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

Sirimewan Maha Mudalige Kalyani Sirimewan,
Udukekulawala, Bujjomuwa.
Plaintiff

SC/APPEAL/47/2017
WP/HCCA/KUR/165/2011(F)
DC KULIYAPITIYA NO. 15707/L

Vs.

Herath Mudiyanselage Gunarath Menike,
Hemudawa, Sandalankawa.
Defendant

AND

Sirimewan Maha Mudalige Kalyani Sirimewan,
Udukekulawala, Bujjomuwa.
Plaintiff-Appellant

Vs.

Herath Mudiyanselage Gunarath Menike,
Hemudawa, Sadalankawa.
Defendant-Respondent

AND NOW BETWEEN

Sirimewan Maha Mudalige Kalyani Sirimewan,
Udukekulawala, Bujjomuwa.
Plaintiff-Appellant-Appellant

Vs.

Herath Mudiyanselage Gunarath Menike,
Hemudawa, Sadalankawa.
Defendant-Respondent-Respondent

Before: Hon. Chief Justice Jayantha Jayasuriya, P.C.
Hon. Justice S. Thurairaja, P.C.
Hon. Justice Mahinda Samayawardhena

Counsel: S.N. Vijithsingh with Tharushi Ishanka for the Plaintiff-Appellant-Appellant.

Upul Kumarapperuma, P.C. with Radha Kuruwitabandara for the Defendant-Respondent-Respondent.

Argued on: 13.02.2024

Written Submissions:

By the Plaintiff-Appellant-Appellant on 13.03.2024
By the Defendant-Respondent-Respondent on 14.03.2024

Decided on: 10.05.2024

Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Kuliyapitiya on 26.12.2007 seeking cancellation of the deed of gift No. 14869 dated 12.10.2002 on the basis that the said deed was executed by the plaintiff's late father in favour of the defendant under undue influence and threats by the latter. The defendant sought dismissal of the plaintiff's action on the basis that it was a voluntary act of the donor. After trial, the District Court dismissed the plaintiff's action. On appeal, the High Court of Civil Appeal affirmed the judgment of the District Court. The plaintiff appealed to this Court from the judgment of the High Court.

According to the uncontradictory evidence led in the *inter partes* trial in the divorce case between the plaintiff's father and the mother (V1), the plaintiff's mother left the matrimonial home on 23.12.1972. By judgment dated 16.03.2000, the District Court had granted the divorce in favour of the plaintiff's father on the ground of malicious desertion on part of the plaintiff's mother. The father had paid a sum of Rs. 2,500,000 as *ex gratia* payment to the mother. At the inquiry before the Magistrate into the death of the plaintiff's father, the plaintiff's mother had testified that she left the matrimonial home in 1973.

At the trial in the instant case, the plaintiff in her evidence stated that the defendant had been living with the plaintiff's father since 1985 as his mistress. She further stated that approximately 2-3 months after the defendant's arrival, her father expelled the plaintiff's mother from the matrimonial home, and the plaintiff also accompanied the mother.

This evidence of the defendant is contrary to the unchallenged evidence led in the parents' divorce case. I must emphasise that the divorce trial was not *ex parte* but *inter partes* where the plaintiff's mother was represented by a lawyer.

The impugned deed had been executed on 12.10.2002 after entering the judgment in the divorce case on 16.03.2000 but before the decree *nisi* was made absolute. The plaintiff's father got married to the defendant on 02.05.2003 after the decree *nisi* was made absolute. There was no rationale for exerting undue influence on the plaintiff's father to execute the deed in favour of the defendant because by that time the divorce proceedings had practically concluded without any opposition from the plaintiff's mother, who had also received a significant sum of money as *ex gratia* payment.

The plaintiff's father died on 16.05.2006. If the defendant started living with the plaintiff's father as husband and wife from 1985, executing the impugned deed in favour of the defendant in 2002 does not raise suspicion at all.

The evidence of other witnesses called by the plaintiff including the Buddhist priest in the village temple does not support the plaintiff's story. The evidence of the priest is that, from the time the priest came to the temple, the plaintiff's father and the defendant lived in harmony as husband and wife for about 16 years.

The plaintiff states that her father died under suspicious circumstances. At the trial, the plaintiff raised issues on this point. This is not directly relevant to the matter to be resolved in this case. The matter in issue in this case is whether the deed was executed under undue influence or threats and not whether the plaintiff's father died under suspicious circumstances. However, the verdict of the inquirer into sudden deaths dated 16.05.2006, and the verdict of the Magistrate dated 11.07.2007, do not indicate any foul play. The plaintiff's father was 65 years old at the time of his death, which was attributed to liver failure due to cirrhosis. The death was declared a natural death. The plaintiff's primary grievance is that despite the coroner's order to bury the deceased's body,

it was cremated. The Magistrate's Court dealt with this matter and the defendant was punished according to law. That does not warrant the deed to be declared invalid.

