

**RAMANI KARUNANAYAKE**

**v.**

**GIRLIE WIMALARATNE**

COURT OF APPEAL  
JAYASINGHE, J.  
UDALAGAMA, J.  
C.A.L.A. 44/2001  
D.C. MT. LAVANIA 982/98/L  
FEBRUARY 23, 2001  
MARCH 13, 2001

*Declaration of title - Cancellation of Deed of Gift - Civil Procedure Code S.147 - Is a cause of action disclosed? Is this a legal issue to be tried first?*

The Plaintiff-Respondent instituted action praying for judgment cancelling the two Deeds of Gift made to the Defendant-Appellant by the Plaintiff Respondent and for a declaration that the Plaintiff-Respondent is entitled to an undivided 1/2 share of the corpus. The Defendant-Appellant in his answer averred that the plaint on the face of it does not disclose a cause of action. The issue, whether the plaint discloses a cause of action was sought to be tried first. The District Court took the view that prejudice would be caused to the plaintiff if the said issue is taken up without evidence being led.

**Held :**

- (i) Since the District Court was of the opinion that this case ought not be disposed of on the issues of law only without any evidence being led, it is not for this Court to invite the District Judge to form a contrary opinion.
- (ii) Under S.147 C. P. C a case to be disposed of as a preliminary issue it should be a pure question of law, which goes to the jurisdiction of the case.

“Judges of original courts should as far as possible go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence can dispose of the case.”

(iii) In this case the questions of law are intricately tied up with questions of fact.

S. 147 is discretionary in that what is relevant is the opinion of Court.

**APPLICATION** for Leave to appeal from an Order of the District Court of Mt. Lavanaia.

**Cases referred to :**

1. *Visvalingam Sivasamy v. Vishvalingam Vinayagamoorthy* - SC Spl. 576/96 - SCM 27. 11. 98.
2. *Gauder v. Gauder* -1 Current Law Reports - Page 11 at 13.
3. *Muthukrishna v. Gomes* - 1994 3 SLR 1
4. *Pure Beverages Ltd., v. Shanil Fernando* - 1997 3 SLR 202.

*Romesh de Silva P.C.*, with *Geethaka Gunawardena*, for defendant - Petitioner.

*A. L. M. Hedayathulla* with *Sanath J. Morawaka* Plaintiff - Respondent.

*Cur. adv. vult.*

March 23, 2001.

**JAYASINGHE, J.**

The Plaintiff instituted action in the District Court of Mt. Lavinia praying for judgment cancelling the gift made to the Defendant by the Plaintiff upon Deed No. 555 of 20. 04. 1987 and Deed No 622 of 08. 10. 1989 and for a declaration that the plaintiff is entitled to an undivided 1/2 share of the said premises No. 46/1, Vajira Road, Colombo 5, and directing that such decree be registered in the Land Registry and for costs.

Defendant filed answer; averred that the plaint on face of it does not disclose a cause of action and that in any event Plaintiff has no right to set aside the Deed No. 555 and or 622 and that the Plaintiff cannot be entitled to a 1/2 share of the premises 46/1, Vajira Road; that premises No. 46 Vajira Road was divided and registered as condominium property and by Deed No. 555 the Defendant became a owner of unit 2 and moved for dismissal

of the Plaintiff's action. When the case was taken up for trial Defendant raised among others issue No. 12. Issue No. 12 was -

For the reasons set out in the paragraph 3 of the answer:  
does the plaint disclose a cause of action?

After raising the issues Counsel for the Defendant moved that issue No. 12 be tried in the first instance as a legal issue in terms of Section 147 of the Civil Procedure Code. The learned District Judge after considering the written submissions tendered by the parties held that serious prejudice would be caused to the Plaintiff if issue No. 12 is taken up without evidence being led. In arriving at this finding the learned District Judge was influenced by a judgment of Weerasekera, J. in *Visvalingam Sivasamy v. Vishvalingam Vinayagamorthy*<sup>(1)</sup> where he had stated that;

"It must not be lost sight of that under Sec. 147 of the Civil Procedure Code for a case to be disposed of on a preliminary issue it should be a pure question of law which goes to the root of the case."

Weerasekera, J. also referred to an observation made by Wendt, J. in *Gauder v. Gauder*<sup>(2)</sup> that;

"An issue of law can only arise upon facts and those facts must be first ascertained by agreement of parties, or by proof. The Court cannot try such a question as this assuming (but without admitting) the facts stated in the Defendant's answer to be true, do they afford any defence to the action."

Weerasekera, J. quoted with approval the view taken by Wijeratne, J. in *Muthukrishna v. Gomes*<sup>(3)</sup> where His Lordship had Stated;

"Therefore the Judges of the Original Courts should as far as possible go through the entire trial and answer all the issues unless they are certain that a pure question of law

without the leading of evidence (apart from formal evidence) can dispose of the case.”

Weerasekera, J. observed that “Judges must remember and constantly remind themselves that it is their sacred duty which they should exercise with humility that those who present their grievances before them are given a Fair Trial. There can be no justice without a Fair Trial.”

The Petitioner is seeking leave to appeal against the order of the learned District Judge of 30. 01. 2001.

**Section 147** provides that -

“Where issues both of law and of fact arise in the same action and the court is of opinion that the case may be disposed of on the issues of law only it shall try those issues first and for that purpose may if it thinks fit postpone the settlement of the issues of fact until after the issues of law having determined.

It seems that there is a discretion vested in Court to try the legal issue in that if the Court is of opinion that the case may be disposed of on the issues of law only that it shall try those issues first. The learned District Judge was however of the opinion that the case ought not be disposed of on the issues of law only without any evidence being led. Since the opinion of Court is the consideration for disposal of the case on issues of law only, it is not for this Court to invite the District Judge to form that opinion.

In *Muthukrishna v. Gomes (Supra)* Court held that “under Section 147 of the Civil procedure Code a case to be disposed of on a preliminary issue it should be a pure question of law which goes to the root of the case.”

“Judges of original Court should as far as practicable go through the entire trial and answer all the issues unless they are certain that a pure question of law without the leading of evidence can dispose of the case.”

In *Pure Beverages Ltd. v. Shanil Fernando*<sup>(4)</sup> it was held "if an issue of law arises in relation to a fact or factual position in regard to which parties are at variance the issue cannot and ought not be tried first as a preliminary issue of law."

"It also needs to be stressed that in a trial of an action the question as to how or in what manner the issues have to be dealt with or tried is primarily a matter best left to the discretion of the trial Judge, and a Court exercising Appellate or Revisionary powers ought to be slow to interfere with that discretion except perhaps in a case where it is patent or obvious that the discretion has been exercised by the trial Judge not according to reason but according to caprice."

In this case the questions of law are intricately tied up with questions of fact. The Plaintiff has made various allegations against the Defendant which Mr. Hedayathulla says constitute the cause of action. There are matters to be gone into by the District Judge. The learned District Judge having considered all the circumstances of the case felt that prejudice would be caused to the Plaintiff if the issue No. 12 is answered without evidence being led. Section 147 is discretionary in that what is relevant is the opinion of Court.

I am unable to interfere with the findings of the learned District Judge.

**UDALAGAMA, J.** - I agree.

*Application dismissed.*