IN THE SEYCHELLES COURT OF APPEAL

BANK OF BARODA
STATE BANK OF INDIA
INDIAN BANK
INDIAN OVERSEAS BANK
BANK OF INDIA APPELLANTS

versus

AILEE DEVELOPMENT CORPORATION LIMITED RESPONDENT

Civil Appeal No: 45 of 1998

[Before: Ayoola, P., Silungwe & De Silva, JJ.A]

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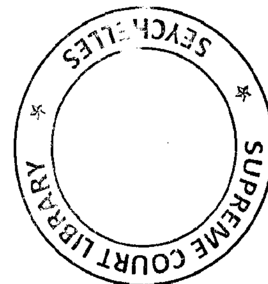


Mr. R. Valabhji for the Appellants
Mr. B. Georges for the Respondent

JUDGMENT OF THE COURT

(Delivered by Ayoola, P.)

The respondent in this appeal, Ailee Development Corporation Ltd., filed a petition in the Supreme Court pursuant to Section 53 of the Immovable Property (Judicial Sales) Act, Cap 94 ("the Act") following a series of commandments served on it pursuant to Section 2 of the Act by counsel on behalf of the appellants in this appeal, Bank of Baroda, State Bank of India, Indian Bank, Indian Overseas Bank and Bank of India. By its petition the respondent sought orders that the notices and the consequent seizure of parcel No. T147 were null, void and of no effect; and of "*cancellation*" of all further steps that are open to the respondents after services of the notices and seizure.

The respondent, a company registered in Seychelles, owned property described as parcel No. T147 on which it had built the hotel known as the Plantation Club Hotel. The appellants are a consortium of

banks registered overseas which by themselves or their predecessors in title had lent substantial sums of money totalling US$43,475,000.00 to the respondent at various times between 7th February, 1960 and 6th February, 1985. The said sums of money were lent for the purpose of construction of the hotel. An Austrian Bank (IBA) and a Belgian company also put up some money for the project. All the loans described in this judgment as "*the existing loans*" were secured with charges on parcel T147 and floating charges on other assets of the respondent. The appellants and other lenders had inter se pari passu agreements in so far as the security was concerned.

As the construction works of the hotel were not progressing well the respondent had to borrow, sometime in 1987, an additional sum of 15 million Swiss Francs from the International Finance Corporation ("IFC") with the knowledge of the appellants. The appellants agreed to lend a further sum of US$1.7 to the respondent. The loan by IFC ("IFC loan") and the further loan were secured inter alia by fixed charges on parcel T147.

In order to obtain the IFC loan the respondent entered into an agreement with IFC ("the Investment Agreement") containing a number of stringent conditions imposed by IFC. In order to meet the conditions for granting the IFC loan the appellants with the other lenders, described altogether as "*the existing lenders*", and the respondent on 2nd June, 1987 entered into an agreement titled "*Existing Lenders and Sponsors Deferment Agreement*" ("the Deferment Agreement") in terms of which the existing loans would be sub-ordinated to the IFC loan and would be deferred, inter alia, as paraphrased by the respondent in its petition, as follows:-

(i) The loans would no longer be repayable on demand but would be rescheduled for repayment in 10 equal annual instalments commencing on August, 31st 1990;

(ii) Interest due would be capitalised and added to the principal amount owned, the whole to be repaid as set out in (i) above;

(iii) Notwithstanding the rescheduling of the repayment of the said loan, even the rescheduled payments of capital and interest would not become due and payable by the appellant when rescheduled, unless:-

(a) the payments due inter alia to IFC under the terms of its 1987 loan agreement had been paid in full;

(b) the payments due to the appellants could be made out of Available Funds and Available Net Income as defined in the said agreement;

(c) the Current Ratio of the Petitioner would be at least 1:2 immediately after making the payment;

(iv) Amounts not paid as a result of the provisions of the said agreement mentioned at (iii) above would be deferred for payment to the next payment date.

The respondent drew down only SWF 4 million loan and did not draw down the further loan of US$1.7 million at all. On November 16th, 1990 the IFC cancelled further disbursement of its loan. On 28th February, 1991 the IFC assigned its right and obligations in the IFC loan to the Government of Seychelles ("the Government") which in turn, on 16th September, 1991, further assigned its rights and obligations under the said loan to a company known as EODC (BVI) Ltd. In June, 1991 the respondent drew down SWF 11 million from the assigned IFC loan.

