

CHITAMBARA NADAR
AND ANOTHER OF COLOMBO
v.
ELASTO LIMITED OF BENTOTA

SUPREME COURT.
G. P. S. DE SILVA, C.J.
KULATUNGA, J. AND
RAMANATHAN, J.
S.C. NO. 5/90
C.A. NO. 1408/83
D.C. COLOMBO 82167/M
OCTOBER 18, 1993.

*Jurisdiction – Preliminary issue of law – Civil Procedure Code sections 9(C), 45 –
Payment on account stated on goods sold and delivered – Refusal to fulfil an
obligation – Law applicable – Is it English Law or Roman Dutch Law?*

In an action founded on an account stated there must be some antecedent liability or some previous transaction with reference to which an account is stated and in such case the plaintiff is suing upon a **new contract upon a new cause of action** which is independent of his liability to pay for goods sold and delivered.

To an action on an account stated the law applicable is the Roman Dutch Law according to which the creditor must seek out the debtor in which event the

District Court of Colombo has no jurisdiction to hear the action, for Bentota falls outside the territorial limits of the District Court of Colombo.

An action on goods sold and delivered is based on English Law according to which the debtor must seek out the creditor. Here an action based on goods sold and delivered would be prescribed.

The present action on accounts stated being governed by Roman Dutch Law, the District Court of Colombo has no jurisdiction to hear the action.

The decision to try the issue of jurisdiction as a preliminary issue of law was covered being based also on consent.

Cases referred to :

1. *Sonnadara v. Weerasinghe* 1 CLW 328.
2. *Kappoor Saibo v. Mudalithamy Bass* 6 NLR 216, 218.

APPEAL from judgment of Court of Appeal.

D. R. P. Goonetilleke for substituted plaintiff-appellant.

P. Wimalachandran with *A. P. Niles* for defendant-respondent.

Cur. adv. vult.

October 29, 1993.

G. P. S. DE SILVA, C.J.,

The Plaintiff who carried on business in partnership at 2nd Cross Street, Colombo 11, instituted this action in the District Court of Colombo, against Elasto Ltd., Bentota, for the recovery of a sum of Rs. 38,232.87. At the trial, both parties raised several issues. Issue No. 8 which related to the jurisdiction of the Court read as follows: "Does this court have jurisdiction to hear and determine this action?" It is right to add that the defendant had in the answer expressly

pleaded that the court has no jurisdiction to entertain the action. Counsel for the defendant invited the court to determine issue No. 8 as a preliminary issue of law in terms of section 147 of the Civil Procedure Code. Counsel for the plaintiff did not object to this issue being determined as a preliminary issue of law. Parties filed their written submissions. The District Court answered the issue in the affirmative and fixed the case for trial on the remaining issues.

The defendant moved the Court of Appeal to revise the order of the District Court. Acting in revision, the Court of Appeal set aside the order of the District Court and held that the District Court had no jurisdiction to hear and determine the action. The action was accordingly dismissed. The plaintiffs have now preferred this appeal against the judgment of the Court of Appeal. At the outset, Mr. Goonetilake for the plaintiffs-appellants urged that issue No. 8 involved a consideration of questions of fact and could not have been taken up as a preliminary issue of law. I do not agree. As rightly submitted by Mr. Niles for the defendant-respondent, at the trial Counsel for the plaintiffs agreed to argue the question of jurisdiction as a preliminary issue of law. In the written submissions filed on behalf of the plaintiffs, no objection was taken on the ground that this issue involved questions of fact. The objection cannot now be taken for the first time in appeal.

Section 45 of the Civil Procedure Code states :-

"Every plaint shall contain a statement of facts setting out the jurisdiction of the court to try and determine the claim in respect of which the action is brought." The Court of Appeal in its judgment stated that there is no plea in regard to jurisdiction. This is not correct, for in paragraph 4 of the plaint it is specifically averred that the "cause of action hereinafter pleaded arose at Colombo within the local limits of the jurisdiction of this court." According to the plaint

therefore the jurisdiction of the court is founded on the plea that the cause of action arose within the local limits of the District Court of Colombo (Section 9 (c) of the Civil Procedure Code). Having regard to the definition of the term "cause of action" in section 5 of the Civil Procedure Code it could be broadly be said that the cause of action is the "refusal to fulfil an obligation." The true question that arises for decision is whether it is a refusal to fulfil an obligation to pay money due for **goods sold and delivered** as contended for on behalf of the plaintiffs or whether it is a refusal to fulfil an obligation to pay money due **on an account stated**. as submitted on behalf of the defendant. If it is the former, the English law would be applicable and the District Court of Colombo would have jurisdiction, for under the English law the debtor must seek out the creditor. If it is the latter, the Roman Dutch Law would apply and the principle is that the creditor must seek out the debtor. In that event, the District Court of Colombo has no jurisdiction to hear the action, for Bentota falls outside territorial limits of the District Court of Colombo.

