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

SC (CHC) 05/2009

Case No. HC (Civil) 128/2000(01)

Seylan Bank PLC,
Registration No.PQ9
Ceylinco Seylan Towers,
90, Galle Road, Colombo 3.

Plaintiff

Vs.

Premier Marketing Ltd,
456, Galle Road, Colombo 3

Defendant

AND NOW

In the matter of an appeal in terms of Section 5(1) of the High Court of the Provinces (Special provisions) Act No.10 of 1997 read with Articles 127 and 128 of the Constitution.

Premier Marketing Ltd,
456, Galle Road, Colombo 3

Defendant –Appellant

Vs.

Seylan Bank PLC,
Registration No.PQ9,
Ceylinco Seylan Towers,
90, Galle Road, Colombo 3.

Plaintiff-Responden

Before: H.N.J Perera CJ,

Vijith K. Malalgoda, PC, J.

L.T.B. Dehideniya J.

Counsel: Maithree Wickremasinghe PC with Rakitha Jayathunga instructed by Paul Rathnayake Associates for the Defendant –Appellant.

Avindra Rodrigo with Shamlie Jayathunga and Rasika Aluwihare for the Plaintiff – Respondent.

Argued on; 11/09/2018

Decided on: 22/03/2019

L.T.B. Dehideniya J,

The Plaintiff-Respondent (hereinafter sometime called and referred to as the Plaintiff) filed an action in the District Court which has subsequently been transferred to the Commercial High Court of the Western Province, seeking to recover the monies due to it from the Defendant-Appellant (hereinafter sometime called and referred to as the Defendant), under the facilities that have been granted by it to the Defendant. The Commercial High Court, after trial delivered the judgement dated 17-10-2008 in favour of the Plaintiff.

The Defendant –Appellant have by its Petition dated 11-12-2008 appealed to this Court praying for the following reliefs:

a) To set aside the said judgement of the Commercial High Court of the Western province.
b) To award costs to the Defendant- Appellants.
c) To award such other and further relief as this court shall seem to meet to the Defendant –Appellant.

In this case, the Plaintiff Bank granted overdraft/loan facilities to the Defendant at the latter's request and the Defendant agreed to repay the facilities with the interest on demand. The parties have entered into an agreement dated 4th April 1996. The Plaintiff's version is that the Defendant obtained several facilities

throughout for a period of time. The Plaintiff has made a demand for the sum of Rs. 4, 571,173.62 being the amount payable by the Defendant and the relevant interest by letter dated 20th October 1997. The Defendant denied the liability to pay the said amount of money by the letter dated 26th November 1997. Subsequent to the letter of denial, the Plaintiff reduced the liability of the Defendant to Rs.4, 274,921.39 and pleaded that it was entitled to judgement for the recovery of the said sum from the Defendant with an interest at 30% per annum from 24th September 1997. The Defendant filed an answer on 26th March 1999 and denied the claim of the Plaintiff and pleaded, denying liability to pay the sum demanded. The Defendant sought a dismissal of the Plaintiff's action. The District Court made an order transferring the action to the High Court established under the Act No.10 of 1996. The High Court, after trial, has decided the case in favour of the Plaintiff.

The Defendant argues in this case that, the upper limit of the facility which could have granted by the bank as per the agreement was Rs. 1,250,000.00 and there is no authority on the part of the Plaintiff to grant greater amount than the specific upper limit to the Defendant.

At the trial the Plaintiff Bank called the Assistant General Manager Mr.T.H.D.C.E De Silva who was the Manager of the Cinnamon Garden branch when the parties entered into the agreement, as a witness. He submitted an affidavit giving evidence in examination-in-chief. Thereafter, he has been cross-examined and re-examined. The witness stated that the Plaintiff and the Defendant entered into the agreement marked P3 to provide facilities to the Defendant. The upper limit of the agreement was 1.25 million, but according to this witness the bank can increase that upper limit.

In questioning this witness, it was put to the witness that the agreed rate of interest is 25% and any increase of the interest has to be advised to the customer. When he was questioned whether he has any document to show that such an increase is advised, he answered in negative, but he volunteered to say that the bank in certain circumstances includes the enhancement of the rate of interest in the bank statements. He further stated that if the rate of interest has been increased, the bank advice the customer. The Defence Counsel neither questioned the witness on this statement nor he denied the statement that the bank advise the customer. Therefore, this piece of evidence that the bank advises the customers on the enhancement of the interest rate is unchallenged.

