Kanapathipillai
v
Anuradhapura Preservation Board

COURT OF APPEAL.
SOZA, J. AND RODRIGO, J.
S. C. 205/74 (F)—D. C. ANURADHAPURA 8689/M.
OCTOBER 2, 1978.

Contract in writing to do construction work and clear jungle—Subsequent oral promise to make additional payment—Claim for balance due of such additional payment--Period of prescription applicable—Prescription Ordinance (Cap. 68) sections 6, 7—Evidence Ordinance, section 92, proviso 4.

The plaintiff and defendant entered into a contract whereby the plaintiff agreed to do certain construction work and the clearing of jungle for the defendant and the terms of this contract were embodied in a written document produced at the trial marked P1. While the work was in progress the Government devalued the rupee and the case for the plaintiff was that the defendant then promised to make a 20% extra payment for work done after devaluation. The present claim was for the balance due out of this extra amount thus calculated at 20%. The defendant contended that there was no binding agreement to pay the extra 20% and also that in any event such a claim was prescribed.

Held

(1) That although the plaintiff would not have a legal right to any extra payment from the mere fact of devaluation, there had been a subsequent oral promise to pay 20% extra made by the defendant to the plaintiff. Payments had also been made to the plaintiff on this basis.

(2) That the plaintiff's claim was not prescribed. The promise to pay 20% on account of devaluation could have no independent existence outside the main contract P1 and is part of this written contract. It would accordingly be prescribed only in 6 years in terms of Section 6 of the Prescription Ordinance.

Held further

That in any event if the subsequent promise to pay 20% on account of devaluation is regarded as a separate unwritten promise and Section 7 of the Prescription Ordinance applied, yet the action would not be prescribed because it had been brought within 3 years from the time after the cause of action, namely, the refusal to pay, arose.

Cases referred to

(1) *The Baarn (No. 1), (1933) P. 251.*
(2) *Treseder-Griffin v. Co-operative Insurance Society, (1956) 2 Q.B. 127*
(3) *Arunasalam v. Ramasamy, (1914) 17 N.L.R. 156.*
(4) *Dawbarn v. Ryall, (1914) 17 N.L.R. 372.*
(5) *Lamatena v. Rahaman Doole, (1924) 26 N.L.R. 406.*
(6) *Goss v. Lord Nugent, 5 B & Ad. 58.*

APPEAL from the District Court, Anuradhapura.

C. Ranganathan, Q.C., with *A. P. Niles*, for the plaintiff-appellant.
N. Devendra, for the defendant-respondent.

Cur. adv. vult

November 16, 1978.

SOZA, J.

The plaintiff-appellant and the defendant-respondent who is the Anuradhapura Preservation Board entered into an agreement on 28th October, 1967, whereby the plaintiff agreed to construct 55 houses, 3 wells, 10 culverts with ancillary road work and jungle clearing on or before 6th July, 1968. For this work the plaintiff was to be paid a sum of Rs. 370, 191. 15. The terms of the contract are embodied in the written document marked P1. After

the contract was signed and while the work was in progress the Government on 22.11.1967 devalued the rupee—see copy of the *Gazette Extraordinary* No. 14,775/15 of 22.11.67 produced as P2. The case for the plaintiff-appellant is that the defendant-respondent promised to make a 20% extra payment for all works done after the devaluation and in fact today the amount which the plaintiff seeks to recover from the defendant is the balance due out of the extra amount calculated at 20% which the plaintiff says the defendant promised to pay. The balance due is Rs. 36,876.14 after giving credit for a final payment of Rs. 32,904 made on 31.3.1969.

On behalf of the defendant Board it is contended that the decision to pay 20% was made unilaterally by itself and not communicated to the plaintiff. The decision to pay 20% extra was gratuitous and not intended to give rise to any legal rights or obligations. He submits that there was no acknowledgement of any obligation to pay and there was no contract to pay and in any event the claim of the plaintiff is prescribed.

At the outset it should be observed that merely from the fact of devaluation the plaintiff will not be entitled to claim any legal right to an extra payment. As Scrutton L. J. said in the case of *The Baarn No. 1* (1).

> "A pound in England is a pound whatever its international value"

So we may say a rupee in Sri Lanka is a rupee whatever its international value. Lord Denning stated the same principle in *Treseder Griffin v. Co-operative Insurance Society.* (2).

> "A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same".

Lord Denning was here giving expression to the nominalistic principle which obtains in Great Britain, Sri Lanka and a great many other countries of the world. The extent of monetary obligations cannot be determined otherwise than by the adoption of this principle of nominalism. The obligation to pay Rs. 10 is discharged if the creditor receives Rs. 10 at the time of performance irrespective of the intrinsic, extrinsic or functional value of Rs. 10 see *Mann : The Legal Aspect of Money* 3rd Ed., 1971, p. 76. Hence there should be no mistake about this that the

plaintiff had no legal right to any extra payment by the mere fact of devaluation in the absence of provision for this in the contract itself or a subsequent promise. If there was a subsequent oral promise we have to consider whether it could be treated as engrafted on to the main contract or whether it is an isolated and independent contract.

The plaintiff's case proceeds on the footing of a subsequent oral promise. Owing to the increase of costs resultant on devaluation there was an oral promise by the defendant Board to pay an extra 20% for all work done after devaluation. Therefore the first question that arises is, 'was there a promise to pay'? It is admitted that the defendant Board decided to make an extra payment of 20% for work done after devaluation. In fact the Plaintiff's account P8 as worked out in the defendant's account book is proof that there was such a decision. Was this decision communicated to the plaintiff in the form of a promise to pay? The letter P3 dated 21st November, 1968, on the subject of devaluation addressed by the defendant Board to the plaintiff is to the effect that the matter would be placed before the next meeting of the Board of Directors for a decision. The letter P4 of 19th November, 1971, is on the subject of outstanding payments arising out of devaluation. By this letter the plaintiff is informed that the matter is receiving attention and he will be informed as soon as a decision is made. P5 dated 23rd January, 1973, also states that the matter still awaits a decision. On 1st January, 1973, the Chairman of the defendant Board wrote letter P6 to the plaintiff requesting him to meet him at his office to discuss the outstanding moneys due to him on account of devaluation. On 28th March, 1973, the defendant Board wrote to the plaintiff that its lawyers have advised against payment—see P7. Though the correspondence P3 to P6 was non-commital in respect of the balance due to the plaintiff, yet earlier on payments had been made on account of devaluation. In fact the position is that 75% of the claim on devaluation had been paid. Such a part payment should be interpreted as an acknowledgement. In the case of *Arunasalam v. Ramasamy*, (3) De Sampayo, A. J. considered the implication of a part payment on account and said as follows at page 157:

> "A payment on account is necessarily an acknowledgement of the debt, and the law, in the absence of anything to the contrary, implies from the acknowledgement of the debt a promise to pay the balance, (*Fordham v. Wallis* (1852) 10 Hare 225).

> This implied promise creates a new obligation and takes the debt out of the operation of the statute, and this is so even though at the date of payment the debt may have been already statute-barred. Of course, the implication of a promise may be rebutted by any special circumstances attending the payment, as where the payment is not on account but purports to be in satisfaction of the entire demand (*Taylor v. Hollard* (1902) 1 K.B. 676), or where the debtor says he will not pay the balance (*Wainman v. Kynman* (1847) 1 Ex. 118), or where the payment is compulsory under some legal proceedings (*Morgan v. Rowlands* (1872) 7 Q.B. 493) "

In the instant case, the correspondence P4, P5 and P6 is headed " oustanding payments arising out of devaluation ", and in P6 there is an invitation to the plaintiff to attend the office of the Board the purpose of which is given as follows :

> " to discuss the outstanding monies (*sic*) due to you on account of devaluation ".

This correspondence therefore far from negativing the inference of acknowledgment of the debt recognises the fact that moneys are outstanding and due to the plaintiff on account of devaluation but the question of payment was under consideration. In these circumstances it is safe to conclude that earlier there was an oral promise made by the defendant Board to the plaintiff to pay 20% extra for works done after devaluation. But later the Board had second thoughts and by letter P7 on 28th March, 1973, sought to resile from its earlier promise. The decision of the defendant Board not to pay came too late in the day and certainly cannot nullify the earlier promise. In fact at the trial only one issue was raised, namely whether the claim of the plaintiff was prescribed, and to this question I will now address myself.

Firstly I would like to consider whether the promise to pay 20% on account of devaluation can be treated as being engrafted on the main contract. In this connection it would be useful to consider the case law on the point. In the full bench case of *Dawbarn v. Ryll* (4), Lascelles, C. J. put the test as follows : Without the written contract would the new obligation exist ? His Lordship went on to hold that a claim for compensation by the vendee for loss of possession of a land sold to him is based on the written contract of sale, and would be prescribed only in six years. In the case of *Lamatena v. Rahaman Doole* (5), Jayawardene, A. J. was called upon to consider whether an action to recover the balance consideration on a deed of sale is prescribed in three or six years. His Lordship stated as follows at page 407 :

"By a deed of sale the vendor transfers the land, and the vendee agrees to pay the price. The action to recover the unpaid balance of the price grows directly out of the deed of sale, it is dependant on it, and derives its vital force from it. It is, therefore, a claim arising from an agreement in writing".

In the case of *Goss v. Lord Nugent* (6), His Lordship Denman, C. J. stated as follows :

"By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or substract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement".

In our Evidence Ordinance the proviso 4 to section 92 provides that a written contract may be rescinded or modified by a subsequent oral agreement.

In the instant case there is nothing to show that the earlier promise to pay 20% on account of devaluation was subject to to any qualifications. The promise to pay 20% on account of devaluation can have no independent existence outside the contract P1. It depends on P1 for its viability. Therefore I am of the view that this subsequent promise to pay 20% is part of the written contract P1 and is prescribed only in six years in terms of section 6 of the Prescription Ordinance.

This action was instituted on 5th September, 1973, well within six years from the date of the breach of the written promise. Even if the subsequent promise to pay 20% is regarded as a separate unwritten promise and section 7 is applicable, still the action is not prescribed because it has been brought within three years from the time after the cause of action arose. The cause of action arose only on the refusal to pay i.e., on 28th March, 1973. The learned District Judge was in error to count the period of three years from the date of the last payment, namely 31.3.1969.

What section 7 of the Prescription Ordinance says is that an action on an unwritten promise should be commenced within three years of the time after the cause of action shall have arisen. The cause of action arose not on the date of the last payment but on the date of the refusal to pay. Here the refusal to pay was on 28th March, 1973. Hence the action is clearly not prescribed.

The plaintiff has claimed interest at 8% on the amount due. This I think is a very reasonable rate of interest.

Therefore I set aside the judgment and decree appealed from and enter judgment for the plaintiff as prayed for with costs both here and in the District Court. Let decree be entered accordingly.

RODRIGO, J.—I agree.

Appeal allowed.