

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST  
REPUBLIC OF SRI LANKA**

**CA 873/98**

D.C. 1768/L

Rani Punchihewa and another

**Defendants -Appellants**

**Vs.**

Ranjith Punchihewa

**Plaintiff-Respondent**

**CA 873/98**

**DC BALAPITIYA 1768/L**

**Before** : K.T. Chitrasiri, J.

**Counsel** : D.M.G. Dissanayake with M.D.J. Bandara  
for the 1<sup>st</sup> & 2<sup>nd</sup> Defendant-Appellants.

Rohan Sahabandu PC with Ms.Hasitha Amarasinghe  
for the Plaintiff-Respondent.

**Argued &**  
**Decided on:** 05.07.2013.

**K.T. CHITRASIRI, J.**

When this matter was taken up for argument on the 13.02.2013, learned Counsel for the Appellant restricted his appeal to a question of law raised on that date. The question of law so raised reads thus:

“Is the plaintiff-respondent entitled in law to have the relief prayed for in the plaint dated 13.08.1991, in the absence of terminating the licensee of the defendant-appellant having pleaded that the defendant is a licensee in paragraph 8 of the aforesaid plaint?”

However, the President's Counsel for the plaintiff-respondent then submitted that the defendant-appellants cannot take up such a position at this appeal stage since it was not an issue before the trial judge. In support of his contention Mr. Sahabandu P.C. refers to the decision in Padmini Vs. Jayaseeli (2004 (3) SLR at page 13). In that decision Balapatabendi, J, has held thus:

“It is clear that the defendant-appellant had claimed to possess the said property as a co-owner against the plaintiff-respondent but not one under the plaintiff respondent. Therefore, I am inclined to agree that the doctrine of “approve and reprobate” forbids the assertion of the defendant-appellant,” when the defendant-appellant failed to establish that she was a co-owner how could she now insist – on termination of the leave and licence – which never existed according to her.”

In that decision, Court held that the appellants could not have taken up a different issue in the appeal which had not been raised in the original Court as far as the facts of the case is concerned. The law pronounced in the above decision is conceded by the learned Counsel for the appellant. The circumstances of this appeal at hand, are almost similar to the facts in the case referred to by Mr. Sahabandu P.C.. Accordingly, I conclude that the defendant-appellants cannot take up the position that the appellants have failed to send a letter terminating the licenseeship of the defendant-appellant at this appeal stage when he has

not taken up such a position before the trial judge. The position took up by the defendant-appellants before the trial judge had been the defence of prescription.

Accordingly, it is my view that the only issue raised by the plaintiff-appellants in this appeal should be decided in favour of the plaintiff-respondent. Accordingly, this appeal is dismissed with costs.

*Appeal dismissed.*

JUDGE OF THE COURT OF APPEAL.

Mm/-.