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

21. Wadduwage Lilinona,
23. Pathirage Gunasena.
24. Pathirage Piyasena,
25. Pathirage Sumanaratne,
All of Remuna.

DEFENDANT-APPELLANTS

CASE NO: CA/658/1996/F

DC HORANA CASE NO: 2808/P

Vs.

Wadduwage Nimal Jayasiri,
Remuna.

PLAINTIFF-RESPONDENT

Before: Mahinda Samayawardhena, J.

Counsel: Atula Perera for the Appellant.
Ranjan Suwandaratne, P.C., with Anil Rajakaruna for the Respondent.

Written submissions:
By the Respondent on 07.08.2018
By the Appellants on 05.10.2018

Decided on: 15.10.2018

Samayawardhena, J.

The plaintiff instituted this action in the District Court of Horana seeking partition of the land known as *Imewatta* among the plaintiff and the 1st-28th defendants. After trial, learned District Judge delivered the Judgment on 29.08.1996. It is against this Judgment the 18th, 19th, 21st-25th defendants have preferred this appeal.

Learned counsel for the appellants and learned President's Counsel for the plaintiff-respondent have, before the previous Bench, agreed the appeal being disposed of by way of written submissions. The written submission of the respondent was filed before that of the appellants even though ideally it should have happened *vice versa*.

In the written submission, learned President's Counsel for the respondent moves to dismiss the appeal of the 18th, 19th and 22nd defendants *in limine,* as they have not filed a Notice of Appeal before joining with the rest of the appellants in the Petition of Appeal. Learned counsel for the appellants has not responded to that threshold objection in his written submissions. However, when I go through the brief, I am fully satisfied that the 18th, 19th and 22nd defendants have not filed a Notice of Appeal.

There cannot be any dispute that, without filing a Notice of Appeal, a party cannot straightaway file a Petition of Appeal. Filing the Notice of Appeal in terms of sections 754(3), 754(4), 755(1) and 755(2) of the Civil Procedure Code is a mandatory prerequisite to filing the Petition of Appeal. Such a patent and blatant omission is incurable even by invoking the provisions of

section 759(2) of the Civil Procedure Code. (*Vide Paranatota v. Napo Singho*[1], *Arulampalam v. Fernando*[2], *Sumanasekera v. Yapa*[3])

The appeal of the 18th, 19th and 22nd defendants is dismissed *in limine*.

Let me now consider the appeal of the 21st, 23rd, 24th and 25th defendant-appellants.

The pivotal argument of learned counsel for the appellants in his written submissions is that, irrespective of the Deeds tendered by the parties at the trial, the learned District Judge should have dismissed the partition action as, according to the extract marked P1, the original owners of the land are Manis, Sadiris and Thegis; and not the ones stated by the appellants and the respondent.

According to the plaint, there are two original owners to the land to be partitioned. They are Davith Appu and Singho Appu. The plaintiff unfolded the pedigree and raised issues on that basis.

The appellants filed an amended statement of claim dated 04.09.1992 and raised issues on that statement of claim at the trial.

They are as follows:

3. Was Wadduwage Singho Appu the original owner of a ½ share of the land sought to be partitioned?

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[1] [1986] 3 CALR 318
[2] [1986] 1 CALR 651
[3] [2006] 3 Sri LR 183

4. Was Wadduwage Kumatheris the original owner of a 1/8 share of the land by purchase upon Deed No.5315 dated 09.11.1915?

5. Was the said Kumatheris a son of Wadduwage Singho Appu entitled to a further 1/8 share on Deed No.7781 dated 08.07.1919, apart from the rights derived by inheritance?

6. Was Davith Appu entitled to only ¼ share of the land?

7. Is Manis entitled to only ¼ share that Davith had?

8. Should the balance ¾ share of this land go to the 21st-25th defendants as set out in the plaint?

In brief, the position taken by the appellants at the trial as crystallized in the said issues is that, Singho Appu, as an original owner, was entitled to ½ of the corpus and, Davith Appu, as an original owner, was entitled to ¼ of the corpus—vide issue Nos. 3 and 6 above. In addition, the appellants seem to be saying that Kumatheris, as an original owner, was entitled to 1/8 of the corpus—vide issue No.4 above. Then the appellants say that "balance ¾ share" shall devolve on them according to the pedigree of the plaintiff—vide issue No.7 above. I cannot understand their argument at the trial. If they admit Singho Appu is entitled to ½, Davith Appu to ¼, and Kumatheris to 1/8, there is no balance ¾ share. It appears that the appellants do not have a clear idea about their claim.

Having taken up such a position at the trial and also in the Petition of Appeal, learned counsel for the appellants, reminding this Court that this is a partition action and therefore an action in *rem*, now, for the first time in appeal (by way of written

submissions and unknown to the respondent) states that the original owners of the land are Manis, Sadiris and Thegis and therefore the learned District Judge should have dismissed the plaintiff's action.

I have no hesitation to reject that argument.

It is settled law that no party can be allowed to make at the trial a case materially different from what he has placed on record. *(vide Hildon v. Munaweera [1997] 3 Sri LR 220, YMBA v. Abdul Azeez 1997 BALJ 7, Ranasinghe v. Somawathie [2004] 2 Sri LR 154.)* Explanation 2 to section 150 of the Civil Procedure Code reads thus: "*The case enunciated must reasonably accord with the party's pleading, i.e., plaint or answer, as the case may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet. And the facts proposed to be established must in the whole amount to so much of the material part of his case as is not admitted in his opponent's pleadings.*"

In parity of reasoning, Chief Justice G.P.S. de Silva in *Candappa nee Bastian v. Ponnambalampillai [1993] 1 Sri LR 184* stated that the above principle is applicable in appeals too, if a party tries to present a case materially different from the case presented before the Trial Court. His Lordship commented:

"*Thus it is seen that the position taken up in appeal for the first time was not in accord with the case as presented by the defendant in the District Court. It is well to bear in mind the provisions of explanation 2 to section 150 of the Civil Procedure Code. It reads thus: "The case enunciated must reasonably accord with the party's pleading, i.e. plaint or answer, as the case*

may be. And no party can be allowed to make at the trial a case materially different from that which he has placed on record, and which his opponent is prepared to meet ……" A fortiori, a party cannot be permitted to present in appeal a case different from the case presented before the trial Court except in accordance with the principles laid down by the House of Lords in The Tasmania (1890) 15 App. Cases 233 and followed by Dias, J. in Setha v. Weerakoon 49 NLR 225, 228, 229. The question of licence or subtenancy involved matters of fact which were not put in issue at the trial. This was certainly not a pure question of law which could have been raised for the first time in appeal."

In *Janashakthi Insurance Co. v. Umbichy Ltd. [2007] 2 Sri LR 39* at pages 44 and 45 Justice Thilakawardane in the Supreme Court stated: "*The defendant-appellant is prohibited from setting up a different case from that set up at the trial…..There is no doubt that the defendant-appellant cannot take up a case in appeal, which differs from that of the trial.*"

It is equally well settled law that questions of fact or mixed questions of fact and law cannot be taken up for the first time in appeal. *(vide Hameed alias Abdul Rahman v. Weerasinghe [1989] 1 Sri LR 217, Simon Fernando v. Bernadette Fernando [2003] 2 Sri LR 158, Piyadasa v. Babanis [2006] 2 Sri LR 17 at 24, Leslin Jayasinghe v. Illangaratne [2006] 2 Sri LR 39 at 47.*)

There is no scintilla of doubt that what the appellants put in issue for the first time in appeal is a pure question of fact.

Partition action is not an exception to those fundamental principles.

In *John Singho v. Pedris Hamy (1947) 48 NLR 345* it was held that: "*Where in a partition action all parties agree on the points in dispute and state them to Court the Judge should not consider without giving due notice to the parties any other matters that may appeal to him to arise between the parties in the course of the proceedings. The position will however be different when the points in dispute are not set down in the form of issues*."

The principal argument of the appellants fails.

Without prejudice to the above, the next argument of learned counsel for the appellants is that the land sought to be partitioned was originally owned not by Davith Appu and Singho Appu as claimed by the respondent, but only by Singho Appu as claimed by the appellants. This is a misleading argument. According to the issues raised by the appellants at the trial, it was never the position of the appellants at the trial that Singho Appu was the only original owner. If I may repeat, at the trial, their position was that Singho Appu was entitled to only ½ of the land (which was conceded by the plaintiff). In appeal they cannot say that Singho Appu was the sole original owner.

At the trial, the appellants have not given evidence nor called any other witness on their behalf, but through the evidence of the plaintiff, three Deeds 18V1-18V3 have been marked. Rights derived from those Deeds have correctly been assigned to the 21st-25th defendants in the Judgment. There is no complaint about it.

The alternative argument of the appellants must also fail.

This appeal is manifestly devoid of merits.

The Judgment of the District Court is affirmed and the appeal is dismissed with costs which I fix at Rs.50,000/= payable by the appellants to the plaintiff-respondent.

Judge of the Court of Appeal