IN THE SEYCHELLES COURT OF APPEAL

Banque FranÇaise Commerciale — Appellant

Samuel Gappy — Respondent

Civ. A. 6/92

Shah for Appellant
Mrs Tooney for respondent

Judgement of Goburdhun J. A

The facts of this case have been fully set out in the judgement of the learned trial judge and I need not repeat them. Counsel for appellant argued before us that there was no evidence to show that the loan guaranteed by respondent had been paid in April 1982. According to him the recital in the notarial deed erasing the mortgage was an error. Witness Harold Lablache the commercial manager of the bank (appellant) stated that appellant (the bank) had no knowledge of the erasure of the mortgage. The deed was duly registered and it is very surprising that the Bank had no record of it. In face of a duly registered notarial deed erasing a mortgage it is difficult to accept an explanation that what is recorded in the deed is not correct. The learned trial judge very rightly rejected the submission that there was an error in the deed. Mr Shah also submitted that even if there was discharge from mortgage respondent would still be liable on his alleged "continuing" personal guarantee. On this submission the learned trial judge said the following: A closer examination of the guarantee contained in document D1 reveals that the continuity security was limited to the mortgage of the property. The personal guarantee though ancillary was not intended to be in perpetuity. Thus the

contention of the plaintiff that the personal guarantee which was limited to a sum of R 50,000 ended with the erasure in 1982 is sound and should be considered as the proper intention of the parties."

I am in agreement with the views of the learned trial judge. It is to be noted that the Bank demanding payment from respondent in its letter dated 3rd May 1984, 28th November 1984 and 8th March 1985 threatened seizure of respondent's land by foreclosure if the loan was not paid.

Counsel for appellant submitted that in any event respondent is not entitled to any damage as appellant did not act out of bad faith. There might have been some merit in the submission had the claim for damages been based on the principle of 'unjust enrichment'. Counsel is in error if he is of the view that it is so. The claim is based on article 1382 of the civil code. Appellant is guilty of "faute" as he has clearly been negligent. It has subjected respondent to a treatment which he did not deserve. In my view respondent is entitled to substantial moral damages. I do not consider the sum of R 25,000 awarded to him by the trial judge excessive. I would accordingly dismiss the appeal with costs.

H Goburdhun

(Justice of Appeal)

Delivered in open Court in the presence of both Counsel by Mr. Justice V. Alleear.

Dated 31st day of March 1993.

V. Alleear
Judge

IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No. 6 of 1992

Banque Francaise Commerciale Ocean Indian — Appellant

VERSUS

Samuel Gappy — Respondent

Mr Shah for appellant
Mrs Twomey for respondent

Judgement of Silungwe, J.A.

This is an appeal against a judgement of the Supreme Court (Perera, J.S.), in which the appellant (then defendant) was ordered to pay to the respondent (then plaintiff) the sum of R66,7000.18 with interest thereon and costs of the action.

Before the Supreme Court, the respondent sued the appellant for the recovery of a total sum of R751,355.92 allegedly comprising an undue payment; interest thereon; an estimated loss of business; and moral damages.

On the facts of the case, the respondent stood surity for Marshall Lesperance (also known as Marshall Morin) in 1978 by mortagaging his land and giving a personal guarantee and thereby enabled Lesperance to obtain a loan of R50,000 from the appellant.

On November 29, 1979, a "convention de pret" was entered into between the appellant and Lesperance wherein it was agreed that the said R50,000 loan would be paid in monthly instalments of R1,600 for a period of twelve months.

Sometime in 1981, Lesperance's wife mortgaged her own land to the appellant in order to secure her husband's loan of R100,000 from the appellant. According to the evidence of Lesperance's son, Rick Morin, this mortgage cleared that of the respondent. On April 20, 1982, the appellant's authorised officials signed a notarially executed document which erased the respondent's mortgage.

When the respondent was informed by Lesperance in October 1982 that the loan had been discharged, he asked the appellant for the release of his mortgage. He was, however, told that no such discharge had occured and that he was required to liquidate the loan himself otherwise he risked foreclosure on his mortgaged property. Letters marked D3, P3 and P4 were sent to the respondent to that effect. Consequently, the respondent paid some instalments but these were irregular. In August 1989, the respondent was given by the appellant a notarialy executed document dated February 3, 1989 whereby his mortgage was erased. But when he took the said document to the Lands Registry, he was informed that the mortgage had been erased in April 1982. According to the respondent, that was the first time he became aware of the erasure of his mortgage and, with the realisation that no monetary payments had been due from him to the appellant, he demanded reimbursement. The appellant's failure to meet the demand then precipitated the respondent's action in the Supreme Court.

At the trial, Mr. Harold Lablache, the Commercial Manager of the appellant bank, defended the action of the bank in requiring the respondent to discharge the debt of Lesperance. He testified that when the letter dated May 3, 1984 was sent to the respondent, the debt remained unpaid; and that although the mortgage on the respondent's property had been released, the respondent's personal guarantee continued until the debt was paid in full. I accept the findings of the learned trial judge that the appellant erased the respondent's mortgage in April 1982 and that the erasure, having been duly regist became a public document.

IN THE SEYCHELLES COURT OF APPEAL

Civil Appeal No. 6 of 1992

Banque Francaise Commerciale- Ocean Indien APPELLANT

VERSUS

Samuel Gappy RESPONDENT

Mr. Shah for appellant
Mrs. Twomey for respondent

Judgment of Mustafa P.

Mr. Gappy (hereafter called the Surety) sued Bank Francaise Commercialle (hereafter called the Bank) in the Supreme Court (Pereira J) for recovery of an over payment of Rs.50,000 he made to the Bank in respect of money lent by the Bank to Mr. Lesperance, otherwise known as Morin, (hereafter called the Debtor) for which loan the Surety had stood guarantee. The Surety claimed a total of Rs.751,355 made up of items including the alleged overpayment, interest on such overpayment, loss of business and moral damages. Judgment was given in his favour in the sum of Rs.66,700.18 being as to Rs.26,724.00 for overpayment, Rs. 14,976.18 for interest and Rs.25,000 for moral damages. He did not succeed on the claim for loss of business. From that judgment the Bank has appealed.

The following facts emerged at the trial. Sometime in 1978 the Surety mortgaged his land in Praslin to the Bank as security for a loan of Rs.50,000 made by the Bank to the Debtor. Sometime in October 1982, the Surety, on receipt of information from the Debtor

Mr Shah argues that as the debt of Lesperance was not paid by April 1982 until about 1986 when Rick, (Lesperance's son) settled it, the respondent was liable to pay under his personal guarantee. In my view, this urgument is untenable as the respondent's personal guarantee was aucilliary and, therefore, limited to the mortgage (which was in turn limited to the debt of R50,000). In the circumstances, when the respondent's mortgage was erased, his personal guarantee too came to an end simultaneously. The respondent granteed a loan, not an overdraft account. This is born out by the finding of a Commissioner (at page 86 of the record) appointed by the learned trial judge to examine the relevant documents. Indeed, the trial court held that the respondent's guarantee was limited to R50,000. The fact, that the appellant allowed Lesperance to operate the loan account as an overdraft account cannot reasonably be held against the respondent who was, in any event, not a party to what appears to have been a tacit arrangement between the appeallant and Lesperance.

By inducing the respondent to make payments which were not legally due from him through threats of foreclosure on a non existent mortgage, the appellant was liable in faute, entitling the respondent to an award of damages. Accordingly, the trial court entered judgement in favour of the respondent in the total sum of R66,700.18 consisting of

(a) R26,724: recovery of undue payments;

(b) R14,976.18: 12% interest on (a); and

(c) R25,000: moral damages.

I do not consider that the damages awareded to the respondent are in any way excessive or unreasonable. I would, therefore, uphold the judgement of the trial court and dismiss the appeal with costs in this court and in the court below.

Delivered in open Court in the Presence of both counsel by Mr Justice V Allegar.

Annel M. Silungwe

that the loan has been discharged, went to the Bank to have his property released from mortgage. The Bank told the Surety that the loan was still outstanding. In the meantime the Debtor had left Seychelles for East Africa. The Surety was instructed by the Bank to pay off the loan, and the Bank threatened to forclose on his mortgage should he fail to do so. The Surety paid by instalments, somewhat intermittently. It was in or about August 1989 that the Bank gave the Surety a notarially executed document erasing his mortgage. When he took the document to the Land Registry the Surety came to know that the mortgage had already been erased on 23rd April 1982. He then demanded payment from the Bank.

The mortgage document executed by the Surety contains inter alia the following provisions: .....

(1) ... And whereas the Bank has agreed to grant the aforesaid overdraft of Rs.50,000 on having the repayment thereof together with interest, charges and costs guaranteed by a personal guarantee by the mortgagee and secured by a first line mortgage on a property situated at Baie St. Anne Praslin.

(2) ... And for further securing to the Bank the repayment of all moneys payable by virtue of these presents the mortgagor thus hereby mortgage especially as continuing security the property at Baie St. Anne Praslin. ....

In 1981 the wife of the Debtor, Mrs. Morin had mortgaged her landed property to the Bank to secure a loan of Rs.100,000 given by the Bank to the Debtor. This loan bears A/C No.20401. The earlier loan guaranteed by the Surety bears A/C No. 051. Rick Morin. the son of the Debtor, in his testimony stated that the loan secured by the mortgage given by the Surety was cleared when the 1981 mortgage was executed by Mrs. Morin and he refers to 3 items totalling Rs.34,702.03 which were credited to A/C No. 051 from A/C No.20401. These transfer items were shown in the bank statements.

In June 1982 the Bank by its authorised officials had signed a notarially executed document erasing the mortgage given by the Surety, with this recital on the erasure

> " The appearers acting as aforesaid recognise having received the said sum of rupees fifty thousand and all interest accruing thereon."

This erasure in June 1982 would lend credence to Rick Morin's testimony.

Mr. Shah appearing for the Bank maintains that no evidence has been produced to show that the loan guaranteed by the Surety had been repaid in April 1982. The Bank by its Commercial Manager Mr. Harold Lablache maintains that the recital in the notarially excuted document dated June 1982 was in error, as , according to the Bank's books, the debt was still owing. However Lablache also says that the Bank has no record of the said erasure on its file, but he accepted that it was a duly registered public document. He

admitted he wrote three letters to the Surety dated respectively 3rd May 1984, 28th November, 1984, and 8th March 1985 threatening seizure of the Surety's land by auction or foreclosure if the Surety defaulted in paying off the loan allegedly owed by the Debtor.

On the basis that the money owing by the Debtor was not paid off in June 1982, despite the notarially excuted document erasing the mortgage, Mr. Shah submits that even if the property had been discharged from mortgage, the Surety is still liable on his continuing personal guarantee and that such personal guarantee subsists so long as the debt remains unpaid in full. He refers to the personal guarantee given by the Surety in the mortgage document. Mr. Shah is also relying on the fact that what was guaranteed was an overdraft account.

I am not convinced that there was a continuing personal guarantee subsisting. I agree with Pereria J that the continuing security was limited to the mortgaged property, that is contained in the clause " And for further securing to the Bank ..... " referred to earlier. And in the three letters sent by the Bank to the Surety demanding payment, the threat contained in them was confiscation of the land mortgaged, and the personal guarantee provision was not invoked.

As to whether it was an overdraft account or an ordinary loan, the Surety firmly believed that he was guaranteeing a loan. There was also a convention de pret, a document emanating from the Bank, signed by the Debtor on 29th November, 1979 which stated that the

loan was for Rs.50,000 and the duration of the loan was 12 months. That is more consistent with an ordinary loan than an overdraft account.

Mr. Lablache testified that in 1986 Rick Morin borrowed money from the Bank, and it was from that money that the loan guaranteed by the Surety was paid off, not before.

Be that as it may, I am satisfied that the loan secured by the mortgage executed by the Surety in 1978 was paid off when the mortgage was erased by the notarial document of June 1982. Whether the Bank had a copy of the document or not is irrelevant. It was properly executed by the Bank's authorised officers and the Bank has produced nothing credible to show why estoppel should not apply. The Debtor has died and is unable to testify.

The Surety of course has no proper books or accounts. The Bank admitted that there was an overpayment by the Surety of Rs.26,724 and that was the sum awarded to the Surety by the trial judge.

Mr. Shah objects to the item of moral damages awarded by the trial judge. He submits there was no mala fide on the part of the Bank, and that it was merely an overpayment, " l'action du repetition l'indue." He refers to Articles 1376, 1378 and 1153 of the Civil Code. And he further submits that in any event the sum of Rs. 25,000 is too high.

In this case as Pereira J rightly pointed out, the Bank misrepresented the position to the Surety that a mortgage over his property was still subsisting when it had been erased. The Bank repeatedly threatened to forclose on a non existing debt. The

Surety paid under duress. The Bank's conduct towards the Surety was inexcusable, and caused the Surety anxiety and distress. In my view the Bank's conduct amounts to a fault in terms of Article 1382 of the Civil Code. The trial judge was right to award damages and the sum of Rs.25,000, in the circumstances, is by no means excessive.

I would dismiss the appeal with costs.

A. Mustafa

A. Mustafa

President

Dated at..... this..31st..... day of ..March.....

Delivered in open Court in the presence of both Counsel by, Mr Justice V Alles.

V Alles

Judge.

31/3/93.