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

In the matter of an appeal in terms of Chapter LVIII and in particular in terms of Section 754 (1) of the Civil Procedure Code read together with the provisions Section 5 and 6 of the High Court of Provinces (Special Provisions) Act No. 10 of 1996 against the Judgment of the Learned High Court Judge of the Commercial High Court of Colombo delivered on 12.12.2006.

1. S. Albert
2. A. Chakravarthy
3. A. Muralitharan
4. A. Muthukumaran
5. Miss N. Vadivuvathi
6. Miss T. Usha
7. Miss Susila Amal
8. Miss C. Ponmalar
9. Miss M. Pon Niraajan

All of No. 22, Lind Main Road, Kattoor Gardens, Kottoorpuram, Chennai No. 85, carrying on business in partnership in India under the name and style of S. Albert & Company duly registered in India. The Head Office situated at No. 75, Yavun Rajah Street, Tuticorin G. 628001 and the Branch Office situated at 13/1, Vanels Road, Egmore, Chennai.

Plaintiffs

S.C. (CHC) Appeal No. 04/2007
HC/Civil/183/2002 (1)

Vs.

S. Sivakumar,
Carrying on business in sole proprietorship under the name and style of "Udaya Enterprises" at P-168, 5th Cross street, Colombo 11.
Presently S. Sivakumar,
No.88, Wasala Road, Colombo 13

Defendant

AND NOW BETWEEN

1. S. Albert
2. A. Chakravarthy
3. A. Muralitharan
4. A. Muthukumaran
5. Miss N. Vadivuvathi
6. Miss T. Usha
7. Miss Susila Amal
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Plaintiff-Appellants

Vs.

S. Sivakumar,
Carrying on business in sole proprietorship under the name and style of "Udaya Enterprises" at P-168, 5th Cross street, Colombo 11.
Presently S. Sivakumar,
No.88, Wasala Road, Colombo 13

Defendant-Respondent

Before: **S. Thurairaja, P.C., J.**

A.L. Shiran Gooneratne, J.

Janak De Silva, J.

Counsel:

Kushan De Alwis, P.C. with Kaushalya Nawarathna and Sashendra Mudannayake instructed by K. Upendra Gunesekara for the Plaintiff-Appellant

N.R. Sivendran with Ms. U. Kalehewatta Thavenesan and Fernando Attorneys-at-Law for the Defendant-Respondent

Written Submissions tendered on:

11.06.2012 and 15.03.2022 by the Plaintiff -Appellants

27.04.2012 and 07.03.2022 by the Defendant-Respondent

Argued on: 21.02.2022

Decided on: 23.01.2023

Janak De Silva, J.

This appeal arises from the judgment of the Provincial High Court of the Western Province (Exercising Original Civil Jurisdiction) Holden in Colombo ("High Court") dated 12.12.2006.

In or around December, 1997 and January, 1998, the Plaintiff-Appellants ("Appellants") sold and exported 225 metric tons of parboiled rice to the Defendant-Respondent ("Respondent"). It was sold and exported under two invoices bearing numbers SAC/MS/205/97-98 dated 27.12.1997 ("P2") for 100 metric tons of rice to the value of USD 27,500/- and SAC/MS/217/97-98 dated 02.01.1998 ("P4") for 125 metric tons of rice to the value of USD 34,375/-.

Excluding a part payment of USD 7000/-, made for the amount due under the invoice marked P2, no further payments were made by the Respondent to settle the amount owed under these transactions. Therefore, an amount of USD 54,875/- was due to the Appellants by the Respondent.

By fax dated 07.07.2000 ("P6"), the Appellants requested that the Respondent pay the outstanding balance. In response, by letter of 21st August, 2000 ("P7"), the Respondent informed the Appellants that arrangements are being made to settle the said sum of USD 54,875/- within one year. While the Appellants acknowledged the receipt of P7 by letter dated 23.08.2000 ("P8") and thanked the Respondent, subsequently by letter dated 06.11.2000 ("P9") they informed the Respondent that the payment of the said sum of USD 54,875/- must be made within one month's time.

Since the Respondent failed to make any payment, the Appellants by letter of demand dated 08.01.2001 called upon the Respondent to make payment within fourteen days of receipt of the said letter. Subsequently, on or about 01.06.2001, the Appellants brought this action before the High Court against the Respondent seeking recovery of the said sum of USD 54,875/-.

After trial, the learned High Court Judge concluded that the Respondent owed the Appellant USD 54,875/- for rice sold and delivered. However, he dismissed the action on the basis that it was prescribed. He proceeded on the basis that the action is one for *goods sold and delivered* thus falling within the ambit of section 8 of the Prescription Ordinance. He rejected the position that P7 is an acknowledgement and concluded that, even if taken into account, the action must fail because it was not based on P7.

Aggrieved by the judgment, the Appellants have preferred this appeal. According to journal entry dated 02.12.2011, the learned counsel for both parties agreed that the written submissions maybe confined to the matters set out in paragraph 10 of the Petition of Appeal. The Respondent has, in his written submissions, sought to put forward the position that this is a suggestion made by the Court and seeks to rely on other grounds to oppose this appeal. The journal entry clearly indicates that the grounds on which the

appeal is to be decided was agreed upon by both counsels. Therefore, I am not inclined to consider reasons other than paragraph 10 of the petition of appeal.

They are:

"*10. The Plaintiff-Appellants plead that in the circumstances the following substantial questions of law arise for Your Lordship's determination:*

(a) Does the letter dated 21.08.2000 marked P7 sent by the Defendant-Respondent to the Plaintiff-Appellants, amount to an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the Plaint?

(b) If so, in any event, is the cause of action of the Plaintiff-Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance?

(c) *Thus, has the Learned Judge erred in holding that the cause of action of the Plaintiff-Appellants is prescribed in law?*"

Is P7 an acknowledgment of liability?

The first point to be determined is whether the document marked P7 is an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the plaint.

However, before addressing this issue, I consider it relevant to deal with a submission made both before the trial court and before us on behalf of the Respondent. It was argued that the Respondent did not draft the contents of the document marked P7, but merely signed a blank document at the Appellants' request.

The document marked P7 is addressed to S. Albert and Company, the partnership business run by the Appellants and it is written on a letter head of M/S Uthaya Enterprises, the sole proprietorship business owned and run by the Respondent. Most importantly, the letter is signed by the Respondent, which was accepted by the Respondent during his testimony.

Addressing this submission of the Respondent, the learned Judge of the High Court has held as follows:

> "තව ද, මෙම සාක්ෂිකරු සාක්ෂි දෙමින් ප්‍රකාශ කර ඇත්තේ, පැ. 7 වශයෙන් සළකුණු කර ඇති ලිපිය මගින් විත්තිකරු මෙම මුදල් පැමිණිලිකරුවන් වෙත ගෙවීමට ඇති බව පිළි ගෙන ඇති බවයි. එම ලිපියේ ඇති අත්සන විත්තිකරුගේ බව විත්තිකරු සාක්ෂි දෙමින් පිළි ගෙන ඇත. (ඒ සඳහා බලන්න 2006.03.28 වන දින නඩු සටහන්වල 12 සහ 13 වන පිටු) ඒ සම්බන්ධයෙන් විත්තිකරු සාක්ෂි දෙමින් ප්‍රකාශ කර ඇත්තේ, එහි අත්සන ඔහුගේ බවත්, අත්සන් කරලා භාර දුන් නමුත්, එම ලිපිය විත්තිකරුගේ ලිපි ශීර්ෂයක නොතිබුන බවත්ය. නමුත් එහි ඇති ලිපි ශීර්ෂයේ විත්තිකරු සතු ව්‍යාපාරයේ නම සදහන්ව ඇත. නෙසේ වෙතත්, එම ලිපි ශීර්ෂයට වෙනස් ආකාරයේ ලිපි ශීර්ෂයක් වෙළදාම් කටයුතුවලදී, විත්තිකරු විසින් යොදා ගන්නා බවට විත්තිකරු සාක්ෂි දෙමින් පවසා ඇති අතර, පැ.14 දරණ ලේඛණයේ ඇති ලිපි ශීර්ෂය විත්තිකරු භාවිතා කරන ලිපි ශීර්ෂය බවට කරුණු ඉදිරිපත් කර ඇත.
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> කෙසේ නමුත්, පැ.7 දරණ ලිපියේ අත්සන විත්තිකරුගේ බවට ඔහු පිළිගෙන ඇත. එම ලිපියේ ඇති කරුණු පිළි නොගෙන, එවැනි වැදගත් කරුණු අඩංගු ලිපියකට මෙවැනි ව්‍යාපාරවල යෙදෙන පුද්ගලයෙකු අත්සන් කළා යයි කියන කරුණ, පිළි ගත නොහැක. එම ලිපියට අනුව විත්තිකරු විසින් පැහැදිලිව ම පැමිණිලිකාර සමාගම වෙත ඇමරිකානු ඩොලර් 54,875/= ක මුදලක් ගෙවීමට ඇති බව පිළි ගනිමින්, එය වර්ෂයක් ඇතුළත ගෙවන බවට පොරොන්දු වී ඇත. එහි පැහැදිලිව ම අදාළ ඉන්වොයිස් පත්‍රවල අංකයන් ද සදහන් කර ඇත. ඒ අනුව පැ.7 දරණ එම ලිපිය මගින් විත්තිකරු පැමිණිලිකරුවන් ඇමරිකානු ඩොලර් 54,875/= ක මුදලක් මෙම සහල් ආනයනය කිරීම හේතුවෙන් ගෙවීමට ඇති බවට තීරණය කරමි."

Furthermore, the Learned Judge of the High Court answered in the affirmative issue no. 9 raised on behalf of the Appellants which reads as follows:

> *"9. Finally, by his letter dated 21/08/2000 has the defendant requested further one year to settle the said money?"*

Hence there is no doubt that the learned High Court Judge considered the document marked P7 to be a genuine document signed by the Respondent voluntarily with full knowledge as to its contents.

The primary findings of fact by trial judges who hear and observe witnesses should not be mildly disturbed on appeal. Moreover, upon perusal of the brief, I find no reason to reject the findings of the learned Judge of the High Court as to the authenticity of the document marked P7. As such I will proceed on the basis that the Respondent is the author and signatory (signee) of the document marked P7.

The relevant parts of P7 read as follows:

"*NON REALIZATION OF PARBOILED RICE EXPORT BILLS*
UNDER INVOICE NO. SAC/MS/205/97-98- USD. 27,500/-
AND INVOICE NO. SAC/MS/217/97-98- USD. 34,375/-"

"*WE ARE ALSO WISH TO STATE THAT OUR BUSINESS AT PRESENT ARE VERY SLOW, HOWEVER ARRANGEMENTS WILL BE MADE TO SETTLE THE BALANCE OUTSTANDING AMOUNT OF USD. 54,875/- WITHIN ONE YEARS TIME.*"

It is seen that the heading of P7 makes specific reference to the invoices marked P2 and P4. It is followed by an unequivocal statement that arrangements will be made to pay the outstanding balance within one year. The acknowledgement is in writing and refers to the exact amount that the Appellants are pursuing. Most significantly, it is signed by the Respondent. P7 is thus both an acknowledgement of the debt and an undertaking to pay it within one year. Accordingly, I have no hesitation in holding that the letter dated 21.08.2000 marked P7 sent by the Respondent to the Appellants, amounts to an acknowledgment of liability in writing to pay the sum claimed for in the prayer to the Plaint.

If so, in any event, is the cause of action of the Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance?

The question is premised on the basis that the Prescription Ordinance No. 22 of 1871 as amended ("Prescription Ordinance") extinguishes the cause of actions covered in sections 5 to 10 therein and an acknowledgment of the debt takes the cause of action out of the limitation period. I will begin by reviewing the accuracy of this premise.

The doctrine of prescription works twofold. First, it can allow a person to acquire the *property* or *servitudes of property* belonging to another person by long and uninterrupted possession by adverse title to the other party. In a sense, this mode permits a person to acquire new rights while extinguishing the rights enjoyed by another party. This is acquisitive prescription which is given statutory recognition in section 3 of the Prescription Ordinance. On the other hand, extinctive prescription is where *obligations* are extinguished after a specified period of time. In extinctive prescription no new rights are created unlike acquisitive prescription although one may argue that in theory there is in fact a right created in one party not to be sued on the extinguished obligation.

