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

In the matter of an Appeal under and in terms of section 5(1) of the High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Act and Article 128 of the Constitution.

Mega Lifesciences Ltd.
(Formerly, Medicap Ltd.)
No. 384 Soi 6,
Pattana 3 Road,
Bangpoo Industrial Estate,
Samutprakarn 10280,
Thailand.

Plaintiff – Appellant

SC CHC Appeal No. 01/2014
HC (Civil) Case No. 253/2007/MR

v.

Harcourts (Pvt.) Ltd.
Harcourts Plaza,
No. 14,
Station Road,
Dehiwala.

Defendant – Respondent

Before: **Yasantha Kodagoda, PC, J.**
Arjuna Obeyesekere, J.
K. Priyantha Fernando, J.

Appearance:	Dr. Romesh De Silva, PC with Sugath Caldera instructed by Paul Ratnayake Associates for the Plaintiff – Appellant. Suren Gnanaraj with Sakuni Weeraratne instructed by Samararatne Associates for the Defendant – Respondent.
Written Submissions:	Filed on behalf of the Plaintiff – Appellant on 5th January 2021 and 29th August 2025. Filed on behalf of the Defendant – Respondent on 1st December 2022 and 7th July 2025.
Argued on:	9th December 2024 and 21st March 2025.
Judgment delivered on:	**30th** April, 2026.

JUDGMENT

Yasantha Kodagoda, PC, J.

1) This Judgment relates to an Appeal against a Judgment dated 30th March 2012 of the High Court of the Provinces – Western Province (Commercial).

Case for the Plaintiff - Appellant

2) Filing Plaint dated 27th July 2007, the Plaintiff – Mega Lifesciences Ltd. averred that it is a company incorporated in Thailand. The previous name of the company was 'Medicap Ltd.'. On or about the 15th of August 2005, the name of the company was changed to 'Mega Lifesciences Ltd.'. The Plaintiff's principal business activity was the supply, sale and delivery of pharmaceuticals and nutraceuticals.

3) During the period relevant to this case, the Defendant functioned as the Agent of the Plaintiff in Sri Lanka.

4) On a request by the Defendant, the Plaintiff supplied to the Defendant pharmaceuticals and nutraceuticals, the details of which were stated in the

statement of accounts attached to the Plaint marked "A". Due to these transactions between the Plaintiff and the Defendant, by letter dated 28th July 2005 attached to the Plaint marked "B", the Defendant acknowledged that a sum of United States Dollars (USD) 296,316.00 was due from him to the Plaintiff and promised to make such payment. The Defendant did not fulfill that undertaking. Thus, the Plaintiff further averred that the outstanding amount had given rise to the first cause of action.

5) Furthermore, due to further transactions between the parties reflected in the Statement of Accounts marked "C" (also referred to as the 'line account'), a further sum of USD 135,122.00 became due from the Defendant to the Plaintiff. By letter dated 28th July 2005 ("B"), the Defendant undertook to pay the Plaintiff that amount too. That undertaking was also not fulfilled by the Defendant. The Plaintiff averred that the breach of that undertaking gave rise to the second cause of action.

6) Furthermore, at the request of the Defendant, the Plaintiff had delivered to the Defendant certain stocks of goods. The Defendant was obliged to pay the Plaintiff the value of such stocks, which was USD 64,234.00. The Defendant failed to pay the Plaintiff that sum, too. The Plaintiff averred that such a breach had given rise to the third cause of action.

7) In view of the foregoing, causes of action had accrued to the Plaintiff to sue the Defendant to recover the aggregate amount due, which was USD 495,671.00.

8) In support of the Plaintiff's case, Thomas Abraham, the Chief Financial Officer of the Plaintiff company (functioning as the Director of Projects at the time he gave oral evidence) tendered affidavit evidence (as a substitute for his examination-in-chief) and later made himself available for cross-examination.

9) According to the witness, Mega Products Ltd. was the Distributor of the Plaintiff company. The distribution of goods to the Defendant was through Mega Products Ltd. Therefore, all documents pertaining to the distribution of goods were attended to by Mega Products Ltd. The Defendant knew of this arrangement. Based on this understanding, the Plaintiff supplied goods to the Defendant through Mega Products Ltd. He said that the supply of such goods is reflected in the several invoices marked and produced "P5" to "P23".

10) According to Abraham, by "P4" (which is also the document annexed to the Plaint marked "B"), the Defendant had admitted that the full sum contained therein (US $ 296,988/=) was due and owing from him to the Plaintiff and undertook to make that payment. Thereafter, he breached that undertaking.

11) Albeit brief, that is the case for the Plaintiff - Appellant.

12) Under cross-examination, the witness has testified that the Plaintiff's complaint to Court related to 'goods sold and delivered' by the Plaintiff to the Defendant, and that the Defendant had failed to pay the price for such goods. He has admitted that "P24" (the written undertaking issued by the Defendant and attached to the Plaint marked "B") does not contain any reference to any of the invoices produced by the witness at the trial as relating to such goods that were sold. It has also been elicited that the first cause of action relates to 'goods sold and delivered' to the Defendant. The amount due from the Defendant in that regard is US $ 296,000/=. The third cause of action relates to stocks with the Defendant, which amounts to US $ 62,234/=. However, the witness has conceded that, such stocks are covered by the goods sold and delivered, which are reflected in invoices "P5" to "P23". However, what was being claimed under the 3rd cause of action arises out of a re-valuation of the price of those goods. Thus, the witness has conceded that in the third cause of action, the Plaintiff had sought to claim an additional price to the goods already sold to the Defendant.

Case for the Defendant - Respondent

13) By its Answer dated 10th December 2007, the Defendant averred that the transactions between the Plaintiff and the Defendant were regulated by a written agreement dated 1st August 2001 ("V1"). At all times relevant to the transactions between the Plaintiff and the Defendant, the Defendant had acted strictly according to "V1".

14) Furthermore, his position was that "B" and "C" do not amount to agreements entered into between the Plaintiff and the Defendant.

15) During the period "V1" was in force, the Defendant had acted as the Plaintiff's Agent in Sri Lanka. As a result of the Defendant acting in that capacity, he had to incur a considerable expense in order to market the Plaintiff's products in Sri Lanka. The amount expended by the Defendant in that regard was Rs.

35,364,631.82. According to the agreement entered into between the parties ("V1"), the Plaintiff was obliged to reimburse the Defendant, for any expenditure incurred by the latter. However, the Plaintiff did not reimburse that amount due to the Defendant. Therefore, a cause of action (first cause of action) had accrued to the Defendant to sue the Plaintiff for the recovery of Rs. 35,364,631.82.

16) Furthermore, during the period the Defendant functioned as the Plaintiff's Agent in Sri Lanka, he had to incur expenditure in a sum of Rs. 5,961,670.00 for the distribution of the Plaintiff's goods. He did so by using vehicles. The Plaintiff has not reimbursed the expenditure incurred by the Defendant in that regard as well. Therefore, a second cause of action had accrued to the Defendant to sue the Plaintiff for the recovery of Rs. 5,961,670.00.

17) In addition thereto, during the period when the Defendant functioned as the Agent of the Plaintiff, the Defendant had to spend a sum of Rs. 12,489,212.03 for general overheads relating to the distribution of the Plaintiff's goods. The Plaintiff has not reimbursed that expenditure as well. Therefore, a third cause of action had accrued to the Defendant to sue the Plaintiff for the recovery of Rs. 12,489,212.03.

18) In view of the foregoing, a composite cause of action had accrued to the Defendant to sue the Plaintiff to recover the full amount due, which was Rs. 53,815,513.85.

19) Though the Defendant had in his Answer raised these claims in reconvention, by an application made in Court on 10th June 2008, learned Counsel for the Defendant had withdrawn these claims, with the liberty to file a fresh action for the recovery of monies due from the Plaintiff to the Defendant.

20) Mohammed Naleer Sally, as the General Manager (Administration) of the company, has testified on behalf of the Defendant. Through his affidavit, he had produced documents marked "D", and "D1" to "D1007(a)" and their contents have been led in evidence. According to the witness, with effect from 1st August 2001, the Defendant had become the sole 'Distributor' of the Plaintiff's goods in Sri Lanka. That relationship is regulated by agreement "V1". Various sums of money were expended by the Defendant company in relation to the promotion, advertising and marketing of the Plaintiff's goods in Sri Lanka. Further sums of money are due from the Plaintiff to the Defendant in relation to the transport of goods of the Plaintiff and with regard to general overheads. Accordingly, an

aggregate sum of Rs. 53,815,513.85 is due in that regard from the Plaintiff to the Defendant. In view of the transactions between the Plaintiff and the Defendant, no sum of money was due from the Defendant to the Plaintiff. Documents "D1" to "D1007(a)" reflect the sums of money due from the Plaintiff to the Defendant. Furthermore, the obligation contained in "P24" was towards Mega Products Ltd. and not towards the Defendant.

21) The sole question put to the Defendant's witness by learned Counsel for the Plaintiff has been a suggestion that 'what is stated in the affidavit is incorrect'. The witness has denied that allegation.

Judgment of the High Court

22) The learned Judge has noted that the Plaintiff in his Plaint had not taken up the position that the Defendant was his 'Distributor' and had not presented documentary evidence to establish such a relationship. Furthermore, he has noted that such a position was taken up only by the Defendant.

23) The learned Judge of the High Court has observed that the Plaintiff had failed to establish a relationship between the promise contained in "B" (produced at the trial marked "P24") and the amount purportedly due to the Plaintiff as a result of the Plaintiff having delivered to the Defendant certain stocks of goods.

24) The learned Judge has also observed that the purported undertaking contained in "B" had been entered into between Plaintiff's witness Thomas Abraham (on behalf of Mega Products Ltd.) and the Chairman of the Defendant – Mohamed Riyaz. He has noted that the Plaintiff had failed to take up this position (that products of the Plaintiff were distributed via Mega Products Ltd.) in the Plaint, thereby precluding the Defendant from responding to that position. Furthermore, he has noted that, what "P24" reveals is that the Defendant has undertaken to make the payment contained therein to Mega Products Ltd., and not to the Plaintiff. The learned Judge has noted that the name 'Mega Products Ltd.' was not the previous name of the Plaintiff company. He has observed that interpreting the undertaking given by the Defendant to Mega Products Ltd. as amounting to an undertaking given to the Plaintiff would be erroneous and would cause prejudice to the Defendant. He has also noted that the Plaintiff did not call a witness to testify on behalf of Mega Products, and corroborate the Plaintiff's position that the Plaintiff operated through Mega Products Ltd.

25) Focusing his attention on the sums of money purportedly due to the Plaintiff from the Defendant on account of the 'running account' ("P5" to "P23"), the learned Judge has noted that the amount due per each invoice had become prescribed (as per section 8 of the Prescription Ordinance) as a result of action not having been filed within 1 year of the last payment due.

26) Furthermore, referring to the goods purportedly issued to the Defendant by the Plaintiff (as reflected in "P5" to "P23"), the learned Judge has concluded that the contents of those documents which related to the Plaintiff (as opposed to the documents relating to Mega Products Ltd.), reveal that such documents are merely 'Certificates of Analysis'. Accordingly, he has concluded that "P5" to "P23" do not generate any obligation by the Defendant towards the Plaintiff.

27) Due to the foregoing, the learned Judge has concluded that the Plaintiff had failed to establish any of the causes of action contained in the Plaint, and therefore has dismissed the Plaint.

Submissions of Counsel

28) **Learned President's Counsel for the Plaintiff – Appellant** submitted that the Judge of the High Court had dismissed the Plaint solely on the basis that there had been no agreement between the Plaintiff and the Defendant. He submitted that it was an erroneous basis, as the evidence revealed otherwise. Deviating from the averment contained in the Plaint, learned President's Counsel insisted that the Defendant was the Plaintiff's 'Distributor' in Sri Lanka and therefore was required to sell the goods that were conveyed to him by the Plaintiff or if it was not possible to sell the goods, return them to the Plaintiff. Deviating from the Plaintiff's witness's testimony regarding the first cause of action, learned President's Counsel for the Plaintiff – Appellant also submitted that the transaction between the parties was not a *"goods sold and delivered transaction"*.

29) Learned President's Counsel submitted further that documents "P5" to "P23" were proof that the goods had been supplied by the Plaintiff to the Defendant. According to these documents, the sum due from the Defendant to the Plaintiff was US $ 296,988.00. According to "B", the Defendant had acknowledged that the said sum was due and owing to the Plaintiff, and the Defendant had promised and undertaken to pay such sum. Furthermore, "P26" to "P35" revealed the "*calculation*

of margin" which the Defendant was obliged to pay the Plaintiff. Such sum that was due to the Plaintiff was US $ 406,941.75.

30) **Learned Counsel for the Defendant – Respondent** submitted that the Plaintiff had failed to establish that the 'promise to pay' document "B" ("P24") was in fact an agreement between the Plaintiff and the Defendant. Document "B" was not an agreement between the Plaintiff and the Defendant. It was an agreement between Mega Products Ltd. and the Defendant. He submitted that Mega Products Ltd. was a company distinct from the Plaintiff company. He explained that Mega Products Ltd. had also been supplying pharmaceuticals to the Defendant, and "B" related to such transactions. In these circumstances, learned Counsel submitted that the Plaintiff did not have a legal entitlement to sue the Defendant based on "B". Learned Counsel also pointed out that though the Plaintiff's witness Thomas Abraham had signed "B", he had done so as the Chief Financial Officer of Mega Products Ltd. and not on behalf of the Plaintiff company. Therefore, if at all, it should be Mega Products Ltd. which had the entitlement to sue the Defendant and not the Plaintiff.

31) Drawing the attention of this Court to documents "P5" to "P23", learned Counsel for the Defendant – Respondent submitted that those documents reflected transactions between Mega Products Ltd. and the Defendant and not between the Plaintiff and the Defendant. Explaining that submission, learned Counsel submitted that all the invoices had been issued by Mega Products Ltd. and not by the Plaintiff. The situation with regard to 'Packing Lists', 'Bills of Lading', 'Marine Cargo Policy Certificates', 'Cusdecs', 'Airway Bills' and documents containing instructions given to Banks, was also the same, as they too had either been issued by Mega Products Ltd. or contained references to such company and not to the Plaintiff. The only documents which contained references to the Plaintiff's former name (Medicap Ltd.) were the 'Certificates of Analysis'. However, such documents too did not reflect details of monies due from the Defendant to the Plaintiff. In these circumstances, learned Counsel submitted that the Plaintiff – Appellant had failed to prove any cause of action against the Defendant – Respondent. In these circumstances, learned Counsel submitted that the Plaintiff did not have any legal entitlement to institute the action against the Defendant.

32) Learned Counsel for the Defendant – Respondent also submitted that the Plaintiff had intentionally suppressed the 'Distributorship Agreement' ("V1") entered into

between the Plaintiff and the Defendant. He further submitted that, such suppression was due to the said agreement containing a clause which stipulated that, should a dispute arise, jurisdiction for judicial adjudication of such dispute was vested in 'Singaporean Courts', and thus, the Commercial High Court of Sri Lanka would not have jurisdiction to hear and decide the case. Thus, had the agreement been pleaded by the Plaintiff, the High Court would have refused to entertain the Plaint and hear the case. Thus, the Plaintiff had suppressed the agreement.

33) Learned Counsel also submitted that, though the Plaintiff – Appellant's principal claim was founded upon "B", its alternate position was based on documents "P5" to "P23", which were a series of invoices, packing lists, Bills of Lading and Marine Policy certificates, pertaining to 'goods sold and delivered' by the Plaintiff to the Defendant. He submitted that, if that was the nature of the transactions between the parties, the claim of the Plaintiff founded upon the said documents was prescribed in terms of section 8 of the Prescription Ordinance.

34) Due to the foregoing reasons and certain other grounds urged by him, learned Counsel for the Defendant – Appellant submitted that the findings reached by the learned Judge of the Commercial High Court were valid and thus, the Appeal of the Plaintiff – Appellant should necessarily fail.

Analysis and Conclusions

35) The first matter that requires consideration is the nature of the relationship that existed between the Plaintiff – Appellant on the one hand, and the Defendant – Respondent on the other hand, during the period relevant to the case. It is common ground that it was **contractual** in nature. Though learned President's Counsel for the Plaintiff - Appellant took a different view, the Plaintiff in his Plaint took up the position that the relationship was one of **Principal and Agent**. The Plaint states that the Defendant was the **Agent** of the Plaintiff in Sri Lanka. The sole witness for the Plaintiff, Thomas Abraham, supported this position. The Plaintiff failed to present to Court the agreement that governed the 'Principal and Agent' relationship. The Defendant annexed to the Answer "V1" which reveals that the Defendant had been the **Distributor** of the Plaintiff. However, as noted by the learned Judge of the High Court, "V1" was not produced in evidence. Nevertheless, it must be observed that in the Replication dated 21st February 2008 filed by the Plaintiff, he had not averred that the relationship that existed between

the Plaintiff and the Defendant was not regulated by "V1". Nor has the Plaintiff even at that stage produced the written 'Agency Agreement' which he says purportedly existed between the parties. In all these circumstances, "V1" must be regarded as the written contract that existed between the Plaintiff and the Defendant. It is possible to accept the submission of learned President's Counsel for the Plaintiff – Appellant that the Defendant was the Plaintiff's 'Distributor' in Sri Lanka. However, whether the Defendant was the Plaintiff's 'Agent' or 'Distributor' in Sri Lanka does not, in my view, make a significant difference to the determination of this Appeal.

36) I shall proceed to examine the evidence relating to this Appeal on the purported basis presented to the Commercial High Court by the Plaintiff – Appellant, that the three causes of action had arisen due to three different sums of monies due from the Defendant to the Plaintiff for *"goods sold and delivered"* and determine whether the Plaintiff had established one or more of the three causes of action averred in the Plaint.

37) It is therefore necessary to consider whether the Plaintiff and the Defendant (a) had a contractual relationship between the parties, (b) whether the Defendant had acted in breach of such agreement (may it be "V1" or any other), and if so, (c) whether such breach gave rise to the three causes of action pleaded in the Plaint.

38) The Plaintiff sought to prove the existence of a contractual relationship (i) through the conduct of the parties, (ii) nature of the transactions that existed, and (iii) associated documentation pertaining to such transactions. While seeking to prove the existence of a series of transactions relating to a contract between the parties pertaining to *"goods sold and delivered"* through such oral and documentary evidence is not prohibited by law, it must be noted that, particularly in today's context, it is highly improbable to proceed on the footing that two contracting parties did not have a **formal written agreement** regulating their contractual relationship. That is particularly since (i) the contracting parties were corporate entities based in two different countries, (ii) a commercial contractual relationship is said to have existed between them, and (iii) the value of the several transactions was very high. Thus, I see merit in the submission of the learned Counsel for the Defendant – Respondent that the Plaintiff – Appellant had intentionally suppressed from the Commercial High Court the written agreement entered into between the parties (that being "V1"), and had done so, in fear that the clause

which conferred jurisdiction to Singaporean Courts pertaining to judicial adjudication of disputes would have led to a disadvantageous situation for the Plaintiff. This position is further reinforced by the principles governing the drawing of adverse inferences in relation to the non-production of evidence.

39) In ***S.C.B. Jayasinghe and others v. Kajima Corporation and others*** *[SC (CHC) Appeal 104/2018, SC Minutes of 19th November 2025]* I expressed agreement with the Judgment of my brother Justice Arjuna Obeyesekere, who expounded on the words by E. R. S. R. Coomaraswamy in "The Law of Evidence" [Volume II, Book I, page 397], by stating that the presumption in question arises in circumstances involving the withholding, spoliation, fabrication, or suppression of evidence. The underlying rationale is that the conduct of the party withholding such evidence may properly be attributed to a consciousness that, if produced, the evidence would operate adversely to that party. Further, in order to justify the drawing of such an unfavourable inference, it must be established that the evidence in question is in existence, is within the power of the party to produce, and has been deliberately withheld. What gives rise to the presumption is not the mere failure to adduce evidence, but the withholding of evidence which could and ought to have been produced.

