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

H.M.A. Ruwan Ravindranath,
No. 13/16, Ariyawansa Mawatha,
Kanthale.
Defendant-Respondent-Appellant

SC/APPEAL/10/2020
HCCA/EP/HCCA/TCO/FA/226/2018
DC KANTALE M/54/2012

Vs.

R. Prageeth Indrarathna Rupasinghe,
No. 17, Wan-Ela,
Kanthale.
Plaintiff-Appellant-Respondent

Before: Hon. Justice S. Thurairaja, P.C.
Hon Justice A.L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: Dr. Sunil Cooray with Hemantha Boteju for the Appellant.
Lakshman Perera, P.C. with Tharika Jinadasa for the Respondent.

Written submissions on:

By the Appellant on 23.12.2020

By the Respondent on 01.06.2020

Argued on: 01.09.2025

Decided on: 06.11.2025

Samayawardhena, J.

I have had the advantage of reading the draft judgment of my learned brother, Justice Gooneratne. However, I regret that I am unable to agree with it.

The plaintiff instituted this action against the defendant in the District Court of Kantale seeking to recover a sum of Rs. 200,000 together with legal interest from the date of demand, as prayed for in the plaint. According to the plaint, the said sum was lent to the defendant on 27.08.2007 upon an oral agreement that it be repaid within six months, and the defendant issued cheque marked P1 as security for repayment. The defendant, in my view, filed a convoluted answer, seeking dismissal of the plaintiff's action together with a cross-claim of Rs. 10 million as damages for alleged malicious prosecution, mental agony, loss of reputation etc.

The defendant's case was that it was not the plaintiff, but he, who had lent a sum of Rs. 200,000 to the plaintiff by cheque P1. However, it is significant to note that the defendant did not make a cross-claim to recover that sum, although he sought to recover Rs. 10 million under various other heads, which are unsustainable in law. This in itself demonstrates how improbable the defendant's story is.

The defendant did not plead in his answer that the plaintiff's cause of action was prescribed in terms of section 7 of the Prescription Ordinance, nor did he raise any issue on prescription at the trial. This was probably because a party cannot take two contradictory positions at the trial, and approbate and reprobate the same transaction simultaneously. To put the matter in context, the defendant's position was not that the plaintiff's cause of action was prescribed, but rather that no cause of action accrued to the plaintiff at all, as the plaintiff never lent money to the defendant. Judges of original courts should not permit the framing of issues founded on inconsistent

positions. A party to an action must elect one of the two alternatives, but not both.

As Sharvananda C.J. stated in the oft-cited case of *Ranasinghe v. Premadharma* [1985] 1 Sri LR 63 at 70, "*The rationale of the above principle appears to be that a defendant cannot approbate and reprobate. In cases where the doctrine of approbation and reprobation applies, the person concerned has a choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with full knowledge accepts the one he cannot afterwards assert the other; he cannot affirm and disaffirm. Hence a defendant who denies tenancy cannot consistently claim the benefit of the tenancy which the Rent Act provides*."

In *Sudarshani v. Somawathi* (SC/APPEAL/173/2011, SC Minutes of 06.04.2017), Prasanna Jayawardena J. stated that "*where a plaintiff who has executed a deed transferring a land to a defendant, prays for a declaration that the defendant holds the land in Trust for the benefit of the plaintiff, that plaintiff cannot, at the same time, also ask for a declaration that the same deed is null and void on the ground of laesio enormis*." These are two inconsistent positions.

I went through the evidence of both the plaintiff and the defendant, who were the only witnesses at the trial. In my view, the defendant did not cross-examine the plaintiff on the basis that the cause of action based on the money lent was prescribed, nor did he give evidence on that basis. The issues 22 and 23, raised by the defendant based on the averments in paragraph 8 of his answer, do not relate to prescription (කාලාවරෝධය) but to laches (අයුතු ප්‍රමාදය). Prescription and laches are two distinct legal concepts.

Issues 22 and 23 read as follows:

(22) පැමිණිලිකරු විසින් 2007.08.27 වන දිනැති චෙක් පතක් සම්බන්ධයෙන් වූ මෙම පැමිණිල්ල සිදු කරන ලද්දේ 2012.10.11 වන දින පමණක්ද?

(23) ඉහත කී විසඳනාවට පිළිතුර 'ඔව්' වන්නේ නම් පැමිණිලිකරුගේ අයුතු ප්‍රමාදය මතම පැමිණිල්ල නිෂ්ප්‍රභා විය යුතු වන්නේද?

11.10.2012 is the date of the plaint.

There was no other issue raised by the defendant on prescription.

After trial, the defendant did not file written submissions but the plaintiff did.

