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

In the matter of an appeal under Section 5(1) of the High Court of the Provinces (Special Provisions) Act No.10 of 1996, against the judgment of the learned Commercial High Court Judge of Colombo dated 28.03.2013.

THE TRAVEL CLUB (PVT) LTD.,
Formally of
Taj Samudra Office Complex,
No.25, Galle Face Centre Road,
Colombo 3.
And presently of
4th Floor, Forbes and Walker Building,
No.46/38, Nawam Mawatha,
Colombo 2

.

Plaintiff

S.C.CHC Appeal No.30 /2013
HC (Civil) No. .668/2010/MR

Vs.

STERLING MERCHANT INVESTMENT LIMITED,
Formally of
No. 54, Walukarama Road,
Colombo 3.
And presently of
No. 85/1, Jambugasmulla Road,
Nugegoda.

Defendant

AND BETWEEN

THE TRAVEL CLUB (PVT) LTD.,
Formally of
Taj Samudra Office Complex,
No.25, Galle Face Centre Road,
Colombo 3.
And presently of
4th Floor, Forbes and Walker Building,
No.46/38, Nawam Mawatha,
Colombo 2

.

Plaintiff-Appellant

Vs.

STERLING MERCHANT INVESTMENT LIMITED,
Formally of
No. 54, Walukarama Road,
Colombo 3.
And presently of
No. 85/1, Jambugasmulla Road,
Nugegoda.

Defendant-Respondent

BEFORE : **MURDU N.B. FERNANDO P.C., CJ.**
A.H.M.D. NAWAZ, J.
ACHALA WENGAPPULI, J.

COUNSEL : Neomal Palpola with Keshani Nilaweera instructed by Ms. Serasinghe for the Plaintiff-Appellant
Shiraz Hassan for the Defendant-Respondent.

ARGUED ON : 11th November, 2021

DECIDED ON : 25th July, 2025

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ACHALA WENGAPPULI, J.

This is a direct appeal, preferred by the Plaintiff-Appellant-Company (hereinafter referred to as the "Plaintiff Company"), against the judgment of the Commercial High Court dated 28.03.2013, by which its action was dismissed. The Commercial High Court accepted the claim of the Defendant-Respondent-Company (hereinafter referred to as the Defendant Company) that the said action is prescribed.

In instituting the instant action before the said High Court on 01.11.2010, the Plaintiff Company had averred in its Plaint that the Defendant Company is wrongfully and unlawfully in breach of its obligation, in its failure or neglect to pay a sum of Rs. 6,034,241.35 and therefore a cause of action accrued to sue that Company to recover the same. The Plaintiff Company accordingly prayed *inter alia* from the trial Court to grant a Judgment and Decree in a sum of Rs. 6,034,241.35, together with further interest at 16% per *annum* in a sum of Rs. 3,900,000.00, from 01.11.2010, until the date of the Decree and thereafter a further interest at 16% per *annum* on the aggregate amount of the Decree until payment in full.

The Plaintiff Company was involved in a travel trade and had some of its financial requirements being served by *Pramuka Management and*

Financial Services Ltd., an entity which was re-named *Pramuka Merchant Corporation* in November 2000 and once more changed the name to its present form, *Sterling Merchant Investments Ltd.,* in July 2003. It is stated in the Plaint that the Plaintiff Company made two fixed deposits with the Defendant Company, bearing Nos. 2002/MMB/035 and 2002/MMB/058 for a sum of Rs. 2,400,000.00 and Rs. 1,500,000.00 respectively at an interest rate of 16% per *annum,* on 08.02.2022. These two deposits were to mature on 06.01.2003.

In addition to the said two fixed deposits, the Plaintiff Company also obtained two Term Loans from the Defendant Company, amounting to a sum of Rs. 1,796,000.00 (Term Loan No. 1) and Rs. 1,500,000.00 (Term Loan No. 2), along with a bank guarantee of Rs. 8,000,000.00, issued by *Pramuka Bank Ltd.* The two fixed deposits of the Plaintiff Company were held under a *lien* by the Defendant Company in respect of those term loan facilities. The Plaintiff Company claims that the total yield of the two fixed deposits, once reached maturity, amounts to Rs. 4,524,000.00. The Plaintiff Company wrote to the Defendant Company on 14.12.2004, informing latter to make the necessary arrangements to pay the balance of the capital and accrued interest to the former, after settling its dues under two term loan facilities.

