

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1997] SGHC 338

Suit 5/1996

Between

Notandas Premchand
Jamnadas Udasi

... Plaintiff

And

Indian Overseas Bank

... Defendant

GROUND S OF DECISION

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Notandas Premchand Jamnadas Udasi v Indian Overseas Bank

[1997] SGHC 338

Suit 5/1996
Christopher Lau JC
13 December 1997

1

Judgment:

2 **GROUND OF JUDGMENT**

3 The claim

4 1. This was an action by the
plaintiff for the following :

5 a) a declaration that an Indenture
of Mortgage dated 17 December 1991 ("the legal mortgage") entered into
between

the defendants and the plaintiff in respect of the plaintiff's property at 6

to the property as were in their possession or control and damages.

9 The result

10 3. On the conclusion of the
hearing, I dismissed the plaintiff's action and awarded costs to the defendants
on an
indemnity basis.

11 The dispute

12 4. The plaintiff's case was
that in an oral agreement reached between himself and the defendants in or
about December
1989, the defendants had agreed to extend to his firm M/s Premchand & Sons
("the
firm") additional credit facilities by way of overdraft on the firm's current
account up to a limit of S\$1.5 million in return for the legal mortgage on the
property to
secure the firm's past debts and these additional facilities. It was his case that

after the oral agreement had been reduced into writing in the legal mortgage and the legal

mortgage executed under seal and registered, the defendants in breach of the alleged

agreement had not allowed the firm to draw on the additional facilities. For that reason

and notwithstanding that it had been executed under seal, the plaintiff's case was

that the legal mortgage was invalid and unenforceable for lack of consideration and he

sought the discharge of the legal mortgage on the basis that the defendants had repudiated

the alleged agreement and the legal mortgage.

13 5. The defendants denied the

alleged agreement or that any agreement had been concluded between the plaintiff and

themselves for additional credit facilities. Their case was that the legal mortgage was

merely a continuing security for amounts owed by the firm to the defendants in respect of

banking facilities which the defendants had extended to the firm prior to 1985 and for

such additional facilities as the defendants might in their absolute discretion agree to

extend in the future. In any event as the legal mortgage had been executed under seal, it

was the defendants' case that consideration was wholly irrelevant to its validity and

enforceability.

14 6. In these circumstances, the issues were :

15 (a) was there a valid and enforceable contract between the parties,

16 (b) if so, were the terms of the contract as contended by the plaintiff, and

17 (c) if they were, had the
defendants repudiated these ?

18 The background

19 7. The defendants are a bank

incorporated in India with a branch office in Singapore. In 1987, following his

father's death, the plaintiff was one of the three partners in the firm, the other

two partners being his brother Mohanlal Premchand Krishnani ("Mohanlal")
and one

Lajwanti Chaturmal ("Lajwanti"). The firm had, from about 1951, been
customers

of the defendants. It had been granted credit facilities by the defendants by way
of trust

receipts, letters of credit, advances by way of overdraft and other forms of
financing.

These facilities had been secured as early as 1977 by an equitable mortgage of
the

property on the deposit of the property's title deeds with the defendants. The
firm

was never the registered owner of the property. In 1977, the plaintiff's mother was

its registered owner. On her and the plaintiff's father's demise, the plaintiff

in 1990 was formally registered as its owner. However although never registered in the

firm's name, it was and remains an asset of the firm.

20 8. From time to time, the firm

sought enhancement of the credit facilities from the defendants and until about mid 1984,

the defendants allowed enhancement. These enhanced facilities continued to be secured,

inter alia, by the deposit of the property's title deeds with the defendants.

21 9. By 1985, the amount owing on the

facilities was about S\$5 million. The defendants demanded repayment. The firm was unable

to repay. As a result the defendants suspended the facilities. Although the facilities

were suspended, interest on the facilities extended prior to 1985 continued to be charged

by the defendants.

