IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. (LA) Appeal 175/2015

SC/HCCA/LA/187/2014
Civil Appellate High Court Ratnapura
SP/HCCA/RAT/29/2012(FA)

D.C. Ratnapura 16554/Money

In the matter of an application for Leave to Appeal made in terms of Article 127 of the Constitution read with Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT

AND BETWEEN

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF-APPELLANT

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

Bank of Ceylon
York Street,
Colombo 1.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

Aswedduma Tea Manufactures (Pvt) Ltd.,
No. 28, Park Road,
Jayanthipura,
Battaramulla.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Priyantha Jayawardena P.C., J.

Anil Gooneratne J. &

Vijith K. Malalgoda P.C., J.

COUNSEL: Shaheeda Barrie S.S.C with Sureka Ahamed S.C
For the Plaintiff-Appellant-Petitioner

Defendant-Respondent-Respondent is absent and unrepresented

WRITTEN SUBMISSIONS OF THE APPELLANT FILED ON: 14.01.2016

ARGUED ON: 06.10.2017

DECIDED ON: 27.10.2017

GOONERATNE J.

The Plaintiff-Appellant-Petitioner is the Bank of Ceylon. This was an action filed in the District Court of Ratnapura by the Bank of Ceylon based on a temporary over draft facility granted to the Defendant-Respondent-Respondent (Aswedduma Tea Manufactures (Pvt) Ltd – Tea Company) to recover a sum of Rs. 4,818,582/52 with interest at 26% per annum from 22.08.1999.

Plaintiff-Appellant-Petitioner (hereinafter referred to as Plaintiff) had been engaged with the banking business with the Defendant-Respondent-Respondent (hereinafter referred to as Defendant) for some time and the Defendant maintained current account bearing No. 000310209724 in the Ratnapura Super Grade Branch of the Bank. Plaintiff Bank granted over draft facilities to the Defendant and the Defendant by letter marked P1 dated 21.11.1998 requested for a temporary over draft facility in a sum of Rs. 4.5 million for a period of three months and the said sum was paid from time to time by the bank to the Defendant. The Defendant submitted several cheques and withdrew money which was not repaid to the Plaintiff bank. As the Defendant defaulted in settling the dues the Plaintiff Bank filed action. Parties

proceeded to trial on 5 admissions and 17 issues. However the District Court dismissed the action on the following main grounds.

(a) There was no written contract between parties to grant over draft facilities, nor were the cheques presented to the Bank by the Defendant, produced at the trial.

(b) In the absence of clear evidence to prove that the statement of accounts marked P3 – P13, the fact that the Plaintiff Bank paid money to the Defendant by way of over drawing the account was not proved.

The Civil Appellate High Court affirmed the Judgment of the learned District Judge and set aside the portion of the District Court Judgment pertaining to prescription. Supreme Court on 12.10.2015 granted Leave to Appeal on questions of law referred to in paragraph 17 (1 – 15) of the Petition of Appeal. The journal entry of the said date indicates that the Senior State Counsel was permitted to select specific questions of law. Respondent party was absent and unrepresented. Accordingly the Senior State Counsel had selected 6 questions of law. This court having looked at the questions, is in a position to answer same to cover the position relied upon by the District Court and the Civil Appellate High Court.

The 1st question of law states as follows:

(1) Did their Lordships of the High Court of Civil Appeal misdirect themselves and err in law by misconstruing 'issue No. 1' stating that the Appellate Bank had essentially presented a case on a written

agreement? Issue No. 1 raised in the original court was whether Plaintiff Bank provided over draft facilities. I agree with the submissions of learned Senior State Counsel that this issue does not involve a written contract at all. It merely suggest that the Bank entered into a contract with the Defendant to grant over draft facilities. As such the High Court has erred in law and fact, by concluding that the District Court cannot be faulted for demanding the presentations of a written agreement in relation to the over draft facilities, since the Appellant's case was not based on the existence of a written contract.

