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

In the matter of an Appeal against the Judgment of the Provincial High Court of the Western Province dated 19.11.2013 in Case No: WP/HCCA/GPH 72/2009 (F), D.C. Attanagalla Case No. 55/SPL.

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff

SC. Appeal No: 24/2015

SC/HCCA/LA: 523/2013

WP/HCCA/GPH: 72/2009

DC Attanagalla No: 55/SPL

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants

Between

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants-Respondents

And Between

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant-Petitioner

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

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Defendants-Respondents

AND NOW BETWEEN

Edirisinghe Arachchige Samantha Edirisinghe,

No. 16, Makalana, Nittambuwa.

Plaintiff-Appellant-

Petitioner-Appellant

-Vs-

1. Suduhakurulage Gayani

   Kaushalya Rasanjalee

   No. A-213, Ranwala Watte, Ambanpitiya.

2. Suduhakurulage Dias Shelton

   No. A-213, Ranwala Watte, Ambanpitiya.

Defendants-Respondents-Respondents-Respondents

Before: Sisira J. de Abrew J
Kumudini Wickramasinghe J &
Achala Wengappuli J

Counsel: Dr. Sunil Cooray with Sudarshni Cooray and Heshan Pietersz for the Plaintiff- Appellant-Petitioner-Appellant

Ashiq Hassim for the 1st Defendant-Respondent-Respondent- Respondent

Argued on : 9.3.2021

Decided on: 25.3.2021

Sisira J. de Abrew J

This is an appeal against the judgment Civil Appellate High Court dated 19.11.2013.

Plaintiff- Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) filed action in the District Court of Attanagalla against the 1st Defendant-Respondent-Respondent-Respondent (hereinafter referred to as the1st Defendant-Respondent) seeking a declaration that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. The 1st Defendant-Respondent in her answer dated 27.8.2008 also sought a declaration that her marriage between her and the Plaintiff-Appellant is a nullity. The 1st Defendant-Respondent in her answer made a cross-claim for Rs.One Million from the Plaintiff-Appellant as damages for seduction committed by the Plaintiff-Appellant. The Plaintiff-Appellant filed a replication dated 18.11.2008 seeking a dismissal of the cross-claim of the 1st Defendant-Respondent. At the trial an admission was recorded to the effect that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. Thereafter the learned District Judge permitted the 1st Defendant-Respondent to begin the case to prove her claim of damages for the seduction committed by the Plaintiff-Appellant. The learned District Judge by his judgment dated 15.6.2009 granted Rs.One Million as damages for the seduction committed by the Plaintiff-Appellant on the 1st Defendant-Respondent. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant appealed to the Civil Appellate High Court and the learned Judges of the Civil Appellate High Court by their judgment dated 19.11.2013, dismissed the appeal. Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff-

Appellant has appealed to this court and this court by its order dated 27.1.2015 granted leave to appeal on questions of law set out in paragraphs 12(iii), (vii) and (viii) of the Petition of Appeal dated 17.12.2013 which are set out below.

1. Did the High Court err in rejecting the plea of prescription when Section 9 of the Prescription Ordinance specifically lays down the criteria for prescription for damages under the written contract?
2. Did the High Court err in holding that the Plaintiff is liable to pay the Defendant Rs. One Million?
3. Did the High Court err in holding that the Plaintiff has not proved his case when his evidence was uncontradicted?

When the 1st Defendant-Respondent was giving evidence, the Plaintiff-Appellant, on the strength of the evidence of the 1st Defendant-Respondent, sought permission of court to raise an issue whether the claim of the 1st Defendant-Respondent for damages of Rs. One Million for seduction committed by the Plaintiff-Appellant was prescribed. However, the learned District Judge by his order dated 11.5.2009 disallowed this application. Therefore, the issue relating to prescription was not raised. It is interesting to find out whether the said claim of the 1st Defendant-Respondent is prescribed or not. In order to consider this question, it is necessary to consider section 9 of the Prescription Ordinance. It reads as follows.

> *No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action, shall have arisen.*

The claim of the 1st Defendant-Respondent for damages for Rs. One Million is for the seduction committed by the Plaintiff-Appellant on her. In view of section 9 of the Prescription Ordinance, the said claim should have been made to court within a period of two years from the date of seduction. The marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent took place on 24.8.2006. But before the marriage the Plaintiff-Appellant has seduced 1st Defendant-Respondent on 25.6.2006. She has stated in her answer and her evidence in court that she and the Plaintiff-Appellant, prior to the marriage, on 25.6.2006, had sexual intercourse and thereby the Plaintiff-Appellant seduced her. Thus, seduction on the 1st Defendant-Respondent has taken place on 25.6.2006 (before the marriage). The claim for damages for seduction was made by her answer dated 27.8.2008. Thus, the claim for damages for seduction was made two years after the seduction. Therefore, I hold that the claim of the 1st Defendant-Respondent for damages for her seduction has been prescribed when it was made to the District Court. On this ground alone the claim of the 1st Defendant-Respondent for damages for her seduction should be rejected and the appeal of the Plaintiff-Appellant to set aside judgments of both courts relating to granting of compensation for the seduction should be allowed.

The application to record an issue whether the claim of the 1st Defendant-Respondent was prescribed was refused by the learned District Judge on the ground that that it had not been stated in the pleadings. The learned District Judge observed that such an issue cannot be permitted by using the evidence since it had not been stated in the pleadings. Reasoning of the learned District Judge appears to be that although it was revealed in evidence that the claim is prescribed, an issue relating to prescription could not be permitted since it is not found in the pleadings. Is this conclusion of the learned District Judge correct?

In this connection, I would like to state here the duty of court in hearing a case is to arrive at the correct decision. This view is supported by the judicial decision in the case of Bank of Ceylon Jaffna Vs Chelliahpillai 64 NLR 25 wherein Privy Council at page27 held that the case must be tried upon the 'issues on which the right decision of the case appears to the court to depend'. Therefore, the court should allow the parties to frame issues to arrive at the correct conclusion on the evidence led before court even though the parties have failed to state facts relating to such an issue in the pleadings. Even if parties do not raise correct issues, court, on its own motion, should frame issues. Section 149 of the Civil Procedure Code reads as follows.

> *The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.*

In this connection I would like to consider certain judicial decisions. In Silva Vs Obeysekera 24 NLR 97 at page 107 Bertram CJ made the following observation:

> *"Counsel for the plaintiff raised the objection that these issues did not arise on the pleadings, and that defendant should have got his answer amended so as to raise these issues. On this objection being taken the learned District Judge disallowed the issues. Here the learned Judge was certainly led into a mistake. No doubt it is a matter within the discretion of the Judge whether he will allow fresh issues to be formulated after the case has commenced, but he should do so when such a course appears to be in the interests of justice, and it is certainly not a valid objection to such a course being taken that they do not arise on the pleadings."*

In Hameed Vs Cassim [1996] 2 SLR 30 Court of Appeal at page 33 held as follows:

> *It is not necessary that the new issue should arise on the pleadings. A new issue could be framed on the evidence led by the parties orally or in the form of documents. The only restriction is that the Judge in framing a new issue should act in the interests of justice, which is primarily to ensure the correct decision is given in the case.*

In Bank of Ceylon Jaffna Vs Chelliahpillai 64 NLR 25 Privy Council at page 27 held that 'it is well settled that framing of issues is not restricted by pleadings'

Considering all the above matters, I hold that new issues can be framed at a trial on the evidence led at the trial although facts relating to the new issues do not arise on the pleadings. The trial Judge, if he wants to raise new issues, should bear in mind that he frames new issues on the evidence already led in order to arrive at the right decision.

