CHINTA DEVI
v.
GLACIO LIMITED

COURT OF APPEAL.
B. E. DE SILVA, J. AND DHEERARATNE, J.
S.C. (C.A.) 270/78 (F) WITH 271/78 (F) – D.C. COLOMBO 79048/M.
MARCH 15, 1985.

Negligence of manufacturer of refrigerator – Breach of the duty to take care – Damages – Prescription – Conciliation Boards Act s. 15 – Deduction of time taken by proceedings before Conciliation Board in computing prescription.

On 13.9.1973 the plaintiff-appellant filed this action based on tort and alternatively on contract seeking to recover from the defendant Company a sum of Rs. 250,000 being damages sustained by her for injuries suffered by her on 16.6.1971 as a result of the explosion of a refrigerator manufactured by it and purchased by her father in 1967 for household use. The plaintiff was completely deformed, disfigured and disabled by the injuries sustained in the explosion.

The plaintiff alleged that there was a failure on the part of the defendant to take due care in the design and manufacture of the said refrigerator. The plaintiff pleaded negligence by the defendant-company in fitting a burner unsuitable and unsafe for a kerosene refrigerator.

The plaintiff by application to the Conciliation Board dated 6.6.1973 (posted on 7.6.1973) which would in the normal course have been received by the Board on 8.6.1973 had sought relief from the Board but as no settlement was possible the Chairman of the Conciliation Board issued a certificate dated 4.9.1973 which was received by the plaintiff on 6.9.1973.

After the trial the District Judge held there was negligence on the part of the defendant but dismissed the action on the ground that plaintiff's claim based on tort was prescribed in two years. The action on contract was not sustainable because the refrigerator was sold to plaintiff's father and there was no contract between plaintiff and defendant. The plaintiff appealed from this judgment and the defendant filed a cross-appeal against the finding of negligence against it.

Held –

(1) The time taken by proceedings before a Conciliation Board includes the time taken by the Board to constitute a panel until the date on which the certificate is signed by the Chairman of the Conciliation Board. The matter of plaintiff's application was pending before the Board from 8.6.1973 to 4.9.1973 when the Certificate was signed by the Chairman. In deciding on prescription this period should be deducted in terms of section 15 of the Conciliation Boards Act and when this is done the action is found to be filed before the expiry of two years and therefore the claim is not prescribed.

(2) There has been a breach of the duty to take care in the design and manufacture of the refrigerator and the finding of the District Judge on negligence is supported by the evidence. The damages claimed are not excessive.

APPEALS from the Judgment of the District Court of Colombo.

H. W. Jayewardene, Q.C. with *Eric Amerasinghe, P.C.*, with *Miss P. R. Seneviratne*, and *Harsha Soza*, for plaintiff-appellant in appeal No. 270/78 and for the plaintiff-respondent in cross-appeal No. 271/78.

H. L. De Silva, P.C. with *M. Illiyas* for the defendant-respondent in appeal No. 270/78 and for the defendant-appellant in cross-appeal No. 271/78.

Cur. adv. vult

May 3, 1985.

B. E. DE SILVA, J.

The plaintiff-appellant filed this appeal from the judgment of the learned District Judge dismissing the plaintiff's action. The plaintiff filed this action to recover from the defendant a sum of Rs. 250,000 being the damages sustained by the plaintiff consequent upon injuries caused to the plaintiff as a result of the explosion of a refrigerator manufactured by the defendant and purchased by the plaintiff's father

for household use. The plaintiff pleaded that the said explosion was due to the negligence of the defendant in fitting the said refrigerator with a burner that was unsuitable and unsafe for a kerosene refrigerator. The plaintiff further pleaded that there was a failure to take care in the design and manufacture of the said refrigerator as set out in paragraph 7 of the amended plaint which caused the explosion resulting in injuries to the plaintiff. As an alternative cause of action the plaintiff pleaded that the said refrigerator was purchased from the defendant through an agent and was sold by the defendant through its agent to the plaintiff's father for the express purpose of being used by the members of the household including the plaintiff. The said refrigerator was not fit for the purpose for which it was manufactured. The said refrigerator was of defective manufacture and dangerous for use and the plaintiff was injured and sustained damages.

The defendant resisted the plaintiff's claim for damages. After trial the learned District Judge held that there was negligence on the part of the defendant but dismissed the plaintiff's action on the ground that the said claim of the plaintiff was prescribed. The plaintiff has challenged the finding of the learned District Judge dismissing the action and filed this appeal. The defendant too has filed a cross appeal and challenged the finding of the learned District Judge that the defendant was guilty of negligence and has moved that this finding be set aside and the appeal of the plaintiff be dismissed.

At the trial the plaintiff and her father gave evidence. The plaintiff also led the evidence of Professor Jayatillake, Professor of Mechanical Engineering, University of Sri Lanka, Peradeniya Campus who had examined the refrigerator and the burner and issued the report P 3. The plaintiff also led the evidence of Dr. Joseph Fernando, the Plastic Surgeon in regard to the injuries sustained by the plaintiff.

The defendant on the other hand, led the evidence of Alagaratnam, a Consulting Engineer who had been a Research Engineer looking after the Industrial Development in the Department of Industries and subsequently employed by Walker Sons & Co. Ltd., as Chief Engineer and the evidence of Dr. Sunderalingam Gnanalingam, Wijesundera, General Manager of Glacio in support of the defendant's case. Alagaratnam and Gnanalingam had performed certain experiments and it was their evidence that this explosion was not due to any

mechanical defect in design and manufacture of this refrigerator as stated. It was the evidence of the witness that this explosion could not have occurred as set out by the plaintiff.

The plaintiff's evidence was that this refrigerator was bought from the defendant in 1967 and functioned very satisfactorily and was maintained by the plaintiff up to the time of her departure to India for a course of study in Home Science. Subsequently she came back from India and this refrigerator functioned satisfactorily till a month before this explosion occurred. It was her evidence that she filled the kerosene tank on a Sunday and it was properly functioning on the night of 15.6.71 with a blue flame. When she got up the following morning on the 16th there was a black smoke emitting from the flue. She also noticed a yellow flame. She went to the refrigerator, bent down and opened the burner compartment and suddenly there was an explosion and burning oil spurted on her body and burnt her causing disfiguration of the face and body. She was rushed to the General Hospital and admitted to the Intensive Care Unit in the Accident Ward. It was only in December, 1971 that her wounds had begun to heal. When the wounds healed she found she could not move her head. Her lower lip had dropped and could not be brought up to the upper lip. She could not raise her upper arm and fingers. As a result of these injuries she had to submit herself to plastic surgery.

Dr. Fernando, Plastic Surgeon who examined her found the plaintiff completely deformed, disfigured and disabled. According to Dr. Fernando she had to undergo plastic surgery about 33 times under anaesthesia. She has suffered permanent disfigurement of her face and her disfiguration is irreparable and the damages claimed by her are not excessive. The plaintiff also led the evidence that she sought a settlement of this dispute in the Conciliation Board but a settlement was not possible and the Chairman of the Conciliation Board issued a certificate dated 4.9.73 which was received on 6.9.73 enabling her to file action in respect of her claim.

