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IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO ~~76~~ 90 OF 2016

BANK OF INDIA (TANZANIA) LIMITED..........................PLAINTIFF

VERSUS

Y.P. ROAD HAULAGE LIMITED.............................. 1ST DEFENDANT

LALIT LATILAL KANABAR................................ 2ND DEFENDANT

KIRAN LALIT KANABAR.................................. 3RD DEFENDANT

JUDGEMENT

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Mansoor, J:

Date of JUDGEMENT- 2^{3RD} DECEMBER 2016

The plaintiff filed a suit claiming against all the defendants jointly and severally for payment of THz 616,479,447.22 and USD 5,984.83 comprised of outstanding loan, interests and penalties. The plaintiff also claims for costs and damages.

Brief facts of this case are that on 04th July 2008, the 1st defendant obtained an overdraft facility of THz 35,000,000. The facility was secured by a letter of guarantee issued by the 2nd and 3rd defendant and promissory notes also issued by the 2nd and 3rd defendant. Again on 25th July 2008, the 1st defendant was given a short term loan of USD 50,000. The loan was secured by a promissory note signed by the 2nd and 3rd defendants, guarantee agreements issued by the 2nd and 3rd defendants and a single debenture creating a first ranking charge over the 1st defendant's motor vehicles with Registration no's T971 AKX (Scania Truck), T765ASC (Trailer), T937ANU (Scania XERA4X2Z) and T799AJV (Trailer). On 28TH November, 2008 the plaintiff approved additional credit facility which was secured by promissory notes, letter of lien and set off and first deed of variation of debenture creating a first ranking charge over all fixed assets of the 1st defendant both moveable and immoveable, present and future whosesoever and howsoever, and on existing trucks with Registration no's T971AKX, (Scania 124 Truck), T765ASC (Trailer), T937ANU (Scania XERA4X2Z), T799AJV (Trailer), T350AUP (Scania), T613 ABH (Gorica Trailer), and 15 new vehicles which were to be purchased by the credit facility.

On 23rd January 2009 the terms of the loans were modified to allow the 1st defendant enjoy the additional facility to purchase trucks/trailers for cargo transportation business. The additional facility was secure by a debenture over all the 1st defendant assets creating a charge on vehicles with registration nos. T971AKX, (Scania 124 Truck), T765 ASC (Trailer), T937 ANU (Scania XERA4X2Z), T799AJV (Trailer), T350AUP Scania, T613ABH Gorica Trailer and two additional vehicles with Registration No. T555AXY Mercedes Benz and T999ASR-Truck Trailer.

Again on 6th July 2009, the plaintiff approved additional credit facility in favour of the 1st defendant secured by promissory notes, letter of lien and set off, letter of guarantee from the 2nd and 3rd defendant, the third deed of variation of debenture creating a first ranking charge over all fixed assets of the 1st defendant movable and immovable, present and future and creating a first ranking charge on the then existing motor vehicles with Registration No's T971AKX (Scania 124 Truck), T765ASC (Trailer), T937ANU (Scania XERA4X2Z), T799AJV (Trailer), T350AUP Scania and 613ABH Gorica Trailer. The Credit was also secured by chattel mortgage 1c

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registered at THz 315,000,000 over vehicles with registration No's T555AXY Mercedes Benz, T999ASR Truck Trailer, T993 AMF Truck Trailer, T660AFG Truck Trailer, T314AGT Viberti Trailer, T528ABS Truck Trailer, T279ADP Truck Trailer, T314AGT Viberti Trailer, T528ABS Truck Trailer, T279ADP Scania, T691ACA Mercedes Benz, T605ABH Mercedes Benz and T421AGP Mercedes Benz.

Again on 23rd January 2010, the 1st defendant was given additional credit facility which was secured by promissory notes, letter of lien and set off between the plaintiff and the 2nd and 3rd defendant, the fourth deed of variation of debenture creating a first ranking charge over all fixed assets of the 1st defendant and a debenture to secure an unspecified amount but initially at THz 670,000,000 also created a first ranking charge on the vehicles with registration numbers T971AKX (Scania 124Truck), T765ASC (Trailer), T937ANU (Scania XERA4X2Z), T799AJV (Trailer), T350 AUP Scania and 613 ABH Gorica Trailer, 15 motor vehicles acquired under the third deed of variation of debenture, and other additional vehicles with Registration Numbers T440ARM, T384ARM, T384ATC, T551ALA, T209AJP and T800AQZ, and also secured with chattel mortgage over the above vehicles.

It is stated in the plaint that the 1st defendant failed to pay the above stated loans and the accounts of the 1st defendant were categorised as Non-Performing Assets (NPA) on 31st October 2011. It is also alleged by the plaintiff that the 1st defendant failed to take care of the vehicles offered as collaterals. The vehicles were damaged and some did not have parts leading them to be grossly depreciated in value and non-operational. Other vehicles could not be traced at all, and this amounted to breach of trust.

On 15th June 2015 the total amount due comprising of principal amount and interest and debt collection commission was THz 616,479,447.22 and USD 5984.83. The plaintiff issued a demand, and later on filed a suit for recovery of the above mentioned amounts, interests and costs.

The defendants filed their joint defence and admitted to have taken the loan of THz 35, 000, 000. They said they were paying the

T209AJP and T800AQZ, and also secured with chattel mortgage over the above vehicles.

It is stated in the plaint that the 1st defendant failed to pay the above stated loans and the accounts of the 1st defendant were categorised as Non-Performing Assets (NPA) on 31st October 2011. It is also alleged by the plaintiff that the 1st defendant failed to take care of the vehicles offered as collaterals. The vehicles were damaged and some did not have parts leading them to be grossly depreciated in value and non-operational. Other vehicles could not be traced at all, and this amounted to breach of trust.

On 15th June 2015 the total amount due comprising of principal amount and interest and debt collection commission was THz 616,479,447.22 and USD 5984.83. The plaintiff issued a demand, and later on filed a suit for recovery of the above mentioned amounts, interests and costs.

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instalments as scheduled by the bank but the bank failed to give the proper accounts statements as to the outstanding balance of the loan, they said they were given part of the statement after a long debate between them and the plaintiff. Mr Lalit Ratilal Kanabar who was the first defence witness DW1 did not produce any proof either in the form of bank statement or deposit slips to show that they paid the instalments as claimed in the paragraph 3 of their joint defence.

The defendants also admit in paragraph 4 of their joint defence to have taken the loan of USD 50,000 from the plaintiff but claimed that they have been paying the instalments. They said this loan they 10 agreed with the plaintiff that this loan account would be closed and the outstanding balance would be debited in the current account No. 052000131. Mr Lalit Ratilal Kanabar produced a letter dated 28th October 2008 from the plaintiff to the 1st defendant, and a letter from the 1st defendant to the plaintiff which was admitted as Exhibit D1. These letters shows that Account No. 0152000131 were closed. This letter reads as follows:

> "We have today closed your above mentioned account by debiting the amount outstanding to your current account No.

0152000131. The statement of account of the loan account is enclosed for your information and records"

In their defence the defendants have stated that they repaid the loan instalments but the bank started opening random bank accounts unknown to the defendants and diverted the funds deposited by the defendants to those accounts. That the defendants have requested for bank statement and the bank failed to give them any statement to date. It is the defendants defence that the bank forced them to pay the outstanding amount in full, and that they were informed that the defendants accounts were declared as a Non Performing Accounts "NPA" since 31st October 2011 while the defendants have been making various deposits up until the year 2015. That the bank continued charging them interests even after the accounts were declared Non Performing and even on a closed account No. 0152000131.

The defendants continued to state that the plaintiff forcefully took the custody of trucks and trailers which were the defendant's source of income and after taking the custody of the trucks and trailers, the defendants were unable to generate any income to repay the loan. This was stated by the defendants in their joint written statement of defence at paragraph 7. The defendants in paragraph 8 of their joint written statement of defence agreed to have taken the loan but disputed the calculations of the amount outstanding. At paragraph 8 of the joint written of defence the defendants are stating that they have repaid the entire principal sum. The defendants stated further that they never failed to take care of the vehicles which were collaterals to the loan, and that the plaintiff auctioned the vehicles without following the proper procedures and that the vehicles were sold at a throw away prices agains the valuation carried out by the plaintiffs themselves.

After the completion of the pleadings, the Court in consultation with the Counsels for the parties recorded the following issues for determination of the case:

1. Whether the 1st defendants obtained several loans from the plaintiff which was secured by assets and personal guarantees from the 2nd and 3rd defendants respectively;

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2. Whether the defendants jointly and severally failed or refused to repay fully the said loans;
3. If the 2nd issue is affirmative, what is the outstanding amount?
4. Whether the plaintiff act of overcharging interests and penalties resulted in loan outstanding amount to be unrealistic and resulting in dispute over the repayment of the said loan;
5. Whether the plaintiff sold the assets of the defendants undervalue against the real market price as per plaintiff own valuer Valuation Report, which would have secured and cleared the entire outstanding amount; 10
6. Whether the defendant did not take care of the assets secured by the Loan which led to depreciated in Market Value against the Loan Agreement;
7. To what relief are he parties entitled.

In tackling the 1st issue, this Court relies on the record whereby on 28th July 2016, during the Final Pre-trial conference, the parties had agreed that the 1st issue is not in dispute as the 1st defendants has agreed to have taken all the loans.

In answering the 2nd, 3rd and fourth issues, I shall consider the evidence given by the plaintiff and in particular the evidence of Mr Kuldeep Kumar Kaul, the plaintiff's first witness who is the Chief Manager of the Bank. He tendered 13 exhibits for proving the plaintiff's case including Letters of Credits/letters sanctioning the loans, Letters of Guarantees, promissory notes, letters of lien and set off, Deeds of Variation of Debentures, Certificates of registration of charges, chattel mortgage for the 16 + 5 vehicles, board resolutions, handover note for 14 vehicles from Amicus Attorneys, accounts statements of 4 accounts which are for the Loan Account No. 0141000131 (36010141000131), Loan Account No 0142000132 (36010142000132), OD Account No. 0122000132 (36010122000132), and USD Term Loan Account No. 0155000132(3600155000132).

The witness gave evidence that the 1st defendants were given the loans, and that the 1st defendant defaulted making the repayments of the loans. On 11 March 2015, the demand was sent to the 1st defendant claiming the amount of THz 591,014,165.71 and USD 4,336.71, and eventually the plaintiff filed a suit in July 2015 demanding for payments of THz 616,479,447.22 and USD 5984.83. The difference was due to interests and penalties charged.

The witness explained that since the payments of the loans were not made or were not enough to service the loan for a continuous period of 90 days, the Accounts were categorised as Non-Performing Assets "NPA", and this means that the customer is either not paying at all or is not depositing sufficient amount to service the loan.

He explained that for the USD Account, i.e. Account No. 0155000132,the customer was to deposit USD 1500 every month to be completed in March 2012, and as at 30th April 2012, the outstanding balance was USD 19,982.92 and they stopped applying interest since 1st November 2011, since this Account was categorised NPA on 1st November 2011. He explained further that on 18th March 2013, the bank transferred funds from the OD Account to this Account, thus the account had a 0 balance, but the uncharged interests from 1st November 2011 to 15th June 2015 which was not charged was USD 5,984.83, and this is what is claimed in the suit on USD Account. The witness confirmed that the principal amount in a USD Account was all paid and what has been claimed in interests.

He explained further that on OD Account No. 3601012000131, the balance was THz 210,000,000 as at 30/09/2014, and the last entry paid was on 21/09/2013. This account became NPA on 1/11/2011.

On Account No. 0156000131, USD Account, he explained that the customer was paying but the money was being transferred to Account No. 36010155000132, which had the balance of USD 5,984.83 as unpaid interests. He explained further that the accounts were restructured on the request by the 1st defendants dated 20th July 2013 (Exh P14), and the unpaid balances were as follows: 10

1. Account No. 36010142000131 was THz 95,844,172.14 as at 26.07.2013;
2. Account No. 36010142000132 was THz 36,488,773.25 as at 26.07.2013;
3. OD Account was THz 203,952,400, outstanding without interests. The interests uncharged since 1/11/2011 to 30th

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June 2013 were THz 150,000,000 making the total of THz 334,000,000.

4. In the Term Loan Account the balance was THz 32,240,000 as at 26.07.2013.

In defending the case, the defence presented Mr Lalit Ratilal Kanabar who presented a letter dated 28/10/2008 from the Bank of India (Exh D1), and a Valuation Report by FRS Assessors (Exh D2). He insisted that he paid the loans but he has proved to give evidence as to how the outstanding loans were cleared. He failed to produce deposit slips or bank statement to prove that indeed the 1st defendant had cleared the loans. However on Account No. Account No. 0155000132, the proof adduced by Mr Kuldeep Kumar Kaul (PW1), plus a letter from the Bank produced as Exhibit D1 shows that the entire amount of this Account was cleared, and that the Bank had agreed to close it. The bank was wrong to charge interests on this Account from 1/11/2013, as the account was already closed as it had 0 balances when closed as testified by the plaintiff's own witness. Thus the amount of USD 5984.83 claimed in the plaint as unpaid interests on the USD Account cannot stand.

Since there is no proof from the defendants on how they have cleared paying the rests of the loans in the THz Accounts, I hold that the defendants are indebted to the Bank to the tune of THz 616,479,447.22 as claimed in the plaint.

Having answered the first 4 issues, now on whether the Assets were sold undervalue, I would say that there were two valuation Reports produced in Court. The 1st Report was done by LET Consult Limited issued in May 2014. This Report was presented in Court by the plaintiff's 3rd witness Mr Jacob Mwakiposa (PW3), and marked as Exhibit P16. The Valuation Report was for the selected Motor Vehicles Scania Trucks and Flat Bed Trailers owned by the 1st Defendant. The Report was dated May 2014. He testified during cross examination that he is not yet registered as a Valuer and Surveyor because he has not yet undergone a course to qualify him the registration. He said that the Land Act allows him to do valuation on motor vehicles but he did not provide to Court which section of the Land Act that allows him to do a valuation. He said during cross examination that the vehicles were packed at Aziz ally

Depot, he took the photos, he saw the vehicles and inspected them, and then he wrote a Report. He testified further during cross examination that he is not a qualified mechanical engineer but he went to inspect the vehicles without one. It has been confessed by PW3 that he is not qualified to carry out valuation of vehicles as he does not possess the Mechanical Engineering skills. He however testified that by just looking at the car he reported that the vehicles were grounded and some spare parts were missing. He said the only car that was in good condition was a Range rover. Apart from lacking qualifications, the Report made by Let Consultants Limited had other discrepancies. It has been shown by evidence that the Valuer just copied and pasted the hand over Report of Amicus Attorneys. PW3 could not give an actual Report on Vehicles without being accompanied by a Mechanical Engineer. It is also on evidence that the Report by Let Consultants Limited although it shows as being made in May 2014, the evidence on record shows that the vehicles were inspected by Let Consultants after they were handed over in September 2014. The Report is therefore doubtful and cannot be taken into consideration in giving values of the vehicles sold at an auction.

The Second Valuation Report was prepared by FRS Assessors and this was dated January 2013. It has been proved that the defendants received a letter from the Bank dated 19th November 2012 (Exh D2) asking the defendants to cooperate with the valuer. I shall therefore consider the value given in the Report by FRS Assessors. As per this Report the following vehicles were inspected and their values were stated:

	Reg no.	Mode	Value
1.	T440ARM	SCANIA TRACTOR P12	USD 34,000
2.	T209AJP	TRAILER	USD 25,500
3.	T613ABH	GORICA TRAILER	USD 20,000
4.	T660AFG	FIAT TRAILER	USD 22,000
5.	T971AKX	SCANIA HORSE	USD 45,000
6.	T800AQZ	TRAILER	USD 22,500
7.	T799AJV	TRAILER FLATBED	USD 12,000
8.	T279ADP	SCANIA TRACTOR	USD 36,000
9.	T528ABS	TRAILER 35T-40	USD 22,000
10.	T551ALA	SCANIA TRACTOR 112	USD 38,250
11.	T937ANU	SCANIA HORSE	USD 32,250
12.	T314AGT	VIBERTI	USD 17,000

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13.	T993 AMF	TRAILER FLATBED	USD 17,000
14.	T384ATC	SCANIA TRACTOR 143M	USD 42,500
TOTAL			**USD 386,000**

The plaintiff sold the mortgaged vehicles at an undervalue.

As for the issue of whether or not the defendants had failed to take care of the assets secured by the Loan, I shall consider the hand over note from Amicus Attorneys, when the vehicles were handed over to Amicus Attorneys by the defendants and a Report by the Valuer (Exh D2), shows that the vehicles were well taken care of and were of good condition. The plaintiff failed to prove that their case on the allegations that the defendants failed to take good care of the mortgaged vehicles.

As to what reliefs the parties are entitled to, I shall state as follows:

1. The plaintiff is entitled to payment of THz 616,479,447.22 from the defendants jointly and severally, however, the amount of USD 386,000 which is the actual market value of the vehicles

sold by the bank at an auction converted into Tanzania Shillings at the exchange rate applicable at the time of the auction should be set off against the outstanding loan of THz 616,479,447.22.

2. There shall be no default interest since the bank was in possession of the mortgaged vehicles since September 2014 and had already sold the mortgaged vehicles since then. From the market value of the vehicles as shown in Exhibit D2, the Bank had already received the entire loan amount plus interests.

3. The plaintiff is not entitled to general damages since it had already exercised its rights of attaching and selling the mortgaged properties, hence it has recovered fully all its outstanding dues;

4. Costs of this suit shall be borne by the defendants.

It is so ordered.

DATED at DAR ES SALAAM this 2^{3RD} day of DECEMBER, 2016

MANSOOR

JUDGE

2nd

~~23~~RD DECEMBER 2016

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IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 90 OF 2015

BANK OF INDIA (TANZANIA) LIMITED .... PLAINTIFF

VERSUS

Y.P. ROAD HAULAGE LIMITED .... 1ST DEFENDANT

LALIT RATILAL KANABAR .... 2ND DEFENDANT

KIRAN LALIT KANABAR .... 3RD DEFENDANT

DECREE

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WHEREAS, the Plaintiff prays for Judgment and decree against the Defendant as follows:-

(a) Immediate payment of the said TZS 616,479,447.22 and USD 5,984.83 plus interest at the rate of 19% and 10% per annum respectively as specified as specified in the credit facility agreements referred to above from 16th June, 2015 to the date of full payment;

(b) Default interest at the rate of 2% from the date of default to the date of full payment over and above the amount mentioned under prayer a) above;

(c) Interest at the Court's rate of 7% from the date of judgment to the date of full payment over and above the contractual interest referred to in prayers a) and b) above;

(d) General damages to be assessed by the court;

(e) Costs of and incidental to the suit;

(f) Any other relief(s) that the Honourable court may deem fit.

This Case which was pending for judgment before Hon. Mansoor, Judge is coming up for Judgment on 22nd day of March, 2017 and delivered by Hon. B.R. Nyaki, Deputy Registrar in the presence of Mr. Laurent Leonard Advocate for the Plaintiff and Mr. Gulam Hasham Advocate for the defendants.

THIS COURT DOTH HEREBY ORDER THAT:

1. The plaintiff is entitled to payment of TZS616,479,447.22 from the defendants jointly and severally, however, the amount of USD 386,000 which is the actual market value of the vehicles sold by the bank at an auction converted into Tanzania Shillings at the exchange rate applicable at the time of the auction should be set off against the outstanding loan of TZS 616,479,447.22.
2. There shall be no default interest since the bank was in possession of the mortgaged vehicles since September, 2014 and had already sold the mortgaged vehicles since then. From the market value of

the vehicles as shown in Exhibit D2, the Bank had already received the entire loan amount plus interests.

3. The plaintiff is not entitled to general damages since it had already exercised its rights of attaching and selling the mortgaged properties, hence it has recovered fully all its outstanding dues;
4. Costs of this suit shall be borne by the defendants.

Given under my hand and the seal of the Court this day of 22nd March, 2017.

THE HIGH COURT TANZANIA COMMERCIAL DIVISION

..............................,

B.R. NYAKI

DEPUTY REGISTRAR

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Extracted on 22nd March, 2017

Issued on 3/11/2017