

Gopal v Barclays Bank (Seychelles)

(2013) SLR 553

Domah, Fernando, Msoffe JJA

6 December 2013

SCA 51/2011

Counsel B Hoareau for the first appellant
 S Rajasundaram for the second appellant

C Lablache for the respondent

The judgment of the Court was delivered by

MSOFFE JA

[1] A number of documents were produced and admitted in evidence at the trial before the Supreme Court. In a similar vein, at the trial PW1 Egbert Laurence and PW2 Ms Rona Labrosse testified in support of the respondent's case. The appellants testified in person and denied the claim against them. It seems however that a fair determination of the case basically depends on two documents. The Guarantee Form (exhibit P1) and the Facility Letter (exhibit P2).

[2] The respondent's case was, and indeed still is, that by virtue of the above two documents they extended the following facilities to the appellants:

- 1) Term loan 1: USD 400,000
- 2) Term loan 2: USD 140,000
- 3) Overdraft: UCR 150,000

4) Letter of Credit: Issuance against the linked USD term loan.

The purpose of the facilities was to finance the cost of a printing press and other accessories of the Indian Ocean Printing Services (Pty) Ltd in which the appellants are Directors.

[3] In exhibit P1 the words GOOD FOR THE SUM OF USD ONE HUNDRED AND FORTY THOUSAND (\$140,000) were inserted in long hand and were followed by the appellants' signatures. According to PW1 he prepared the Guarantee Form (exhibit P1). He filled in the name of the principal debtor at the beginning of the document, the names of the appellants, and the above words before the appellants signed the document.

[4] Under the proviso to cl 2 of exhibit P1 the words USD 140,000 (United States Dollars one hundred and forty thousand) were also inserted in long hand. The proviso was filled in by Philip Pierre, the Relationship Manager who managed the principal debtor's accounts relationship with the appellants. The appellants' contention was that this was filled in without their knowledge and consent after they had signed exhibit P1. According to them, they only signed a blank form with cl 2 unfilled in. They also challenged this document on the basis that it does not bear any date.

[5] As regards the Facility Letter (exhibit P2) it is evident that it did set out the terms upon which the loans and overdraft were to be made available by the respondent to the appellants. With regard to security it stated:

1. Director's Guarantee supported by:
2. Fixed and floating charge over company's assets;

3. A 2 years renewable contact between IOT and IOPS to incorporate an undertaking from IOT to assign all payments through Barclays Bank;
4. Barclays as agent, noted as Loss Payee under all risks insurance policy;
5. A first line mortgage over property parcel number 54563 with insurance and the Bank's interest noted in the policy.

All indebtedness and liabilities, actual or contingent, now or at any time owing or due by the client to the Bank will be secured by the above security in favour of the Bank.

[6] The last paragraph of exhibit P2 contains the following words:

Please confirm your acceptance of this Agreement by executing and dating this Facility Letter and the closed duplicate. The duplicate should then be returned to the Bank. The date of this Agreement shall be the date signed below. This Agreement will remain available to be accepted for a period of 30 days from the date of this Facility Letter, after which will lapse if not accepted.

Thereafter, the letter was signed by the respective parties. The appellants in particular signed on behalf of Indian Ocean Printing Services (Pty) Ltd.

[7] There is no serious dispute that the principal debtor paid off the USD 143,000 loan and the respondent recovered R 492,460.25 in respect of the overdraft. No repayments were made to the USD 400,000 loan. It was in respect of this state of affairs that the respondent filed the suit before the Supreme Court contending that the Guarantee Agreement was henceforth activated by the principal debtor's breach of the loan agreements and that the appellants were liable to pay the guaranteed sum of USD 140,000 with interest at R 865,687.30 and the costs of the suit. The Chief Justice ruled in favour of the respondent save that he disallowed the claim for interest. Aggrieved, the appellants have preferred this appeal.

