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

In the matter of an Appeal from the Judgment of the High Court (Civil) of the Western Province Holden in Colombo.

SC CHC - Appeal No. 54/2007

CHC No.66/2003(1)

Ambewela Livestock Co. Ltd.
Ambewela Farm, Ambewela.

Plaintiff

Vs.

Sri Lanka Co-operative Marketing Federation Ltd. Markfed,
Co-operative Square, 127,
Grandpass, Colombo 14.

Defendant

And

Sri Lanka Co-operative Marketing Federation Ltd. Markfed,

Co-operative Square, 127,
Gandpass, Colombo 14.

Defendant-Appellant

Vs.

Ambewela Livestock Co. Ltd.
Ambewela Farm, Ambewela.

Plaintiff-Respondent

Before: Thilakawardena, J.
Chandra Ekanayake, J.
Sathyaa Hettige, PC, J.

Counsel: Harsha Soza, PC. With Athula Perera for
Defendant-Appellant.
V.K. Choksy for Plaintiff-Respondent.

Written submissions
tendered on 15.11.2012 (by Defendant-Appellant)
19.04.2012 (by Plaintiff-Respondent)

Decided on: 27.03.2014

Chandra Ekanayake, J.

The defendant-appellant (hereinafter sometimes referred to as the defendant) by its petition dated 27/11/2007 has sought *inter alia* to set aside the judgment dated 2/10/2007 entered in favour of the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) by the Commercial High Court of Colombo in case No. HC(Civil) 66/2003(1).

By the plaint dated 3/3/2003 the plaintiff had prayed for judgment against the defendant in a sum of Rs.4,694,000/- together with legal interest from 1/12/1993 till payment in full with costs.

The basis of the plaint was as follows:-

(a) the plaintiff is a company incorporated by the Secretary to the Treasury on 19/7/1999 to succeed to and carry out the business of Ambewela Farm managed by the National Livestock Development Board. The said Board was said to have been established by an order published in the Government Gazette of Sri Lanka on 4/5/1973 under and in terms of section 2 of the State Agriculture Corporations Act No. 11/1972,

(b) at the request of the defendant to supply 100 Metric Tons of Potato seedlings by contract dated 18/10/1993 as was agreed between the plaintiff's predecessor and the defendant that the plaintiff's predecessor would supply to the defendant 100 Metric Tons of Potato seedlings to the value of 7 million rupees,

(c) by letter dated 11/10/1993 the defendant having agreed to make payment for the same,

(d) as such at the request of the defendant the plaintiff sold and delivered the said quantity of seedlings for a price of 7 million rupees and the defendant acknowledged the receipt of the same,

(e) having given credit in a sum of Rs.2,307,810/- being the amount paid by the defendant, a balance sum of Rs.4,694,000/- became due and owing from the

defendant to the plaintiff and the defendant failed and neglected to pay the same, and

(f) in the alternative the defendant was unjustly enriched in the said sum of Rs.4,694,000/-.

The defendant by its answer dated 20/2/2009 had moved for a dismissal of plaintiff's action whilst vehemently denying the sale and delivery of the seedlings and the existence of such a contract between the parties. By way of further answer the defendant had mainly raised the following amongst others:

(a) that the alleged cause of action against the defendant is prescribed on the face of the plaint,

(b) that the transaction between the plaintiff and the defendant was one of that the defendant having only assisted the farmers in the Welimada and Uva Paranagama Districts enabling them to establish Farmers' Societies and to supply fertilizer, agro-chemicals and potato seedlings,

(c) that the defendant offered to act only as an intermediary between the National Live Stock Development Board (NLDB) and Farmers' Societies for the purpose of remitting the sums so received from the Societies as against the purchase price of the seedlings,

(d) that the defendant's offer to remit the said sums of money to the NLDB was conditional upon the said sums being received by the defendant from the said Societies and,

(e) that the defendant duly remitted the sums of money so received from the Societies (totalling to Rs.606,000/-) to the NLDB as against the price of the said seedlings.

