IN THE SUPREME COURT OF SEYCHELLES

SEYCHELLES SAVINGS BANK

Vs

ERIC SAVY
JOSTEL DENOUSSE

Civil Side No: 353 of 2008

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Mr. F. Ally for the judgment creditor
Mr. Gabriel for the judgment debtor

JUDGMENT

By a plant entered on 12 November, 2008 the Plaintiff is claiming from the Defendants jointly and severally the sum of Rs29,967.75 with continuing interest thereon and charges, with costs.

Both Defendants were duly served with summons but only the 2 Defendant responded and entered his Statement of Defence with includes pleas in liminelitis terms as follows:

a. "The 2nd Defendant never entered into any agreement with the Seychelles Savings Bank, the Plaintiff in this case, dated 8 November, 2002 for the

said amount of Rs20,000.00 or for any other amount whatsoever on the above mentioned date.

b. The 2nd Defendant was a guarantor only to a loan agreement entered into on 6 April, 1999, which was to be repaid by the 26 March, 2003 by the 1st Defendant or in default or payment by the 1st Defendant during that period, by the 2nd Defendant, hence the claim dated 6 October, 2008, against the 2nd Defendant is prescribed by virtue of Article 2271 of the Civil Code of Seychelles Act, Cap 33 of the Laws of Seychelles."

The 2nd Defendant did not admit all or any reference to a loan agreement dated 6 April, 1999 and the other averments contain in the Plaint and averred that he was only a guarantor for a loan agreement entered into on the 6 April, 1999 to be paid by 48 monthly installments of which the final payment was to be on the 26 March 2003. He prayed this Court to dismiss the claim against him with costs; order the 1st Defendant to solely repay the loan, and, to make any other order deem fit.

The 1st Defendant failed either in person or by Counsel to respond to the summons and neither did he enter his defence. Learned Counsel for the Plaintiff sought and was granted leave to proceed with the hearing of this suit ex parte against the 1st Defendant on 29 July 2009 at 1:45 p.m. The Registrar informed the 1st Defendant of this ex parte hearing by letter dated 12 March, 2009. The suit

was not heard on 30 July, 2009 but was adjourned at the instance of Learned Counsel for the 2nd Defendant to be mentioned on the 17 September, 2009 at 9 a.m. for fixing of a new hearing date. The hearing date was set for 30 July, 2010 at 9 a.m. At the instance of the Plaintiff the ex parte hearing against the 1st Defendant and inter parte hearing against the 2nd Defendant was adjourned 10 March, 2011 as the Plaintiff was making repayments of the amount due. The 1st Defendant failed to continue making repayments and the suit was fixed for hearing on the 27 June, 2011 at 1:45 p.m.

At the hearing on 27 June, 2011 at 1:45 p.m. Ms. CarollineVolcere, a Debt Recovery Officer in the employment of the Plaintiff was duly authorized to testify on its behalf (Exhibit P1). The Plaintiff operates as a commercial bank in Seychelles.

She testified that by virtue of the loan agreement dated 6 April, 1999 between the Plaintiff and the 1st Defendant and the 2nd Defendant, the Plaintiff granted the 1st Defendant a loan of Rs20,000 with interest at the rate of 10% per annum. That loan was subject to other bank charges, to which loan the 2nd Defendant agreed to act as a guarantor. It was agreed between the parties that the 1st Defendant would repay the loan and interest in the sum of Rs4,348.08 by 48 monthly installments of Rs507.27 commencing from 26 April, 1999 and that the whole loan, plus interest and other charges would be repaid not later than 26 March, 2003. The loan agreement is exhibit P2.

The 1st Defendant failed to repay the said loan as agreed. It was a term of the agreement that if the 1st Defendant failed to repay the loan as agreed the balance will be subjected to penalty interests at the discretion of the Plaintiff as a result the plaintiff charged penalty interest at the rate of 22% up to 30 November, 2008. As from 1 December, 2008 until the 30 November 2009 the penalty interests was at 30% and continuing thereafter at 22%.

