

IN THE SUPREME COURT OF SEYCHELLES

Civil Side No: 89 of 2013

[2018] SCSC.28

VISHRAM JADVA PATEL

Plaintiff

v.

LAURENCE FRESLON

Defendant

Heard: 29th November 2016; 18 and 21 July 2017

Counsel: MS. V. Gill for Plaintiff
Mrs. N. Burian and A. Benoiton for Defendant

Delivered: 18th January 2018

JUDGMENT

S. GOVINDEN-J

- [1] This Judgment arises out of a Plaint filed on the 5th November 2013 by Mr. Vishram Jadva Patel (“Plaintiff”) against Laurence Freslon (“Defendant”), wherein the Plaintiff prays for reimbursement of an outstanding loan with costs for Defendant’s alleged breach of a loan agreement. On the 18th March 2014, Defendant filed a Statement of Defence denying ever receiving any loan from Plaintiff.
- [2] Upon completion of the hearing, Plaintiff and Defendant both submitted final written submissions on the 1st and 2nd August 2017 of which contents have been duly considered for the purpose of this Judgment.
- [3] The following are the relevant factual background in a gist as per the Records of proceedings.
- [4] On the 27th September 2012, Plaintiff and Defendant signed a loan agreement, which provided that SR 400, 000/- would be loaned to Defendant (*Exhibit P1*). Under the loan agreement, Defendant was to repay the loan in eight installments of SR 50, 000/- per month at the start of the 31st January

2013. The Plaintiff thus seeks an Order from the Court to recover the SR 400, 000/- allegedly owed.

- [5] In her Statement of Defence, the Defendant denies ever receiving the sum of SR 400, 000/-.
- [6] The testimonial evidence adduced at the hearing in a gist reveal that the Plaintiff testified and also presented the testimonies of Mr. Bernard Georges, his attorney at the start of hearing, and two representatives from Barclays Bank namely, Ms. Lynn Ah-Tave and Ms. Dhivia Pillay. After Plaintiff's case-in-chief, Defendant testified for the Defence.
- [7] The Plaintiff's testimony of the 29th November 2016 and the 18th July 2017 reveal that the Plaintiff is the Managing Director of Vijay Construction and that he knew the Defendant and that he had decided to loan her SR 100, 000/- to assist her with some difficulties she was having with her spa business. He therefore issued a cheque, dated the 15th March 2012 in the sum of SR 100, 000/- to ASD PTY LTD being a company that the Defendant had said belonged to her. He testified that the Defendant had asked him to write the cheque to ASD PTY LTD.
- [8] Plaintiff further testified that the Defendant later asked for more assistance and he agreed to loan her an additional SR 300, 000/- by cheque, dated the 27th September 2012 again upon her request to ASD PTY LTD. At this point, given that the amount was large, Plaintiff testified that he decided to formalize the loans. He testified that an agreement was formalized in Defendant's personal name, as he did not know about the company. He testified that the agreement was signed by Defendant and himself and that there were two witnesses present (*Exhibit P1 being the Loan Agreement between Plaintiff and Defendant Dated 27 September 2012*).
- [9] Moreover, the Plaintiff testified that he asked the Defendant to repay him several times. He testified that the Defendant said that she would do so as soon as she had sold her apartment in France, but she never repaid him.
- [10] The testimony of Mr. Bernard_Georges of the 18th July 2017 (after having withdrawn from his representation of Plaintiff without objections of the Defendant) and leave of the Court, testified that he was instructed by Plaintiff to recover the sums paid to the Defendant in her personal capacity. He testified that he met with the Defendant personally and they were unable to find an arrangement for the repayment. He testified that she clearly recognized that she owed the money and she stated that she would be paying the loan as soon as she sold her apartment.
- [11] Ms. Ah-Tave's testimony of the 18th July 2017 in her capacity as Branch Manager at Barclays Bank, was to the effect that a Barclays bank statement for Plaintiff's account indicates that SR 100, 000/-, R 400, 000/-, and R 300, 000/- were debited from his account. However, she was not able to indicate the recipient of these debited amounts.
- [12] Ms. Pillay's testimony of the 21st July 2017 as the Head of Premier banking at Barclays Bank, reveals that she could not confirm the date the Plaintiff's two cheques (*Exhibits P4 & P5*) were deposited because the depositor bank was MCB. She confirmed that the cheques were cleared and debited from Plaintiff's account. She testified that Barclays Bank would not be able to track the

name of the person who deposited the cheques into ASD PTY LTD for Barclays Bank can only see MCB's client, ASD PTY LTD, was the one requesting the clearance.

[13] On the other hand, the Defendant's testimony of the 21st July 2017 reveals her acknowledgement of the loan agreement and that she never received SR 400, 000/- from the Plaintiff. She denied ever telling Mr. Bernard Georges that she had received this sum from the Plaintiff. The Defendant further testified that ASD PTY LTD was a trading company that imports and sells wholesale beauty and spa products. She testified that she and her daughter were shareholders of the company.

[14] She further testified that she signed the loan agreement in her capacity as shareholder of ASD PTY LTD and that she never received the sum of SR 400, 000/- personally. She testified that the money was never used for personal reasons. When asked how the Plaintiff had known to make the payment out to ASD PTY LTD, she testified that she confirmed that she had asked Plaintiff to make out the cheques to ASD PTY LTD. She testified that as representative of ASD PTY LTD she accepted the money, but had to sign as ASD PTY LTD. She confirmed that she met Mr. Bernard Georges, but denied talking about the loan. She testified that ASD PTY LTD owes the money and not her personally.

[15] I now move on to consider the legal standards to be applied and its analysis thereto in this matter.

[16] Article 1101 of the Civil Code (Cap 33) ("Code") provides that:

"a contract is an agreement whereby one or several persons bind themselves towards one or several others to give, do or refrain from doing something."

[17] Article 1142 of the Code complements the provision of Article 1101 and provides that:

"every obligation to do or to refrain from doing something shall give rise to damages if the debtor fails to perform it."

[18] Additionally, with respect to proving contractual obligations, Article 1341 of the Code provides that:

*"Any matter the value of which exceeds 5000 Rupees shall require a document drawn up by a notary or under private signature, even for a voluntary deposit, **and no oral evidence shall be admissible against and beyond such document nor in respect of what is alleged to have been said prior to or at or since the time when such document was drawn up, even if the matter relates to a sum of less than 5000 Rupees.**"*

[19] However, the provisions contained in Article 1341 of the Code are not absolute for they are subject to many exceptions one of which being that *"they do not apply where a party either expressly or impliedly waives them."* (Reference to *Cooposamy v Duboil* [2012] SCCA 15 (quoting *Corgat v Maree* (1976) SLR 109 at 114).

- [20] Although the contract appears quite clear, the parties at the hearing, both produced testimonies which were not objected to, that indicated that the intention of the parties were not reflected in the written agreement. The parties do not contest that the contractual agreement provided in writing that the Plaintiff was loaning SR 400, 000/- to “Laurence Freslon” and that there were no indications on the contract that the agreement was being made on behalf of ASD PTY LTD. However, at the hearing, the Defendant on several occasions maintained that she had contracted in her capacity as a shareholder of ASD PTY LTD. Moreover, she testified that she had directed the Plaintiff to make his cheques out to ASD PTY LTD. This testimony was corroborated by the Plaintiff, who himself testified that the Defendant had requested that he makes his cheques out to ASD PTY LTD.
- [21] The issue is therefore whether the Court may rely on the oral evidence adduced at the hearing to determine the true intentions of the parties, when the terms of the agreement are not ambiguous. In this regard, the court in *(Dogley v Renaud (1982))*, explained that in the interpretation of a contract, the predominant consideration is the true intention of the parties. Moreover, in the event of a conflict between their true intention and their intention as expressed in a contract document, the former must prevail. (Reference is made to the matter of *Georges & Anor v Guinness Overseas [2013] SCCA 3 (citing Dogley)* (Supra). While the obligation arising from the written agreement was for the Plaintiff to loan SR 400, 000/- to Laurence Freslon, the oral evidence presented at trial suggests that the true intentions of the parties was otherwise.
- [22] Based on the totality of evidence adduced at the hearing (supra), it appears that the Defendant contracted with the Plaintiff in her personal capacity, as evidenced in writing in the agreement (*Exhibit P1*), but stipulated that the benefit were to be directed to ASD PTY LTD a third party. Given the Defendant’s instructions, the true intention of the parties was for the Plaintiff to make SR 400, 000/- available to ASD PTY LTD (*obligation de faire*), which would have been fulfilled when ASD PTY LTD had received this sum (*obligation de resultat*).
- [23] Article 1121 of the Code provides that:
- “a person may stipulate for the benefit of a third party. Such stipulation shall not be revoked if the third party has declared that he wants to take advantage of it.”*
- [24] In this case, the Plaintiff satisfied his obligations, as he issued cheques totaling SR 400, 000/- to ASD PTY LTD and the Barclays Bank representatives confirmed that the cheques had been received by ASD PTY LTD. Therefore, the Defendant had an obligation to reimburse Plaintiff.
- [25] The Court finds thus, that on a balance of probabilities, the Plaintiff has met the burden of proof required of him this civil litigation and fulfilled his obligations and that the Defendant has failed to reimburse him.
- [26] It follows therefore that the Plaintiff Plaintiff’s is hereby granted and I accordingly enter judgment in favour of the Plaintiff in the total sum of SR. 400, 000/- with costs.

Signed, dated and delivered at Ile du Port on the 12th day of January, 2018.

A handwritten signature in black ink is written over a blue circular official seal. The seal contains the text "Supreme Court of Mauritius" and "S. GOVINDEN" around a central emblem.

S. Govinden

Judge of the Supreme Court