The learned Judge of the Commercial High Court after an *inter-parte* trial delivered

the judgment in favour of the plaintiff granting all the reliefs sought by the plaint. This appeal has been preferred against the said judgment.

Mr.Ranjith Attygalle, the Director (Finance & Administration) of the plaintiff company had testified on behalf of the plaintiff. His uncontradicted testimony was to the effect that the plaintiff is the successor to Ambewela Farm of the National Livestock Development Board and as evidenced by the document marked as P35 [which being the share sale and purchase agreement entered into between the Government of Sri Lanka and Lanka Milk Foods (CWE) Limited], Lanka Milk Foods (CWE) Limited had purchased 90% of shares of Ambewela Livestock Company.

It is noteworthy that the primary objects of the plaintiff' Company as per the Memorandum of Association marked as P1 were :-

> 1)To succeed to and carry out the business of Ambewela Farm managed by the National Livestock Development Board established by an order published in the Gazette of Sri Lanka on 04-05-1973 in terms of Section 2 of the State Agriculture Corporations Act No.11 of 1972.
>
> 2) To take over and succeed to the :
>
> (a) Ownership of all movable property owned, possessed and used by the said Ambewela Farm and all rights, powers, privileges and interest arising out of such property.
>
> (b) To take over all liabilities of Ambewela farm including liabilities of the National Livestock Development Board incurred in connection to the said farm and gratuities payable to employees of Ambewela Farm in respect of service provided on or to the date of takeover and debt incurred in connection with the farm as identified in the books of the farm on that day immediately preceding the date of take over.

(c) Contracts and agreements including contracts of employment entered into by the National Livestock Development Board for the purpose of the business of Ambewela Farm.

(d) Ownership of all books, accounts and documents relating or pertaining to Ambewela Farm.

3) To take over all moneys that may have to be paid or acts that may have to be performed after the date of take over in consequence of orders made by Industrial Tribunals and the like in respect of present or former employees of the the National Livestock Development Board while they served in the said Farm at inquiries pending on the date of take over.

4) To take over and succeed to the ownership of all current assets identified in the books of the Farm on the day immediately preceding the date of takeover.

5) To enter into a 50 year lease agreement with the National Livestock Development Board with regard to the land and buildings processed and used by the Ambewela Farm.

6) To take over all rights powers privileges and interests arising out of the properties defined in Section (2), (3), (4) & (5).

7) To rear breed and farm livestock and carry on agricultural activities to supply high quality breeding materials, to import all necessary inputs and machinery for the same, export of all forms of livestock and agricultural produce, deal in livestock products including cattle, goats, sheep,

poultry, pigs, rabbit, meat and eggs.

8) To carry on business of manufacturers, producers, buyers, sellers, importers and exporters of all types of livestock, feeds, forages, feed supplements, medicines and ingredients required for feeding and fattening and nutritional preparations of every description, chemicals, fish meal, poonac of all kinds, processed fish and sugar products including molasses.

In view of the primary objects as enumerated in sub paragraphs 2(c), 3 and 6 of P1 plaintiff will take over all contracts and agreements (including contracts of employment) entered into by the National Livestock Development Board for the purpose of the business of Ambewela Farm and succeed to the ownership of all current assets identified by the books of the Farm on the day immediately preceding the date of the take over to wit - 19.7.1999.

As borne out by the document marked P 34 produced in the testimony of the said witness Attygalle which being the statement of expenditure of the Ambewela Farm of NLDB on the day immediately preceding the date of handing over containing current assets and the debtors as per schedule 3 therein, the defendant (Markfed) has been shown as a debtor in a sum of Rs.4,695,810/-. Accordingly, the said amount of money is an asset of the Ambewela Farm of NLDB and after the incorporation of the Ambewela Livestock Company Limited (the plaintiff in this case) the said amount has become an asset of the plaintiff. Furthermore, it is manifestly clear from the uncontradicted testimony of plaintiff's said witness that the plaintiff has become the successor to the Ambewela Farm of NLDB.