Instead of complying with the said direction, the Defendant Company chose to set off the total outstanding amount due to it on the two term loans, amounting to a sum of Rs. 1,363,369.11, against the total sum payable on the maturity of the said two fixed deposits and proceeded to "re-invest" the balance sum of Rs. 3,160,630.89 with them. The Plaintiff Company was in agreement with the act of the Defendant Company in

setting off its dues under Term Loans but demanded that the balance from sum of Rs. 3,160,630.89 due on the said two placements to be paid in full.

Since then, the Defendant Company, apart from making two part-payments (the last of which was made on 14.11.2007), had wrongfully and unlawfully neglected to make the balance payment in full, due on the Plaintiff Company on capital and interest of the said two fixed deposits. The Plaintiff Company, by its letter dated 09.11.2007, called upon the Defendant Company to make the full payment.

The Defendant Company, in its answer, whilst moving Court to dismiss the Plaint of the Plaintiff Company, stated that the re-investment of the remaining amount due to the Plaintiff Company on the two fixed deposits was made with the concurrence of the latter, who since accepted the payments that were made from time to time, under the re-payment scheme, and therefore is estopped from claiming a contrary position. The Defendant Company also pleaded in its answer that the cause of action disclosed by the Plaintiff Company is already prescribed.

Parties proceeded to trial on a total of 20 issues raised and accepted by Court. Issue No. 19 in particular, had dealt with the question whether the cause of action of the Plaintiff Company is prescribed.

The trial Court, in delivering its judgment, now being impugned by the Plaintiff Company in this appeal, was of the view "… *it can safely be concluded that the first time the plaintiff wrote to the defendant specifying the amount the defendant Company was willing to pay in terms of the said two placements* (the two fixed deposits) *was not by letter X11(a) dated 09.11.2007, but by letter X2 dated 21.03.2003. The plaintiff instituted this action on*

01.11.2010. The action has been filed 6 years after the breach of the Agreement and therefore prescribed in law." The trial Court thereupon proceeded to dismiss the action instituted by the Plaintiff Company.

In coming to the said conclusion, the trial Court considered the evidence presented before it in both oral and documentary *forms* and reproduced the positions advanced by the Plaintiff Company regarding the issue raised on prescription.

During the hearing of the instant appeal, learned Counsel for the Plaintiff Company accepted the ruling made by the trial Court that the cause of action is based on a written contract and as such the applicable period of prescription is a period of six years. However, the learned Counsel contended that the said Court was in clear error when it concluded that the date on which the alleged breach of the agreement committed by the Defendant Company should be reckoned with, in the determination of the issue on prescription.

Learned Counsel, in support of the said contention, invited attention of this Court to the judgment of the trial Court where it deals with the position of the Plaintiff Company placed before that Court. The relevant section of the impugned judgment reads "*[I] cannot accept that, the defendant, on 09.11.2007, by X11(a) and Attachment thereto X11(b),* ***for the first time*** *wrote to the plaintiff specifying the amount the defendant company was willing to pay in terms of the said two placements. As the witness for the defendant stated in evidence and so stated in X11(a), the letter X11(a) and X11(b) are based on X2, which is a letter sent by the defendant to the plaintiff dated 21.03.2003"* and, upon this reasoning, the Court reached the conclusion

that, it was by letter X2, dated 21.03.2003, the Defendant Company had indicated its willingness to pay the specified amounts contained therein for the first time, in terms of the written agreement (emphasis original).