[8] It is trite law that a contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of default. The person who gives the guarantee is called the surety, the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. In a contract of guarantee there must be a conditional promise to be liable on the default of the principal debtor. Thus, if the purpose of a guarantee is to secure payment of a debt, the existence of a recoverable debt is necessary. It is of the essence that there should be someone liable as a principal debtor and the surety undertakes to be liable on his default. In a valid guarantee there must be a principal debt. Therefore, a contract of guarantee is a tripartite agreement which contemplates the principal debtor, the creditor and the surety – See Avtar Singh *Law of Contract* (6th ed) 430–431.

[9] In this case, exhibits P1 and P2 have all the hallmarks of a contract of guarantee. The principal debtor is the Indian Ocean Printing Services (Pty) Ltd. The sureties are the appellants herein. The principal debts are the loans in issue.

[10] In the notice of appeal the appellants canvassed five grounds of appeal. At the hearing grounds 3 and 4 were abandoned thereby leaving grounds 1, 2 and 5. We propose to deal with grounds 1 and 2 together and ground 5 separately.

[11] The complaint in the first and second grounds of appeal is essentially centered on that portion of the judgment of the Chief Justice which reads:

13. The defence revolves around the fact that the defendants claim they did not consent to the contents of the proviso to clause 2 that were inserted by Pierre. Given the endorsement at the foot of the document next to the defendants' signatures which states, 'GOOD FOR THE SUM OF USD ONE HUNDRED FORTY THOUSAND (\$140,000), existed on the document prior to the defendants' signatures; having been so endorsed by PW1, the defendants cannot conceivably deny knowledge that the guarantee was at least good for the sum of USD 140,000. The defendants acknowledge signing the guarantee form and this information was clearly available on the form at the time of their signing the document next to where they appended their signatures.

[12] The appellants' stance on the above grounds is that the Chief Justice erred because their position has always been that the proviso to cl 2 in exhibit P1 was filled in without their knowledge and or consent after they had signed the guarantee. They only signed a blank form with cl 2 unfilled in. With respect, on the available evidence there is no basis for us to fault the Chief Justice in his findings and conclusions on the point. The evidence of PW1 is clear that he filled

in the name of the principal debtor at the beginning of the document, the names of the appellants and phrase “GOOD FOR THE SUM OF USD ONE HUNDRED AND FORTY THOUSAND (\$140,000)” at the foot of the document before the appellants signed the said document. Since these are the same words and figures which feature in the proviso it is too late in the day to disown the document on that aspect. And once they signed, coupled with the uncontroverted evidence by PW2 that of the loans guaranteed there were outstanding amounts to be paid, it followed that the guarantee agreement was activated by the principal debtor’s breach of the loan agreements.

[13] At any rate, it is trite law that “he who asserts must prove” (ei incumbit probatio qui dicit, non qui negat) — Adrian Keane and Paul McKeown *The Modern Law of Evidence* (9th ed) at 83. This principle of law is supported by both French law and English law. It is a principle which is well cherished in both jurisprudences.

[14] Articles 1319, 1320 and 1322 of the Civil Code of Seychelles are clear on the above point. Article 1319 in particular provides:

An authentic document shall be accepted as proof of the agreement which it contains between the contracting parties and their heirs or assigns.

Nevertheless, *such document shall only have the effect of raising a legal presumption of proof which may be rebutted to the contrary*. Evidence in rebuttal, whether incidental to legal proceedings or not, shall entitle the Court to suspend provisionally the execution of the document and to make such order in respect of it as it considers appropriate.

[Emphasis added]

[15] In the justice of this case, it was incumbent upon the appellants to adduce strong evidence in rebuttal of the respondent's case that the above words and figures in the document were inserted before they appended their signatures. Apparently the appellants' case has all along been a general denial to the effect that the said words and figures were inserted after they had signed the document, without strong evidence to rebut the respondent's case on the point. In the absence of strong evidence to the contrary, it will be fair to say that they did not discharge their evidential burden in the matter.

[16] Section 12 of the Evidence Act gives room for the application of English law of evidence in Seychelles except where it is otherwise provided by special laws. In *Suleman v Joubert* SCA 27/2010 at 6 this Court quoted with approval *Re B (Children)* [2008] UKHL 35 whereby Lord Hoffman using a mathematical analogy in explaining the burden of proof stated:

If a legal rule requires a fact to be proved (a 'fact in issue'), a Judge or Jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

[17] Similarly, s 110 of the Evidence Act of Tanzania (which is essentially English law) provides:

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

And s 115 thereto is to the effect that in civil proceedings when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. And Sarkar *Law of Evidence* (16th ed) at 1675 defines the word “especially” as facts that are pre-eminently or exceptionally within one’s knowledge.

[18] Explaining that the burden of proof may shift from one party to another in the course of a trial *Halsbury’s Laws of England* (4th ed) has the following to say at page 11, paragraph 13:

... The *evidential burden*, however, may shift from one party to another as the trial progresses according to the balance of the evidence given at any particular stage; this burden rests upon the party who would fail

if no evidence at all, or no further evidence, as the case may be, was adduced by either side.

[Emphasis added]

And *Cross and Tapper on Evidence* (12th ed) at 124 defines “evidential burden” as:

... the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue

[19] Yet again, at page 18, paragraph 19 *Halsbury’s* (supra) says something on the standard of proof to this effect:

To succeed on any issue the party bearing the legal burden of proof must (1) satisfy a Judge or Jury of the likelihood of the truth of his case *by adducing a greater weight of evidence than his opponent*, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof.

[Emphasis added]

[20] Needless to say, in civil cases the standard of proof is satisfied on a balance of probabilities.

[21] As already alluded to, the appellants’ case at the trial was built on the premise that it was “especially” within their knowledge, if we may respectfully say so, that the words and figures in exhibit P1 were inserted after they had signed the document. Yet, they did not adduce evidence of “greater weight” than that of the respondent to discharge their burden of proof on the point. As it is, if we may respectfully repeat, their case was a general statement that the words and figures were inserted after they had appended their signatures. With respect, more and stronger evidence ought to have come from them to substantiate and justify this assertion. Apparently no such evidence was forthcoming in the case!

[22] Moreover, it is in the evidence of the appellants, particularly that of the first appellant at pages 128–129 of the record before us, that they trusted the respondent bank to do what was in their best interest. If so, we think, it is a contradiction in terms for them to come up later and say that what the respondent did in the matter was not in their best interest!

[23] Furthermore, it was never the appellants' case that their consent in relation to the guarantee in issue was given by mistake, or extracted by duress or induced by fraud so as to bring it within the ambit of art 1109 of the Civil Code. In the absence of a defence to the above effect there is no basis for doubting the respondent in its case against the appellants. As it is, we are satisfied that exhibit P1 constituted a fully concluded and valid agreement which has the force of law between the parties in terms of art 1134 of the said Code.

[24] This brings us to ground 5. The essence of the complaint in this ground is best captured in the contents of paragraph 2.4.4 of the appellants' skeleton heads of argument. It is the appellants' contention that paragraph 1 of exhibit P1 clearly states that the appellants, as guarantors, will become liable only if there is a demand notice made in writing. In their view, there was no evidence that there was any demand made to them in writing. In their further view on the point, the letter of demand which was exhibited in the case was sent to the company and not to them personally.

