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

Industrial and Commercial Development [Private] Ltd
No.30, Sea View Avenue
Colombo 03

1st Defendant-Appellant

S.C.CHC Appeal No.33/2009
HC (Civil) 232/05(1)

Vs.

International Cement Traders [Pvt] Ltd., No.44/1, New Nugegoda Road
Peliyagoda

Plaintiff-Respondent

Devco Showa [Private] Ltd
New Nugegoda Road
Peliyagoda

2nd Defendant-Respondent

BEFORE : **S.E.WANASUNDERA, PC J.**
ANIL GOONARATNE, J.
K.T.CHITRASIRI, J.

COUNSEL : K.Kanag-Iswaran P.C with Lakshman Jayakumar for the 1st defendant-appellant
Sanjeewa Jayawardane P.C with Kamran Aziz and Lakmini Warusawithana for the plaintiff-respondent

ARGUED ON : **20.01.2016**

WRITTEN SUBMISSIONS ON : 14.06.2013 by the Plaintiff-Respondent
09.05.2014 by the Defendant-Appellant

DECIDED ON : **17.02.2016**

CHITRASIRI, J.

The 1st defendant-appellant (hereinafter sometimes referred to as the 1st defendant) is a company engaged in construction work whilst the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) is a company selling cement imported from other countries. The 2nd defendant-respondent did not participate at the trial and the case against it had been laid by. It has no interest in the matter.

Plaintiff instituted this action by the plaint dated 26.10.2006 pleading 27 causes of action relying upon the invoices issued in connection with selling cement to the 1st defendant during the period 01.08.2001 to 18.10.2001. Basically, the plaintiff's claim is for a sum of Rs.3,088,074.51 in respect of supply of bulk cement to the 1st defendant through the 2nd defendant during the aforesaid period. In the plaint, 27 causes of action had been disclosed and of which the first 21 causes of action were on the delivery of cement that had been made on separate occasions and the rest of the causes of action other than the last were on transport charges for the respective deliveries of cement and the last cause of action is on unjust enrichment.

The 1st defendant in its answer having denied any liability as to the claim of the plaintiff has taken up the defence of prescription among other defences. Plaintiff at the outset has raised distinct issues in the original court on each and every causes of action depending on the averments in the plaint.

Having held a protracted trial, learned High Court Judge decided that the plaintiff is entitled to the reliefs that it had prayed for in the prayer to the plaint.

Being aggrieved by the aforesaid decision of the learned High Court Judge, 1st defendant filed this appeal acting under Section 5 of the High Court of the Provinces (Special Provisions) Act No.10 of 1996.

At the commencement of the argument before this Court, Learned President's Counsel for the plaintiff submitted that the petition of appeal of the appellant is not in conformity with the Supreme Court Rules. However, it must be noted that Section 6 of the aforesaid Act No.10 of 1996 clearly stipulates that the procedure adopted in appeals filed to the Supreme Court under Section 5 of the Act shall be the procedure prescribed in Chapter LVIII of the Civil Procedure Code.

Learned President's Counsel for the plaintiff has not raised any objection regarding any specific violation of the provisions contained in the aforesaid Chapter LVIII of the Civil Procedure Code which is the applicable procedure as far as this appeal is concerned. Therefore, the preliminary objection raised on behalf of the plaintiff referring to the Supreme Court Rules is rejected since it has no relevance to this appeal filed against the judgment of the High Court of the Western Province exercising its civil jurisdiction.

Basically, the argument of the learned President's Counsel for the 1st defendant is that the failure on the part of the learned High Court Judge for not addressing her mind to the issue of prescription that was raised on behalf of the 1st defendant. In support of his contention, learned President's Counsel submitted that the plaint of the plaintiff is on the basis of a claim that was made for the goods sold and delivered by the plaintiff to the 1st defendant. Accordingly, he submitted that the claim of the plaintiff is barred by Section 8 of the Prescription Ordinance. Even though the learned President's Counsel for the 1st defendant submitted that the learned trial judge has not addressed her mind to the issue of prescription, it must be noted that the said Section 8 of the Prescription Ordinance was not specifically brought to the notice of the original Court judge in the manner that it was argued in this Court enabling her to consider the issue of prescription in that perspective.

