

**In the Court of Appeal of the Democratic
Socialist Republic of Sri Lanka**

Case No. CA 1131/96 (F)

DC Colombo: 7751 MHP

Minimuthu Pathirannehelage
Stephen,
Niwatuwa, Dorawaka
3rd defendant-appellant

Vs.

Mercantile Credit Limited,
55, Janadhipathi Mawatha,
Colombo 01.
Plaintiff-Respondent

Before : **A.W.A. Salam, J.**

Counsel : Wijedasa Rajapakshe PC with
Rajitha Hathurusingha for the 3rd defendant-
appellant and Prabash Senasingha for the plaintiff-
respondent.

Written Submissions filed on : 07.06.2011.

Decided on : 15.11.2011

A.W.A.Salam, J.

This appeal arises from the undated judgment of the learned additional district judge¹ of Colombo appears to have been delivered on 29.11.1996. By the impugned judgment the learned ADJ granted relief to the plaintiff-respondent as prayed for in the plaint against the 3rd defendant-appellant.

The plaintiff-respondent is an incorporated Company engaged inter alia in the business of providing financial assistance to its customers for the purchase of vehicles on hire purchase basis. The 1st defendant has obtained such a facility from the plaintiff-respondent and the 2nd, 3rd and 4th defendants had stood as the guarantors to the hire purchase agreement entered into between the plaintiff-respondent and the 1st defendant. The trial against the 1st, 2nd and the 4th defendants had been taken up *ex parte* and judgment entered for the plaintiff-respondent prior to holding the *interpartes* trial between the plaintiff-respondent and 3rd defendant-appellant. Consequently, there are more than one judgment and decree entered in the action.

The only point urged on behalf of the 3rd defendant-appellant in this appeal is that in terms of section 188 of the CPC read together with form 41 there would be only one decree entered in a case and therefore the court had no power or authority to enter a second and subsequent judgment and decree having first entered judgment and decree against the 1st, 2nd and the 4th defendants.

The law applicable to this kind of transactions is the Consumer Credit Act. However, as the Consumer Credit Act is silent as to whether English Law or Roman Dutch Law that is applicable to it. In terms of the proclamation of 1796 the English law is applicable to transactions and affairs stated in the Civil Law Ordinance and all other disputes are governed by Roman Dutch Law. Since a hire

purchase agreement does not fall under the category of financial agreement and the Civil Law Ordinance, it is the Roman Dutch Law that governs hire purchase agreements.

In terms of the agreement entered into between the parties the liability of the guarantors and that of the hirer is joint and several.

A decision in the case of Kuhafa vs. Viravan Chettiar 51 NLR 176 is of much assistance to decide the question of law that has been raised in this appeal. The relevant passage from the said judgment is produced below for ready reference.

“The only point argued before us in appeal was that the plaintiff was not entitled to ask for judgment against the 3rd and 4th defendants, as judgment had already been entered against the 1st and 2nd defendants. The appellants' Counsel relied on some decisions of this Court where it was held that judgment against one debtor on a joint debt was a bar to any further proceedings against the remaining debtors. As Mr. H. W. Jayewardene pointed out, these decisions are not relevant in the present case. The defendants in this case are liable jointly and severally to pay the amount of the cheque (vide Halsbury's Laws of England, volume 2, paragraph 887). Where the parties are jointly and severally liable, a creditor recovering judgment against one is not precluded thereby from recovering judgment against the others (Blyth v. Fladgate [(1891) 1] Chancery 337 at 353). This principle which is recognized in section 89 of our Civil Procedure Code stated follows in Lechmere v. Fletcher [(1893) 149 English Reports]: -

There are many cases in the books as to joint and several bonds from which it appears, that, though you have entered judgment on a joint and several bond against one obligor, you are still at liberty to

satisfied; but so long as any part of the demand remains due, you are at liberty to sue the others notwithstanding you have obtained judgment against one. This, I think, establishes the principle, that where there is a joint obligation and a separate one also, you do not, by recovering judgment against one, preclude yourself from suing the other".

The learned counsel for the respondent has quoted Pothier from volume 1 page 150 where it is stated that the choice which the creditor makes one of the debtors against whom he exercises his first pursuit, does not liberate the other until he is paid. He may discontinue his first against the first and proceed against the others, or if he pleases he may proceed against them all at the same time.

Dr Weeramantry also in his treatise "Law of contracts" at page 559 sets out the same principle and emphasizes the plaintiff's right to proceed against one or more of the defendants, as it pleases the plaintiff, when the liability is joint and several.

The principle enunciated has received statutory recognition in section 89 of the Civil Procedure Code where it is enacted that in the case of an action against two or more defendants alleged to be severally liable, where a summons is served upon any of them, the plaintiff may proceed against the person or persons served as if no other defendant was named in the summons. Where it is served upon all of them, the plaintiff may take judgment against one or more of them,

where he would be entitled to judgment if the action was against him or them alone.

The learned President's Counsel has placed much reliance on section 188 of the Civil Procedure Code to emphasize that only one formal decree can be entered in an action. He finds support for his argument from Form 41 of the first schedule to the Civil Procedure Code which strictly does constitute, in my opinion, the substantive law of procedure, but only a guidance, presumably to maintain uniformity. With respect, it is my considered opinion that the point of law the learned President's counsel was trying to drive at is, merely technical and cannot stand in the way of dispensation of Justice according to law.

For reasons stated above, I am of the opinion that the appeal preferred merits no favourable consideration and therefore should stand dismissed.

I make no order as to costs.

Judge of the Court of Appeal

Kwk/-