Now I shall advert to the contention of the plaintiff's counsel that a contractual transaction existed between the plaintiff and the defendant for the purchase and supply of 100 M. tons of potato seedlings for the price of Rs.7 million payable on or before 30.11.1993 by the defendant to the plaintiff. In fact plaintiff's issues 2 to 4 had been raised on the above footing.

It has been well demonstrated in the course of the testimony of the plaintiff's

witness Mr.Attygalle, by the letter of the defendant's Chairman dated 23.09.1993, a request was made by the defendant to the plaintiff's predecessor for the supply of the said quantity of potato seedlings and further the letter of the defendant dated 11.10.1993 (P5) had reiterated the request for the supply of the said seedlings. It is pertinent to note that the letter of the defendant bearing the same date as P5 (11.10.1993) by which the defendant whilst acknowledging P5 had undertaken to make the payment in respect of the sale of said seedlings before 30.11.1993 as borne out by the letter of the defendant dated 15.10.1993 (P6) setting out the amount to be paid for the supply of said quantity of seedlings together with an undertaking to make payment before 30.11.1993. The letter of the defendant dated 18.10.1993 addressed to the NLDB reiterates the position with regard to the supply of the aforesaid quantity of seedlings for a sum of Rs. 7 million payable on or before 30.11.1993.

It would also be pertinent to note that the promissory note executed on 18.10.1993 (P8) the defendant promised and undertook to pay the plaintiff the aforesaid sum of Rs. 7 million on or before 30.11.1993. All the aforementioned documents were not contradicted during the cross examination by the defence.

What has to be determined now is whether a contractual transaction existed between the plaintiff and the defendant for the purchase of the aforesaid quantum of seedlings, subject to the terms and conditions enumerated above.
At the outset I opt to approach the above issue by considering - 'what is a contract'?

C.G. Weeramantry in his monumental work titled - 'The Law of Contracts' volume – I, in paragraph 84 [at p.84] has opted to summarise the basic essentials of a valid contract as follows :-

(a) agreement between parties,
(b) actual or presumed intention to create a legal obligation,
(c) due observance of prescribed forms or modes of agreement, if any,
(d) legality and possibility of the object of the agreement,
(e) capacity of parties to contract.

With regard to (a) above, an agreement is essential to the formation of a valid contract. Further, it depends on the intentions of the parties. Same author of the above book at paragraph 104, [pp.107 and 108] under 'Manifestation of Agreement' has expressed as

follows :-

> "..... The law therefore adopts an objective test in determining the intention of the parties to a contract, and is guided by their manifestations of intention whether by words, or by acts. From such words or acts it draws its inferences regarding intention on the basis of a reasonable person's assessment of them in the context in which they were uttered or performed".

What is essential for the making of a contract is the manifestation of mutual assent. "..... When there is such a manifested meeting of minds the law says that there is "*consensus ad idem*" between the parties, or, more shortly, that the parties are "*ad idem*".

In this regard, the observations of Weerasooriya SPJ in the case of Muthukuda V Sumanawathie (1962) 65 NLR 205 at 208 would also be of importance. Per Weerasooriya SPJ :-

> "It is an elementary rule that every contract requires an offer and an acceptance. An offer or promise is binding on the person making the same unless it has been accepted".

> See also – Noorbhai v Karuppan Chetty (1925) 27 NLR at 325. Per Lord Wrenbury at p. 325 :-

> "For the decision of the case there is no need to travel beyond the very elementary proposition of law that a contract is concluded when in the mind of each contracting party there is a *consensus ad idem*, and that a modification or revocation of the contract requires a like consensus".

In other words the above observation too affirms the elementary proposition of law to be that a contract is concluded only when there is a *consensus ad idem* in the mind of each contracting party.

It's a basic requirement that every contract requires an offer and acceptance. An offer – is a promise of performance which is however, conditional upon a written

promise or an act of forbearance being received in exchange for it, whereupon it matures into a contract. Furthermore an offer must contain definite terms of performance. An offer may lapse for want of acceptance or could be revoked before acceptance. In other words, only acceptance can convert an offer into a promise and then it will be too late to revoke it. Acceptance always must be manifested if it is to be given any legal effect and must also be communicated to the offerer. It has to be borne in mind that, acceptance must correspond directly with the terms of the offer – an acceptance which does not correspond/accord with the terms of the offer is ineffectual to conclude a contract. Further, acceptance must be always clear and unambiguous. When the above threshold requirements are fulfilled a contract is formed.

Upon careful consideration of oral and documentary evidence led in the plaintiffs case, it becomes manifestly clear that documents lead in evidence marked P3 - P8 suffice to constitute a promise and undertaking to pay, thereby forming a written contract. In view of the reasons enumerated in the foregoing paragraphs of this judgement, I am inclined to uphold the conclusion of the learned Judge appearing at p.15 of the impugned judgement with regard to formation of a written contract.

It is observed that the defendant had taken up the defence of prescription of the plaintiff's claim. This is borne out by the issue bearing No. 12 (a) and (b) raised by the defendant which had been admitted to trial. At the conclusion of the trial the learned Judge of the Commercial High Court had proceeded to answer the aforesaid issue No. 12 in her judgement as follows :-

12 (a) – No
(b) – No

It appears from the impugned judgement that the learned judge, after a careful analysis of the evidence has stated as follows - (at p. 14 of the impugned judgement).

> "It is salient to notice that the defendant has taken up the position that the plaintiff's claim is prescribed in law and as such the plaintiff's claim should be rejected in *limine*. It was observed through out the trial that the defendant has not established this position. The plaintiff has adverted the attention of

> Court to the fact that the plaintiff has been a Government Institution and a part of the Government. Therefore, it is said that Section 15 of the Prescription Ordinance will not affect the state. It is also the position of the plaintiff that it was after the year 2001 that it became a private company. Hence, it is clear that the prescription should commence from the year 2001. It is important to note that the Plaintiff has sent the letter of demand to the defendant on 23.10.2002 and the Plaint has been filed on 03.03.2003 which clearly shows that the action has been filed within 2 years of plaintiff became a private company".

In this regard, it would be pertinent to consider Section 6 of the Prescription Ordinance. Section 6 reads thus :-

> "No action shall be maintainable upon any deed for establishing a partnership,or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security not falling within the description of instruments set forth in Section 5, unless such action is brought within 6 years from the date of the breach of such partnership, deed or of such written promise, contract, bargain, or agreement, or other written security, or from the date when such note or bill shall have become due, or of the last payment of interest thereon".

It had been the clear stance of the plaintiff that the request for the supply of potato seedlings to the above value was made by the letter dated 23.09.93 (P3) which contains a clause to the effect that a sum of Rs. 7 million being the value of the aforementioned quantity of potato seedlings to be paid within 30 days. The same request was subsequently pursued by the defendant whilst agreeing that steps will be taken to pay the value for the 100 M. Tons of seedlings on or before 30.11.93 (see the letter dated 11.10.93 P4). It was the uncontradicted evidence of the plaintiff's witness Attygalle that by the letter of the defendant dated 11.10.93 (P5) the defendant reiterated the same request from the plaintiff's predecessor. It is noteworthy that by letter of the Chairman of the defendant dated 15.10.93 (P6) addressed to the Chairman Peoples Bank (copied to Chairman – NLDB) the defendant had even negotiated with the Peoples Bank to pay a sum of Rs. 7 million to the plaintiff being the value of the aforesaid 100 M. Tons of seedlings supplied by the plaintiff to the defendant. Even the document marked as P7 (letter of the Chairman of the defendant dated

18.10.93) bears testimony to the fact that the defendant had specifically undertaken to pay the said sum of Rs. 7 million which being the value of the said quantity of seedlings before 30.11.93.

Furthermore it is amply clear that the promissory note (P8) was also executed (signed by 2 officers of the defendant) and by the same, the defendant had undertaken to pay the aforementioned amount on or before 30.11.93. The documents marked P9 – P12 would further demonstrate that a representative of the defendant had accepted and/or received the said quantity of potato seedlings from the plaintiff. By the letter of the General Manager of the defendant dated 12.03.2002 (P28) addressed to the Managing Director, Lanka Milk Foods CWE Limited whilst admitting the aforesaid transaction, had stated that due to the failure of the respective Cooperative Societies to settle the debt the defendant is unable to settle the same. The document P 28 was sent after entering into the Share Sale and Purchase Agreement (P35) on 28.09.2001. Thus it becomes manifestly clear that even after P35 to wit - (after 28.09.2001) the defendant had admitted that the aforesaid money was due to the plaintiff. As the action was instituted on 07.03.2003 the claim is not prescribed. Further it is observed that the letter of demand was dated 23.10.2002 (P32) while the plaint dated 03.03.2003 had been filed on 07.03.2003. In view of the foregoing analysis, I am inclined to hold the view that the plaintiff's claim had not been prescribed. As such I conclude that the final determination of the learned Judge of the Commercial High Court to the effect that the plaintiff's claim was not prescribed is correct and the answers given to all the issues admitted to trial inclusive of the answer to the issue on prescription, [12(a) and (b)] are also correct.

At the hearing before this court it was strenuously urged by the counsel for the defendant that there was a novation of the contract in question. According to Black's Law Dictionary, (8th Edition), Bryan A. Garner defines "novation" as follows:

> 'The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party'.

A novation may substitute :- (1) a new obligation between the same parties,

(2) a new debtor, or

(3) a new creditor.

A contract that (1) immediately discharges either a previous contractual duty or a duty to make compensation, (2) creates a new contractual duty, and (3) includes as - a party, one who neither owed the previous duty nor was entitled to its performance. – *Also termed substituted agreement.* In other words, *novation* is the emerging and transfer of a prior debt into another obligation either civil or natural, that is, the constitution of a new obligation is such a way as to destroy a prior one. The only way in which it is possible to transfer contractual duties to a third party is by the process of novation, which requires the consent of the other party to the contract. In fact, novation really amounts to the extinction of the old obligation, and the creation of a new one, rather than transfer of the obligation from one person to another.

The Law of Contracts by C.G. Weeramantry - Volume 2 at page 718 has defined *novation* as below :-

> "The term 'novation' is used in two senses. In its wider sense it means the creation of a fresh contract by the extinction of pre-existing one in whose room it stands. In its narrower sense it refers to one only of the varieties of novation comprised within the broader meaning of the term".

Further, the nature of novation proper is described by the said author at page 719 as follows:

> "Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract.
>
> A new obligation must be created which contains some element not found in the earlier obligation. Thus an absolute obligation may succeed to a conditional one or a money debt to an obligation to transfer property. A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation, or does the grant of an

additional security or the mere confirmation of an original agreement."

In the case at hand, the defendant has denied that it entered into any contract with the plaintiff. However the defendant takes up the position that the contract is vitiated due to novation. It is a case of approbation and reprobation in respect of the contract. The defendant on one hand denies entering into a contract with the plaintiff and at the same time attempts to claim the benefit of novation.

The evidence led at the trial, does not disclose that there has been any substitution in the place of the defendant or its interests in favour of another. There is no evidence to infer that the defendant's obligations were transmitted to or taken over by any other substituted party by way of a new agreement. For novation to take place the parties to the transaction should necessarily consent to the previous agreement being replaced or taken over by another, or another party being substituted. However, in this instance the defendant has failed to establish that the debt owed to the plaintiff has been transferred to another or that another has been substituted by consent of the parties.

The position of the plaintiff in this case is that the defendant owed a sum Rs.4,694,000/- to the plaintiff. The said debt thus is an asset of the plaintiff. Accordingly, plaintiff stands in the shoes of a creditor in a sum of Rs.4,694,000/- to be recovered from the defendant. The evidence elicited at the trial demonstrates that the very institution of the action was for the recovery of that asset. In the circumstances the sum due to the plaintiff is not a liability of the plaintiff company but an asset to be recovered from the defendant.

The defendant has not established that the plaintiff at the point of conversion to a company (by P35) entered into a new agreement with the defendant to waive off the amount due as a bad debt. Neither has the defendant established at the trial that by mutual agreement nor by consent its debt devolved on a new debtor. However, the defendant endeavors to establish that novation arose as a result of the National Livestock Development Board changing its name to Ambewela Livestock Company Limited and the subsequent sale of 90% shares of it to Lanka Milk Foods (CWE) Limited by P35.

The Memorandum of Association of Ambewela Livestock Company Limited has been produced in evidence marked as P1. Primary Objects and Ancillary Powers in P1 clearly establish the takeover and succession. Primary objects 2(a)-(d) provide for the taking over and succession of movable property, rights, powers, privileges and interests of the National Livestock Development Board. Similarly, contracts and agreements and ownership of books, accounts and documents vested lawfully with Ambewela Livestock Company limited with effect from 19.07.1999. In terms of P1 the assets devolved on the plaintiff by specific provisions in clauses 2(a), (c) & (d). However, P1 does not refer to the extinguishing of the contract or extinction of the obligation of the defendant in making the payment of Rs.4,694,000/- .

An examination of the evidence led at the trial amply demonstrates that there was no mutual consent (express or implied), to waive the debt owed by the defendant to the plaintiff. As such there is no novation or any change with regard to the obligation to repay the money. Thus, the status of the debtor -(in the present case the defendant) remains unchanged.

The defendant further contends that the said Ambewela Livestock Company Limited has sold 90% of its shares to Lanka Milk Foods Limited. The relevant Share Sale and Purchase Agreement has been produced in evidence by the plaintiff marked as P35. The said sale of the shares has taken place on 28.09.2001. By P35, the obligations and duties of the defendant has not been renounced or changed. On the other hand the plaintiff company has not gone into liquidation or become non-existent. The Purchaser's Covenants in 3.3 (i) clearly signifies that the plaintiff has retained the power and authority to proceed with such cases in the best interests of the Company. The plaintiff having sent the letter of demand dated 23.10.2002 (P32) had proceeded to institute the present case for the recovery of the aforesaid debt in the Commercial High Court of Colombo.

Further, it would be pertinent to note that it is only the description of the name of the creditor that got changed but certainly not the nature and character of the debt. More specifically, Lanka Milk Foods (CWE) Limited has taken over only the operation and management of the said Company (see P35). In order to prove novation the defendant had to establish in evidence the intention of the creditor to discharge the debtor from the

obligation. In the case before us, no such evidence was led at the trial. The express and declared will of the creditor is required in order to constitute novation. In this case the defendant has completely failed to produce such evidence. In the circumstances, the defendant in this case cannot avoid liability on the basis that there has been novation. In this regard, the observation of Lascelles Chief Justice in the case of Karthikesu v. Ponnachchy 14 NLR 486 at 487 would lend assistance:-

> ".....Novation may take place, not only by express agreement, but also tacit or by implication, the consent of the parties to the *novatio* being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation".
>
> This passage, I think, indicates the principle which should be followed in considering the sufficiency of evidence to establish an agreement of novation"

It has to be stressed here that, in the present case the defendant has failed to place any evidence with regard to the existence of meeting of minds of the creditor and the debtor in forming a new obligation arising out of an express agreement or by conduct or by tacit understanding in the place of the previous obligation. On the contrary the plaintiff has produced several letters (P13, P14, P18 & P32) sent to the defendant over a period of time requesting it to make the relevant payments. This amply establishes that there had been no deviation or change of intention to recede from the original claim for the debt and thus there had been no novation.

For the foregoing reasons, I proceed to affirm the impugned judgement of the learned Judge of the Commercial High Court dated 02.10.2007. This appeal is dismissed with costs fixed at Rs. 50,000/- payable by the defendant-appellant to the plaintiff-respondent.

Judge of the Supreme Court

Thilakawardena, J.

I agree

Judge of the Supreme Court

Sathyaa Hettige PC, J.

I agree

Judge of the Supreme Court.