

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

In the matter of an appeal in terms of Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006 to be read with Chapter LVIII of the Civil Procedure Code.

SC/ CHC/ 35/2009

HC/ Civil/186/2006 (1)

W. A. H. Weerasinghe,
“Dambuwa Walawwa”,
Radawana Road,
Yakkala.

Plaintiff

Vs

Peoples Bank,
No 75, Sir Chittamplam A. Gardiner
Mawatha,
Colombo 2.

AND NOW BETWEEN

Peoples Bank,
No 75, Sir Chittamplam A. Gardiner
Mawatha,
Colombo 2.

Defendant Appellant

VS.

W. A. H. Weerasinghe,
“Dambuwa Walawwa”,
Radawana Road, Yakkala.

Plaintiff Respondent

BEFORE : SISIRA J. DE ABREW, J.
UPALY ABEYRATHNE, J.
K. T. CHITRASIRI, J.

COUNSEL : S.A. Parathalingam PC with Kushan De
Alwis PC, and Kawshalya Nawaratne for the
Defendant Appellant
M. H. M. Morais for the Plaintiff
Respondent

WRITTEN SUBMISSION ON: 03.10.2012 (Defendant Appellant)
13.08.2012 (Plaintiff Respondent)

ARGUED ON : 18.01.2017
DECIDED ON : 07.04.2017

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the action against the Defendant Appellant (hereinafter referred to as the Appellant) in the District Court of Gampaha seeking a judgment directing the Appellant bank to credit a sum of Rs. 17.5 million together with the interest thereon to the Respondent's joint savings account at the Appellant Bank's,

Gampaha Branch. As averred in the plaint the facts relevant to the case can be briefly summarised as follows;

On 06.11.1998 the Respondent and a person by the name D. M. Peiris had opened a joint savings account bearing No 00262071327831 at the Gampaha branch of the Appellant's Bank by depositing a sum of Rs. 54,000,000/- (Fifty-Four Million). Thereafter, on 16.11.1998 and 09.12.1998, the Respondent together with the said D. M. Peiris had withdrawn the sums of Rs. 5,000,000/- and Rs. 7,500,000/- from the said joint account respectively. Said D. M. Peiris had died on 30.11.2000.

The Respondent specifically averred that excluding the said two withdrawal of money from the said joint savings account, said Peiris, prior to his death, had not withdrawn any money from the said bank account. On 07.01.1999, the Respondent was informed by one H. S. Perera who was an employee of the Gampaha branch that he had received a letter from said D. M. Peiris requesting to withdraw a sum of Rs. 20,000,000/-. Consequent to the said information, the Respondent had met immediately the Manager of the Gampaha branch and he had been informed that, said Peiris, by his letter dated 15.11.1998, had requested the Gampaha branch to transfer a sum of Rs. 17,500,000/- from the said joint savings account to an account opened at the Headquarters' branch of the Appellant Bank.

The Respondent has averred that said D. M. Peiris, prior to his death, had not opened an account at the Headquarters' branch of the Appellant bank and said Peiris by a letter dated 08.01.1999 had informed the said facts to the Manager of the Gampaha branch. He has further averred that the senior manager of the Headquarters branch by a letter dated 26.02.1999 and also the Regional Head Office by a letter dated 28.02.2001 had informed the Respondent that his

complaint is being investigated and the Respondent would be informed of the outcome of the said investigation.

On 13.01.1999, the Respondent had lodged a complaint at the Criminal Investigation Department (CID) and the CID had instituted the action bearing No. 54871/B in the Magistrate's Court of Gampaha. On 14.07 1999, the learned Magistrate had directed the Examiner of Questioned Documents (EQD) to examine the signature of said D. M. Peiris on the cheques and documentation pertaining to this matter and also a similar incident of withdrawal of money from an account held by said Peiris in Hong Kong and Shanghai Banking Corporation (HSBC) and to submit a report to the court. According to the report of the EQD dated 30.11.1999 the signatures on the letters dates 15.11.1998 and 07.01.1999 differed to that of said Peiris's signature.

The Respondent in their pleadings has averred that the procedure followed by Gampaha branch of Appellant's bank in transferring a sum of Rs. 17.5 million from the joint account to an account claimed to be opened by said Peiris at Headquarters branch, had been negligent, unsatisfactory and against the banking practice and principles.

