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

Sirimewan Maha Mudalige Kalyani
Sirimewan,
Udakekulawala, Bujjomuwa.
Plaintiff

SC/APPEAL/48/2017
SC/HCCA/LA/59/2015
NWP/HCCA/KUR/83/2011(F)
DC KULIYAPITIYA NO. 15936/L

Vs.

1. Herath Mudiyanselage Gunarath Manike,
2. Herath Mudiyanselage Ranil Suriya Bandara (Minor),
3. Registrar,
   District Court, Kuliyapitiya.
   All of Hemudawa, Sadalankawa.
   Defendants

AND

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

Vs.

1. Herath Mudiyanselage Gunarath Manike,
2. Herath Mudiyanselage Ranil Suriya Bandara (Minor),
3. Registrar,
   District Court, Kuliyapitiya.
   All of Hemudawa, Sadalankawa.
   Defendants-Respondents

AND NOW BETWEEN

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

Vs.

1. Herath Mudiyanselage Gunarath Manike,
2. Herath Mudiyanselage Ranil Suriya Bandara (Minor),
3. Registrar,
   District Court, Kuliyapitiya.
   All of Hemudawa, Sadalankawa.
   Defendants-Respondents-Respondents

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-Respondents.

Argued on: 13.02.2024

Written Submissions:

By the Plaintiff-Appellant-Appellant on 03.10.2023
By the Defendant-Respondent-Respondents on 15.09.2017

Decided on: 10.05.2024

Samayawardhena, J.

Introduction

The plaintiff filed this action on 05.06.2007 in the District Court of Kuliyapitiya primarily seeking the cancellation of Deed No. 13951 dated 31.03.2000 and Deed No. 14883 dated 23.10.2002 executed by the plaintiff's late father in favour of the 2nd defendant on the basis that those Deeds were executed under undue influence and duress exerted by the 1st defendant. The defendants filed answer seeking dismissal of the plaintiff's action *inter alia* on the basis that the plaintiff's cause of action is prescribed.

After the issues were raised, learned counsel for the defendants moved that the 15th and 16th issues raised by the defendants be tried as preliminary questions of law.

15. Has the plaintiff's action been prescribed?

16. If so, should the action be dismissed *in limine*?

The learned District Judge answered these two issues in the affirmative and dismissed the plaintiff's action *in limine*. On appeal, the High Court of Civil Appeal of Kurunagala affirmed the order of the District Court. The plaintiff appealed to this Court from the judgment of the High Court. At the argument, learned counsel for the plaintiff-appellant confined his argument to the questions of law set out in paragraphs 12(i) and 12(iii) of the petition.

> 12(i) Did the High Court of Civil Appeal err in law in holding that the prescription begins to run from the date of execution of the Deeds whereas it begins to run from the date on which the plaintiff became aware of the existence of the Deeds?
>
> 12(iii) Did the High Court of Civil Appeal err in law in deciding that the 15th and 16th issues which consist of both fact and law can be decided without evidence being taken?

Cancellation of a Deed

Section 10 of the Prescription Ordinance, No. 22 of 1871, reads as follows:

> *No action shall be maintainable in respect of any cause of action not herein before expressly provided for, or expressly exempted from the operation of this Ordinance, unless the same shall be commenced within three years from the time when such cause of action shall have accrued.*

There is no dispute that, as held in *Ranasinghe v. De Silva* (1976) 78 NLR 500, "*An action for declaration that a notarially executed Deed is null and void is prescribed within 3 years of the date of execution of the Deed in terms of section 10 of the Prescription Ordinance*."

However, when a plaintiff seeks cancellation of a notarially executed Deed upon concealed fraud, it was held in *Kirthisinghe v. Perera* (1922) 23 NLR 279 that the three-year period begins to run not from the date of execution of the Deed but "*from the time of the discovery of the fraud, or from the time the party defrauded might by due diligence have come to know of it.*" In *Dodwell & Co. Ltd. v. John,* both the Supreme Court (1915) 18 NLR 133 and the Privy Council (1918) 20 NLR 206 took the same view. This exception need not be confined to fraud. The three-year period should begin to run from the date the plaintiff becomes aware of the very existence of the impugned Deed or from the time the plaintiff might by due diligence have come to know of it.

For a comparable approach, fundamental rights applications can be taken. Although the time limit of one month within which the application shall be filed as set out in Article 126(2) is mandatory, it was held in *Siriwardena v. Brigadier Rodrigo* [1986] 1 Sri LR 384 at 387 that "*the said period of one month will be computed only from the date on which such petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.*" This position was reiterated in several cases including *Dayaratne and Others v. National Savings Bank and Others* [2002] 3 Sri LR 116.

Section 44 of the Civil Procedure Code states "*If the cause of action arose beyond the period ordinarily allowed by any law for instituting the action, the plaint must show the ground upon which exemption from such law is claimed.*" It is significant to note that the word used here is not "*may*", but "*must*" pointing to the fact that it is mandatory.