The complaint of the Plaintiff Company regarding the correctness of the process of reasoning adopted by the trial Court contained in the said section of the judgment, is that the Court below, in adopting the said process of reasoning, had fallen in to grave error, in its failure to consider the evidence placed before it on behalf of that Company, in the form of a series of correspondence between the two Companies, which clearly indicate that there had been regular acknowledgement of the debt by the Defendant Company, the most recent being on 01.03.2008, and therefore the action instituted on 01.11.2010, is well within the applicable period of six years, within which such an action should be instituted. Learned Counsel relied on the judgment of the Court of Appeal in ***Saparamadu and another v Peoples Bank*** (2002) 2 Sri L.R. 15, in support of his submission by placing reliance on where it is stated (at p. 19), *"[E]ven where the period of prescription has expired a part payment or an acceptance of the sum which was due would take the case out of the operation of the enactment which prescribes the time within which an action ought to be brought. Part payment into the account of the Bank on which the monies were transacted is a renunciation* of the *benefit of prescription."*

Learned Counsel for the Defendant Company, in his endeavour of supporting the impugned judgment of the trial Court, contended that the witness who gave evidence before the trial Court on its behalf had categorically stated that the documents X11(a) and X11(b) are only a reconciliation statements and therefore cannot be taken as an independent

documents to that of X2 and the references that were made in these two documents were in fact and essentially based on the figures contained in the document X2, as correctly held by the trial Court.

During the hearing of the appeal, learned Counsel for the Plaintiff Company as well as the Defendant Company have conceded that the applicable period of prescription in relation to the instant appeal is six years. Thus, the only question they are at variance with is the date on which the said prescription period should start to run.

Thus, in view of these two competing contentions, it is important this Court to determine the question whether the trial Court was in error when it concluded that the alleged breach of Agreement occurred when the Defendant Company failed to act on its undertaking to pay the amounts specified in the document X2, issued in the year 2003 or whether there had been a subsequent acknowledgement of the debt by that Company, which takes the action of the Plaintiff Company, out of the relevant period of prescription.

It might be helpful to the reader if I were to make at least a notional reference to each of these documents that were relied on by the parties during their respective submissions, both in support as well as in opposition, in relation to the issue of prescription.

I shall commence my consideration with an examination of the contents of the documents marked X11(a), X11(b) and X3, according to which the Commercial High Court had decided that the year in which the alleged breach of the agreement as 2003. The document X11(a) is a letter addressed by the Defendant Company to the Defendant Company on

9.11.2007, by which it informed the reasons for the delay in responding to a previous correspondence, presumably of the Plaintiff Company, by stating that it was due to the change of ownership and management of the Company. The Defendant Company further stated that it is a Statement of Reconciliation and notified the Plaintiff Company that "… *the accrued interest outstanding as at 31.07.2003 of Rs. 509,867.77, Rs. 500,000.00 has been transferred to capital, and the total balance payable on the above two placements as notified to you is Rs. 1,911,720.24.*"

The letter X11(a) in its last paragraph stated that "… *we propose to bring the Travel Club (Pvt) Ltd. in line with all the other placement holders, and propose to refund 20% of the total placement value capitalized amounting to Rs.382,344.04. The amount refundable after recovering an adjustment of Rs. 11,896.81 on account of unpaid interest due on loans amounts to Rs. 370,447.23. We propose to make an immediate payment of Rs. 200,000.00 and the balance of Rs. 170,447.23 payable by the end of November 2007. The next refund for the placement holders is planned for January 2008 and details of this will be notified later.*"

The document X11(b) is a Statement of Account, as referred to in X11(a) and the document X2, on which the trial Court acted, is dated 21.03.2003 and addressed to the Plaintiff Company. It appears from the contents of the first part of that letter was to explain the circumstances under which the transition of the management of the Defendant Company had taken place and informs the latter that it has "… *taken over the responsibility of honouring the payments of the placements you have made with Pramuka Merchant Corporation Ltd.*".

But, in the concluding paragraph of X2, the Defendant Company states that "… *Sterling Merchant Investments Limited foresee that a minimum period of 12 months is necessary to restructure the business operations of the Company and to honour our commitments towards our valued customers. In order for us to carry out this proposed restructuring we kindly request you to re-invest the captioned placements with us for a further period of 12 months. Until such time we will continue to pay the contracted interest rate up to the date of maturity and thereafter at the prevailing market rates. Further, we are making arrangements to pay the interest on matured placements to clients who wish to obtain interest payments on matured placements on or before 30th April 2003."*

Now I turn my attention to the contents of the letters that were relied on by the Plaintiff Company in support of its position that there had been subsequent acknowledgements of debt on the part of the Defendant Company. Learned Counsel for the Plaintiff Company submitted that the latest of such acknowledgements is reflected in the letter dated 01.03.2008 ("X13") by which the Defendant Company admits that its liability over the "… *placement value as per the plan was Rs. 1,911,720.24*" and thus, its action against the latter was instituted well within the required period of six years.

The letter X13, is a response by the Defendant Company to a letter sent by the Plaintiff Company dated 25.01.2008 and sets down the several important events that had taken place since its letter dated 03.01.2003 ("X6") addressed to the Plaintiff Company, arranged in a chronological order. Paragraphs 2, 3, 4 and 5 of the letter X13 are of relevance to the issue to be determined and are reproduced below.

"2. *Your deposits had been re-invested at a yield of 13.5% p.a. as notified in the letter dated 3rd January 2003. Accordingly, interest up to 31.07.2003 has been added as per the statement.*

3. *Thereafter, you have been advised of the amounts outstanding on your placements at the time of the announcement of the restructuring plan in July 2003. Your placement value as per the plan was Rs. 1,911,720.24. How this is arrived at is also shown on the reconciliation statement.*

4&5 *Accordingly, the amounts refunded in November 2003, February 2004, and 20% refunded thereafter are all explained in our letter dated 9th November 2007. You have been refunded 30% of your placements to-date as per all other placement holders of this Company, and you have accepted these payments as and when refunded, without objection*."

The purpose of reproducing the contents of these letters exchanged between the Plaintiff Company and the Defendant Company was to assess the correctness of the claim made by the former that they are in fact acknowledgements of debt that would bring its action within the prescriptive period, in the light of the relevant judicial precedents.

The relevant law on this regard is found in Section 6 of the Prescription Ordinance, which sets out the limitation period on written contracts states that no action shall be maintainable " … *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."

In describing the cause of action on which it sued the Defendant Company, the Plaintiff Company states in its Plaint (at paragraphs 18, 19 and 20) that the former owes the latter a sum of Rs. 6,034,241.35 (as at 31.10.2010) in respect of the two fixed deposits it had maintained with them, as reflected in the Statement Accounts P10, which is annexed to the said Plaint. Since the Defendant Company, in breach of its obligation wrongfully and unlawfully failed or neglected to pay the said sum, a cause of action has accrued to the Plaintiff Company.

In effect, the Plaintiff Company maintains its cause of action against the Defendant Company accrued to it in the year 2008, and raised issue No. 8 based on that claim, which reads as follows;

"8. As set out in paragraph 17 of the Plaint;

(a) Has the defendant by letters dated 09.11.2007 [P7/ X11(a)] and 01.03.2008 [P9/X13] admitted and accepted its liability to pay the moneys due to the plaintiff upon the said two investment placements?

(b) If so, is the defendant estopped in law and in fact from:

(i) denying its liability to pay the plaintiff?

(ii) pleading that the cause of action of the plaintiff is prescribed?"

The Commercial High Court answered issue No. 8(a) as "*yes, but on restructuring scheme*" whilst answering issue Nos. 8(b)(i) and 8(b)(ii) as the Defendant Company "*does not deny on the restructuring scheme*" and "*defendant can*", respectively. The issues that were raised by the Defendant Company seeking to counter the said issue No. 8, are the issue Nos. 14, 15, 16 17 and 18, which based on its claim that the Plaintiff Company agreed with the new investment plan it had proposed on 21.03.2003. The High Court specifically found that the Defendant Company had proceeded to act on the re-structuring plan it had formulated, disregarding the objections repeatedly raised by the Plaintiff Company to the implementation of such a plan.

Thus, the Commercial High Court arrived at the conclusion that the cause of action, although claimed by the Plaintiff Company in its Plaint to have accrued in the year 2008 on X 13, the oral and documentary evidence presented before it clearly points to the conclusion that it in fact accrued in 2003, with the issuance of X2 by the Defendant Company and, when the instant action was instituted in November 2010, it is clearly time barred by operation of the statutory provisions contained in Section 6 of the Prescription Ordinance.

The said conclusion reached by the trial Court is a justifiable conclusion in view of the evidence presented by the parties. In order to consider the contents of the correspondence between the parties in its proper perspective, it is necessary to set out the circumstances under which the documents X2, X11(a) and X11(b) were issued.

The genesis of the present dispute could be traced back to a bank guarantee issued on behalf of the Plaintiff Company by *Pramuka Savings & Development Bank.* On 28.10.2002, the Country Manager of the airline *Cathey Pacific,* requested the Plaintiff Company to furnish a new bank guarantee (X8). The Plaintiff Company requested the Defendant Company to arrange a bank guarantee by letter dated 14.11.2002, but there was no meaningful action taken, compelling the former to write to latter (X10) once more on 15.11.2002 informing that "… *Pramuka Savings & Development Bank has ceased operations temporarily the guarantees issued through the bank have been dishonoured"*. Importantly, the Plaintiff Company also made a request in that letter to "… *release the deposits with interest to us immediately to substitute the guarantees through another bank*". By this time, the two fixed deposits that were made on 06.01.2002, for a period of 365 days, were to mature within the next few weeks (date of maturity was in fact 06.01.2003).

Clearly, the Plaintiff Company made its intentions clear on the fate of its deposits held by the Defendant Company for the first time by this letter X10, which was followed by another letter dated 14.12.2002 (X5) making a request to the latter "… *to deduct the balance due from our fixed deposit*" to cover the loan instalments of Rs. 119,252.24 and to make necessary adjustments as to the balance due to it. The Defendant Company's response to the said requests of returning the balance of the two deposits, after deducting whatever dues, was informing the Plaintiff Company of the fact that the balance amount of Rs. 3,160,630.89 will be re-invested for a period of 6 months at a yield of 13.5% p.a. and it also assured that "… *every effort will be made to forward the above balance payment due to you at the earliest possible time*" (vide letter dated 03.01.2003, tendered

as X6). The Plaintiff Company, by its letter dated 09.01.2003 (X6), indicating it is "*not agreeable*" to the proposed re-investment plan and renewed its request to make arrangements to refund the capital and remaining interest.

Then comes a series of correspondence that indicate the Defendant Company, totally ignoring the demands of the Plaintiff Company, proceeded along its re-structuring plan after re-investing the balance from the two fixed deposits (X2, X3, X11(a), X14, X16, X17, X18 and X19).

The letter dated 02.09.2003 (X20) stands out from the said series of correspondence as for the first time, the Plaintiff Company forewarns the Defendant Company that it would "*reluctantly compelled to resort to legal action*" if the latter persisted with its actions any further. This letter was followed by another letter sent on 26.09.2003 (X 21), demanding an immediate return of the dues. Then the letter (X22), was sent to the Defendant Company on 17.11.2003 with the title "FINAL REMINDER" once more demanding to refund the dues. It also reminded the Defendant Company once more that "… *we will be reluctantly compelled to resort to legal action in order to recover all our dues with accrued interest and cost*."

Since the instant action was instituted on 01.11.2010, by working back on the prescriptive period of six years, the cause of action on which the Plaintiff Company sued the Defendant Company ought to have accrued before 01.11.2004.

When the Plaintiff Company wrote the letters X20, X21 and X23, it was fully aware that the Defendant Company had no intentions to depart

from the re-structuring plan it has put in place and thereafter implemented to ensure the continuity of its commercial operations.

Thus, the conclusion reached by the trial Court that the dispute arose well before six years from the date on which the action was instituted, is a conclusion which could be justified, in view of the available evidence.

It is apparent from the contention advanced by the learned Counsel for the Plaintiff Company that it does not seriously canvass the validity of that finding but rather opts to attribute a fault on the trial Court, on its failure to consider the subsequent acknowledgements of debt, which it should have, before proceeding to dismiss its action as time barred. Thus, the Plaintiff Company thereby makes an attempt to bring its case within Section 12 of the Prescription Ordinance by placing reliance on its provisions that reads "*… no acknowledgement or promise by words only shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of enactments contained in the said Sections*" on the strength of the documents X11(a), X20, X21 and X23.

Perusal of the judgment and the answers provided to the several issues by the Commercial High Court, it is difficult to accept the said proposition of the Plaintiff Company. It is already noted that the issue Nos. 14, 15, 16 17 and 18 of the Defendant Company were based on its claim that the Plaintiff Company had agreed with the new investment plan it had proposed on 21.03.2003. Answers to issue No. 8(a), as well as to issue Nos. 14, 15 and 18 clearly indicate the trial Court was mindful of the

subsequent developments over the initial dispute that already erupted between the parties in 2003.

The issue No. 14 was raised on the basis that the Plaintiff Company agreed with the interest due on the fixed deposits be payable upon maturity after setting off its dues on the loan facilities, the Court answered "*Plaintiff agreed only as per X5*". The document X5 is a letter by which the Plaintiff Company informed the Defendant Company that it could deduct the monthly instalment of Rs. 119,252.24 from the accrues interest due from the two fixed deposits. Similarly, when the Defendant Company raised the issue No. 15 to read "… *have the agreements entered into between the plaintiff and the defendant in terms of the documents marked P2A [X3(a)] and P2B [X3(b)], been renewed ?"*, the Court answered the issue in the affirmative but with the qualification that the renewal was " … *on a different basis (vide X2) to which the plaintiff did not agree*." Issue No. 18(a) of the Defendant Company was to the effect whether " … *the plaintiff not made any objection to the new investment plan proposed by the defendant ?"* was answered as " *Plaintiff did repeatedly"* whereas issue No. 18(b), raised on the point whether " … *the plaintiff obtained benefits in terms of the new investment plan proposed by the defendant without raising any active objection to the same?"*, the Court answered the same with " *obtained part payments without accepting the rescheduled scheme".*

A factual position similar to the one presented before this Court in relation to the instant appeal, was presented before a bench of *Dalton* J and *Drieberg* J, in ***Hoare & Company v Rajaratnam*** (1932) 34 NLR 219. In this matter the defendant had written to the plaintiff Company a letter (P1) on 28.09.1928, stating "*In reply to your letter of 5th instant, on account of rubber*

prices, you will have to wait another couple of months for settlement". The plaintiff Company, in its reply to P1, declined to grant any further time and asks the defendant for a cheque in settlement.

The District Court held P1 to be an unconditional promise to pay on the expiration of two months from the date of the letter and that the Plaint being filed on 30.10.1929 is not prescribed. *Dalten* J accepted that the P1 is indicative of an acknowledgement of debt by the defendant he owed to the plaintiff Company, but differed with the trial Court finding that it is an unconditional promise by stating that (at p. 220), "*[I] am unable to agree with the learned trial Judge that the letter was an unconditional promise to pay at the expiration of two months. It is an acknowledgment of the defendant's indebtedness at the date the letter was written, to which has been added an intimation that he cannot raise the money for two months, implying a request to the plaintiff firm to wait for that time, which request was refused.*"

After citing the judgment of ***Buckmaster v. Russell*** 10 C. B. N. S. (at p. 750) quoting from ***Philips v. Philips*** 3 Hare (at p. 299), in which the applicable law is very concisely set out, *Dalten* J states as follows (at p. 221);

> "*The legal effect of an acknowledgment of a debt barred by the statute of limitation is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise and not the old debt is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old*

> *debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise given him*".

Dalten J went on to state further that "*[T]he fact that to the acknowledgment is added a request for time (to be distinguished, be it noted, from a promise to pay within a definite time), does not, it seems to me, make the acknowledgment any less a promise to pay.*" Having noted that the request for couple of months to pay the debt was refused by the plaintiff Company, "*… nevertheless seeking to obtain as against the defendant the benefit of those two months for itself in order to prevent the bar of prescription from running, when it refused the request of the defendant to allow him the two months he asked for*".

In view of these considerations *Dalten J* held (at p.221) that "*[T]here is no doubt that the firm could have sued the defendant to recover the debt at once. To hold defendant bound by his offer or request to pay after the lapse of two months, when his request had been definitely rejected by the other side, would be unjust, …*".

