

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

In the matter of an application
for leave to appeal

Court of Appeal No. CALA 404/2005

District Court of Marawila No: 1095/L

Deitma Doering

1st Defendant-Petitioner

Vs.

W.H. Thamara Doering &
another

Plaintiff-Respondents & Four
Defendant-Respondents

Before: Eric Basnayake J

K.T. Chitrasiri J

Counsel : S.A.D.S. Suraweera for the 1st Defendant-Petitioner

M.R. De Silva P.C. with Bandara Thalagune for the Plaintiff-Respondent

Argued On: 21.10.2009 & 11.1.2010

Written Submissions Tendered On: 20.5.2010

Decided On: 27.10.2011

Eric Basnayake J

The 1st defendant-petitioner (1st defendant) objected to issues 9, 10 and 11 raised for the plaintiffs-respondents (plaintiffs). The learned Judge after inquiry, on 27.9.2005 decided to consider the objections at the end of the trial and directed the defendants to raise their issues and thereafter the defendants too raised issues. The 1st defendant filed this leave to appeal application to have the order dated 27.9.2005 of the learned District Judge of Marawila postponing the decision on the objections set aside and to have the three issues rejected. Leave was granted by this court on 1.6.2009.

The three issues are as follows:-

9. Due to family disputes did the 1st defendant act in an ungrateful manner towards the plaintiff and the children of the marriage?
10. Did the 1st plaintiff file Maintenance case No. 39668 in the Magistrate's Court of Marawila to sustain the 1st plaintiff and the children?
11. Has a cause of action arisen to have the deed of gift No. 1960 declared invalid on the ground of ingratitude on the part of the 1st defendant?

Submissions of the learned counsel for the 1st defendant

The learned counsel submitted that the three issues relate to a cause of action based on gross ingratitude. He submitted that on perusal of the plaint it appears that this action is not based on gross ingratitude but a trust in favour of the

plaintiff. The learned counsel submitted that there is no mention in the plaint of a cause of action based on gross ingratitude. Therefore on the face of the plaint plaintiffs are not entitled to raise issues on a cause of action not pleaded. The learned counsel submitted that in the event the issues are allowed to stand the defendants will be at a distinct disadvantage as they have filed answer only answering the averments contained in the plaint and the defendants will be denied an opportunity to place their case fully before the trial court and take up any defence in their answer.

The learned counsel submitted that the very first deed pleaded in the plaint is the deed of gift and the plaintiffs have opted to obtain a decree for cancellation of this deed on the basis of trust. In the event the plaintiffs are allowed to challenge the said deed on the ground of gross ingratitude, the plaintiffs will not be able to maintain their action as there will be a conflict in the causes of action. If the deed No. 1960 is challenged on the basis of a trust, the plaintiffs have to rely on the fact that they have transferred the property to the 1st defendant but without the intention of passing the beneficial interest. On the other hand if the plaintiffs are to rely on a cause of action of gross ingratitude the plaintiffs admit the passing of the beneficial interest but for the reason of gross ingratitude the said deed is liable to be revoked. Hence the learned counsel submitted that the two claims cannot co-exist in law and the plaintiffs could not have sought relief against the defendants on both causes of action at the same time. He submitted that the plaintiffs cannot approbate and reprobate.

The learned counsel also submitted that the learned trial Judge should have made a ruling on the matters involved at the first instance without waiting till the

conclusion of the case as the defendants should know the exact scope of the case to place their defence. It was submitted that the order of the learned Judge has placed an additional burden on the defendants to adduce evidence in respect of a cause of action which was not even pleaded and without knowing as to whether the said evidence will be considered at the end of the trial.

Submission of the learned counsel for the plaintiffs

The learned President's Counsel submitted that the fact of family disputes between the 1st plaintiff and the 1st defendant as well as the ingratitude displayed by the 1st defendant by neglecting to feed the family and a maintenance action filed in the Magistrate's Court of Marawila is quite conspicuously stated in paragraph 10 of the plaint. He submitted that the learned Judge quite correctly postponed the answering of the objections to the end of the case.

