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

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jaya Mawatha,
Colombo 10.
Plaintiff

SC APPEAL NO: SC/APPEAL/101/2017
SC LA NO: SC/HCCA/LA/26/2017
HCCA ANURADHAPURA NO: NCP/HCCA/ARP/1076/2016
DC POLONNARUWA NO: 14798/M/12

Vs.

Dharshani Construction,
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18, Habarana Road,
Polonnaruwa.
Defendant

AND BETWEEN
Sri Lanka Mahaweli Authority,
No. 500,
T.B. Jaya Mawatha,
Colombo 10.
Plaintiff-Appellant

Vs.

Dharshani Construction
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18, Habarana Road,
Polonnaruwa.
Defendant-Respondent

AND NOW BETWEEN

Dharshani Construction,
No. 42, Pothgull Road,
Polonnaruwa.
Under the sole ownership of
Amarasiri Masakorala,
No. 18,
Habarana Road,
Polonnaruwa.
Defendant-Respondent-Appellant

Vs.

Sri Lanka Mahaweli Authority,
No. 500, T.B. Jaya Mawatha,
Colombo 10.
Plaintiff-Appellant-Respondent

Before: Murdu Fernando, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Senaka De Saram for the Defendant-Respondent-Appellant.

Rajitha Perera, S.S.C., for the Plaintiff-Appellant-Respondent.

Argued on : 05.07.2021

Written submissions:

by the Defendant-Respondent-Appellant on 14.07.2017.

by the Plaintiff-Appellant-Respondent on 16.08.2017.

Further written submissions:

by the Plaintiff-Appellant-Respondent on 14.07.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The plaintiff Mahaweli Authority and the defendant contractor entered into a written agreement marked P2 to make improvements to the spillway and tail canal of the Pimburattewa tank in the Polonnaruwa District. In terms of clause 59.2(a) of the agreement, the plaintiff terminated the agreement by letter

dated 01.03.2006 marked P10 on the basis that the defendant had stopped work for more than 28 days without authorisation.

Clauses 59.1 and 59.2(a) of the agreement read as follows:

> *59.1 The employer or the contractor may terminate the services under the contract if the other party causes a fundamental breach of the contract.*
>
> *59.2(a) Fundamental breach of contract shall include, but shall not be limited to, the contractor stops work for 28 days when no stoppage of work is shown on the current program and the stoppage has not been authorised by the engineer.*

By letter P10 the plaintiff also informed the defendant that in terms of clause 60.1 of the agreement steps would be taken to decide on "*the payment upon termination and completion of the balance work of the contract.*"

Clause 60.1 reads as follows:

> *If the services of the contractor under the contract is terminated because of a fundamental breach of contract by the contractor, the engineer shall issue a certificate for the value of the work done and materials ordered less advance payments remaining to be recovered at up to the date of the issue of the certificate and less the percentage to apply to the value of the work not completed. Additional liquidated damages shall not apply. If the total amount due to the employer exceeds any payment due to the contractor, the difference shall be a debt payable to the employer.*

Clause 60.1 shall be read with "*Contract Data*" as agreed upon by the parties which states "*The percentage to apply to the value of the work not completed, representing the employer's [plaintiff's] additional cost for completing the works, is 25%.*"

P10 further stated that the defendant would be informed of when he would be required to be present at the site for the final measurements in order to prepare the final payment bill subsequent to termination.

Notwithstanding the defendant was informed of the date, he was not present at the site inspection. The summary of the final payment prepared *ex parte* is marked P12, whereby it was calculated that the value of 25% of the incomplete work of the defendant in terms of clause 60.1 of the agreement is Rs. 2,150,000.

Thereafter by the letter of demand dated 26.04.2006 marked P14 the plaintiff demanded this sum from the defendant.

As the defendant failed to make this payment, the plaintiff filed this action against the defendant in the District Court of Polonnaruwa on 24.04.2012 seeking to recover the said sum with legal interest. The defendant filed the answer seeking dismissal of the plaintiff's action and also made a claim in reconvention to recover a sum of Rs. 3,000,000 from the plaintiff for the termination of the agreement.

After trial, the District Court dismissed the plaintiff's action on the basis that the action is prescribed in terms of section 6 of the Prescription Ordinance, as it was not instituted within six

years of the date of termination of the agreement. The District Court also dismissed the defendant's claim in reconvention.

Being aggrieved by this judgment, the plaintiff appealed to the High Court of Civil Appeal. The High Court of Civil Appeal set aside the judgment of the District Court and directed the District Court to enter judgment as prayed for in the prayer to the plaint on the basis that the cause of action accrued to the plaintiff against the defendant on the date the demand was made by P14 and, as the action was filed within six years of the date of the demand, the action is not prescribed in terms of section 6 of the Prescription Ordinance.

This court granted leave to appeal against the judgment of the High Court of Civil Appeal on the following questions of law:

(a) *Did the High Court of Civil Appeal fail to consider that the plaint filed on 24.04.2012 was prescribed in terms of section 6 of the Prescription Ordinance?*
(b) *Did the High Court of Civil Appeal misinterpret section 6 of the Prescription Ordinance?*
(c) *Did the High Court of Civil Appeal fail to consider that clause 60.1 of the agreement is part of the agreement and not a separate ground which triggers a separate cause of action upon termination of the agreement?*
(d) *Did the High Court of Civil Appeal misdirect itself when it decided that the cause of action against the defendant arose from the date the demand was made on 26.04.2006?*

Both parties rely on section 6 of the Prescription Ordinance in that the plaintiff's position is that the prescriptive period of six years starts to run from the date of the demand by P14 (which was accepted by the High Court of Civil Appeal) whereas the defendant's position is that the prescriptive period of six years starts to run from the date of the termination of the agreement by P10 (which was accepted by the District Court). It is common ground that if the plaintiff's interpretation is accepted the cause of action is not prescribed and if the defendant's interpretation is accepted it is.

Section 6 of the Prescription Ordinance reads as follows:

> *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 shall be brought within six 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.*

Learned counsel for the defendant strenuously submits that in terms of section 6 of the Prescription Ordinance, an action shall be brought within six years "from the date of the breach" of the agreement and, in terms of the letter of termination P10 read with clause 59.2(a) of the agreement, the breach of the agreement occurred on the date of the letter of termination since

discontinuing work for more than 28 days is a fundamental breach as per clause 59.2(a). This is no doubt an interesting argument in the literal application of section 6 but the legal application of the section in my view does not support the argument.

Let me explain. What is prescribed after the lapse of six years in terms of section 6 of the Prescription Ordinance? It is none other than the cause of action. Every action is based on a cause of action and section 40(d) of the Civil Procedure Code mandates the plaintiff to particularise his cause of action in the plaint. What is a cause of action? According to section 5 of the Civil Procedure Code, "*cause of action is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury*." What is the cause of action the plaintiff says accrued to him in paragraph 9 of the plaint? It is the recovery of the value of 25% of the incomplete work calculated in a sum of Rs. 2,150,000 in terms of clause 60.1 of the agreement. This sum which the defendant is obliged to pay in terms of the agreement was not paid notwithstanding a demand was made by P14 dated 26.04.2006.

The next question is when does the prescriptive period of six years in terms of section 6 begin to run? Learned counsel for the defendant claims that clause 60.1 is part of the agreement which cannot be considered in isolation. I totally agree. Learned counsel then develops his argument to say that a separate cause of action cannot accrue to the plaintiff upon clause 60.1 when

the cause of action has already accrued to the plaintiff upon the breach of the agreement which culminated in the termination of the agreement by P10. I cannot agree.

An agreement can give rise to several causes of action at different stages. The termination of the agreement under clause 59 gave rise to a technical cause of action but nothing flows from it. It is the next step set out in clause 60 that gives rise to a practical cause of action to either party. What is relevant is the breach of the agreement giving rise to a cause of action contemplated by section 6 of the Prescription Ordinance. The question at what point such a breach takes place depends upon the facts of the particular case.

In order for clause 60.1 to apply, the engineer shall prepare the final bill after the site inspection with the participation of the defendant. This is not possible at the termination of the agreement in terms of clause 59.1 although clause 59.1 is linked to clause 60.1.

The aforesaid argument of learned counsel would have succeeded if liquidated damages was the remedy the parties agreed upon after the breach of the agreement leading to its termination. In such an event, there is no further step to be taken to calculate damages as parties have already agreed pre-determined damages at the time of entering into the agreement. In the instant case, clause 60.1 expressly provides that apart from the calculated damages, "*Additional liquidated damages shall not apply*."

Although the cause of action is the wrong (in terms of section 5 of the Civil Procedure Code), the wrong is the combination of the right in the plaintiff and its violation by the defendant. In that context, I must further add that even if the remedy is liquidated damages, there shall be a demand and the refusal of that demand to constitute a breach of contract for the purpose of initiating the period of prescription.

Hence I take the view that the prescriptive period in the instant action begins to run from the date of the demand by P14, which is the date of the breach of the agreement insofar as the plaintiff's action is concerned.

For the aforesaid reasons, I take the view that the plaintiff's cause of action is not prescribed.

I answer the questions of law in respect of which leave to appeal was granted in the negative.

The judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed with costs.

Judge of the Supreme Court

Murdu Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court