(2) The 2nd question of law is whether the Judges of the Civil Appellate Court erred in law and act contrary to the weight of the evidence, by failing to hold that a legally binding agreement arose between the parties for the provision an overdraft facility by the Appellant Bank to the Respondent.

The important aspect of this case is that over draft facilities results in an existence of an oral or unwritten agreement between parties. Presenting a written agreement is not essential.

It is well established that, from a legal point of view, an over draft is a loan granted by the bank to the customer. When an account is overdrawn, the customer becomes the debtor and the Bank, the creditor. A point is made that a bank is obliged to let its customer overdraw only if it has contractually undertaken to do so. This would not mean only a written contract. The High

Court has erred in considering the basic tenants of the law of contracts. The formation of a contract depends an offer and acceptance. There is a meeting of minds. P1 document by the Defendant is a written requests for overdraft facility (TOD). Document P2 and P15 are Bank memorandums which prove that the customers facility has been approved by the Bank. The Defendant made a written request by P1 which is the offer. P2 & P15 are the acceptance of the Plaintiff Bank. What more do you need?

Another way to look at this problem is that the cheques offered by the Defendant would amount to an offer. If there are insufficient funds in the current A/C the bank could even ignore the cheques and reject payment. However if the bank honours the payment order of the Defendant by way of cheques, it will be deemed to have accepted when it executes the customers payment order, in this case the several cheques.

The position could be further elaborated by the following case law citied by the learned Senior State Counsel.

Peter Royston Voller V Lloyds Bank Plc No. B3/99/1177 Justice Wells of the Court of Appeal (Civil division) held that "In my judgment, the position is very simple and well established as a matter of banking law and practice. It is this. If a current account is opened by a customer with a bank with no express agreement as to what the over draft facility should be, then, in circumstances where the customer draws a cheque on the account which causes the account to go into over draft, the customer, by necessary implication, request the bank to grant the customer an overdraft of the necessary amount, on its usual terms as to interest and other charges. In deciding to honor the cheques the bank by implication accepts the officer".

Barclays Bank Ltd V. W.J. Simms son and Cooke (southern) Ltd and another (1977 B. No. 679) Rober Goff J held that:

"In other circumstances the bank is under no obligation to honour its customer's cheques. If however a customer draws a cheque on the bank without funds in his account or agreed over draft facilities sufficient to meet it, the cheque on presentation constitutes a request to the bank to provide over draft facilities sufficient to meet the cheque. The bank has an option whether or not to comply with that request. If it declines to do so, it acts entirely within its rights and no legal consequences follow as between the bank and its customer. If however the bank pays the cheque, it accepts the request and the payment has the same legal consequences as if the payment had been made pursuant to previously agreed over draft facilities; the payment is made within the bank's mandate, and in particular the bank is entitled to debit the customer's account, and the bank's payment discharges the customer's obligation to the Payee on the cheque".

Defendant never denied an existence of a contract, except a written contract. The Civil Appellate Court has failed to appreciate an existence of an unwritten agreement as observed above.

The 3rd question of law is on estoppel. Defendant is estopped in denying liability. The Defendant having overdraw the current account and having benefited from the facility cannot be heard to deny liability.

In Barclays Bank Ltd V. W.J. Simms son and Cooke (southern) Ltd and another (1977 B. No. 679) Rober Goff J held that:

"If a customer draws a cheque when there is insufficient funds in his account and without making prior arrangements with the bank, the position is that the drawing of the cheque is a request for overdraft facilities. The bank has no obligation to grant such facilities or to honour the cheque. It is free to choose. If the bank chooses to pay, this creates an enforceable obligation against the customer. By these means the banker pays with a mandate".

The 4th question of law is whether the Judges of the Original Court misconstrued the best evidence rule?

I do agree with the learned counsel for the Bank that the bank does not rely on Section 50 of the Civil Procedure Code, which require a litigant who relies on a document to produce the document or even annex it to the plaint. This was an arrangement between the Plaintiff Bank and the Respondent. This being a over draft facility the bank need not annex a document or the several cheques since there is evidence of the several bank statements placed and produced before court. These documents i.e the statement of A/c were produced in court and had been compared by witness No. 2 for the bank with the relevant ledger. This is not an action based on a cheques but on over draft facilities. In this regard I note the provisions contained in Section 53 of the Civil Procedure Code.

In *King Vs. Peter Nonis 49 NLR 16*

"In any case what is the meaning of "best evidence" in the English law sense? It certainly does not, and never did, mean that no other direct evidence of the fact in dispute could be tendered. Its meaning is rather that the best evidence must be given of which the nature of the case permits. If one were to apply that meaning of the phrase to the present case, it might be held that the entry in the register ought to have been produced, since it would appear from the evidence of the first wife herself that the marriage was registered. But the "best evidence" rule in England has been subjected to a whittling-down process for over a century, and today it is not true that the best evidence must be given, though its non-production where available may be a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead."

I hold that the best evidence is the statement of accounts, which was compared with the original ledger, by the witness for the Bank.

Question No. 5 reads as "did the learned High Court Judge err in holding that secondary evidence was produced instead of primary evidence?

Plaintiff Bank's case is based on over draft facility. It is the position of the Bank that it need to prove that the account was over drawn. Bank statements P3 to P13 were produced to court without any objection, when it was produced. Further witness No. 2 for the Bank fortified the position of the Bank on statements by giving evidence and comparing P3 – P13 with the original ledger. Bank statements are in the custody of the A/C holder. As such secondary evidence could be received in evidence.

If there was a discrepancy in the monthly statement the customer is required to notify the bank immediately. Defendant Company did not give any evidence nor did it complain of any fault in A/C etc. In fact the Defendant benefited but a huge monetary loss had been caused to the bank, by the Defendant over drawing the account. There cannot be an objection for leading secondary evidence. Further the statements produced at the trial is permissible to be led in terms of Section 90A of the Evidence Ordinance.

Question No. 6 did the High Court err in failing to take cognisance of the fact that there was no evidence in denial.

Respondent never led evidence to establish their position. Law permits to draw necessary inferences in the event of the Respondent's failure to lead evidence.

Rodrigo Vs. St. Anthony's Hardware Stores 1995 (1) SLR 7

"The 1st Defendant did not give evidence and the court is entitled to draw the presumption that had he given evidence; such evidence would have been unfavourable to the case of the Defendants – see Section 114 illustrations (f) of the Evidence Ordinance"

I wish to observe that both courts had erred in coming to a conclusion that the original written contract and the several cheques were not produced. I have already in this Judgment demonstrated that by offer and acceptance a contract comes into existence. In law there is the express and implied contracts. Both are recognised in law. In the case in hand the initiative was taken by the customer by letter P1. (request for O/D facilities in a large sum). Bank accepted such proposal and went ahead and permitted the Defendant to overdraw the account. As observed secondary evidence of the Statements of Accounts were led without any objection. In fact in cross-examination the learned counsel for the Defendant fortified the position of the Bank in giving the cheque numbers to the witness and questioned the witness about the cheques (Folio 69/70 of the brief). Witness willingly answered the question by saying that Defendant was paid on the cheques. I also note as stated above that the statements of accounts marked and produced in this case were

compared with the original ledger by witness No. 2 for the Bank. Section 90A of the Evidence Ordinance has made provisions to deal with bank books, ledgers, statements etc. Courts must consider the proper utilisation of the provisions, in the Evidence Ordinance.

In all the above circumstances I allow this appeal. Plaintiff-Appellant-Petitioner would be entitled for relief as per paragraphs d, e, f, g & h of the prayer to the petition. I also allow sub-paragraph 'c' of the prayer to the petition except that part of the Judgement dealing with prescription; Questions of law are answered in favour of the Plaintiff-Appellant.

Appeal allowed with costs.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Vijith K. Malalgoda P.C. J.

I agree.

JUDGE OF THE SUPREME COURT