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

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,
Nugegoda.
Plaintiff

SC APPEAL NO: SC/APPEAL/154/2017
SC LA NO: SC/HCCA/LA/59/2017
HCCA BADULLA NO: WP/HCCA/MT/42/2013(F)
DC NUGEGODA NO: 179/2008/L

Vs.

Lalith Wickramarathne,
No. 51/1,
Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant

AND BETWEEN

Lalith Wickramarathne,
No. 51/1,
Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant-Appellant

Vs.

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,

Nugegoda.
Plaintiff-Respondent

AND NOW BETWEEN

Stella Gwendelline Hycinth Wijesinghe,
No. 05, Railway Avenue,
Nugegoda.
Plaintiff-Respondent-Appellant

Vs.

Lalith Wickramarathne,
No. 51/1, Stanley Thilakaratne Mawatha,
Nugegoda.
Defendant-Appellant-Respondent

Before: P. Padman Surasena, J.
A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: J.P. Gamage with Nisansala Pathirana for the Plaintiff-Respondent-Appellant.
Hemasiri Withanachchi with Shantha Karunadhara for the Defendant-Appellant-Respondent.

Argued on: 12.01.2022

Written submissions:
by the Plaintiff-Respondent-Appellant on 20.10.2017 and 23.02.2022
by the Defendant-Appellant-Respondent on 21.10.2020 and 08.02.2022

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff instituted this action against the defendant in the District Court of Nugegoda, seeking a declaration that lot 4 in the final decree entered in partition case No. 5399/P belongs to the parties to that action, and the defendant has no right of way over lot 4. The defendant filed amended answer seeking dismissal of the plaintiff's action. He also made a cross-claim in the answer stating that he has acquired prescriptive title to lot 4 (not right of way by prescription) and/or he is entitled to use lot 4 as a way of necessity.

At the trial it was recorded as an admission (admission No. 3) that the said lot 4 had been given as a road to the parties to that partition action by the final decree. It is common ground that the defendant was not a party to that partition action.

The plaintiff raised the following issues at the trial:

1. 5399 බෙදුම් නඩුවේ අවසාන නීන්දු ප්‍රකාශය පරිදි පැමිණිල්ලේ උපලේඛණගත ලේඛණයේ අයිතිවාසිකම් ලැබූ පාර්ශවකරුවන් පමණක් එකී දේපල මාර්ගයක් වශයෙන් භාවිතා කරන ලද්දේ ද?
2. විත්තිකරුවන් 2008.08.13 වන දින හෝ ඊට ආසන්න දිනක එකී මාර්ගයේ පැමිණිලිකාරියගේ බුක්තියට නීති විරෝධී ලෙස ආරවුල් කරන ලද්දේ ද?
3. ඉහත සඳහන් විසඳනාවන්ට ලැබෙන පිළිතුරු ඔව් නම් පැමිණිලිකාරියට පැමිණිල්ලේ අයාචනයේ සහන ලබා ගත හැකිද?

The defendant raised the following issues:

4. පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 18 වගන්තියේ ප්‍රතිපාදන වලට පටහැනිව ඉදිරිපත් කර ඇද්ද?

5. පැමිණිල්ල සිවිල් නඩු විධාන සංග්‍රහයේ 35 වගන්තියේ ප්‍රතිපාදන වලට පටහැනිව ඉදිරිපත් කර ඇද්ද?
6. ඉහත කී 7 සහ 8 විසඳනාවන්ට එසේ යයි පිළිතුරු ලැබේ නම් පැමිණිලිකාරිය එම නඩුව පවරා හැකි ආකාරයෙන් පවත්වා ගෙන යා නොහැකිද?
7. අංක 5399/ටී දරණ නඩුවේ අවසාන නීන්දු ප්‍රකාශය මගින් මීට වසර 60 කට පෙර එම නඩුවේ පාර්ශවකරුවන්ට පමණක් මාර්ග අයිතියක් ලබා දී තිබුනද කාලයාගේ ඇවෑමෙන් මෙම නඩුවේ විෂයගත මාර්ගය පැමිණිලිකාරියද යාබද ඉඩම් හිමියන්ද, නුගේගොඩ නගර වාසීන්ද පොදු පාරක් ලෙස බාවිතා කර ඇද්ද?
8. අදාල මාර්ගය පුරා වසර 30 කට අධික කාලයක් කෝට්ටේ මහ නගර සභාව විසින් නඩත්තු කර ඇත්ද?
9. සංශෝධිත උත්තරයේ 17 වන ඡේදයේ කියා ඇති පරිදි විත්තිකරුවන් විසින් පුරා වසර 10කට අධික කාලයක් පොදු පාරක් ලෙස අදාල මාර්ගය පරිහරණය කර ඇද්ද?
10. පුරා වසර ගණනාවක් තිස්සේ නගර සභාවෙන් නඩුවට අදාල මාර්ගයට තාර දමා විදුලි ආලෝකය ලබා දී මහජන මුදලින් වැඩිදියුණු කිරීම සමගම මේ පාර පොදු මහජන මුදලින් නඩත්තු වන මාර්ගයක් බවට පත් වී ඇද්ද?
11. ඉහත කී විසඳිය යුතු ප්‍රශ්න එකකට හෝ වැඩිගණනකට විත්තියේ වාසියට නීන්දු වූයේ නම් උත්තරයේ අයාචනයේ අයැද ඇති සහන විත්තිකරුට හිමිකම් ඇත්ද?

Although the defendant in the prayer to the answer claimed lot 4 on prescription and/or use of lot 4 as a way of necessity as the substantive relief, he changed the character of his case by way of the issues. By way of the issues, he took up the position that lot 4 is now a public road and therefore the plaintiff's action shall fail. He confined his case only to that

issue. His last issue (issue No. 11) is, if one or all of the said issues are answered in the affirmative, whether the defendant is entitled to the reliefs as prayed for in the prayer to the answer. In other words, if the defendant fails to prove that lot 4 is a public road, the defendant's case fails.

