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

In the matter of an Appeal from a judgment of the High Court [Civil Appeal] of the North Western Province holden at Kurunegala.

S.C.Appeal No. 172/2013
SC HC (CA) LA No.228/2013
NWP/HCCA/KUR No. 03/2010/F
D.C.Kuliyapitiya Case No. 16166/07/M

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF

VS.

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**

Both of Makandura,
Gonawila.

DEFENDANTS

AND

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**

Both of Makandura,
Gonawila.

DEFENDANTS-APPELLANTS

VS.

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

KAHANDAWA APPUHAMILAGE DON TILAKARATNE
No.43, Negombo Road,
Banduragoda.

PLAINTIFF-RESPONDENT-PETITIONER/APPELLANT

VS.

1. **WIJESINGHE MUDIYANSELAGE CHANDRASIRI**
2. **CHANDRANI ADHIKARI**
   Both of Makandura,
   Gonawila.

DEFENDANTS-APPELLANTS-RESPONDENTS

BEFORE:	Priyantha Jayawardena, PC, J. K.T.Chitrasiri J. Prasanna Jayawardena, PC, J.
COUNSEL:	H. Withanachchi with Shantha Karunadhara for the Plaintiff-Respondent-Petitioner/Appellant. M.C.Jayaratne with T.C.Weerasinghe and M.D.J.Bandara for the 1st and 2nd Defendants-Appellants-Respondents.
ARGUED ON:	19th September 2016
WRITTEN SUBMISSIONS FILED:	By the Plaintiff-Respondent-Petitioner/Appellant on 10th October 2016. By the 1st and 2nd Defendants- Appellants-Respondents on 10th September 2016.
DECIDED ON:	27th January 2017

Prasanna Jayawardena, PC, J.

The question to be decided in this appeal is whether the High Court [Civil Appeal] of the North Western Province holden at Kurunegala erred when it dismissed the Plaintiff-Respondent-Petitioner/Appellant's action. The High Court held that, the Plaintiff's Cause of Action was prescribed and set aside the judgment of the District Court of Kuliyapitiya which had been entered in favour of the Plaintiff.

The Plaintiff-Respondent-Petitioner/Appellant is a businessman and his trade is selling coconuts. The 1st and 2nd Defendants-Appellants-Respondents are husband and wife. The parties will be referred to in this judgment as "the Plaintiff, "the 1st Defendant" and "the 2nd Defendant" respectively.

On 15th October 2007, the Plaintiff filed this action against the 1st and 2nd Defendants stating that he sold coconuts to the 1st and 2nd Defendants on credit terms and praying for the recovery of a sum of Rs. 723,503/- from the 1st and 2nd Defendants, jointly and severally, which was due to the Plaintiff upon a writing filed with the Plaint marked **"පැ1"** signed by the 1st Defendant in connection with the monies due to the Plaintiff upon these sales of coconuts.

A perusal of the Plaint shows that, the Plaintiff's Cause of Action is averred in Paragraphs [5], [6], [7] and [8] of the Plaint. In Paragraph [5] of the Plaint, the Plaintiff pleads that, by the letter dated 28th August 2006 filed with the Plaint marked **"පැ1"**, which is signed by the 1st Defendant, the 1st and 2nd Defendants acknowledged their liability to pay a sum of Rs. 723,503/- which was due to the Plaintiff as at 28th August 2006 and promised to pay these monies to the Plaintiff before 30th June 2007. In Paragraph [6] of the Plaint, the Plaintiff pleads that, the agreement set out in **"පැ1"** makes both Defendants, jointly and severally, liable to pay this sum to the Plaintiff. In Paragraphs [7] and [8] of the Plaint, it is pleaded that, since the 1st and 2nd Defendants failed to pay this sum as agreed by them [*ie:* by **"පැ1"**], the payment of this sum has been demanded from the 1st and 2nd Defendants, who have wrongfully and unlawfully failed to make payment, thereby, giving rise to a Cause of Action to sue both Defendants for the recovery of this sum of Rs. 723,503/-.

Thus, it is clear from the Plaint that, the Plaintiff's Cause of Action was upon the writing marked **"පැ1"** by which, it is pleaded, the 1st and 2nd Defendants acknowledged their liability to pay a sum of Rs. 723,503/- to the Plaintiff and promised to pay this sum before 30th June 2007.

In their joint answer, the 1st and 2nd Defendants admit that the 1st Defendant purchased coconuts from the Plaintiff on credit terms but deny that the 2nd Defendant had any connection with these transactions. They plead that, all monies due to the Plaintiff had

been paid, albeit with some delays. They admit that the 1st Defendant signed **"ළ1"** but claim that he did so under duress. The Defendants did *not* plead in the answer that the Plaintiff's claim was prescribed.

When the trial commenced, it was admitted that, the 1st Defendant purchased coconuts from the Plaintiff on credit terms. The Plaintiff framed five issues based on his pleadings. The key issues are Issue No.s [3], [4] and [5] which ask whether the 1st and 2nd Defendant had, by the letter marked **"ළ1"** signed by the 1st Defendant, promised to pay the sum claimed in the Plaint before 30th June 2007; whether they have failed and neglected to make this payment; and whether, if the above issues are answered in the affirmative, the Plaintiff is entitled to judgment as prayed for.

The Defendants framed 12 issues. One of these issues was whether the letter marked **"ළ1"** was obtained by the Plaintiff by exerting duress on the Defendants. The Defendants did *not* raise an issue as to whether the Plaintiff's action was prescribed.

The Plaintiff gave evidence and recounted the transaction between him and the Defendants. He stated that, the 1st and 2nd Defendants carried on business together and purchased coconuts from him. The Plaintiff stated that, the details of the transactions relating to the sales he made to the Defendants were entered in a note book produced at the trial marked **"ළ2"** and that the entries therein were made by the 2nd Defendant and, thereafter, signed by the 1st Defendant. He said that when he went to the Defendants' home to collect payment of the sum of Rs. 723,503/- which was due from the Defendants to him as at 28th August 2006, the 2nd Defendant wrote the aforesaid letter marked **"ළ1"** stating that the Defendants would pay this sum before 30th June 2007 and that the 1st Defendant had then signed **"ළ1"** and given it to the Plaintiff. Since the Defendants did not pay this sum by 30th June 2007, the Plaintiff's attorney-at-law had demanded payment by the letter of demand marked **"ළ3"**. Since payment was not made despite the demand, this action had been instituted against the 1st and 2nd Defendants for the recovery of this sum of Rs. 723,503/-. The Plaintiff also led the evidence of J.H.A.J.L. Jayatilaka who had signed **"ළ1"**, as a witness. Jayatilaka also stated that, **"ළ1"** had been written by the 2nd Defendant and signed by the 1st Defendant.

The 1st Defendant gave evidence and claimed that he and the Plaintiff jointly carried on a business of selling coconuts to exporters in based in Colombo. The 1st Defendant also admitted that his wife (the 2nd Defendant) wrote **"ළ1"** and that he signed it. It is significant to note that, when the 1st Defendant was cross examined , he admitted that, the sum of Rs. 723,503/- stated in **"ළ1"** was payable to the Plaintiff. He admitted that, the entries in the notebook marked **"ළ2"** were written by the 2nd Defendant. The 2nd Defendant gave evidence. She also claimed that the Plaintiff and the 1st Defendant were engaged in a joint business and denied having any connection with that business. It

also has to be noted that, neither Defendant claimed that threats were made or that duress was exerted on them to write and sign **"පැ1"**.

The learned District Judge entered judgment for the Plaintiff, as prayed for in the Plaint, against the 1st and 2nd Defendants, jointly and severally. The learned Trial Judge held that the Plaintiff has proved that, the sum of Rs. 723,503/- was due and owing to him from both the 1st and 2nd Defendants. He also held that, the Defendants had failed to establish any duress was exerted on them to write and sign **"පැ1"**.

It has to be stated here that, the Defendants did *not* plead prescription as a defence. *No* issue regarding prescription was framed at the trial. There was *no* suggestion made at the trial that the Plaintiff's action was prescribed. Thus, the learned Trial Judge, very correctly, did not consider whether the Plaintiff's action was prescribed, since he was not required to do so.

The Defendants appealed to the High Court. It is to be noted that, the Petition of Appeal does *not* claim that the Plaintiff's action was prescribed and that it should have been dismissed by the District Court for that reason.

However, at the hearing of the appeal, learned Counsel appearing for the Defendants submitted that, the Plaintiff's action was one for 'Goods Sold and Delivered' which, by operation of Section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30th March 2005 [as per the entries in the notebook marked **"පැ2"**, the last sale was on 30th March 2005]. On that basis, learned Counsel for the Defendants urged that, the High Court was entitled to frame, in appeal, an issue on Prescription on the basis that such an issue is *"a pure question of law"*.

At the commencement of their judgment, the learned Judges of the High Court have observed that *"On the aforesaid issues of the Respondent and what has been submitted on behalf of the Respondent as quoted above the significance of the letter P.01 to the Respondent's case is clear. It appears the case of the Respondent rests on this alleged promise given on P.01***"**.*"* Thus, the learned High Court judges correctly identified that, the Plaintiff's Cause of Action was upon the writing marked **"පැ1"** which, as set out above, has been pleaded to be an acknowledgement of liability and promise to pay Rs. 723,503/- given by the 1st and 2nd Defendants to the Plaintiff.

However, the learned High Court judges then went on to hold that, according to the entries in the notebook marked **"පැ2"**, the last transaction on the sale of coconuts was done on 30th July 2005. In arriving at this finding, the learned High Court judges, inexplicably, overlooked two part payments made *after* that date – *ie:* on 25th June 2006 and 28th August 2006 – despite having referred to these two part payments in their judgment. On the basis of their erroneous conclusion that the last transaction was on

30th July 2005, the learned High Court judges held that, the Plaintiff's claim for payment became prescribed one year thereafter – *ie:* on 30th July 2006 – by operation of Section 8 of the of the Prescription Ordinance. On this basis, the High Court held that, at the time **"පැ1"** was written on 28th August 2006, the Plaintiff's claim for payment *"was already prescribed"*. The learned High Court judges then decided to disregard the writing marked **"පැ1"** taking the view that it relates to contracts for the Sale of Goods and *"does not have an independent existence from those contracts of sale of goods and those contracts with sums due on them have been prescribed."*.

Having reached these determinations, the learned High Court judges held that, the Court was entitled to frame, in appeal, an "Issue of Law" as to whether the Plaintiff's action was prescribed on the face of the entries in the notebook marked **"පැ2"**. Thereafter, the High Court held that, the Plaintiff's action was prescribed and set aside the judgment of the District Court and dismissed the Plaintiff's action against both Defendants.

Before proceeding further with this judgment, it will be appropriate to briefly deal with the decision of the learned High Court judges to accept and decide on an issue regarding the prescription which was raised for the first time in appeal. As mentioned earlier, prescription was *not* pleaded as a defence in the Answer, *no* issue regarding prescription was framed at the trial and there was *no* suggestion made at the trial that the Plaintiff's action was prescribed.

In this connection, I should first refer to the fact that, the provisions in Sections 5 to 10 of the Prescription Ordinance only set out defences available to a Defendant in cases where the Plaintiff is proved to have slept over his rights for a specified period of time. The invocation of such a defence is optional and a Defendant may chose not to invoke a defence of prescription. The successful invocation of these provisions of the Prescription Ordinance in an action, will only bar the Plaintiff's remedy in that action and entitle the Defendant to have that action dismissed. However, the Plaintiff's rights are not extinguished and he can seek to assert his rights in some other form of proceeding or action which may be available to him. Thus, in RAVANNA MANA EYANNA vs. COMMISSIONER OF INLAND REVENUE [46 NLR 121 at p.125], Jayetilake J cited the English case of EX PARTE COWLEY and stated [at p.125], *" A debt is still due notwithstanding that the Statute of Limitations may have run against it, for the statute only bars the remedy and does not extinguish the debt.".* The case of PERERA vs. DON MANUEL [21 NLR 81] is an illustration of an instance where a debt that was prescribed by operation of Section 11 [the present Section 10] of the Prescription Ordinance, was held to be recoverable in an action founded on a 'proctor's lien'. De Sampayo J stated [at p.83], *" An action might not be brought by reason of section 11 of the Prescription Ordinance, but, as pointed out above, the present proceedings do not constitute an action within the meaning of the Ordinance. A valid lien may, however, be enforced even after the debt is barred ….. For it was explained in London and Midland Bank v.*

Mitchel that the statute only barred the personal action, but that an action might be maintained, notwithstanding the statute, to enforce any security for the debt by sale or otherwise. The law so expounded equally applies to our Ordinance of Prescriptions, and, in my opinion, the proctor's lien in this case can be enforced by applying for payment out of the fund in Court.".

In view of the aforesaid nature of the defences of prescription set out in Sections 5 to 10 of the Prescription Ordinance, the long standing rule is that such a defence should be raised at the trial so that the Plaintiff has a fair opportunity of meeting it by leading evidence to counter the defence that his claim in that action is time barred or, if the Defendant has shown the action to be plainly time barred, choosing to abandon the action and seek another avenue of relief without delay. As Chitty [Contracts 25th ed. at p.1051-1052] points out, *"….. the effect of limitation under the Limitation Act 1980 is merely to bar the plaintiff's remedy and not to extinguish his right. Limitation is a procedural matter, and not one of substance, and it has to be specially pleaded by way of defence."*. Further, it hardly needs to be stated that, a Plaintiff who has no inkling that the Defendant intends to rely on a defence on prescription, will be unfairly subjected to grave prejudice if he has to confront an issue of prescription raised for the first time in appeal, which he had no opportunity of countering at the trial.

Consequently, it is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser CJ described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a *"shield"* and not a *"weapon of offence"*. Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.

Weeramantry [The Law of Contracts] enunciates this rule when he states [at p.866], *"A plaintiff cannot rely upon a ground of exemption from the law of limitation raised for the first time in appeal….. Where the point is not taken in the lower court and no issue is framed upon the question, it is too late for the point to be taken in appeal, more especially when it is not taken in the petition of appeal."*. I should add that, the only exception to this rule may be where the issue of a time bar is a pure question of law.

The rule that, a defence of prescription cannot be raised for the first time in appeal is well established and has been referred to in several decisions of this Court for over a century. Thus, in the early case of PERERA vs. PUNCHAPPU [VII SCC 71], Fleming ACJ held that, an issue of prescription cannot be raised for the first time in appeal. A similar view was taken by Lascelles CJ in DINGIRI MENIKA vs. DINGIRI AMMA [5 Leader Law Reports 49]. In SUMANGALA vs. KONDANNA [5 CWR 211 at p.212], Bertram CJ, referring to an attempt to raise an issue regarding prescription for the first in appeal, stated *"It does not appear that this point was raised in the court below. No issue of fact or law was framed upon this basis. The question does not appear to have*

been argued, and the District Judge says nothing about it. It is raised for the first time in appeal. If it were necessary to seriously consider the question, the right course would probably be to send the case back to the District Court in order to allow the point to be formally raised, argued and decided. But it is perfectly clear that there is no substance in the point and there is no occasion for us to take that course.". In HOARE & CO. vs. RAJARATNAM [34 NLR 219], Dalton J stated [at p.222], *" ….. a plaintiff is not to be allowed to rely upon a ground of exemption from the law of limitation raised for the first time in the Appeal Court."*.

In BRAMPY APPUHAMY vs. GUNASEKERA [50 NLR 253] where the Defendant-Appellant sought to raise an issue on prescription for the first time in appeal, Basnayake J held that an issue regarding prescription cannot be framed in appeal stating [at p.255], *"An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.".*

Thus, the learned High Court judges erred when they accepted and decided on an issue on prescription which was raised for the first time in appeal. The learned High Court judges also erred when they considered that the decisions in ARULAMPIKAI vs. THAMBU [45 NLR 457] and SETHA vs. WEERAKOON [49 NLR 229] were authority for accepting an issue on prescription which is raised for the first time in appeal. The decision in SETHA vs. WEERAKOON was that a new issue may be raised in appeal only if it is *"a pure question of law"* and that a *"mixed question of law and fact"* cannot be raised for the first time in appeal. However, the issue of prescription in the present case was a `mixed question of law and fact' since the effect of the entries in the notebook marked **"පැ2"** and the nature and purport of the writing marked **"පැ1"** are, very obviously, `mixed questions of law and fact'. The decision in ARULAMPIKAI vs. THAMBU was that a new issue may be raised in appeal only if *"….. it might have been put forward in the Court below under some one or other of the issues framed."*. However, in the present case, there was no issue framed at the trial from which an issue of prescription could be `extracted' at the stage of appeal. For the sake of completeness, it may be useful to cite Amerasinghe J's formulation in RANAWEERA MENIKE vs. SENANAYAKE [1992 2 SLR 180] of the circumstances in which a new issue can be raised in appeal. His Lordship stated [at p.191], *"A matter that has not been raised before might, nevertheless, be a ground of appeal on which an appellate court might base its decision, provided it is a pure question of law; or, if the point might have been put forward in the court below under one of the issues raised, and the court*

is satisfied (1) that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal.".

Although the judgment of the High Court is liable to be set aside by reason of the aforesaid error, the Plaintiff does not appear to have pressed this point in the present appeal and has not obtained leave to appeal on the question whether the High Court erred when it framed and decided an issue on prescription in appeal. However, since this appeal can be decided on the questions of law in respect of which the Plaintiff has obtained leave to appeal, I am not required to consider whether this palpable error of law on the part of the High Court entitles us to frame an appropriate question of law at this stage so as to ensure that justice is done.

This Court has given the Plaintiff leave to appeal on the questions of law set out in paragraph [17] (ii), (iii) and (vi) of the Plaintiff's Petition filed in this Court. I will reproduce these paragraphs *verbatim*:

(ii) Have the learned Civil Appellate High Court Judges erred in law by not taking judicial notice that a fresh period of prescription would commence from the date of partial payment of debt in the event such payment is made prior to the expiration of the prescribed period ?

(iii) Had the learned Civil Appellate High Court Judges misdirected themselves by not taking cognizance in respect of the payments made by the Defendants on 01-10-2005, 25-06-2006 and 28-08-2006, when the learned High Court Judges held that the Plaintiff's case on sums of money referred to in "පැ1" was already prescribed when they were embodied in that document ?

(vi) Was the Civil Appellate High Court in error by holding that the claim of the Plaintiff was based on a contract of sale of goods when the Defendants by document "පැ1" which comes within the scope of the provisions of Section 12 of the Prescription Ordinance, had acknowledged the sum due to the Plaintiff and undertook to settle the sum within a period of time stated therein ?

It should be stated that, the reference to Section 12 of the Prescription Ordinance in Paragraph [17] ((vi) must be an inadvertent error or typographical mistake since the contents of that paragraph make it plain that the reference is to Section 6 of the Prescription Ordinance. Therefore, I will proceed on the basis that the provision of the Prescription Ordinance referred to in this question of law, is Section 6.

I will now consider the third of these questions of law [set out in (vi) above] since the answer to that question will determine this appeal. The issue to be determined is simply whether this Plaintiff's action was one based on the failure to pay in breach of the writing marked **"පැ1"** *or* simply an action for "Goods Sold and Delivered".

The pleadings in the Plaint make it very clear that, this is *not* an action for `Goods Sold and Delivered' since the pleadings do not contain the hallmarks of an action for 'Goods Sold and Delivered' such as specific averments with regard to the date or dates of the sale or sales, the quantity or quantities of the goods which were sold, the price or prices, the place or places of sale and delivery, that the goods were delivered to the Defendants, and the date or dates when payment was due. The Plaintiff's issues confirm that, this is not an action for "Goods Sold and Delivered" since issues have not been raised with regard to the abovementioned facts and circumstances which are the building blocks of an action for "Goods Sold and Delivered".

Instead, as referred to at the commencement of this judgment, the relevant pleadings in the Plaint are: an averment regarding the execution of the writing marked **"පැ1"**; an averment that **"පැ1"** is an acknowledgement of liability and promise to pay Rs. 723,503/- by 30th June 2007; an averment that, the Defendants have, in breach of this agreement, failed to make payment; an averment that, the Defendants have not made payment though it was demanded; and an averment that, therefore, a Cause of Action has accrued to the Plaintiff to sue the Defendants for the recovery of this sum of Rs.723,503/-.

Thus, it is evident that, as mentioned earlier, the Plaintiff's Cause of Action is upon the writing marked **"පැ1"**, which has been pleaded to be an acknowledgement of liability and promise to pay and that, the basis of liability is the failure to pay in breach of the agreement set out in **"පැ1"**. The issues raised by the Plaintiff are on the same lines and make it clear that, the Plaintiff's Cause of Action is the failure to pay in breach of the acknowledgement of liability and promise to pay set out in the writing marked **"පැ1"**.

However, the learned High Court judges failed to see that, this action was filed upon the writing marked **"පැ1"** and that, the Plaintiff's Cause of Action was that the Defendants had, failed to pay the sum of Rs. 723,503/- in breach of the acknowledgement of liability and promise to pay set out in the writing marked **"පැ1"**. They erred when they proceeded on the basis that this was an action for 'Goods Sold and Delivered' and disregarded the writing marked **"පැ1"** mistakenly considering it to be an adjunct of contracts for the Sale of Goods with no *"independent existence"*.

Instead, what the learned High Court judges should have done is to examine the writing marked **"පැ1"** and ascertain whether it constituted a written promise, contract, bargain or agreement as described in Section 6 of the Prescription Ordinance. If that

examination showed that, **"පැ1"** does falls within the description of a written promise, contract, bargain or agreement as contemplated by Section 6, the period of prescription will be six years. If it does not meet the requirements of Section 6, the period of prescription will be one year under Section 8 of the Prescription Ordinance or three years under Section 10, depending on the other evidence before the Court. [For purposes of clarity, I should mention here that, in answering the question of law which is being considered, these matters have to be considered on the footing that the issue of prescription was properly before the High Court. However, as determined earlier in this judgment, in fact, the High Court erred when it ventured to frame an issue on prescription in appeal.]

When determining whether **"පැ1"** constitutes a written promise, contract, bargain or agreement as described in Section 6 of the Prescription Ordinance, it has to be kept in mind that, Section 6 only requires that, the promise, contract, bargain or agreement should be in writing. No special form or manner of such writing is specified. As Vythialingam J observed in CEYLON INSURANCE CO.LTD vs. DIESEL AND MOTOR ENGINEERING COM. LTD [79 NLR 5 at p.8]*, "For the purpose of constituting a written promise, contract, bargain or agreement no special form of writing is required."*. Instead, what is essential is that, the writing must contain a promise by the Defendant to pay an identifiable sum to the Plaintiff. This promise may be contained in one document or be evidenced by more than one document or by an exchange of documents. Thus, in ADAMJEE LUKMANJEE AND SONS LTD vs. ABDUL CAREEM HALLAJE [63 NLR 407], a letter written by the Defendant in which he acknowledged that a sum of Rs. 4,300/- is due from him to the plaintiff and stated *"We shall definitely pay this bill by the end of this month "* was held to be a written promise to pay that sum which falls under Section 6 of the Prescription Ordinance; In URBAN DISTRICT COUNCIL, MATALE vs. SELLAIYAH [33 NLR 14], an exchange of letters by which the Plaintiff requested the Defendant to pay a specified sum on account of some construction work and the Defendant agreed to pay a lesser sum, was held to be a written promise falling under Section 6 [then Section 7] of the Prescription Ordinance; and in CEYLON INSURANCE CO.LTD vs. DIESEL AND MOTOR ENGINEERING COM. LTD, a written offer to carry out repairs to a motor car with an estimate of the cost sent by the Plaintiff and a letter written by the Defendant agreeing to pay a lesser sum specified by him was held to be a written promise to pay the lesser sum which falls under Section 6 of the Prescription Ordinance.

When the writing marked **"පැ1"** is examined, it is seen that, it states, "ඔහුට රුපියල් හත් ලක්ෂ විසි තුන් දහස් පන්සිය තුනක මුදලක් (723,503/-) ගෙවීමට ඇති බවත් එකී සම්පුර්ණ මුදල 2007.06.30. දිනට පෙර ගෙවා අවසන් කරන බවට පොරොන්දු වෙමි." The 1st Defendant has, admittedly, signed **"පැ1"**. Thus, by **"පැ1"**, the 1st Defendant has expressly acknowledged his liability to pay, a sum of Rs.723,503/- which was due to the Plaintiff as at 28th August 2006, and has promised to pay this sum to the Plaintiff by 30th June 2007. The 1st Defendant has invested a measure of formality on

the writing marked **"පැ1"** by placing his signature on stamps to the value of Rs.800/-. His signature has been witnessed by another person. The evidence of the 1st Defendant and the 2nd Defendant make it clear that, when the 1st Defendant signed **"පැ1"**, he did so with the deliberate intention of making a promise to pay Rs.723,503/- to the Plaintiff by 30th June 2007.

It is to be noted that, the facts in the present case are similar to the facts in ADAMJEE LUKMANJEE AND SONS LTD vs. ABDUL CAREEM HALLAJE where the Plaintiff sold 500 bags of cement to the Defendant on credit terms. When the Defendant delayed in making payment, he gave the Plaintiff the aforesaid letter promising to pay Rs.4,300/- by the end of the month. As mentioned earlier, it was held that, the letter amounted to a written promise falling under Section 6 of the Prescription Ordinance. K.D. De Silva J held [at p.408], *"In the letter P3 there is not only an acknowledgment that the amount is due but also a clear promise to pay this amount within a month. I would, therefore, construe this letter as a written promise to pay the amount: accordingly, Section 6 and not Section 8 of the Prescription Ordinance applies to the facts of this case.."*

I make a similar determination in the present case and hold that, the contents of the writing marked **"පැ1"** and the circumstances of its execution make it a written promise within the meaning of Section 6 of the Prescription Ordinance. As stated earlier, this action has been filed upon the writing marked **"පැ1"** which is dated 28th August 2006. The Plaint was filed on 15th October 2007, which is long before the expiry of the six year period specified in Section 6. Thus, this action is not prescribed.

Accordingly, I hold that, the learned High Court judges erred when they held that, the Plaintiff's action against the 1st Defendant was prescribed and when they set aside the judgment entered by the District Court against the 1st Defendant.

However, the learned High Court Judges were correct when they held that, there was no evidence to establish that the 2nd Defendant had any personal liability with regard to the transactions relating to this action and set aside the judgment entered in the District Court against the 2nd Defendant. In this regard, it is to be noted that, the 2nd Defendant gave evidence and denied that she had any connection with the business of the 1st Defendant. There was no reliable evidence placed before the District Court which established that, the 1st and 2nd Defendants were jointly carrying on the business of trading in coconuts. The mere fact that, the 2nd Defendant wrote the entries in the notebook marked **"පැ2"** or wrote **"පැ1"** for the 1st Defendant to sign it, cannot make the 2nd Defendant a partner in the business of the 1st Defendant. There was no reliable evidence to establish that, the 2nd Defendant has any personal liability to pay the monies claimed by the Plaintiff. Most significantly, the 2nd Defendant has not signed the writing marked **"පැ1"** upon which the Plaintiff has based his action.

For the reasons set out earlier, I answer the aforesaid third question of law in the affirmative in respect of the 1st Defendant only. In view of this determination, there is no need to consider the other two questions of Law.

Accordingly, the judgment of the High Court is varied in the following manner: (i) the judgment of the High Court dismissing the Plaintiff's action against the 1st Defendant, is hereby set aside and the judgment entered by the District Court in favour of the Plaintiff against the 1st Defendant, is hereby affirmed; (ii) the judgment of the High Court dismissing the Plaintiff's action against the 2nd Defendant, is hereby affirmed.

For purposes of further clarity, as a result of what I have held above, the Plaintiff has succeeded in his case against the 1st Defendant and has obtained judgment as prayed for in the Plaint against the 1st Defendant. The Plaintiff has failed in his case against the 2nd Defendant and the action against the 2nd Defendant stands dismissed. In the circumstances of this case, I make no order with regard to costs.

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.
I agree

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree

Judge of the Supreme Court