I have earlier pointed out that the claim for damages for the seduction of the 1st Defendant-Respondent had ben prescribed when it was made in her answer. But the learned trial Judge did not allow the issue on prescription to be raised since it is not found in the pleadings. When I consider the above legal literature, I hold that the above conclusion of the learned District Judge was clearly wrong and the learned Judges of the Civil Appellate High Court were wrong when they affirmed the above portion of the judgment. On this ground itself the above conclusions reached by the learned District Judge and the learned Judges of the Civil Appellate High Court should be set aside.

The learned District Judge in his judgment has also observed that the defence of prescription could not be considered because the 1st Defendant-Respondent was a minor at the time of the act of seduction. Is this observation correct? I now advert to this contention. The fact that the 1st Defendant-Respondent was a minor is not a disqualification to institute action because the law provides for the appointment of a Guardian. If the law permits a minor to file a case through his Guardian, restriction in the law relating to prescription should also apply to the case. In this regard I would like to consider the following situation. If a minor and/or his parents meet with an accident and suffer injuries due to the negligence of the person who drove the vehicle, a cause of action would arise for the minor to file a case for damages against the person who drove the vehicle. But his minority would not act as an exception to the prescription period of two years. Even though he is a minor, case for damages should be filed within a period of two years from the date of the accident. Thus, the above observation of the learned District Judge is not correct.

For the above reasons, I hold that the learned District Judge was in error when he did not permit and consider the issue on prescription; that the learned Judges of the Civil Appellate High Court too were in error when they rejected the plea of prescription; and that they were in error when they affirmed the judgment of the learned District Judge.

The learned District Judge, by his order dated on 11.5.2009, disallowed the application to frame an issue whether claim of the 1st Defendant-Respondent is prescribed. But the Plaintiff-Appellant did not make an appeal against the said order. Can the legality of the said order be raised in the final appeal? When considering this question, I would like to consider the judicial decision in the

case of Mudiyanse Vs Punchi Banda Ranaweera 77 NLR 501 wherein this court held that 'a party aggrieved by an order made in the course of the action, though such order goes to the root of the case, has two courses of action open to him, namely (a) to file an interlocutory appeal or (b) to stay his hand and file his appeal at the end of the case even on the very same ground only on which he could have filed his interlocutory appeal. If he adopts the latter course, he cannot be shut out on the ground that his appeal being against the incidental order is out of time.'

In my view legality of an order made in the course of a trial can be raised at the final appeal. I have earlier held that in the present case, the claim of the 1st Defendant-Respondent for damages for her seduction had been prescribed when she made the claim to the District Court. Thus, the court cannot grant damages for the seduction of the1st Defendant-Respondent.

For the above reasons, I set aside the portion of the judgment of the learned District Judge granting damages of Rs.1.0 Million to the 1st Defendant-Respondent for seduction but affirm the portion of the judgment of the learned District Judge declaring that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. I set aside the portion of the judgment of the learned Judges of the Civil Appellate High Court which affirmed the portion of the judgment of the learned District Judge granting damages of Rs.1.0 Million to the 1st Defendant-Respondent for seduction but I affirm the portion of the judgment of the learned Judges of the Civil Appellate High Court which affirmed the portion of the judgment of the learned District Judge declaring that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent is a nullity. For the purpose of clarity, I state here that judgments relating to the

damages of Rs. One Million are set aside and the judgments relating to the declaration that the marriage between the Plaintiff-Appellant and the 1st Defendant-Respondent a nullity are affirmed.

In view of the conclusion reached above, I answer the 1st question of law as follows. "The learned Judges of the Civil Appellate High Court erred in rejecting the plea of prescription."

I answer the 2nd question of law in the affirmative. The 3rd question of law does not arise for consideration.

The learned District Judge is directed to enter decree in accordance with this judgment.

Judge of the Supreme Court.

Kumudini Wickramasinghe J

I agree.

Judge of the Supreme Court.

Achala Wengappuli J

I agree.

Judge of the Supreme Court.