Returning to the facts of the instant appeal, it is with the letter dated 14.12.2002 (X5) under the title "***LOAN AMOUNTS: RS. 1,697,000/- & RS. 1,500,000/- , INSTALMENTS:RS. 63,542/24 & RS. 55,710/- Per month***" the Plaintiff Company written to the Defendant Company issuing instructions that "*[W]e write with reference to the above Instalments of Rs.* ***119,25,.24*** *per month due on the above loan, and kindly request you to deduct the balance due from our 'Fixed Deposit bearing numbers:* ***2002 MMB 35 & 2002 MMB 58 amounting*** *to* ***Rs. 3,900,000/-*** *with accrued interest as at 27th December 2002, being the maturity date of the Fixed Deposit.*" The letter X5 also contains a

request made by the Plaintiff that states "*[W]e would appreciate your intimation after making necessary adjustments, as to the balance due to us on same*".

The letter X5 is clear in its meaning. The Plaintiff Company wants to have the capital and interest due from the two deposits made, and after deducting the dues to the Defendant Company, the balance to be paid to them.

The Defendant Company responded to letter X5, with the letter dated 03.01.2003 (X6) under the heading "***Credit Facilities and Placements with PMCL***". In that letter the Defendant Company clearly informed the Plaintiff Company what it intends to do with regard to the instructions issued by the latter by letter X5. The relevant sections of the letter X5 are reproduced below as this forms the core of the issue that was argued before this Court;

> "*You will appreciate the fact due to the circumstances which prevail, we are unable to forward the payment for capital and yield in respect of the said placements. Therefore, as requested by you we are agreeable to recover the total outstanding due on the term loan facilities as at 06th January 2003 amounting to* ***Rs. 1,363, 369/11*** *from the amounts payable on the placements.*
>
> *The balance amount of* ***Rs. 3,160,630/89*** *will be reinvested for a period of 6 months at a yield rate of 13.5% p.a.*
>
> *However, we assure you that every effort will be made to forward the above balance payment due to you at the earliest possible time.*"

The Plaintiff Company was not at all pleased with the contents of the reply letter sent by the Defendant Company. The Plaintiff Company wrote to the Defendant Company on 09.01.2003 (X7) totally rejecting the proposed re-investment of the balance sum due and demanding its payment, stating "*[W]e write with reference to your fax dated 3rd January 2003 received by us on 8th January 2003, and the subsequent conversation I had with you, and regret we are not agreeable for a reinvestment of Rs. 3, 160, 630/89, and would like to request you to make arrangements as agreed to refund the said amount withing the next 7-10 days*".

Therefore, as in the case of ***Hoare & Company v Rajaratnam*** (supra) where the plaintiff Company demanded its due from the defendant, who then wrote P1, whilst acknowledging the debt, subject to the condition that it "*will have to wait another couple of months for settlement*", in this instance too when the Plaintiff Company sends X5, the Defendant Company, whilst acknowledging the debt, imposes a condition that "*The balance amount of* ***Rs. 3,160,630/89*** *will be reinvested for a period of 6 months at a yield rate of 13.5% p.a.*" Thus, it is a conditional acknowledgement of debt and is qualified to be taken in as *Dalton J* observed "*[B]ut if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise given him.*"

The vital part of the comparison is, similar to what the plaintiff Company did in ***Hoare & Company v Rajaratnam*** (supra) by rejecting the letter of the defendant P1, here too the Plaintiff Company made its intentions clear when it conveyed that "*we are not agreeable for a reinvestment of Rs. 3, 160, 630/89, and would like to request you to make arrangements as agreed to refund*

the said amount withing the next 7-10 days", which aligns with the observation made by *Dalton* J that having refused the request for couple of months to pay the debt made by the defendant, the plaintiff Company, nevertheless sought " … *to obtain as against the defendant the benefit of those two months for itself in order to prevent the bar of prescription from running, when it refused the request of the defendant to allow him the two months he asked for*".

