1931

Present : **Maartensz A.J.**

RODRIGO *v.* JINASENA & CO.

227—*C. R. Colombo*, 50,838.

Prescription—Agreement to supply materials signed by plaintiff—Statement of claim—Defendants letter making part payment—Repudiation of liability to pay balance—Written agreement—Ordinance No. 22 of 1871, ss. 7, 9, and 13.

The plaintiff by a written agreement signed by him undertook to supply the defendant with materials for a steel structure.

In reply to plaintiff's statement of claim the defendant made part payment and by letter repudiated his liability to pay the balance owing to a defect in the materials supplied.

Held, that the letter of the defendant did not amount to a written acknowledgment within the meaning of section 13 of the Prescription Ordinance, but that it may be relied upon to constitute a written agreement falling under section 7, in which case the prescriptive period provided by the section will apply.

THIS was an action for the recovery of a sum of Rs. 160·80 the balance value of materials supplied to the defendant for a steel structure in August, 1927. The action was filed in February, 1929. The defence set up the plea of prescription. It was urged in reply that the defendant by his letter dated March 7, 1928, had acknowledged the debt. The letter was in these terms :—" A loss of more than Rs. 160·80 has been caused to me by such default on your part. I am accordingly forwarding you a cheque for the balance Rs. 195·48, after deducting the said sum of Rs. 160·80."

The learned Commissioner held that the letter took the claim out of the operation of the Prescription Ordinance and entered judgment for the plaintiff.

Rajapakse (with him *Kurukulasuriya*), for defendant, appellant. Action is for goods sold and delivered. It is prescribed in one year (section 9 of Ordinance No. 22 of 1871). To take the case out of prescription, there must be an acknowledgment in writing or a part payment from which an acknowledgment of the debt and a promise to pay may be inferred. D3 far from being an acknowledgment of a debt states the payment is in full settlement, and therefore no debt is due. 71 *C. R. Colombo*, 51,101, is not an authority on the point ; if it is, that decision should not be followed in view of several authorities to the contrary. (17 *N. L. R.* 156 ; 3 *Ceylon Law Reports* 92.). section 13 of our Prescription Ordinance is the same as section 1 of Lord Tenterden's Act and the English decisions are to the same effect. 5 *S. C. C.* 62 ; 1 *Ceylon Law Reports* 69 ; (1847) 1 *Exch.* 118 ; (1851) 6 *Exch.* 839 ; (1902) 1 *K. B.* 67 ; 19 *Halsbury ss.* 110–111.

Weerasooria for plaintiff, respondent.—D3 refers to a debt due and the part payment is on account. 71 *C. R. Colombo*, 51,101, is on all fours with this case. The English authorities are all collected in *Spencer v. Hemmerde* [1]. If D3 is to be construed differently, it is submitted that the action is based on a written contract. The contract need not be in a special form of writing. Any note or memorandum in evidence of the contract is sufficient. It need not be contemporaneous (*Idroos v. Sheriff* [2]). The action is, therefore, not prescribed till 6 years, section 7 of Prescription Ordinance (*Campbel v. Wijeyasekere* [3]).

Rajapakse, in reply.—*Spencer v. Hemmerde* (*supra*) is in my favour. There is no evidence of any writing embodying the agreement. D4 is only an estimate or catalogue of goods to be supplied. It is not signed by the defendant. D3 cannot help the plaintiff. The prescriptive period for unwritten contracts generally, is 3 years, see section 8 of the Prescription Ordinance; if the contract be in writing the period is 6 years, see section 7 ; and for a special class of contract, viz., sale of goods the period is 1 year, see section 9 (4 *N. L. R.* 70 and 21 *N. L. R.* 317).

April 1, 1931. MAARTENSZ A.J.—

This is an action for the recovery of a sum of Rs. 160·80, the balance value of certain materials supplied to the defendant for a steel structure.

The materials were delivered to the defendant at the beginning of August, 1927.

The plaint in this action was filed in February 25, 1929.

In the course of the trial, the defendant set up the defence that the claim was prescribed. The reply to this defence was that the defendant by his letter D3 dated March 7, 1928, had acknowledged the debt.

This letter was apparently a reply to plaintiff's claim to be paid a sum of Rs. 356·28 being, according to the account particulars filed with the plaint, the balance due with interest on January 31, 1928.

The defendant in this letter complained that the iron frame work supplied was not in accordance with the drawing submitted by him and concluded as follows :—

> ". . . . A loss of more than Rs. 160·80 has been caused to me by such default on your part. I am accordingly forwarding you a cheque for the balance Rs. 195·48 after deducting the said sum of Rs. 160·80. Please forward me a receipt in full settlement."

The learned Commissioner held on the authority of the decision in case No. 51,101 of the Court of Requests, Colombo, S. C. No. 75 [1] that the letter D3 (erroneously

[1] (1922) 2 *A. C.* 507. [2] 27 *N. L. R.* 231.
[3] 21 *N. L. R.* 431.

[1] *S. C. Minutes of July* 30, 1930.

referred to as dated March 8), took the claim out of the operation of the Prescription Ordinance and entered judgment for plaintiff as prayed.

The defendant appeals from this judgment.

The questions for decision are (1) whether the learned Commissioner was right in holding that the claim was not prescribed by reason of the letter D3 and (2) whether the claim was on a written agreement governed by the provisions of section 7 of the Prescription Ordinance, 1871.

The appellant's counsel contended on the first question that the decision in C. R. Colombo, No. 51,101, was not an authority for holding that the letter D3 took the claim out of the operation of the Ordinance, and that, if it was, the decision was not in accordance with the earlier decisions of this Court of greater authority.

I do not think it necessary to discuss the correctness of the decision in case No. 51,101. Whether a letter or other written acknowledgment of a debt or a part payment or both has the effect of taking a case out of the operation of the Ordinance must depend on the terms of the written acknowledgment or the circumstances in which the part payment was made in each case.

The law is that there must be (1) an acknowledgment of the debt in writing and (2) a promise to pay the debt, which promise is implied where the acknowledgment is not modified or qualified by words to the contrary ; if there are words which amount to a refusal to pay there is no promise implied or expressed. If the words amount to a conditional promise to pay, the condition should have been fulfilled (*Avvupillai v. Ferdinand* [1]).

The law with regard to acknowledgments in England was very fully reviewed and discussed by the House of Lords in the case of *Spencer v. Hemmerde* [2]. The rules laid down in that case are applicable to section 13 of our Ordinance which reproduces almost verbatim, section 1 of Lord Tenterden's Act (9 *Geo. IV., c.* 14).

The effect of a part payment was considered in the case of *Murugupillai v. Muttelingam* [1] where Lawrie J. held that a part payment of a debt will not take the case out of prescription unless the payment is made under circumstances from which an acknowledgment of the debt and a promise to pay the balance may reasonably be inferred.

The letter D3 contains neither an acknowledgment of the debt nor a promise to pay it. On the contrary it asserts that a loss of Rs. 160·80 has been caused by the plaintiff's default, a cheque is sent for the balance, and a receipt in full settlement is demanded.

The part payment is not accompanied by a promise to pay the balance nor are there circumstances from which such a promise can be inferred.

I am of opinion therefore that if the principles I have referred to above are applied, the letter D3 cannot operate to take the claim out of the operation of the Ordinance. But there is direct authority in the case of *In re River Steamer Company, Mitchell's Claim* [2], that an acknowledgment coupled with an assertion that the debtor has a set off sufficient to countervail the debt is not sufficient to take the claim out of the Statute of Limitations.

I accordingly held that the letter D3 dated March 7, 1928, did not take the claim out of the operation of the Prescription Ordinance, No. 22 of 1871, and if the action is governed by section 9 of the Ordinance it is out of time.

Plaintiff's counsel, however, contended that the action was governed by section 7 of the Ordinance as there was a written agreement between the parties.

There was clearly an agreement in writing by the plaintiff to supply materials contained in the document D4 dated September 28, 1927. It is referred to in

[1] (1891) 1 *Ceylon Law Reports* 69.
[2] (1922) 2 *Appeal Cases* 507.

[1] (1894) 3 *Ceylon Law Reports* 92.
[2] 1870P1871) 6 *L. R. Ch.* 822.

paragraph 2 of the answer as an undertaking in writing by the plaintiff to make, supply, and deliver all necessary structural iron frame work for a rubber factory and a desiccating mill according to the dimensions stated in it for a sum of Rs. 4,100.

It was argued that the letter D3 constituted a memorandum in writing of the contract on the part of the defendant.

It has been held that no special form is required for a memorandum and that it need not be contemporaneous ; but it must be in existence when the action is commenced and there must be a concluded agreement existing at the time it is signed (*Halsbury's Laws of England, vol. VII., p.* 367). All these conditions have been fulfilled in the present case. It has been held further that a document is available as a memorandum although it contains a repudiation of the contract if it recognizes all the terms thereof and does not set up a fresh term.

D3 refers to the frame work made to plaintiff's order. The reference is clearly to the frame work mentioned in D4 and does not dispute the terms thereof. I am therefore of opinion that the contention that there was a written agreement must be upheld.

The question whether section 7 or section 9 applies to an action on a written agreement for the sale of goods is concluded by the decision in the case of *K. P. V. Louis de Silva and another v. A. P. Don Louis* [1] which is a decision of three Judges. The action was for the recovery of rent reserved by a deed of lease. The appellant contended that, whether there was a written contract or not, the action was governed by section 7 of the Prescription Ordinance and it was so held in *C. R. Kandy No.* 3,764 [2]. The full Court overruled the decision and held that section 7 applied. The *ratio decidendi* in this case applies to the argument of appellant's counsel in this appeal that, as section 9 specially mentions actions for goods sold and delivered, section 7 must apply to agreements other than agreements for the sale of goods. This decision of the full Court does not appear to have been cited in the case of *Horsfall v. Martin* [1] where Moncrieff J. held that section 9 of the Ordinance applied to all actions for goods sold and delivered irrespective of the nature of the agreement. This decision was disapproved of in the case of *Dawbarn v. Ryall*[2] which was also a decision by a Full Bench.

The decision in the case of *Walker, Sons & Co., Ltd. v. Kandyah* [3] where it was held that an offer to effect repairs by letter which was accepted by letter did not constitute an agreement under section 7 was in view of the ultimate decision in the nature of an *obiter dictum* and I am not bound by it.

I affirm the judgment appealed from on the issue of prescription but not for the reasons given by the learned Commissioner.

I see no reason to dissent from the learned Commissioner's finding on the facts as regards the claim and counter claim, and I dismiss the appeal with costs.

Appeal dismissed.

[1] (1881) 4 *S. C. C.* 89.

[2] (1877) *Ramanathan's Reports* 73.