40) Particularly since the Plaintiff – Appellant had not pleaded a written agreement that governed the contractual relationship between the parties and such agreement was not presented by the Plaintiff in evidence, it is necessary to very carefully examine the documentary evidence presented by the Plaintiff. Those documents are in clusters of documents marked "P5" to "P23" and documents connected thereto marked "P25" to "P44". [The learned Judge of the High Court had rightfully held that the documents marked "P45(a)" to "P45(g)" purportedly being hard copies of certain electronic mails that were exchanged between the Plaintiff and the Defendant had not been proved according to law. In fact, during the appellate proceedings before this Court, learned President's Counsel for the Appellant did not seriously challenge that finding.] Thus, I shall give my attention to only the series of documents marked and produced "P5" to "P23" and "P25" to "P45". Of them too, the primary documents related to the series of transactions relied upon by the Plaintiff – Appellant were "P5" to "P23". "P25" to "P45" contain further information relating to the transactions contained in "P5" to "P23".

41) As observed by the learned Judge of the Commercial High Court, among the documents produced by the Plaintiff marked "P5" to "P23" are a series of documents, which put together, were referred to as evidence relating to the 'running account' between the parties. "P5" for example, constitutes a bundle of documents which can be described as follows:

i. "P5" – An Invoice (No. 38/04/2005) dated 25th April 2005. Issued by Mega Products Limited. Signed for Mega Products Limited (undecipherable signature. Relates to 2,090 boxes of Ferrovit and 1,915 boxes of Vitacap, total valued at USD 9,450.90. Buyer – Harcourts (Private) Limited, Consignee – Harcourts (Private) Limited.

ii. "P5(a)" – A Packing List (relating to Invoice No. 38/04/2005) dated 25th April 2005. Issued by Mega Products Limited.

iii. "P5(b)" – Air Way Bill No. 160 – 53474875, dated 26th April 2005. Related to Invoice No. 38/04/2005 dated 25.04.2005. Shipper – Mega Products Limited. Consignee – Harcourts (Private) Limited. Issued by Harpers Freight Int'l Air Cargo Co. Ltd.

iv. "P5(c)" – Marine Cargo Policy Certificate, No E109619. Issued in favour of – Mega Products Limited. Goods – relates to Invoice No. 38/04/2005 dated 25.04.2005. Marks & Nos. – Harcourts (Private) Limited. Issued by – ACE Insurance Limited.

v. "P5(d)" – 'Certificate of Analysis' issued by Medicap Limited. Customer – Harcourts. Product: Vitacap. Manufactured on 09.03.2005.

vi. "P5(e)" – 'Certificate of Analysis' issued by Medicap Limited. Customer – Harcourts. Product: Ferrovit. Manufactured on 28.03.2005.

42) It would thus be observed that documents "P5", "P5(a)" to "P5(d)" relate to goods issued to the Defendant by Mega Products Ltd. Only "P5(d)" and "P5(e)" captioned 'Certificate of Analysis' can be reasonably inferred as having been issued by the Plaintiff'. The position regarding document bundles "P6" to "P23" is also the same. Other than the 'Certificates of Analysis', the remaining documents pertaining to the actual transactions reveal that the transacting parties were a company called 'Mega Products Ltd.' and the Defendant.

43) However, these documents do point to the direction that the goods in issue had been manufactured by Medicap Ltd. (the previous name of the Plaintiff). The ensuing inference being that certain goods manufactured by the Plaintiff were given to Mega Products Ltd., which sold such goods to the Defendant.

