

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

---

**S.C.APPEAL 99A/2009**

Appeal No: WP/HCCA/COL/248/2007(F)

D.C.Colombo: 16985/99/MB

Hatton National Bank Limited

having its registered office at No.481,

T.B.Jaya Mawatha,

Colombo 10.

And having its branch office at No.16,

Janadhipathi Mawatha,

Colombo 1.

**Plaintiff**

**Vs**

1. Rumeco Industries Limited

No.99, Cotta Road,

Borella.

2. Shirani Jasintha Thirunavukkarasu,

No.15, Melbourne Avenue,

Colombo 4 and

No.99, cotta road,

Borella.

3. Kangasabapathy Thirunavukkarasu,  
No.15, Melbourne Avenue,  
Colombo 4. And  
No,99, Cotta Road,  
Borella.

**Defendants**

**AND**

Hatton National Bank Limited  
having its registered office at No.481,  
T.B.Jaya Mawatha,  
Colombo 10.

And having its branch office at No.16,  
Janadhipathi Mawatha,  
Colombo 1.

**Plaintiff-Appellant**

**Vs**

1. Rumeco Industries Limited  
No.99,Cotta Road,  
Borella.

2. Shirani Jasintha Thirunvakarasu,  
No.15, Melbourne Avenue,  
Colombo 4 and  
No.99, Cotta Road,  
Borella.
  
3. Kangasabapathy Thirunavukarasu,  
No.15, Melbourne Avenue,  
Colombo 4. And  
No,99, Cotta Road,  
Borella.

## Defendants-Respondents

Hatton National Bank Limited  
having its registered office at No.481,  
T.B.Jaya Mawatha,  
Colombo 10.

And having its branch office at No.16,  
Janadhipathi Mawatha,  
Colombo 1.

Plaintiff-Appellant-Appellant

Vs

1. Rumeco Industries Limited  
No.99,Cotta Road,  
Borella.
2. Shirani Jasintha Thirunvakarasu,  
No.15, Melbourne Avenue,  
Colombo 4 and  
No.99, cotta road,  
Borella.
3. Kangasabapathy Thirunavukarasu,  
No.15, Melbourne Avenue,  
Colombo 4. And  
No,99, Cotta Road,  
Borella.

Defendants-Respondents-  
Respondents

**Before:** Amaratunga J,  
Imam J,  
Suresh Chandra J.

I.Idroos with T.D.Ediriweera for Plaintiff-Appellant-Appellant

S.P.Sriskantha with Sashika Rupasinghe for 3<sup>rd</sup> defendant-Respondent-Respondent

**Argued on:** 9<sup>th</sup> September 2010

**WRITTEN SUBMISSIONS FILED ON:** 8/10/2011 for Plaintiff-Appellant-Appellant

**Decided on:** 8<sup>th</sup> June 2011

## **Suresh Chandra J,**

This is an appeal from the judgment of the Provincial High Court of the Western Province holden in Colombo.

The Plaintiff-Appellant had instituted action against the Defendants-Respondents on the basis of a term Loan granted to the 1<sup>st</sup> Defendant which was purported to be guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and claimed the sums due from them jointly and severally. The 1<sup>st</sup> and 2<sup>nd</sup> defendants failed to appear before Court and an ex parte judgment was delivered against them. The 3<sup>rd</sup> defendant filed answer and on the conclusion of the ex parte trial against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the trial against the 3<sup>rd</sup> defendant commenced. The Plaintiff led evidence through an officer of the Bank after the framing of issues, which were fourteen in number, and produced documents marked P1 to P8. Two witnesses gave evidence for the 3<sup>rd</sup> defendant and after both parties tendered written submissions, judgment was reserved and judgment was delivered dismissing the plaintiff's action. The plaintiff appealed against the said judgment to the Provincial High Court and that Court by judgment dated 16<sup>th</sup> December 2008, dismissed the said appeal. The Plaintiff-Appellant sought leave to appeal to the Supreme Court and leave was granted on the following questions:

- (a) Has the Provincial High Court of the Western Province erred in not coming to the finding that P6 is a rescheduling of P1?
- (b) Has the Provincial High Court of the Western Province erred in not coming to the finding that the Guarantee Bond marked P5 is a continuing security?
- (c) Has the Provincial High Court of the Western Province erred in not coming to the finding that the 3<sup>rd</sup> Defendant is liable for the money due to the Petitioner under P5 and P6 ?
- (d) If so should the judgment and decree against the 3<sup>rd</sup> Defendant be entered as prayed for in the prayer to the plaint?

The averments in the plaint of the plaintiff set out firstly a case against the 1<sup>st</sup> Defendant on the basis of a term loan of Rs. 1 Million granted on 28<sup>th</sup> May 1995 (Document 'A') and the security on the said loan being provided for by two mortgage bonds (Documents marked 'B' and 'C') regarding movables. The plaintiff annexed to the plaint the said documents on which the term loan was granted, the mortgage bonds, the statement of accounts and the demand for payment. The 3<sup>rd</sup> defendant in his answer denied any cause of action and consequently denied any Liability.

The plaintiff when leading evidence in respect of the ex parte trial against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants went on the basis in which the plaint was filed, which was starting with the term loan granted on 28<sup>th</sup> May 1995 (Document 'A' dated 28<sup>th</sup> April 1995), the two Mortgage Bonds (B – 705 dated 3<sup>rd</sup> December 1987 and 'C' – 343 dated 22<sup>nd</sup> March 1993) leading up to the default in payment. The Document 'A' referred to a Term Loan of Rs.1.0 Million and as security Mortgage over the stocks of the Company were referred to.

