

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

C.A 41/1998 (F)
D.C. Maravila 715/L

W. J. Sri Raj Fernando of
Angampitiya, Waikkala.

PLAINTIFF

Vs.

1. W. T. Ranjani Fernando
2. W. J. J. A. R. Pradeep Appuhamy
3. W. A. Joseph Appuhamy
4. W. P. Noel Fernando

All of Angampitiya, Waikkala.

DEFENDANTS

AND

W. J. Sri Raj Fernando of
Angampitiya, Waikkala.

PLAINTIFF-APPELLANT

1. W. T. Ranjani Fernando
2. W. J. J. A. R. Pradeep Appuhamy
3. W. A. Joseph Appuhamy
4. W. P. Noel Fernando

All of Angampitiya, Waikkala.

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: L.P.A. Chithrangie for Plaintiff-Appellant
N. Palpola for 1st and 2nd Defendant-Respondents

ARGUED ON: 28.11.2011

DECIDED ON: 17.01.2012

GOONERATNE J.

This was an action filed in the District Court of Marawila praying for a declaration that the deed of partition bearing No. 7087 of 7.4.1984 be declared invalid/void ab initio and for cancellation of the said deed. Parties proceeded to trial on 16 issues and Plaintiff (according to proceedings of 10.12.1996) moved to try issue Nos. 11 – 16 as preliminary issues and the Defendant also moved to have issues 3 to 7 also be tried as preliminary issues. Court allowed parties to file written submissions. Plaintiff in the action is dated 10.1.1995.

On perusing the suggested preliminary issues of both parties, the trial Judge observes that Plaintiff's issue Nos. 11 to 16 are based on the

issues suggested by the 1st & 2nd Defendants. Judge further observes that එකී ප්‍රශ්න සියල්ලම 1 - 2 වත්තිකරුවන් වෙනුවෙන් ඉදිරිපත් කර ඇති හරස් ඉල්ලීම මත අදාළ ප්‍රශ්නය වී ඇත. As such trial Judge states that the Defendant’s issues (Nos. 3 – 7) need to be considered prior to that of the Plaintiff, since court has to consider whether Defendant suggested preliminary issues are issues of law. I note the following issues which develops on the premise that the above deed of partition No. 7087 is a fraudulently executed deed and as such invalid/void.

- 3 වත්තිකරුවන්ට වරැද්දට පැමිණිල්ලෙන් නඩු නිමත්තක් වලදරව් කර තිබේද?
- 4. යම් හෙයකින් 1,2 වත්තිකරුවන්ට වරැද්දට නඩු නිමත්තක් වලදරව් වී ඇතැයි සලකන්නේ නම් එම නඩු නිමත්ත කලාවරෝධ වී තිබේද?
- 5. පැමිණිලිකරු විසින් මෙම නඩුවට නිසි පර්යවකරුවන් ඇතුලත් කර තිබේද?
- 6. ඉහත කී 3 හා 5 වසඳිය යුතු ප්‍රශ්න වලට ‘නැත’ යයි ද 4 වසඳිය යුතු ප්‍රශ්නයට ‘ඔව්’ යයි ද පිලිතුරු සැපයෙන්නේ නම් මෙම නඩුව තවදුරටත් පවත්වාගෙන යා හැකිද?

I state that the trial Judge is perfectly correct when the Judge decided to try the Defendant’s issues at the outset. The above issue Nos. 3 & 4 relate to cause of action and prescription. Both would be important since no Plaintiff could proceed with his case if the cause of action is not disclosed in the plaint and if the action is prescribed. Section 147 of the Civil

Procedure Code enacts that trial of issues of law be tried first if the case could be disposed of on issues of law. Court has the power to dismiss an action on an issue of law without any evidence or admission being recorded 15 NLR 389. It need to be a pure question of law 1994 (3) SLR 01. Trial Judge has wide discretion in terms of Section 147 of the Code. 2001 (1) SLR 290.

It was admitted at the trial that 1st & 2nd Defendants were the wife and child of one Francis Appuhamy. In the plaint it is averred that Francis Appuhamy took all steps to execute the fraudulent deed of partition No. 7087, and the said Francis Appuhamy defrauded or cheated the Plaintiff and one Francis Noel Fernando and got them to sign the deed 7087. In the premises Plaintiff plead in paragraph 21 of the plaint that a cause of action has accrued to the Plaintiff to sue the said Francis Appuhamy for executing a fraudulent deed and on the death of Francis Appuhamy the cause of action would survive and arise against the 1st and 2nd Defendant being the heirs of the said late Francis Appuhamy. (admission No. 1)

It is evident that the Plaintiff's cause of action to sue the 1st & 2nd Defendant is based on the above, especially paragraph 21 of the plaint, and as observed by the trial Judge it is apparent that the alleged fraudulent

act, alleged to be committed by Francis Appuhamy cannot be passed on to the heirs (1st & 2nd Defendant). The cause of action cannot survive in that way and it would be an abuse of the law to permit such a course of action. I endorse the views of the trial Judge on the reasoning (Folio 50) given in the judgment regarding the cause of action. The plaint filed of record does not disclose any cause of action against the parties who are made Defendant in the action and the 1st & 2nd Defendants are improperly joined. It also offends Section 43 of the Code.

The other important issue in this case is on prescription. It is evident that on Plaintiff's own plaint and his pleadings and the several averments contained therein, the so called partition deed was executed on or about 7.4.1984 and the plaint has been filed on or about 23.2.1995 (District Court seal), though the date of plaint is 10.1.1995. It is obvious that the action has prescribed and well over 10 years have lapsed, and in this type of suit being declaratory action should be filed in 3 years. I reject the argument of the learned counsel of the Appellant that there is continuity in the alleged fraud by executing the partition deed.

In Ranasinghe vs. de Silva 78 NLR 500

An action for a declaration that a notarially executed deed is null and void is prescribed within 3 years of the date of execution of the deed in terms of section 10 of the Prescription Ordinance.

Section 10 of the Prescription Ordinance reads thus:

No action shall be maintainable in respect of any cause of action not hereinbefore expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.

It is clear that action should have been filed within 3 years. Plaintiff's suit has not been filed within 3 years as required by the above Section.

I have noted the submissions of Counsel on either side. I am inclined to accept the submissions of Defendant. Respondents that new facts cannot be urged in the appeal which is materially different to that set up in the Original Court.

In Gnanathan Vs. Premawardena 1999 (3) SLR 301 at 311

Chief Justice G. P. S. de Silva in Talwatte v. Somasundaram

“In this connection it is well to bear in mind the provision of explanation 2 of section 150 of the Civil Procedure Code. A fortiori a party cannot be permitted to present in appeal a case materially different from the case presented before the Court”

I go further and state a fortiori a party cannot be permitted to present before even the trial Court a case materially different from the case presented in his pleadings and in particular a plea of prescription. The effect of the Prescription Ordinance is that it only limits the time within which an action may be brought. This, in my view, is reasonable, fair and just.

In Talawatte v. Somasundaram 1997 @ SLR 109 GPS De Silva CJ @ pages 111 & 112;

“Besides, the question of appropriation of payments by way of rent does not arise in the present case for the reason that the case was not presented before the District Court on that basis. Neither the pleadings nor the issues nor even the written submissions reflect the question of appropriation of payments. A new contention of this kind cannot be raised for the first time in appeal since it involves questions of mixed fact and law – vide the judgment of Dias J. in Setha v Weerakoon. In this connection, it is well to bear in mind the provisions contained in Explanation 2 to section 150 of the Civil Procedure Code. A fortiori, a party cannot be permitted to present in appeal a case materially different from the case presented before the trial court.

Counsel for Respondents also refer to paragraphs 18 & 19 of the plaint. It refer to the manner in which the purported fraud was deemed to have been perpetuated. It is not a concealed fraud discovered later. Concealed fraud need to be expressly pleaded. There was no submission in this regard in the District Court. One cannot introduced a fact of this nature in the appeal. There is the other requirement under Section 44 of the Civil Procedure Code. (exemption from bar from lapse of time to be shown).

When I consider all the facts and circumstances of this case and the law applicable, I cannot find any basis in fact and law to interfere with the findings of the learned District Judge. I affirm the order of the learned District Judge. Appeal dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL