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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 141/09

SC/ HCCA/LA/ 153/2008

SP/HCCA/KEG/507/2007/F

DC Kegalle 26317/P

Pahalayaya Nandasena,
Kumbaldiwela,
Molagoda.

Plaintiff

Vs.

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy,
   All of Kabaldiwela,
   Molagoda.

Defendants

AND

Pahalayaya Nandasena,

Kumbaldiwela,

Molagoda.

Plaintiff Appellant

Vs.

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda.

Defendant Respondents

AND NOW BETWEEN

1. Karunanayaka Hitiralalage Ananda Bandara of Edalla Watta, Suriyagama, Dewalagama.
2. Sunethra Kumari,
3. Mayura Kumari,
4. Abekoon Bandara,
5. Galagoda Bandara,
6. Y. M. Dingiri Kumarihamy, All of Kabaldiwela, Molagoda.

Defendant Respondent Appellants

Vs.

Pahalayaya Nandasena,

Kumbaldiwela,

Molagoda.

Plaintiff Appellant Respondent

BEFORE	:	PRIYASATH DEP PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Maithri Wickremasinghe PC with R. Jayatunga for the Defendant Appellant M.U.M. Ali Sabry PC with Shamith Fernando for the Plaintiff Respondent.
ARGUED ON	:	23.03.2015
WRITTEN SUBMISSION ON:		13.01.2010 (Defendant Respondent Appellant) 22.02.2010 (Plaintiff Appellant Respondent)
DECIDED ON	:	19.02.2016

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the learned Judges of the High Court of Civil Appeal of Sabaragamuwa Province holden in Kegalle dated

13.10.2008. By the said order the Civil Appellate High Court has set aside the judgment of the learned District Judge of Kegalle dated 03.04.2002 and allowed the appeal of the Plaintiff Appellant Respondent (hereinafter referred to as the Respondent). The 1st to 06th Defendant Respondent Appellants (hereinafter referred to as the Appellants) sought leave to appeal from the said judgment of the Civil Appellate High Court and this Court granted leave to appeal on the questions of law set out in sub paragraph (f) and (g) of paragraph 10 of the Amended Petition dated 3rd of August 2009. Said questions of law are as follows;

(f) Where a co-owner of a larger land who in lieu of his undivided share, had acquired a prescriptive title to a divided portion of such larger land, execute a deed expressed to be conveying his undivided share of such larger land instead of the divided portion to which he had acquired sole ownership by prescriptive possession, can such deed be construed as conveying his sole ownership to such divided portion as held by the majority of a Divisional bench of the then Supreme Court in Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 and later by the Court of Appeal in Ponnambalam Vs Vaithaliagam 1978/79 2 SLR 166?

(g) Did the Provincial High Court in its judgment in the present case err by holding that even if the predecessor in title of the contesting Defendants had prescribed to a specific lot of the corpus, yet, as the deed on which they acquired title was for an undivided share they could not rely on the prescriptive title of their predecessor as was held in Mustapha Vs Rajapaksa (1985) 2 SLR 25?

The Respondent (Plaintiff) in this case instituted the said action against 01st to 5th Defendants in November, 1994, seeking to partition a land called 'Beligaswatta' containing in extent of one pela of paddy described in the schedule to the plaint. The 06th Defendant had been added during the pendency of the action in the District Court. In the plaint, the Respondent averred that Weligalle Muhandiramalage Punchimahattaya and Koralalage Dingiri Amma were the original owners in the proportion of ½ and ½ shares respectively. Said Punchimahattaya by deed bearing No 15695 dated 24.01.1925 (P 1) transferred his undivided ½ share to Tikiribanda and said Tikiribanda by deed bearing No 4350 dated 13.05.1926 (P 2) transferred said undivided ½ share to Dingiribanda. Also said original owner Dingiriamma by deed bearing No 26213 dated 30.01.1925 transferred her undivided share to said Dingiribanda and two others namely Tikiribanda and kirimudiyanse and each of them became entitled in the proportion of 1/6, 1/6 and 1/6 respectively of the corpus. Said Dingiribanda who became entitled to undivided 4/6 (1/2 + 1/3) share by deed bearing No 52402 dated 02.06.1961 (P 4) transferred his said undivided share to Samson Seneviratne and he by deed bearing No 7068 dated 02.09.1993 (P 5) transferred to the Plaintiff Appellant Respondent. Accordingly the Respondent became entitled to 4/6th share of the said land to be partitioned. Upon the death of said Tikiribanda, his 1/6th share devolved on his four children 1st 2nd 3rd and 4th Respondent. Accordingly the 1st to 4th Defendant Respondent Appellants became entitled in the proportion of 1/24, 1/24 and 1/24 respectively of the corpus.

The Appellants filed their second statement of claim dated 3rd of September 1997 admitting the said two original owners and also the devolution of title up to said Dingiribanda, Tikiribanda and kirimudiyanse. The Appellants' position was that said original owner Dingiriamma by deed bearing No 26213

dated 30.01.1925 transferred her undivided share to said Dingiribanda, Tikiribanda and kirimudiyanse and after the death of said original owner Dingiri Amma since she died intestate the balance ½ share also devolved on said Dingiribanda, Tikiribanda and kirimudiyanse. But the Appellants had not explained that how said Dingiriamma became entitled to balance ½ share since she had exhausted her rights to the corpus by executing the said deed bearing No 26213.

The appellants raised the issues on the basis that their predecessors in title namely Tikiribanda and Kirimudiyanse had possessed lot 1 and 2 depicted in the preliminary Plan bearing No. 3399 as separate entities and thereby had acquired prescriptive title to lot 1 and 2 of the said plan No 3399. The finding of the trial Judge was that the Appellants had established a prescriptive title to lot 1 and 2 of the said plan and the Respondent cannot have and maintain a partition action against the Appellants. The learned Counsel for the Respondent strenuously contended that this finding of the trial judge cannot be supported on the evidence adduced before court and invited this court to hold that these Appellants have not prescribed to said lot 1 and 2 and to uphold the aforesaid judgment of the High Court of Civil Appeal.

It also must be noted that according to the title deeds of the Appellants which were produced at the trial marked 1V1, 5V1 and 6V1, the predecessors in title of the Appellants had conveyed their undivided shares of the corpus by deeds 1V1, 5V1 and 6V1. Also it was an undisputed fact that their predecessors in title had not transferred a divided portion of land of the corpus or undivided shares of a divided or separate portion of the corpus to the Appellants.

The Appellants heavily relied upon the majority decision of the case of Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 in which it was held by

Gunasekara J. and Choksy A.J. (Nagalingam A.C.J. dissenting) “where deeds dealing with shares in an allotment of land purport to convey undivided shares of a larger land of which the allotment had at one time formed a part, a Court administering equity has the power, in a partition action relating to the allotment, to rectify the mutual mistakes of the parties in the description of the property, even though no plea of mistake and claim for rectification is set up in the suit.”

With respect to their Lordships I am not inclined to agree with the said findings. Is it correct to interpret a deed against the will and/or intention of the person who execute it? My answer is ‘no’. It is my considered view that the Court should interpret a deed in order to give effect to the intention of the vendor of a deed. It is not the function of the Court to ascertain the intention otherwise than from the words used in the deed. The intention which is being given effect to must be ascertained in accordance with established principles. The Court's powers do not extend to making alterations as are necessary to bring the deed in accord with the idea of what is just or equitable. Where a deed employs language not obscure but perfectly plain and the construction placed thereon is in accordance with its plain meaning, in such case courts give neither a strict nor a broad construction but simply according to the plain language that has been used in the deed and then it is neither a strict nor a broad interpretation of the words but the one and only interpretation of them.

It must be noted that even Gunasekara J in Girigoris Perera Vs Rosalin Perera (supra)(at page 544) observed that “I have had the advantage of reading the draft of the Acting Chief Justice's judgment and, if I may say so with respect, I agree with what he has said regarding the interpretation of deeds. It seems to me, however, that, rightly understood, the controversy with which we are concerned relates not to the construction of a deed but to the nature and extent of

the Court's power to give relief against mistake when it appears that as a result of mutual mistake the parties have expressed in the deed an intention different from their actual intention. As for the admissibility of evidence of such mistake it would not be correct, I think, to state as a general proposition without qualification that "no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed".

On other hand it appears that in the case of Girigoris Perera Vs Rosalin Perera there had been no plea of mistake set out at the trial. It also seems that mistake of fact had been raised for the first time in appeal. No doubt that a plea of mistake of fact could only be established by leading of evidence to that effect. It is my considered view that Appellate Courts should not go in to the facts of the case unless the trial judge has failed to evaluate the evidence led at the trial and thereby has made an error on facts of the case in reaching to a right conclusion.

In the case of Alwis vs. Piyasena Fernando (1993) 1 SLR 119 G. P. S. de Silva, C.J. held that "It is well established that findings of primary facts by a trial Judge who hears and sees witnesses are not to be lightly disturbed on appeal."

In the case of Setha vs. Weerakoon 49 NLR 225 Howard C.J. stated that "A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

In the case of Candappa vs. Ponambalampillai (1993) 1 SLR 184 Supreme Court held that “A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law.”

In Girigoris Perera Vs Rosalin Perera (supra) Nagalingam ACJ following series of decisions and also as observed in the case of Simpson Vs. Foxon 1[(1907) Probate 54.], " What a man intends and the expression of his intention are two different things he is bound and those who take after him are bound by his expressed intention", held that “construing the deed, which in its terms are clear, unambiguous and precise, the only conclusion one can come to is that the deed conveyed to the 8th defendant a 1/20 share of the larger land, and if the vendor had no title to the entirety of the larger land, but title only to a smaller portion of it, the deed can only convey to the vendee the same fractional share in the smaller lot, and the deed must be held to be operative only to the extent of a l/20th share in the lot now in dispute.”

I shall now pass on to a consideration of the various authorities cited by Nagalingam ACJ when arriving at the aforesaid conclusion on construction of deeds where the vendor who was entitled to a divided lot in lieu of his undivided interests in a larger land conveyed an undivided share of the larger land. In the case of Fernando Vs. Christina [(1912) 15 N. L. R. 321.] where Pereira J. was invited as in the present case to construe a conveyance of ‘an undivided four-sixths of one-third share of the defined southern portion of Mawatabadawatta’ as conveying the entirety of the divided portion of the land which the vendor had possessed in lieu of his undivided interests. His Lordship refused to accede to the request and held that "Whatever the parties may have intended to convey, the property in fact

conveyed was an undivided four-sixths of one-third of that portion, that is, of the divided lot.”

In the case of Bernard Vs. Fernando [(1913) 16 N. L. R. 438] where too the vendor who was entitled to two divided lots A and D in lieu of his undivided interests in a larger land conveyed a one-fifth share of the larger land, and where it was contended that the deed must be construed as conveying to the vendee the entirety of the lots A and D. Pereira J., with whom de Sampayo J. was associated, in delivering judgment said in emphatic terms " It is, of course, obvious that, having purchased an undivided share in the entirety, they cannot establish title to the divided lots A and D."

A similar view was taken in Fernando Vs. Podi Sinno [(1925) 6 C. L. R. 73]. In this case the Court was called upon to construe a deed conveying undivided shares in a bigger extent of land as in fact conveying divided lots to which the vendors were entitled. Bertram C.J., with whom Jayawardene J. was associated, repelled the contention and expressed himself thus :" If persons who are entitled by prescription of a land persist after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves acquired a title by prescription must be bound by the terms of their deeds."

Dalton and Akbar JJ. arrived at a like conclusion in respect of this question in Perera Vs. Tenna [(1931) 32 N.. L. R. 228:]. The facts here were that the vendors conveyed an undivided half share of the entire land when in point of fact they were entitled to two divided lots D and Dl. The Judges rejected the

argument that the deed must be construed as operating to convey the divided lots D and D1.

In the case of Mudalihamy Vs. Appuhamy [(1934) 36 N. L. R. 33.] where Maartensz A.J. used language which is self-explanatory of the facts. His Lordship expressed the view that "At the same time having failed to take the necessary steps to have lot A3 declared bound and executable and sold he cannot claim the entirety of lot A3. Having purchased an undivided 2/3 share of the whole land when the execution debtor was entitled to lot A3, he is only entitled to an equivalent share, namely 2/3 of A3." In the said case Dalton J. also expressed the same view that “the plaintiff himself purchased only an undivided share in the entirety, he is entitled as a result to an undivided share only in the share in severalty."

In the case of Dona Elisahamy Vs Don Julis Appuhamy (1950) 52 NLR 332 it was held that " If persons who are entitled by prescription of a land persist, after they have acquired that title, in conveying an undivided share of the whole land of which what they have possessed is a part and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves have acquired a title by prescription, must be bound by the terms of their deeds"

In the case of Jayaratne Vs Ranapura (1951) 52 NLR 499, where one of six co-owners of a common property had, following upon an amicable partition, acquired prescriptive title to a divided portion of the land. He thereafter intended to convey an undivided 1/6 share in that divided portion to a third party, but the deed of conveyance wrongly described the share so conveyed as an undivided 1/36 share in the larger land. An action was later instituted for the partition of the

divided portion in which all the parties derived their title from the same predecessor-i.e., the original co-owner who had acquired prescriptive title to the corpus. It was held that "the Court was entitled so as to give effect to the real intention of the deed of conveyance, to construe it as having conveyed an undivided 1/6 share and not merely an undivided 1/36 share in the divided portion sought to be partitioned."

Thus G.P.S. De Silva J in Mustapha Asma Umma Vs Rajapaksa (1985) 2 SLR 25, following the decision of Bertram CJ in Fernando Vs Podisinno (1925) CLR 73, held that "Even if the predecessor in title of the contesting defendants had prescribed to a specific lot of the corpus yet as the deed on which they acquired title was for undivided shares, they could not rely on the prescriptive title of their predecessor. They would have to establish prescription by their own possession for over the prescriptive period. But here the partition suit had been filed before they could have prescribed to the specific lot; as they have not acquired prescriptive title, they must be bound by the terms of their own deed."

For the forgoing reasons I hold that the majority decision in Girigoris Perera Vs Rosalin Perera (1952) 53 NLR 536 is not the correct construction of a deed in which a vendor who was entitled to a divided lot in lieu of his undivided interests in a larger land conveyed an undivided share of the larger land. Applying the principle laid down in Fernando Vs. Podisinno (supra) by Bertram CJ, I hold that in the present case too, the predecessors in title of the Appellants who claimed to be entitled to divided lots 1 and 2 in lieu of their undivided interests in the corpus, by deeds 1V1, 5V1 and 6V1, had conveyed their undivided shares of the corpus to the Appellants. The deeds 1V1, 5V1 and 6V1should be construed according to the ordinary connotation of the language used in them and the

intention ascertained from the words employed by the parties. Hence the Appellants cannot claim a prescriptive title to lot 1 and 2 of the said preliminary plan No 3399 based on the possession of their predecessors in title. Accordingly I answer the aforesaid questions of law set out in sub paragraph ‘f’ and ‘g’ of paragraph 10 of the amended petition of appeal in the negative. The instant appeal of the appellants is dismissed with cost.

Appeal dismissed.

Judge of the Supreme Court

PRIYASATH DEP PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court