When the contested matter was taken up against the 3<sup>rd</sup> Defendant for trial the plaintiff started off on the basis of a facility given in 1992, that there was a rescheduling of that loan, that the said loan was covered by the security given on 20<sup>th</sup> October 1992 (which was marked as P5), that the document dated 28<sup>th</sup> May 1995 referring to the term loan (marked as P6) was a rescheduling of the loan given in 1992, and that the 3<sup>rd</sup> defendant was liable for the default of the 1<sup>st</sup> defendant as he had personally guaranteed the loan given to the 1<sup>st</sup> Defendant in 1992 by document marked P5.

This position of the plaintiff was completely different from the position set out in the pleadings in the plaint which was on the basis of a term loan granted in 1995 by P6. The 3<sup>rd</sup> defendant took up the position that the term loan was a different transaction and that the 3<sup>rd</sup> Defendant had not guaranteed the payment of that loan, even though the plaintiff sought to show that the guarantee given by the 3<sup>rd</sup> defendant in 1992 (P5) covered the term loan as well. A perusal of the document P6 which was the term loan had no reference whatsoever to the personal guarantee given by the 3<sup>rd</sup> Defendant.

Explanation 2 of S.150 of the Civil Procedure Code states the case enunciated must reasonably accord with the party's pleading. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. In *Y.M.B.A. v Abdul Azeez* Bar Journal 1997 Vol.VII Part I page 34 it was held that no party can be allowed to make at the trial a case materially different from that which he has placed on record.

The Plaintiff in this case while sticking to his pleadings when conducting the ex parte trial against the 1<sup>st</sup> and 2<sup>nd</sup> defendant, proceeded on a different basis when proceedings in the contest against the 3<sup>rd</sup> defendant which ironically was a sequel to the contract entered into between the Plaintiff and 1<sup>st</sup> defendant as the 3<sup>rd</sup> Defendant was sued as a purported guarantor. The contract between the plaintiff and the 1<sup>st</sup> defendant did not bind the 3<sup>rd</sup> Defendant and the attempt by the plaintiff to bring in the 3<sup>rd</sup> defendant on a personal guarantee given earlier in 1992 was a vain attempt to make the 3<sup>rd</sup> defendant liable for the default by the 1<sup>st</sup> defendant.

The plaintiff sought to show that the guarantee given by the 3<sup>rd</sup> defendant in 1992 was a continuing guarantee which covered all facilities granted to the 1<sup>st</sup> defendant. But the term loan document did not mention about the personal guarantee given in 1992 which had been given regarding earlier transactions.

The plaintiff also tried to show that the term loan given in 1995 was a rescheduling of the loan given to the 1<sup>st</sup> defendant previously but a perusal of the document P5 does not state so and it states specifically that it is a term loan granted to the 1<sup>st</sup> defendant.

The learned District Judge dismissed the case of the plaintiff against the 3<sup>rd</sup> defendant on the basis that the transaction sued upon was the term loan granted in 1995 and that it had not been guaranteed by the 3<sup>rd</sup> defendant. The High Court affirmed the said decision and examined the law relating to novation of contracts and arrived at the conclusion that there was a novation of the earlier loan granted by the plaintiff and that the term loan was a new contract.

The High Court cited C. G. Weeramantry at page 719 to the effect that “A novation discharges not only the original obligation but the obligations accessory to it. Interest, penal charges, suretyships and pledges, accessory to the original contract, are thus all discharged. In the words of Lord Moulton, in explaining the similar English concept of ‘accord and satisfaction by substituted agreement’, “No matter what were the rights of the parties inter se, they are abandoned in consideration of the acceptance by all of a new agreement. The consequence is that when such an accord and satisfaction takes place, the prior rights of the parties are extinguished. They have in fact been exchanged for the new rights; and the new agreement becomes a new departure, and the rights of all the parties are fully represented by it.” (*Palaniappa v Saminathan* 17 N.L.R. at 58.)

On a consideration of the evidence, the documents, the proceedings and the judgments of the District Court and the High Court, it is quite clear that the action brought to court by the plaintiff specially against the 3<sup>rd</sup> defendant was based on the term loan granted in 1995 and that the guarantee given by the 3<sup>rd</sup> defendant in 1992 cannot be considered as a continuing guarantee. In view of this position the grounds on which leave was granted by this Court have to be answered in the negative.

It is to be observed that Banks adopt a general practice of securing guarantees when granting loans and the obtaining of a continuing personal guarantee is often resorted to. This case is yet another example of a Bank trying to get the optimum type of security and guarantee from a customer when granting a facility. Customers very often are not mindful of what they are signing specially when the documents presented to them are long winded and often in a language not really understood by them. It would be in the best of interests of both banks and customers for the Banks to explain with care the type of documents obtained from customers and their effect in granting facilities.

The appeal is accordingly dismissed and the judgment of the High Court and that of the District Court are affirmed with costs fixed at Rs.31,500/-.

**JUDGE OF THE SUPREME COURT**

**N.G.AMARATUNGA J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**S.I.IMAM J.**

I agree.

**JUDGE OF THE SUPREME COURT**