

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

C.A. APPEAL No: - 75/98 (F)
D.C. Colombo Case No.6212/ZL

Vajira lanaki Hettiarachchi Nethicumara,
No.310/6,
Pannipitiya Road,
Pelawatta, Battaramulla.

**Substituted-Substituted
-Defendant-Appellant**

Vs.

Semage Ruwani Sumeda Wijeyewardena,
No.128/2,
Kohalwila Road,
Kelaniya

**Substituted - Plaintiff
- Respondent**

C.A. Appeal No. 75/98(F)

-

D.C. Colombo No. 6212/ZL

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

Counsel : Faiz Musthapha P.C. with Faizer Musthapha
P.C. with Santha Jayawardena for the
Defendant-Appellant

Rohan Sahabandu with Samithrie Kumarawadu
for the Substituted-Plaintiff-Respondent

Argued &

Decided on : 13.01.2014

K.T. Chitrasiri, J.

Mr. Faiz Musthapha President's Counsel, concluded his submissions having argued the appeal today and previously on 21.06.2013. He submitted that the learned District Judge has not addressed her mind at all to the question of prescription which was raised by the defendant-appellant as the issue No.4 when the matter was taken up for trial in the District Court on the 9th of September 1994.

In view of the above submission, Court inquired from the learned President's Counsel for the respondent as to the areas where the learned District Judge has dealt with, in respect of the said issue of prescription taken up by the defendant. His submission on this point is that the learned District Judge has disregarded the evidence of the two witnesses who supported the claim of prescription of the appellant. He is unable to show the places where the learned trial judge has discussed the issue of prescription or at least the places where he has identified such an issue.

Accordingly, it is clear that the learned trial judge has not specifically considered the prescriptive claim of the defendant at any stage. Therefore, it is seen that the learned District Judge has failed to look at the issue of prescription in a judicious manner. In the circumstances, both counsel agree to have a re-trial allowing the trial Judge to consider the evidence as to the prescriptive claim of the appellant.

The best person to determine the question of prescription is the trial Judge who hears the evidence rather than this Court making a decision upon perusing the evidence already recorded since it involves facts and circumstances of the issue. Therefore this Court also is of the view that it is better to have a *trial de-novo*

in order to determine the issue of prescription. Admittedly, it is the only issue that is to be decided in this case.

Accordingly, both the President's Counsel at this stage agree to have a re-trial only on the issue of prescription raised as the issue No. 4 by the defendant. Accordingly, the matter is referred back to the District Court for re-trial to determine the limited question of prescription. In view of the above, the answer given by the learned District Judge to the issue No. 1 would stand as it is. Answers to the other issues are set aside allowing the sitting trial judge in the District Court of Colombo to determine the remaining 3 issues. In view of the above, the defendant will have to commence the case in the District Court in order to establish his claim of prescription. In the light of the above, the judgment dated 13.12.1996 is varied to the extent referred to above. Learned District Judge is directed to take steps accordingly.

Appeal is partly allowed.

JUDGE OF THE COURT OF APPEAL

/mds