1969
May 29
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NICOLAS
PYRGAS
v.
THEODORA
CHARALAMBOUS
STAVRIDOU

[JOSEPHIDES, LOIZOU AND HADJIANASTASSIOU JJ.]

NICOLAS PYRGAS,

Appellant-Plaintiff,

v.

THEODORA CHARALAMBOUS STAVRIDOU,

Respondent-Defendant.

(*Civil Appeal No.* 4752).

Trial in civil cases—Judicial disagreement—Two Judges constituting Full Court equally divided—Action dismissed—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960), *section* 27(2)—*Appeal by the plaintiff—Proper case for retrial—Section* 25(3) *of the Courts of Justice Law,* 1960.

Retrial—Trial Judges' disagreement on all material questions of fact—Great number of witnesses—Strong conflict of evidence—Questions of honesty and dishonesty involved—Court of Appeal, not having had advantage of seeing witnesses, cannot decide between the two divergent judgments—Proper case for an order of retrial under section 25(3) *of the Courts of Justice Law,* 1960, *before a new bench of three Judges—Case of* Antonis Andrea and Others *v.* Sadi Dourmoush, 1962 *C.L.R.* 7 distinguished.

Civil Procedure—Appeal—Court of Appeal—Powers of the Court of Appeal in appeals—The Courts of Justice Law, 1960 (*Law of the Republic No.* 14 *of* 1960), *section* 25(3)—*The Civil Procedure Rules, Order* 35, *rules* 3 *and* 8.

Court of Appeal—Powers—See immediately hereabove.

Appeals—Shall be by way of rehearing—The Civil Procedure Rules, Order 35, *rule* 3.

Appeals—Credibility of witnesses—Appeals turning on credibility of witnesses—Approach of the Court of Appeal to the matter—Principles applicable.

Appeals—Rehearing of witnesses by the Court of Appeal in certain cases not excluded.

Witnesses—Credibility of—Principles upon which the Court of Appeal will act in appeals turning on credibility of witnesses—See also supra.

Witnesses—Rehearing of witnesses by the Court of Appeal in certain cases.

Fraud—"Actual fraud"—The Civil Wrongs Law, Cap. 148 *section* 36 *reproduces the principles of the common law on the point, that is, the action for deceit at common law—Fraud under that section is only one species of fraud viz. fraudulent misrepresentation, also known as "actual fraud"—But "fraud" in equity is wider—It embraces not only "actual fraud" but also certain other conduct which falls below the standards demanded by "equity"—"Constructive fraud".*

Fraud—At common law and in equity—"Actual fraud"—"Constructive fraud"—See supra.

Limitation of actions—Cause of action based on fraud viz. *"constructive fraud" rather than on "actual fraud"—Section* 7 *of the Limitation of Actions Law, Cap.* 15*—See also* supra.

Words and Phrases—"Fraud"—"Actual fraud"—"Constructive fraud".

This case was tried by a Full Court in Nicosia composed of two Judges, but as they were equally divided the plaintiff's claim was dismissed pursuant to section 27(2) of the Courts of Justice Law, 1960 (Law of the Republic No. 14 of 1960). The learned trial Judges disagreed on all material questions of fact, the one believing the version of the appellant-plaintiff and his witnesses, the other believing the version of the respondent-defendant and her witnesses. In view of the great number of witnesses on whose credibility the trial Judges differed, the Court of Appeal did not enter itself into the question of credibility as it did in a previous case (*Antonis Andrea and Others* v. *Dourmoush*, 1962 C.L.R. 7), but ordered a new trial under section 25(3) of the Courts of Justice Law, 1960 before the District Court of Nicosia by a new bench of three Judges. Another interesting feature of this case is to be found in the "provisional" views expressed by the Court on the concept of fraud at common law ("actual fraud", "fraudulent misrepresentation", "deceit", which concept is reproduced in section 36 of our Civil Wrongs Law, Cap. 148) and the wider concept of fraud in equity, the Court apparently being inclined to the view that the present case is one of what is described as "constructive fraud" in Snell's Principles of Equity 26th edition p. 607.

Held, (1). The powers of this Court on appeal are well settled and they have been reiterated in many cases, so that

we need only summarise them here. We need hardly quote the provisions of section 25(3) of the Courts of Justice Law, 1960; but in addition to that we should also bear in mind that, under our Civil Procedure Rules, Order 35, rule 3, "all appeals shall be by way of rehearing", and that, under rule 8 of the same Order, this Court has power "to draw inferences of fact and to give any judgment and make any order which ought to have been made". These powers are now reproduced in section 25(3) of the Courts of Justice Law, 1960, which empowers this Court "to make any order which the circumstances of the case may justify, including an order of retrial".

(2) Matters of credibility are within the province of the trial Courts. We need only refer to *Charalambous* v. *Demetriou* 1961 C.L.R. 14; *Imam* v. *Papacosta* (1968) 1 C.L.R. 207 at p. 208 and *Hadji Petri* v. *HadjiGeorghou* (reported in this Part at p. 326 *ante*) where the main authorities are summarised laying down the principles upon which the Court of Appeal will interfere with findings of fact made by trial Courts and based on credibility of witnesses.

(3) In the case of *Simadhiakos* v. *The Police,* 1961 C.L.R. 64, at p. 93, in considering whether the Court of Appeal should rehear evidence of a witness who had been already heard by the trial Court, I envisaged the possibility of divergence of opinion of two judges who might compose a full Court and I ventured the opinion that might possibly be a case where the Court of Appeal would rehear a witness. But here we are not concerned with one witness but with a whole set of 17 witnesses which would be absolutely impossible for this Court to rehear because as we said in *Simadhiakos* case (*supra*), the Court of Appeal "should not normally substitute itself for the trial Court and retry the case..... If the circumstances of the case justify such a course this Court has power to order a retrial..... under the provisions of section 25(3) of the Courts of Justice Law, 1960....." (See page 93 of the report *supra*).

(4) We have come to the conclusion that, not having had the advantage of seeing the witnesses giving their evidence we cannot decide between the two judgments and, in the special circumstances of this case, we have reached the conclusion that a retrial of the whole case should be ordered. In ordering a retrial we have taken into account, *inter alia,* that this is a case where there is a strong conflict of evidence, and questions of honesty or dishonesty are involved in it, which must be

determined finally and not left in the uncertainty of the divergent findings of fact of the two trial judges. (*Antonis Andrea and Others* v. *Sadi Dourmoush,* 1962 C.L.R. 7 *distinguished*).

(5) For these reasons we order under section 25(3) of the Courts of Justice Law, 1960 a retrial of the whole case by a new Bench of three Judges to be presided over by the President of the District Court of Nicosia. None of the Judges who took part at the first hearing should be members of the new bench which is to retry the case.

Appeal allowed. Retrial ordered as above. Costs of this appeal to be costs in cause.

Per Curiam: One of the trial Judges came to the conclusion that plaintiff's-appellant's claim was statute barred under the provisions of section 7 of the Limitation of Actions Law, Cap. 15, holding that this action was brought more than two years after the alleged fraud had been committed or after the time that the plaintiff (appellant) ought with reasonable diligence to have discovered such fraud. We may make a brief digression on this question of prescription with regard to the cause of action which is stated to be based on fraud. Although the point was not fully argued before us, as at present advised we think we ought to express a provisional view as to how we see this matter. We feel that the claim, as expressed, does not come within the ambit of section 36 of the Civil Wrongs Law, Cap. 148. That section reproduces the provisions of the common law on the point, that is, the action for deceit at common law. Fraud under section 36 is one species of fraud, fraudulent misrepresentation, which is also known as "actual fraud". This fraud was remedied by Courts of equity concurrently with Courts at common law. In equity the term "fraud" embraces not only "actual fraud" but also certain other conduct which falls below the standards demanded by equity. In the present case we think that we are dealing with what is described as "constructive fraud" in Snell's Principles of Equity 26th edition, at p. 607.

Cases referred to:

Doyle v. *Olby (Ironmongers) Ltd. and Others,* reported in "The Times", February 1, 1969;

Nocton v. *Lord Ashburton* [1914] A.C. 932, at p. 954;

Charalambous v. *Demetriou*, 1961 C.L.R. 14;

Imam v. *Papacostas* (1968) 1 C.L.R. 207 at p. 208;

Hadji Petri v. *Hadji Georghou* (reported in this Part at p. 326 *ante*);

Simadhiakos v. *The Police*, 1961 C.L.R. 64, at p. 93;

Antonis Andrea and Others v. *Sadi Dourmoush*, 1962 C.L.R. 7 *distinguished;*

Pesquerias y Secaderos De Bacalao De Espana S.A. v. *Beer* (1947) 80 Ll. L. Rep. 318.

Appeal.

Appeal by the plaintiff against the judgment of the District Court of Nicosia (Evangelides Ag. D.J. and Vakis D.J.) dated the 5th July, 1968 (Action No. 470/65) whereby his claim for a declaration, *inter alia*, that certain building sites belonged to him, was dismissed.

G. Constantinides with *A. Triantafyllides*, for the appellant.

L. Demetriades, for the respondent.

Cur. adv. vult.

The judgment of the Court was delivered by:

JOSEPHIDES, J.: This case was tried by a Full Court in Nicosia composed of two Judges but as they were equally divided the plaintiff's claim was dismissed pursuant to the provisions of section 27(2) of the Courts of Justice Law, 1960. The Court was composed of a retired President District Court, Judge Evangelides, who was acting Judge at the time, and of District Judge Vakis. It is very rarely that we have cases of this sort and that is why it is not very easy to decide the present case. In the course of this judgment we shall be referring to a previous case of judicial disagreement in the District Court.

It is common ground in the present case that in the year 1951 the plaintiff (appellant), who is the brother of the defendant (respondent), together with a certain Vahan Yepremian, who gave evidence in this case, bought a field of about 23 donums. This field, for reasons of their own, was registered in the name of Yepremian but it is clear from the evidence that it was the property of both Yepremian and the appellant

in equal shares. Later, these two persons agreed to sell one-half share of the field to a certain Nicos Karandokis for the sum of £700. From the evidence of Karandokis, who is an independent witness, and that of the appellant and Yepremian, it appears (and it is not disputed by the defence) that Karandokis did not wish to have dealings with Yepremian and so the appellant suggested that the whole property be registered in the name of the appellant's sister, that is, the respondent. This was accepted by all three of them and the field was registered one-half share in the name of Karandokis and one-half share in the name of the respondent. The declaration of transfer at the Land Registry took place in November, 1952, and it stated that one-half share of the field had been sold to Karandokis for £700, and one-half share to the respondent for another £700. Later, this field was divided into 45 building sites; 25 of these sites were registered in the name of Karandokis and 20 in the name of the respondent.

The case for the appellant was that the respondent became the owner of the one-half share nominally and that the real owners were Vahan Yepremian for one-quarter share and the appellant for the other quarter share. The case for the respondent was that the one-half share was transferred into her name in consideration of the appellant's indebtedness to her and her husband; that is to say, that she was the purchaser of the one-half share.

The trial Judges, after hearing a number of witnesses (seven called on behalf of the appellant and ten on behalf of the respondent), reserved their judgment which they delivered some time later. But, unfortunately, they disagreed on all material questions of fact. We do not propose enumerating all the points of their disagreement, but we shall refer to some of them.

Judge Evangelides believed the version of the appellant and not that of the respondent and he would have been prepared to give judgment for the appellant for the whole claim of £9,000.–, which was the agreed sum of damages. Judge Evangelides was very impressed with the fact that the respondent changed front in the course of her evidence; and he stated that, after the appellant and Vahan Yepremian had given evidence, although the respondent's case was that in 1952 she had bought the one-half share of the field, in her examination-in-chief she admitted that the share of Vahan Yepremian, that

is, the one-quarter of the field, had not been purchased by her but that it belonged to Yepremian, and she admitted that in 1958 the appellant and Yepremian had agreed for the appellant to purchase the ten sites which belonged to Yepremian for the sum of £1,050.– After this admission, the respondent changed her position. She did not admit that she never became the real owner of the ten sites which belonged to Yepremian but she put forward a new allegation, not stated in the pleadings or put to the appellant while giving evidence, to the effect that after appellant had bought Yepremian's sites he "gave them" to her so that her husband would not keep worrying her. Judge Evangelides states expressly in his judgment that he disbelieved this version, and he gives his reasons for doing so (at page 104 of the record). Furthermore, Judge Evangelides disbelieved the explanation of the respondent and her husband that the transfer of the eight sites to the appellant (to which we shall refer later) was made because he, the appellant, was threatening them. Finally, Judge Evangelides accepted the appellant's version regarding all twenty sites and he gave his reasons at pages 104E and 105C of the record.

Before we consider what were the findings of Judge Vakis on this point, I think we should give a brief history of what happened to these sites. The twenty sites which were registered in the name of the respondent were disposed of as follows: one site was sold by the appellant to a third person in 1957 and the respondent effected transfer at the Land Registry; ten sites were transferred by the respondent to her daughter on the 1st August, 1961; eight sites were transferred by the respondent to the appellant on the 5th December, 1963; and at the time of the hearing of the action there was still one site registered in respondent's name.

Judge Vakis in his judgment states that "the defendant's (respondent's) case is that the transfer of the field in her name was in part consideration or part settlement of debts owing by the plaintiff (appellant) to her and her husband"; and he goes on to state: "However, in the statement of defence nothing is mentioned about Vahan's interest in the matter. Such an interest the defendant (respondent) admitted in her evidence in the way we have described earlier. Regarding her claim on Vahan's share, she alleged in her evidence that when her brother (appellant) purchased Vahan's interest in 1958, he did so and paid for the agreed amount for her account and benefit as he, the plaintiff (appellant), was still indebted to her and her husband".

Judge Vakis accepts that at the time when these sites were registered in respondent's name the appellant was indebted in considerable amounts to the respondent's husband and he points out that the appellant admitted that at least a bond for £800 to a bank was paid off by the respondent's husband, and the Judge observes that the appellant's version of the payment did not at all satisfy him. Judge Vakis further accepted the respondent's version that she paid the sum of £300 mentioned in the agreement made with Karandokis in 1952 for the division of the land into building-sites and the construction of the roads. Finally, on this point Judge Vakis states in his judgment that the appellant did not satisfy him that at the time of the 1952 transfer he (the appellant) had come into any agreement with the respondent, or that the legal relation upon which the appellant claimed to base his cause of action between himself and his sister, the respondent, had been established. On the contrary, on Judge Vakis's view, the respondent's version appeared more natural and reasonable and the Judge gave his reasons at page 97F of the record.

With regard to the change of front by the respondent in the course of the hearing, Judge Vakis found that the appellant was right when he claimed that upon the payment of the £1,050 to Yepremian in 1958, he, the appellant, became the beneficial owner of the ten building sites which were the property of Yepremian. The learned Judge then states that nothing of this is pleaded in the defence and goes on to express the view that, once this is not pleaded, he takes the view that the Court cannot "take cognizance" of respondent's allegation put forward for the first time when she was giving her evidence at the trial. If this was her case, he says, it would be all important for her to raise it in her pleadings: these were material facts and she failed to plead them. And he goes on, "it follows that if I should ignore this allegation of hers, I must find that the plaintiff (appellant) in 1958 became the beneficial owner of these 10 building sites that consequently the defendant (respondent) was and is accountable to the plaintiff (appellant) in respect of this part of his claim. Taking that this is the proper approach, I find that defendant (respondent) acquired no rights in connection with these sites and I reject her version on this point".

Whether Judge Vakis rejects the respondent's version on this point because he disbelieved her as not telling the truth, or on procedural grounds for the reason that she did not

plead it in her defence, we do not consider it necessary to decide for the purposes of this appeal. But the net result is that on this issue he appears to be in agreement with Judge Evangelides.

But, although Judge Vakis found for the appellant on this issue, he came to the conclusion that his claim was statute barred under the provisions of section 7 of the Limitation of Actions Law, Cap. 15, holding that this action should have been brought within two years unless the plaintiff (appellant) could bring himself within the exceptions laid down in that section. And, after considering the circumstances of the case and making certain findings of fact, Judge Vakis came to the conclusion that the action was brought more than two years after the alleged fraud had been committed or after the time that the plaintiff (appellant) ought with reasonable diligence to have discovered such fraud.

We may make a brief digression here on this question of prescription with regard to the cause of action which is stated to be based on fraud. Although the point was not fully argued before us, as at present advised, we think we ought to express a provisional view as to how we see this matter. We feel that the claim, as expressed, does not come within the ambit of section 36 of the Civil Wrongs Law, Cap. 148. That section, we think, reproduces the provisions of the common law on the point, that is, the action for deceit at common law. A recent case on this point is that of *Doyle* v. *Olby (Ironmongers) Ltd. and Others*, decided by the Court of Appeal in England and reported in "The Times" (1969), February 1st. Fraud under section 36 of our Cap. 148 is one species of fraud, fraudulent misrepresentation, which is also known as "actual fraud". This fraud was remedied by Courts of equity concurrently with Courts of common law (see Snell's Principles of Equity, 26th edition, p. 605). In this case we think that we are dealing with what is described as "constructive fraud" in Snell's Principles of Equity, ibid., at page 607.

"In equity the term 'fraud' embraces not only actual fraud, in the sense just defined, but also certain other conduct which falls below the standards demanded by equity. Courts of equity did not even stop at 'moral fraud in the ordinary sense' but took account of any 'breach of the sort of obligation which is enforced by a Court that from the beginning regarded itself as a Court of conscience' ". (This statement of the law is based on *Nocton* v. *Lord Ashburton* [1914] A.C. 932, at page

954). "The Courts have refused to define this extended, or constructive, fraud; for, in the words of Lord Hardwicke, 'Fraud is infinite, and were a Court of Equity once to lay down rules, how far they would go, and no farther, in extending their relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped, and perpetually eluded by new schemes which the fertility of man's invention would contrive' " (see page 608 of Snell).

We leave the matter at that, having already said that this is not our final view; but we felt that it was proper for us to express at least a provisional view in the matter once this was raised before us.

Reverting to the findings of the learned Judges in the Court below, there was more divergence of opinion on other primary facts; e.g. Judge Evangelides did not believe the evidence of the respondent and her witnesses that when the respondent's daughter got married in 1961 and the respondent transferred to her ten building-sites, out of the building-sites in dispute, that the appellant knew of this and did not complain. Furthermore, Judge Evangelides stated in his judgment that he was satisfied that the appellant learnt about this in the year 1964 from a certain Nitsa Peters and that there is corroboration of the appellant's evidence in the fact, which is admitted by the respondent, that appellant then beat up the respondent. On this point Judge Vakis disagrees. He prefers the evidence of Nitsa Peters to that of the appellant. Finally, there is the evidence of the Land Registry Clerk, Kassianides. This evidence was called on behalf of the appellant to show that the respondent admitted the appellant's claim at the Land Registry office on the 5th December, 1963, when she went there and she actually transferred to the appellant the eight building-sites. On this point again Judge Vakis disagrees and he disbelieves witness Kassianides who did not impress him (the Judge) as a reliable witness.

These are, as briefly as we could state them, the material differences in the findings of fact made by the learned trial Judges.

Learned counsel for the appellant (plaintiff) today argued that we should prefer the judgment of Judge Evangelides and give judgment accordingly or, failing that, at least this Court should give judgment in respect of two of the building-sites,

in respect of which Judge Vakis also agreed, but he found that the claim was statute barred.

Learned counsel of the respondent (defendant), on the other hand, argued that, as there was very little in common in the findings of fact of the two Judges, it would be unsafe and dangerous for this Court to adopt either of them, the main reason being that we did not have the benefit of watching the demeanour of the witnesses while giving their evidence before the trial Court. He also argued that, on the evidence on record, this Court cannot draw any conclusion and make definite findings and that, if this Court reaches the point of deciding to order a retrial, it must order a retrial in toto and not a partial retrial. Before doing so, however, this Court must have a good reason for ordering such a retrial and, in his submission, no such reason had been shown by the other side.

Now, what are the powers of this Court on appeal? They are well settled and they have been reiterated in many cases, so that we need only summarise them here. We need hardly quote the provisions of section 25(3) of the Courts of Justice Law, 1960; but in addition to that we should also bear in mind that, under our Civil Procedure Rules, Order 35, rule 3, "all appeals shall be by way of rehearing", and that, under rule 8 of Order 35, this Court has power "to draw inferences of fact and to give any judgment and make any order which ought to have been made". These powers are now reproduced in section 25(3) of the Courts of Justice Law. The power to order a new trial or a retrial is now expressly provided in section 25(3) of the Courts of Justice Law, which empowers this Court "to make any order which the circumstances of the case may justify, including an order of retrial". Matters of credibility are within the province of the trial Court. We need only refer to *Charalambous* v. *Demetriou,* 1961 C.L.R. 14; *Imam* v. *Papacostas* (1968) 1 C.L.R. 207 at p. 208; and *Hadji Petri* v. *Hadji Georghou* (reported in this Part at p. 326 *ante*), where the main authorities are summarised.

On the question of credibility I think we may usefully refer to one or two extracts from Lord Devlin's Book entitled "Trial by Jury" (1956). In England, as in Cyprus, all appeals to the Court of Appeal are by way of rehearing. This is what he says at page 136:

"From the start it does not appear to have been contemplated that in a witness action the witnesses should literally he heard

again. What happened was that the oral evidence, reduced into writing in the form of the judge's note, became part of the documentary material upon which the Court of Appeal pronounced. That meant that in matters of credibility the Court was generally dependent on the judge's conclusions. So, the principle was formulated that if he believed one witness rather than another, the Court of Appeal would rarely, if ever, interfere".

In a note at page 178 the learned author refers to one or two cases on questions of credibility and goes on: "The cases in which a judge's finding on credibility is rejected are generally those of a complicated character, in which the judge's rejection of a witness's story is based upon some fundamental misconception of the evidence as a whole; or those in which a lengthy narrative has twisted and turned as the case has developed, and the judge has failed to check his conclusions of credibility by a review of the probabilities that emerge from the evidence as a whole". Then he refers to the case of *Pesquerias y Secaderos De Bacalao De Espana, S.A.* v. *Beer* (1947) 80 Ll. L. Rep. 318, in which Lord Greene in the Court of Appeal by a masterly analysis of the evidence rejected the judge's disbelief of one of the principal witnesses.

But the question always turns on this, that there must exist an indisputable fact, a touchstone, whereby the Appeal Court will be able to test the credibility of a witness. What is more, in England the position is substantially different in the case of jury trials; if there is a disagreement then the jury is discharged and a new trial is ordered. On the other hand, if the case is tried by a judge it is normally tried by a judge sitting alone, and in that case it would, I believe, be less difficult for the Court of Appeal to reach a decision on a matter of credibility.

In the case of *Simadhiakos* v. *The Police*, 1961 C.L.R. 64, at page 93 (a criminal appeal), in considering whether the Court of Appeal should rehear the evidence of a witness who had been heard already by the trial Court, I envisaged the possibility of divergence of opinion of two judges who might compose a full Court, under the provisions of section 22(1) of the Courts of Justice Law, 1960, and I ventured the opinion that might possibly be a case where the Court of Appeal would rehear a witness. But, here we are not concerned with one witness only but with a whole set of seventeen witnesses, which would be absolutely impossible for this Court to rehear because,

as we said in the *Simadhiakos* case, the Supreme Court "should not normally substitute itself for the trial Court and retry the case. That is not our function. If the circumstances of the case justify such a course this Court has power to order a retrial by the trial Court or any other Court having jurisdiction in the matter, under the provisions of section 25(3) of the Courts of Justice Law....." (see page 93 of the report).