Section 146 of the Civil Procedure Code states what material to use in the framing of issues. Section 146 (2) states as follows:- ...the court shall, **upon the allegation made in the plaint, or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of parties as may appear necessary, ascertain upon what material proposition of fact or law the parties are at variance**, and shall thereupon proceed to record the issues on which the right decision of the case appears to the court to depend (emphasis added).

It is appropriate at this stage to deal with the facts of this case as it appears from the pleadings and documents (It is well settled that the framing of issues is not restricted to pleadings (A.G. v. Smith 8 N.L.R. 229, Iynul Kareeza v. Jayasinghe 1986 CALR 109). The 1st plaintiff married the 1st defendant a German national on

26.12.1983. By deed 1677 of 27.4.1984 marked P1 the two plaintiffs (sister and brother) became owners of the two allotments referred to in the schedule to the plaint. On 28.3.1988 the 1st plaintiff (owner of ½ of the two lands referred to in the schedule) gifted ½ of her share (that is ¼ of the whole land) to the 1st defendant. The 2nd defendant (Pan Construction & Industries (Pvt.) Ltd) was formed on 15.11.1991.

The plaintiffs had sold both lots referred to in the schedule to the plaint to the 2nd defendant company for a sum of Rs.2 million by deed No. 844 of 31.5.1993. According to the plaintiffs no consideration had passed in this transaction. The deed states that the vendors admit that the money was paid prior to the execution.

In the plaint the plaintiffs specifically pleaded in paragraphs 21 to 24 four separate causes of action.

The 1st cause of action

The plaintiffs in paragraphs 7,8,12,13,14,15 and 16 pleaded that the transfer referred to in deed 844 in fact is a trust. On the face of it, it is a sale. However the plaintiffs state that no money passed and the plaintiffs never intended to pass the beneficial interest.

2nd cause of action

The plaintiffs in paragraphs 9, 10 and 11 make reference to deed No. 1960. Deed 1960 is a deed of gift absolute and irrevocable. One of the grounds that such a deed may be declared void is gross ingratitude. The complaint of the learned counsel for the 1st defendant is that the word “ingratitude” is not mentioned in

the plaint. The plaintiffs refer to the deed of gift No.1960 in paragraph 9 of the plaint. In paragraphs 10 and 11 the plaintiffs state that the 1st defendant due to family disputes, failed and neglected to maintain the 1st plaintiff and the children of their marriage, and as a result the 1st plaintiff had to file an action in the Magistrate's Court of Marawila claiming maintenance and the 1st defendant had filed a divorce case in the District Court. In paragraph 11 the 1st plaintiff stated that she was removed from the directorship of Pan Construction & Industries (Pvt.) Ltd. The deed 844 is in connection with this company where she claims a trust. 3rd cause of action: to claim damages in a sum of Rs.1 million. 4th cause of action: to obtain an interim injunction.

The 1st plaintiff had gifted ½ of her share of the property to the 1st defendant who was her husband due to love and affection that she had towards him. She states that the husband who is under a duty to feed her and the children stopped doing so. She also states that her income was reduced due to the reason of her removal from the director post. She also states that her husband has now filed a divorce case against her.

One is entitled to get a deed of gift declared void on the ground of gross ingratitude. Whether the facts mentioned in the plaint, namely, not maintaining the wife and children, filing a divorce case and removal of the wife from directorship would be considered as grounds of gross ingratitude is a question of law. These are the circumstances that the plaintiff is relying on to get this deed declared void. The word ingratitude is not mentioned in the plaint. In case the plaintiffs had used the word gross ingratitude in the plaint this objection would not have taken. However, if the above material would amount to ingratitude, the

court may decide on the deed. If the court finds that the material submitted would not amount to ingratitude the issue may be answered in favour of the 1st defendant.

