IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

C.A. No. 624/2001(F)

D.C. Colombo Case No. 17515/L

Janeetha Martel Loren Perera nee

Coorey of No. 8, Block M.

Government Flats,

Bambalapitiya, Colombo 4.

Plaintiff-Appellant

Vs.

1(a) Weerasinghe Arachchige
Amarawathie
2(a) Karunawathie Ranasinghe
3(a) M.W. Dharmawathie
4(a) Princy Priyadarshanie Perera
5. Henry Lenard Perera

All of No. 1600, Cotta Road,
Colombo 8.

Defendant-Respondents

Before : **W.L.R. Silva, J. and**
A.W.A. Salam, J.

Counsel : Gamini Marapana P.C. with Navin Marapana and Keerthi Gunawardane for the Plaintiff-Appellant.

N.R.M. Daluwatte P.C. with Daya Guruge for the Defendant-Respondents.

Argued on : 06.12.2010, 02.12.2010 and 05.10.2010

Written submissions tendered on: 15.03.2011

Decided on : 03.10.2011

A.W. Abdus Salam, J.

The question that arises in this appeal for consideration pertains mainly to the propriety of the two issues read out and answered by the learned district judge for the first time while delivering the judgment. The said issues have been thus raised after the conclusion of the trial followed by the receipt of written submissions. The judgment which is impugned in this appeal culminated in the dismissal of the plaintiff's action purely by reason of the district judge electing to raise those issues at the eleventh hour.

The background to the dispute, as it transpired on the pleadings, needs to be put it in a nutshell for the proper comprehension of the crucial point arising for determination in this appeal. The plaintiff's action against the five defendants was to seek inter alia a declaration of title to the subject matter, possession of the same and their ejectment. It is common ground that the husband of the plaintiff was the owner of the subject matter at one point of time and upon his demise it devolved on the plaintiff by virtue of his last will that was duly proved and admitted to probate.

The 1st, 2nd, 3rd and 5th defendants in their answer denied the alleged accrual of the cause of action to sue them and maintained that the husband of the plaintiff instituted a rent and ejectment action against the mother of the defendants and during its pendency, he caused the action to be laid-by on the pretext that the premises are to be acquired by the Urban Development Authority. As the plaintiff in this action, never claimed to be the owner of the premises in suit nor demanded rent from them thereafter, the defendants urged that there is no legal basis for the institution of the present action.

In the plaint, the plaintiff set out the alleged cause of action against the defendants in paragraph 7 which when translated would convey the following expression....

> 7. The aforesaid defendants without any manner of title or rights whatsoever to the said premises morefully described in the schedule wrongfully and unlawfully occupying the same causing loss and damages to the plaintiff in her estimation at Rs 10000/- per mensum.

Traversing paragraph 7 of the plaint the defendants vehemently denied the contents therein and stated nothing more or less.

Admittedly, the husband of the plaintiff was the owner of the premises in suit. The plaintiff has adduced cogent and overwhelming evidence to establish her position that she had become the owner of the subject matter by virtue of the last will of her husband. As has been commented by the learned district judge in her judgment, despite the fact that the plaintiff was able to establish her title to the property, since she has failed to conform to section 40 (d) of the Civil Procedure Code the plaintiff's action should fail. (Page 7 of the impugned judgment)

A careful reading of the plaint reveals that the plaintiff has failed to plead the exact date or the probable period at or during which the cause of action is alleged to have accrued to her to sue the defendants for relief. This is a clear violation or non-observance of the provisions of section 41(d) of the Civil Procedure Code which requires that a plaint in addition to other requirements should contain a plain and concise statement of the circumstances of each cause of action and where and when it arose.

In terms of section 75(d) of the Civil Procedure Code the answer of the defendant requires him to admit or deny the several averments of the plaint, and set out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which he means to rely for his defence. Even though it was open to the defendants to have attacked the plaint for non-observance of section 40(d) of the Civil Procedure Code, they chose not to avail of any such defence but relied amongst other matters on proceedings No. RE 4245 and moved for a dismissal of the plaintiff's action.

