

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

In the matter of an appeal in terms of
Section 5 (2) of the High Court of the
Provinces (Special Provisions) Act No. 10 of
1996 as amended by High Court of the
Provinces (Special Provisions) (Amendment)
Act No. 54 of 2006.

Seylan Bank PLC,
No. 69, Janadhipathi Mawatha,
Colombo 01.

Presently at “Ceylinco-Seylan
Towers”,
No. 90, Galle Road,
Colombo 03.

**S.C. Appeal (CHC) No. 45/2014
H.C. (Civil) No. 119/2007/MR**

Plaintiff

Vs.

1. Abdul Cader Mohomed Faizer,
2. Seyyed Khan Azad Khan,

Both carrying on business in
Partnership under the name, style
and firm of “Regal Tyre House” at No.
149, Jayantha Weerasekara
Mawatha, Colombo 10.

Defendants

AND NOW BETWEEN

1. Abdul Cader Mohomed Faizer,
2. Seyyed Khan Azad Khan,

Both carrying on business in
Partnership under the name, style
and firm of “Regal Tyre House” at No.
149, Jayantha Weerasekara
Mawatha, Colombo 10.

Defendant-Appellants

Vs.

Seylan Bank PLC,
No. 69, Janadhipathi Mawatha,
Colombo 01.

Presently at “Ceylinco-Seylan
Towers”,
No. 90, Galle Road,
Colombo 03.

Plaintiff-Respondent

Before: Hon. Priyantha Jayawardena, P.C., J.

Hon. Janak De Silva, J.

Hon. K. Priyantha Fernando, J.

Counsel:

Mohamed Ziras Hassen for Defendant-Appellants

Senaka de Saram for Plaintiff-Respondent

Written Submissions:

10.03.2021 by the Defendant-Appellant

16.10.2020 by the Plaintiff-Respondent

Argued on: 06.06.2023

Decided on: 28.02.2024

Janak De Silva, J.

The Plaintiff-Respondent (“Respondent”) instituted this action in the Provincial High Court of the Western Province holden in Colombo (Commercial High Court) (“High Court”) on 20.03.2007 to recover the sums due on two loans of Rs. 3,440,181.00 and Rs. 4,173,474.00 from the Defendants-Appellants (“Appellants”).

According to the Respondent, it extended two term loan facilities to the Appellants which were later re-scheduled due to non-payment. The Appellants signed promissory notes and loan agreements which formed integral parts of the rescheduled loans. These loans were secured by a Mortgage Bond No. 3575 dated 17.05.1997 (P9). Nevertheless, the Appellants defaulted in making repayment of the two re-scheduled term loan facilities as well. The re-scheduled term loans were payable on demand. This action was instituted since the Appellants failed to pay on demand.

The Appellants denied that any sums were due to the Respondent. They claimed that the Statement of Accounts (P4a, P4b, P7a and P7b) are false, the offer letter (P3) was not known to them, the term loan agreements (P5 and P8) were not signed by them, the Mortgage Bond was not properly stamped and that the Respondent’s cause of action is prescribed.

Trial commenced on 01.07.2008 on 3 admissions and 23 issues. Issues pertaining to stamping of the Mortgage Bond (P9) were withdrawn by the Appellants on 10.07.2008. The Respondents led the evidence of one witness, who was the Assistant Manager of

the Respondent Bank Branch office in Maradana. In his evidence it was stated that the Respondent had granted two rescheduled term loans to the Appellants as reflected in the Statement of Accounts and Bank ledgers (P4a, P4b and P7a, P7b).

The witness testified that the Appellants had signed two promissory notes for the two term loans (P5 and P8). He further testified that the Appellants had signed the offer letter (P3) and agreed to its terms and conditions. Since the Appellants had failed and neglected to pay the sums due on the aforementioned re-scheduled loan agreements, a demand had been made by the Respondent on 01.03.2007 (P6).

Having first withdrawn the objection on stamping of Mortgage Bond (P9), the Appellants moved to object to the Mortgage Bond on the basis that the 'facilities' were not granted in 2006, but in 1997 when P9 was made. The Appellants further contended that the offer letter (P3) was not signed before them and there were no other documents to prove the whereabouts of the facilities granted.

The learned High Court Judge held that the documents are not fraudulent, the action is not prescribed, and that the Respondent is entitled to the re-payment of the two loan amounts subject to the limitation of Rs. 5 million in the said Mortgage Bond.

The Appellants have sought to impugn the judgment of the Commercial High Court on the following grounds:

- (1) The plaint does not conform to section 40 (d) of the Civil Procedure Code.
- (2) The action is prescribed.
- (3) The documents produced by the Respondent are in respect of Regal Tyre House and not the Appellants.

Section 40 (d) of the Civil Procedure Code

According to the Appellants, the plaint does not conform to the requirements specified in section 40 (d) of the Civil Procedure Code which reads as follows:

“40. The plaint shall be distinctly written upon good and suitable paper, and shall contain the following particulars:

...

(d) a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs; and where two or more causes of action are set out, the statement of the circumstances constituting each cause of action must be separate, and numbered”

This provision is based upon the right to a fair trial. It requires the Plaintiff to set out the details constituting the cause of action so that the defendant becomes fully aware of the case pleaded against him and can accordingly set up the defense. It also enables to establish jurisdiction of Court where it is sought to be done on the basis of the place where the cause of action arose.

The jurisdiction of the High Court was not put in issue at the trial. The answer did not specifically aver that the plaint does not conform to the provisions in section 40 (d) of the Civil Procedure Code. Moreover, the answer has set out several defenses against the causes of action set out in the plaint. In these circumstances, it is too late in the day for the Appellants to raise this issue in appeal. In my view, it is a frivolous and vexatious ground of appeal.

Prescription

In the answer, it was specifically pleaded that the cause of action is prescribed. Issue No. 22 raised the question of prescription.

This issue is based on the assertion by the Appellants that the original term loans were granted in 1997 where as the rescheduled loan facilities were granted in 2007. According to the Appellants, the action was prescribed by the time the rescheduling was done.

This submission is untenable in law. There is sufficient evidence on record to establish that the Appellants agreed to the rescheduling of the earlier loans.

In response to the Appellant's contention that the offer letter (P3) was not signed before them, the following testimony of the 1st Appellant in his evidence on 17.10.2012 is instructive:

“ප්‍ර: මේ නඩුවේ තවමත් සමරයක් වෙලා නෑ?

උ: මේ නඩුවෙන් දැන් ගිහිල්ලා කතා කරලා තිබෙනවා. තවම අපිට සමරයක් වෙන්න පොඩි කාලයක් ගන්නවා. මොකද යම්කිසි ගානක් මේ ගොල්ලෝ ඉල්ලන මුදල අපිට වැඩියි කියලා හිතෙනවා. මොකද පොළිය වැඩියි. අර වගේ ගිය සැරේ වගේ අපිට සාමාන්‍ය ගානක් අඩු කරලා දුන්නොත් අපි ඉවර කරන්න තමයි බලන්නේ.” (at page 6 of the proceedings on 17.10.2012)

The 1st Appellant conceded that the earlier loans were rescheduled. Moreover, he conceded that there had been an attempt to reschedule the two loan facilities on which the present action was instituted. The 2nd Appellant did not testify.

Hence the assertion that the cause of action on the original loans were prescribed are devoid of any merit.

It must be noted that this matter does not arise from the Mortgage Bond, but from the two 'Loan Agreement Forms' (P5 and P8). The learned High Court judge has correctly formed the view that the Appellants have signed these documents.

Clause 1 under 'Terms and Conditions' of both forms explicitly state that the loan amounts are repayable on demand. Moreover, the operative clause of the Mortgage Bond states the following:

*"NOW KNOW YE AND THESE PRESENTS WITNESS that in pursuance of the said agreement and in consideration of the aforesaid premises the **Principal Debtors** and the Surety do hereby covenant and agree with and bind and oblige themselves to the said Bank that the **principal Debtors shall and will on demand well and truly pay or cause to be paid at Colombo aforesaid to the said bank.**"*

It is settled law that the cause of action concerning a loan repayable on demand will arise only at the time when a demand is made [*Seylan Bank Ltd v. Inter Trade Garments (Pvt.) Ltd.* (2005) 1 Sri.L.R 80; *Sivasubramaniam v. Alagamutui* (1950) 53 N.L.R 150; *See also, Bank of Ceylon v. Flex Port (Pvt.) Ltd.*, SC Appeal 120/2012, S.C.M. 03.07.2020 at pages 6-7]. This extends even to matters which concern rescheduled loan facilities [*Union Bank v. Emm Chem (Pvt.) Ltd. and Others*, S.C. Appeal (CHC) 22/2011, S.C.M. 07.03.2019].

At this point, it is apposite to note that the Appellants did not challenge the demand made by the Respondent dated 01.03.2007. In any case, the 'Letter of Demand' addressed to the Appellants constitute the requisites of an appropriate demand. In *Re Colonial Finance, Mortgage, Investment and Guarantee Corp. Ltd.* [(1905) 6 SRNSW 6] which was cited with approval in *Union Bank v. Emm Chem (Pvt.) Ltd. and Others* [Supra at page 16] it was held that:

"there must be a clear intimation that payment is required to constitute a demand; nothing more is necessary, and the word 'demand' need not be used; neither is the validity of a demand lessened by its being clothed in the language of politeness. It must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect."

In this context, the learned Judge of the Commercial High Court had accurately analysed the facts and arrived at the correct conclusion. The demand was made by the Plaintiff on 01.03.2007 and the action was filed in the Commercial High Court on 20.04.2007. The plea of prescription is untenable in law.

Documents pertain to Regal Tyre House and not the Appellants

This ground was raised for the first time in appeal. It was not pleaded in the answer, not raised as an issue and not even put to the witness for the Respondent.

It is clear on the evidence that the two Appellants were partners of Regal Tyre House. They have signed all the documents produced in this case in that capacity.

I see no merit on this point. It is a frivolous and vexatious defense.

For all the foregoing reasons, the appeal is dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE SUPREME COURT