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

Case No SC (CHC) Appeal 13/2001

Commercial High Court No CHC 15/99 (1)

People`s Bank

No 75, Sir Chittampalam A Gardiner mawatha

Colombo 02

PLAINTIFF

Vs

Lokuge International Garments Ltd.

No 10, Parsons Road,

Colombo02

DEFENDANT

AND NOW

People`s Bank

No 75, Sir Chittampalam A Gardiner mawatha

Colombo 02

PLAINTIFF-APPELLANT

Vs

Lokuge International Garments Ltd.

No 10, Parsons Road,

Colombo02

DEFENDANT-

RESPONDENT

Before	**:**	**JAN de Silva CJ**
		Sripavan J
		Ekanayake J
Counsel	**:**	**Rasika Dissanayake for Plaintiff-Appellant**
		Navin Marapana for Defendant-Respondent
Argued on	**:**	**20-11-2009**
Decided on	**:**	

JAN de SILVA CJ

This is an appeal from a judgment of the commercial High Court of the western province. It concerns a transaction between the appellant bank and the defendant who is a customer of the said bank involving a certain export bill of exchange. The appellant alleges that the defendant had neglected to pay certain sums owing to the plaintiff bank.

The learned High Court judge had with the consent of the parties heard issues 14 and 16 as preliminary issues.

Namely,

14. is the plaintiff`s cause of action prescribed in law in terms of the provisions of the prescription ordinance?

16. Is the defendant estopped in law from claiming any benefit on the plea of prescription as the defendant has already admitted paragraphs 1, 2,3,5,6 and 8 of the plaint and documents marked “P2” and “P4”?

It was the contention of the counsel for the appellant that the learned judge had erred in hearing the said issues as a preliminary issue.

Section 147 of the civil procedure code reads thus,

> “*when issues of both law and fact arise in the same action, **and the court is of opinion that the case may be disposed of on the issues of law only**, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined*.”

In **Pure Beverages Ltd. v. Shanil Fernando** (vide 1997 (3) SLR 202), it was held that only pure questions of law should be tried as preliminary issues.

De Z. Gunawardena, J. Was of the view that

> **“**An issue can be tried in limine, that is, as a preliminary issue, only if that issue is an issue of law **and the factual position, from which that issue of law emaciates, is common-ground.** If an issue of law arises

> in relation to a fact or factual position in regard to which parties are at variance that issue cannot and ought not to be tried first, as a preliminary issue of law"

I am mindful of the fact that the counsel for the plaintiff consented to hearing the issues number 14 and 16 as preliminary issues. Therefore this court must first decide as to whether this court is precluded from hearing the above argument.

The appellant submits in the main that the action was revived by a letter purportedly sent by the defendant admitting liability.

In **Moorthiapillai v. Sivakaminathapillai** (14 NLR 30) Hutchinson C.J was of the view that,

> "When the time has expired within which an action to recover a debt is maintainable, and the debtor afterwards promises in writing to pay the debt, or makes a payment on account of it, the effect of the promise in writing or of the payment (from which a promise to pay the balance is inferred) is to take the case out of the operation of the enactments which prescribe the time within which an action must be brought."

Justice C.G. Weeramantry in his treatise "The Law of Contracts" appears to concur. He refers to Wigram V.C. `s observations in Philips v. Philips and states that the position in Ceylon is similar to that of in England.

> "An acknowledgement even after the full period of prescription has run, will take the case out of the statute"

The very recent judgment of **Bradford & Bingley plc v. Rashid [2006] UKHL 37** also confirms the English law position.

On examining the available authorities on the question of revival I am inclined to agree that such a letter would revive the action and prescription would begin to run anew.

The appellants further argue that a second letter of demand would have the same effect. This proposition deserves closer scrutiny.

A letter of demand is inherently charasterically different from an admission of liability. The law of limitations was introduced due to strong policy reasons. One of which is that a defendant should not have the cloud of impending litigation hovering above him indefinitely. When liability is admitted at some point before the term of prescription ends, this operates as a renewal of the running of prescription.

This should not be the position with regard to letters of demand which originate from the plaintiff. Such a principle would bring about the anomalous result of renewing the running of prescription each time a letter of demand is sent by the plaintiff. This is irreconcilable with the policy objectives of the statute of limitations set out previously. Therefore I am of the opinion that the learned High Court judge was correct in deciding that a second letter of demand, if one existed, would not revive the action.

Next I draw my attention to the letter that is alleged to be one which the defendant admits his liability. The letter first surfaces annexed to the written

submissions filed by the appellant counsel. Whilst the contents are suggestive, I am precluded from considering its contents as the validity of the document in issue. This court is a court of law which hears appeals on judgments and orders made by lower courts with regard to facts proven before such courts. Where a fact is not proven by the party on which the burden of doing so is on, such statements must be altogether discarded.

Written submissions offer court a speedy and effective method of disposing hearings as supplementary to oral advocacy. It does not offer an opportunity to a judge to consider evidence that is inadmissible although they may be submitted as evidence. The judge can only consider what is proven before him or that which is admitted.

Several sections of the civil procedure code permit the presentation of documents to court. Sections 49 and 50 require a plaintiff to annex to the plaint a list of documents he relies on as evidence. Section 121 (2) requires a plaintiff to file in court a list of documents which he relies on as evidence and which he wishes to produce at the trial. Section 175(2) provides for the production of documents not in such list upon obtaining leave from court.

Now it is clear that the appellant has not utilised any of the provisions adverted to above. The letter dated 1993-03-16 is first mentioned in averment 11 of the plaint. As stated previously the plaintiff had neglected to annex the letter as part and parcel of the plaint.

It is quite possible that the significance of the letter dawned on the plaintiff at a later stage as the plaintiff attempts to draw the learned High Court judge's attention to the said letter in his written submissions. However the learned High

Court judge has dealt mainly with the consequences of the possible existence of a second letter of demand dated 1998-09-16, which too had not been produced before court.

Furthermore the written submissions addressed to both this court and to the High Court cite subsequent letters purportedly originating from the respondent bank admitting its liability(vide paragraphs 10 and 11)

Having decided on the admissibility of these documents at this stage of the proceedings, I now consider as to whether the learned High Court judge ought to have tried issues no 14 and 16 as preliminary issues.

It is worth noting that at the very inception both parties consented to disposing of issues 14 and 16 as preliminary issues.

Section 147 requires court to form an opinion as to whether a case could be disposed of on the issues of law only and only thereupon should court on the said issues of law first.

The learned High Court judge has in this instance framed fifteen issues as suggested by the parties. Thereupon the learned judge moves to try issues 14 and 16 first.

However issue no 4(a) deserves closer scrutiny. It reads,

> "**As set out in paragraph 11 of the plaint,** did the defendant attempt to make alternative arrangement to cause the value of the said bill of exchange to be paid to the plaintiff bank?"

Paragraph 11 of the plaint makes reference to the letter dated 16-3-1993, where allegedly, the defendant seeks to introduce an alternative buyer to the plaintiff bank. Paragraph 11 is denied by the defendant and places the burden of proving such on the plaintiff.

Therefore it is clear that the fact of the existence of the said letter was a matter of controversy between the parties. I am also of the opinion that the finding on this issue has a direct bearing on issue no 14. In other words issue no 14 cannot be conclusively decided without first deciding on issue Number 11. Therefore it follows that issue 14 cannot be considered a pure question of law. Therefore it is my position that the learned High Court judge had erred in forming an opinion that issues no 14 and 16 can dispose of the case completely.

It may be that had no such issue been framed and the letter dated 16-3-1993 was not identified as being in issue, then the learned High Court judge would have been correct in deciding the case on issues 14 and 16 as preliminary issues. This is because once issues are framed the pleadings recede to the background (Hanafi v. Nallamma 1998 (1) SLR 73) and irrespective of the pleadings the judge is expected to decide on the case as crystallised in the issues. In this instance having identified the letter dated 16-3-1993 as a matter in issue between the two parties, and one which has a bearing on issue no 14, the learned judge ought not have decided the case on the preliminary issues 14 and 16 even though to the learned judge`s credit, it was the wishes of the parties to do so.

In the above circumstances I set aside the judgment of the learned High Court judge dated 25-05-2001 and direct him to try the case on all the issues. I make no order with regard to costs.

Chief Justice

Sripavan J

I agree.

Judge of the Supreme Court

C. Ekanayake J.

I agree.

Judge of the Supreme Court