The obligations of the Defendants were joint and severally under the agreement. Notices were sent to the 1st Defendant on 11 May, 2007 and to the 2nd Defendant on the same date demanding payment (exhibits P3 and P4) of the balance outstanding as at 11 May, 2007 of Rs13,422.12.

As at the date of filing this Plaint, that is 12 November, 2008, the Defendants were indebted to the Plaintiff in the sum of Rs29967.75,and at the time of the hearing on the 27 June, 2011 the 1st and 2nd Defendant were jointly indebted to the Plaintiff in the sum of Rs54,259.65 which sum includes the penalty interests.

It is indeed a term of the loan agreement that should the 1st Defendant and the 2nd Defendant fail to pay the debt they would be liable to default interest. However, the rate of such interest is not stipulated in the agreement and the Plaintiff never notified the Defendants as to what rate of default interest it was levying.

As this Court stated in a previous case involving this same Plaintiff versus Chang PengTive, such default interest has no effect unless the Defendants are put on

notice. The Plaintiff, despite the agreement, cannot arbitrarily imposed and charged whatever penalty interest it wishes unless the Defendants are put on the notice prior to or upon the penalty interest is about to be levied.

In this case the 1st Defendant put up appearance in person on 3 March, 2009 but did not enter a statement of defence. This Court granted leave for the matter to be heard ex parte against him.

On the basis of the uncontroverted evidence of the Plaintiff I find that the Plaintiff has satisfied this Court on a balance of probabilities its claims against the 1st Defendant. I accordingly enter judgment in favour of the Plaintiff as against the 1st Defendant in the sum of Rs29.976.75 with continuing interest thereon at the rate of 10% per annum and the charges with effect from 12 November, 2008 and continuing all these with costs to the Plaintiff.

As regards the suit against the 2nd Defendant this Court will proceed to consider his defence on the points of law he raised in his statement of defence, because he did not adduce any evidence on the merits.

I find that indeed the 2nd Defendant never entered into any agreement with the Seychelles Savings Bank, the Plaintiff in this case, dated 8 November, 2002 for the amount of Rs20,000 as pleaded, or for any other amount whatsoever on the above mentioned date. The Plaintiff, after receiving the statement of defence of the 2nd Defendant, did not make any amendment to its Plaint. A suit before the Court is decided upon pleadings. Indeed there is no evidence before Court to

support the pleading that the 2nd Defendant was party to any agreement with the Plaintiff dated 8 November, 2002. In the circumstances I hold with the 2nd Defendant and rule in his favour on that point of law.

The 2nd Defendant admitted that he was a guarantor only to a loan agreement entered into on 6 April, 1999, which was to be repaid by the 26 March, 2003, by the 1st Defendant or in default of payment by the 1st Defendant during that period, by the 2nd Defendant, hence the claim dated 6 October, 2008, against the 2nd Defendant is prescribed by virtue of Article 2271 of the Civil Code of Seychelles Act, Cap 33 of the Laws of Seychelles.

Article 2271 of the Civil Code of Seychelles is worded as follows:

> *"1. All rights of action shall be subject to prescription after a period of five years as provided in article 2262 and 2265 of this Code.*
>
> *2. Provided that in the case of a judgment debt, the period of prescription shall be then years."*

Indeed, as per the loan agreement admittedly entered into by the 2nd Defendant, this debt was due and payable by 26 Marcy, 2003. This suit was entered on 12 November, 2008, a period of 5 years 7 months from the date the debt became due and payable. I find that this period falls within the ambit of Article 2271 of the Civil Code of Seychelles and is therefore prescribed by provision of law.

I find that the second point of law raised by the 2nd Defendant has merit and uphold the legal objection of the 2nd Defendant.

There is no case established against the 2nd Defendant and the suit against him is accordingly dismissed.

In the circumstances I enter judgment in favour of the Plaintiff as against the 1st Defendant only in the total sum of Rs29,967.75 with continuing interest thereon at the rate of 10% per annum, and charges, with effect from 12 November, 2008 and continuing, all these with costs to the Plaintiff.

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B. RENAUD
JUDGE

Dated this 14 May, 2012, Victoria, Seychelles