

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

S.C. CHC. APPEAL No. 37/2006

CHC 215/03(1)

Francis Raymond,
Proprietor,
El Shaddai Enterprises,
4C/3, Mani Nagar, Tuticorin, 628002,
Tamil Nadu, India.

Presently
No. 164 G, North Beach Road,
Tuticorin, 628001, Tamil Nadu, India.

PLAINTIFF

Vs.

1. Sathasiwam Vincendrajan,
No. 320 1/3, Galle Road,
Colombo - 03.

2. Sumathi Vincendrajan,
No. 320 1/3, Galle Road,
Colombo - 03.

DEFENDANTS

AND NOW BETWEEN

Francis Raymond,
Proprietor,
El Shaddai Enterprises,
4C/3, Mani Nagar, Tuticorin, 628002,
Tamil Nadu, India.

Presently

No. 164 G, North Beach Road,
Tuticorin, 628001, Tamil Nadu, India.

PLAINTIFF-APPELLANT

Vs.

1. Sathasiwam Vincendrajan,
No. 320 1/3, Galle Road,
Colombo - 03.
2. Sumathi Vincendrajan,
No. 320 1/3, Galle Road,
Colombo - 03.

DEFENDANT-RESPONDENTS

BEFORE:

**S. THURAIRAJA, PC, J
KUMUDINI WICKREMASINGHE, J AND
K. PRIYANCHA FERNANDO, J.**

COUNSEL:

Ikram Mohamed, PC with Mrs. A. T. Shyama Fernando for the Plaintiff-Appellant.

Faisz Mustapha, PC with Ms. Faisza Marker and Ms. Thushani Machado for the Defendant-Respondents.

WRITTEN

Plaintiff-Appellant on 08th February 2022 and 22nd September

SUBMISSIONS:

2023.

Defendant-Respondent on 09th June 2014 and 25th September 2023.

ARGUED ON: 03rd October 2023.

DECIDED ON: 14th June 2024.

S. THURAIRAJA, PC, J.

1. The Plaintiff-Appellant instituted action in the Commercial High Court of the Western Province for the recovery of a sum of USD \$1,665,572.76 (being the equivalent of Rs. 161,310,721.80) with legal interest from the 1st and 2nd Defendant-Respondents (hereinafter sometimes collectively referred to as the "Defendant-Respondents").
2. The learned Judge of the Commercial High Court, by judgment dated 06th June 2006, dismissed the Plaintiff-Appellant's action with costs and held that the cause of action was prescribed in law.
3. Being aggrieved by the decision of the Commercial High Court, the Plaintiff-Appellant has preferred this appeal by way of Petition dated 04th August 2006, praying for the judgment of the High Court to be set aside and a judgment in favour of the Plaintiff-Appellant's action.
4. The questions of law as formulated by the parties crystallised as follows:
 - (i) *"Is the Plaintiff's action based on a written agreement? If so, is the cause of action not prescribed in law?"*
 - (ii) *"In as much as the Defendants have denied any contract with the Plaintiff, are the Defendants not entitled in law to rely on the provisions of the contract to plea prescription against the Plaintiff?"*

Factual Background

5. The basis of this action rests on eighty-three (83) consignments of goods, including various perishable commodities exported from India to Sri Lanka by the Plaintiff-Appellant through his company, El Shaddai Enterprises, to the Defendant-

Respondents' Company, Nithan Trading Company, between the period of 24th July 1999 and 17th April 2000.

6. According to the Plaintiff-Appellant, in the early part of 1999, he entered into an agreement with the 1st and 2nd Defendant-Respondents in terms of which the Plaintiff-Appellant agreed and undertook to export the aforementioned commodities on credit, i.e., 60 days D/A Bills basis in respect of the consignments so exported, and whereas, the Defendant-Respondents agreed and undertook to make payments in respect of the said Bills within the relevant credit period.
7. The Plaintiff-Appellant has specified the processes of the transactions under this agreement as follows; the Plaintiff-Appellant's Company purchased goods from third parties and exported the same to the Defendant-Respondents' Company, and copies of the invoices, Bills of Lading and other relevant documents were faxed to the 1st Defendant soon after the same were received by the Plaintiff-Appellant. Accordingly, originals of the said documents were sent to People's Bank (Pettah) via Tamil Nadu Mercantile Bank Ltd (South) or Federal Bank Ltd (Tuticorin). The Defendant-Respondents received faxed copies of the documents certified by People's Bank and presented the same to the relevant authorities to take delivery of the goods.
8. The complaint of the Plaintiff-Appellant pertains to non-payment by the Defendant-Respondents for orders received in relation to the eighty-three (83) consignments of exported goods, which the Plaintiff-Appellant states that the Defendants had taken delivery from the Port of Colombo.
9. In support of this submission, the Plaintiff-Appellant has annexed true copies of the invoices, Bills of Lading, Exchange Declaration (GR Form) and the Bills of Exchange for each consignment.¹ Further, the Plaintiff has annexed a SWIFT message dated 7th

¹ Marked "A2(i)", "A2(ii)", "A2(iii)" and "A2(iv)" to "A84(i)", "A84(ii)", "A84(iii)" and "A84(iv)" respectively.

March 2003 sent by People's Bank to Tamil Nadu Mercantile Bank and a letter dated 5th March 2003 sent by People Bank to Federal Bank Ltd² in corroboration of the fact that the 2nd Defendant accepted the said Bills of Exchange and thereafter she dishonoured the Bills by not paying upon them. It has to be noted that these documents were admitted without proof being insisted upon and they constitute evidence.

10. Conversely, the 1st and 2nd Defendant-Respondents have averred that, in fact, no written agreement was entered into between the parties and thereby no moneys are due or owing to the Plaintiff-Appellant. Additionally, the 2nd Defendant, by her Answer dated 18th May 2004, has submitted that she purchased goods in India from various sellers where the Plaintiff-Appellant acted as an agent and shipped the same to the 2nd Defendant, for which all due payments were settled with the Plaintiff when he visited Sri Lanka or at his request to his nominee in Sri Lanka. According to the 2nd Defendant, the Plaintiff-Appellant continued to ship goods without presentation of the alleged Bills of Exchange to the 2nd Defendant for payment.
11. Importantly, both Defendant-Respondents have submitted that the Plaintiff-Appellant's alleged claim is, in any event, prescribed in law. The President's Counsel for the Defendant-Respondents submitted that the invoices, Bills of Lading and Bills of Exchange marked and tendered by the Plaintiff-Appellant are dated from 27th July 1999 to 17th April 2000, whereas the plaint was filed in the Commercial High Court on 12th August 2003. It is the contention of the Defendant-Respondents that, in the application of Section 7 of the Prescription Ordinance, the Plaintiff-Appellant's cause of action based on an unwritten agreement is barred and prescribed in law as it was not commenced within three years from the time the cause of action arose which, in this case, is evinced to be 17th April 2000.

² Marked "A85(i)" and "A85(ii)" respectively.

12. Conversely, the Plaintiff-Appellant has argued that, in fact, the applicable provision is Section 6 of the Prescription Ordinance, which governs written contracts and provides for a prescriptive period of six years from the cause of action.
13. The crux of the rival arguments is that whilst the Plaintiff-Appellant relied on Section 6 of the Prescription Ordinance, the Defendant-Respondents sought the dismissal of the action based on Section 7 of the Prescription Ordinance.

Analysis

14. In determining the merits of the Plaintiff-Appellant's submissions vis-à-vis the submissions of the Defendant-Respondent the primary question that has to be addressed is the nature of the purported agreement.
15. In the case of **Perera v. John Appuhamy**,³ 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."
16. In the Plaintiff and the Written Submissions of the Plaintiff-Appellant submitted to the Commercial High Court, it was explicitly argued by the Counsel that the obligations between the parties arose in terms of an oral contract or agreement. Conversely, in the course of the proceedings before the Supreme Court, the Counsel for the Plaintiff-Appellant contended that the agreement is a written contract on the basis of the eighty-three (83) Bills of Exchange issued in respect of the consignments so delivered to the Defendant by the Plaintiff-Appellant's Company.
17. Section 3(1) of the Bills of Exchange Ordinance reads as follows:

"A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is

³ (1950) 51 N.L.R. 308 (43 C.L.W. 58).

addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer."

18. While it is true that bills of exchange can form the basis of a written contract, the fact remains that the question of a written contract has been taken only before this Court.
19. It cannot be denied that the Plaintiff-Appellant did not plead the written nature of any contract as an issue, and instead explicitly pleaded that the contract of export and import was a verbal agreement. It would appear that the pleadings and issues were focussed on an oral contract only insofar as the contract of sale between the parties was concerned.
20. However, embedded in the oral contract, but existing independently of that oral contract, is the presence of 83 bills of exchange transmitted by the Plaintiff-Appellant to the Defendant-Respondents for acceptance.
21. It is crystal clear that these sets of bills of exchange would constitute written contracts. It is undeniable that these bills of exchange were adduced in evidence and would constitute a vital component of the case of the Plaintiff-Appellants.
22. Though these collateral contracts were not raised as issues, they did figure quite prominently in evidence, and thus, this aspect of the matter cannot be divorced or excluded from the province of liability on the part of the Defendant-Respondents.
23. It has to be noted that learned Counsel appearing for the Plaintiff-Appellant at the hearing of the appeal and in the Written Submissions filed on 08th February 2024 has invited this Court to regard the bills of exchange as constituting a written contract and thus it is his argument that the action is not prescribed, if the cause of action arises from these bills of exchange.

24. In ***Setha v. Weerakoon***,⁴ Dias J., relying upon a line of authorities,⁵ held that a new issue may be raised in appeal only if it is 'a pure question of law' and that a 'mixed question of law and fact' cannot be raised for the first time in appeal.
25. The only circumstances wherein a new issue can be raised in appeal have been formulated by Amerasinghe J. in ***Ranaweera Menike v. Senanayake***:⁶

"A matter that has not been raised before might, nevertheless, be a ground of appeal on which an appellate court might base its decision, provided it is a pure question of law; or, if the point might have been put forward in the court below under one of the issues raised, and the court is satisfied (1) that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal".

26. In ***Don Tilakaratne v. Chandrasiri***,⁷ this Court did not permit the defendant from raising the issue of prescription for the first time in appeal. However, the question of prescription in this instant case would depend on the determination of the relevant contract which gives rise to the liability of the Defendants and whether evidence has already been led bearing upon that liability.
27. It is quite clear that the relevant bills of exchange would constitute written contracts and it has to be ascertained whether evidence on these written contracts has been led. Though no issues were raised on the above contract emanating through the bills

⁴ 49 N.L.R. 225.

⁵ *Tasmania* (1890) H App. Cases 223; *Appuhamy v. Nona* (1912) 15 N.L.R. 311.

⁶ [1992] 2 Sri L.R.

⁷ S.C. Appeal No. 172/2013, S.C. minutes of 27th January 2017.

of exchange, a fresh issue could certainly be raised in this Court, and a question of prescription has to be resolved with reference to these contracts arising on the bills of exchange.

28. Upon perusal of the proceedings in the Court below, it is quite clear that 81 bills of exchange remain unpaid. The money indicated in these bills of exchange is owed by the 2nd Defendant to the Plaintiff, and a significant fact to be noted is that the signature of the 2nd Defendant, namely, Sumathi Vincendrajan, remains affixed to these bills of exchange.
29. All these bills of exchange have been led in evidence and marked without any protest from the two Defendants. The Plaintiff-Appellant has also submitted in evidence a letter from the People's Bank, Pettah Branch to the Senior Manager of the Federal Bank which had dispatched the shipping documents and the bills of exchange on behalf of Francis Raymond (Plaintiff-Appellant)⁸ wherein People's Bank, Sri Lanka states quite unequivocally that twenty-seven (27) bills of exchange accepted by the 2nd Defendant remain unpaid. All these twenty-seven (27) bills of exchange are given in a schedule to the letter of the People's Bank dated 01st September 2003. In addition to these twenty-seven (27) bills of exchange, another set of unpaid bills of exchange numbering fifty-four (54) have also been led in evidence before the Commercial High Court. Upon this evidence, *prima facie*, eighty-one (81) bills of exchange remain unpaid by the 2nd Defendant who is admitted to be the sole proprietor of Nithan Trading Company.
30. Though the claim of the Appellant is based on eighty-three (83) bills of exchange, two bills of exchange have to be excluded from consideration by virtue of the fact that these two bills do not appear to have been accepted by the 2nd Defendant.

⁸ Marked "P91(a)".

31. It has to be pointed out that four (4) bills of exchange⁹ appear to have been paid by the 2nd Defendant having regard to the fact that they were all sight bills. In the circumstances, it is on seventy-seven (77) bills of exchange that the 2nd Defendant becomes liable.
32. All in all, the aggregate of the sums due on these seventy-seven (77) unpaid bills of exchange amounts to a sum of US \$1,493,596.00.
33. There is evidence, both documentary and oral, that these seventy-seven (77) bills of exchange contain the signature of the 2nd Defendant indicating her liability to pay on these bills of exchange.
34. Having regard to the fact that bills of exchange remain unpaid and the course of action in this case flows through them, the next question to be considered is the applicable provision of the Prescription Ordinance that applies to the institution of this case. The Counsel for the Plaintiff-Appellant has submitted that Section 6 of the Ordinance, which reads as follows, must apply to the instant case:

"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."

35. Since the liability on the part of the Plaintiff-Appellant emerges from accepted bills of exchange, it is, indeed, section 6 of the Prescription Ordinance that would cover

⁹ Marked "P167", "P170", "P171", and "P172".

the issue of prescriptive period in the case, and it is quite clear that the 6-year period would begin to run from the date when such bill of exchange has become due for payment.

36. It is undisputed that seventy-seven (77) bills of exchange have been accepted but not paid. As pointed out before, all these bills have been admitted on record without any protest from the Defendants, more particularly, the 2nd Defendant.
37. There is evidence before this Court from two banks namely the People's Bank and the Tamil Nadu Mercantile Bank, that the bills were not paid at all by the 2nd Defendant though they were accepted by her.
38. It can be safely assumed from the evidence led in this case that all the accepted bills of exchange became due for payment within the prescriptive period long before the case was instituted by the Plaintiff on 12th August 2003.
39. All these seventy-seven (77) bills¹⁰ are dated between the period of 02nd August 1999 and 12th April 2000.
40. Overall, all these seventy-seven (77) bills of exchange became payable 60 days after the dates of the Bills of Lading and a perusal of these dates prove that the institution of this case took place long before the 6 years lapsed.
41. It is my view that there is no extinguitive prescription that can be invoked against the Plaintiff-Appellant and the judgment of the Commercial High Court dated 06th June 2006 must be set aside and the appeal of the Plaintiff-Appellant must be allowed.
42. A close scrutiny of the accepted seventy-seven (77) bills of exchange which remain unpaid brings out the fact an aggregate sum of the individual bills of exchange totalling US \$1,493,596.00 with legal interest has to be paid by the 2nd Defendant to

¹⁰ Marked "P92" to "P166", "P168" and "P169".

the Plaintiff-Appellant and we order that this amount becomes payable by the 2nd Defendant to the Plaintiff-Appellant with cost to the action.

43. In the end, we allow the appeal of the Plaintiff-Appellant and direct that this judgment be communicated to the Commercial High Court as expeditiously as possible.

Appeal Allowed with costs.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J

I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J

I agree.

JUDGE OF THE SUPREME COURT