In the instant case, the plaintiff in paragraph 18 of the plaint states that she became aware of the aforesaid Deeds after the death of her father on 16.05.2006. Whether or not this is true, needs to be tested on evidence.

If it is true, the cause of action is not prescribed since the case was filed on 05.06.2007.

The learned District Judge dismissed the plaintiff's action *in limine* simply on the basis that the three-year period has lapsed from the dates of execution of the Deeds. He has not considered when the plaintiff became aware of the execution of Deeds.

The defence of prescription

Prescription can be divided into two categories: acquisitive prescription and extinctive prescription. The former operates to acquire a right whilst the latter operates to extinguish a right.

In either category, a defendant who intends to take up the plea of prescription must do so in the answer and raise it as an issue. The defendant cannot take the plea of prescription for the first time on appeal.

The Prescription Ordinance only limits the time within which an action may be instituted but it does not prohibit an action being instituted outside the stipulated time limit. If the objection is not raised by the opposite party in the pleadings, the opposite party is deemed to have waived it and acquiesced in the action being tried on the merits.

The judge cannot take up the plea of prescription *ex mero motu* because a party can waive such objection. *Chitty on Contract*, Vol I, 33rd edn, para 28-108 states "*A party is not bound to rely on limitation as a defence if he does not wish to do so. In general, the court will not raise the point suo officio even if it appears from the face of the pleading that the relevant period of limitation has expired.*" *Chitty* at para 28-127 states "*Limitation is a procedural matter, and not one of substance".*

In *Juanis Appuhamy v. Juan Silva* (1908) 11 NLR 157, Hutchinson C.J. and Wood Renton J. state that "*it is competent for a party to waive a claim by prescription.*"

Section 17 of the Prescription Act, No. 68 of 1969 (South Africa) states:

> *17(1) A court shall not of its own motion take notice of prescription.*
> *(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings:*
> *Provided that a court may allow prescription to be raised at any stage of the proceedings.*

It is not obnoxious to law or public policy for parties to agree not to plead prescription (*Hatton National Bank Ltd v. Helenluc Garments Ltd* [1999] 2 Sri LR 365). *Chitty* (*ibid*) dealing with the English Law states at para 28-109, "*An express or implied agreement not to plead the statute, whether made before or after the limitation period has expired, is valid if supported by consideration (or made by Deed) and will be given effect to by the Court.*" Prof. C.G. Weeramantry, *The Law of Contracts*, Vol II, para 844, states: "*It is not contrary to public policy for parties to enter into an agreement not to plead limitation. Such an agreement is valid and enforceable in English Law if supported by consideration, whether it be made before or after the limitation period has expired. The same observation holds good for our law, except that such an agreement need not be supported by consideration.*"

In *Brampy Appuhamy v. Gunasekere* (1948) 50 NLR 253 at 255 Basnayake J. (as His Lordship then was) held:

> *An attempt was made to argue that the defendant's claim was barred by the Prescription Ordinance (Cap. 55). The plea is not taken in the plaintiff's replication. There is no issue on the point, nor is*

> *there any evidence touching it. The plaintiff was represented by counsel throughout the trial. In these circumstances the plaintiff is not entitled to raise the question at this stage. It is settled law that when, as in the case of sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the court will not take the statute into account unless it is specially pleaded by way of defence.*

In *Gnananathan v. Premawardena* [1999] 3 Sri LR 301, the defence taken in issue Nos. 7-9 was based on section 10 of the Prescription Ordinance. These issues on prescription were raised after the commencement of the trial. On appeal, the Court of Appeal took the view that the District Judge should not have accepted those issues as the defendant did not plead such a defence in the answer. Justice Weerasekera at 309-310 states:

> *Presumably, the defence taken in the issue is based on section 10 of the Prescription Ordinance. The acts of nuisance complained of are thus sought to be shown to have taken place long prior to the 3-year period. To that the plaintiff-appellant's answer is that the application of the defendant-respondent to the National Housing Department for the premises to purchase was finally concluded only 2 months before the institution of the action.*
>
> *Be that as it may the position in law is quite clear and settled. In the case of Brampy Appuhamy v. Gunasekera 50 NLR 253 Basnayake J. held: "Where the effect of the Prescription Ordinance is merely to limit the time within which an action may be brought, the Court will not take the statute into account unless it is expressly pleaded by way of defence."*

It is, therefore, settled law and that for salutary reasons lest all the basic rules of law particularly that of the rule of audi alteram partem that if a party to an action intends to raise the plea of prescription it is obligatory on his part to plead that in his pleadings. I say salutary because reason, justice and fair play demands that the opposing party be given an opportunity of making such a plea and that party or no party should not be taken unawares of a defence taken that the action is barred by lapse of time.