[25] Apparently the above point was canvassed before the Supreme Court. The Chief Justice dismissed it mainly because it was not distinctly pleaded as required by s 75 of the Seychelles Code of Civil Procedure which states:

The statement of defence must contain *a clear and*

distinct statement of material facts on which the defendant relies to meet the claim. A mere denial of the plaintiff's claim is not sufficient. Material facts alleged in the plaint must be distinctly denied or they be taken to be admitted. [Emphasis added]

[26] In dismissing the above point the Chief Justice reasoned as follows:

My view is that the defendants did not distinctly plead in their defence, as required by section 75 of SCCP that the plaintiff had not made demand from the defendants in their capacity as guarantors on default of the principal debtor. It would have been necessary for the defendants to do so if this was being set up as a defence to the action. To require the other party to strictly prove a fact is not necessarily to plead that such alleged fact did not in fact occur or take place. I do not accept the submission put forward by Mr Hoareau.

[27] If we understood Mr Hoareau for the appellants correctly, and we think we did, he was of the view that contrary to the Chief Justice's finding the above point was specifically pleaded under paragraph 8 of the plaint and specifically denied under paragraph 8 of the written statement of defence.

[28] In order to appreciate the essence of the above point it is instructive that we quote the paragraphs verbatim. Paragraph 8 of the plaint averred as follows:

In breach of the express term, by virtue of non-payment by the Company as alleged in paragraph 7

above, the Guarantee Agreement has been activated and the Defendants are liable to satisfy the Company's debt plus interest, to which they have failed.

And under paragraph 8 of the written statement of defence it was averred as under:

In the premise of all the averments stated above, the defendants deny that there is a breach of express term. The Plaintiff is further put to strict proof of "activation" of the alleged guarantee agreement. In isolation of the main loans and the liability attached thereon, no amount is payable under the alleged guarantee agreement with or without interest. In essence, no guarantee agreement is enforceable in isolation of the main loans for which the guarantee is purported to have been given. The non-payment by the Company of two other loans is put to strict proof by the Plaintiff.

[29] With respect, in our careful reading of the averments in the above pleadings, we do not get the impression that the point under scrutiny was clearly and distinctly pleaded thereto. In other words, there is nothing clear and distinct in relation to the letter of demand. To this end, we find no justification for faulting the Chief Justice in his reasoning on the point. It occurs to us that for s 75 (supra) to apply, in the circumstances of this case, there ought to have been in the first place a clear and distinct averment in the plaint relating to the letter of demand followed by a clear and distinct statement by the appellants denying the existence of any such letter. Apparently none of these existed in any of the said averments in the pleadings.

[30] In spite of the foregoing, it is not quite correct to say, as the appellants would wish us to believe and hold, that there is nothing at all in the evidence to show that they were made aware in writing of the default of the borrower. On the contrary, it cannot be over-emphasized that the appellants were at all material times the shareholders and directors of the borrower. To this end, there was a letter of demand (exhibit P5) dated 31 July 2008 which was written to the first appellant. The record of proceedings at page 81 shows that this letter was produced and admitted in evidence before the Supreme Court on 25 May 2011 without objection by Mr Hoareau appearing on that day on behalf of the first appellant herein. Mr Rajasundaram for the second appellant objected but was overruled. And the existence of the said letter was further confirmed by the first appellant's own testimony in court under cross-examination at page 136 of the record of proceedings thus:

Q. Were you informed of this US\$140,000 claimed when a *claim letter* was issued by Barclays Bank. Was there any mentioned (sic) about US\$140,000 claimed in the *demand or claimletter* issued by Barclays Bank, was it mentioned there?

A. In the facility letter?

Q. No in *the claim letter* when you failed to pay according to allegation of the Barclays Bank there was a claim letter from the Barclays Bank. Was it mentioned that guarantee document stands good for US\$140,000?

A. Yes.

Q. Was it mentioned there?

A. *Yes.*

[Emphasis added]

[31] In conclusion on the above point, we are of the considered view that much as the issue of the letter of demand was not pleaded, the evidence on record is to the clear effect that there indeed existed the said letter. It is not therefore, correct for the appellants to state to the contrary in the midst of the above glaring piece of evidence which is for all intents and purposes against them.

[32] When all is said and done, we are satisfied that there is no merit in this appeal. We hereby dismiss it with costs.