An unchallenged piece of evidence is a 'matter before court'. In the case of Silva v. Chandradasa de Silva 70 NLR 169 it was held:

When the Respondent's counsel in the instant case called upon the Election Judge to decide the matter of the Petitioner's status upon a consideration of the evidence on record at the close of the case for the Petitioner, he did so without himself calling any evidence in disproof of the status. In other words, the evidence on record remained uncontradicted. But, nowhere in the judgement did the learned Election judge refer to this circumstance as a 'matter before the court' and it is evident that he took no account of this circumstance in reaching his conclusion. The failure to take account of this circumstance was a non- direction amounting to misdirection in law which vitiates the conclusion of fact which the Judge, ultimately

reached. That is a sufficient ground on which to set aside the order dismissing the petition.

The evidence that has been led in the instant case that the interest had been increased and the Defendant was advised accordingly can be accepted though there is no documentary proof, because the oral evidence was not denied or challenged.

What the Plaintiff argues in this case is that the Defendant did not call any evidence and the evidence which was given by the Plaintiff was not contradicted, and in such an instance not giving evidence becomes a 'matter before court'.

The Defendant stated that, 25% is the interest which has been provided in the agreement, and any other rate of interest can be charged only if it is notified and the Plaintiff Bank has made no notification to that effect. Further, the Defendant continues in his contention that, setting out a different interest rates in the bank statement is not a method in accordance with the contract and the Bank Statements produced by the Plaintiff Bank does not depict the interest rates. It is apparent, that what the Defendant attempted to uphold throughout the case, was that he is not liable to pay the claim demanded by the Plaintiff Bank, and especially the rates of interest 28% and 30% are not relevant to the Defendant. The court expects the Defendant to be diligent and attentive to protect the right that he expects to vindicate. It is clear that, the Defendant has not in any manner attempted to oppose the voluntary statement made by the witness. The silence entertained by the Defendant at the instance where he needed to question the stance of the Plaintiff amounts to an acceptance of the fact that, he was duly

advised by the Plaintiff Bank about the increased rates of interest and he is liable to pay the claim of the latter.

This court further pays attention to the argument that was brought before at the hearing. The Plaintiff argues that non payment of the money due to the Bank becomes an unjust enrichment on the part of the Defendant. This was not pleaded in the plaint or raised as an issue at the trial.

The principle of 'unjust enrichment' has roots in both Roman Dutch Law and English Law. As far as the Roman Dutch Law is concerned, it has been stated in **Peiris v. Municipal Council, Galle 65 N.L.R. 555 AT 557,**

> *Under the Roman law, an action would lie where one person had been unjustly enriched to the detriment of another. Hence, different types of condictiones and the actio de in rem verso were available, but no general action based on undue enrichment existed.*
>
> *In Roman –Dutch Law, the cases where an action would lie to recover undue enrichment received extension. Many Dutch Jurists, considered undue enrichment as a source of obligations and the various condictiones by which such enrichment could be recovered are still part of the modern law, though both in Roman and Roman Dutch Law, these actions are essentially statements on the substantive law, cloaked under terms of various actions.*

The English Law approach to the principle of unjust enrichment is worthy to consider here. In **Banque Financiere de la Cite v. Parc (Battersea) Ltd (1999) AC 221, 227, HL,** Lord Steyn held that a *Plaintiff must show three things to make a claim under the ground of unjust enrichment.*

1) *The Defendant has been enriched.*
2) *The enrichment has been gained at the Plaintiff's expense.*
3) *The circumstances of the enrichment are such that, it would be unjust to let the Defendant keep the benefit.*

This specifically refers to an instance which depicts the receipt of money and service. In **BP Exploration Co. (Libya) v. Hunt (1979) 1WLR 783,** Robert Goff J, held that,

> *Money has the peculiar character of a universal medium of exchange. By, it is receipt, the recipient is inevitable benefited; and (subject to problems arising from such matters as inflation, change of position and the time value of money) the loss suffered by the Plaintiff is generally equal to the Defendant's gain, so that no difficulty arises concerning the amount to be repaid.*

In the present case, it is apparent to court that, the Plaintiff Bank has provided money to the Defendant that constitute an amount of money out of the funds of the Plaintiff. This becomes detrimental to the Plaintiff, if the Defendant evades the payment of money. At a failure to payment, the Defendant incurs a benefit

which is undue and unjust. But, the Plaintiff has not pleaded unjust enrichment in the plaint.

Even though the argument on the unjust enrichment is not considered, the other evidence of the Plaintiff's witness establishes the plaintiff's case.

I see no reason to interfere with the findings of the learned High Court Judge. Appeal dismissed with cost fixed at Rs. 25,000/-

Judge of the Supreme Court

H.N.J Perera CJ

I agree

Chief Justice

Vijith K. Malalgoda PC, J.

I agree

Judge of the Supreme Court