The plaintiff states in her evidence that the deed was executed under death threats. However, there is not even a police complaint made about death threats or any family dispute, either by the deceased father or by the plaintiff herself.

In short, there is no evidence acceptable to Court to prove undue influence or death threats. The judgment of the District Court is purely based on evidence. Both the District Court and the High Court have analysed the evidence in detail before dismissing the plaintiff's action. There is no necessity to repeat the analysis of evidence in this judgment.

This Court has granted leave to appeal on the questions of law as stated in paragraph 16(ii)-(vi) of the petition. At the argument, learned counsel for the plaintiff-appellant stated that he would not pursue the question in paragraph 16(iii) of the petition. Let me now consider this appeal in light of the questions of law raised by the plaintiff-appellant.

16(ii). Has the High Court of Civil Appeal erred in law in holding that the father of the plaintiff could transfer the rights of the entire property when the mother of the plaintiff's father was alive?

The plaintiff's father seems to have derived title to the property from the paternal inheritance. Learned counsel for the plaintiff raises this question to suggest that the plaintiff's father was not the sole owner of the land conveyed by the impugned deed. This assertion is based on the premise that when the plaintiff's grandfather died, his wife, the plaintiff's grandmother, was alive, and therefore, one half of the land should belong to the widow.

In the District Court, the plaintiff presented the case on the basis that the plaintiff's father was the sole owner of the land. The plaintiff maintained the same position even before the High Court. The plaintiff cannot take up a new position for the first time before the Supreme Court, which is not a question of law but a question of fact.

A party to an action is bound by specific constraints regarding the presentation of his case. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by Court, a party cannot present a different case at the trial from what was already raised by way of issues. Thirdly, once the judgment is pronounced by the trial Court, the losing party cannot present a different case before the appellate Court from what was presented in the lower Courts, unless the new ground is on a pure question of law and not on a question of fact or on a mixed question of fact and law.

These rules seem to have universal application when the decisions of other jurisdictions are considered.

In *Mokweni and Others v. Plaatjies and Others* [2023] ZAWCHC 266, Nziweni J. in the High Court of South Africa stated at paragraph 17:

> *Undoubtedly, raising an entirely new issue for the first time on appeal is something to be frowned on. This is because, it is well settled that appellate courts do not decide any issue that was not raised in the court a quo. The upshot of this is that a party cannot raise an issue on appeal that was not raised in the court a quo unless it is a pure question of law. Hence, a party must seek leave of the appellate court to introduce a new issue on appeal.*

The Indian Supreme Court has followed the same practice. In *Chitturi Subbanna v. Kudapa Subbanna & Others* 1965 AIR 1325, Mudholkar J. declared:

> *It is right and proper that parties to a litigation should not be permitted to set up the grounds of their claims or defence in driblets or at different stages and embarrass the opponents. Considerations of public policy require that a successful party should not, at the appellate stage, be faced with new grounds of attack after having repulsed the original ones. The proper function of an appellate court is to correct an error in the judgment or proceedings of the court below and not to adjudicate upon a different kind of a dispute that was never taken before the court below. It is only in exceptional cases that the appellate court may in its discretion allow a new point to be raised before it provided there are good grounds for allowing it to be raised and no prejudice is caused thereby to the opponent of the party permitted to raise such point.*

In *Jones v. MBNA International Bank* [2000] EWCA Civ 514, Peter Gibson L.J. elucidated the rationale underlying these rules while summarising the English law on the matter at para 38:

> *It is not in dispute that to withdraw a concession or take a point not argued in the lower court requires the leave of this court. In general the court expects each party to advance his whole case at the trial. In the interests of fairness to the other party this court should be slow to allow new points, which were available to be taken at the trial but were not taken, to be advanced for the first time in this court. That consideration is the weightier if further evidence might have been adduced at the trial, had the point been taken then, or if the decision on the point requires an evaluation of all the evidence and could be affected by the impression which the trial judge receives*

> *from seeing and hearing the witnesses. Indeed it is hard to see how, if those circumstances obtained, this court, having regard to the overriding objective of dealing with cases justly, could allow that new point to be taken.*

The same approach was adopted by the High Court of Australia in *Water Board v. Moustaka* (1988) 62 ALJR 209 where Chief Justice Mason and Justices Wilson, Brennan and Dawson, after a careful consideration of precedent on the matter held at para 13:

> *More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.*

In the Sri Lankan context, the proposition that a question of fact can be raised for the first time in appeal is mainly based on the old decision of the House of Lords in *The Tasmania* (1890) 15 App. Cases 223 at 225 where Lord Herschell stated:

> *It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box.*

In the Supreme Court case of *Appuhamy v. Nona* (1912) 15 NLR 311 at 312, Justice Pereira raised some doubt about the acceptability of the above position in the context of procedure we adopt in Sri Lanka where a civil trial is conducted on identified issues. His Lordship stated that a new point could be entertained in appeal if "*it might have been put forward in the Court below under some one or other of the issues framed*".

> *I am not sure that this ruling would apply to a system of procedure in which the framing of issues at the trial is an essential step except to the extent of admitting a new contention urged for the first time in the Court of Appeal, which, though not taken at the trial, is still admissible under some one or other of the issues framed. Under our procedure all the contentious matter between the parties to a civil suit is, so to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other, and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under some one or other of the issues framed, and when such a ground, that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the case of the Tasmania may well be observed.*

Justice Pereira did not entertain the question of fact raised for the first time in that appeal.

The cumulative effect of these two leading decisions (i.e. *The Tasmania* and *Appuhamy v. Nona*) is that a question of fact can be raised for the first time in appeal if:

(a) "*it might have been put forward in the Court below under some one or other of the issues framed*"; and

(b) "*if it is satisfied beyond doubt*" that

(i) "*it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial*"; and

(ii) "*no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box*".

Later cases such as *Arulampikai v. Thambu* (1944) 45 NLR 457, *Setha v. Weerakoon* (1948) 49 NLR 225, *Ranaweera Menike v. Rohini Senanayake* [1992] 2 Sri LR 180 at 191, *Somawathie v. Wilmon* (*supra*) followed the above two decisions.

In *Leechman Co. Ltd v. Rangalle Consolidated* [1981] 2 Sri LR 373, Justice Soza stated at page 391:

> *Where the point depends upon a question of fact which is disputed and should be determined on evidence, then it cannot be taken up for the first time in appeal unless the facts necessary for the determination appear in the evidence and are not in dispute at all.*

The plaintiff in the instant appeal has not satisfied the above requisites in order for this Court to entertain the new points of facts raised for the first time on appeal.

16(iv). Has the High Court of Civil Appeal erred in law in holding that the plaintiff has failed to establish that the impugned deed was executed under undue influence and threats exerted by the defendant on the plaintiff's father?

Through this question of law, learned counsel for the plaintiff took pains to present a different argument in terms of the burden of proof for the first time before the Supreme Court. The trial in the District Court

proceeded on the basis that the burden of proof of undue influence was on the plaintiff. When reading the written submissions filed before the High Court and the judgment of the High Court, it is abundantly clear that the plaintiff maintained the same position in the High Court. The plaintiff's argument before the High Court was that, notwithstanding the fact that she proved undue influence in the execution of the deed, the District Court held otherwise.

However, learned counsel for the plaintiff referring to section 111 of the Evidence Ordinance argues for the first time before this Court that the defendant was in a position of active confidence, and therefore the burden of proving the good faith of the execution of the deed falls on the defendant. In other words, learned counsel submits that the burden was on the defendant to prove the negative; namely, that she did not exercise undue influence on the plaintiff's father in the execution of the deed.

This in my view is not a pure question of law but a mixed question of fact and law because in order to shift the burden as counsel for the plaintiff now suggests, there are prerequisites to be met by the plaintiff.

In this case, at the commencement of the trial, the execution of the deed was recorded as a formal admission.

Thereafter, the plaintiff raised issues on the basis that the plaintiff's father died under suspicious circumstances mainly because of the cremation instead of burial, which I have already stated, is irrelevant to decide the main issue in this case.

Thereafter the plaintiff raised issues on the basis that the deed was executed under undue influence and death threats.

Once the due execution of the deed, in terms of section 2 of the Prevention of Frauds Ordinance, No. 7 of 1840, as amended, is admitted, the general

principle is that, the burden shifts to the opposing party to prove undue influence, fraud, conspiracy, coercion, or any other ground he relies upon to invalidate the deed.

If the plaintiff's position was that the burden of proof of the negative was on the defendant, she ought to have presented the case in the trial Court in that manner. This was not done. The concept of fair trial demands it. The administration of justice is not a game of strategy but rather a solemn and earnest pursuit to uncover the truth.

In any event, both parties had led evidence at the trial: the plaintiff led evidence that there was undue influence and the defendant led evidence to prove that there was no undue influence. The District Court and the High Court accepted the defendant's version. On the facts and circumstances of this case, there is no reason for this Court to interfere with that finding.

16(v). Could the issue No. 21 and 22 be answered in favour of the defendant in the circumstances of this case?

The issue No. 21 was whether the impugned deed was executed by the plaintiff's father voluntarily. The issue No. 22 was whether the defendant is entitled to the reliefs sought in the answer.

After analysing the evidence, the District Court has answered these two issues in the affirmative and the High Court has affirmed it. Learned counsel for the plaintiff does not explain how the analysis of evidence made by the District Court, which was affirmed by the High Court, is perverse.

16(vi). Has the High Court of Civil Appeal erred in law by not considering the evidence in the correct perspective?

In view of the forgoing analysis, this question must be answered in the negative.

The judgment of the High Court of Civil Appeal is affirmed and the appeal is dismissed. The defendant is entitled to costs in all three Courts.

Judge of the Supreme Court

Jayantha Jayasuriya, P.C., C.J.
I agree.

Chief Justice

S. Thurairaja, P.C., J.
I agree.

Judge of the Supreme Court