Extinctive prescription can operate in two ways. On the one hand, it can prevent an action from being brought on a debt while safeguarding the debt as a natural obligation. The South African Prescription Act 1943 is a case in point. On the other hand, it may extinguish the debt or obligation as the Prescription Act 1969 of South Africa. This distinction has far-reaching consequences. Where the obligation survives but the action is prescribed, the surviving obligation has other utilities such as the possibility to be the basis of set off or *compensatio* which is not possible where the obligation is extinguished.

The point to be considered is what form of extinctive prescription is contained in sections 5 to 10 of the Prescription Ordinance. Before examining this point, I would like to examine briefly the situation under Roman Dutch law, which is our common law.

Lee traces the introduction of extinctive prescription in Roman Law to an enactment of Theodosius II (A.D. 424) whereby actions, in the absence of any other provisions in law, were barred by the lapse of thirty and in some cases forty years. No substantive rights were extinguished [Lee, *The Elements of Roman Law*, Sweet & Maxwell Limited, London, 4th Ed. (1956), page 125]. Grotious takes the view that in Roman Law, obligations are not extinguished by time and that a bar only is afforded against them, whilst Roman Dutch Law recognized both forms of extinctive prescription [See *The Introduction to Dutch Jurisprudence of Hugo Grotious*, Charles Herbert, John Van Voorst, Paternoster Row, London, 1844, page 469]. Voet is of the opinion that the effect of prescription is not *ipso jure* to destroy the obligation itself [Weeramantry, *The Law of Contracts*, Vol. II, p. 766].

However, in ***Terunnanse v. Menike*** (1 N.L.R. 200 at 202) it was held that the Prescription Ordinance and the previous Ordinance No. 8 of 1834, kept alive the repeal by Regulation No. 13 of 1822 of *"all laws heretofore enacted or customs existing "* with respect to the acquiring of rights and the barring of civil *"actions by prescription,"* and that the consequence of that Regulation and those Ordinances was to sweep away all the Roman-Dutch Law relating to the acquisition of title in immovable property (including positive and negative servitudes) by prescription, except as regards the property of the Crown. Any doubt as to the applicability of extinctive prescription under Roman Dutch Law was cleared in ***Dabare v. Martelis Appu*** (5 N.L.R. 210 at 215) where it was held that the limitation of actions under the Common Law was completely abrogated, first by the Proclamation of 1801 and then by Ordinance No. 8 of 1834. The sweeping away of the whole of Roman Dutch Law on both acquisitive and extinctive prescription was confirmed by the Privy Council in ***Corea v. Appuhamy*** (15 N.L.R. 65 at 77) where it was held that the whole law of limitation is now contained in the Prescription Ordinance.

The question then arises whether there is any utility of decisions of English Courts in interpreting the Prescription Ordinance. In ***Emanis v. Sadappu*** (2 N.L.R. 261 at 269) Withers J. denied any such use and held that the Prescription Ordinance should be construed by its own language. Weeramantry (*The Law of Contracts, Vol. II, page 777*) appears to agree with this position in stating that resort should not be had to the principles of English law in construing the sections of the Prescription Ordinance. The only exception identified therein is where resort will be made to English law in those branches of our law governed by it, but that too merely to determine the time of accrual of the cause of action and no more. However, Weeramantry (*supra. at p. 803*) states that English decisions under Lord Tenterden's Act may be relied upon to aid in the interpretation of the Prescription Ordinance.

Moreover, Weeramantry (*supra. page 800*) takes the view that an acknowledgment or promise to pay a statute barred debt is valid and *may be sued upon*, whether the debt in question be one governed by English or Roman Dutch Law. In support of this proposition the decisions of ***Philips v. Philips*** [(1844) 3 Hare 281], ***Spencer v. Hemmerde*** [(1922) 2 A.C. 507 (HL)], ***Hoare & Co. v. Rajaratnam*** (34 N.L.R. 219 at 224) and ***Mohideen Saibo v.***

Walters [(1887) 8 S.C.C. 99] are cited. This statement appears to be a validation of the proposition found in some decisions of English Courts that the theoretical basis of an acknowledgment of a statute barred debt is a fresh obligation and not merely as an extension of the limitation period and hence the action must be based on the acknowledgment and not the statute barred debt.

Accordingly, I must out of the greatest of respect to the great judge and jurist, examine closely the position in English Law on limitation in general and acknowledgment in particular and its impact on the debt.

This examination must first recognize that English statutory law recognizes both acquisitive prescription (sections 3 and 17 of the Limitation Act 1980) and extinctive prescription. The point to be considered is what form of extinctive prescription English Law adopted.

The Limitation Act, 1623 did not recognize that an acknowledgment of a debt stopped the running of time. As far as this Act was concerned, nothing would allow simple contractual debts to be recovered after six years.

The doctrine of acknowledgment was developed by judges to mitigate the rigors of the Act. Thus, where the debtor acknowledges the debt or made a part payment, it was held that in the interests of justice the debtor will no longer be able to invoke the Limitation Act, 1623. Yet opinion was divided on the theoretical basis of that doctrine. Some judges took the view that the acknowledgment must also imply a promise to pay the debt and arguably therefore the plaintiff must sue on the fresh promise and not the old debt [See ***Tanner v. Smart*** (6 B. & C. 603)]. This line of authority was given statutory recognition in Lord Tenterden's Act 1828 and Mercantile Law Amendment Act 1856.

The first English case cited by Weeramantry in support of the proposition that an acknowledgment of a debt barred by statute may be sued upon is ***Philips v. Philips*** (supra. at p. 299) where Wigram V.C. held as follows:

> "*The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's rights*."

This reasoning was adopted in ***Arunasalem v. Ramasamy*** (17 N.L.R. 156), ***Walker Sons & Co., Ltd. v. Kandyah*** (21 N.L.R. 317 at 319, 320) and ***Hoare & Co. v. Rajaratnam*** (supra). De Sampayo A.J. in ***Arunasalam v. Ramasamy*** (supra) adopting this reasoning held that a payment on account amounts to an acknowledgement of the debt which implies a promise to pay the balance and that the implied promise creates a new obligation.

However, Mosely S.P.J. in ***Udumanchy v. Meeralevve*** (43 N.L.R. 59) after considering ***Arunasalam v. Ramasamy*** (supra) held that the payment on account made in that case, cannot be regarded as creating a new cause of action but it merely extended the period of prescription. He adopted the reasoning of Lord Sumner in ***Spencer v. Hemmerde*** (supra), an authority on which Weeramantry bases his support for the proposal that acknowledgment of a debt creates a new obligation.

In ***Spencer v. Hemmerde*** (supra), Lord Sumner made an exhaustive examination of the legal position in England on prescription and acknowledgement, including ***Philips v. Philips*** (supra). He went on to hold (at 524-525):

> *"I find that the great preponderance of the cases is against regarding the new promise as a new cause of action, and it seems to me that reason also is against it. Surely the real view is, that the promise, which is inferred from the acknowledgement and "continues" or "renews" or "establishes" the original promise laid in the declaration, is one which corresponds with and is not a variance from or in contradiction of that promise…If so, there is no question of any fresh cause of action"*

Lord Sumner held (at page 533) that the implication of a promise, which is fixed as a test in ***Tanner v. Smart*** (supra) is rather the mode of determining the character of the acknowledgment than the basis in itself of the debtor's revived liability. He concludes (at p. 534) that *the new promise revives the old debt, but does not create a new one*; it revives it, however, not simpliciter, but subject to any conditions attached to the words, which operates the revival.

In fact, Farwell L.J. in ***Re Lacey*** [(1907) 1 Ch. 330 at 345] described acknowledgment as the withdrawal by virtue of the Statute of the abrogation of the remedy which leaves the old debt still recoverable at law. Lightwood in *The Time Limit on Actions* (Butterworth & Co., 1909, page 209) states:

> *"The Limitation Act 1623, and the Civil Procedure Act, 1833, do not extinguish the debt, but only bar the remedy. Hence, though the debt cannot be recovered by action if the debtor pleads the statute, nevertheless it remains an existing debt (Wainford v. Barker (1697), 1 Ld. Raym. 232), and can be made available whenever the creditor has it in his power to set it up without resorting to an action."*

In ***Busch v. Stevens*** [(1962) 1 All E.R. 412 at 415] Lawton J. held that the statement of Lord Sumner in ***Spencer v. Hemmerde*** (supra) was the correct view prior to the Limitation Act 1939. In fact, as far back as 1889, Cotton L.J. in ***Curwen v. Milburn*** [(1889) 42 Ch. D. 424 at 434] held that Statute-barred debts are due although payment of them cannot be enforced by action. More recently, in ***Royal Norwegian Government v. Constant & Constant and Calcutta Marine Engineering Company Ltd*** [(1960) 2 Lloyds List Law Rep 431 at 442] Lord Diplock held that in English law, subject to a few statutory exceptions, the expiry of the limitation period bars the claimant's remedy, but does not extinguish the claimant's right. He in fact referred to it as elementary law.

Accordingly, I am inclined to accept that, according to English Law, during the relevant period, the limitation period did not extinguish the debt, but only barred the right of action. Upon an acknowledgment of the debt been made by the debtor, to use the colourful words of Lawton J. in ***Busch v. Stevens*** (supra. at page 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*.

I will now examine the provisions of the Prescription Ordinance to determine what form of extinctive prescription it recognizes.

Sections 5 to 10 of the Prescription Ordinance use the common phrase "*no action shall be maintainable"*. This is a clear indication, in my view, that these sections are not intended to extinguish an obligation. On the contrary, it only prevents an action being maintained on an obligation after the lapse of a specified period. The issue is put beyond doubt by section 11 of the Prescription Ordinance which reads:

> "*11. No claim in reconvention or by way of set-off shall be allowed or maintainable in respect of any claim or demand after the right to sue in respect thereof shall be barred by any of the provisions herein before contained*."

The words *right to sue in respect thereof* in this regard indicates the intention of the legislature to preserve the obligation and bar only the remedy. The action is barred but the obligation survives. Accordingly, I hold 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.

This position has been adopted in ***Moorthipillai v. Sivakaminathapillai*** (14 N.L.R. 30 at page 32) where Hutchinson C.J. held:

> *"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 not to revive a dead claim, but to take the case out of the operation of the enactments which prescribe the time within which an action must be brought.*** *That is sufficiently*

> *shown by the passage from Pothier quoted by the Commissioner in his first judgment.* ***When the debt is prescribed it is not extinguished****; the bar must be opposed by the debtor; it is not supplied by the Judge; and it may be waived by a renunciation of it by the debtor; and an express promise to pay it (which is now required by the Ordinance to be in writing), or a part payment, is a renunciation of the benefit of the prescription. (Pothier on Obligations, p. 3, ch. 8, art. 1.)"* (Emphasis added)

Moreover, in ***Brampy Appuhamy v. Gunasekere*** (50 N.L.R. 253) it was held that the effect of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, is merely to limit the time in which an action may be brought and not to extinguish the right. Thus, in ***Ravanna Mana Eyanna & Co. v. The Commissioner of Income Tax*** (46 N.L.R. 121) it was held that a debt, although prescribed, can be still regarded as due to the business within the meaning of section 10(1)(b) of the Excess Profits Duty Ordinance. Similarly, in ***Perera v. Don Manuel*** (21 N.L.R. 81) it was held that a Proctor's lien may be enforced even though an action might not be brought by reason of section 11 of the Prescription Ordinance.

Further support for this position, if needed, is found in section 46(2)(i) of the Civil Procedure Code which permits the Court to reject a plaint when it appears from the statement in the plaint that *the action is barred* by any positive rule of law.

Therefore, the question formulated by the Appellant is incorrect and the question we have to consider is *if P7 is an acknowledgment of the debt, is the action of the Appellants set out in the Plaint, taken out from the limitation imposed in terms of Section 8 of the Prescription Ordinance*.

The learned High Court Judge has correctly concluded that the action was brought in respect of goods sold and delivered which is governed by section 8 of the Prescription Ordinance. Hence the Appellant should have filed this action within one year from the date of the accrual of the cause of action. The learned judge of the High Court correctly concluded that the action should have been instituted no later than January 8, 1999, whereas the action was instituted on June 1, 2001.