The plaintiffs filed this action to mainly get two deeds declared void. One of them is deed 1960 which is a gift. The other deed is N. 844 which is a sale. A deed of sale cannot be declared void on the ground of ingratitude. However deed of gift No.1960 could be declared void on the ground of ingratitude. It is for this purpose the plaintiffs mentioned in the plaint about the filing of the maintenance and the divorce actions. Why should the plaintiffs mention in this case that she is not being sustained by her husband? Why should she mention that she had been removed from the directorship? She believed that the marriage would last and that her love towards her husband and vice versa would last. She gifts half of her properties to the 1st defendant with the hope of continuing to have that love and affection. She naturally expects the husband to sustain her. With that belief she writes her properties to her husband. After the properties are gifted, the 1st defendant neglects to maintain her and the children. If these facts cannot be considered as amounting to ingratitude conduct the court may answer the issue in the negative.

The conduct of the 1st defendant becomes relevant to decide the validity of deed No.1960 which is a deed of gift. While deciding on the validity the court has to decide whether the 1st defendant's conduct amounts to gross ingratitude? The conduct is the failure to sustain the plaintiff and the children etc. The failure to sustain may not be an act of ingratitude. The question is whether the matters set

out could help court to raise issues 9, 10 and 11? Is the material sufficient to raise issues 9, 10 and 11?

On the face of it deed No. 844 is an outright sale. By this deed the plaintiffs sell the whole land (lands described in schedule as 1 and 2) to the 2nd defendant. The plaintiffs claim this to be a trust. Plaintiffs state that no money was paid although on the face of the deed the sale was for a sum of Rs. 2 million. The plaintiffs state that the beneficial interest had not passed. The plaintiffs have to bring evidence to prove the trust. If the plaintiffs succeed in proving a trust the plaintiffs may not depend on the issue with regard to the deed of gift as the deed 844 involves the whole land. If the plaintiffs fail in proving a trust, the plaintiffs may fall back on the deed of gift. The deed of gift would have to be declared void on the ground of ingratitude.

The plaintiffs pleaded certain facts to get the deed of gift declared invalid. The plaintiffs relied on those facts to prove ingratitude which would help the plaintiffs to have the deed declared void. The question is by not using the word "ingratitude", the plaintiffs should be shut off from raising it as an issue. I am of the view that the plaintiffs pleaded those facts in order to challenge this deed of gift. Therefore I am of the view that the issues 9, 10 and 11 should be allowed. Once these issues are allowed it would enable the plaintiffs to bring in evidence. The court may decide whether the evidence placed before court amounts to ingratitude.

I am of the view that there is no conflict between the two causes of action. One cause of action relates to the deed of gift No 1960. If this deed of gift is to be declared void the plaintiffs would have to prove ingratitude on the part of the 1st

defendant. Issues 9, 10 and 11 are concerning the issue of ingratitude. Paragraphs 9, 10 and 11 of the plaint are concerning these issues. Whether what is pleaded amounts to ingratitude or not will have to be decided. That will be at the end of the case. Deed No. 844 is concerning the trust. This has no connection to deed 1960. Deed 844 was executed in 1993. Deed 1960 was executed on 28.3.1988.

By deed No. 1960 the 1st plaintiff had gifted $\frac{1}{4}$ of the property. Even if the deed of gift is declared valid, plaintiffs may proceed to establish a trust in respect of $\frac{3}{4}$ th of the property. All that needs to be done is to adduce evidence. I agree with the learned counsel for the 1st defendant that the learned Judge should have made an order with regard to the objection raised, immediately. The order cannot be postponed till the end of the case. What is the position if the Judge disallows the issues raised or upholds the objection? By this time evidence would have been led to prove the issues. As submitted by the learned counsel the parties would be put to unnecessary expenditure. The decision should be taken immediately whether the issues should be allowed or not.

For the reasons given, I am of the view that issues 9, 10 and 11 should be allowed. The objection raised against the framing of these issues is overruled. The appeal is partly allowed. No costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal