IN THE SEYCHELLES COURT OF APPEAL

ANANDAN PILLAY APPELLANT

Versus

BARCLAYS BANK RESPONDENT

Civil Appeal No: 12 of 1998

[Before: Goburdhun, P., Ayoola & Venchard JJ.A]

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Mr. P. Boulle for the Appellant
Mr. R. Valabhji for the Respondent

JUDGMENT OF THE COURT

(Delivered by Venchard J.A)

The Appellant's father owned a plot of land (H2348) which he mortgaged in favour of the Respondent to secure an overdraft facility of Rs.15000 which had granted to him by the Respondent in October 1972. The said plot H2348 was purchased by the Appellant in March 1993. The property was still encumbered at the time of the sale to the Appellant. The interest payable on the overdraft facility was contractually agreed not to exceed 12% yearly.

The appellant's father subsequently obtained two further facilities of Rs.200,000 and Rs.100,000 respectively. The rate of interest claimed on the subsequent loans was at 20% yearly.

The Respondent merged and amalgamated all the facilities granted to Appellant's father who was not a party to the merger or amalgamation. It would, if we are to believe the Bank Manager, a banking practice. On the other hand, it is permissible to infer that the merger or amalgamation was a colourable device to justify the Bank

from claiming under the first over draft an interest rate of 20% yearly in breach of its contractual obligation to claim a rate of interest not exceeding 12% yearly. The Bank Manager attempted to explain that the higher rate had been determined by the Central Bank and impertinently suggested that counsel should instead question the Central Bank on this issue.

We are not impressed by the explanation of the Bank Manager. The contractual obligation of the parties is sacrosanit and we are not aware of any statutory provision which empowers the Central Bank to modify the rate of interest on loans made by commercial banks.

We have thought fit to refer to the unilateral increase by the Bank in the rate of interest payable on the first overdraft secured by plot H2348 as this way have a bearing on the issue of merger. No evidence has however been adduced that for accounting purposes the merger did not affect the rate of interest. On the contrary, the Bank Manager's evidence is clearly to the effect that a rate of interest higher than 12% was claimed on the first overdraft.

When the Appellant purchased the plot H2348, he sought the erasure of the inscription of mortgage over the plot but this was refused. He instituted proceedings before the Supreme court and in an amended plaint prayed for an order discharging the charge on Title H2348 has been extinguished by payment or in the alternative by prescription or novation. The Respondent in an amended defence denied that the principal obligation or the charge has been extinguished.

One of the issues which has been canvassed in this appeal is the locus standi of the Appellant. It is desirable that this issue be dealt with first as the need to consider the other issues do not arise if the Appellant has no locus standi.

The Bank had since 1990 until 4th April 1994 been collecting rent from a tenant to whom it had let plot H2348 for Rs.1000 monthly. The Bank credited the Appellant's father's account with the rent so collected. The Bank had no authority to appropriate the rent as from 29th March 1993, the date on which the Appellant purchased the property. The Appellant is therefore entitled to require the Bank to render accounts for the rent collected and wrongfully credited to the father's account. The Appellant is also entitled to seek all ancillary remedies that he may be entitled for the erasure in favour of the Bank of the encumbrance burdening the property which now belongs to him.

Mr Boulle, of counsel for the Appellant, submitted that the debt secured by the inscription of mortgage on Title H2348 has been extinguished by novation, prescription or payment and accordingly the charge also has been extinguished.

The trial judge carefully considered the issue of novation and concluded that there was no novation. His finding is fully justified by the evidence on record. We wish only to add that a novation can only take effect if there is a direct or constructive involvement of the debtor. In the instance case the merger or amalgamation was a unilateral internal act on the part of the Bank for its convenience not requiring the concurrence of the debtor who was placed before a 'fait accompli'.

As regards prescription, the trial judge has correctly set out the governing legal principles. However, in this case the charge was in respect of overdraft facilities as averred by the Appellant in the amended plaint and not for a term loan. It was therefore material to determine the point from which the prescription could start to run. In a matter of overdraft this starting point is on the day on which there

ceases any activity relating to the specific account established for the purpose of the overdraft facility. There is no evidence on record to enable us to reach a decision on this starting point. We accordingly remit the case to the trial judge to determine this factual issue.

As regards payment, all amounts paid to or collected by the Bank and which should have been credited to the overdraft should be determined. The aggregate of the amounts should be reduced by the interest payable on the outstanding balance of the overdraft facility. The debt would have been extinguished if the overdraft has been cleared. In any event, the rent collected by the Bank from 29 March 1993 should have accrued directly to the Appellant and the overdraft reduced by at least that amount. The evidence on record does not enable us to determine those amounts. We also remit the case to the trial judge to determine those amounts.

It will be open to the trial judge to require the parties to limit themselves to the two issues which have been remitted.

The cost of this appeal shall be borne by the respondent.

Dated at Victoria, Mahe this ..14th..... day of ***August*** 1998.

H. GOBURDHUN	**E.O. AYOOLA**	**L.E. VENCHARD**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**