By four separate notices each dated 30th April 1996 and served on the respondent on 23rd May, 1996 pursuant to Section 2 of the Act the appellants sought to recover respectively the sums of US$49,925,097.19; US$3,675,000.00, US$8,509,462.50, US$9,8000,000.00 and US$27,731,073.19 together with interest accruing from February 1995 and incidental expenses. The appellants by the said notices threatened seizure of parcel T147 should the sums not be paid. Eventually, the seizure was effected on 10th June, 1996.

The appellants alleged that the various sums were due for several reasons which need not now be set out in details as they related to each of the loans. They alleged (i) breaches by the respondent of clauses of the agreement relating to insurance of the assets and property and breaches occasioned by failing to pay loans due on the loan and termination of the deferment; (ii) agreement by reason of the failure of the respondent to draw down in full the SWF 15 million IFC loan; and a fraudulent assignment of the rights and obligations of the IFC to the Government and subsequently to EODC (BVI) Ltd., which was a shareholder in the respondent company.

At the Supreme Court, the main contention of the respondent was that the loans were not yet repayable to the appellants or any of them because the conditions under which the loans were severally repayable had not yet arisen. They contended that it was incorrect to imply conditions, as the appellant did, into the Deferment Agreement, particularly, that the respondent had to draw down the total sum of the IFC loan; or prohibiting an assignment by IFC of its rights and obligations. In regard to breaches of insurance and taxation clauses, it pleaded waiver and readiness to perform had the appellants advised it of any sums to be paid or requested payment of any such sums.

In their response the appellants repeated much of the grounds already stated in the notices served on the respondent as justification for the seizure. They attacked the assignment to the Government and, subsequently, to EODC (BVI) Ltd., from several perspectives. They further contended that the Deferment Agreement never came into effect because IFC had cancelled the loan and that, if it did, the deferment was subject to a condition at will and was consequently null and void.

Bwana, J, before whom the matter came decided that the notices served on the respondent as well as the seizure of parcel T147 were null,

void and of no effect; and that all further steps which were open to the appellant pursuant to those notices and seizure be cancelled. He held that notwithstanding that IFC cancelled the right of the respondent to further disbursement of the balance 11 million Swiss Francs of the IFC loan, the loan having been partially drawn to the tune of SWF 4 million was not cancelled in toto as the portion that had been drawn by the appellant was still governed by the terms and conditions contained in the package of agreements. He held that the respondent had not defaulted in paying instalments that were due on the existing loans as those instalments have not yet been due and payable in terms of clauses 4 and 5 of the deferment agreement. In regard to the other breaches alleged by the appellants he held as follows:-

(i) In regard to all outstanding insurance debts; that they were subsequently paid. However , if they be not paid consequent to the Deferment Agreement, they were either waived by virtue of clause 5.01(c) (ix) A(ii) of the Investment Agreement or deferred in terms of clause 5 of the Deferment Agreement or waived by delay or acquiescence;

(ii) In regard to alleged failure of the respondent to discharge and indemnify the appellants against all rates, taxes, and duties, in line with practice between the parties, the appellants could have paid and debited the respondent with sums so paid on these items. The respondent was not statutorily liable to pay withholding tax;

(iii) In regard to an alleged breach of the undertaking not to sell, mortgage, lease or part with the possession of the property charged, the appellants were duly informed before one acre of parcel T147 was leased by the respondent to Ailee Recreation Company;

(iv) In regard to the assignment of IFC's rights to the Government, there was such assignment and it was duly notified to the appellants;

(v) On the contention that the Deferment Agreement was subject to a condition at will on the part of the respondent from the circumstances there was no condition at will because the respondent had no power to defraud or escape from its contractual obligations or to evade its obligations.