Even assuming issues 22 and 23 relate to prescription, according to those two issues the plaintiff's action is said to be prescribed because the plaint was filed on 11.10.2012 in respect of a cheque dated 27.08.2007 marked P1, not on any other basis. The cross-examination of the plaintiff was on P1. However, the plaintiff's action was not founded on P1, but on the sum of money which he alleged to have lent to the defendant. P1 was given as security for the money borrowed. It is crucial to understand this distinction to decide whether the plaintiff's action is prescribed.

The learned District Judge dismissed the plaintiff's action solely on the ground that it was prescribed under section 7 of the Prescription Ordinance, which provides as follows:

> *No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be-commenced within three years from the time after the cause of action shall have arisen.*

The District Judge, in the judgment, stated that the plaintiff's action was prescribed not on the basis on which the defendant claimed it was, but on a different basis. The District Judge stated as follows:

> ඒ අනුව පැමිණිලිකරු සහ විත්තිකරු අතර ඇති කර ගත් වාචික එකඟතාවයට අදාලව නඩු නිමිත්ත කාලාවරෝධවීම සම්බන්ධ නීතිමය තත්ත්වය පිළිබඳව විමසා බලමි. ඒ අනුව මෙය 1871 අංක 22 දරණ කාලාවරෝධී ආඥා පනතේ 7 වන වගන්තිය යටතට වැටෙන අතර එවැනි නඩුවක් වසර තුනක් ඇතුළත නොපවරන්නේ නම් එකී නඩු නිමිත්ත කාලාවරෝධය වන බව පැහැදිලිය.
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> මෙහිදී පැමිණිලිකරු විත්තිකරුට ණය මුදල දුන් දිනය බවට ප්‍රකාශිත දිනය 2007.08.27 වන දිනය. එදින සිට මාස හයක් ඇතුළත මසකට 6% මාසික පොළියක් සමඟ එය ආපසු ගෙවීමට එකඟවූ බවටද සාක්ෂි ලබාදී ඇත. එනම් 2008.02.26 දින වන විට විත්තිකරු එකී ණය මුදල පොළියද සමඟ ආපසු ගෙවිය යුතුය. ඒ අනුව විත්තිකරු ණය මුදල ගෙවීම පැහැර හැරි දිනය ලෙස සැළකිය යුත්තේ 2008.02.26 දිනය. ඒ අනුව එදින සිට උපරිම වසර තුනක් ඇතුළත මෙම නඩුව පැමිණිලිකරු විසින් විත්තිකරුට එරෙහිව පැවරිය යුතුය. එනම් 2011.02.25 වන දිනයේ පැමිණිලිකරුගේ නඩු නිමිත්ත කාලාවරෝධය වේ. කෙසේවුවද පැමිණිලිකරු විසින් මෙම නඩුව පවරා ඇත්තේ 2012.10.11 වන දිනය. එනම් පැමිණිලිකරුගේ පැමිණිල්ල කාලාවරෝධය වී ඇත.

On appeal, the High Court of Civil Appeal of Trincomalee set aside the judgment of the District Court and entered judgment in favour of the plaintiff. It is against the judgment of the High Court that the defendant has preferred the present appeal, with leave obtained. This Court granted leave to appeal on the following question of law:

> Did the High Court err in law by failing to appreciate that the plaintiff's action was prescribed?

Prescription is a defence which must be expressly pleaded in the pleadings and sufficiently particularised to enable the plaintiff to meet that position. If a party intends to rely on prescription as a defence, it must be raised as an issue at the commencement of the trial. A plea of prescription, for

instance, cannot be taken in the course of the trial depending on the evidence that may elicit. The Prescription Ordinance merely limits the period within which an action may be instituted but does not prohibit the institution of an action outside the prescribed period. Where the objection is not raised by the opposite party in the pleadings, such party is deemed to have waived the objection and acquiesced in the action being tried on its merits. A judge cannot *ex mero motu* form the defence of prescription on behalf of the defendant and dismiss the action. The same principle was affirmed by me, with the concurrence of Jayasuriya C.J. and Thurairaja J., in *Sirimewan v. Gunarath Manike* (SC/APPEAL/48/2017, SC Minutes of 10.05.2024).

Chitty on Contract, Vol I, 33rd edn, para 28-108 states "*A party is not bound to rely on limitation as a defence if he does not wish to do so. In general, the court will not raise the point suo officio even if it appears from the face of the pleading that the relevant period of limitation has expired.*" *Chitty* at para 28-127 states "*Limitation is a procedural matter, and not one of substance".*

In *Juanis Appuhamy v. Juan Silva* (1908) 11 NLR 157, Hutchinson C.J. and Wood Renton J. stated that "*it is competent for a party to waive a claim by prescription.*"

Section 17 of the Prescription Act, No. 68 of 1969 (South Africa) states:

> *17(1) A court shall not of its own motion take notice of prescription.*
> *(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings:*
> *Provided that a court may allow prescription to be raised at any stage of the proceedings.*

It is not obnoxious to law or public policy for parties to agree not to plead prescription (*Hatton National Bank Ltd v. Helenluc Garments Ltd* [1999] 2

Sri LR 365). *Chitty* (*ibid*) dealing with the English Law states at para 28-109, "*An express or implied agreement not to plead the statute, whether made before or after the limitation period has expired, is valid if supported by consideration (or made by Deed) and will be given effect to by the Court*." Prof. C.G. Weeramantry, *The Law of Contracts*, Vol II, para 844, states: "*It is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration.*"

In *Brampy Appuhamy v. Gunasekere* (1948) 50 NLR 253 at 255 Basnayake J. (as he then was) held:

> *An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.*

In *Gnananathan v. Premawardena* [1999] 3 Sri LR 301, the defence taken in issue Nos. 7-9 was based on section 10 of the Prescription Ordinance. Those issues on prescription were raised after the commencement of the trial. On appeal, the Court of Appeal took the view that the District Judge should not have accepted those issues as the defendant had not pleaded such a defence in the answer. Justice Weerasekera at 309-310 stated:

Presumably, the defence taken in the issue is based on section 10 of the Prescription Ordinance. The acts of nuisance complained of are thus sought to be shown to have taken place long prior to the 3-year period. To that the plaintiff-appellant's answer is that the application of the defendant-respondent to the National Housing Department for the premises to purchase was finally concluded only 2 months before the institution of the action.

Be that as it may the position in law is quite clear and settled. In the case of Brampy Appuhamy v. Gunasekera 50 NLR 253 Basnayake J. held: "Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence."

It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of audi alteram partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary because reason, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unawares of a defence taken that the action is barred by lapse of time.

In this action the answer did not state that the cause of action was prescribed in law. For the first time this defence was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which judges should desist. In any event the defendant-respondent has denied all the acts of nuisance acts pleaded, but also for some inexplicable reason pleaded non-deterioration. Therefore, a plea of prescription cannot arise without the act or acts of nuisance being admitted whereas the

defendant-respondent has in his answer specifically denied them. The plea is, therefore, not only in law, but also at the stage it was so done, both bad in law, but also contradictory in itself.

The acceptation of these issues is also repugnant to the law inasmuch as the date of commencement of prescription is vague in that the absence of a plea as to whether it was the acts of nuisance or the date of the notice to quit. It is, therefore, additionally for the same reason of reasonableness that as is required by section 44 of the Civil Procedure Code that a plea of the reasons for the non-operation or application of prescription is mandatory that it is equally reasonable and fair that the law requires that the defence of prescription be specifically pleaded in the answer.

I am, therefore, of the view that issues 7, 8 and 9 should not have been accepted as issues for adjudication and that the order accepting them is bad, insupportable and made per incuriam. I, therefore, reject them.

In the Supreme Court case of *Tilakaratne v. Chandrasiri and Another* (SC/APPEAL/172/2013, SC Minutes of 27.01.2017), prescription was not pleaded as a defence in the answer, no issue regarding prescription was framed at the trial and there was no suggestion made at the trial that the plaintiff's action was prescribed. However, at the hearing of the appeal before the High Court, counsel for the defendants submitted that the plaintiff's action was one for "goods sold and delivered" which, by operation of section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30.03.2005 as per the entries in a notebook marked P2. The High Court accepted this argument and dismissed the plaintiff's action. Prasanna Jayawardena J. held that the defendant could not have taken up the defence of prescription for the first time in appeal.

> *[I]t is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser C.J. described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a "shield" and not a "weapon of offence". Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.*

I repeat that, in the present case, the defendant did not take up the position that the plaintiff's action was prescribed on the basis that it had not been instituted within three years from the expiry of the six-month period after the money was lent. That defence of prescription was meticulously formulated by the learned District Judge, and not by the defendant, and the District Judge was not entitled to do so.

My learned brother, Justice Gooneratne, states that although the defence of prescription was not pleaded in exact words, the language used and the relief sought indicate the defendant's intention to rely on the lapse of time as a defence. With respect, I am unable to agree. As I have already explained, for prescription to succeed as a defence, it must be expressly pleaded and sufficiently particularised for the plaintiff to meet that position.

Justice Gooneratne further observes that the plaintiff raised a consequential issue on prescription and was therefore fully aware of the issue, resulting in no prejudice to the presentation of his case. The said consequential issue is issue 32, which reads as follows: "කාලාවරෝධී ආඥා පනතට අනුව පැමිණිලිකරුගේ පැමිණිල්ල කාලාවරෝධය වී නොමැත්තේ ද?" Firstly, the defence of prescription must be raised by the defendant, not by the plaintiff. Secondly, the plaintiff raised the consequential issue only in response to issues 22 and 23, which were based on the cheque, and not on the basis on which the learned District Judge ultimately decided. This position is

clearly reflected in the plaintiff's written submissions on prescription, where he states: "ඉහත සඳහන් විසඳනාව සම්බන්ධව විරුද්ධත්වය පලකරමින් මා ගෞරවයෙන් අධිකරණයට ප්‍රකාශකර සිටින්නේ චෙක්පත්‍රයක් නඩු පැවරීමේදී 'ප්‍රමාදවීම්' යන කරුණ චෙක්පත්‍රයට විරුද්ධ වීමට නෛතික හේතුවක් නොවන බවයි. මක්නිසාදයත් කාලාවරෝධී ආඥා පනතේ 6 වන වගන්තිය අනුව අවු 6 ක් යන තුරු චෙක්පත්‍රයක් කාලාවරෝධය නොවන්නේ නම් එකී කාලය තුල ඕනෑම දිනක නඩු පැවරීම වලංගු සහ බලාත්මක වන බැවිනි."

On the facts and circumstances of this case, the plaintiff lent money to the defendant on 27.08.2007. According to section 7 of the Prescription Ordinance, the plaintiff must institute action "within three years from the time after the cause of action shall have arisen", and not from the date on which the money was lent. The cheque is irrelevant to decide the core issue in this action. The defendant, in paragraph 31 of his answer, admits that he received the letter of demand marked P2 on 20.12.2011, calling upon him to make payment. The cause of action therefore accrued to the plaintiff on that date, and prescription commenced to run from that point. The plaint was filed on 11.10.2012. Hence the plaintiff's action is not prescribed, as it was filed "within three years from the time after the cause of action shall have arisen."

I answer the question of law in the negative and dismiss the appeal with costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I have had the benefit of reading in draft the judgment proposed to be delivered by my brother Gooneratne, J. as well as the dissenting opinion of my brother Samayawardhena, J.

As my brothers have observed, prescription is a plea that must specifically be raised by a defendant. Where the objection of prescription is not raised

by a defendant, such party is deemed to have waived its effect and acquiesced in the action. A trial judge is not entitled, thereafter, to set up and consider issues of prescription *ex mero motu.* I need not labour to analyze the authorities on this as my brothers have already done so.

As my brother points out, two issues, i.e., issues No. 22 and 23, refer to the maintainability of the action with reference to the delay in making instituting the action. Thereafter, a consequential issue, i.e., issue No. 32, has been raised with specific reference to prescription.

However, issues No. 22 and 23 refer to the cheque dated 27th August 2007 [marked "P1"]. The Plaintiff's action, according to those issues, is said to be prescribed as it was not filed within the stipulated time from the date of the cheque ["P1"]. The consequential issue was raised by the Plaintiff and not the Defendant, with reference to issues No. 22 and 23 and not on any other basis. Accordingly, this consequential issue, too, is concerned with the "P1" cheque.

The action of the Plaintiff is very clearly based on the sum of money that was allegedly borrowed by the Defendant. The cheque marked "P1" was merely submitted to court as a supporting document.

Accordingly, I am of the view that the Defendant has not properly set up the objection of prescription in his pleadings. I am in agreement with my brother Samayawardhena, J. that the question of law must be answered in the negative.

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

Judge of the Supreme Court

A.L. Shiran Gooneratne J.

1. The Factual Background

By Plaint dated 11.10.2012, the Plaintiff–Appellant–Respondent (hereinafter referred to as the "Plaintiff–Respondent") instituted action against the Defendant–Respondent–Petitioner (hereinafter referred to as the "Defendant–Petitioner") in respect of a transaction alleged to have taken place on or about 27.08.2007.

The Plaintiff-Respondent avers that the Defendant-Petitioner borrowed a sum of Rupees Two Hundred Thousand (Rs. 200,000.00) from the Plaintiff-Respondent at an interest rate of 6%, with a promise to repay the said sum within a period of six months.

The Plaintiff-Respondent further states that the Defendant-Petitioner issued a cheque dated 27.08.2007, marked P1, for the said amount, as security for the loan.

Upon the expiration of the six-month period, the Plaintiff-Respondent claims that he requested the Defendant-Petitioner to repay the borrowed sum. However, since the Defendant-Petitioner failed to make any payment, the Plaintiff-Respondent issued a letter of demand (undated), marked P2. Nevertheless, the Defendant-Petitioner neither responded to the letter nor took any steps to repay the loan.

Subsequently, the Plaintiff-Respondent lodged a complaint with the Mediation Board of Kanthale. Due to the Defendant-Petitioner's failure to appear, the Board issued a Certificate of Non-Settlement dated 12.11.2011.

In his Answer dated 12.02.2013, the Defendant-Petitioner raised several preliminary objections, including but not limited to:

- a denial of the alleged loan transaction.

- That it was the Defendant–Petitioner who issued the cheque dated 27.08.2007 in the sum of Rs. 200,000 as a loan.

- that the letter of demand was issued on or about 20.12.2011, and therefore, the action filed on 11.10.2012 is prescribed.

1.1. The decision of the District Court.

By Judgment dated 09.01.2018, the learned District Judge delivered her decision upon a consideration of the evidence led by both parties. The Plaintiff testified on his own behalf, while the Defendant also gave evidence in support of his case. Neither party called any additional witnesses.

The learned District Judge, having analyzed the totality of the evidence, held that the Plaintiff had failed to establish his claim on a balance of probability. However, the action was dismissed on the ground that it was prescribed in law.

1.2. Appeal to the Civil Appellate High Court and Its Decision.

The Plaintiff-Respondent challenged the Judgment of the District Court on the basis that the learned District Judge erred in law by misapplying the provisions of the Prescription Ordinance, failed to properly consider the implications of the cheque issued by the Defendant, and did not give due weight to the evidence led at the trial.

The Civil Appellate High Court allowed the appeal and set aside the Judgment of the District Court, entering Judgment in favor of the Plaintiff-Respondent.

It is noted that the Civil Appeal High Court has not made a definitive legal pronouncement that the action is not time-barred under the applicable provisions of the Prescription Ordinance or on legal precedent. Although the Judgment refers to several authorities dealing with prescription, it has not

explained how those authorities apply to the specific facts of this case. **Instead, the conclusions can only be implied through the outcome of the appeal.**

2. Appeal to the Supreme Court

The Defendant-Petitioner thereafter preferred a Petition of Appeal dated 24th July 2019 to this court, against the judgment of the Civil Appellate High Court of Trincomalee.

By the Order dated 27/01/2020, this court granted leave on the following question of law.

"Did the Learned High Court Judges err in law by failing to appreciate that the Respondent's action has been prescribed?"

The issue of prescription cannot be raised for the first time in the course of the trial, nor can it be considered by the trial judge *ex mero motu*. The reasoning for this principle was clearly explained in ***Gnananathan v. Premawardena (1999) 3 Sri LR 301*** where Weerasekera J. observed:

> *"It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of audi alteram partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary because reason**, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unaware of a defence taken that the action is barred by lapse of time.**"*

The rationale, as stated in that case, is to ensure that the plaintiff is given a fair opportunity to address the defence raised.

In the present case, although the term "prescription" has not been expressly used, the averment 8 of the defendant's answer clearly indicates an intention to rely on delay as a bar to the maintainability of the action.

"8. පැමිණිලිකරු සඳහන් කරන,

I. ඊනියා ගනුදෙනුව 2007.08.27 වැනි දින සිදුවූවක් බැවින්ද;

II. ඊනියා චෙක් පත 2007/08/27 වැනි දින දරන්නක් බැවින්ද;

III. විෂය ගත එන්තර වාසිය ඒවා ඇත්තේ 2011.12.20 වැනි දින හෝ ඊට ආසන්න දිනයකදී බැවින්ද;

IV. පැමිණිලිකරු විසින් මෙම නඩුකරය පවරා ඇත්තේ 2012.10.11 වෙනි දින පමණක් බැවින්ද;

V. පැමිණිලිකරුගේ පැමිණිල්ල අතිශය ප්‍රමාද වූ ඉල්ලීමක් බැවින් මතද පැමිණිලිකරුගේ පැමිණිල්ල පවත්වාගෙන යා නොහැකි බව විත්තිකරු කියා සිටී."

Subsequently, in his prayer, the defendant has sought the dismissal of the action based on the reasons stated in the answer.

While the defence of prescription was not pleaded in the exact words, the language used, and the relief sought indicates an intention of the defendant to rely upon the lapse of time as a defence. Accordingly, I am of the view that this cannot be construed as an abandonment or waiver of the defendant's right to raise prescription as a defence.

The defendant has raised his issues as follows:

(22) පැමිණිලිකරු විසින් 2007.08.27 වන දිනැති චෙක් පතක් සම්බන්ධයෙන් වූ මෙම පැමිණිල්ල සිදු කරන ලද්දේ 2012.10.11 වන දින පමණක්ද?