22 10. Following the father's

death in January 1987, the plaintiff on 21 July 1987 as the sole beneficial owner of the

property, executed a Deed of Undertaking in favour of the defendants. In this Deed of

Undertaking, the plaintiff undertook at paragraph 1(ii)(c) that as and when required by or

called upon by the defendants, he would at his own cost and expense duly execute and

deliver to the defendants a registrable first legal mortgage (in such form and containing

such conditions stipulations covenants and terms as the defendants might require) of the

property in the defendants' favour, for securing the overdraft credit line and other

banking facilities up to the aggregate limit of S\$1 million either already granted
or to

be granted on the current or other account(s) of the firm with the defendants. He
further

agreed that pending the execution and registration of the legal mortgage, he
would not

create any other mortgage (except in favour of the defendants) or otherwise
encumber the

property.

23 11. The defendants remained

equitable mortgagees of the property.

24 12. On or about 26 June 1990, the

plaintiff as the beneficial owner of the property and as a partner of the firm
executed

the legal mortgage under seal. Mohanlal and Lajwanti followed on 5 July 1990.

25 13. On or about 23 July 1990, a

Deed of Assent was executed by Mohanlal and the plaintiff's other siblings
formally

conveying the property to the plaintiff absolutely as the surviving partner of the firm.

26 14. On 10 August 1991 the
defendants registered a caveat on the property ("the caveat"). They did so as
equitable mortgagees by virtue of the plaintiff's, Mohanlal's and
Lajwanti's having executed in escrow or having agreed to execute a first legal
mortgage of the property in favour of the defendants to secure banking facilities
up to a
limit of S\$1.5 million and interest and by virtue also of the defendants "having
allowed or permitted" the partners of the firm "to draw on the said account
current".

27 15. On 26 December 1991, the legal
mortgage was formally registered at the Registry of Deeds as a first legal
mortgage.

28 The legal mortgage

29 16. As it was the plaintiff's

submission that the terms of the legal mortgage supported his case, I set out the terms

that he relied on in full. In the Recital to this document, it was stated (the defendants

being referred to as "the Bank", the plaintiff as "the Mortgagor" and the firm as "the Borrowers" throughout this document):

30 "WHEREAS:

31 1. The Borrowers are partners

carrying on business in the name or under the style of "PREMCHAND & SONS" at

#02-02 High Street Plaza, Singapore (hereinafter called "the Firm") and have

opened or are about to open an account current with the Bank (hereinafter referred to as

"the said Account") in the name of the Firm.

32 2. The Mortgagor is seised of the

land and premises described in the Schedule hereto (hereinafter referred to as

"the

Mortgaged Property") for an estate in fee simple in possession free from encumbrances.

33 3. At the joint request of the

Mortgagor and the Borrowers the Bank has made advances to the Firm by permitting the said

Account to be overdrawn AND also agreed that the Bank may make further advances by

permitting the said Account to be further overdrawn or may make advances by way of

overdraft on any new or other account which the Mortgagor the Borrowers and the Firm

either alone or jointly or jointly with any other person may open or have with the Bank or

otherwise may give credit or banking facilities or grant other accommodation to the

Mortgagor the Borrowers and the Firm either alone or jointly or jointly with any other

person up to the limit of Dollars One million and five hundred thousand (S\$1,500,000.00)

for principal moneys with liberty to the Bank to increase such limit up to such further or

additional amount as may be fixed by the Bank at its absolute discretion.

34 4. It has been agreed between the

Mortgagor the Borrowers and the Bank that all moneys which are now owing or which shall

hereafter be owing or remain unpaid to the Bank on the general balance of the said Account

or on any other account or otherwise from the Mortgagor the Borrowers and the Firm either

alone or jointly or jointly with any other person together with interest shall be secured

to the Bank in manner hereinafter appearing."

35 17. The parties then covenanted in

the body of the legal mortgage in the following manner :

36 "NOW THIS INDENTURE WITNESSETH

as follows :

37 1. In pursuance of the said

agreement and in consideration of the premises the Mortgagor and the
Borrowers hereby

JOINTLY AND SEVERALLY COVENANT with the Bank TO PAY to the
Bank -

38 (a) on demand in writing made to

the Mortgagor the Borrowers and/or the Firm the balance which at the date of
such demand

shall be owing to the Bank by the Firm on the said Account or by the Mortgagor
the

Borrowers and the Firm either alone or jointly or jointly with any other person
on any

other account which the Mortgagor the Borrowers and the Firm either alone or
jointly or

jointly with any other person may have with the Bank

39 (b) interest on daily balances on

or in respect of the principal moneys hereinbefore covenanted to be paid or any part

thereof as shall from time to time be owing or remain unpaid at the Bank's ruling

prime rate plus one per cent (1%) per annum or at such other rate as may from time to time

be fixed by the Bank with monthly rests or at such periodical rests at the absolute

discretion of the Bank; and

40 (c)

41 2. For the consideration aforesaid

the Mortgagor HEREBY CONVEYS unto the Bank ALL the land and premises described in the

Schedule hereto TO HOLD the same unto the Bank its successors and assigns in fee simple

subject to the proviso for redemption hereinafter contained.

42 PROVIDED ALWAYS that if upon such

demand as aforesaid or without demand the Mortgagor and the Borrowers or

either of them

shall pay to the Bank all moneys hereby covenanted to be paid the Bank will at the request

and cost of the Mortgagor and the Borrowers or either of them reconvey the property hereby

mortgaged to the Mortgagor or as the Mortgagor shall direct.

43 3.

44 4. PROVIDED ALWAYS and it is hereby

agreed and declared by and between the parties hereto as follows :-

45 (a)

46 (b) These presents and the

Mortgaged Property shall be and remain a continuing security for the payment to the Bank

on demand of the advances which the Bank may hereafter make to the Mortgagor the Borrowers

and the Firm either alone or jointly or jointly with any other person and whether as

principal or as surety and for any balance which may be owing or remain unpaid
on the said

Account or on any other account whatsoever to the Bank by the Mortgagor the
Borrowers and

the Firm either alone or jointly or jointly with any other person together with
interest

as provided in this Mortgage.

47 (c)

48 (d) The Mortgagor the Borrowers and

the Firm shall be jointly and severally liable to the Bank and the Mortgaged
Property

shall be a security to the Bank not only for all moneys actually debited to the
said

Account or to any other account which the Mortgagor the Borrowers and the
Firm either

alone or jointly or jointly with any person may have with the Bank at the time
when demand

shall be made for payment but also for all moneys outstanding and not
immediately payable

for which the Mortgagor the Borrowers and the Firm either alone or jointly or jointly with

any other person is or are absolutely or contingently liable to the Bank in any manner

howsoever.

49 (e)

50 (f)

51 (g) This Mortgage shall be a

continuing security and shall continue to be valid and binding for all purposes

notwithstanding :-

52 (i) any account ceasing to be

current or any settlement of account or fluctuation in the amount for the time being owing

to the Bank or the existence of any credit balance at any time;

53 (ii)

54 (iii)

55 (i)

56 (j) The interest on any principal

money for the time being secured by this Mortgage including capitalised interest
shall at

the end of each calendar month or at the end of such period as may be
determined by the

Bank be capitalised and added for all purposes to the principal sum then owing
and shall

thenceforth bear interest at the rate covenanted to be paid under this Mortgage
and be

secured and payable accordingly and all the covenants and conditions contained
in or

implied by these presents and all powers and remedies conferred by law or by
these

presents and all rules of law or equity in relation to the said principal moneys
and

interest shall equally apply to such capitalised interest and to interest on such
arrears.

57 (k) For the purposes of
ascertaining whether the limit of the principal money intended to be secured by
this

Mortgage has been exceeded or not all accumulated and capitalised interest shall
be deemed

to be interest and not principal money.

58"

59 The decision

60 18. I saw no merit in the
plaintiff's case.

