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

C A.Appeal No. 1031/99(F)
DC.Colombo 12580/MR

State Bank of India,
No. 16, Sir Baron Jayatillake
Mawatha,
Colombo 1.
PLAINTIFF

Vs

D.P. Piyatissa
No. 194, Havelock Road,
Colombo 5.

G.B. Fernando
No. 80-3/1, Dewala Road,
Nugegoda.

Mrs. Trixie Piyatissa
No. 5, Pathiba Road,
Colombo 5.
(Substituted in place of the
Late D.I. Piyatissa)

D.P. Piyatissa
No. 194, Havelock Road,
Colombo 5.
(Substituted in place of the
Late J.W. Piyatissa)
DEFENDANTS

AND

Mrs. Trixie Piyatissa
No. 5, Pathiba Road,
Colombo 5.
(Substituted in place of
Late D.I. Piyatissa)

D.P. Piyatissa
No. 194, Havelock Road,
Colombo 5.
(Substituted in place of the
Late J.W. Piyatissa)
DEFENDANT-APPELLANTS

Vs.

State Bank of India,
No. 16, Sir Baron Jayatillake
Mawatha,
Colombo 1.
PLAINTIFF-RESPONDENT

Before: A W A Salam, J and Sunil Rajapaksa, J

Counsel: Prasanna Jayawardena Pc with Milinda Jayathilaka for the plaintiff-resoindent. defendant-appellants absent and unrepresented.

Argued on: 14.03.2013

Decided on: 18.03.2013

A W A Salam, J

State Bank of India ("Plaintiff") filed action *inter alia* to recover monies due from the defendants and substituted-defendants upon a Written Guarantee which was produced at the trial marked P7 and alleged to have been

executed by the 1st and 2nd defendants and two others namely D.I. Piyatissa and J.W. Piyatissa who are presently deceased.

Incidentally, under the Provisions of S:14A of the Civil Procedure Code, 3rd and 4th Substituted defendants were appointed in place of the late D.I. Piyatissa and J.W. Piyatissa.

The plaintiff's Case was that the 1st, 2nd defendants, the late D.I. Piyatissa and J.W. Piyatissa were Directors of the Company called "M/S PIERGLOBE LIMITED". The said company was a Customer and constituent of the plaintiff Bank. "M/S PIERGLOBE LIMITED" obtained Banking Facilities amounting to U.S. Dollars 442,382/18, the re-payment of which was guaranteed by the 1st, 2nd defendants and late D.I. Piyatissa and J.W. Piyatissa.

As has been submitted by the learned President's Counsel, Section 14A of the Civil Procedure Code, permits a plaintiff to make an application to Court for the substitution of the legal representatives of a deceased person for the purposes of filing an action. Applications have been made to the District Court of Colombo in Case Nos. 4489/CGM and 4488/CGM for substitution. Consequently, the applications were allowed by court, substituting the 3rd defendant in place of the deceased D.I. Piyatissa and the 4th defendant in place of the deceased J.W. Piyatissa. Therefore, the inclusion of the names of the 3rd and 4th defendants has been duly made and no objection can now be taken up against the same.

As a matter of fact the plaintiff has sent letters of demand to the 1st, 2nd, 3rd and 4th defendants demanding payment of a sum of U.S.

Dollars 442,382/18 due upon the Guarantee.

The plaintiff Bank has established with cogent evidence that that the amount of money claimed by it, is due from PIERGLOBE LIMITED. The Statements of Account marked at the trial and the Bills of Exchange marked 'P10' and 'P12' and the Trust Receipt marked 'P14' clearly show that, these monies were lent and advanced to PIERGLOBE LIMITED and that, PIERGLOBE LIMITED has failed to discharge its obligation in repaying the monies due to the plaintiff Bank.

As was urged at the hearing of the appeal by the plaintiff, the correspondence in the letters marked at the trial shows that, PIERGLOBE LIMITED had acknowledged the liability. Besides, the defendants in their evidence have not disputed that the monies claimed by the plaintiff are due to the plaintiff Bank from

Further, the plaintiff Bank has established that the 1st and 2nd defendants and the late D.I. Piyatissa and the late J.W. Piyatissa executed the Guarantee marked 'P7.'

In any event, the defendant did not dispute the fact that, the Guarantee was executed by the 1st and 2nd defendants and D.I. Piyatissa and the late J.W.Piyatissa. The guarantee produced at the trial, undoubtedly constitutes a joint and several Guarantee. Thus, it is clear that under and in terms of the Guarantee, the 1st and 2nd defendants and the late D.I. Piyatissa and J.W. Piyatissa were jointly and severally liable to pay a sum of U.S. Dollars 442,382/18 claimed in this action.