The Respondent has further averred that the name of the said D. M. Peiris was not in the pass book of the said account claimed to be opened by said Peiris at the Headquarters branch of the Appellant's bank and said Peiris had never disclosed the Respondent as to who the partner of the said joint saving account was or about an account opened at the Headquarters branch.

The case proceeded to trial on 25 issues. During the pendency of the trial before the District Court of Gampaha objections had been raised on the jurisdiction of the District Court to hear and conclude the case and upon an appeal

from the order of the learned District Judge on the issue of jurisdiction, the Court of Appeal had directed to transfer the case to the Commercial High Court holden at Colombo. The Commercial High Court has delivered a judgment in favour of the Respondent. Being aggrieved by the said judgment dated 25.09.2009 the Appellant has appealed to this court. In paragraph 10 (a) (b) and (c) of the petition of appeal dated 20.11.2009 the Appellant has set out the following questions of law for the consideration of this court.

- 10 (a) Has the learned Commercial High Court Judge misdirected herself in law in holding that the claim and the cause of action had arisen out of a breach/violation of a written contract?
- (b) Has the learned trial judge erred in law in holding that there is a written contract between the plaintiff and the defendant in existence notwithstanding that no such agreement had been produced in court or the existence of such written agreement had been recorded as an admission between the parties?
- (c) In any event, has the learned Judge erred in law in holding that the cause of action of the Plaintiff Respondent is not prescribed in law?

I now deal with the question of prescription. The learned counsel for the Appellant submitted that at the trial the Respondent had testified that he came to know about the alleged transfer of monies in a sum of Rs. 17,500,000/- had been taken place on 07.01.1999 and the Manager informed him that the entire amount would be paid back to them. Also, the Respondent has admitted that the action had been instituted on 20th of May 2002, 03 years after the alleged transfer of money.

In this regard the Appellant relied upon the Section 9 and 10 of the Prescription Ordinance No. 22 of 1871. Sections 9 and 10 of the Prescription Ordinance read thus;

9. No action shall be maintainable for any loss, injury or damage unless the same shall be commenced within two years from the time when the cause of action shall have arisen.
10. No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.

On the other hand, the Respondent contended that the cause of action falls within the ambit of Section 6 of the Prescription Ordinance and in terms of said Section, the action of the Respondent against the Appellant is not prescribed in law. Section 6 of the Prescription Ordinance reads thus;

6. 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 instrument 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.

It is clearly seen from Section 6 of the Prescription Ordinance that certain agreements which are in writing, are covered by the provisions contained therein. Such agreements are as follows;

- A deed for establishing a partnership,
- Any promissory note or bill of exchange,
- Any written promise, contract, bargain or agreement,
- Other written security not falling within the description of instrument set forth in Section 5,

It is seen from the aforesaid circumstances that the requirement in terms of Section 6 is that the instrument in question should be in writing and if not such transaction will not fall within the scope of Section 6 of the Prescription Ordinance.

The Appellant had admitted the said joint account the Respondent had with the Appellant bank at Gampaha branch and on 06.11.1998, they deposited a sum of Rs. 54,000,000/- (Fifty-Four Million) to the credit of the said account. Also, admitted as averred by the Respondent, the withdrawal of money from the said account at two occasions by the Respondent and said D. M. Peiris.

In banking transactions, the word "deposit" means a customer crediting money into an account maintained at a bank and the word "withdrawal" means debiting money of account maintained at a bank. From a legal and financial accounting viewpoint, the word "deposit" is used by the banking industry in financial statements to describe the liability owed by the bank to its depositor, and not the funds that the bank holds as a result of the deposit, although shown as assets of the bank. Subject to the limitations imposed by the terms and conditions of such account, the account holder (customer) retains the right to have the

deposited money repaid on demand made by him. The terms and conditions may specify the methods by which a customer may move to withdraw out of the account, e.g., by cash, cheque, transferring, or other method. According to the bank procedure money deposited into an account with a bank remain as an amount that the bank has borrowed from its depositor and thereby has contractually obliged itself to repay the customer according to the terms of the agreement.

In the case of Perera vs. John Appuhamy (1950) 51 NLR 308 (43 CLW 58) it was held that “Where in a deed of sale there is a recital that the full consideration has been paid and there is no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered, an action brought to recover an alleged balance of the consideration is prescribed in three years. The cause of action, in such a case, arises not upon a written contract but upon a simple money debt.” Nagalingam J. observed that “Before it could be said that the action falls under section 6 of the Ordinance, it must be shown that the action is based upon a written promise or contract.”

