

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

In the matter of an application for Leave to Appeal.

S.A. Amitha Ranjani
Lakmini Agro Centre,
Blackpool, Nuwara Eliya

Plaintiff-Respondent-Appellant

SC Appeal No. 176/12
SC.HC CALA 267/12
CP/HCCA/KAN/72/2010 [F]
DC Nuwara Eliya Case No. MR 86

Vs.

Sunil Ratnayake Labuthala
No. 185, New Settlement
Ruwan Eliya.

Defendant-Appellant-Respondent

Before : Priyasath Dep, PC. J
B.P. Aluwihare, PC. J.&
Sisira J. de Abrew, J.

Counsel : Dulani Warawewa for the Plaintiff-Respondent-Appellant
Himali Kularathne for the Defendant-Appellant-Respondent

Written Submissions filed
by the Appellant on : 14.11.2012

Argued on : 14.12.2015

Decided on : 10.11.2016

Priyasath Dep, PC. J

The Plaintiff- Respondent- Appellant hereinafter referred to as ‘Plaintiff’ instituted action in District Court of Nuwara Eliya in case No.MR/86 to recover a sum of Rs 297,000 from the Defendant-Appellant-Respondent hereinafter referred to as ‘Defendant’. In the Plaintiff, the Plaintiff averred that the Plaintiff supplied 45 crates of potato seeds to the Defendant. The Defendant agreed to tender a cheque for the amount due. As the defendant failed and neglected to pay the amount due, the Plaintiff sent a letter dated 08. 08. 2006 marked P1. Thereafter the Plaintiff sent a letter of demand which was marked as P2.

The Defendant in his answer whilst denying the Plaintiff’s claim admitted only the jurisdiction of the Court. The Defendant denied that he had a transaction as alleged by the Plaintiff and thereby denied the liability.

The parties proceeded to trial on 12 issues of which 7 issues were raised by the Plaintiff and 5 issues were raised by the Defendant. Apart from denying the liability to pay, the Defendants raised three issues pertaining to the maintainability of the action They are:

Issue No 8

Is the business of the Lakmini Trade Centre carried on by the plaintiff and her husband is a lawful business?

Issue No. 9

Could the Plaintiff maintain the action against the Defendant without joining the husband as a party as he is a partner of the business?

Issue No. 10

Did the Defendant had a transaction with the Plaintiff as alleged in the Plaintiff?

It is appropriate at this stage to briefly refer to evidence led at the trial.

The Plaintiff Amitha Ranjane Shanthi Aratchi stated that her husband and herself were running a business named Lakmini Agro Center for 10 years and she supplied 45 crates of potatoes to the Defendant. Though the Defendant had alleged that business was a partnership, the Plaintiff has maintained the position that she was helping her husband in the business due to the fact that he was disabled and could not attend to business and that she was not a partner. It was revealed that the Lakmini Agro Centre is an agent of the Hayleys Agro Company.

It was the position of the Plaintiff that the Defendant did not make any payments for the goods he had obtained. The Defendant at the time he accepted delivery of goods, had stated that he forgot to bring the cheque book and had assured the Plaintiff that he will hand over a cheque to the plaintiff on the following day morning. The Defendant took delivery of the goods but failed and neglected to make the payment even when the Plaintiff on several occasions demanded that he settles the money due to the Plaintiff. According to the evidence of the Plaintiff the said transaction was entered into between the her and the Defendant, and not with the Plaintiff's husband and the Defendant. It was also the position of the Plaintiff that these goods were given to the defendant purely on trust and reliance they placed on him due to the good relationship the Defendant has had with the Plaintiff.

At the trial Plaintiff and her husband gave evidence and marked documents P1 which was the reminder letter dated 08.08.2006 sent by the Plaintiff to the Defendant requiring him to make payments for the goods that he has already obtained. P2 is the letter of demand dated 18.08.2006 which was sent by the Plaintiff's Attorney at Law to the Defendant and P3 is the letter dated 19.05.2006 sent by the Defendant to Hayleys Agro Company with a copy to the Plaintiff stating that he had purchased 45 crates of potato seeds from Lakmini Agro Center and that a cheque given by him to the said shop has been dishonored by the bank. The Defendant did not testify nor did he summon any witnesses.

The District judge had referred to the case of *Sri Lanka Port Authority vs Jugolinija Bold East* 1981 (1) SLR 18 where it was stated that: ' when a document is marked on condition to prove and then if it is not been proven and no objection were raised of its validity at the end of the trial, that document will be treated as proved.'

Furthermore in the judgment it was stated that Defendant had not denied the signature on the document marked as P3 and did not call any witness to contradict the position taken up by the Plaintiff or to prove his position.

The learned District Judge on 26.03.2010 delivered the Judgment in favour of the Plaintiffs and granted the relief prayed for in the plaint.

