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

T.A.P.Fernando,

No 103, Walana Panadura.

Defendant-Appellant

C.A.Case No:-1285/99(F)

District Court of Panadura Case No:-1037/M

Vs

Thewarasige Madurawathi Fernando,

St Peter's Road, Moratumulla,

Moratuwa.

Plaintiff-Respondent

Before:- H.N.J.Perera, J.

Counsel:-Upul A. Wickremaratne for the Defendant-Appellant

Plaintiff-Respondent absent and unrepresented.

Argued On:-07.11.2013

Written Submissions:-12.12.2013

Decided On:-02.05.2014

H.N.J.Perera, J.

Plaintiff-Respondent instituted this action against the Defendant-Appellant for the recovery of a sum or Rs 145,000/= given by the Plaintiff-Respondent to the Defendant-Appellant and for costs.

The case of the Plaintiff-Respondent was that the Defendant-Appellant who was her brother borrowed a sum of Rs 150,000/= from the Plaintiff in February 1988 and the said sum was lent to the Defendant without interest thereon.

Defendant failed to pay back the said sum of money to the Plaintiff despite numerous requests made by the Plaintiff and the Plaintiff lodged a complaint to the police against the Defendant. After inquiry the Police advised the Defendant to pay back the said sum of money to the Plaintiff and as a result the Defendant gave a written undertaking to pay back the said money to the Plaintiff. It was the Plaintiff's position that the only payment made by the Defendant was a sum of Rs 5000/= in January 1992. Thereafter Plaintiff caused a Letter of Demand sent to the Defendant through an Attorney-at-law demanding the payment of Rs 145,000/= and legal interest thereon to which the Defendant made no response.

The Defendant filed answer and denied the version of the Plaintiff and set up a cross claim for Rs 188.000/=

The Defendant further claimed that the transaction described in the plaint was prescribed and moved for the dismissal of the plaintiff's action. The learned District Judge after trial gave Judgment in favour of the Plaintiff-Respondent granting the reliefs prayed for in the prayer to the plaint. Being aggrieved by the said judgment of the District Court, the Defendant-Appellant has filed this appeal to this

Court seeking, inter alia , to have the said judgment set aside and to have the reliefs prayed for in the answer be granted.

From the evidence of the Plaintiff it is very clearly seen that she has given a sum of Rs 200,000/= to the Defendant her brother in 1988 and that she has thereafter recovered a sum of Rs 55,000/= from the Defendant. The plaintiff has filed this action in 1992 after four years to recover balance money from the Defendant-Appellant. It is the Plaintiff position that the Defendant paid Rs 5000/= in the year 1992. It was the contention of the Counsel for the Defendant-Appellant that even though the Plaintiff had stated that it was in 1992 that the last payment with regard to this transaction was made by the Defendant, that position has not been corroborated by any other independent evidence. Therefore it was submitted on behalf of the Defendant-Appellant that the present action filed by the Plaintiff-Respondent is prescribed in law and that this action cannot be maintained.

Section 7 of the Prescription Ordinance states that:-

No action shall be maintainable for the recovery of any movable property, rent, or mesne profit, or for any money lent without written security, or for any money paid or expended by the plaintiff on account of the defendant, or for money received by defendant for the use of the plaintiff, or for money due upon an account stated, or upon any unwritten promise, contract, bargain, or agreement, unless such action shall be commenced within three years from the time after the cause of action shall have arisen.

Further section 12 states that:-

In any of the forms of action referred to in sections 5, 6, 7, 8, 10 and 11 of this Ordinance, no acknowledgment or promise by words only

shall be deemed evidence of a new or continuing contract, whereby to take the case out of the operation of the enactments contained in the said sections, or any of them, or to deprive any party of the benefit thereof, unless such acknowledgment shall be made or contained by or in some writing to be signed by the party chargeable, or by some agent duly authorized to enter into such contract on his behalf; and that where there shall be two or more joint contractors, or heirs, executors, or administrators of any contractor, no such joint contractor, or heir, executor, or administrator, shall lose the benefit of the said enactments, or any of them, by reason of any written acknowledgment or promise made by any other or others of them:

Even though the plaintiff had stated that it was in 1992 that the last payment with regard to this transaction was made by the defendant, the plaintiff has failed to produce any evidence of any written acknowledgment made by the defendant to substantiate the same.

In the plaint dated 17.12.1992 the plaintiff had stated that the defendant borrowed a sum of Rs 150,000/= from the plaintiff in February 1988. The defendant had failed to pay back the said sum of money to the plaintiff despite numerous requests made by the plaintiff and the plaintiff lodged a complaint to the police against the defendant. In 1989.11.29 the defendant had given a written undertaking to pay the balance due to the plaintiff by the document marked P4. Yet the plaintiff had failed file this action within three years from that date. Very clearly the plaintiff had failed to produce any document to prove that the defendant had paid her Rs 5000/= in 1992. Section 12 of the Prescription Ordinance very clearly states that there must be a written acknowledgment to take a case out of the operation of the Prescription Ordinance. The plaintiff has very clearly failed to lead such evidence to prove the same. Therefore I

am of the opinion that the Plaintiff-Respondent's action is prescribed in law and therefore this action cannot be maintained.

The Defendant had stated that he had settled the loan outstanding by mid February 1990.The learned District Judge had disbelieved the said evidence given by the Defendant-Appellant in this case and had given cogent reasons for doing so. This court finds no reason to interfere with the said conclusion arrived to by the learned District Judge in this case based on evidence. Therefore the application made by the Defendant-Appellant to grant the reliefs prayed for in the prayer of the answer cannot be allowed.

For the above reasons I set aside the judgment of the learned District Judge of Panadura dated 12.10.1999 and dismiss the plaintiff-Respondent's action. I make no order for costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL