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

Union Assurance Limited,

20, St.Michael's Rod, Colombo 3.

Defendant-Appellant

C.A Case No:-891/99(F)

D.C.Colombo Case No:-15755/MR

V.

P.Lalith Perera,

No. 51/33A, Swarna Road,

Colombo 6.

Substituted-Plaintiff-Respondent

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

Counsel:-Geoffrey Alagaratnam P.C. with Shamalie Jayatunga

Respondent absent and unrepresented.

Argued On:-18.03.2014

Written Submissions:-05.05.2014

Decided On:-22.01.2016

H.N.J.Perera, J.

The plaintiff instituted this action against the defendant-appellant in the District Court claiming a sum of Rs. 31,737.91 due to him from the

defendant-appellant as Insurance commissions and legal interest on the said sum and for costs.

The plaintiff claimed that he worked as an Insurance Agent of the defendant-appellant and that the defendant-appellant has wrongfully reduced his commissions as insurance agent from 1991 June to 1994.

The plaintiff has admitted in giving evidence that at the time of joining the Appellant Company, the plaintiff has not signed any written agreement and confirms that he worked as an insurance agent without any written agreement with the defendant-appellant. The plaintiff claims that there was an oral agreement to pay 15% commission to the plaintiff and that the defendant-appellant has continued to pay the said commission to him up to January 1991 and had reduced the said commissions paid to him for every month from January 1991 without giving any reason or any notice to him.

The defendant-appellant filed answer and claimed that the plaintiff was paid a commission in accordance with agreement and according to the applicable quantum at the relevant time and no further sums are due to the plaintiff. The defendant-appellant further claimed that the plaintiff is estopped by his conduct from claiming any sums and that the said claim is prescribed in law.

After trial the learned trial Judge by her judgment dated 29.09.1999 held in favour of the plaintiff on the ground that there was no agreement between the defendant-appellant and the plaintiff to reduce the commission and that the cause of action is not prescribed as the prescriptive period for an oral agreement is 6 years. Accordingly the learned trial Judge ordered that the amount prayed for by the plaintiff-respondent and costs be paid by the defendant-appellant. Aggrieved by the said judgment of the learned trial Judge the defendant-appellant had preferred this appeal to this court.

It is not in dispute that the alleged cause of action is based on an oral agreement by and between the plaintiff and the defendant-appellant. The fact that the plaintiff acted as an insurance agent to the defendant-appellant is not disputed by the defendant-appellant. The plaintiff claims that he was paid a 15% commission on such claims. It was the position of the plaintiff that the defendant continued to pay his commissions correctly up to the end of the year 1990 and thereafter after January 1991 deducted the said sum without any reason or any notice to the plaintiff-respondent.

The defendant-appellant denies the said position and specifically states that in consequence of the losses incurred in the motor insurance business, the defendant-appellant issued a circular dated 28.03.1990 marked V2 at the trial insisting on the maintenance of a ratio of motor insurance to non-motor insurance by agents to enable payment of commissions at a higher rate failing which a sliding scale will apply. The defendant-appellant's position is that the said sliding scale was administratively introduced only in January 1991 (V9) and the defendant-appellant gave due notice of this sliding scale to all its agents by posting the said circular V2 to all insurance agents.

The plaintiff has clearly denied having any notice of the said circular V2 and also denied that he ever received a copy of the said circular from the defendant-appellant. It was the contention of the Counsel for the defendant-appellant that the evidence of the plaintiff that he did not receive the said circular V2 or that for three years the plaintiff remained ignorant of the said circular is unacceptable and cannot be believed. The learned trial Judge after considering the evidence led by the parties has decided to accept the evidence given by the plaintiff as true. The learned trial Judge has arrived at her decision on certain factual matters or has decided on primary facts. I have considered the entire judgment and see no reason to interfere with the primary facts of this case. An Appellate

Court should not without cogent reasons interfere with primary facts of this case. But I am of the opinion that the learned trial Judge has erred when she concluded that the prescriptive period for unwritten contracts is 6 years.

Section 7 of the Prescription Ordinance states:-

"No action shall be maintained for the recovery of any movable property, rent, or mense 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."

The plaintiff claims a sum of Rs.31,737.91 together with legal interest covering a period from January 1991 to June 1994.The plaint has been filed on 02.12.1994. The plaint filed by the plaintiff therefore can cover a period from 02.12.1991 to June 1994. The plaintiff has marked and tendered documents P1A to P10 prove his claim against the defendant-appellant. The said documents shows the various amounts deducted from the commissions due to the plaintiff by the defendant-appellant.. The total of these documents P1A to P10 is Rs.6166.96, and the said documents marked P1A to P10 cover the period from 03.08.1993 to 02.08.1994. The learned President's Counsel for the defendant-appellant too concede the fact that the said sum of Rs.6166.96 claimed by the plaintiff-respondent for the said period is not prescribed.

On perusal of the evidence led on behalf of the plaintiff-respondent in this case this court is of the opinion that the plaintiff-respondent had failed to lead evidence and prove that the defendant-appellant has deducted the sum he claimed in the prayer to the plaint. The documents

marked and produced by the plaintiff in this case only shows that a sum of Rs.6166.96 had been deducted by the defendant-appellant from the commissions due to him. The plaintiff has failed to lead evidence and prove that the defendant-appellant had deducted a sum of Rs 31,737.91 from the commissions due to him as claimed in the plaint.

In Wijekoon V. Panditha 21 N.L.R 89 it was held that:-

"Where a plaintiff comes before a court alleging that a wrong has been committed and claiming damages in respect of the wrong, he should put his case before the court and prove his damages before the defendant is called upon, even though the defendant puts in a plea which is for him to substantiate."

In Wijewardene V. Noorbhai 28 N.L.R 430 it was held that plaintiff was entitled only to claim only the actual damage sustained.

It was further held in W.H.Bus Co.Ltd. V. Samaranayake 55 N.L.R 182 that the plaintiff should adduce precise proof of the pecuniary loss suffered.

In Mrs Sirimavo Bandaranayake V. Times of Ceylon Limited 1995 (1) S.L.R 22, it was held that:-

"Even in an ex parte trial, the judge must act according to law and ensure that the relief claimed is due in fact and in law, and must dismiss the plaintiff's claim if he is not entitled to it."

It was further held that:-

"Section 85(1) requires that the trial Judge should be "satisfied" that the plaintiff is entitled to the relief claimed. He must reach findings on the relevant points after a process of hearing and adjudication. This is necessary where less than the relief claimed can be awarded if the judge's opinion is that the entirety of the relief cannot be granted. Further, sections 84,86 and 87 all refer to the judge being "satisfied" on

a variety of matters in every instance; such satisfaction is after adjudication upon evidence."

I am of the view that the plaintiff–respondent has failed to lead evidence and prove that the defendant–appellant had deducted a sum of Rs.31.737.91 as claimed by him. At most the plaintiff is entitled to a sum of Rs .6166.96 .

Therefore I answer the issue No.3 in the affirmative. And the amount to be paid is only Rs. 6166.96.

Therefore I enter judgment in favour of the plaintiff-respondent against the defendant-appellant for Rs.6166.96 with legal interest. I make no order for costs.

Subject to the said variation in the judgment the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL