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

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

S.C. Appeal No. 21/2017
High Court Kegalle
No. SP/HCCA/KAG/23/2013(F)
D.C. Mawanella No. 1348/M

Plaintiff

Vs.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant

AND

In the matter of an Appeal in terms of Section 754[1] of the Civil Procedure Code read with Section 5 of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant -Appellant

Vs.

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

Plaintiff -Respondent

AND NOW BETWEEN

In the matter of an Application for Leave to Appeal to the Supreme Court in terms of Section 5(C) of the High Court of Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

Wijitha Group of Companies (Private) Limited,
No. 160, Main Street,
Mawanella.

Defendant - Appellant - Appellant

Capital Printpack (Private) Limited,
No. 257, Grandpass Road,
Colombo 14.

Plaintiff - Respondent - Respondent

Before: **Buwaneka Aluwihare, P.C., J.**
E.A.G.R. Amarasekara, J.
Janak De Silva, J.

Counsel:

Basheer Ahamaed with Lakshman Jeyakumar for the Defendant-Appellant-Appellant

Sumedha Mahawanniarachchi with Nishan Balasooriya for the Plaintiff-Respondent-Respondent

Written Submissions tendered on:

Appellant on 14.03.2017

Respondent on 20.07.2018

Argued on: 01.11.2021

Decided on: 09.06.2023

Janak De Silva, J.

The Plaintiff-Respondent-Respondent (Respondent) is a company that manufactures and provides packaging material used to package edibles. The Defendant-Appellant-Appellant (Appellant) is a company that manufactures, packages and distributes certain food products.

Towards the end of 2006, the Appellant requested quotes from suppliers for the provision of packaging materials. Following the Respondent's submission and after discussion, the parties entered into a contract, which is admittedly unwritten. In terms of this contract, the Respondent was to supply packaging materials on 45 days' credit. As a result, the Respondent provided the Appellant with packaging materials between March 2007 and October 2007 which were used by the Appellant to pack certain food they manufactured.

On 4.11.2008 the Respondent instituted the above styled action in the District Court of Mawanella against the Appellant for the recovery of the sum of Rs.2, 100,103.30 due to the packing material supplied.

The Appellant denied that any sum is due to the Respondent and made a claim in reconvention for damages suffered due to the packing material being defective and not suitable for the purpose of packing food.

The learned District Judge entered judgment as prayed for in the plaint and dismissed the cross-claim. On appeal, the judgment was affirmed by the High Court (Civil Appeal) of Sabaragamuwa Province holden in Kegalle (High Court).

This Court granted leave on the following questions of law:

Question of Law No. 1:

> "*13 (a)That the said Court has misdirected itself on the facts and erred on the law in concluding that the prescriptive period of 3 years in section 7 of the Prescription Ordinance for breach of an unwritten contract applied, whereas the Respondent's action was for monies due on goods sold and delivered by the Respondent to the Appellant to which the prescriptive period of one year in section 8 of the Prescription Ordinance applied.*

Question of Law No. 2:

> "*In view of the document marked "V3" is the plaintiff's claim in any event not prescribed in view of the provisions of section 12 of the Prescription Ordinance.*"

Question of Law No. 1

The Learned District Judge held that the action is not prescribed as this matter is governed by section 7 of the Prescription Ordinance No. 22 of 1871 (Prescription Ordinance). He went on the basis that the action was based on an unwritten contract. Moreover, he held that even if the issue is governed by section 8 of the Prescription Ordinance, the action was not prescribed as it was filed within a year of receiving a letter dated 28.02.2008 (V3) which he concluded as amounting to an acknowledgement of the debt by the Appellant.

The High Court applied the reasoning in ***Assen Cutty v. Brooke Bond Ltd.*** **(36 N.L.R. 169)** and held that the issue of prescription is governed by section 7 of the Prescription Ordinance. It declined to follow the reasoning in ***Dharmaratne v. Fernando*** **(56 N.L.R. 498)** and ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd*** **[79 (II) N.L.R. 5]** as urged by the Appellant.

In ***Assen Cutty v. Brooke Bond Ltd.*** (supra. 179) Court concluded that as between section 8 (present section 7) dealing with unwritten contracts and section 9 (present section 8) dealing with goods sold and delivered, the latter section is the particular enactment and so "operative" while the former section is the general enactment and so *"must be taken to affect only the other parts of the statute to which it may properly apply"*. It was held that section 9 (present section 8) the particular enactment, operates in the case of contracts for and in respect of goods sold *"for which an action lies owing to the fact of delivery"* while section 8 (present section 7) operates in the case of unwritten contracts for or in respect of goods sold for which an action lies otherwise than owing to the fact of delivery. Accordingly, it was held that the claim in reconvention in that case was a claim for damages for breach of warranty of goods delivered upon an unwritten contract of sale and not an action *"for or in respect of goods sold and delivered"* within the meaning of section 9 (present section 8) and is not barred until after the lapse of three years in terms of section 8 (present section 7) after the cause of action shall have arisen.

It is observed that the learned Judge of the High Court had relied on the decision in **Assen *Cutty v. Brooke Bond Ltd* (supra)**, to hold that the claim in the present action does not fall within section 8. However, I am of the view that he did so on the wrong premise. This case arose out of three tea sales and purchase contracts in which the plaintiff was selling and delivering certain quantities of tea to the defendant. The plaintiff's claim was related to contracts for tea sold and delivered to the defendants and the defendant's claim in reconvention was for a sum of money the defendants paid to the plaintiff, for tea sold and delivered to them on the ground that the tea supplied were found to be of a lower quality. This was held to be a breach of warranty and it was this claim of the defendant for breach of warranty of the sale of goods contract that was held to not fall within the ambit of section 8.

On the contrary, the learned counsel for the Appellant submitted that the ratio of ***Dharmaratne v. Fernando*** (supra) and ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd*** (supra) must govern the issue of prescription in the matter before us. It was submitted that based on the principle of statutory interpretation; *generalia specialibus non derogant* - general provisions do not derogate from special provisions, section 7 which is the general section must give away to section 8 which is the special provision applicable to transactions where goods are sold and delivered under an unwritten contract.

Section 7 of the Prescription Ordinance reads as follows: -

> "*No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen*"

This section clearly provides that actions in respect of "*any unwritten promise, contract, bargain, or agreement*" are prescribed only after three years from the time when the cause of action shall have arisen. In the instant case the fact that there was an unwritten contract between the parties in relation to supply of packaging materials by the Respondent to the Appellant is not disputed. If it is to be considered that this is an action in respect of the said unwritten contract, then the action would have been prescribed only after a period of three years from the time the money claimed for became due on the Respondents.

However, we have to take into consideration section 8 of the Prescription Ordinance, which reads as follows:-

> "*No action shall be maintainable for or in respect of any goods sold and delivered, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants, unless the same shall be brought within one year after the debt shall have become due*."

This section clearly sets out that if the action is for or in respect of inter alia "goods sold and delivered" the action will be prescribed after a lapse of one year from the time the cause of action arose.

Where a given cause of action appears to fall within the scope of more than one provision of a statute, our Courts have consistently held that specific provision must be operative while the general provision must be taken to affect only other parts of the Statute to which it may properly apply [***Campbell & Co. v. Wijesekere*** **(1920) 21 N.L.R. 431;** ***Ceylon Insurance Company Ltd., v. Diesel and Motor Engineering Company Ltd*****. (supra);** ***Brown & Co., Ltd v. G. S. Fernando*** **(1986) 2 Sri.L.R. 177**].

The question as to whether it is section 7 or section 8 of the Prescription Ordinance that may be considered as the specific section out of the two has been considered by Court on many an occasion.

In ***Walker, Sons & Co. Ltd. v. Kandyah*** **(1919) 21 N.L.R. 317** where the plaintiff, a motor firm, sued the defendant to recover a certain sum of money for repairs done to the defendant's motor car and for materials supplied in connection with that work. It was submitted on behalf of the defendant that that this was an action for work and labour done and goods sold and delivered which comes under section 9 (now section 8) of the Prescription Ordinance while it was pleaded on behalf of the Plaintiff that the action was based on an unwritten contract between the parties. De Sampayo J. (At p. 319) held:

> "*If the correspondence does not constitute a written contract, it must be conceded that there was an unwritten contract. But then comes section 9, which appears to provide specially for actions on certain classes of unwritten contracts, and I think that actions for work and labour done and goods sold and delivered, though these are unwritten contracts, come within section 9.*"

Similarly, Garvin, J. in the case ***Assen Cutty v. Brooke Bond Ltd*** **(supra. 190)** held:

> *"The actions for goods sold and delivered contemplated by section 9 in so far as they are not based on written contracts are embraced by the general words of section 8 "or upon any unwritten promise, contract, bargain or agreement". But if we read these two sections, as I think we must, so as to give a distinct interpretation to each of these sections we are driven to the conclusion that the object of the legislature was to exclude from section 8 the actions for which special provision is made by section 9.*"

In ***Dharmaratne v. Fernando*** **(supra)** the action was based on an unwritten promise to pay the balance purchase price for goods sold and delivered. It was held that in regard to the issue of prescription, the action was governed by section 8 and not section 7 of the Prescription Ordinance.

In ***Ceylon Insurance Co. Ltd. v. Diesel and Motor Engineering Co. Ltd.*** **(supra)** the Supreme Court made a comprehensive review of its decisions and concluded that in the case of written promises or contracts, section 6 being the particular enactment must in keeping with the rules of interpretation prevail over section 8 of the Prescription Ordinance which is the general section. It was further held that in the case of unwritten contracts, section

8 of the Prescription Ordinance would be the particular enactment to which the general section 7 must give way.

These authorities establish that section 8 of the Prescription Ordinance is the specific provision which will be operative where the cause of action of the case falls within the scope of both sections 7 and 8. An action "*for or in respect of any goods sold and* delivered" will be prescribed by a period of one year even if it is based on an unwritten contract between the parties to the action in relation to such "*goods sold and delivered*".

I am of the view that this is indeed the correct legal analysis of the interface between sections 7 and 8 of the Prescription Ordinance. A sale of goods transaction can be based on either a written or unwritten contract. A claim for the price of goods sold and delivered under a *written contract* is governed by section 6 of the Prescription Ordinance. If a claim for the price of goods sold and delivered under an *unwritten contract* is held to be governed by section 7 of the Prescription Ordinance, the words "*goods sold and delivered"* in section 8 become redundant. In interpreting any section of an Act, the Court cannot make any part of the Act superfluous. Accordingly, I hold that a claim for the price of goods sold and delivered on an unwritten contract, falls within section 8 of the Prescription Ordinance.

It must now be ascertained whether the claim in the instant action is based on the "*goods sold and delivered*" as contemplated by section 8 of the Prescription Ordinance. In the case of ***Markar v. Hassen*** **(2 N.L.R. 218)** it was held that the term "goods" in section 9 (now 8) of the Prescription Ordinance means "*movable property*,". Therefore, the packaging material supplied by the Respondent to the Appellant meets the definition of the term "goods" as defined in section 8 of the Prescription Ordinance. Further, in **Assen *Cutty v. Brook Bond Ltd*** **(supra. 190)** Garvin, S.P.J. held that, "*an action for goods sold and delivered*" under section 8 should be considered as meaning actions for the recovery of the price or value of goods sold and delivered.

In the instant case, the action was instituted to recover monies due to the Respondent from the Appellant, on a goods sold and delivered transaction, and hence the issue of prescription is governed by section 8 of the Prescription Ordinance. Hence, I answer question of law No. 1 in the affirmative.

Question of Law No. 2

The debt becomes due on the date on which the price was payable for the goods sold and delivered. Both the lower courts did not make any finding as to the date on which the cause of action arose.

The document marked P4 indicates that the amount claimed is payable on goods sold and delivered on six invoices. The goods were sold and delivered on the basis of a 45-day credit. These 6 invoices are dated from 14.05.2007, 14.05.2007, 15.06.2007, 30.06.2007, 30.06.2007, 30.07.2007, 31.07.2007, 07.08.2007 and 31.10.2007. The total amount due on the six invoices as claimed in the plaint is Rs. 2,100,103.30. This action was filed on 4.11.2008. Consequently, the action on all invoices, with the exception of the last invoice dated 31.10.2007, since goods were sold and delivered on the basis of a 45-day credit, for Rs. 190,874.10 was prescribed by the time this action was filed. Therefore, the action of the Respondent for a sum of Rs. 1,909,229.20 (2,100,103.30-190,874.10) is prescribed unless there is an acknowledgement within the meaning of section 12 of the Prescription Ordinance which reads as follows:

> "*In any forms of action referred to in sections 5,6,7,8,10 and 11 of this Ordinance, no acknowledgment or promise by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said sections, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable ...*"

The effect of this section is that if there is an acknowledgment or promise made or contained in writing signed by the party chargeable, it shall be deemed evidence of a new or continuing contract and it would take the case out of the operation of the foregoing provisions of the Ordinance.

