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

Bisowasanthi Walgampaya,
"Niwasa" Mamudawela, Katukumbura,
Kadugannawa.
Plaintiff-Respondent-Appellant (Deceased)

Sooriyasena Wimala Keerthi Hemachandra,
"Niwasa" Mamudawela, Katukumbura,
Kadugannawa.
Substituted Plaintiff-Respondent-Appellant

SC/APPEAL/106/2013
CP/HCCA/KAN/159/2002 (F)
DC KANDY 17223/L

Vs.

1. G.M.L. Sudatha Galkotuwa,
2. G.M. Henry Galkotuwa,
   Both of Walgampaya, Danthure. (Deceased)
   Defendant-Appellant-Respondent-Respondents

2A. G.M. Frank Sidantha Galkotuwa,
Walgampaya, Ganthure.
Substituted 2nd Defendant-Appellant-Respondent

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice K. Priyantha Fernando
Hon. Justice Menaka Wijesundera

Counsel: Sapumal Bandara with Gangulali de Silva Dayarathna for the Substituted Plaintiff-Respondent-Appellant.

Rohan Sahabandu, P.C., with Chathurika Elvitigala, Sachini Senanayake and Pubudu Weerasuriya for the Substituted 2nd Defendant-Appellant-Respondent.

Argued on: 27.08.2025

Written submissions:

By the Substituted Plaintiff-Respondent-Appellant on 26.09.2025.

By the Defendant-Appellant-Respondent-Respondents on 23.09.2025.

Decided on: 13.01.2026

Samayawardhena, J.

The plaintiff instituted this action against the two defendants in the District Court of Kandy on 25.09.1992, seeking a declaration of title to the land described in the schedule to the plaint and depicted in plan No. 1700 marked X, ejectment of the defendants therefrom, and damages. The defendants filed answer seeking the dismissal of the plaintiff's action on the basis of a different pedigree. The land described in the answer was also different from the land described in the plaint. By way of issues, the defendants further took up the position that they had acquired prescriptive title to the land.

After trial, the District Court, by judgment dated 12.07.2002, granted reliefs as prayed for in paragraphs (a) and (b) of the prayer to the plaint. On appeal by the defendants, the High Court of Civil Appeal of Kandy, by judgment dated 30.11.2009, dismissed the appeal. That judgment was subsequently set aside by the same Court on 06.01.2010 on the ground that it was *per*

incuriam. Thereafter, a fresh judgment was delivered on 11.06.2010, again dismissing the appeal.

By direction of this Court, the appeal was argued afresh before another Bench of the High Court. At the trial, the plaintiff tendered deeds marked P1 to P7 in order to establish the devolution of title. That Bench, by judgment dated 24.05.2012, set aside the judgment of the District Court and dismissed the plaintiff's action on the sole basis that deed No. 2391 marked P3, by which Siripina gifted the land to Jayasena, was subject to a *fideicommissum*, and therefore the transfer by Jayasena to Jamis by P4 and other subsequent deeds have no effect or avail in law.

This Court granted leave to appeal against the said judgment on the question whether the High Court erred in law in deciding the case on the basis of *fideicommissum*, when such a question had neither been pleaded nor raised as an issue at any stage of the proceedings before the District Court.

In *Nevil Fernando v. Sanath Fernando* [2024/25] BLR 78, I explained the law relating to the impermissibility of shifting positions from the pleadings to the trial and thereafter on appeal, subject to strictly limited exceptions, in the following terms:

> *A party to an action is subject to specific constraints in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. He cannot keep changing his position to suit the occasion. There must be an end to litigation. 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 raised by way of issues. Thirdly, once the judgment is pronounced by Court, the losing party*

cannot present a different case before the appellate Court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has developed in our Courts to entertain questions of fact for the first time on appeal subject to strict conditions, which have been discussed in The Tasmania (1890) 15 App. Cases 223 and Appuhamy v. Nona (1912) 15 NLR 311. The cumulative effect of these two leading decisions 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".

In the present appeal, there is an additional factor. The new position was taken by the learned High Court Judge himself at the stage of writing the judgment, without affording any opportunity to learned counsel for the plaintiff to address the Court on that matter. The system of justice we follow is adversarial as opposed to inquisitorial. Hence, the Court shall decide the dispute as presented by the parties, within the framework of the law.

Although section 149 of the Civil Procedure Code permits the District Court to amend issues or frame additional issues at any time before passing the decree, such discretion cannot be exercised unilaterally in a manner that violates the principles of natural justice. The same restraint applies with equal force to the Appellate Courts. Even in the impugned judgment, the

learned High Court Judge has acknowledged that *fideicommissum* is a question of fact to be determined on the facts and circumstances of the case. Nevertheless, by analysing the facts without affording the parties any opportunity to address the issue, and despite neither party having advanced such an argument, the learned High Court Judge concluded that deed P3 created a valid *fideicommissum*.

A question of fact cannot be raised for the first time on appeal unless the Appellate Court has before it all the material facts bearing on that contention and is satisfied that no satisfactory explanation could have been offered had the issue arisen at the trial. Those conditions were not satisfied in the present case. The learned High Court Judge therefore exceeded the permissible limits of appellate adjudication.

I set aside the judgment of the High Court dated 24.05.2012 and restore the judgment of the District Court dated 12.07.2002. The plaintiff is entitled to costs of this appeal.

Judge of the Supreme Court

K. Priyantha Fernando, J.
I agree.

Judge of the Supreme Court

Menaka Wijesundera, J.
I agree.

Judge of the Supreme Court