The appellants by their Memorandum of Appeal raised 33 grounds of appeal against the decision of the Supreme Court. Such proliferation of grounds of appeal several of which counsel for the appellants conceded were no ground at all, was not only unnecessary but is also tedious. Several of the so called grounds are not in proper form. However, it is evident that the case for the appellants, put in several ways, is that Bwana, J., was in error in the view he held that the agreed instalments of the existing loans were not due for payment by operation of the Deferment Agreement and also because the events of default which could trigger the calling in of the loans had not happened. It was contended that the Deferment Agreement had ceased to have any effect because the agreement of the appellants to defer payment of interest and principal amount in respect of the Baroda loans has been terminated pursuant to Clause 9 of the Deferment Agreement by reason of the respondent committing a default of its obligations with IFC under the Investment Agreement made between the respondent and IFC, consequently there were no loans to which the existing lenders could be deferred. It was further argued that the IFC was not a party to the Deferment Agreement. Counsel for the appellants contended that Bwana, J., was wrong in holding that the several breaches alleged by the appellants as events of default had not occurred.

The two main agreements with which this case is concerned are:

(i) The Investment Agreement; and

(ii) The Existing Lenders and Sponsors Deferment Agreement ("the Deferment Agreement")

The Investment Agreement entered into by the respondent and IFC whereby IFC agreed to lend the respondent SWF15 million made provision for the repayment of the loan by instalments and dates of such payments. In Section 3.04(b) thereof it envisages the eventuality that the full amount

of the loan may not be disbursed at any time prior to the date when repayment of the loan should commence, and made provisions to accommodate such eventuality. One of the conditions of disbursement of the loan covered by the Investment Agreement as contained in Section 5.01(B)(i) and (ii) is as follows:-

> "(B) the Existing Lenders and the Sponsors respectively agree with the Company that:
>
> (i) no amount will become due and payable by the Company in respect of the Revised Existing Loans and the Sponsors Deferred Loan unless the Company is not in default in respect of any amounts then due and payable in respect of the Loan, the Fifth Bank of Baroda Loan and the IHC Loan and the IFC Incentive Fee (as hereinafter defined), and the IHC Incentive Fee, in the case of principal repayments there are "Available Funds" (as hereinafter defined) and in the case of interest or other payments there is "Available Net Income" (as hereinafter defined) and at the time immediately after making such payment the Current Ratio would be at least 1.2; and
>
> (ii) any amounts which are not paid on account of sub-paragraph (I) above will be deferred for payment until the next payment date subject again to the provisions of sub-paragraph (B) with any deferred amounts being paid out in priority to amounts which might otherwise then be due and payable."

The Existing Lenders by the Deferment Agreement agreed with the respondent that the existing loans:-

> "shall no longer be repayable on demand but shall be re-scheduled for repayment in ten (10) equal annual instalments commencing August 31, 1990 subject to the provisions of paragraph 4."

Paragraphs 3 and 4 of the Deferment Agreement provide as follows:-

> "3. With effect from Project Completion Date interest will commence to accrue on the principal amounts outstanding and capitalised under paragraphs 1 and 2 hereof at the annual rates as provided in respective agreements between the Company and the Existing Lenders and will, subject to paragraph 4, become payable on August 31, of each year;
>
> 4. No amount will become payable by the Company to us though it shall accrue in respect of interest payable under paragraph 3 or in respect of principal instalments referred to in paragraphs 1 and 2 above or in respect of any other amount unless:
>
> (a) all amounts then due and payable whether by way of principal, interest or otherwise in respect of the IFC Loan, the IHC Loan, the Fifth Bank of Baroda Loan and in respect of the IHC Incentive Fee and the IFC Incentive Fee (as such terms are defined in the IFC Investment Agreement between the Company and International Finance Corporation) have been paid in full;
>
> (b) such payment, if in respect of a principal instalment, can be made out of Available Funds, as hereinafter defined;
>
> (c) such payment, if in respect of interest or otherwise, can be made out of Available Net Income, as hereinafter defined; and
>
> (d) at the time immediately after giving effect to such payment whether by way of principal, interest or otherwise, the Current Ratio or the Company (as

> defined in the said IFC Investment Agreement) would be at least 1.2;

> to the extent that all or any part of any amount of principal, interest or otherwise does become available in accordance with the foregoing provisions, such amount as may be available, if not paid in full to all, shall be paid to the holders of the said Deferred Loans except promoters/sponsors' deferred loans, pro-rata to amounts which would then be due but for any deferment."