Hence the Court must determine whether the Appellant has made any acknowledgement of the debt which takes the action outside the operation of section 8 of the Prescription Ordinance.

In determining Question of Law No. 2, we must address two separate and distinct issues, namely:

(i) Is document marked V3 an acknowledgement within the meaning of section 12 of the Prescription Ordinance (Acknowledgment)?

(ii) If so, has this action being filed within the relevant period (Relevant Period)?

Acknowledgment

As we must interpret the contents of the letter marked V3, it is reproduced verbatim below:

28/02/2008

M.A.M. Siriwardana
Asst Sales Manager,
Capital Printpack (Pvt) Ltd
Colombo 14,

Dear Sir,

SUB RE –SETTLEMENT OF RS 2,100,103.30

Your correspondence of 17.09.2007, 06.02.2008, and our replies dated on the above subject matter of 11.10.2007 and 06.02.2008 refers.

Kindly peruse to the above dated correspondences where you can draw a very clear picture of the total loss incurred by us to wit.

(a) Total wrapper cost 1015806 x27025 = 2745215.715
(b) Total production cost 1015806 x12 = 12189672.00
Total loss = 14934887.72

We presume that you are not well aware of the pacts that when your own valuable and responsible officer Mr Malintha ,who had personally visited, checked and inspected
With his own sight of the defective materials lying at our stores premises at Mawanella and had failed to submit a comprehensive detail report of his inspection to your management.

But what We observed in your letter dated 06.02.2008, nothing whatsoever is mentioned about the inspection made by Mr Malintha of the defective materials

We wish to suggest that an responsible officer be sent to our factory to see the defective materials lying at this end without the other defects at Jaffna which could not be collected due to the present situation prevailing in the north.
Once this is one We can come to A very cordial and understanding settlement of
setting
The dues with a generous gesture for the defective materials amount on your part

Thanking you,
Yours Faithfully,
…….
A.A. Nawarathna
(Assi. Operations Manager)

In examining whether this letter is an acknowledgment within the meaning of section 12 of the Prescription Ordinance, I will, where appropriate, refer to English decisions as section 12 of Prescription Ordinance has been copied verbatim from Lord Tenterden's Act (Statute of Frauds Amendment Act, 1928) [Weeramantry, *The Law of Contracts*, Vol. II, 803].

In ***Hoare & Co. v. Rajaratnam*** **(34 NLR 219 at 223)** Drieberg J. cited with approval the dicta by Bankes, L.J. in ***Fettes v. Robertson*** **[(1921) 37 T.L.R. 581]** that it is important *"never to lose sight of the fact that what a plaintiff has to prove is a promise express or implied, to pay the debt, made within six years before action, and that any consideration of an acknowledgment is merely for the purpose of seeing whether the acknowledgment is expressed in such language that an unqualified promise to pay can be implied from it."*

The letter V3 forms part of the correspondence commencing with letters dated 17.09.2007 (P3) and 06.02.2008 (P4) sent by the Respondent. By P4, the Respondent specifically claimed an amount of Rs. 2,100,103.30 for goods sold and delivered. The Appellant in V3 does not contest that it received the goods at issue. Nor does it claim that the price of the said merchandise sold and received has been paid. Rather, the Appellant argues that the goods are defective and therefore it suffered damages that must be deducted from the amount claimed by the Respondent.

In ***Rodrigo v. Jinasena & Co.*** **(32 N.L.R. 322 at 324)** Maartensz A.J. cited with approval the decision of ***In Re River Steamer Company, Mitchell's Claim*** **[(1870-1871) 6 L.R.Ch. 822]** for the proposition that an acknowledgment coupled with an assertion that the debtor has a set off sufficient to countervail the debt is not sufficient to take the claim out of the Statute of Limitations. Nevertheless, an attentive reading of this decision shows that the Court found that no promise of payment could result from it because the set-off claimed left the debtor no debt to the other party.

The present case is distinguishable from the facts and circumstances of ***In Re River Steamer Company, Mitchell's Claim*** **(supra)**. There is no doubt that letter V3 claims a sum of damages higher than the amount claimed by the Respondent as the price due on the goods sold and delivered. Nevertheless, the writer of V3 ends the letter with the words "*Once this is one We can come to A very cordial and understanding settlement of setting The dues with a generous gesture for the defective materials amount on your part"*(emphasis added). Having waded through the grammatical and spelling mistakes in V3, the plain import of this statement to me is that upon an inspection of the alleged defective material supplied by the Respondent is done, the Appellant is willing to come to an understanding for the settlement of the dues with a generous gesture on the part of the Respondent for the defective materials. This is an acknowledgment that the sum that may actually be due to it as damages for defective goods is less than the sum claimed by the Respondent as the amount due for the goods supplied. Therein lies the acknowledgment of the debt on the part of the Appellant.

In ***Perera v. Wickremaratne*** **(43 NLR 141 at 142)** Soertsz J. held:

> *"'I wish to settle' is not merely an acknowledgment of the debt from which a promise to pay can be inferred but it is an acknowledgment with an express declaration of a desire to pay. It has frequently been laid down that when there is an acknowledgment of a debt without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred. Much more, then, must such a promise be inferred when the acknowledgment is coupled with an expression of desire to pay."* (emphasis added)

Moreover, the Appellant cross-claimed for the damages allegedly due in respect of defective goods. However, the learned trial judge concluded that the Appellant had failed to establish that the goods were defective. Hence, the claim by the Appellant for damages was not in any event proved.

It is important to acknowledge that the letter V3 makes no reference to the amount owed to the Respondent by the Appellant. Whether an acknowledgment of a debt must clearly identify the amount due arose for consideration in ***Dungate v. Dungate*** **[(1965) 1 WLR 1477 at 1487]** where Diplock LJ said that *"an acknowledgment under this Act need not identify the amount of the debt and may acknowledge a general indebtedness, provided that the amount of the debt can be ascertained by extraneous evidence"*.

The amount payable by the Appellant to the Respondent is set out in letter P4. As noted earlier, the Appellant did not deny that the Respondent had supplied these products. Nor did it claim to have paid the price of the said merchandise. Moreover, the trial judge concluded that this amount is in fact payable by the Appellant for the goods sold and delivered by the Respondent. Therefore, there is extraneous evidence that establishes the amount of the debt.

In this context, the question arises as to whether an acknowledgment of the debt within the meaning of section 12 of the Prescription Ordinance must be done before the action is prescribed. In ***Albert and Others v. Sivakumar*** **[S.C. (CHC) Appeal 04/2007; S.C.M. 23.01.2023]** I held that the *legal effect of sections 5 to 10 of the Prescription Ordinance is only to bar action on the cause of action and not extinguishment of the cause of action itself* and as such there is no rational justification to insist that to be effective, an acknowledgment must be made before the expiry of the limitation period.

Therefore, the date on which the cause of action accrued in favour of the Respondent is irrelevant in determining whether a valid acknowledgement was made. A valid acknowledgment may be made even after the *action is prescribed* by any provision of the Prescription Ordinance.

For the foregoing reasons, I hold that the letter V3 amounts to an acknowledgment of the debt and interrupts the operation of prescription which must therefore start afresh.

Relevant Period

We must determine whether the action was commenced within the applicable period from the date of the acknowledgement in document V3. The issue is which is the applicable provision in the Prescription Ordinance which determines the time within which this action should have been filed from the date of the valid acknowledgment. Is the relevant time to be determined by applying the time frame for the original cause of action or is it to be determined by considering the acknowledgment to be a contract within the meaning of section 6 of the Prescription Ordinance?

In ***Albert and Others v. Sivakumar*** **(supra)** I further held that upon an acknowledgment of the debt was made by the debtor, to use the colourful words of Lawton J. in ***Busch v. Stevens*** **[(1962) 1 All E.R. 412 at 415]**, *the right of action is given a notional birthday and, on that day, like the phoenix of fable, it rises again in renewed youth-and also like the phoenix, it is still itself*.

Hence, in the present case, the original cause of action, namely failure to pay the price payable on goods sold and delivered survives and as such the action should have been filed within one year from the date of acknowledgment in terms of section 8 of the Prescription Ordinance. Any other interpretation works to the detriment of the debtor and in favour of the creditor by giving him 6 years' time from the date of acknowledgment to file action when he should do so within one year in terms of the original cause of action.

The date of acknowledgment in terms of document marked V3 is 28.02.2008, and the action was filed on 04.11.2008. Accordingly, I hold that this action was filed within one year from the date of acknowledgement and is not time barred. Hence, question no. 2 is answered in the affirmative.

For the foregoing reasons, the appeal is dismissed with costs. The Appellant shall pay the costs of the Respondent in the two lower courts.

Appeal dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court