The question whether the action is one for goods sold and delivered or whether it is an action on an account stated may be determined on a consideration of the averments in the amended plaint.

The relevant averments read as follows:

- "(4) The defendant from time to time purchased from the plaintiffs and the plaintiffs sold and delivered to the defendant tanned leather, industrial chemicals and foot wear accessories and the cause of action hereinafter pleaded arose at Colombo within the local limits of the jurisdiction of this court to recover all sums due to the plaintiffs on the said goods sold and delivered to the defendant.

- (5) The plaintiffs opened an account in the plaintiffs books for the defendant and debited the defendant with the value of the goods sold to the defendant and credited the defendant for all payments made from time to time by the defendant for such purchases.
- (6) The defendant also opened an account in the defendant's books for the plaintiffs and credited the plaintiffs with the value of the goods sold by the plaintiffs to the defendant and debited the plaintiffs with all payments made by the defendant for same.
- (7) The defendant on or about the 31st March, 1977 adjusted the said accounts between the plaintiffs and the defendant and a sum of Rs. 790.24 was found due to the plaintiffs which sum the plaintiffs and the defendant confirmed to be correct.
- (8) After the 31st March, 1977 the plaintiffs continued to sell tanned leather, industrial chemicals and foot wear accessories to the defendant and the value of the goods sold to the defendant and the payments made by the defendant from time to time were entered in the books of the plaintiffs and the defendant as stated in paragraphs 5 and 6 of the plaint.
- (9) The plaintiffs after the 31st March, 1977 from time to time placed bills for payment and the defendant from time to time made various payments as shown in the statement of accounts marked "A" and filed herewith.
- (10) The plaintiffs went through the accounts in their books on or about the 25th April 1978 and found that a sum of Rs. 38,232.87 was due from the defendant to the plaintiffs for the said goods sold and delivered to the defendant.

(11) The defendant failed and neglected to pay and settle the said sum of Rs. 38,232.87 found to be due to the plaintiffs and adjusting the accounts between the plaintiffs and the defendant on or about the 25th April 1978."

On a scrutiny of the averments in paragraphs 5 and 6, and in particular the averments in paragraphs 7, 9 and 11, it seems to me that the action is founded on an account stated. Paragraph 7 specifically speaks of an **adjustment** of accounts between the parties and that it was agreed that a sum of Rs. 790.24 was due to the plaintiffs, as on 31st March, 1977. Similarly in paragraph 11 it is expressly pleaded that there was an adjustment of accounts between the plaintiffs and the defendant on or about 25th April, 1978.

Moreover, in the account particulars filed along with the plaint it is significant that there is no reference to the facts (the quantity, the price) relating to the goods sold and delivered. On the other hand, under date 23.2.77 there is a reference to a **loan** of Rs. 15,000/- given by the plaintiffs to the defendant. The account particulars commence with an opening balance of 14,455.50 as at 31st March 1976. If the action was for goods sold and delivered this claim would have been prescribed. What is more, out of the 6 issues raised on behalf of the plaintiffs, 5 issues were based on an account stated. This clearly shows the true nature of the plaintiffs' claim.

Where the action is founded on an account stated there must be some antecedent liability or some previous transaction with reference to which an account is stated (*Sonnadara v. Weerasinghe*⁽¹⁾). In the instant case the antecedent liability is for goods sold and delivered. But the action itself is based on the amount due to the plaintiffs from the defendant after the accounts maintained by each other are examined, adjusted, and a balance struck. As stated by Moncreiff J.,

in *Kappoor Saibo v. Mudalihami Baas*⁽²⁾. "If this claim (i.e. a claim for goods sold and delivered) is brought on a valid account stated, the plaintiff is not suing for goods sold and delivered, nor in a sense possibly upon any acknowledgment of liability for, or promise to pay for goods sold and delivered, nor upon a continuing contract. He is suing upon a **new contract, upon a new cause of action** which is independent of his liability to pay for goods sold and delivered." (The emphasis is mine).

I accordingly hold that the cause of action pleaded in the plaint is founded on an account stated and not for goods sold and delivered. The Court of Appeal rightly held that the District Court of Colombo had no jurisdiction to hear and determine the action. In the result, the appeal fails and is dismissed with costs.

KULATUNGA J., – I agree.

RAMANATHAN J., – I agree.

Appeal dismissed.