Finally, before stating our conclusions in the present case, I think we should refer to a reported case in which the two trial Judges disagreed and the plaintiff's claim failed, i.e. the case of *Antonis Andrea and Others* v. *Sadi Dourmoush* 1962 C.L.R. 7. That was an appeal against the separate judgment given by Zihni D.J. sitting in the "mixed" Court, in the District Court of Larnaca, together with Malachtos, D.J., whereby he dismissed the plaintiff's claim for a declaration that a certain piece of immovable property registered in the name of the defendant was the property of the plaintiff by virtue of inheritance and uninterrupted possession for 60 years. In that case there was a general finding by Malachtos D.J. as follows: "Now, on the evidence adduced, I find as a fact that the disputed piece of land originally belonged to Andreas Hadji Antoni who was cultivating it", and he went on to give the history of the cultivation of this land, as found by him. He did not analyse the evidence of the witnesses separately nor did he say which of the witnesses' evidence he accepted and which he rejected.

On the other hand, Zihni D.J., after reviewing the evidence, found that it was so meagre that he could not possibly find that the heirs of Hadji Antoni had had the plot in dispute in their possession for a period exceeding that of prescription. Zihni D.J., in analysing the evidence of one of the witnesses, said that he found his testimony was full of contradictions and unbelievable allegations, and he said that he disregarded it. Malachtos, D.J. did not comment on the evidence of this particular witness but he made the general finding which we quoted earlier.

The High Court on appeal, after analysing the evidence, came to the conclusion that "on the whole, we agree with Zihni D.J. that the evidence adduced by the appellant in this case in respect of the alleged undisputed and uniterrupted adverse possession between the years 1918 and 1935 is very meagre on which to base such a claim"; and for this reason the Hight Court preferred the judgment of Judge Zihni and upheld it.

That case is, to our mind, clearly distinguishable from the present case, because here we have a detailed analysis of the witnesses called on both sides and findings of fact and reasons for such findings by each of the two trial judges. For these reasons we have come to the conclusion that, not having had the advantage of seeing the witnesses giving their evidence, we cannot decide between the two judgments and, in the special circumstances of this case, we have reached the conclusion that a retrial of the whole case should be ordered. In doing so, we have not lost sight of the submission of appellant's counsel that, at least, in the case of the two building-sites judgment should be given in appellant's favour. But as the question of prescription, which is one of the issues in the case, will eventually depend on the findings of fact which will be made at the new trial, we concider that it would be highly undesirable to have the case decided piecemeal.

In ordering a retrial, we have been strongly influenced by the fact that the respondent (defendant) changed front in the course of the hearing and that she was disbelieved by Judge Evangelides: and that on this point Judge Vakis refused to "take cognizance" of her version for the reasons quoted earlier in this judgment. Furthermore, this is a case where there is a strong conflict of evidence, and questions of honesty or dishonesty are involved in it, which must be determined finally and not left in the uncertainty of the divergent findings of fact of the two trial judges.

For these reasons we order a retrial of the whole case under the provisions of section 25(3) of the Courts of Justice Law, 1960, by a new Bench of three judges to be presided over by the President of the District Court of Nicosia. Needless to say that none of the judges who took part at the first hearing should be members of the new bench which is to retry the case.

In the result the appeal is allowed, the judgment of the District Court is set aside, and an order of retrial made as above. The costs of this appeal shall be costs in cause.

Mr. Demetriades: There is an order as to costs in this action before the trial Court against the plaintiff in favour of ex-defendant 2.

Mr. Triantafyllides: This order is not challenged.

COURT: Order as above.

Appeal allowed; retrial ordered; order for costs as above.