It is trite law that where a plaint which is not defective *ex facie* is presented and accepted, and summons is duly served on the defendants, as has occurred in this matter, the Court loses its control over the document, and it is usually left to the defendants to raise any questions as to its legal sufficiency to support the intended action. It is therefore permissible to object to the plaint for non-compliance of the requirements of the law in the answer of the defendant or on certain occasions by way of a simple motion. However, in this matter summonses having been served on defendants, they have chosen not to admit the plaintiffs claim, but to deliver to the court a written answer as was done by them.

Be that as it may, whatever be the position taken by both parties in their pleadings the question of fact or of law to be decided between them are stated in the form of an issue and the court thereupon proceeds to determine the same. (Vide section 146 (1) of the Civil Procedure Code). It is to be observed that the question of raising issues under 146 (2) by court did not arise at the commencement of the trial.

The issues thus raised by the parties when translated would be as follows...

1. As stated in the various averments of the plaint did the plaintiff become the owner of the subject matter of the action?
2. Did the defendants from 16.06.1996 continue to remain on the subject matter challenging the title of the plaintiff?
3. If the above two issues are answered in the affirmative, is the plaintiff entitled to relief as prayed for in the plaint?
4. (a) Did the husband of the plaintiff previously institute action against the mother of the defendant in proceedings No. RE 4245?

   (b) Subsequently, were the defendants added as parties to that action?

   5. Has the husband of the plaintiff in that action stated that the mother of the defendants occupied the premises in question as a tenant?
6. Was the cause of action pleaded in that case for reasonable requirement of the plaintiff's husband?
7. In that action, at the request of the husband of the plaintiff were the proceedings laid by on the basis that the premises were to be acquired by the state for the Urban Development Authority?
8. If so, can the plaintiff maintain the present action for the reliefs sought in the plaint?

It may be useful to take a commonsense approach to ascertain the rationale behind the requirement of having to plead as to when and where the cause of action arose. Such a requisite in a plaint will undoubtedly give the plaintiff or the defendant as the case may be to admit or deny the jurisdiction (patent or latent) and also an opportunity to plead the defence as to

whether the action is barred by a positive rule of law. It may also facilitate the defendant or the plaintiff as the case may be, when there is a counter claim in the answer, to raise a plea of alibi or such other defence which may finally useful to decide the fate of the action.

As far as the present case is concerned there is no such defence raised by the defendants. They neither pleaded that the action is time-barred nor their inability to plead to it as the date of the cause of action is not mentioned in the plaint. The plea of prescription being the special plea must be specifically pleaded. In the circumstances, on a perusal of the answer it is quite obvious that the defendants in their defence have not been prejudiced by the absence of the particulars required to be stated under 40 (d) of the Civil Procedure Code. In other words the main purpose of pleadings in writing under the CPC is to avoid prejudice through catching the rival party unprepared with and element of surprise. Nevertheless, the case under consideration when the plaintiff had raised the issue relating to the cause of action and when it arose the defendants have not objected to it and taken part at the trial, cross examined the witnesses, produced documents and the 3rd defendant has given evidence as well.

Moreover, the plaintiff joined issues with the defendant at the commencement of the trial and one of the issues was whether the defendants from 16.06.1996 continue to remain on the subject matter challenging the title of the plaintiff.

In the case of Hanaffi Vs Nallamma SLR-1998 Vol 1 at Page 73 the Landlord sued the tenant (1ST defendant) for ejectment. On the summons returnable day, another person (2nd defendant)

appeared claiming to be the tenant and moved that he be added as a party. In the meantime, the 1st defendant died and the plaintiff was permitted to proceed against the 2nd defendant. Judgment was then entered against the 2nd defendant. It was urged on behalf of the 2nd defendant that the plaint did not disclose a cause of action against the 2nd defendant and that the judgment against him was bad in the absence of an amended plaint. Delivering the judgment of the Supreme Court His Lordship G P S De Silva, CJ, held inter alia that "there was no reference to the 1st defendant in the issues and there was no issue as to whether the plaint disclosed a cause of action. Once issues are framed the case which the court has to hear and determine becomes crystallized in the issues and the pleadings recede to the background. On the basis of the issues raised by the parties the crucial issue was whether the 2nd defendant a tenant under the plaintiff, and that in the light of the issues framed and the evidence on record the District Court rightly entered judgment for the plaintiff against the 2nd defendant".

In the case of Pure Beverages Ltd., Vs Shanil Fernando 1997 SLR volume 3 page 202 the facts were that the plaintiff filed action for damages that he had suffered damages in consequence of the consumption of the contents of a Coco-Cola bottle that allegedly contained parts of a decomposed worm on **12.6.84**. However one of the issues raised by the plaintiff without objection was that consumption was on **12.6.94**. The District Court rejected the application of the defendant to try issue as to whether the alleged cause of action ex facie prescribed in law. Upon an interlocutory appeal being preferred against the said order, it was held by this court that as to whether the incident arose on 12.6.1984 or

12.6.1994 is a proposition of fact upon which the parties are at variance on the issues that have been settled and accepted by Court. It was further held that the plaintiff respondent by raising issue (3) on the footing that the relevant date was 12.6.1994 and not 12.6.1984 (date set out in the plaint) must clearly be taken to have abandoned the date given in the plaint and the defendant not objecting to such a departure or abandonment must be deemed to have clearly acquiesced on the plaintiff raising the issue giving a new date. Incidentally, the impugned order in that case was delivered by me in my capacity as the district judge of Colombo.

Even in this matter, when the plaintiff suggested the issue relating to the accrual of the cause of action the defendants' maintained absolute silence which meant, if not their consent, at least their acquiescence.

The learned President's counsel of the plaintiff-appellant has contended that the rules in the Civil Procedure Code make it perfectly clear that the case has been decided on the basis of pleadings and on the basis of issues on which the trial proceeded and there is no provision for any questions of fact or of law to be raised after the parties have closed their respective cases. He has further contended that the judge is required at the commencement of the trial to put in issue the disputed questions and deal with them and answer them in the judgment subject however to the reservation that depending on the evidence placed before court during the course of the trial, further issues may be raised with liberty to lead further evidence on the matter. In principle, the contention of the learned President's counsel appears to me as quite consistent with the requirement of the law and the *audi alram partem* or *audiatur et altera pars* which literally means

"hear the other side" or "hear the alternative party". It is most often used to refer to the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

As has been submitted on behalf of the appellant, the trial had been concluded and the defendants in their written submissions had suggested 4 new issues assigning them the number as 9 to 12. The issues thus suggested in the written submissions of the defendants pertain to the question of tenancy. The learned additional district judge having carefully considered them, quite correctly refused to entertain them as issues arising from the dispute involved. The basis on which she has refused the application is that no evidence had been adduced on those suggested issues.

However, to the utmost surprise of both parties, the learned district judge on her own volition raised two issues giving them the numbers as 9 and 10. Issue No 9 which is the substantial issue raised by the learned additional district judge was whether the plaintiff had failed to plead as to when the cause of action arose and if so whether the action is maintainable. The two issues raised by the learned district judge at page 9 of her judgment are reproduced below with the answers given to them.

9. Has the plaint been presented in compliance of section 40 (d) of the Civil Procedure Code? No

10. If the above issue is answered in the negative should the plaint be dismissed? Yes

On behalf of the appellant the learned President's counsel complains that the parties could never been asked whether it was correct to raise such issues, after they have closed their

cases nor were they consulted on the question whether it was possible for the court to dismiss an action on technical grounds such as the one raised by the learned judge.

I am in total agreement with the submission that the facts and the application of the law to this case must be distinguished from certain cases where a special duty is cast on court, such as in a partition action to investigate into the title as required by section 25 of the Partition Act.

In the case of Thilagaratnam Vs Athpunathan And Others SLR Vol 2 page 66, it was positively laid down by this court although there is a duty cast on court to investigate title in a Partition action, the court can do so only within the limits of pleadings, admissions, points of contest, evidence both documentary and oral. Anandacoomaraswamy, J. in the course of his judgement stated that "Court cannot go on a voyage of discovery tracing the title finding the shares in the corpus for them; otherwise parties will tender their pleadings and expect the court to do their work and their Attorneys-at Law's work for them to get title to those shares in the corpus."