However, this Court is required to consider the applicability of the issue of prescription since it is a question of law which is to be determined even at this appeal stage in terms of Section 758(2) of the Civil Procedure Code. It stipulates thus:

> 758(2) *The Court in deciding any appeal shall not be confined to the grounds set forth by the appellant, but it shall not rest its decision on any ground not set forth by the appellant, unless the respondent has had sufficient opportunity of being heard on that ground.*

Accordingly, I will now advert to the argument advanced relying upon Section 8 of the Prescription Ordinance. The said Section 8 reads thus:

> "*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".*

Having referred to the aforesaid Section 8, Mr.Kanag-Iswaran, P.C. contended that the issue involved in this case amounts to a transaction where the plaintiff had sold and delivered its goods to the 1st defendant. Accordingly, he submitted that the action to recover dues from such a transaction should be brought before Court within a period of one year after the debt became due to the creditor for him to succeed. In **The Law of Contracts [Volume II] by C.G.Weeramantry at paragraph 883**, the manner in which a case falls within Section 8 of the Prescription Ordinance has been discussed. In sub-paragraph (IV) therein he states as follows:

> *"Whether a case falls within the section is determined inter alia by the nature of the agreement in each case, and the mere fact that there is a reference to "goods sold and delivered" in section 8 does not mean that the term of prescription therein stated applies to all actions for goods sold and delivered".*

Also, in sub-paragraph 1 in the aforesaid paragraph 883, Prof. Weeramantry states that Section 8 of the Prescription Ordinance applies only to the goods which are capable of being physically delivered. He also is

mindful of the distinction between the categories of contracts governed by the Sale of Goods Ordinance with that of those referred to in Section 8 of the Prescription Ordinance.

Accordingly, the Court will have to carefully examine the merits of the case in order to determine whether the transaction involved in this matter falls within the category of "goods sold and delivered." In the evidence in chief of the 1st witness for the plaintiff, he has stated that the delivery of cement to the 1st defendant was between the period 14.10.2000 and 31.10.2002. During which period the plaintiff had completed approximately 350 deliveries to the 1st defendant and the defendant had not disputed the same. Therefore, there is no dispute as to the receipt of such consignments of cement by the 1st defendant.

At the time the parties agreed for the above transaction in respect of the selling of cement to the 1st defendant, they also had agreed that the 1st defendant was responsible to make due and prompt payments to the plaintiff for the delivery of cement. [vide at paragraph 7 of the affidavit containing evidence in chief of A.A.0. Ranjith Amarasinghe at page 120 in the appeal brief] In paragraph 22 in that affidavit, he has also stated that the 1st defendant was to pay for the cement supplied and therefore the value of the invoices was always commensurate with the value of the payment. Flowing from this, the total value of the invoices was commensurate to the values of the aggregate payment. Each and every invoice upon which goods were sold

and delivered had been marked in evidence. The last such invoice is dated 18.10.2001. The evidence referred to above had not been contraverted.

In the circumstances, it is clear that the sale of cement to the 1st defendant by the plaintiff was a transaction that fell well within the term "goods sold and delivered". Admittedly, this action was filed on 26.10.2005. The last date of delivery of goods supplied to the 1st defendant by the plaintiff was on 08.11.2001. Therefore, it is clear that this action had been filed after a lapse of a period of one year. Therefore, on the face of the evidence, the action had been prescribed in terms of Section 8 of the Prescription Ordinance.

However, learned President's Counsel for the plaintiff contended that the monies that were due to the plaintiff became due only after the demand was made by the Letter of Demand dated 21.02.2005 that was marked P2 in evidence. (vide at page 84 in the appeal brief) It is common sense to state that when the goods sold and delivered are movables then the value of the goods according to the price that they have agreed would become due to the seller upon completion of the delivery of such goods. In this instance, there was no dispute as to the nature and the delivery of the goods involved. Neither there had been any dispute as to the selling of cement to the 1st defendant by the plaintiff. There was no dispute as to the price of the goods as well.

In the circumstances, soon after the delivery of goods to the buyer, the money due to the seller for those goods becomes payable to the seller and

therefore the said sum of money would be considered as money due to the seller. As mentioned hereinbefore, the last date of the invoice is dated 18.10.2000. Accordingly, it is my opinion that the money due to the plaintiff for the last invoice became due on 18.10.2001 and certainly not upon the demand been made. Hence, I am not inclined to agree with the above contention of the learned President's Counsel for the plaintiff.