44) On the Plaintiff – Appellant's own admission, 'Mega Products Ltd.' functioned as the 'Distributor' of the Plaintiff's goods (ostensibly from the end of Thailand). Therefore, goods were channeled to the Defendant through such an intermediate company. In fact, the afore-mentioned documentary evidence supports that proposition. That gives rise to three contractual arrangements, which are as follows:

i. Mega Lifesciences Ltd. (formerly Medicap Ltd.) and Mega Products Ltd. – Distributorship Agreement (not produced by the Plaintiff)

ii. Mega Lifesciences Ltd. and Harcourts (Pvt.) Ltd. – Distributorship Agreement (produced by the Defendant attached to the answer - "V1") [Clause 4 of "V1" specifically stated that the Defendant is appointed as its "*Distributor for the importation, distribution and sale of the products…*".]

iii. Mega Products Ltd. and Harcourts (Pvt.) Ltd. (Not produced by either the Plaintiff or the Defendant.)

45) It is important to note that the Plaintiff did not produce the 'Distributorship' agreement it had entered into with Mega Products Ltd. Furthermore, the Plaintiff also did not produce the purported 'Agency' agreement with the Defendant.

46) As described by C. G. Weeramantry in "The Law of Contracts" (Volume I, page 84), the basic constituent elements of a contract are: (a) an agreement between the parties; (b) the actual or presumed intention of the parties to create a legal obligation; (c) due observance of prescribed forms or modes of agreement; (d) legality and possibility of the object of the agreement; and (e) capacity of the parties to contract.

47) In view of such a triangular contractual relationship that appears to have existed between the Plaintiff, Mega Products Ltd., and the Defendant, with due consideration of the above stated prerequisites, it can be ascertained that the transaction pertaining to the "*goods sold and delivered*" appears to have been between Mega Products Ltd. and the Defendant. Thus, it is evident as to why the Defendant had issued the undertaking contained in "B", which was unequivocally

towards Mega Products Ltd. and not towards the Plaintiff. That such undertaking did not arise out of the Distributorship agreement ("V1") between the Plaintiff and the Defendant is evident from the fact that, "V1" makes no reference to Mega Products Ltd. Thus, as pointed out by the learned Judge of the High Court, acknowledgement of monies being due from the Defendant ("B" / "P24") is clearly towards Mega Products Ltd. and not towards the Plaintiff. Thus, the undertaking contained in "B" appears to be an undertaking separate and independent of the contractual relationship that had existed between the Plaintiff and the Defendant. Thus, if the Defendant had defaulted in fulfilling the undertaking as contained in "B", it was the entitlement of Mega Products Ltd. to have sued the Defendant and not the Plaintiff's entitlement.

48) Particularly since the Plaintiff relied extensively on document "B", it is necessary to give detailed attention to it. The following features of that document are worthy of reproduction in this Judgment.

i. Date: 28th July 2005
ii. Caption: *"Agreement to Re-schedule payments to Mega Products (Bangkok) by Harcourts (Pvt) Ltd (Sri Lanka)"*
iii. First sentence: *"As of 30/6/2005, there is a net amount overdue to be paid to Mega Products (Thailand) by Harcourts amounting to USD 157,387.12."*
iv. Further sentences: *"So the total dues to Mega amounts to USD 296,988 (United States Dollars) [157,387 + 139,601]"*
v. Signatories: *"On behalf of Mega Products (Thailand) Thomas Abraham Chief Financial Officer …(signature)… 28/7/2005, 7.15 PM, Harcourts Tower, Colombo"* and *"On behalf of Harcourts Pvt Ltd Mr. Ahamed Rheyas Chairman & CEO …(signature)…"*
vi. The final page of document "B" (which for convenience shall be referred to as "B1" contains another undertaking.
    i. Date: 28th July 2005
    ii. Caption: *"Line Account Payments"*
    iii. Contents: *"All money due on line account will be paid against proper invoices produced by Mega Sri Lanka till the line account stocks are over. The balance money becoming due on line account shall be remitted to Mega Bangkok by Harcourts as per Mega's instructions. …"*
    iv. Signatories: Identical to the signatories of the principal document marked "B".

49) It is clear that the undertaking contained in document "B" is from the Defendant to Mega Products Ltd., and not to the Plaintiff. The only common factor linking the Plaintiff to Mega Products Ltd. is Thomas Abraham, who appears to have been the Chief Financial Officer of both the Plaintiff company and Mega Products Ltd. However, it is quite possible that the two companies had one or more common officials, such as Thomas Abraham. Nevertheless, as the learned Judge of the Commercial High Court has pointed out, document "B" does not confer on the Plaintiff an entitlement in law to sue the Defendant company for the breach of the undertaking contained in that document. That is so evidently due to the fact that, Mega Products Ltd. (also referred to as 'Mega Products Thailand') is a company distinct from Mega Lifesciences Ltd. Furthermore, even when Thomas Abraham gave evidence, he has not even attempted to explain how the breach of the undertaking given by the Defendant to Mega Products Thailand became the basis for the Plaintiff to sue the Defendant. In fact, the contents of document "B" are quite tenable given the fact that the transactional documents "P5" to "P23" reveal that the goods were dispatched by Mega Products Ltd. and received by the Defendant. That is distinctly possible, notwithstanding the fact that it appears that the goods were manufactured by the Plaintiff. Therefore, I find myself in agreement with the finding reached by the learned Judge of the Commercial High Court that document "B" does not serve as a legal basis for the Plaintiff to sue the Defendant. If at all, the entitlement is for Mega Products Ltd. to sue the Defendant. However, such entitlement does not accrue to the benefit of the Plaintiff – Appellant.

50) The only other basis on which the Plaintiff's case can be assessed is to consider whether documents "P4" to "P23" confer on the Plaintiff a legal basis to sue the defendant. As pointed out before, other than the series of documents captioned "Certificate of Analysis" the remaining documents reveal that the party which dispatched the goods from Thailand to Sri Lanka (which goods undoubtedly was received by the Defendant was Mega Products Ltd. Even otherwise, even if this Court were to accept the principal submission of the learned President's Counsel for the Plaintiff – Appellant that "P5" to "P23" is proof of the Plaintiff having transacted directly with the Defendant, since these documents are admittedly documents relating to *"goods sold and delivered"*. I must consider whether the claim of the Plaintiff had been prescribed as at the time the action was instituted.

51) Section 8 of the Prescription Ordinance provides as follows:

> "***No action shall be maintainable for or in respect of any goods sold and delivered****, or for any shop bill or book debt, or for work and labour done, or for the wages of artisans, labourers, or servants,* ***unless the same shall be brought within one year after the debt shall have become due****."*
> [Emphasis added by me.]

As observed by the learned Judge of the High Court, in terms of section 8 of the Prescription Ordinance, claims arising out of such transactions become prescribed in 1 year.

52) Moreover, in ***Capital Printpack (Private) Limited v. Wijitha Group of Companies (Private) Limited,*** *[SC/Appeal/21/2017, Supreme Court Minutes of 9th June 2023]*, Justice Janak De Silva provides detailed clarifications of sections 6, 7 and 8 of the Prescription Ordinance and their respective applications, affirming that an action *"for or in respect of any goods sold and delivered"* based on an unwritten contract falls squarely within the ambit of section 8 and is thus subject to a prescriptive period of one year.

53) Thus, as rightly pointed out by the learned Judge of the Commercial High Court and by learned Counsel for the Defendant – Respondent, the claim presented on the strength of "P5" to "P23" had been prescribed by the time action was instituted in the High Court and was therefore non-actionable. Thus, it is noted as to why learned President's Counsel for the Plaintiff – Appellant commenced and concluded his submissions, drawing attention of this Court to the purported undertaking contained in "B" ("P24"), as such written undertaking would have extended the applicable prescriptive period. However, as noted above, "B" is not an undertaking given by the Defendant to the Plaintiff.

54) Due to the foregoing reasons, I conclude that the Plaintiff – Appellant has failed to prove on a balance of probabilities a factual and legal basis for the three causes of action contained in the Plaint. Therefore, I find myself in complete agreement with the decision of the learned Judge of the Commercial High Court in dismissing the Plaint.

Outcome of the Appeal

55) In view of the foregoing, this Appeal is dismissed.

56) The Defendant – Respondent shall be entitled to recover the cost of litigation before this Court from the Plaintiff – Appellant.

Judge of the Supreme Court

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

K. Priyantha Fernando, J.

I agree.

Judge of the Supreme Court