The learned District Judge answered the Plaintiff's issues in the affirmative. In respect of the issue no 8 the court held that the business is a lawful business.

The issue no 9 relates to the question as to whether or not the Plaintiff could file action without joining her husband as a party. It is the position of the Defendant that Lakmini Agro Center is a partnership and without joining the husband as a plaintiff, the Plaintiff cannot proceed with the case .The position taken up by the Defendant was that there was a non joinder. The Learned District judge held that the Plaintiff could file the action without joining the husband as a plaintiff.

As regards to the objection raised by the Defendant regarding non joinder, the Plaintiff relied on sections 17 and 22 of the Civil Procedure Code. Section 17 reads thus:

“No action shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every action deals with the matters in controversy so far as regards the rights and interests of the parties actually before it”

The issue of non joinder was taken up in the answer. According to section 22 the objection should be taken up at the earliest possible opportunity. The section 22 reads thus:

“All objections for want of parties, or for joinder of parties who have no interest in the action, or for misjoinder as co-plaintiffs or co-defendants, shall be taken up at the earliest possible opportunity, and in all cases before the hearing. And any such objection not so taken shall be deemed to have been waived by the defendant”.

In the judgment the learned District Judge referred to several authorities regarding the issue of non joinder.

In *Abdul Cader vs Ahamudu Lebbe* 37 NLR 257, it was held that :

‘Court would not uphold a belated objection on this ground if injustice would result from giving effect to it. Furthermore submits that case law also establishes that the Court will not dismiss a case for want of parties’

In *Dingiri Appuhamy and others vs Thalokolawewe Pangananda Thero* 67 NLR 89 where is was held that:

“there is no provision in the Civil Procedure Code or any other law requiring an action to be dismissed where there is a misjoinder of causes of action. It is therefore, improper for the Court to dismiss an action on the ground of misjoinder of defendant and the causes of action without giving an opportunity to the Plaintiff to amend the plaint”.

The learned Counsel for the Plaintiff submitted that had the Defendant raised this objection at the very beginning, the Plaintiff would have had a chance to amend her pleadings.

The District Judge has also considered the case of *Ponnamma vs Kasipathi Pille* 4 NLR 261, where it was held that:

“An objection under S 17 of the code has to be taken at the earliest possible opportunity. It has been held that an objection of this premise cannot be raised in an answer but that it has to be raised at an earlier stage by way of a motion. It has been held that if the objection is one of non joinder, the defendant has to name the party to be joined”.

The learned District Judge found that, the Defendant has failed to raise an objection to the non-joinder of the Plaintiff's husband at the earliest possible opportunity. Therefore the learned District Judge had correctly rejected the objection raised by the defendant regarding non joinder of the Plaintiffs's husband as a plaintiff to the action.

The defendant been aggrieved by the judgment of the Learned District Judge appealed to the High Court of Civil Appeal of the Central Province on six grounds.

- (a) That the said order and Judgment is contrary to law and misconceived in law and not supported by the evidence.
- (b) That the learned District Judge has misdirected herself on the question of 'burden of proof'
- (c) That the finding that the Respondent is entitled to relief is wrong and contrary to law and in any event there is no cause of action established by the Respondent to proceed against the Appellant.
- (d) That the evidence does not disclose that there had been a sale of the relevant potato seed boxes and therefore the Respondent is not entitled to relief.
- (e) That the finding on document marked 'P3' is not supported by the evidence led in the case.
- (f) That the finding that 'Luckmini Argo Center' is a legal person is contrary to law and wrong.

The High Court of Civil Appeal had allowed the appeal and found that the Plaintiff Respondent has no Locus Standi and in the Judgment dated 29th May 2012 stated as follows:

“the question then arises for the consideration whether the plaintiff had the locus standi to bring this action against the defendant. Issue No 10 suggested by the defendant is to the effect that the transaction referred to in the plaint was not between him and the plaintiff. The finding of the learned District Judge on the above issue is that the defendant has transacted with Lakmini Agro Centre. Admittedly the plaintiff is not the owner of Lakmini Agro Centre. Lakmini Agro Centre is not a legal entity that can sue and be sued. There is no evidence that the plaintiff had any share of the business except for being the wife of the owner. Her position is that what belongs to my husband belongs to me. That may be the understanding between the husband and the wife but it is not sufficient to confer a right on the plaintiff to sue the defendant upon a transaction entered into between the defendant and her husband.”

The Learned High Court Judges allowed the appeal and set aside the judgment of the Learned District Judge on the basis that the Plaintiff is not the owner of Lakmini Agro Centre and it is not

a legal entity that can sue or be sued and therefore for Plaintiff had no Locus Standi to institute action.