After trial, the District Court entered judgment for the plaintiff. The defendant preferred an appeal to the Hight Court of Civil Appeal of Mt. Lavinia. On appeal he again changed his case. He abandoned all his defences taken in the answer and issues and took up an entirely new position, that is: what the plaintiff filed in the District Court was an action known as *actio negatoria*; only an owner having soil rights can file such an action; since the plaintiff does not have soil rights to lot 4, the plaintiff's action must fail. The High Court accepted this new position taken for the first time on appeal and set aside the judgment of the District Court and directed the District Court to enter judgment for the defendant granting all the reliefs as prayed for in the answer. It may be recalled that the defendant's first cross-claim is that he is the owner of lot 4 by prescription.

The plaintiff is before this Court against the judgment of the High Court. This Court granted leave to appeal on the following questions of law as formulated by learned counsel for the plaintiff.

a. *Did the Learned Provincial High Court Judges err in law in deciding that an issue on the nature of a case is a question of Law?*
b. *Did the Learned Provincial High Court Judges err in law in allowing a new issue in Appeal which affects the nature of the case?*
c. *Did the Learned Provincial High Court Judges err in law in deciding that the Plaintiff-Petitioner's case is in the nature of actio negatoria?*
d. *Did the Learned Provincial High Court Judges err in law in not considering that neither the Plaintiff-Petitioner nor the Defendant-*

Respondent has raised any issue on the basis of actio negatoria at the trial?

e. *Did the Provincial High Court Judges err in law in deciding that the Plaintiff-Petitioner has no soil rights to the subject matter to the case (lot No. 4, corpus morefully described in the schedule to the plaint)?*
f. *Did the Learned Provincial High Court Judges err in law in not considering that the concept of actio negatoria in Roman Dutch Law cannot be applied on the subject matter which was partitioned in terms of the provisions of the Partition Law?*
g. *Did the Learned Provincial High Court Judges err in law in not considering the admission by the parties which is marked as "P14" in allowing the Appeal of the Defendant-Respondent?*

A party to an action cannot change his position as he pleases to suit the occasion. Firstly, a party cannot present by way of issues a different case from what he has pleaded in his pleadings. However, if the opposing party does not object, the Court can accept the issues since once issues are raised pleadings recede to the background. Secondly, once issues are raised and accepted by Court, a party cannot present a new case when leading evidence at the trial from what he has raised by way of issues. Thirdly, once the judgment is delivered by the trial Court, a party cannot present a new case before the appellate Court from what was presented before the trial Court, unless any 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.

Two questions arise in this context: (a) is the new issue raised for the first time on appeal a pure question of law; and (b) if the answer to the aforesaid is in the affirmative, is the answer given to that question by the High Court correct.

According to the third admission recorded, the defendant admitted at the trial that lot 4 was allotted to the parties to the partition action as a road

by the final decree. it is common ground that the plaintiff's mother was the plaintiff in that partition action, and she transferred a defined portion from her lot to the plaintiff by a deed.

In my view, the Courts below should not have allowed the defendant to change positions to suit the occasion. The purported new position taken up by the defendant on appeal is not a pure question of law but a mixed question of fact and law. It is by analysing the averments in the plaint and the evidence led at the trial that learned counsel for the defendant says that what the plaintiff filed was an action known as *actio negatoria*. That is how he classifies the plaintiff's case. Since this matter was not put in issue before the trial Court, the plaintiff did not lead any evidence to meet that argument. The plaintiff rejects the position of the defendant that she filed an action in the nature of *actio negatoria*. I am not inclined to take the view that it is a pure question of law. If the new matter raised for the first time on appeal is not a pure question of law, the matter shall end there and the judgment of the High Court shall be set aside and the judgment of the District Court shall be restored.

But let us assume for the sake of argument that what the plaintiff filed was an action in the nature of *actio negatoria* and that the plaintiff ought to have soil rights to file such an action. The High Court held that the parties to the partition action obtained soil rights only to the specific allotments of land allotted to them in lieu of their undivided shares and that they are not entitled to soil rights to lot 4 which was left to be used by the allottees in common as a road. Then who has soil rights to lot 4 – the neighbours? In the final decree of partition marked P1 at the trial, lot 4 has been referred to mainly in two places. In the first place it says "*The lot No. 4 being reservation for a road twenty feet wide morefully described in the schedule hereto declared to be in common between the parties*." In the other place it says *"The Lot No. 4 reservation for a road twenty feet*

wide is declared a private road or a right of way which is in common to the parties and which said lot No. 4 is according to the said plan No. 942 bounded on the North east by Railway Avenue on the south east by properties now of Albert Perera and Malwattage Simon Peiris on the south west by lot No. 3 on the North west by Lots Nos 1 and 2 containing in extent twenty point eight seven perches (A0-R0-P.20.87)." There is no scintilla of doubt that according to the final decree of partition, lot 4 has been left to the allottees who got separate allotments of the land, to be used as a "private road". That portion has been separated as a common road only for the benefit of the said allottees, not for outsiders. The portion of land subject to lot 4 is the land of the allottees. It is preposterous to even think the allottees of the specific lots lost their soil rights to lot 4 after the final decree of partition was entered. All the allottees have soil rights to lot 4 in common.

I answer the questions of law in the affirmative. I set aside the judgment of the High Court and restore the judgment of the District Court and allow the appeal with costs in all three Courts, which I fix at rupees two hundred and fifty thousand.

Judge of the Supreme Court

P. Padman Surasena, J.
I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court