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

CA 973/98

D.C. Mt. Lavinia 84/92/M

P.L. Amarasinghe

Defendant -Appellant

Vs.

M.B. Dharmadasa

Plaintiff-Respondent

C.A. 973/98(F) D.C.Mt.Lavinia Case No.84/92/M

BEFORE : K. T. CHITRASIRI, J.

COUNSEL : Rohan SahabanduP.C. with Hasitha Amarasinghe for the Defendant-Appellant.

Plaintiff-Respondent is absent and unrepresented

ARGUED ON : 05.04.2013

DECIDED ON : 18th June, 2013

K. T. CHITRASIRI, J.

When this matter was taken up for hearing on the 12th February 2013, the registered Attorney of the plaintiff-respondent (hereinafter referred to as the plaintiff) had informed Court that he had not received instructions to appear for the plaintiff. The Court then fixed the matter for argument and made order to issue notice to the plaintiff directing him to appear in Court on the day the matter was fixed for argument namely 05th April 2013. When it was taken up for argument even on the 05th April 2013, the plaintiff-respondent was absent and was not represented by an Attorney-at-Law. Hence, the matter was taken up for argument in the absence of the plaintiff-respondent.

On the day of the argument, learned President's Counsel for the defendant-appellant (hereinafter referred to as the defendant) submitted that

the learned District Judge is wrong when he decided to rely on Section 7 of the Prescription Ordinance and to allow the plaintiff to proceed with the action stating that his cause of action will only be prescribed after the lapse of a period of three years from the date, the cause of action was commenced. He then further contended that it is the Section 8 of the Prescription ordinance that is applicable in this instance and therefore the plaintiff should have come to Court within one year from the date on which the cause of action has arisen.

It being an issue involving a question of law the learned District Judge has decided to answer the same, as a preliminary issue. Accordingly, he had allowed the parties to file their submissions in writing with the view of answering the particular issue that was raised as the issue No.8. Journal Entry No.20 made on 29th September 1994 also indicates that an order had been pronounced in respect of the said issue. Even though the Court had made such a minute as to the issue No.8, this Court could not find an order in respect of the issue 8. Mr.Rohan Sahabandu P.C. informs Court today that he too is unable to find any order made on this issue bearing No.8. However, the learned District Judge has answered the said issue No.8 in the impugned judgment dated 20.02.1998 against the defendant having addressed his mind to the law relevant to the prescription.

Issue No.8 suggested by the defendant is to determine whether the cause of action of the plaintiff is prescribed or not. Decision of the learned District Judge is that it is not prescribed and has held further that the plaintiff is

entitled to file action within a period of three years from the date on which the cause of action has arisen. Learned Judge, relying upon Section 7 of the Prescription Ordinance has specifically stated that the plaintiff is entitled to have and maintain this action since it had been instituted within three years as the dispute between the parties has arisen out of an unwritten agreement. Relevant decision of the learned District Judge reads thus:

" මෙම නඩුව පැමිණිලි කර තිබුනේ 1192 මැයි මස 12 වන දිනය. නඩු නිමිත්ත ඇති වූයේ 1991. 1. 10 දින බවට ගනන් ගත හැකිය. මෙම නඩුව පැමිණිලි කර තිබුනේ නඩු නිමිත්ත හට ගෙන මාස 16 කින් පසුව බව පෙණුනි.මෙම නඩුවට අදාල ආරවුල නොලියූ ගිවිසුමක් මත ඇති කර ගත් ගනු දෙනුවක් සම්බන්ධයෙන් බව තීරණය කරමින් කාලාවරෝධි ආඥා පනතේ 7 වන වගන්තිය පරිදි නඩු පැවරීමේ කාල සීමාව අවුරුදු 3 ක් බව තීරණය කරමි."

Contention of the learned President's Counsel is that it is the Section 8 of the Prescription ordinance that is applicable in this instance and therefore it is incorrect to rely on Section 7 of the ordinance and to reject the defence of the defendant. Accordingly, it is necessary to consider the facts of the case to determine the issue as to the prescription.

There is no dispute as to the date on which the cause of action arose and the date of filing action. Cause of action has arisen on the 10th January 1991 and the action was filed on the 19th May 1992. Accordingly, the action has been filed within three years but certainly after the lapse of one year from the date on which the cause of action has arisen. Now it is necessary to

ascertain whether the circumstances that led to file this action fall within the ambit of Section 7 or it is the Section 8 of the Prescription Ordinance that is applicable. If the facts and circumstances fall within Section 7 then the cause of action is not prescribed but if it governs by Section 8 then the plaintiff's action would be time barred.

Sections 7 and 8 of the Prescription Ordinance read thus:

"7. *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.*

8. *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"*

The plaintiff instituted this action praying inter alia for the recovery of Rs.125, 780.74 from the defendant alleging that the said sum of money was due to him for the work and labour done. Defendant has taken up the position that he has paid the dues to the plaintiff in full and therefore nothing is due to the plaintiff from him. Plaintiff being a building contractor has come to an oral agreement with the defendant to provide labour for the construction of a building with the material supplied by the defendant. The

defendant has agreed to pay the plaintiff according to work that he has completed. Time to time, the plaintiff was paid accordingly. This is evident by the documents marked by the plaintiff himself. The type of the work involved also shows that those are in relation to the work done or for the labour involved in completing the work. In this regard, the learned District Judge having considered the evidence has stated thus:-

" පැමිණිලිකරු විසින් ඉදිරිපත් කරන ලද සාක්ෂි වලින් තව දුරටත් හෙළි දරව් වුන කරුණක් නම්, පැමිණිලිකරු ගොඩනැගිලි කොන්ත්‍රාත් කරුවෙකු බවයි. එනම්, පැමිණිලිකරු විසින් සේවකයින් යොදවා වැඩ කරවා ගැනීමයි . පැමිණිලිකරු මෙම නඩුව පැමිණිලි කර තිබුනේ පැමිණිලිකරු විසින් පුද්ගලිකව විත්තිකරුගේ ගොඩනැගිලි සෑදීමක් සම්බන්ධයෙන් නොව වැඩ කරුවන් යොදා වැඩ කිරීමක් සම්බන්ධයෙන් බවට සාක්ෂි වලින් හෙළි දරවව් වී ඇත."

The aforesaid findings of the learned District Judge as to the facts of the case and the evidence recorded in the case show that the cause of action of the plaintiff is on the basis of the work and labour done. Then the question arises that in such a situation can the Court decide that the claim of the plaintiff is on an oral agreement disregarding the type of the work that the plaintiff has performed and the manner in which the payments were made. The decision in the case of **Amarasinghe V De Alwis [48 N L R 519]** is directly on this point. For convenience and completeness, I like to reproduce the entire judgment in that case.

1947 Present: **Howard C. J.**

AMERASINGHE, Appellant, and **DE ALWIS,** Respondent.

S. C. 143-C. R. Colombo,, 4,531

Prescription-Repairs to motor car-Work and labour done-Chapter 55, sections 7 and 8.

A claim for repairs effected and materials supplied to a motor car falls within section 8 of the Prescription Ordinance and is barred after one year.

Walker Sons & Co., Ltd, v. Kandiah (1919) 21 N. L. R. 317, followed,

APPEAL from a judgment of the Commissioner of Requests, Colombo.

E. S. Amerasinghe, for the plaintiff appellant.

S. Canagarayer, for the defendant, respondent.

Cur. adv. vult.

October 10,1947. **HOWARDC. J.-**

The plaintiff appeals in this case from a decision of the Commissioner of Requests, Colombo, dismissing his action with costs. The plaintiff who carries on business at No.128, Lauries Road, Bambalapitiya, under the name and style of British Motors, brought this action against the defendant for a sum of Rs, 70 on account of. certain repairs effected and materials supplied to the defendant's motor car on or about January 28, 1944. The defendant filed answer pleading, inter alia, that the cause of action was prescribed under the provisions of the Prescription Ordinance (Chapter 55). It was agreed that this issue of prescription should be tried as a preliminary issue. The Commissioner considering himself bound by the case of Walker Sons & Co., Ltd., v. Kandiah [1][(1919) 21 N. L. R. 317.] held that the plaintiff's claim is barred by prescription under section 8 of the Prescription Ordinance.

Section 8 of the Prescription Ordinance is worded 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."

Counsel for the appellant contends that this section only applies to manual labour and that the question of prescription in the present case is governed by section 7 of the Ordinance. In Walker Sons v. Kandiah (supra) the plaintiffs instituted an action to recover a sum. of Rs. 2,677.42 for repairs effected to a motor car. The order of the defendant requesting the plaintiffs to effect the repairs was given by a letter and the acceptance of the order by the plaintiffs was also by a letter. It was held that the contract between the parties was not a written contract within the meaning of section 6 of the Prescription Ordinance nor an unwritten contract falling under section 7, but fell under that class of unwritten contract specially provided for by section 8, Actions for work and labour done and goods sold and delivered, though these are unwritten, contracts, come under section 8 and not under section 7. It was also held that, as the defendant within a year from the date of action acknowledged his indebtedness and promised to pay Rs. 2,000 in full satisfaction, the plaintiffs were entitled to recover only Rs. 2,000 and not the full amount of the claim. The facts in regard to the nature of the claim are exactly the same in this case as in Walker

Sons v. Kandiah (supra). Counsel for the appellant has pointed out that the latter decision was contrary to a long line of cases which decided that section 8 referred only to manual labour or work of a menial character. It did not refer to a case where the work of repairs required a certain amount of engineering skill. In view of the fact that it was held in Walker Sons v, Kandiah that there was an acknowledgment as to Rs. 2,000 of the amount claimed Counsel for the plaintiff asked me to say that the decision in regard to the ambit of section 8 was obiter and not binding on me. I am unable to say that the decision is obiter. If it had been, the plaintiff would have had judgment for Rs. 2,677.42 the whole amount claimed.

Counsel for the plaintiff has cited a number of cases decided before the decision in Walker Sons v. Kandiah to show that previous to that case the Courts had held that section 8 referred only to manual labour or work of a menial character. The cases cited in Walker Sons v. Kandiah are Alvapillai v. Sadayar [1]; Gunasekera v. Ratnaike [2]; Mack v. Wickrema-ratne [3]; Silva v. Ritche [4]; and Baker v. Siman Appu [5] In spite of these decisions the Court held that the plaintiffs' claim was within the ambit of section 8 of the Ordinance and not within sections 7 or 8. Counsel for the plaintiff has also suggested that I should not follow Walker Sons v. Kandiah (supra) by reason of the fact that de Sampayo J. in his judgment has misinterpreted the judgment of Moncrieff J. in Horsfall v. Martin [6]. In the latter case it was held that though money due for goods and delivered on three months credit may be money due upon an unwritten promise yet the action brought for its recovery falls within section 8 of the Prescription Ordinance and as such is prescribed within one year after the debt became due. In his judgment Moncrieft J. held that any action " for or in respect of goods sold and delivered" whether it be upon an unwritten or even on a written contract is excluded from the operation of sections 6 and 7 respectively by the provisions of section 8. It was to this part of the judgment of Moncrieff J. that de Sampayo J. referred in his judgment in Walker Sons v. Kandiah. As pointed out by Garvin S.P.J. in Assen Cutty v. Brooke Bond, Ltd.[7] at p. 139, the extent to which Moncrieff J, held that an action for or in respect of goods sold and delivered fell under section 8 to the exclusion of section 6 when the action was based on a written contract his judgment was in conflict with the principle of the decision in K. P. V. Louis de Silva v. A. P. Don Louis [8] which is a judgment of the Full Court. It would appear that the judgment of Moncrieff J. went further than the law warranted so far as written contracts are concerned. But this fact does not in my opinion afford a reason for not following the judgment of de Sampayo J. in Walker Sons v. Kandiah. The learned Judge in that case was not relying on that part of the judgment of Moncrieff J. which Garvin J. states in Assen Cutty v, Brooke Bond, Ltd. (supra) was not in accordance with the law.

Like the Commissioner I feel I am bound by Walker Sons v. Kandiah. In reaching the decision that I have, 1 do not in any way depart from the principle laid down by Lawrie A. J, in Mack v. Wickremaratne (supra) that work and labour contemplated by section 8 does not include the work of educated men. The work and labour done in the present case would not fall into this category.

The appeal is dismissed with costs.

Appeal dismissed.

Similar view had been taken in the case of **Ceylon Insurance Co. Ltd. Vs. Dimo Co. Ltd.,** as well. **[79 NLR Vol. 2 at page 5]** In that case it was held that in the case of an unwritten contract, Section 8 of the prescription ordinance would be the particular enactment to which the general Section 7 must give way.

Having looked at the facts of this instant case as well as the law relevant thereto, it is my view that the learned District Judge has misdirected himself when he decided that the circumstances of this case do not fall within the ambit of Section 8 of the Prescription Ordinance. It is my view that the facts and circumstances of this case should clearly fall within the ambit of Section 8 of the prescription Ordinance.

In the circumstances, it is my opinion that the plaintiff is not in a position to claim damages from the defendant since Section 8 of the Prescription Ordinance prevents him to file action after lapse of a period of one year for the cause of action alleged to have accrued to him. Accordingly, I decide that it is incorrect to answer the issue No.8 in favour of the plaintiff. Therefore, I answer the issue No.8 in favour of the defendant and decide that the plaintiff's action is time barred. Accordingly, I allow the appeal setting aside the judgment dated 20th February 1998 of the learned District Judge of Mt. Lavinia. Having considered the circumstances of the case, I make no order as to the costs of the appeal

Appeal allowed without costs.

JUDGE OF THE COURT OF APPEAL

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