Being aggrieved by the judgment of the High Court, the Plaintiff filed a leave to appeal application in the Supreme Court and obtained leave on the following questions of law:

- a) Did the High Court err in holding that the Plaintiff does not have locus standi when the parties were not at issue on the question of locus
- b) Could the Defendant make out a new case in appeal where the issues in the trial court were different
- c) Did the High Court set aside the judgment of the District Court based on grounds that were not argued and matters that were not contentious in the trial court between the parties
- d) In the circumstances of the instant case is the question of locus standi a question of fact as the evidence categorically show that it was the Plaintiff who took the initiative and conducted the business called and referred to as Lakmini Agro Center

The District Judge in her Judgment had come to a finding that the Plaintiff Respondent Appellant is not the owner or a Partner to the business named Lakmini Agro Center. But due to her husband's handicapped conditions she was helping her husband to run the business.

It is also submitted by the learned Counsel for the Plaintiff- Respondent- Appellant that the finding of the learned High Court Judges that the Plaintiff has no Locus Standi is erroneous as the Defendant never denied that the plaintiff has a right to institute this action but merely insisted that her husband whom he considered to be a partner of the business ought to have been made a party to this action. The defendant only complained of non-joinder of a party and never denied the right of the Plaintiff to institute this action. In addition to that, in the written submissions filed on 05.01.2010 by the Defendant, the Defendant even went to the extent to state that if at all the Plaintiff is entitled to recover only half of the price. This amounts to once again admitting that the Plaintiff has a right to sue him.

The learned Counsel for the Plaintiff Respondent Appellant also submitted that as borne out by the evidence, it was the plaintiff who had been at the shop at the time of the transaction and it was the Plaintiff who had issued the goods to the Defendant. The transaction had taken place between the Plaintiff and the Defendant. Therefore the husband of the Plaintiff who was not conducting the business due to his disability as he had lost both hands and was also not at the place of business is therefore not privy to this transaction.

The question that arises in this case is whether or not the plaintiff could maintain the action even though she was not the owner or a partner of the business. The husband of the Plaintiff who is the owner had testified to the effect that he has no objection to the plaintiff maintaining this action on behalf the business. There is clear evidence that though the owner of the business is the husband of the plaintiff, she was the one who did all the day to day work of the business. Furthermore the said transaction alleged in the plaint was between the plaintiff and the defendant.

The learned High Court judges held that the Plaintiff has no locus standi to institute and maintain the action. The learned Counsel for the Plaintiff-Respondent-Appellant submitted this question was raised for the first time in the appeal . This Court has to decide whether the issue of locus standi is a question of law or mixed question of law and fact. If it is a question of law it could be raised for the first time in appeal. On the other hand if it is a mixed question of law and fact it could not be raised for the first time in appeal.

The learned Judges of the High Court has used the word locus standi which is generally used in actions based on Public law such as in writ applications and fundamental right applications. In the Civil Procedure the equivalent is the right to sue or capacity to sue. In the District Court the main issues were non joinder of the parties and whether there was a transaction between the Plaintiff and the Defendant as alleged in the plaint. The Learned District Judge dealt with these two issues and held with the Plaintiff.

When considering the facts and circumstances of this case it is clear that the question of locus standi or right to sue is a mixed question of law and fact. The issue of right to sue cannot be considered in isolation. The Court has to consider the nature of business, whether it is a large ,medium or small scale business, nature of relationship between the parties and persons who are in control of the business. In this case Lakmini Agro Center is not formally registered as a sole proprietorship nor as partnership. It is a small business run by husband and wife although the husband claims to be the owner. Due to husband's disability as he had lost both his hands, wife was running the business. She is not an employee, agent or servant of the husband. Both of them are not only partners in life but also partners in business and income from the business is their livelihood. In view of the facts and circumstances of this case I hold that the question of locus standi or right to sue is a mixed question of law and fact and cannot be raised for the first time in appeal

In Talagala Vs. Gangodawila Cooperative Stores Society Limited, NLR 48 page 472 it was held that

‘ where a question which is raised for the first time in appeal is a pure question of law and not a mixed question of law and fact, it can be dealt with’

In Jayawickrema Vs. Silva N.L.R. 427 it was held that ‘ A pure question of law can be raised in appeal for the first time, but if it is a mixed question of fact and law it cannot be done.’

Ranaweera Vs. Bank of Ceylon, 79(2) N.L.R. 482 followed the judgments *in Talagala Vs. Gangodawila Cooperative Stores Society Limited(supra) and Jayawickrema Vs. Silva (Supra)*

For the reasons stated above, I set aside the judgment of the High Court and affirmed the judgment of the District Court. The appeal allowed.

The Defendant to pay Rs. 50,000/= to the plaintiff as cost of this appeal.

Judge of the Supreme Court

B.P.Aluvihare, P.C., J.

I agree.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court