Professor Jayatillake a Professor of the University of Sri Lanka (Peradeniya Campus) in Mechanical Engineering had been consulted by the plaintiff as to whether or not the explosion of the refrigerator was due to a mechanical defect in its manufacture. Professor Jayatillake had visited the plaintiff's house and examined the refrigerator P 7. He had been given the tank of the refrigerator P 5 and

the burner. Professor Jayatillake expressed the view that on the 15th night the burner of this refrigerator had been malfunctioning and a yellow flame came into being. As a result of this yellow flame the metal parts of the burner got overheated. This heat was transmitted through the metallic parts of the burner to the tank. When the tank gets overheated the fuel in the tank reaches a temperature above flash point. When the fuel reaches a temperature which is the flash point of kerosene the vapour when mixed with air forms an ignitable mixture within certain limits of flammability. The ignitable mixture of vapour and air whilst the refrigerator is malfunctioning can escape only through the vent holes at the base of the burner. There was an ignitable mixture in the kerosene tank. This ignitable mixture was lurking until the morning. When smoke was noticed the plaintiff had tug-opened the door of the burner which has a spring loaded catch ; that tug caused a disturbance in the stable atmosphere. When there was the disturbance of the air flow, the flame spread with overheating ceased to act as a flame trap and the flames would have got deflected. In the narrow tube there was the ignitable mixture which catches fire and that was probably how this explosion occurred.

In his report P 3 he has stated that the kerosene tank was defective structurally. The tank has not been constructed so as to contain any flame that may initiate inside it or be introduced to it from the burner. The sheet metal baffles which are fixed inside the tank to confine the flame to a portion between the edges and the sides and bottom of the tank are not effective. For the baffles to be effective they should be in contact with the sides of the tank and leave only a small gap at the bottom of a size that would quench any flame that tries to pass through it. The bottom of the burner and the wick are directly exposed to the inside of the tank. Because of this heating up of the wick can evaporate kerosene vapour to saturate a substantial portion of the space above the fuel of the tank. This could have been avoided by letting the wick draw oil from a well located inside the tank as is found in the Electrolux refrigerator and this could be considered highly conducive to safety. This well is formed of a cylindrical can attached to the inner surface of the top of the tank so that it surrounds the wick and draws oil into it through a small hole in the bottom as shown in figure 5.

The 3/64 inch diameter holes at the bottom of the burner are unnecessary because unlike in the lamp to which this type of burner is usually fitted the fuel tank in the refrigerator is vented via the filler

opening. These holes should not be there because they allow flames to pass through when the fuel vapour in the central tube gets ignited. The bottom of the burner should have no openings at all except where the wick enters and the wick should fit the openings intended for it closely so as not to allow vapour and flames to pass through. The seal between the top of the glass chimney and the flame could easily become ineffective due either to the sealing ring not falling into place or the chipping of the chimney. A more positive and fool-proof sealing arrangement and a means of protecting the chimney from damage during insertion of the tank are essential improvements on account of the importance of natural draft for supplying air for combustion. The procedure for cleaning the flue is not clearly specified and the importance of regular cleaning is not stressed.

On the other hand, Alagaratnam and Dr. Gnanalingam called by the defendant did not agree with the view expressed by Professor Jayatillake as to how this explosion occurred. They tried to show that this explosion was not due to any mechanical defect in the manufacture of the burner of this refrigerator. They had performed experiments which disproved the theory expressed by Professor Jayatillake. There was no mechanical defect in the burner of this refrigerator. This explosion could not have occurred in the manner stated by the plaintiff.

The learned District Judge upon a consideration of the evidence accepted the evidence of the plaintiff that the accident was due to the negligence of the defendant in the design and manufacture of this refrigerator. He also held that having regard to the injuries sustained by the plaintiff the plaintiff's claim for damages was not excessive. He dismissed the plaintiff's action on the ground that the plaintiff's claim was prescribed. The plaintiff's action for damages being filed after a period of 2 years after the cause of action arose was prescribed and the plaintiff thus could not maintain this action.

The plaintiff's first cause of action was one based on tort on the ground that there was negligence on the part of the defendant as alleged in the plaint. The alternative cause of action was based on contract. The alternative cause of action on contract cannot be sustained as there was no contract between the plaintiff and the defendant as the refrigerator was sold by the defendant not to the plaintiff but to the plaintiff's father. Adverting to the first cause of

action based on negligence this cause of action is prescribed within 2 years from the date the cause of action arose. This incident which caused injuries to the plaintiff occurred on 16.6.71. The plaintiff's cause of action arose on 16.6.71.

Under section 14 (*a*) of the Interpretation Ordinance when a period is calculated from a certain date that date is excluded. Prescription on the plaintiff's cause of action begins to run from 17.6.71. The plaintiff's cause of action based on negligence would thus be prescribed on 16.6.73. The evidence shows that the plaintiff had made an application to the Conciliation Board for settlement of this dispute on 6.6.73 by registered post. Vide copy of application P 18 and P 18 A certificate of posting. The application which was posted on 7.6.73 would have been received by the Conciliation Board on 8.6.73 in the normal course of business. The certificate of the Conciliation Board is dated 4.9.73 and the plaint was filed on 13.9.1973. In this certificate the Chairman has certified that this matter came up for inquiry on 8.7.63 and could not be settled.

Section 15 of the Conciliation Boards Act provides that in *computing the period of prescription in regard to any cause of action or offence the time taken by proceedings before a Conciliation Board in regard to that cause of action shall not be taken into consideration.* The learned District Judge has held that the time that is excluded under this Section is the time spent by the Conciliation Board on the proceedings and not the time spent by the Chairman of the Panel of Conciliators in constituting the panel and issuing the certificate. On 8.7.73 the Board was unable to settle this dispute. The learned District Judge held that it is from the date the application was received till 8.7.73 that has to be excluded for purposes of prescription under section 15 of the Conciliation Boards Act.

Learned counsel for the defendant contended that for the purposes of section 15 of the Counciliation Boards Act the commencing terminal was reference by the Chairman of the Board to defendant by summons on 1.7.73. The concluding terminal was 8.7.73 when the Conciliation Board could not settle this dispute. It was only this period from 1.7.73 till 8.7.73 that was excluded under section 15. Upon a proper construction of the provisions of Sections 5, 6, 7, 12 and 14 of the Conciliation Boards Act the view taken by the learned District Judge and counsel for the defendant are erroneous. In my view, on a proper construction of the provisions of the Act "*the time taken by*

proceedings before a Conciliation Board in regard to any cause of action" includes the time taken by the Board to constitute a panel till the date the certificate was signed by the Chairman of the Conciliation Board.

I am fortified in this view by the language of section 14 of the Act which precludes a party from instituting an action unless the party instituting such action produces a certificate from the Chairman of the Conciliation Board that such dispute was inquired into by the Conciliation Board and that it was not possible to effect a settlement of the dispute. In this case prescription started unning from 17.6.71. The last date for filing plaint would be 16.6.73. The application of the plaintiff dated 6.6.73 posted on 7.6.73 would have been received on 8.6.73 in the normal course of business and this matter was pending from 8.6.73 till 4.9.73 the date on which the certificate was issued by the Chairman. From the 8th to the 16th there are 9 days and those 9 days would have to be added to the date on which proceedings terminated on 4.9.73. The last date for filing plaint was 13.9.73. This plaint has been filed on 13.9.73. Having regard to the provisions of the Prescription Ordinanace read with the provisions of section 15 of the Conciliation Boards Act the action has been filed within 2 years from the date the cause of action arose. The learned District Judge has thus erred in holding that the plaintiff's action was prescribed and in dismissing the plaintiff's action on the ground that the claim was prescribed.

The learned District Judge has held with the plaintiff that the explosion was due to the negligence of the defendant in failing to take due care and precaution in the design and manufacture of this refrigerator as set out in paragraph 7 of the amended plaint. This finding of the learned District Judge that there has been negligence on the part of the defendant in the design and manufacture of this refrigerator was challenged by the defendant by way of cross appeal. The question does arise whether the plaintiff has established negligence on the part of the defendant in the design and manufacture of this refrigerator as set out in the plaint. On this aspect of the case the plaintiff, Professor Jayatillake, Alagaratnam and Dr. Gnanalingam gave evidence. The defendant tried to make out that this explosion could have taken place as a result of the burner not being put correctly into the socket ; when the tank was pushed the burner had come into contact with the flue and fallen down and the flame in the burner had

come into contact with the mixture of kerosene. Another suggestion was that kerosene might have been contaminated by petrol. It was also suggested that the explosion could have taken place as a result of rusty flakes from the flue falling into the burner. The learned District Judge holds that there was a bulge in the tank of the burner indicating a violent explosion. The plaintiff's clothes had caught fire from the flames. These flames had flamed out of the tank. He has preferred to accept the plaintiff's evidence and rejected the defence version as to how this explosion occurred and held that there was no negligence on the part of the plaintiff in the maintenance of this refrigerator.

The learned District Judge has carefully considered the evidence of Professor Jayatillake, Alagaratnam and Dr. Gnanalingam. The learned District Judge has preferred to accept the evidence of Professor Jayatillake that a drop in the pressure forces the air in the flue downwards and this could result in the flame going into the tank through the vent holes. He has observed that even Dr. Gnanalingam admitted that this could take place if the bottom plate of the burner was red hot. He has thus observed that it could be expected to have had this temperature considering the fact that there was an immediate explosion when the burner compartment door was opened.

He has held that if the bottom plate had been red hot the flame spreader too would have got red hot as stated by Professor Jayatillake and the flame could have entered the inner tube through the perforations and ignited the flammable mixture within the tube. He has held that a flame could have generated within the tank in the manner stated by Professor Jayetillake. He was of opinion, considering the state of the bulge on the tank that the flame within the tank has caused a serious build up of pressure. The flame which either entered through the vent holes or broke out spontaneously under the burner had the range to spread throughout the tank by reason of the space being provided for free and easy circulation without hindrance. The failure to enclose the wick under the burner and the failure to provide breaks for fire spreads by such a device as extending the baffles right up to the edges of the tank constitute a lack of care in the design and manufacture of the refrigerator. The manufacturer of the tank has ignored the probability of a flame breaking out within the tank and the certain danger that results from an explosion which is very probable as a result of the flame and vapour.

Care on the part of the Engineers who manufactured this refrigerator of the defendant would have made them alive to this probability. If they were alive to this reality they should have provided a device to contain or quell a flame from within the tank. A comparison with the Electrolux tank makes it evident that a simple device was possible. This has been provided by the manufacturers of Electrolux who had extended the baffles right to the edges of the tank and provided a narrow well to take in the wick flaps. According to this device a flame caused under the burner will not last long because the oxygen would be consumed in a short time. The failure to take this precaution is a breach of duty to take care in the design and manufacture of this refrigerator.

He has also held that the defendant has failed to specify clearly the manner of cleaning the flue and the importance of regular cleaning. It has been urged by counsel for the defendant that the learned District Judge has erred in his finding that there was a failure to take proper care in the design and manufacture of this refrigerator and the evidence of the defendant's witnesses should have been acted upon. The learned District Judge has carefully considered the evidence led by the plaintiff and the defendant and come to a finding that there was negligence in the design and manufacture of the refrigerator. There has been a violent explosion in this case. The evidence of the plaintiff as to how this explosion took place has not been seriously challenged and has been accepted by the learned District Judge. The finding of the learned District Judge that there has been negligence on the part of the defendant is supported by the evidence in the case. Upon a consideration of the evidence I see no justification to interfere with the findings of the learned District Judge that there has been negligence on the part of the defendant. In the result, I allow the appeal of the plaintiff and set aside the judgment of the learned District Judge dismissing the plaintiff's action. I enter judgment for the plaintiff as prayed for. The defendant's cross appeal is dismissed. The plaintiff will be entitled to costs of appeal and costs in the District Court.

DHEERARATNE, J. – I agree.

Appeal of plaintiff allowed.
Cross-appeal of defendant dismissed.