In the above context, I hold that the cause of action of the Respondent falls within the ambit of Section 6 of the Prescription Ordinance and therefore the learned High Court Judge is correct in holding that the cause of action of the Plaintiff Respondent is not prescribed in law.

At the trial the parties had admitted that the Plaintiff Respondent along with one D. M. Peiris had opened a joint savings account No. 00262071327831 at the People’s Bank Regional Office, Gampaha, on 06.11.1998 and deposited a sum of Rs. 54,000,000/- (Fifty-Four Million) and thereafter they had withdrawn a sum of Rs 5,000,000/- (Five Million) on 16.11.1998 and a sum of

Rs. 7,500,000/- (Seven decimal Five Million) on 09.12.1998 from the said savings account.

Subsequent to the said two transactions the Appellant Bank had transferred a sum of Rs 17,500,000/- from the said joint account at the Gampaha Branch to an account of said D. M. Peiris maintained at the Head Quarters Branch of the Appellant's Bank. The Plaintiff Respondent averred that said transfer of money has been done unsatisfactorily and negligently and against the accepted bank practice by the Appellant. At the trial the Appellant had not led any evidence to establish that the bank had not acted unsatisfactorily and negligently and against the accepted banking practices in transferring the money from the Respondents account to an account opened at the Head Quarters Branch of the Appellant's bank.

The Respondent has led evidence and has produced documents through the witnesses to prove the facts that;

- On 06.11.1998 the Respondent and a person called D. M. Peiris had opened a joint savings account bearing No 00262071327831 at the Gampaha branch of the Appellant's Bank by depositing a sum of Rs. 54,000,000/- (Fifty-Four Million),
- On 16.11.1998 and 09.12.1998, the Respondent together with the said D. M. Peiris had withdrawn the sums of Rs. 5,000,000/- and Rs. 7,500,000/- from the said joint account respectively,
- Said D. M. Peiris had died on 30.11.2000
- Prior to his death, said D. M. Peiris had not opened an account at the Headquarters' branch of the Appellant bank,
- Acting upon a letter dated 15.11.1998, the Gampaha branch had transferred a sum of Rs. 17,500,000/- from the said joint savings

account to an account opened at the Headquarters' branch of the Appellant Bank,

- Said letter dated 15.11.1998 had not been sent by said D. M. Peiris,
- According to the report of the EQD dated 30.11.1999 the signatures on the said letter dated 15.11.1998 and also a letter dated 07.01.1999 differed to that of said D. M. Peiris's signature,
- In evidence the Respondent has stated that when he received information about the fraud on 07.01.1999, he met the Manager of the Gampaha branch of the Appellant's bank and the Manager consoled him by stating that the total amount would be paid to him.

The Appellant has not made any attempt to contradict the evidence led by the Respondent or to deny the said position by leading evidence on his behalf. Evidence should have been led to establish that the bank acted satisfactorily and diligently and according to the accepted banking practices in transferring the money from the Respondents' account to an account opened at the Head Quarters Branch of the Appellant's bank. It is well accepted practice in banking transactions to compare the signatures of customers, who are dealing with the bank, with the signature placed on the specimen signature card maintained by the bank. Hence the Appellant must establish that its officers followed the said practice by comparing the alleged signature of said D. M. Peiris with the signature he had placed on the specimen signature card. But the Appellant has not made any attempt to call the bank officers who were responsible to the transfer of money, in order to prove that they compared the signatures of the author of the letters produced marked P 6 and P 8 with the signature placed on the specimen signature card marked P 8a in order to identify the genuineness of the said documents.

Furthermore, the signature card P 8a dated 06.11.1998 contained specific instructions that “do not pay money without the approval of the Senior Manager”. The Appellant has not made any attempt to prove that the officers who dealt with the task of transferring of money obtained the approval of the Senior Manager prior to transferring of money to the Head Quarters Branch. Thereby the Appellant has failed to prove that the Appellant bank has acted satisfactorily and diligently and according to the accepted banking practices.

In the absence of such evidence against the position established by the Respondent at the trial, the balance of probabilities is in favour of the Respondent. In the circumstances, I see no error in the judgment of the learned High Court Judge in holding in favour of the Respondent. Hence, I dismiss the appeal of the Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court

SISIRA J. DE ABREW, J.

I agree.

Judge of the Supreme Court

K.T. CHITRASIRI J.

I had the opportunity of reading the draft judgment of Upaly Abeyrathne J and I have no reason to disagree with his decision to dismiss this appeal. Having read the draft judgment, I thought it is necessary to express my views as well on the questions of law that are to

be answered by this Court. Basically, those questions of law have two limbs and they are as follows.

- Whether there was any breach/violation of the terms and conditions of **a written contract?** and
- Whether the cause of action of the plaintiff is prescribed?

Contention of the learned President's Counsel for the defendant-appellant was that; unless the plaintiff-respondent establishes an existence of a written agreement between the parties, he could not have maintained this action since it is the Section 6 of the Prescription Ordinance that allows filing action within 6 years when counted from the date on which the cause of action has arisen. Such a contention was advanced since the date of filing of this action is a date after 3 years from the date on which the cause of action had alleged to have arisen.

In the plaint filed on 21st May 2002, it is stated that the plaintiff-respondent and one D.M. Pieris had opened and maintained a joint account in Gampaha branch of the appellant bank namely, the Peoples Bank since 06.11.1998. Authority to withdraw money from the said account had been given to both the plaintiff-respondent and to D.M. Pieris. Accordingly, those two individuals had withdrawn different sums of moneys from that account from time to time.

On 07.01.1999, the appellant had received information to the effect that a request had been made to transfer Rs.17.5 million to an account alleged to have been opened by D.M. Pieris who is now deceased, at the headquarter branch of the same People's Bank, from his joint account held and maintained at the Gampaha branch. Upon receiving the said

information, plaintiff-respondent had made several inquiries from the authorities concerned and finally he had made a complaint to the police as to the opening of the account at the head quarter branch by D.M.Peiris. Accordingly, the police have reported facts in this regard to the Magistrate's Court of Gampaha. In the Magistrate's Court of Gampaha, an EQD Report had been called for, to ascertain the correctness of the signature of D.M. Pieris in order to find out whether D.M. Pieris has in fact opened the aforesaid account at the headquarter branch. Examiner of Questioned Document, by the letter marked 'P5' has reported that it is not the signature of D.M. Peiris which is found in the mandate that was used to open the said account at the headquarter branch. Assistant EQD S.A.Batakandage who has signed the report has testified in court in support of this fact. The aforesaid mandate which was examined by the EQD had been marked in evidence as 'X1', 'X2' and 'X3'. Accordingly, it was found that the account to which the aforesaid Rs.17.5 million had been transferred was not opened by D.M. Pieris. Therefore, it is manifestly clear that a fraud had been committed when making the application to open the account at the headquarter branch. Accordingly, the transfer of funds to the said account which had been opened fraudulently at the headquarter branch becomes an illegal act.

I will now look at the issue of prescription in the light of the aforesaid fraudulent act that surfaced with the production of the EQD report marked P5. This EQD report is date 30.11.1999 and is found at page 237 in the appeal brief. In that context, the law is that commencement of the period of prescription begins on the day of such a fraudulent act came into existence or in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it. In this regard, I will refer to

Prof. Weeramantry's comments found in his book "The Law of Contracts". [at para 863] In that book, he states thus:

"Prescription does not run in the case of concealed fraud until there is knowledge of the fraud or until the party defrauded might by due diligence have come to know of it."

In support of his view, Prof. Weeramantry has quoted the decision in **Kirthisinghe V. Perera [23 NLR 279]**

Facts and circumstances of this case show that the plaintiff has filed action within three years from the date he came to know of the fraudulent act that was committed when opening the account at the headquarter branch. It is the account to which the moneys were transferred from the Gampaha bank account jointly maintained by the plaintiff-respondent and D.M. Peiris. Therefore, the plaintiff-respondent is entitled to file action within 3 years from 30.11.1999, in accordance with Section 10 of the Prescription Ordinance. Accordingly, it is clear that the cause of action of the plaintiff-respondent has not prescribed.

In the circumstances, it is incorrect to contend that the plaintiff should establish an existence of a written agreement to escape the defence of prescription. More particularly, it is illegal to transfer funds into an account which had been opened fraudulently. For the reasons set out above, I answer all the questions of law in favour of the plaintiff-respondent.

Accordingly, as Abeyrathne J. has held, this appeal should stand dismissed with costs.

K.T.CHITRASIRI J.