The discretionary power of the district judge to raise issues after the closure of the case of all the parties and before judgment was the subject of discussion in the case of Hameed Vs Cassim reported in 1996 SLR - Volume 2 Page 30.

Commenting on the discretionary power and as to how and when it should be exercised, Dr Ranaraja, J, stated that the provisions of S.149 of the Civil Procedure Code do not preclude a District Judge from framing a new issue after the parties have closed their respective cases and before the judgement is read out in open Court. His Lordship further laid

down that "It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case."

Notwithstanding the fact that the learned district judge was quite conscious of this decision and that of Cynthia De Alwis Vs Marjorie D'alwis And Two Others 1997 SLR- 3-113 as she has distinctly referred to them in her judgment, quite unfortunately she had not been correctly guided by the principles enunciated in those judgments.

The learned district judge was completely blind to the *ratio decidendi* in the case of Cynthia De Alwis which was a decision of this court in respect of an appeal against a judgment in a partition case. In that case the District Court held that the Commissioner of National Housing, though failed to file a statement of claim and in the circumstances there was no justification and provision in the Partition Act to permit an issue to be raised as to title and interests vested in the Commissioner. Taking into consideration the nature of a partition action being an action in rem and that a final decree in such a case being one against the whole world this court held that the duty to investigate title by raising the necessary "points of contest" is a sacred duty of the district judge although it may appear to have arisen outside the pleadings. It seems that the principle behind this rule applicable to partition actions stems from the fact that a district judge in exercise of this sacred duty to investigate title cannot be found fault with for being too careful in such an exercise as those proceedings are considered actions in rem and final decree as

one binding the whole world notwithstanding certain type of specified irregularities.

Therefore, as regards a partition action the right of the judge to step out of the pleadings and documents to frame the correct points of contest cannot be disputed. However, the opinion expressed in the same case in relation to a rei vindicatio action is only obiter.

It is of much relevance to refer to the judgement in Wickramathilaka Vs Marikkar 2 NLR page 9 where Bonser CJ held that the district judge should not give effect to technical objections. This was once again emphasized by the often quoted dictum of Abraham CJ in Velupillai Vs The Chairman, District Urban Council, 39 NLR 464 where His Lordship echoed the same principle in a different way with the words of wisdom that "This is a Court of Justice and not an Academy of Law". The judges of the present day and the Bar at large should recall this concept every moment of discharging the sacred duty jointly cast on them, if they are committed to achieve expeditious disposal of cases by throwing away technicalities that may stand in their way.

Had learned district judge properly exercised the discretion and in fact refrained from raising the two unwarranted issues, the approach to the resolution of the present dispute could have been totally different. No doubt, the right to raise the proper issues is primarily a matter that should be left to the discretion of the trial judge but in this particular case the discretion has not been exercised with a touch of proper judicial mind or understanding of the correct principles involved.

I am quite conscious that an appellate court should be slow to interfere with the discretion of the district judge in this type of matters but being mindful of the manifest injustice caused to the appellant and the miscarriage of justice that had occurred, it is with great reluctance I am compelled to disapprove the capricious manner of raising the two controversial issues against all known norms of the law to the detriment of the plaintiff.

As the learned district judge has categorically stated that the plaintiff has established her ownership of the property, the burden of proving the right to continue in occupation of the plaintiff's land and premises lies entirely on the defendants. The resulting position in such a situation has been lucidly explained by His Lordship Sharvanada CJ in Theivendran Ramanathan Chettiar 1986 2 SLR 219 in the following manner..

> "An owner of a land has the right to possession of it and hence is entitled to sue for the ejectment of a trespasser. In a vindicatory action the claimant needs merely to prove two facts; namely, that he is the owner of the thing and that the thing to which he is entitled to possession by virtue of his ownership is in the possession of the defendant. Basing his claim on his ownership, which entitles him to possession, he may sue for the ejectment of any person in possession of it without his consent. Hence, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is in lawful possession".

As I have remarked earlier the learned district judge in no uncertain language has disclosed her finding that the plaintiff has successfully accomplished her task of proving her

ownership to the subject matter and the defendants are in unlawful occupation of the same as disclosed in her evidence from 16.06.1996. As has been decided by our courts an owner of immovable property is entitled to enjoy it without disturbance and without fear of unjustifiable interference from outsiders and if his enjoyment is disturbed the remedy of rei vindicatio action is always available.

For purpose of ready reference the relevant passage of the impugned judgment is given below...

> අයිතිය ප්‍රකාශ කරවා ගැනීමේ නඩුවකදී නඩුවට අදාල දේපලට අයිතිය තමාට ඇති බව සනාථ කිරීමේ කාර්යභාරය මූලික වශයෙන්ම සහ ප්‍රධාන වශයෙන් රැඳී ඇත්තේ පැමිණිලිකරු සතුව බවත් එසේ සනාථ කිරීමට අපොහොසත් වුවහොත් නඩුකරය සාර්ථක නොවන බව ඉතා පැහැදිලි කරුණකි. කෙසේ වෙතත්, නඩුවේ විෂය වස්තුව වී ඇති දේපලෙහි අයිතිය තමා සතු බව සනාථ කිරීමට **පැමිණිලිකාර පාර්ශවයට හැකියාව තිබුනද** විත්තිකරුට විරුද්ධව ඉදිරිපත් කර ඇති පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 40(අ) වන වගන්තියට අනුකූලව ඉදිරිපත් කර තිබිය යුතුය.
>
> (pages 6 and 7 of the impugned judgment)

On the own showing of the learned district judge the defendants do not seem to have established their right to occupy the subject matter. They have admittedly not recognized the plaintiff as the landlord or paid any rent from 18.06.1985. In terms of D2 the rent and ejectment action has been laid-by on that day. By way of a simple reckoning no difficulty would arise to conclude that the defendants have not paid any rent or recognized the plaintiff as the landlord or taken any steps to have them placed as tenants in the shoes of their mother at least from 18.06.1985. This is an unusual

length of time (26 years as a today) to keep an owner of a property in suspense.

If the two controversial issues are expunged from the judgment the learned district judge would have had no alternative but to answer the issues suggested by the plaintiff and the defendants in the affirmative.

Hence the findings, judgment and the decree which ended up in the dismissal of the plaintiff's action are liable to be set aside. The learned district judge who heard the case is ceased to be a judge of the original court and may not be able to rehear the case. Taking into consideration all these circumstances, to send this case back to the district court for a re-trial would mean further litigation, unnecessary expenses for both parties, and a further meaningless appeal. Such a course, if adopted would mean prolonging the agony which would certainly be unfair and not at all beneficial or conducive to the best interest of the parties.

As such I feel that justice in this matter be meted out by answering the issues afresh in the following manner.

1. As stated in the various averments of the plaint did the plaintiff become the owner of the subject matter of the action? Yes
2. Did the defendants from 16.06.1996 continue to remain on the subject matter challenging the title of the plaintiff? Yes
3. If the above two issues are answered in the affirmative, is the plaintiff entitled to relief as prayed for in the plaint? Yes
4. (a) Did the husband of the plaintiff previously institute action against the mother of the defendant in proceedings No. RE 4245? Yes

(b) Subsequently, were the defendants added as parties to that action? Yes

5. Has the husband of the plaintiff in that action stated that the mother of the defendants occupied the premises in question as a tenant? Yes
6. Was the cause of action pleaded in that case for reasonable requirement of the plaintiff's husband? Yes
7. In that action, at the request of the husband of the plaintiff were the proceedings laid by on the basis that the premises were to be acquired by the State for the Urban Development Authority? Yes
8. If so, can the plaintiff maintain have and maintain the present action on the reliefs prayed for in the plaint? Yes

For the foregoing reasons, I am compelled to set aside the judgment of the learned district judge as it had manifestly ended up in a travesty of Justice and direct that judgment and decree be entered in favour of the plaintiff in terms of the reconsidered answerers given to the issues.

Subject to the above this appeal stands allowed. Parties shall bear their own costs.

Judge of the Court of Appeal

I agree.

W L R Silva, J

Judge of the Court of Appeal

NT/-