

1948

Present : Dias and Basnayake JJ.

BRAMPY APPUHAMY, Appellant, and GUNASEKERE,
Respondent

S. C. 389—D. C. Kalutara, 24,223

Prescription—Not pleaded in answer—Limitation of action—Court cannot consider Statute.

Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence.

APPEAL from a judgment of the District Judge, Kalutara.

C. Thiagalasingam, for the plaintiff appellant.

S. W. Jayasuriya, with *Kingsley Herat*, for the defendant respondent.

Cur. adv. vult.

April 20, 1948. BASNAYAKE J.—

The plaintiff-appellant (hereinafter referred to as the plaintiff) seeks to recover from the defendant-respondent (hereinafter referred to as the defendant) a sum of Rs. 439·65 being the value of timber supplied by him to the defendant on September 3, 1943. The defendant disputes the plaintiff's claim and alleges in paragraph 3 of his answer that the timber in question was delivered to him about March, 1939, and denies that any sum whatsoever is due to the plaintiff. The defendant further alleges that between July 22, 1938, and July 24, 1939, he made advances of money and sold goods on credit to the plaintiff to the value of Rs. 274·93 on the latter agreeing and undertaking to supply him with sawn timber, at rates agreed on, for the value of Rs. 200 and to pay the balance in cash. He further alleges in paragraph 6 (c) of his answer that after paying the sum of Rs. 74·93 the plaintiff in July, 1939, delivered to him sawn timber to the value of Rs. 200 which he deposited in a mud hole on the land adjoining a land called "Samplewatta" from which the timber was extracted by the plaintiff who had in 1938, secured a contract from the Government to clear it. The defendant says that when, in August, 1943, he attempted to take away the timber so deposited the plaintiff refused to let him remove the entire quantity but permitted him to take only a part of it to the value of Rs. 105·93 in respect of which the plaintiff has brought this action. He therefore claims from the plaintiff a sum of Rs. 94·07 being the balance due to him after deducting the sum of Rs. 105·93 from the sum of Rs. 200. He also offers to return the timber supplied by the plaintiff on his paying him the sum of Rs. 200. The plaintiff denies that there is a debt of Rs. 200 due to the defendant and says he is willing to take back the timber.

The case went to trial on the following issues :

1. What were the rates at which the plaintiff agreed to supply the timber in question to the defendant ?
2. When did the plaintiff supply the timber in question ?
3. What is the value of the timber actually received by the defendant ?
4. What value did the defendant supply goods and make advances to the plaintiff for ?
5. What sum is due to the defendant on his claim in reconvention ?

The learned District Judge has held that the plaintiff agreed to supply timber to the defendant at the rate of 18 cents a cubit for beams and

8 cents a cubit for rafters. He also holds that the sale was in 1939, and delivery in 1943, and that the value of the timber actually received by the defendant is Rs. 103·24. In regard to the defendant's claim he holds that he made advances and supplied goods to the plaintiff to the value of Rs. 199·93 and that a sum of Rs. 94·07 is due to him.

The plaintiff has appealed against the decision of the learned District Judge. Learned counsel for the appellant submits that the contract of sale which the learned judge has held was made by the defendant in 1939 cannot be enforced as it does not satisfy the requirements of section 5(1) of the Sale of Goods Ordinance. That provision reads

“ A contract for the sale of any goods shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or pay the price or a part thereof, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.”

On the learned judge's own finding the buyer did not accept or receive the goods or any part thereof in 1939, at the time of the contract. There is no evidence of a note or memorandum in writing of the contract made and signed by the party to be charged or his agent. Learned counsel's contention is therefore entitled to succeed.

In regard to contract alleged by the plaintiff the defendant accepted and actually received the goods and used them in his building, although in his answer he offered to return them and the plaintiff agreed to take them back. He says “ The timber the plaintiff supplied I made use of and built the house. When the case was filed the roof had not been fixed. When the case was postponed from day to day I constructed the roof.” The defendant is therefore bound to pay for the timber. As there is no evidence of an agreement as to price he must pay a reasonable price¹. What is a reasonable price is a question of fact. The case must therefore go back to the District Court for the ascertainment of a reasonable price for the timber at the date of acceptance and receipt by the defendant. The defendant is entitled to credit in the sum of Rs. 199·93 which the learned District Judge has found is due to him from the plaintiff. The amount due to the defendant on his claim in reconvention can only be ascertained after the value of the timber received by him has been decided. If such value exceeds Rs. 199·93 he will be entitled to nothing and will be ordered to pay the excess.

An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.

¹ Section 9 (2) of the Sale of Goods Ordinance.

The plaintiff's appeal is allowed and the judgment of the learned District Judge is set aside and the case is sent back for the purpose of giving effect to our decision. Each party will bear the costs of this appeal and the trial.

DIAS J.—I agree.

Appeal allowed.