However, the P7 acknowledgement is dated August 21, 2000 and the action was filed within one year from that date. Nevertheless, the learned counsel for the Respondent submitted that an acknowledgement of the debt to be effective in terms of section 12 of the Prescription Ordinance must be made before the expiry of the limitation period and not thereafter. Hence, he submitted that the acknowledgment in this matter should have been made on or before January 8, 1999 and not later and as it is not the case, the action is prescribed.

The learned counsel for the Respondent relied on the decisions in ***Sampath Bank PLC v. Kaluarachchi Sasitha Palitha*** [S.C. Appeal 196/2011, S.C.M. 09.09.2019] and ***People's Bank v. Lokuge International Garments Ltd.*** [(2010 B.L.R. 261) SC (CHC) Appeal 13/2001].

The position articulated by the learned Counsel for the Respondent appears to be the position in the English Limitation Act 1980, for it is provided in section 29(7) that subject to subsection (6), a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment. However, this has no application in Sri Lanka.

In view of my finding that the Prescription Ordinance merely bars the remedy with lapse of time and does not extinguish the debt, there is no rational justification to insist that an acknowledgment must be made before the expiry of the limitation period to be effective. I hold that an acknowledgment of the debt to be effective for the purposes of section 12 of the Prescription Ordinance need not be made before the expiry of the period of limitation.

Before leaving this point, I must state that far from making any pronouncement in support of the contention of the Respondent, J.A.N. De Silva C.J. in ***People's Bank v. Lokuge International Garments Ltd.*** *(supra)* quoted with approval the statement of Weeramantry (*The Law of Contracts*, Vol. II, page 803) that an acknowledgment even after the full limitation period has run, will take the case out of the statute. That statement is based on ***Moorthipillai v. Sivakaminathapillai*** *(supra).*

Accordingly, I hold that an acknowledgment of the debt made in this matter by P7 is valid and effective to start time running again although it was made after the action on the debt was barred by the provisions of the Prescription Ordinance.

For the foregoing reasons, I hold that P7 is an acknowledgment of the debt, and the *action* of the Appellants set out in the plaint, is taken out from the limitation of time imposed in terms of Section 8 of the Prescription Ordinance.

Has the Learned Judge erred in holding that the cause of action of the Plaintiff-Appellants is prescribed in law?

The learned High Court Judge concluded that even if P7 is to be regarded as an acknowledgment, the action must to fail as the action was not based on P7. No reasons are given in the judgment as to why the Appellant should have based his action on P7. I can only surmise that this was on the basis that due to lapse of time the original debt was extinguished and the effect of P7 is to create a new obligation which then must form the basis of the action. In fact, the submissions of the learned counsel for the Respondent appear to be in that direction.

The Appellant has in the plaint pleaded both the two invoices, P2 and P4, forming the subject matter of the sale of goods transactions as well as the acknowledgment P7. It appears that P7 was pleaded in order to overcome the application of section 46(2)(i) of the Civil Procedure Code. A strict view of the rules of pleading may lead to the conclusion that the action is based on the invoices and not the acknowledgment as only the two invoices have been attached to the plaint.

Nevertheless, as morefully explained earlier, the lapse of time did not extinguish the original debt. There is no legal bar for the action to be founded on the old debt. The Appellants were correct in basing this action on the two invoices P2 and P4 and not on P7. No doubt P7 has to be pleaded to overcome the limitation period but it cannot certainly be the basis of a fresh cause of action. The legal effect of P7 is to take away the time bar to the action. Of course, if P7 only admitted part of the old debt, the Appellants can only maintain the action for that part and not the total debt. This is because P7 will then remove the bar on maintaining an action only for the amount acknowledged and no more.

For all the foregoing reasons, I set aside the judgment of the learned Judge of the High Court dated 12.12.2006 and enter judgment as prayed for in the plaint.

The answer to all the issues shall remain as in the judgment of the High Court, with the exception of issue no. 14 which is now answered in the affirmative and issue nos. 33 and 34 which are now answered in the negative.

The learned High Court Judge is directed to enter decree accordingly.

The Appellant is entitled to costs in both the High Court and this Court.

Appeal allowed.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court