Paragraph 9 of the Deferment Agreement provided as follows:-

> "In the event of any default committed by the Company of any of its obligations (other than payment obligations in respect of which we have agreed for deferment) under any agreement in respect of the existing loans with the existing lenders or in the event of any default by the Company of any of its obligations with IFC under the Investment Agreement made/ to be made between the Company and IFC in respect of IFC Loan in the amount of Sw. Frs. 15 million and subject to the IFC loan and Fifth Bank of Baroda Loan (fresh bank of Baroda Loan of US$1.7 million) having been declared to be immediately due and repayable, our agreement to defer payment of interest and principal amount in respect of our respective loans as aforesaid shall be terminated, the entire amount of our loans and interest accrued thereon shall become forthwith due and payable as provided in the respective agreement notwithstanding anything to the contrary contained herein."

Paragraph 13 provides that the Agreement shall be governed by the laws of England.

From the express terms of the Deferment Agreement it is manifest that the existing lenders have agreed that the existing loans are rescheduled and that payment of the existing loans are to be deferred to payment of the IFC loans. By sub-paragraph B of the agreement they

agreed that payment due to the appellant could be made from available funds and Available Net Income as defined in the Deferment Agreement.

The position taken by the appellants as spelt out in their defence was that the Deed of Postponement regulating the priorities and the Deferment Agreement "*did not come into effect and or have become null and void and nugatory*" because the package of agreements have been "*cancelled*" by IFC. That position forms the nub of the appellants' case on this appeal. The issue raised by that aspect of the appellants' case is whether the court should construe the contract between the parties as implying a condition that a cancellation by IFC of the right of the respondent to further disbursement on the balance of 11 million Swiss Francs of the IFC loan would render the package of agreement nugatory.

Bwana, J., had no difficulty in holding that the IFC Loan was not cancelled. He was of the view that by virtue of the letter (Exhibit D47) of IFC what was cancelled was "further disbursements on the balance of the Loan." That letter reads as follows:-

> "We refer to the Pari Passu Inter-Se Agreement dated June 2, 1987. The purpose of this Index is to give you notice, in accordance with section 6(e) of that agreement, that after disbursing 4 million Swiss Francs, effective March, 1990, IFC cancelled the right of Ailee Development Corporation Ltd to further disbursements on the balance of 11 million Swiss Francs under the IFC's Investment Agreement dated June 2, 1987."

Exhibit D47 was issued pursuant to section 6(e) of the Pari Passu agreement which enjoins any party to the agreement promptly to inform the other parties of termination or suspension of disbursement of its loans under the provisions of its loan agreement and the reasons therefor. The cancellation of disbursement itself was pursuant to section 3:12 of the Investment Agreement which empowered the IFC by notice to the

respondent to cancel the right of the respondent to disbursements of the loan on the happening of certain events. Upon giving such notice the right of the respondent to disbursement of the undisbursed part of the loan shall be suspended, or, as the case is in this case, cancelled.

It is evident that cancellation of the right of the respondent to disbursement does not bring the Investment Agreement to an end. Where there has been a disbursement or have been disbursements before further right of disbursement is cancelled the agreement subsists to regulate the rights and obligations of the parties in regard to the disbursed loan. Section 8.06 provided that:-

> "This Agreement shall continue in force until all monies payable hereunder shall have been fully paid in accordance with the provisions hereof."

When disbursements have been made before the cancellation of further rights of disbursement "*monies payable hereunder*" include monies which the respondent is liable to pay in repayment of monies disbursed. Such monies are also included in monies described in paragraph 3(a) of the Deferment Agreement as:-

> "all amounts then due and payable whether by way of principal, interest or otherwise in respect of the IFC loan."

By the provision of that paragraph payment of existing loans were deferred until such amounts have been paid in full.

We are satisfied that Bwana, J. came to a correct conclusion when he held that:-

> "The SF 4 million that had been utilised by the petitioner was still governed by the terms and

> conditions contained in those 'package of agreements'"

and that:

> "The petitioner is therefore bound to pay it back pursuant to sub-paragraph B of Section 5.1(c) supra," (i.e. section 5.1.(c) of the Investment Agreement)

However, learned Counsel for the appellants, Mr. Valabhji, contended on this appeal that by virtue of paragraph 9 of the Deferment Agreement the existing loans become due and payable. The text of paragraph 9 has been set out earlier. The circumstances in which paragraph 9 would apply are:-

(i) When there has been an event of default committed by the respondent of any of its obligations under any agreement in respect of the existing loans with the existing lenders.

(ii) In the event of any default by the respondent of any of the obligations IFC under the Investment Agreement made in respect of the IFC Loan AND subject to the IFC loan having been declared to be immediately due and repayable."

In the Supreme Court the appellants had relied on the first of these circumstances. They alleged several defaults by the respondent of its obligations to the existing lenders. As earlier stated, Bwana, J., did not find such defaults as were alleged proved. These defaults were set out in paragraph 1 of the appellants' defence. On this appeal the criticism of the learned judge's findings that the enumerated defaults have not been proved has been weak and half-hearted, presumably because of the shift of emphasis in the appellants' case from reliance on circumstances of default in performing the obligations of the Existing Lenders' agreement to reliance on default under the Investment Agreement. We find nothing in the arguments placed before us to make us come to the conclusion that Bwana J., was wrong when he held that defaults alleged were not proved.

Bwana J., did not deal with the other aspect of paragraph 9 of the Deferment Agreement because it was not clearly raised before him although there was an oblique mention of paragraph 9 in appellants' counsel address. The case put forward by the appellants in the Supreme Court was that "*the package of Agreement of 2nd June 1987 is not relevant to the case*", and that what the case was concerned with were the existing loans agreement (Nos. 1 – 4) in respect of which such breaches of obligation had occurred so as to make the several existing loans payable. The appellants' case on this appeal built around an alleged default of obligation in regard to the Investment Agreement is a new case being made on appeal. For that reason alone such fresh point should not be permitted without leave of this court. However for the sake of completeness and because it is a point which can be shortly disposed of, it will be pronounced upon.

For the deferment to be terminated in terms of the second part of paragraph 9 of the Deferment Agreement not only must there have been a default of the obligation with IFC under the Investment Agreement but the IFC loan must have been declared to be "*immediately due and repayable.*" It is rightly conceded by counsel for the appellants that there has been no such declaration. He argued, however, that there was no need of such declaration because the IFC loan had been only partially disbursed. It is not difficult to reject this argument because as earlier stated that part of the IFC loan disbursed became part of the amounts referred to in paragraph (a) of the Deferment Agreement.

It is in the context of paragraph 3(a) of the Deferment Agreement that the argument that cancellation of right to disbursement of the rest of the IFC loan and assignment by IFC of its rights and obligations in the IFC loan has to be considered.

Where the express terms of a written agreement are clear and unambiguous it is not right to read into it terms which are not there. The applicable principle of law is that express terms prevail. There is nothing in the Deferment Agreement that made its continued operation conditional on the respondent obtaining the full disbursement of the IFC loan. The terms of the deferment specified in the Deferment Agreement do not have room for any implied condition suggested that the operation of the terms of deferment are conditional on full disbursement of the IFC Loan. If that was intended the words "*all amounts then due and payable*" would not have been used. This is a case in which the general presumption "that the parties have expressed every material term which they intended should govern their agreement, whether oral or in writing" should apply. For such presumption see **Luxor (Eastbourne) Ltd v Cooper** [1981] A-C 108, 137.

There is also nothing in the Deferment Agreement that expressly or impliedly prohibited assignment of rights and obligations under the agreement.

It is unnecessary to embark on an enquiry whether the assignment to the Government and subsequently to EODC (BVI) was a fraudulent assignment because whether or not there was an assignment as claimed, the deferment would subsist in terms of paragraph 4(b) of the Deferment Agreement. Furthermore, Bwana, J's., opinion cannot be faulted when he reasoned thus:-

> "... the initial SF4 million was disbursed to the petitioner and its payment is still governed by the terms and conditions of the Investment Agreement as well as Deferment Agreement, among others. Thus, the rights and benefits of the IFC could be assigned validly."

He made the important finding that the remaining SF 11 million also found its way to the project and the respondents were aware of it. That finding has not been challenged and its consequences are that the assignees have enhanced the value of the project and that the assignment was not at all a sham. It seems clear that fraud had been alleged by the appellants and that the trial judge had not found it established at all.

One final effort made by the appellants to dislodge the effect of the Deferment Agreement is in the argument that it is affected by a condition at will. The question was raised by paragraph 4 of the Defence where it was averred that the "'package' of agreements never came into effect and if it did, which is denied, it is null and void for being inter alia subject to a condition AT WILL on the part of the Debtor." In answer to a request for further and better particulars the appellants adopted the definition of condition at will contained in Articles 1170 and 1174 of the Civil Code of Seychelles and added further that:-

> "The Deferment Agreement is affected by such a condition and is therefore null and void as the defendant (sic) will never be liable to pay its debt and by his (sic) failure to pay."

There is no doubt that in relying on this line of defence the appellants implied, wrongly, that the Agreements were governed by the laws of Seychelles, whereas the Investment Agreement (Section 8.07) and the Deferment Agreement (para. 13) expressly and respectively stated that the agreements shall be governed by the laws of England. English law does not exactly have the type of distinctions between conditions which French Law on which the Civil Code is fashioned does. However, counsel for the respondent on this appeal tried the best he could to find a similarity between a condition at will and sham promises. The appropriate similarity seems to be condition at will and discretionary promises which are unenforceable because of their illusory nature.

A condition at will is one which depends for its fulfillment purely on the will of one of the parties. Article 1170 puts it this way:-

> "A condition at will is a condition which causes the performance of a contract to depend upon an event which is in the power of one or other of the contracting parties to fulfil or to prevent."

Article 1174 provides that:

> "An obligation shall be null if it is agreed upon subject to a condition at will on the part of the person who binds himself."

French law described such condition as purely potestative. However, English law does not have a similar concept. The common law would probably arrive at the same conclusion by asking whether the obligation incurred is not so illusory as to be unenforceable. It is unnecessary to dwell too much on the difference between the Civil Code and English law in this regard since for the purpose of this appeal the same conclusion will be reached.

Bwana, J., rejected the argument that the Agreements are nullified by condition at will for three reasons which can be summarised as follows:-

(i) The respondent had no power to influence events or consequently the fulfilment or prevention of the implementation of the contractual obligations.

(ii) There was no evidence suggesting that the respondent had hidden instruction to defraud.

(iii) The IFC – an affiliate of the World Bank – could not be said to have imposed such conditions in order to "bail out" on the part of either the IFC or the respondent.

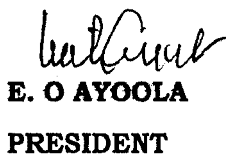
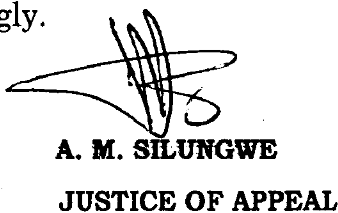
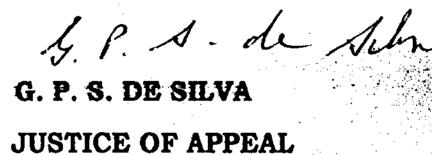
Counsel for the appellants has not shown how the trial judge was wrong in any of these views.

It is pertinent to observe that the Deferment Agreement came into being pursuant to Section 5.01(ix)(B) which was one of the conditions stipulated by the IFC for disbursement of the IFC Loan and that it was the appellants which on their own included the provisions requested by IFC in the Deferment Agreement – in paragraph 4 thereof. Thus, if as counsel for the respondent did, one must regard sham transactions as those in English law nearest to transactions tainted by conditions at will, the circumstances of this case are far from showing that the Agreements are sham. The appellants' argument seemed to have overlooked sections 6.01 and 6.02 of the Investment Agreement which put in place stringent mechanism for monitoring the performance of the respondent. Even if Articles 1170 and 1174 were applicable, the appellants have overlooked Article 1178 which provides that:-

> "The condition is deemed to have been fulfilled when the debtor bound by the condition prevents its fulfilment."

There is no substance in the submission that the agreements were subject to a condition at will or that the agreements are a sham.

For these reasons we find no substance in the appeal. The appeal is dismissed accordingly.

E. O AYOOLA	**A. M. SILUNGWE**	**G. P. S. DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 12 day of *April* 2001.