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

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff

SC APPEAL NO: SC/APPEAL/180/2011
SC LA NO: SC/HCCA/LA/309/2011
HCCA KEGALLE NO: SP/HCCA/KEG/717/2010(F)
DC KEGALLE NO: 5955/L

Vs.

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,
Colombo Road, Kegalle.
Defendant

AND BETWEEN

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff-Appellant

Vs.

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,

Colombo Road, Kegalle.
Defendant-Respondent

AND NOW BETWEEN

Hewavitharanage Podimenike,
"Saman Nivasa",
No. 40, Hitinawatte,
Colombo Road, Kegalle.
Defendant-Respondent-Appellant

Vs.

Wedikkarayalage Nirosha Sanjeewani,
Adurapotha, Kegalle.
Plaintiff-Appellant-Respondent

Before: S. Thurairaja, J.
Kumuduni Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Dr. Sunil Coorey with Sudarshani Coorey for the Defendant-Respondent-Appellant.
Ishan Alawathurage for the Plaintiff-Appellant-Respondent.

Argued on: 27.10.2022

Written submissions:
by the Plaintiff-Appellant-Respondent on 16.02.2012
by the Defendant-Respondent-Appellant on 16.12.2011

Decided on: 21.11.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Kegalle seeking a declaration of title to the land described in the second schedule to the plaint, ejectment of the defendant therefrom, and damages. The plaintiff claimed title to the land on the deed of transfer marked P1 read with the deed of rectification marked P2 executed in favour of her by the defendant. The defendant filed answer seeking dismissal of the plaintiff's action and made a claim in reconvention on the basis that, although the deed appears to be an outright transfer, it was in fact security for a loan obtained from the plaintiff's husband and therefore the plaintiff is holding the property subject to a constructive trust created in favour of the defendant, as the defendant never intended to transfer the beneficial interest in the property to the plaintiff.

The trial commenced on 16.09.1999 with the raising of 23 issues and ended after nearly a decade on 24.06.2009. Both parties called several witnesses and marked several documents. After trial, the learned District Judge by a comprehensive judgment dated 15.03.2010 held with the defendant.

Being dissatisfied with the judgment, the plaintiff appealed to the High Court of Civil Appeal of Kegalle. The High Court set aside the judgment of the District Court and ordered a retrial. This appeal is against the judgment of the High Court. This Court granted leave to appeal on the following questions of law formulated by counsel for the plaintiff:

(a) Did the High Court err in holding that the failure on the part of the learned District Judge to state in his judgment the section of Chapter IX of the Trusts Ordinance under which he had held that the Plaintiff-Appellant was holding the property concerned on a constructive trust

on behalf of the Defendant-Respondent is fatal and affects the very root of the impugned judgment?

(b) Did the High Court err in failing to realize and appreciate that it was under section 83 of the Trusts Ordinance that the learned District Judge has held that the property in suit was subject to a constructive trust, although the learned District Judge did not state so anywhere in his judgment?

(b) Was the failure to mention section 83 in the judgment of the District Judge only a technicality and in no way fatal and did such failure not in any manner affect the legality or validity of the judgment?

(c) Did the High Court fail to act on the principle of law that where a judge had the power to act as he has done, his failure to invoke the correct provision of law in so doing, and/or his invoking the wrong provision of law, does not in any way affect the validity or legality of what he has done?

(d) Did the High Court err by relying on a quotation from the judgment of His Lordship Chief Justice Basnayake in the decision of Wijewardena v. Lenora 60 NLR 457 because the said quotation had no relevance to the decision to be given by the High Court in this appeal?

(e) Did the High Court err in holding that, "this court is of the view that learned counsel appearing on both sides missed the salient point of argument involved in the case", in view of the fact that the point on which the High Court based its decision is totally untenable and bad in law?

(f) Did the High Court err by violating the Defendant-Respondent's right to be heard by the High Court in deciding this appeal when the High Court decided this appeal on a point that had not been raised by either party and on which the Defendant-Respondent had no opportunity of being heard before the High Court?

The learned High Court Judge quite categorically accepts that "*The learned District Judge while pronouncing the impugned judgment had stated the reasons that prompted him to hold that the plaintiff-appellant is holding the property concerned on behalf of the defendant-respondent on a constructive trust.*" He does not state that those reasons are faulty or unacceptable. He accepts them. Then he states that both counsel "*missed the salient point of argument involved in this case*" which "*is fatal and affects the very root of the impugned judgment*". What is this most important point?

The learned High Court Judge says "*a party who is claiming a constructive trust to be in existence has to bring his case within any of the provisions of section 83 to 96 of the Trusts Ordinance…that the learned District Judge had erred himself in law when he failed to mention under which section of chapter IX of Trusts Ordinance that the plaintiff-appellant was holding the property concerned on a constructive trust on behalf of the defendant-respondent*". This is a point that has not been raised by either party before the High Court. It is this point that the learned High Court Judge says "*is fatal and affects the very root of the impugned judgment*". On this basis alone, the judgment of the District Court was set aside and a retrial ordered.

Chapter IX of the Trusts Ordinance (sections 82-98) deals with categories of constructive trusts. But there was no issue at the trial in the District Court or in the High Court on appeal regarding the number of the section of the Trusts Ordinance that is applicable in this case. In the District Court, the plaintiff claimed title to the land on deed P1 read with P2 and the defendant stated that the plaintiff is holding the land relevant to this deed on a constructive trust in favour of her, because she never intended to transfer the beneficial interest in the land to the plaintiff. These positions were expressly stated in the pleadings and in the issues. The

plaintiff knew the defendant's position from the time the answer was filed. At the argument before this Court, in answering a specific question posed by the Court, learned counsel for the plaintiff candidly admitted that on the facts and circumstances of this case there is no doubt that the applicable section is section 83 of the Trusts Ordinance, but regrettably did not accept that the judgment of the High Court was wrong. In my view, the judgment of the High Court is manifestly wrong and must be set aside.

The High Court Judge has cited *Bernedette Valangenberg v. Happuarachchige Anthony* [1990] 1 Sri LR 190 in support of his proposition. But nowhere in that judgment does it state that unless the relevant section of the Trusts Ordinance is mentioned in the judgment, a case filed on a constructive trust must fail. The other case cited by the High Court Judge, namely, *Wijewardene v. Lenora* (1958) 60 NLR 457, has no application at all in resolving this issue.

Although section 149 of the Civil Procedure Code permits the District Judge to amend the issues or frame additional issues at any time before passing the decree, the Judge shall use his discretion with caution, particularly when he unilaterally decides to raise an issue unknown to both parties in the course of writing the judgment.

Although a new issue taken in isolation may appear to be a pure question of law, the Judge needs to analyse the evidence and interpret the law to answer that question. *Hammed v. Cassim* [1996] 2 Sri LR 30 provides a classic example. In that case, during the course of writing the judgment, the District Judge raised the following issue: "*Can the plaintiff have and maintain the action in view of provisions of section 22(7) of the Rent Act?*" The District Judge held with the plaintiff on the issue of reasonable requirement, on the basis of which the case was filed against the defendant for ejectment; but in view of his answer in the negative to this

new issue, he dismissed the plaintiff's action. On appeal, although Ranaraja J. referring to section 149 of the Civil Procedure Code stated "*In the present appeal, the relevant issue is a question of law on which it was not absolutely necessary for the Judge to hear either party before answering it. Thus I am of the view there was no prejudice caused to either party on that score*", after analysing the evidence of the case and interpreting section 22(7) of the Rent Act he came to the conclusion that "*The learned District Judge was therefore in error in holding that the plaintiff was debarred by section 22(7) from instituting the action against the defendant*". Had the District Judge afforded the parties an opportunity to make submissions on that legal issue before the pronouncement of the judgment, the learned District Judge also should have come to the same conclusion. This does not mean that a Judge cannot raise an issue and answer it during the course of writing the judgment without hearing the parties; he can, but he must exercise his discretion with restraint and circumspection. The case must be decided by the Judge as it was presented before him by the rival parties, keeping in mind that the system of justice we practice is adversarial, not inquisitorial. Even if it is inquisitorial, the Judge cannot decide a matter without giving a hearing to both parties. The rule of *audi alteram partem* is applicable to all decision-making authorities including Judges.

Let us assume that citing the section in the judgment is a legal requirement. What prejudice did failure to do so cause to either party? For all intents and purposes, the trial proceeded on the basis that the defendant asserts a constructive trust against the title deed of the plaintiff in terms of section 83 of the Trust Ordinance. The District Judge accepted the defendant's position. The matter shall end there. Whilst setting out the jurisdiction of the Court of Appeal, the proviso to Article 138 of the Constitution states, "*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."

Is it necessary to cite the section in the judgement and does failure to do so vitiate the judgment? When invoking the jurisdiction of a Court it is salutary to mention the specific section under which it is invoked. But if a party fails do so or cites a wrong section in this process, the application need not be dismissed if the Court has jurisdiction to deal with the matter, unless it has caused prejudice to the opposite party to meet the plaintiff's case. The same will apply to any other decision including judicial pronouncements: citing the wrong section or failure to cite the relevant section by the Judge in the order or judgment will not *ipso facto* vitiate the decision.

Bindra on the Interpretation of Statutes (1975) 6th Ed. at page 153 states:

> *It is a well-settled principle of interpretation that as long as an authority has power to do a thing, it does not matter if it purports to do it by reference to a wrong provision of law.*

Solicitor-General v. Perera (1914) 17 NLR 413 was a criminal case filed under the Excise Ordinance where the license to sell liquor was cancelled for failure to make some payment due. The Government Agent cancelled the license under section 26(1)(a) of the Ordinance when the correct section was section 26(1)(b). When the conviction for selling liquor without a license was contested in appeal on this basis, Pereira J. rejected it stating at page 416 "*the fact that sub-section (a) of section 26 was cited did not render the cancellation of the license any less effectual. The Government Agent was not bound to cite any section at all.*"

In *Peiris v. The Commissioner of Inland Revenue* (1963) 65 NLR 457 it was held that a certificate issued to the Magistrate in recovery proceedings under section 80(1) of the Income Tax Ordinance was not invalidated by

the mistake of the Assistant Commissioner of Inland Revenue where he had purported to act under section 64(2)(b) although the correct procedure would have been under section 65. Sansoni J. (later C.J.) stated at 458: "*It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power.*" This was quoted with approval by Soza J. in *Leechman & Co. Ltd. v. Rangalla Consolidated Ltd* [1981] 2 Sri LR 373 at 379-380 and *Kumaranatunga v.* Samarasinghe [1983] 2 Sri LR 63 at 73-74. *Vide* also *Jayawardane v. Ran Aweera* [2004] 3 Sri LR 37 at 41.

I answer all the questions of law upon which leave was granted in the affirmative and set aside the judgment of the High Court and restore the judgment of the District Court. The defendant is entitled to costs in all three Courts.

Judge of the Supreme Court

S. Thurairaja, J.
I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.
I agree.

Judge of the Supreme Court