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

Hettiarachchige Weerasekara,
No. 623, Kandewaththa Road,
Meegoda.
Plaintiff

SC APPEAL NO: SC/APPEAL/49/2014
HCCA NO: WP/HCCA/AV/1004/2009(F)
DC HOMAGAMA CASE NO: 2456/L

Vs.

1. Rajaguru Patabendige
   Kamalawathie Devasurendra,
   Kandewatta, Parana Para,
   Meegoda.
   Defendant
2. Danthasinghe Patabendige Shanthi Anoma
3. Danthasinghe Patabendige Latha Danthasinghe
   Both of No. 6, Thennekumbura,
   Kandy.
4. Danthasinghe Patabendige Indrani Danthasinghe,
   No. 649/1, Old Road,
   Meegoda.

5. Danthasinghe Patabendige Ashoka Leelarathne,
   No. 51, Walawwaththa Road,
   Gangodawila, Nugegoda.
   Added Defendants

AND

2. Danthasinghe Patabendige Shanthi Anoma
3. Danthasinghe Patabendige Latha Danthasinghe
   Both of No. 6, Thennekumbura,
   Kandy.
4. Danthasinghe Patabendige Indrani Danthasinghe,
   No. 649/1, Old Road, Meegoda.
5. Danthasinghe Patabendige Ashoka Leelaratne,
   No. 51, Walawwaththa Road,
   Gangodawila, Nugegoda.
   Defendant-Appellants

Vs.

Hettiarachchige Weerasekara,
No. 623, Kandewaththa Road,
Meegoda.
Plaintiff-Respondent

AND NOW BETWEEN

Hettiarachchige Weerasekara,
No. 623, Kandewaththa Road,
Meegoda.
Plaintiff-Respondent-Appellant

Vs.

2. Danthasinghe Patabendige Shanthi Anoma
3. Danthasinghe Patabendige Latha Danthasinghe
   Both of No. 6, Thennekumbura, Kandy.
4. Danthasinghe Patabendige Indrani Danthasinghe,
   No. 649/1, Old Road, Meegoda.

4A. Dininda Thamara,
No. 06, Thennekumbura, Kandy.

5. Danthasinghe Patabendige Ashoka Leelarathne,
   No. 51, Walawwaththa Road,
   Gangodawila, Nugegoda.
   Defendant-Appellant-Respondents

Before: Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Achala Wengappuli
Hon. Justice Mahinda Samayawardhena

Counsel: Shiraz Hassan for the Plaintiff-Respondent-Appellant.
B. Jayamanne for the 2nd – 5th Defendant-Appellant-Respondents.

Argued on: 28.05.2024

Written Submissions:

By the Plaintiff-Respondent-Appellant on 14.06.2024
By the Defendant-Appellant-Respondents on 13.06.2024

Decided on: 29.08.2024

Samayawardhena, J.

The plaintiff filed this action in the District Court of Homagama against the 1st defendant seeking declaration of title to, ejectment of the defendant from, the land described in the schedule to the plaint, and damages. The plaintiff's position was that he became the owner of the land by the Deed of Transfer marked P3. The 1st defendant filed answer seeking dismissal of the plaintiff's action. Her position was that P3 is not an outright transfer although it appears to be so, but rather a mortgage. She also averred that her four children should be added as defendants. Those four children were subsequently added as 2nd to 5th defendants. Thereafter the 1st defendant passed away and the plaintiff's Attorney-at-Law informed the Court that the plaintiff would proceed with the case only against the 2nd to 5th defendants. There was no objection to this application.

The 2nd to 5th defendants filed a joint answer dated 03.02.1998 seeking dismissal of the plaintiff's action and a declaration that the 2nd to 5th defendants are the absolute owners of the land. Additionally, they prayed that in the event the case is decided in favour of the plaintiff, the plaintiff should be ordered to pay a sum of Rs. 100,000 to the said defendants for improvements. It is significant to note that, the 2nd to 5th defendants filed this answer after the death of the 1st defendant. The prayer to the answer of the 2nd to 5th defendants reads as follows:

මේ අනුව 2, 3, 4 සහ 5 විත්තිකරුවන් ගරු අධිකරණයෙන් ගෞරවයෙන් අයැද සිටින්නේ,

(අ) පැමිණිලිකරුගේ නඩුව නිශ්ප්‍රභා කරන ලෙසත්,

(ආ) ඉහත 6(අ) සහ 6(ආ) ඡේදවල ප්‍රකාර සහ 7 ඡේදය ප්‍රකාර මෙම නඩුවේ විෂය වස්තුවේ පරම අයිතිකරුවන් 2, 3, 4 සහ 5 විත්තිකරුවන් බවට ප්‍රකාශයක් කරන ලෙසත්,

(ඇ) එසේ නැතහොත් යම් හෙයකින් මෙම නඩුව පැමිණිලිකරුගේ වාසියට විසඳනු ලබන්නේ නම් එකී දේපලේ කරන ලද වැඩිදියුණු කිරීම් වෙනුවෙන් එකී දේපලේ භුක්තිය පැමිණිලිකරුට භාරදීමට පෙර විත්තිකරුවන්ට රුපියල් එක් ලක්ෂය (රු. 100 000/-) ක් ගෙවීමට පැමිණිලිකරුට නියෝග කරන ලෙසත්.

In paragraph 6 of the said answer, the 2nd to 5th defendants claimed title to the land on prescriptive possession. They did not state that P3 is a mortgage, not a transfer.

At the trial, issues were raised on the aforesaid basis. After trial, the District Court entered judgment for the plaintiff.

Being dissatisfied with the judgment of the District Court, the 2nd to 5th defendants preferred an appeal to the High Court of Civil Appeal of Avissawella. The High Court set aside the judgment of the District Court on the basis that, since the plaintiff did not take steps to proceed with the case against the 1st defendant, the District Court should have abated the action. The High Court concluded:

> *This action of the Plaintiff cannot be maintained as he has failed to establish his title against the deceased 1st Defendant without taking steps for substitution. Hence, I have not considered the facts of this case lengthily due to the procedural errors of this case.*

The plaintiff came before this Court against the judgment of the High Court. This Court granted leave to appeal on the following question of law:

> *Was there any necessity for substituting the legal representatives in the room of the deceased when the legal representatives had already been parties to the action and when they had no desire to proceed with the reliefs sought by the deceased 1st defendant and instead had made a claim in reconvention on their own?*

In the impugned judgment, the High Court refers to several sections of the Civil Procedure Code relating to the death of parties, survival of the cause of action, substitution, amendment of pleadings, etc. The entire discussion in the judgment of the High Court focuses on "procedural errors", not on the merits of the case. As I quoted above, the learned High Court Judge made it very clear when she concluded, "*I have not considered the facts of this case lengthily due to the procedural errors of this case.*"

The wise words of Chief Justice Abrahams, expressed nearly nine decades ago in *Vellupillai v. The Chairman, Urban District Council* (1936) 39 NLR 464 at 465, echo in my mind: "*This is a Court of Justice, it is not an Academy of Law.*"

I must state that none of the alleged "procedural errors" were raised before the District Court by the 2nd to 5th defendants. They presented their case before the District Court as they had pleaded in their answer (which I narrated above) and raised issues and led evidence on that basis. Having failed the case on the merits in the trial Court, they cannot render the judgment nugatory by pointing out procedural defects for the first time before the appellate Court.

It is stated in Sir John Woodroffe & Ameer Ali's *Commentary on The Code of Civil Procedure, 1908* (Act No. 5 of 1908) (5th edn, Vol 1, 2009, Delhi Law House) at pages 1108-1109, that as a general rule, questions on technicality cannot be raised as substantial questions of law on appeal.

> *Once the suit is decided on merits by two subordinate Courts, the appellants cannot be allowed to raise technical pleas in second appeal with emphasis that these technicalities should be treated to be substantial questions of law. The question of misjoinder of parties and multifariousness of causes of action cannot be permitted to be raised under Sec. 100 C.P.C. treating it to be a substantial question of law. If the technicalities are pitted against substantial justice then the Court of law cannot allow the substantial justice either to escape or to slide on mere technicalities. The Courts of appeal are respected by the people not because of the fact that it can legalise injustice but because the Courts impart substantial justice between the parties. Hence, these questions of technicalities also cannot be treated to be substantial questions of law. (Khema and Others v. Shri Bhagwan and Others AIR 1995 Raj 94, at pp.96, 97.)*

In *Iqbal Ismail Sodawala v. State of Maharasthra and Others* 1974 AIR 1880, the Supreme Court considered whether a conviction is vitiated due to the Trial Judge's non-compliance with the procedural requirement of signing the judgment. The Court answered this question in the negative on the basis that the appellant had not raised this issue in the High Court and that this procedural irregularity had not resulted in a failure of justice.

> *Question next arises as to whether the above irregularity can be said to have occasioned failure of justice. So far as this aspect is concerned, we find that the judgment was ultimately transcribed and was signed by the learned Sessions Judge. The appellant was*

thereafter supplied a copy of the judgment and he filed an appeal against the judgment of the trial court. The appeal was dismissed by the Bombay High Court on September 13, 1973. In case the appellant felt aggrieved against the procedural irregularity mentioned above, the appellant should have agitated that point in appeal before the High Court. The fact that the appeal of the appellant was dismissed shows that either the appellant did not agitate that point in appeal before the High Court or in case he did so, the High Court found no substance therein. It cannot in the circumstances be said that the procedural irregularity mentioned above has occasioned failure of justice. As the judgment of the learned Sessions Judge has been affirmed on appeal by the High Court and the appeal of the appellant has been dismissed, the appellant, in our opinion, cannot be said to be kept in prison without the authority of law.