(23) ඉහත කී විසඳනාවට පිළිතුර 'ඔව්' වන්නේ නම් පැමිණිලිකරුගේ අයුතු ප්‍රමාදය මතම පැමිණිල්ල නිෂ්ප්‍රභා විය යුතු වන්නේද?

While it is correct that the issues raised refers to a cheque, it must be observed that the present action was instituted on the basis of a monetary transaction, and not on the cheque itself. The cheque in question was never realized or presented to the bank within the prescribed period, and therefore no cause of action arises in relation to it. There is also no evidence on record to suggest that the plaintiff had instituted any separate proceedings founded upon the said cheque. Accordingly, although the issue makes reference to a cheque, the expression "මෙම පැමිණිල්ල" ("this action") can only refer to the action presently before this Court.

More importantly, the issue of prescription has been framed as a consequential issue before the commencement of the trial,

Proceedings of 22/07/2014

"අනුශාංගික විසඳිය යුතු ප්‍රශ්න:

32. කාලාවරෝධී ආඥා පනතට අනුව පැමිණිලිකරුගේ පැමිණිල්ල කාලාවරෝදය වී නොමැත්තේ ද?"

Therefore, it is my view that the plaintiff was fully aware of the issue and was afforded every opportunity to address it. No element of prejudice has been caused to the plaintiff in the presentation of his case.

3. Analysis

For the purpose of determining whether the action filed by the Plaintiff-Respondent is prescribed in law, it is necessary to consider the timeline of events.

The transaction in question is alleged to have taken place on 27.08.2007 and was based on an oral agreement. The Plaintiff-Respondent states that a sum of Rs. 200,000/- was given to the Defendant-Petitioner, to be repaid within six months. Upon the Defendant-Petitioner's failure to repay the said

sum, the Plaintiff-Respondent initiated proceedings before the Mediation Board on 27/09/2011. However, due to the Defendant-Petitioner's non-appearance, the Mediation Board issued a Certificate of Non-Settlement dated 12.11.2011. Subsequently, the Plaintiff-Respondent issued a letter of demand, which, although undated, is admitted by the Defendant-Petitioner to have been received on or about 20.12.2011. The present action was thereafter instituted by plaint dated 11.10.2012.

The parties do not dispute that the transaction took place based on an oral agreement and that it should fall within section 07 of the Prescription Ordinance.

Section 07 of the Prescription Ordinance reads as follows:

"No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen."

A plain reading of the above provision indicates that the action should be instituted within three years from the date the cause of action has arisen. On behalf of the Plaintiff-Respondent it was argued that the prescriptive time starts running when the Defendant-Petitioner failed to answer the letter of demand, and on the other hand, the Defendant-Petitioner argued that it starts at the expiration of six months from the alleged date of the loan transaction.

The Plaintiff-Respondent's position is that the loan in question was granted on or about 27.08.2007 and that it was agreed between the parties that

repayment would be made within six months. This has been averred in the 3rd paragraph of the plaint as:

"වර්ෂ 2007-08-27 වන දින හෝ ඊට ආසන්න දිනක විත්තිකරු විසින් පැමිණිලිකරුගෙන් මාස 06 ක කාලයක් තුල මසකට 6% බැගින් වූ පොලියක් මත ආපසු ගෙවීමට පොරොන්දු වෙමින් එම කොන්දේසි පිට පැමිණිලිකරුගෙන් රුපියල් ලක්ෂ දෙකක (රු. 200,000/=) ණය මුදලක් ඉල්ලා සිටියේය."

Furthermore, the letter of demand which was marked during the Plaintiff's evidence states:

"My client instructs me to inform you that you have requested, on or about 27/08/2007, a financial facility if Rupees Two Hundred Thousand (Rs. 200,000/=) as a loan from my client ***having promised to repay it in full within a period of 06 months*** *with an interest of 6% per mensum and my client has agreed with the said request…" [emphasis added]*

The same has been confirmed by the Plaintiff in his oral evidence as follows:

Re-examination of the plaintiff dated 23/05/2017 (page 235 of the appeal brief)

"… එම පොලිය මාසික පොලියක් ලෙස මාසයකට 6% බැගින් ඔහු චෙක්පතක් මාස 6ක් ඇතුළත භාර ගන්න බවට ප්‍රකාශ කළ නිසා. විත්තිකරු එකඟ වුණා ***එම මුදල මාස 6ක් තුළ නැවත ලබා දී චෙක්පත ලබා ගන්නවා කියා.*** *එම මාස 6ක කාලයක් පසු වුණාට පසු මුදල ලබා දුන්නේ නැහැ. කීප වතාවක් ඉල්ලා සිටියත්. මම සමඨ මණ්ඩලයට පැමිණිල්ලක් කලා කන්තලේ සමඨ මණ්ඩලයට. හරස් ප්‍රශ්න ඇසීමේදී ඇහුවා එම චෙක්පත බැංකුවට තැන්පත් කළා කියලා. එම චෙක් පත බැංකුවට තැන්පත් කළා කියලා අවිධිමත් ආකාරයෙන් එය ආපසු ඒවා තිබුණා. එම නඩුව පවරලා තිබෙන්නේ විත්තිකරු විසින් ලබාගත් මුදල් සහ පොලී ඉල්ලීම සඳහා මෙම කාලය තුළ මෙම නඩුව ගොනු කරලා තිබෙනවා." [emphasis added]*

This indicates that in the Plaintiff's version of events, a definite time frame for repayment had been contemplated by the parties.

In ***Ford Footwear Ltd. v. Carolis Appuhamy and Others (1958) 59 NLR 450***, the Supreme Court considered a claim for goods sold and delivered and addressed the applicability of Section 8 of the Prescription Ordinance. The Court observed that the plaintiff had supplied goods on credit without a definite period of credit being agreed upon, and that credit had been continued so long as the defendants made payments on account. In that context, the Court held that *"The evidence discloses that the plaintiff sold goods on credit to the defendants and that there was no definite limit as to the period of credit and that so long as the defendants made payments on account credit was continued until payment was demanded. In such a case the defendants must in order to succeed in their plea prove that there was a definite period of credit and that at the end of that period the debt became-payable and that the date on which the debt became payable is more than a year from the date of institution of the action."*

The Court made it clear that if a fixed period had been agreed, the cause of action would have arisen on the expiry of that period.

In order to ascertain the time of prescription applicable to contracts of loan, it is useful to examine briefly how this distinction is treated in other common law jurisdictions. The Limitation Act 1980 of England and Wales draw a clear distinction between loans which stipulate a specified date of repayment and those which do not provide for any such date.

Section 5 of the Limitation Act states that:

"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."

And Section 6- *Special time limit for actions in respect of certain loans,* clarifies that:

"(1) Subject to subsection (3) below, section 5 of this Act shall not bar the right of action on a contract of loan to which this section applies.

*(2) This section applies to any contract of loan which—**does not provide for repayment of the debt on or before a fixed or determinable date; and** does not effectively (whether or not it purports to do so) make the obligation to repay the debt conditional on a demand for repayment made by or on behalf of the creditor or on any other matter;" [emphasis added]*

In such cases, Section 6(3) provides that where a demand in writing for repayment is made, the limitation period begins to run from the date of that written demand, as though the cause of action accrued on that date.

While the legal consequences may differ, Indian law, like English law, recognizes a similar distinction between loans that are repayable on a fixed or determinable date and those that are either repayable "on demand" or do not specify a repayment date.

Indian law makes this distinction within the Schedule to the Limitation Act, 1963. Article 19 applies to simple loans repayable without condition, and Article 21 governs loans stated to be "payable on demand". In contrast, where a loan is to be repaid after a specified period or on a particular date, the matter falls outside Articles 19 and 21 and is governed instead by Article 55, which provides that limitation begins to run from the date of breach, that is, from the time the debtor fails to repay on the agreed date. This approach was affirmed in ***Mideast Integrated Steel Ltd. v. Industrial Promotion & Investment Corporation of Orissa Ltd AIR 2015 (NOC) 746 (Ori) (India)***, where the plaintiff was a state-owned financial institution that had given a loan of Rs. 20 crores to the defendant company. The terms of the agreement stated that the loan was to be repaid in six months from the date of disbursement. Since the defendant failed to repay the loan within the agreed period, the plaintiff initiated legal proceedings to recover the

outstanding amount. The defendants argued that the suit was time-barred since "money payable for money lent" within the meaning of Article 19 provides that the time of prescription starts calculating immediately when the loan is advanced.

However, the High Court held that since the repayment obligation was tied to a specific future date, the cause of action arose upon breach of that obligation, which is at the expiry of the six-month term.

[For clarity: Indian law does not provide a statutory definition for "cause of action". For the purposes of limitation, the Limitation Act, 1963 expressly provides the point at which time begins to run, as set out in its Schedule. For example, in the case of loans payable on demand, time begins to run from the date the loan is advanced, irrespective of when or whether a demand is made. The cause of action is therefore treated as having arisen on a statutorily fixed date. This is different from Sri Lankan law, where the concept of cause of action is defined in Section 5 of the Civil Procedure Code, and the question of when it arises must be determined with reference to such provision.]

While the English Limitation Act 1980 and the Indian Limitation Act 1963 expressly categorize loans based on repayment terms, such a distinction is not present in Sri Lankan law. Having considered this distinction, it becomes necessary to determine the point at which a cause of action arises in respect of a monetary obligation.

It is a settled principle that the cause of action arises at the point at which a legally enforceable right is breached. As per 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 fulfil an***

***obligation**, the neglect to perform a duty and the infliction of an affirmative injury."* (emphasis added)

So, the question that essentially needs to be answered is "at what point of time does the action (or inaction) of the Debtor amount to a *refusal to fulfill an obligation?*"

In ***Cooke v Gill (1873) LR 8 CP 107 at p 116***. Brett J has defined the cause of action as follows:

"Cause of action has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed- every fact which the defendant would have a right to traverse."

In cases involving loans or promises to pay money, where the obligation to repay is fixed to a specific date or determinable period the 'refusal' would take place when the debtor fails to perform at the end of that period.

Therefore, the logical flow appears to be quite straightforward: once the contractual obligation is due, the creditor has a right to immediately commence action against the debtor, and any further communication does not affect the moment at which the cause of action comes into existence. In such circumstances, the legal consequence is that the right to sue arises upon the expiry of the agreed period, and therefore, the calculation of the prescriptive period must start from that point in time.

This is different from situations where the contract does not stipulate a specific date for repayment or provide that the debt is payable on demand. In such cases, the debtor is not considered to be in default until a demand is made by the creditor and the debtor subsequently fails or refuses to comply. The cause of action arises only at the point of refusal to honor the obligation following a valid demand. Until such refusal occurs, no breach

can be said to have taken place, and accordingly, time does not begin to run for the calculation of the prescriptive period.

It is established law that a letter of demand would not automatically take a case out of the period of prescription. In consideration, I wish to draw attention to the Judgement of J.A.N De Silva CJ in ***People's Bank v. Lokuge International Garments Ltd (1873) LR 8 CP 107 at p 116.***

"A letter of demand is inherently charasterically [sic] different from an admission of liability. The law of limitations was introduced due to strong policy reasons. One of which is that a defendant should not have the cloud of impending litigation hovering above him indefinitely. When liability is admitted at some point before the term of prescription ends, this operates as a renewal of the running of prescription.

This should not be the position with regard to letters of demand which originate from the plaintiff. Such a principle would bring about the anomalous result of renewing the running of prescription each time a letter of demand is sent by the plaintiff. This is irreconcilable with the policy objectives of the statute of limitations set out previously."

It is the Plaintiff-Respondent's position that the loan was granted on or about 27th August 2007, with an agreement that repayment would be made within six months. Accordingly, the obligation to repay arose upon the expiry of that six-month period, namely on 27th February 2008. The prescriptive period under Section 7 of the Prescription Ordinance must therefore be calculated from that date, which means that the action would have become prescribed on 27th February 2011.

The exception to the operation of the Prescriptive period is given in section 12 of the Prescription Ordinance, which reads as follows:

"In any of the forms of action referred to in sections 5, 6, 7, 8, 10, and 11 of this Ordinance, no acknowledgment or promise by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said sections, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable, or by some agent duly authorized to enter into such contract on his behalf ;…"

As held in ***Perera vs. Wickremaratne (1942) 43 NLR 141;***

"It has frequently been laid down that when there is an acknowledgment of a debt without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred. Much more, then, must such a promise be inferred when the acknowledgment is coupled with an expression of desire to pay."

In the final analysis, in determining whether the action is prescribed or not, it is necessary to consider whether there had been an express or implied acknowledgement of the debt by the Defendant-Petitioner.

Once it is established that the Plaintiff-Respondent failed to file the action within the three-year prescriptive period, the burden shifts to him to show that the case falls within the exception created by Section 12 of the Prescription Ordinance. The position of the Defendant-Petitioner throughout these proceedings has been a complete denial of engaging in any loan transaction with the Plaintiff-Respondent. The Plaintiff-Respondent has also failed to produce any document which may amount to an acknowledgment of debt, and there is nothing on record to suggest that such an acknowledgment, as required by law, was ever made.

The Plaintiff-Respondent's action, having been instituted more than three years after the cause of action arose and unsupported by any valid acknowledgment of debt, is therefore prescribed in law.

Accordingly, I answer the question of law in the affirmative.

For the foregoing reasons, the Judgment of the Civil Appellate High Court is set aside. The Appeal is allowed. Parties are directed to bear their own costs.

Judge of the Supreme Court