61 19. There is no doubt the parties
had reached an agreement and that the legal mortgage was that agreement and
contained its

terms. As the document had been executed under seal, it was valid and
enforceable and took

effect according to its terms notwithstanding the absence of any consideration :
see

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Halsbury Laws of England Vol. 12 (4th Edn.) paragraph 1355 at page 536;
Development Bank

of Singapore Ltd v Yeap Teik Leong & Ors [1988] 3 MLJ 443. So to rescind
the agreement

and discharge the legal mortgage, the plaintiff had to show that the defendants
had

repudiated it by breaching its terms.

62 20. What were the terms ? They were

not, as the plaintiffs argued, that the defendants were obliged to extend
additional

credit facilities of S\$1.5 million to the firm on its current or any account and
that that

was the basis for the legal mortgage. Clauses 1 and 3 of the Recital and the
covenanting

clauses 1, 2 and 4 in the body of the document did not say that the defendants
were

obliged to extend additional credit facilities of S\$1.5 million or of any sum.
Neither was

there any basis for the plaintiff's argument that in the Recital, clause 4 was to be

subordinated to clauses 1 and 3. The terms of the legal mortgage were clear : the parties

had not agreed that the defendants were to extend credit facilities of S\$1.5 million or of

any sum to the firm on the firm's current or any account. On the contrary clause 4 of

the Recital and clauses 1 and 4(b) and (d) in the body of the document showed clearly that

the object of the legal mortgage was to secure amounts already owed and any further

amounts the defendants might in their sole and absolute discretion decide to extend. These

clauses did not state that the defendants had agreed to extend credit facilities of S\$1.5

million to the firm and that that was the basis for the legal mortgage.

63 21. That this is what the parties

intended and agreed is confirmed by the Deed of Undertaking that the plaintiff executed in

1987 and such of the correspondence between the firm and the defendants that the plaintiff

was prepared to admit in evidence in the course of the hearing.

64 22. The correspondence was telling.

It covered the period between 1986 and 1994. It comprised letters written either by the

plaintiff or his brother Mohanlal on the firm's letterhead to the defendants and

letters written by the defendants to the firm. Not surprisingly, the plaintiff put the

defendants to strict proof of these letters even though these had either been written by

his brother or by him. They were admitted only in the course of the hearing. These were

exhibits "D1 - D7" and the others were identified and marked as

"DB-109", "DB121 - 122", "DB-155", "DB-156",

"DB-158", "DB-208", "DB-213", "DB-248" and
"DB-295" in the defendants' bundle of documents.

65 23. These, together with the Deed

of Undertaking (which the plaintiff also put the defendants to strict proof of
before he

was prepared to admit it in evidence) showed that far from the legal mortgage
being the

security for the alleged additional credit facilities, the plaintiff and his brother
had

during the entire period from 1987 to 1994 simply been asking the defendants
to waive or

at least partially reduce the interest being charged by the defendants on the
unpaid

facilities that the defendants had extended to the firm until 1985 and to lift the

defendants' suspension of the firm's facilities. They said nothing about the

agreement allegedly concluded in 1989 between the plaintiff and the defendants
and they

did not at all indicate that the legal mortgage was to be security for the alleged additional credit facilities of S\$1.5 million. Indeed after the legal mortgage was registered in December 1991 and as late as 1994, some three years later, neither the

plaintiff nor Mohanlal had in their discussions and meetings with the defendants put the

case the plaintiff sought to advance at the hearing.

66 24. The correspondence showed the

defendants were equitable mortgagees of the property even before the legal mortgage was

registered in December 1991, that the defendants were quite concerned throughout to

‘perfect’ their equitable mortgage by having the legal mortgage executed and

registered (which was the *raison d’être* for the Deed of Undertaking), that the legal

mortgage was to be a continuing security for the firm’s past debts and crucially that

no agreement had been concluded requiring the defendants to extend additional credit

facilities of S\$1.5 million to the firm.

67 25. Nothing that was said by the plaintiff and Mohanlal in evidence pointed to any other conclusion. Their evidence was

notable for its selectiveness, contradictions and inconsistency. I refer to some instances

to illustrate.

68 26. Mohanlal and the plaintiff had had numerous meetings and discussions with the defendants. Yet his evidence-in-chief was

remarkable for its brevity. All he was prepared to say in his affidavit of

evidence-in-chief was that he had transferred his interest in the property to the

plaintiff, by signing the Deed of Assent in 1990, to enable the plaintiff to mortgage the

property to the defendants for the additional facilities.

70 28. Similarly in his letter to the
defendants a few days later, on 24 January 1989 (exhibit "D-5) he referred to
the
defendants pointing out their concern that the mortgage of the property had yet
to be
perfected and to the steps which were being taken by him to address their
concern. That

showed the legal mortgage of the property was contemplated long before the
alleged
agreement.

71 29. When he was cross-examined on
the alleged agreement, he did not actually say the defendants had approved the
additional
credit facilities. What he said (at page 145 A to C of the notes of evidence) was
that K.

Rajagopal, the defendants' chief executive officer (whom the plaintiff alleged
had

agreed to the additional facilities on the defendants' behalf), had only indicated

that such facilities could only be approved by the defendants' head office in India

and that he would try to obtain such approval. That was not the same as saying that

approval had been granted.

72 30. As for the plaintiff, firstly

when he executed the Deed of Undertaking in 1987, that must have meant that the parties

had discussed the creation of a legal mortgage at the time, that is in or about July 1987.

Until he was confronted with this document in cross-examination, he maintained that such

discussion had only taken place towards the end of 1989. When he was then confronted with

this Deed of Undertaking, his answer was illuminating. He said initially (at page 49 A to

B of the notes of evidence) :

73 "I don't know how to answer this."

74 Then he alleged that he had not read this document and that he had signed it on his brother's advice. Secondly, although he alleged that he was informed on 26 September 1990 of the defendants'

refusal to extend additional credit facilities of S\$1.5 million, he could not satisfactorily explain why the firm's letter only two days later on 28 September 1990

written by his brother to the defendants ("DB-121") did not allege, if in fact the alleged agreement had been concluded, that the defendants had breached it.

75 31. The evidence given by the defendants' witnesses in contrast, was consistent with the documentary evidence that

I referred to earlier. I was also impressed by their candour.

76 32. The collective evidence of Mr

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V.O. Balagangadaran, the defendants' regional manager and chief executive officer of

its branch in Singapore between 21 May 1984 and 17 February 1989, Mr K. Rajagopal, the

chief executive officer of the defendants' Singapore branch between 17 February 1989

and 15 September 1993, Mr B. Swaminathan, the defendants' Singapore branch's

present chief executive officer and Mr M.V. Narayana Moorthy, the senior manager of the

defendants' Singapore branch in summary, was that the defendants had from as early as

1985 become so concerned by the large amount outstanding by the firm that they

'froze' the firm's accounts with the defendants, refused any further

facilities, pressed for the outstanding amounts to be paid, for the equitable mortgage to

be 'perfected' by the legal mortgage and it was that the plaintiff agreed that

the legal mortgage was to be in respect of the firm's outstanding debts. That was why

the plaintiff executed the Deed of Undertaking in 1987 as the property at the time had yet

to be formally conveyed to him by his siblings and that was why the plaintiff and the

firm's partners executed the legal mortgage in June and July 1990 and agreed to its

registration. The defendants had never agreed to extend any additional credit facilities

to the firm.

77 33. The plaintiff had not in the

circumstances, on a balance of probabilities, proved his case. He had not shown the

defendants had repudiated any agreement, and he had not shown any basis for avoiding,

rescinding or discharging the contract as embodied in the legal mortgage.

78 34. The plaintiff's claim was

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accordingly dismissed with costs on an indemnity basis as provided under the terms of the legal mortgage.

79 Dated the 13th day of December 1997.

80 **CHRISTOPHER LAU JC**

81 *Solicitors* : *M/s Manjit Samuel & Partners*

82 *M/s Derrick, Ravi & Partners*

Christopher Lau JC

Manjit Singh and Samuel Chacko for the plaintiff
Sreenivasan, P S Raj and Charles Lin for the defendants