Learned President's Counsel for the plaintiff has also submitted that there had been an oral agreement between the parties to this transaction of cement. Accordingly, he contended that the prescriptive period referred to in Section 8 of the Prescription Ordinance shall not apply to this instance. However, in evidence-in-chief of the witnesses who gave evidence on behalf of the plaintiff has not taken up such a position in his evidence. The totality of the evidence led on behalf of the plaintiff had been on the invoices upon which the cement was sold and delivered to the 1st defendant. It is on that footing that the plaint of the plaintiff was also been drafted and filed. Nothing is referred to therein as to any oral or written agreement between the parties.

When the averments in the plaint are read and understood with that of the evidence led in this case, it is clear that it was on the invoices that the cement was sold to the 1st defendant and there was no oral agreement as such between the parties. Indeed, the plaint is clearly on the basis of separate invoices as referred to in paragraph 4 in the plaint. The answer filed by the 1st defendant too had been drafted replying on those averments in the plaint. The

first witness namely Felix Thomas has specifically admitted that there was no written agreement between the parties. (vide at page 160 in the appeal brief) Neither has he said that there had been an oral agreement. In that evidence he had specifically referred to separate transactions based on the respective invoices. Distinct delivery notes also had been marked in evidence by the said witness Thomas to establish that the goods were delivered to the agent of the 1st defendant.

However, it is seen that the second issue of the plaintiff had been raised to establish existence of an agreement entered into between the parties. Upon a perusal of the evidence particularly the evidence in re-examination, it is clear that the position of the plaintiff had always been to recover monies due for the goods that had been sold and delivered to the 1st defendant on the invoices that were marked in evidence and certainly it was not on a written or oral agreement. No questions had been asked either, as to the existence of any agreement between the parties.

The plaintiff had relied upon the document marked P29 (Running Debtors Statement) P42 & P43 in support of the aforesaid contention namely the existence of an agreement between the parties. In those documents a summary of the monies due to the plaintiff had been described. Referring to those documents learned President's Counsel for the plaintiff submitted that those are the documents that indicate an agreement between the two parties. Admittedly, those documents (P29, P42 and P43) had been prepared after

filing of this action. It was admitted so, by the witness for the plaintiff himself and he has clearly stated that in his evidence. (vide at page 213 in the appeal brief) Therefore, the evidence found in those three documents cannot be considered to decide the issue since those had come into place after filing of this action.

In the case of Adamjee Luckmanjee and sons Ltd. Vs. Abdul Careem Hallaje, [63 NLR 407 at 408] the manner in which debt due for the goods sold and delivered had been distinguished with that of an existence of a written letter accepting the amount due. This issue was again extensively discussed in **Ceylon Insurance Company Ltd vs. Diesel and Motor Engineering Company Ltd. [79 NLR Part II at page 5)** as well. No specific acceptance of the debt by the defendant had been produced in this instance. As mentioned in the preceding paragraph, the contents in the documents marked P29, P42 and P43 cannot be considered as evidence in this instance.

In the circumstances, as referred to above, it is clear that this action of the plaintiff had been to recover monies due to it for the goods sold and delivered to the 1st defendant on the invoices marked in evidence. Also, no evidence is forthcoming as to an existence of any written or oral agreement between the parties. The claim of the plaintiff was to sell and deliver its goods to the 1st defendant on the respective invoices.

Furthermore, this action had been filed after a lapse of one year after the date of the last invoice namely, 18.10.2001. Admittedly, the plaint had been filed on 26.10.2005. In the circumstances, it is clear that the positive rule of law referred to in Section 8 of the Prescription Ordinance shall apply in this instance. Accordingly, it is my opinion that this action is to be dismissed in view of the time frame referred to in the aforesaid Section 8 of the Prescription Ordinance.

For the aforesaid reasons, this appeal is allowed. Action of the plaintiff filed in the High Court is dismissed. I make no order as to the costs of this action.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC J.

I agree

JUDGE OF THE SUPREME COURT

ANIL GOONARATNE, J.

I agree

JUDGE OF THE SUPREME COURT