

In the court of appeal of the Democratic Socialist
Republic of Sri Lanka.

Case No: CA 48/97 F
DC Colombo : 16498/MR.

Ceylon Shipping Lines Ltd,
No 450,
D R Wijewardena Mawatha,
Colombo 10
Plaintiff-Appellant

Vs

Island Wide Tours and Travels
Pvt. Ltd,
No 213, Castle Road, Colombo -
08

Defendant - Respondent

Before : A.W.A. Salam, J.

Parties absent and unrepresented

Decided on: 20.01.2011.



A.W.Abdus Salam,J

The impugned judgment was delivered in this matter pursuant to an action filed by the plaintiff against the defendant seeking to recover a sum of Rs 212,749/47 alleged to be due from the latter as the sale agent of airline tickets on behalf of the plaintiff. The plaintiff has also included an alternative cause of action in the plaint based on unjust enrichment.

The defendant took up the position that the cause of action of the plaintiff is prescribed in law. Having tried the preliminary issue, the learned district judge came to the conclusion that the cause of action of the plaintiff is in fact prescribed in law. Accordingly, the action of the plaintiff was dismissed on the preliminary legal issue based on prescription.

The learned counsel of the plaintiff argued that the district judge has erred in law when she came to such conclusion. On a perusal of the judgment, it is to be seen that the learned district judge's decision is on the footing that the claim of the plaintiff arises on a running account maintained between the parties. As such, it appears that the decision of the learned district judge is based on section 8 of the Prescription Ordinance which reads as follows.

"No action shall be maintainable for or in respect of any goods sold and delivered, or for shop bills or book debt or for work and labour done or for work done or for artisans, labourers, or servants unless the same shall be brought within one year after the debt shall have become due".

This is quite evident from the reasoning adopted in the impugned judgment where the district judge states that according to P1 the last transaction between the parties had taken place on 7 June 1994, a date prior to a period beyond one year after the accrual of the cause of action and therefore is time-barred under section 8.

The term "goods" as used in section 8 is referable to movables which are capable of physical delivery. (Vide Weeramantry, The Law of Contract. Volume ii page 844 paragraph 883).

In the case of J E Perera Vs M M Zainudeen (65 NLR 261) the plaintiffs, who were the trustees of the Galle Gymkhana Club, sold to the defendant, a member of the club, 20,000 sweep tickets priced at fifty cents each and sought, in that action, to recover the value of the tickets. The defendant pleaded prescription. It was held in that case that the sale was in law the sale of a chose in an action and that section 10, and not section 8, of the Prescription Ordinance that is applicable. It was further held in that case that Section 8 of the Prescription Ordinance is applicable only to goods which are

capable of being physically delivered and not to the sale of incorporeal things such as a chose in action. Based on this authority it would be seen that the cause of action of the plaintiff pleaded in the instant case can be considered as being prescribed only after three years of the accrual of it and not after one year as has been misconstrued by the learned district judge.

In the *Official Receiver v. Tailby*, 56 L. J. Q. B. 30, dealing with an assignment of property and book debts, Lord Esher defined a book debt to include debts arising in the trade or business in which it is usual to keep books, not necessarily those actually put into books but those which ought to be booked in ordinary course. His Lordship in that case clearly stated that the expression "Book Debts" is not in itself vague.

The question as to what constitute a book debt has been considered in the case of *Pate Vs Mack* 28 NLR 321. Even as regards the cause of action relating to unjust enrichment the decision of the learned district judge that prescribes within a period of one month of its accrual is a clear misdirection of the law. In the case of *Fernando vs Munasingha* 71 CLW 80 it has been laid down that the cause of action based on unjust enrichment lasts for three years before it gets prescribed.

For the reasons stated above, it is my view that the learned district judge has erred in law, when she came to the conclusion that the plaintiff's action is prescribed in law. In the circumstances, in my opinion the plaintiff should succeed in his appeal. Hence, issue No's 9, 10(a) and (b) should be answered in the negative.

Accordingly, the impugned judgment of the learned district judge is set aside and the case sent back for retrial.

There shall be no costs.

Judge of the Court of Appeal

Kwk/-