In the instant appeal too, the Plaintiff Company relied on X20 to X22 to prevent the bar of prescription from running against its action, which then attracts the principle on which the Court determined the appeal in ***Hoare & Company v Rajaratnam*** (supra), namely "*[T]here is no doubt that the firm could have sued the defendant to recover the debt at once. To hold defendant bound by his offer or request to pay after the lapse of two months, when his request had been definitely rejected by the other side, would be unjust, …*". *Dreiberg* J, while concurring with the said conclusion added that (p. 223);

> "*In this case the respondent's claim that the condition has been fulfilled for the reason that they brought this action within a year of the expiry of the two months requested in P 1, but can they by now saying that they observed the conditions gain the benefit of the promise which they had expressly rejected? The case of* ***Buckmaster v. Russell*** *(1861) 10 C. B. new series 746 and 4 L. J. 552, is a direct authority to the contrary; it was there held that a special promise is one which will not bind unless accepted by the plaintiff to whom it is preferred, and that where a proposal is rejected it cannot be relied on as an acknowledgment to bar the statute."*

The position of the Plaintiff Company, that it was by letter dated 09.11.2007 X11(a) only the Defendant Company acknowledged the debt it owes to the former, was rejected by the Commercial High Court. It then proceeded to dismiss the action as prescribed. The trial Court did so on the basis that the acknowledgement of debt "*… was not by letter X11(a) dated 09.11.2007 but by letter X2 dated 21.03.2003*" issued well over seven years.

This conclusion reached by the Commercial High Court upon adopting the said reasoning is justified. With the receipt of the letter dated 03.01.2003 (X6), the Plaintiff Company could have sued the Defendant to recover the debt at once. In the year 2003, the Plaintiff Company had written to the Defendant Company issuing a final reminder to latter that they "*… will be reluctantly compel to resort to legal action to in order to recover all our dues with accrued interest*". But they did so, only in October 2010, despite the fact that date of maturity of the two fixed deposits was in fact 06.01.2003, on which fact the cause of action the Plaintiff Company of refusal to pay was founded on.

The series of subsequent correspondence, including X11(a), X 20, X 21 and X22 are merely a reiteration of the stubborn refusal of the Defendant Company to pay its debt to the Plaintiff Company reiterating its already indicated position by sending X6, therefore does not accrue a new cause of action by renewing an old debt, and extending the period of limitation with the issuance of each of these letters.

Therefore, in my view that the facts of the ***Hoare & Company v Rajaratnam*** (supra), are almost identical with the facts of the instant appeal and thus, the principle of law, which the Court acted on then, applies to the instant matter as well. This Court had consistently relied on the reasoning of that judgment where the issue before Court was whether there was an acknowledgement of debt, whether conditional or otherwise, that either could be inferred or established through evidence (vide judgements of ***Triad Advertising Pvt Ltd., v Attorney General*** (SC Appeal No. 48/2013 – decided on 26.07.2024) and ***Wijitha Group of Companies (Private) Ltd., v Capital Paintpack (Private) Ltd.,*** (SC Appeal No. 21/2017 – decided on 09.06.2023)

In ***Kahandawa Appuhamilage Don Tilakaratne v Wijesinghe Mudiyanselage Chandarasiri and another*** (SC Appeal No. 48/2013 – decided on 27.01.2017), in view of the judgment of ***Hoare & Company v Rajaratnam*** (supra), this Court cited that "… *a plaintiff is not to be allowed to rely upon a ground of exemption from the law of limitation raised for the first time in the Appeal Court*."

The judgment of ***Sampath Bank PLC v Kaluarachchi Sasitha Palitha*** (SC Appeal No. 196/2011 – decided on 09.09.2019), where *Murdu N.B. Fernando* J,(as she then was), in relation to the correctness of the reliance placed on the judgment of ***Hoare & Company v Rajaratnam*** (supra) by the Court below, in coming to the conclusion that there was no acknowledgement of debt, observed that *"[T]he facts of the appeal before us, in my view cannot be compared with the above case"*.

In view of the foregoing, I am of the view that the appeal of the Plaintiff Company is devoid of merit. The judgment of the Commercial High Court is accordingly affirmed and the appeal of the Plaintiff Company is dismissed.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

MURDU N.B. FERNANDO P.C., CJ.

I agree.

CHIEF JUSTICE

A.H.M.D. NAWAZ, J.

I agree.

JUDGE OF THE SUPREME COURT