The orders marked 'P32' and 'P33' permitting the

substitution of the 3rd and 4th defendants were not canvassed. Hence, in as much as the 1st and 2nd defendants are jointly and severally liable to repay the monies claimed by the plaintiff, similarly, the 3rd and 4th defendants are also liable to repay the same in the like manner and degree of responsibility, as the duly appointed Legal Representatives of the late D.I. Piyatissa and J.W. Piyatissa from and out of the estate of the deceased.

In the petition of appeal the defendants claim that, the plaintiff Bank is not entitled to recover the monies due in U.S. Dollars. It is worthy of being noted that it is established law that any plaintiff is entitled to pray for the recovery of the monies due in foreign currency if the Contract between the plaintiff and the defendant was in foreign currency, as it had taken place in this case.

In THE CEMENTATION COMPANY (OVERSEAS) LIMITED VS. HOTEL INTERNATIONAL LIMITED [1986 1 SLR 262], it was laid down by the Supreme Court that, where a contract is entered into for the payment of monies in foreign currency, a party is entitled to pray for the recovery of the dues in foreign currency.

As far as the instant case is concerned, the fact that the contract between the plaintiff and the defendants was for the repayment of the monies due in U.S.Dollars, it is manifest on the face of the guarantee that the re-payment, needs to be in the same currency. Thus, there can be no dispute as to the entitlement of the plaintiff to seek the recovery of the money due from the defendants in US Dollars.

In the circumstances, the argument advanced by

the defendant that payment in U.S. Dollars cannot be sought does not appear to be sustainable, by reason of the legal position that under and in terms of the Exchange Control Act and the Monetary Law Act (Section 35(1) and (2) of the Exchange Control Act No. 24 of 1953, as amended) payment of monies due in foreign currency under and in terms of judgements entered by Courts, are explicitly permitted. The Law provides for the defendant to pay the decreed sum in foreign currency into the Court and in turn authorizes the plaintiff to draw the monies so deposited in foreign currency with the sanction of the Central Bank. This position is strengthened by S: 4(1) of the Monetary Law Act No. 58 of 1949 which recognizes that, by express agreement an obligation can be lawfully incurred to pay monies in foreign currency. In terms of the Provisions of Section S:4(2) the Monetary Law Act in the event of such an obligation to

The submission that, the plaintiff Bank has not proved that, the sums are payable on the Import Bills marked 'P10' and 'P12' appears on its face to be incorrect as, PIERGLOBE LIMITED has signed and accepted these two Import Bills.

As regards the allegation that the letters of demand had not reached the defendants, it is appropriate to advert to the principle that the common course of business would have been followed as set out in Illustration (e) to S:114 of the Evidence Ordinance. The 1st defendant's attempt to dispute the receipt of the letter of demand claiming that he was in Japan at that time is rendered futile as, he had in any event returned to Sri Lanka a few weeks after the letter of demand was sent. Thus it appears that in any event the letter would have got into his hands as it was properly addressed.

The Evidence in this case points to the fact that that the principal debtor namely the company made Part Payments up to 10th December 1987. Then, the plaintiff's Claim could have become prescribed only after the expiry of six years from date of last payment i.e. 10th December 1987. As the action has been instituted in September 1992, it is not open to the defendants to maintain that the cause of action of the plaintiff was prescribed.

The final point that arises for consideration is whether the plaintiff could have maintained the action against the defendants since the company, which availed of the banking facility was in liquidation. Since the guarantee marked 'P7' clearly states that, the defendants are liable thereunder notwithstanding any disability on the part of PIERGLOBE LIMITED - Vide: Clauses [4], [12] and of the Guarantee marked 'P7', this

argument too is not worthy of any merits. As matter of fact, Clauses [12] and [15] of the guarantee 'P7' unambiguously imposes the liability on the defendants when it refer to the obligation to re-pay despite any liquidation of PIERGLOBE LIMITED.

Clause [21] of the Guarantee makes the defendants liable as principal debtors and in the light of the said clause too the winding up process of the relevant company cannot have any bearing on the defence raised as to disclaim liability.

The plaintiff Bank had proved its case as set out in the Plaint and in Issue Nos. [1] to [7] raised by the plaintiff. For these reasons, the Learned District Judge cannot be faulted for having entered judgement for the plaintiff as prayed for in the Plaint.

Therefore, none of the matters urged in the petition of appeal by the appellant warrant the intervention of this Court in the exercise of appellate jurisdiction to reverse the impugned judgment. For the above reasons, I dismiss the petition of appeal and affirm the judgment of the trial judge subject to costs.

A W A Salam, J

Judge of the Court of Appeal

Sunil Rajapaksa, J

I agree

Judge of the Court of Appeal

NR/-