In *Dabare v. Appuhamy* [1980] 2 Sri LR 54 the defendant sought to dismiss the plaintiff's action on *res judicata* but the objection was overruled. On appeal by the defendant, the plaintiff submitted that the dismissal of his former action was invalid as the Court had followed the wrong procedure, in that, instead of summary procedure, regular procedure had been followed. The plaintiff had not objected to the wrong procedure being followed in the original Court. Rejecting that argument and allowing the appeal, the Court stated that notwithstanding that the wrong procedure had been followed, the order of dismissal made by the Court was valid since the Court had jurisdiction to hear and determine the action and the plaintiff did not take objection to the wrong procedure being followed at that time. Wrong procedure can be validated by acquiescence, waiver or inaction on the part of the parties.

In *Elias v. Muhajid A. Cader and Another* (SC/APPEAL/50/08, SC Minutes of 28.06.2011) the issue was whether the first power of attorney had adequate authority to file action against both defendants. The objection taken by the defendant was observed by Justice Suresh Chandra as being highly technical:

> *It is a highly technical matter which has delayed the dispensation of justice in this case regarding a matter which needed quick disposal. For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law.*

Article 138(1) of the Constitution which defines the jurisdiction of the Court of Appeal reads:

> *The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and*

> *restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*
>
> *Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

The Constitution is the supreme law of the land, and all other laws must be interpreted consistent with the Constitution. The language of the proviso to Article 138(1) of the Constitution makes it mandatory for the Court of Appeal not to reverse or vary the judgments, decrees or orders of the original Courts on any error, defect, or irregularity unless it is shown that such error, defect, or irregularity has prejudiced the substantial rights of the parties or occasioned a failure of justice. The Constitution places a premium on substantive justice over rigid procedural compliance.

Provincial High Courts exercising civil appellate and revisionary jurisdiction over judgments and orders of the District Courts must adhere to this. Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 (which was introduced by Act No. 54 of 2006) reads as follows:

> *5A. (1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.*

> *(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:*
>
> *Provided that no judgment or decree of a District Court or of a Family Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

In *Kiri Mahaththaya and Another v. Attorney General* [2020] 1 Sri LR 10 at 18-19, Justice Aluwihare emphasized that the Judges have no option but to comply with the constitutional provisions couched in mandatory terms:

> *With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading 'The Court of Appeal'. The proviso to the said Article of the Constitution lays down that "Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."*

The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the 1948 Soulbury Constitution or the First Republican Constitution of 1972.

The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone.

As the respected American jurist, Justice Benjamin N. Cardozo said, "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered" (The Nature of the Judicial Process, 1921).

The learned counsel on behalf of the Accused-Appellants had heavily relied on a number of decisions handed down by this court as well as by the Court of Appeal, in support of the proposition that the trial

> *should be declared a nullity in view of the non-compliance with Section 196 of the Code of Criminal Procedure Act. However, I am of the view that these decisions need to be revisited in light of the Constitutional provision referred to above.*

In *Ranmenika and Others v. Perera* [2019] 1 Sri LR 282 at 287, Justice Janak De Silva pointed out that proviso to Article 138(1) of the Constitution would prevail over the Civil Procedure Code.

> *Clearly the constitutional provisions prevail over section 187 of the Civil Procedure Code. I hold that even if a trial judge has failed to answer all the issues raised and accepted by Court the judgment need not be reversed or varied if such error defect or irregularity has not prejudiced the substantial rights of the parties or occasioned a failure of justice. One such instance is where upon a close examination of the totality of the evidence it is found that the learned District Judge is correct in pronouncing the judgment.*

After the death of their mother (the 1st defendant), the 2nd to 5th defendants filed a separate answer and contested the case on their own. They did not take up any objection regarding the procedure in the District Court. They waived any objections and acquiesced to the procedure. Even if there were procedural errors, no prejudice has been caused to the 2nd to 5th defendant thereby. The High Court of Civil Appeal has not adverted to these express provisions which prevent the High Court from setting aside the judgments of the District Court on procedural defects unless such defects caused prejudice to the substantial rights of the parties or occasioned a failure of justice.

I answer the question of law raised before this Court as follows: Since the 2nd to 5th defendants contested the case on their own, there was no necessity to abate the action upon the death of the 1st defendant.

I set aside the judgment of the High Court of Civil Appeal and restore the judgment of the District Court and allow the appeal. Let the parties bear their own costs.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court