

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

In the matter of an appeal in terms of Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 to be read with Chapter LVIII of the Civil Procedure Code.

SC/CHC/ 35/2009

HC/Civil/ 186/2006(1)

W.A.H. Weerasinghe,
“Dambuwa Walawwa”,
Radawana Road,
Yakkala.

Plaintiff

-Vs-

Peoples Bank,
No.75, Sir Chittampalam A. Gardiner
Mawatha,
Colombo-02.

And Now Between

Peoples Bank,
No.75, Sir Chittampalam A. Gardiner
Mawatha,
Colombo-02.

Defendant-Appellant

W.A.H. Weerasinghe,
“Dambuwa Walawwa”
Radawana Road, Yakkala.

Plaintiff-Respondent

BEFORE : **SISIRA J .DE ABREW, J**
UPALY ABEYRATHNE, J
K.T.CHITRASIRI, J

COUNSEL : S.A.Parathalingam PC with Kushan De Alwis PC, and Kawshalya Nawaratne for the Defendant-Appellant.

M.H.M. Morais for the Plaintiff-Respondent.

WRITTEN SUBMISSIONS

ON : 03.10.2012 (Defendant-Appellant)

13.08.2012 (Plaintiff-Respondent)

ARGUED ON : 18.01.2017

DECIDED ON : 07.04.2017

K.T. CHITRASIRI J.

I had the opportunity of reading the draft judgment of Upaly Abeyrathne J and I have no reason to disagree with his decision to dismiss this appeal. Having read the draft judgment, I thought it is necessary to express my views as well on the questions of law that are to be answered by this Court. Basically, those questions of law have two limbs and they are as follows.

- Whether there was any breach/violation of the terms and conditions of **a written contract?** and
- Whether the cause of action of the plaintiff is prescribed?

Contention of the learned President's Counsel for the defendant-appellant was that; unless the plaintiff-respondent establishes an existence of a written agreement between the parties, he could not have maintained this action since it is the Section 6 of the Prescription Ordinance that allows filing action within 6 years when counted from the date on which the cause of action has arisen. Such a contention was advanced since the date of filing of this action is a date after 3 years from the date on which the cause of action had alleged to have arisen.

In the plaint filed on 21st May 2002, it is stated that the plaintiff-respondent and one D.M. Pieris had opened and maintained a joint account in Gampaha branch of the appellant bank namely, the Peoples Bank since 06.11.1998. Authority to withdraw money from the said account had been given to both the plaintiff-respondent and to D.M. Pieris. Accordingly, those two individuals had withdrawn different sums of moneys from that account from time to time.

On 07.01.1999, the appellant had received information to the effect that a request had been made to transfer Rs.17.5 million to an account alleged to have been opened by D.M. Pieris who is now deceased, at the headquarter branch of the same People's Bank, from his joint account held and maintained at the Gampaha branch. Upon receiving the said information, plaintiff-respondent had made several inquiries from the authorities concerned and finally he had made a complaint to the police as to the opening of the account at the head quarter branch by D.M. Peiris. Accordingly, the police have reported facts in this regard to the Magistrate's Court of Gampaha. In the Magistrate's Court of Gampaha, an EQD Report had been called for, to ascertain the correctness of the signature of D.M. Pieris in order to find out whether D.M. Pieris has in fact opened the aforesaid account at the headquarter branch. Examiner of Questioned Document, by the letter marked 'P5' has reported that it is not the

signature of D.M. Peiris which is found in the mandate that was used to open the said account at the headquarter branch. Assistant EQD S.A.Batakandage who has signed the report has testified in court in support of this fact. The aforesaid mandate which was examined by the EQD had been marked in evidence as 'X1', 'X2' and 'X3'. Accordingly, it was found that the account to which the aforesaid Rs.17.5 million had been transferred was not opened by D.M. Pieris. Therefore, it is manifestly clear that a fraud had been committed when making the application to open the account at the headquarter branch. Accordingly, the transfer of funds to the said account which had been opened fraudulently at the headquarter branch becomes an illegal act.

I will now look at the issue of prescription in the light of the aforesaid fraudulent act that surfaced with the production of the EQD report marked P5. This EQD report is date 30.11.1999 and is found at page 237 in the appeal brief. In that context, the law is that commencement of the period of prescription begins on the day of such a fraudulent act came into existence or in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it. In this regard, I will refer to Prof.Weeramantry's comments found in his book "The Law of Contracts". [at para 863] In that book, he states thus:

"Prescription does not run in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it."

In support of his view, Prof.Weeramantry has quoted the decision in **Kirthisinghe V. Perera [23 NLR 279]**

Facts and circumstances of this case show that the plaintiff has filed action within three years from the date he came to know of the fraudulent

act that was committed when opening the account at the headquarter branch. It is the account to which the moneys were transferred from the Gampaha bank account jointly maintained by the plaintiff-respondent and D.M.Peiris. Therefore, the plaintiff-respondent is entitled to file action within 3 years from 30.11.1999, in accordance with Section 10 of the Prescription Ordinance. Accordingly, it is clear that the cause of action of the plaintiff-respondent has not prescribed.

In the circumstances, it is incorrect to contend that the plaintiff should establish an existence of a written agreement to escape the defence of prescription. More particularly, it is illegal to transfer funds into an account which had been opened fraudulently. For the reasons set out above, I answer all the questions of law in favour of the plaintiff-respondent.

Accordingly, as Abeyrathne J. has held, this appeal should stand dismissed with costs.

K.T.CHITRASIRI J.