In this action the answer did not state that the cause of action was prescribed in law. For the first time this defence was permitted after the commencement of the evidence. A practice which in my view is both repugnant to law, reasonableness and fair play and from which judges should desist. In any event the defendant-respondent has denied all the acts of nuisance acts pleaded, but also for some inexplicable reason pleaded non-deterioration. Therefore, a plea of prescription cannot arise without the act or acts of nuisance being admitted whereas the defendant-respondent has in his answer specifically denied them. The plea is, therefore, not only in law, but also at the stage it was so done, both bad in law, but also contradictory in itself.

The acceptation of these issues is also repugnant to the law inasmuch as the date of commencement of prescription is vague in that the absence of a plea as to whether it was the acts of nuisance or the date of the notice to quit. It is, therefore, additionally for the same reason of reasonableness that as is required by section 44 of the Civil Procedure Code that a plea of the reasons for the non-operation or application of prescription is mandatory that it is equally reasonable and fair that the law requires that the defence of prescription be specifically pleaded in the answer.

> *I am, therefore, of the view that issues 7, 8 and 9 should not have been accepted as issues for adjudication and that the order accepting them is bad, insupportable and made per incuriam. I, therefore, reject them.*

In the Supreme Court case of *Tilakaratne v. Chandrasiri and Another* (SC/APPEAL/172/2013, SC Minutes of 27.01.2017), prescription was not pleaded as a defence in the answer, no issue regarding prescription was framed at the trial and there was no suggestion made at the trial that the plaintiff's action was prescribed. However, at the hearing of the appeal before the High Court, counsel for the defendants submitted that the plaintiff's action was one for "Goods Sold and Delivered" which, by operation of section 8 of the Prescription Ordinance, was prescribed after the expiry of one year from the date of the last sale which took place on 30.03.2005 as per the entries in a notebook marked P2. The High Court accepted this argument and dismissed the plaintiff's action. Prasanna Jayawardena J. held that the defendant could not have taken up the defence of prescription for the first time in appeal.

> *[I]t is settled Law that, a party is prohibited from raising an issue regarding prescription for the first time in appeal. As Bonser C.J. described in the early case of TERUNNANSE vs. MENIKE [1 NLR 200 at p.202], a defence of prescription is a "shield" and not a "weapon of offence". Adopting the phraseology used by the learned Chief Justice over a century ago, it may be said that, if a Defendant chooses not to pick up the shield of prescription when he goes into battle at the trial, the 'rules of combat' are that he forfeits the use of that shield in appeal.*

The High Court Judgment

Let me now turn to the High Court judgment.

In the impugned judgment, the High Court first discusses the contention of learned counsel for the plaintiff who argues that the plaintiff became aware of the existence of the impugned Deeds after the death of her father and therefore the cause of action is not prescribed.

The High Court does not state whether or not this argument is legally valid. Instead, it states, "*Apparently, the plaintiff had not shown any grounds in the plaint to take the plaintiff's case out of prescription*" and "*on this ground alone the action of the plaintiff has to be dismissed*."

This finding is factually incorrect. As I stated previously, the plaintiff in paragraph 18 of the plaint has stated why the plaintiff's action should be taken out of prescription.

The High Court admits that the 15th and 16th issues are mixed questions of fact and law and therefore the District Court erred in law by deciding to try those issues as preliminary issues.

Having said so, the High Court notes that the plaintiff did not object to the 1st defendant's application to try those issues as preliminary issues. However, it is pertinent to mention that the plaintiff did not consent to those issues being tried as preliminary issues.

Even if the plaintiff did, as stated in *Mohinudeen v. Lanka Bankuwa* [2001] 1 Sri LR 290 "*section 147 of the Civil Procedure Code gives a wide discretion to the trial Judge, so that even if he has decided earlier to try an issue as a preliminary issue of law, it is open to him to decide such an issue later, if he is of the view that it cannot be decided without taking evidence*."

The High Court analysed the averments of the plaint and concluded that the impugned Deeds had not been executed under undue influence and duress. Although the conclusion of the Court after trial may be the same,

the High Court could not have made a final determination on that question without affording the parties the opportunity to adduce evidence.

Conclusion

The two questions of law quoted above are answered in the following manner:

> 12(i) The High Court did not answer this question. The High Court decided the appeal on a factually wrong basis described in this judgment. Questions of fact or mixed questions of fact and law cannot be decided as preliminary questions of law.
>
> 12(iii) Yes.

The judgments of the District Court and the High Court are set aside.

The District Court shall answer the 15th and 16th issues at the end of the trial.

The appeal is allowed. The costs of all three Courts will bind the final outcome of the case.

The substantive matter to be decided in this case is identical to the matter decided in SC/APPEAL/47/2017 between the same parties. In view of the judgment delivered by this Court in that case, the plaintiff will consider whether she should proceed with this matter further in the District Court.

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