

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

In the matter of an Appeal in terms
of Section 5 C(1) of the High Court of
the Provinces (Special Provisions)
Act No.54 of 2006.

Mawanane Hewa Gnanadasa
Polwatte , Ambalangoda
Plaintiff(Deceased)

Mawanane Hewa Shantha
Railway Quarters,
Railway Station,
Koggala
Substituted-Plaintiff

Vs.

S.C. Appeal No.54/2020
SCHCCA LA No. 60/2019
Civil Appellate High Court Galle
No. SP/HCCA/GA/ 114/2013(F)
D.C. Balapitiya No. P/3769

1. Sembakuti Walter
Near Post Office, Polwatta,
Ambalangoda.
2. Walpita Gamage Danasiri
Woodland Watta
Gonapinuwala.
3. Kathaladuwa Bulathge Kulathunga,
184, Polwatta,
Ambalangoda.

4. Kathaladuwa Bulathge Thanuja
Dilrukshi
231E, Nilammahara,
Bokundara, Piliyandala.
5. Santhiyagu Chandana De Silva,
180, Polwatta, Ambalangoda
Defendants

AND

1. Walpita Gamage Danasiri
Woodland Watta
Gonapinuwala.
2nd Defendant-Appellant
Vs.
Mawanane Hewa Shantha
Railway Quarters,
Railway Station,
Koggala
Substituted-Plaintiff-Respondent.
1. Sembakuti Walter
Near Post Office, Polwatta,
Ambalangoda.
3. Kathaladuwa Bulathge Kulathunga,
184, Polwatta,
Ambalangoda.
4. Kathaladuwa Bulathge Thanuja
Dilrukshi
231E, Nilammahara,
Bokundara, Piliyandala.
5. Santhiyagu Chandana De Silva,
180, Polwatta,
Ambalangoda.
**1st 3rd, 4th, & 5th Defendant-
Respondents**

AND NOW

Santhiyagu Chandana De Silva,
180, Polwatta,
Ambalangoda.

**5th Defendant-Respondent-
Appellant**

Vs.

01. Walpita Gamage Danasiri
Woodland Watta
Gonapinuwala.

**2nd Defendant-Appellant-
Respondent**

02. Mawanane Hewa Shantha
Railway Quarters,
Railway Station,
Koggala

**Substituted-Plaintiff-Respondent-
Respondent.**

03. Kathaladuwa Bulathge Kulathunga,
184, Polwatta,
Ambalangoda.

04. Kathaladuwa Bulathge Thanuja
Dilrukshi
231E, Nilammahara,
Bokundara, Piliyandala.

**3rd & 4th Defendant-Respondent-
Respondents**

BEFORE : S. THURAIRAJA, PC, J.
ACHALA WENGAPPULI, J.
ARJUNA OBEYESEKERE, J.

COUNSEL : Viran Fernando for the 5th Defendant-Respondent-
Appellant.

Rajeev Amarasuriya with Ruvindu Bandara, Ms. Sumudu Nanayakkara, and Ms. Dulanga Nanayakkara for the 2nd Defendant-Appellant-Respondent and Subst. Plaintiff- Respondent-Respondent.

Krishan Fernandupulle for the 3rd and 4th Defendant- Respondent-Respondents

ARGUED ON : 10th January, ,2024

DECIDED ON : 25th February, 2026

ACHALA WENGAPPULI, J.

This appeal arises out of a partition action instituted by the Plaintiff in the year 2004, by which he sought to partition a land called “Lot No. B of *Merenna Watta*”, in an extent of 01 Rood and 12.9 Perches, in terms of the share allocation pleaded in the Plaint, and based on the devolution of title as described therein in respect of each of the co-owners.

The District Court, by its judgment, decided to partition the land.

The 2nd Defendant preferred an appeal against the said judgment of the original Court, in appeal No. SP/HCCA/GA/114/2013(F), whereas another party too preferred an appeal against same judgment in appeal No. SP/HCCA/GA/114A/2013(F). The appeal of the 2nd Defendant in appeal No. SP/HCCA/GA/114/2013(F) was allowed by the High Court of Civil Appeal, by its judgment. The 5th Defendant, thereupon sought Leave

to Appeal against the said judgment of the High Court of Civil Appeal from this Court in application No. SC/ HCCA/LA/60/2019.

The Plaintiff, 1st, 2nd, 3rd and 4th Defendants have resisted the 5th Defendant's application for Leave to Appeal.

On 03.07.2020, this Court granted Leave to Appeal to the 5th Defendant on the following questions of law, which were formulated by him in sub paragraphs (b) and (e) of paragraph 17 of the petition dated 21.02.2019 and reproduced below;

Have their Lordships erred in failing to appreciate that the law as set out in the recent judgment of your Lordships Court in SC Appeal No. 172/2013 dated 27.01.2017 that a Court cannot consider the issue of prescription for the first time in appeal?

Have their Lordships erred in failing to appreciate that the learned District Judge of the District Court of *Balapitiya* had correctly recognised the existence of a trust between the 5th Defendant and the substituted Plaintiff's brother?

The Plaintiff, in his Plaint filed before the District Court of *Balapitiya*, claimed that the original owner of the land sought to be partitioned is one *Anthony Luvinis Perera* alias *Simon Lionel Wickramasuriya*, (In deeds the name referred to as *Samson Lionel Wimalasuriya*) who acquired his title upon a Deed of Partition No. 23895, executed on 29.06.1932. The rights of the original owner were succeeded by his five children, who each inherited an

undivided 1/5 share of the *corpus*. According to the pedigree pleaded by the Plaintiff, the share allocation of the *corpus* was set out as 1/15 to the Plaintiff, 6/15 to the 1st Defendant and 2/15 to the 2nd Defendant, leaving 6/15 undivided shares un-allotted, on account of two other children of the original owner, whose whereabouts are not known to the Plaintiff.

In the instant appeal, the underlying dispute is confined to the 2nd and 5th Defendants., who both relied on the said devolution of title in support of their respective claims, commencing from the 1/5th share of *Anthoney Kuladewa Gamini Gilfred Wimalasuriya*, one of the five children of the original owner.

The Plaintiff described the devolution of title in relation to the 2nd Defendant in his Plea as follows. *Gilfred Wimalasuriya* transferred his rights to *Winifreeda Fernando* by executing Deed No. 343 on 13.11.1974 (P6), who in turn transferred her rights to *Padmini de Silva* by Deed No. 1722 on 11.12.1976 (P7). The 5th Defendant received *Padmini de Silva's* rights by Deed No. 2507, executed on 25.12.1980 (P8), and thereafter "transferred" those rights in favour of *Manane Hewa Priyantha* by Deed No. 7053 on 29.11.1991 (P9). Thereafter, *Priyantha* has transferred his rights to the 2nd Defendant by execution of Deed No. 8366 on 13.08.1996 (P10). The 2nd Defendant in turn has transferred 1/3rd share of his rights over the *corpus* in favour of the Plaintiff by Deed No. 4903 on 10.06.1998 (P11).

The core of the dispute between the 2nd Defendant and the 5th Defendant lies in the Deed No. No. 7053 on 29.11.1991 (P9), which was executed by the latter, in favour of *Manane Hewa Priyantha* by Deed of Transfer No. 7053, on 29.11.1991. This notarial instrument was relied on by

the Plaintiff by marking same as P9 whereas the 5th Defendant too relied on same, by marking it as 5V34.

The share allocation made by the Plaintiff in relation to other parties is not challenged in either of the Courts below and thus lies outside the scope of this appeal.

It is the position of the 2nd Defendant that the said Deed No. 7053 is an outright transfer of the rights stated therein, and has been executed in favour of the transferee over valuable consideration that has passed between the two parties. However, the 5th Defendant has averred in his Statement of Claim that the said “*transfer*”, in fact is not an absolute transfer but a conditional transfer that has been executed for the purpose of security, in relation to a loan of Rs.40,000.00 obtained from the mother of *Priyantha*, following an oral agreement between them to re-transfer the title of the property once the said loan amount is fully settled. The 5th Defendant further alleged that he obtained the said amount in two instalments and it was before the release of the second instalment, that the said deed was executed.

The 5th Defendant asserted in his Statement of Claim that he never intended to part with the beneficial interest he had over the portion of land described in the schedule to the said deed at any point in time and was in its possession, ever since the execution of P8. The 5th Defendant therefore claimed that the said transferee, *Priyantha*, has held that property “*for the benefit of the owner*” in trust and therefore pleaded that, since there was a constructive trust established in terms of Section 83 of the Trusts

Ordinance, the subsequent transfers that were made after the execution of Deed No. 7053 (P9) are voidable.

The points of contest commencing from Nos. 11 to 21, were raised before the trial Court by the 5th Defendant, and formulated in line with the said position taken up by him in the Statement of Claim. The trial Court, in its judgment concluded that the 5th Defendant, in executing the Deed of Transfer No. 7053 (P9/5V34) did not intend to part with the beneficial interest over the portion of land to *Priyantha*, who held that title in trust on behalf of the 5th Defendant. Therefore, the Court concluded that the deeds that were executed consequent to Deed of Transfer No. 7053 (P9/5V34), carried no title. The trial Court accordingly allocated 1/5 undivided share to the 5th Defendant, off the *corpus*.

In appeal, the 2nd Defendant raised a ground of appeal on the basis that the claim of constructive trust relied upon by the 5th Defendant is already prescribed and therefore, the trial Court erred in accepting the latter's rights over the *corpus*, which he in fact had transferred in favour of *Priyantha*, by execution of the Deed of Transfer No. 7053 (P9/5V34). The appellate Court, having noted that the prescription period for constructive trusts being three years, decided that when reckoned from the date of refusal by *Priyantha* to re-transfer the property, the claim of constructive trust was already prescribed, when the Plaintiff instituted the partition action.

This conclusion was reached by the High Court of Civil Appeal on the evidence that indicated the position, that when the 5th Defendant sought relief from the Debt Conciliation Board over this particular loan

transaction, his application was dismissed by that Board, with a direction that he should seek his remedy from the District Court. Since the dismissal of the 5th Defendant's application was made by the Debt Conciliation Board on 05.11.1996 (5V29), the High Court taken up the view that the 5th Defendant has slept over his rights and owing to that reason, his claim of constructive trust should not have been allowed to put in as a Point of Contest, by the trial Court. The appellate Court therefore rejected the contention of the 5th Defendant that the issue of prescription could not be taken by the 2nd Defendant for the first time in appeal stage with the statement that "... if the matter to be decided is a mixed question of fact and law still it could be raised for the 1st time in appeal if all the necessary facts are contained in the evidence recorded". The High Court of Civil Appeal relied on the reasoning of the judgment of *Leechmen and Company Ltd., v Rangalla Consolidated Ltd.*, (1991) 2 Sri L.R. 373, in making the said pronouncement.

Learned Counsel for the 5th Defendant, in his submissions before this Court, contended that the High Court of Civil Appeal has fallen into grave error when it accepted the position that the issue of prescription could be taken for the first time in an appeal, whereas a contrary position was explicitly laid down in the judgment of this Court in *Tilakaratne v Chandrasiri and another* (SC Appeal 172/2013 - decided on 27.01.2017), even though as the learned Counsel submits, that *Prasanna Jayawardena J* has taken a " *more liberal view*" in writing the said judgment on that identical issue. Learned Counsel for the 5th Defendant further contended that the trial Court has very carefully considered all the attendant circumstances before satisfying itself that the 5th Defendant established

existence of a constructive trust, in the execution of the Deed of Transfer No. 7053 (P9/5V34) in favour of *Priyantha*, a finding which the 2nd Defendant did not challenge seriously.

Learned Counsel for the 2nd Defendant's contention is that, in the judgment of *Tilakaratne v Chandrasiri and another (supra)* this Court accepted the position that the issue of prescription could be raised in appeal for the first time if "... it might have been put forward in the Court below under someone or other of the issues framed", and the Point of Contest No. 15 which was framed to the effect that, whether the 5th Defendant repeatedly requested *Priyantha* to repay the amount mentioned in the deed and the said person failed to take any action to re-transfer the property, qualifies to be termed as such an issue. With regard to the submissions made on the attendant circumstances, learned Counsel for the 2nd Defendant challenged the competency of the surveyor who issued a valuation to the property described in Deed of Transfer No. 7053 (P9/5V34), the valuation on which the 5th Defendant relied on to highlight the gross inadequacy of the 'consideration' said to have passed between the parties in relation to the execution of the said notarial instrument P9/5V34.

In view of the submissions made on behalf of the 5th and 2nd Defendants by their respective Counsel, I think it is appropriate to consider the attendant circumstances that the trial Court has considered in arriving at the conclusion that a constructive trust is established.

Perusal of the judgment of the trial Court indicated that the said Court had the opportunity of considering following factors that were

presented before that Court as attendant circumstances in support of the claim made by the 5th Defendant;

- i. Mother of the Plaintiff and her son, the transferee (*Priyantha*) were engaged in money lending business during the relevant time and this fact was proved by the 5th Defendant with documentary evidence. That material indicated that when Mother lent money it was the Plaintiff who kept accounts, on behalf of his mother,
- ii. the 5th Defendant lodged a complaint to Debt Conciliation Board over the loan transaction in relation to P9/5V34 in the year 1996, which confirms the consistency of his claim that the purpose of execution of the said deed was providing security for the loan amount,
- iii. The evidence clearly indicated that the Lot No. C, depicted in the preliminary plan, was in possession of the 5th Defendant throughout, despite the execution of the Deed P9/5V34 (as admitted by the Plaintiff), and a caveat was registered by him in the Land Registry in relation to the disputed portion of land under his possession. It was the 5th Defendant who registered the ownership of that parcel of land in the local authority and paid annual assessment rates,

- iv. The Plaintiff, during cross-examination admitted that a deed has been accepted as security to a loan (vide proceedings at pages 119 and 137 of the appeal brief),
- v. The Plaintiff or the 2nd Defendant failed to call *Priyantha*, the transferee of P9/5V34, to counter the assertions made by the 5th Defendant that the said transferee held the disputed property for his benefit. Neither the Plaintiff nor the 2nd Defendant had any personal knowledge as to the circumstances that led to the execution of P9/5V34,
- vi. The demeanour and deportment of the 5th Defendant in presenting evidence pertaining to the loan obtained, coupled with an oral agreement and the circumstances associated with the execution of P9/5V34, made it a more probable version, when compared to the position relied upon by the 2nd Defendant asserting the contrary,
- vii. The attestation to deed P9/5V34 indicates that the consideration of Rs. 40,000.00 was not paid at the time of execution of the deed P9/5V34 before the Notary, but the transferee has admitted payment of same in an unspecified date, but before the act of execution,

- viii. Father of the 5th Defendant instituted an action against the Plaintiff and the other Defendants in the District Court of *Balapitya* in case No. 2426/L, over a dispute that erupted between these very same parties over the portion of land he occupied. The said action was settled by the parties. The defendants in that action have agreed to a pay Rs. 42,500.00 to the plaintiff, in lieu of renunciation of his rights over the Lot No. C2 of Plan No. 2407, leaving same to the said defendants.

After a careful consideration of all the material that were presented before the trial Court on the issue of constructive trust by the 5th Defendant, I fully endorse the finding made in favour of the said Defendant by that Court.

The contention of the 2nd Defendant is that the reliance placed on the value of the property in P9/5V34 in the valuation report in order to show the “*gross inadequacy*” of the consideration said to have passed in executing P9/5V34, cannot be relied upon because it has not been issued by a qualified valuer but by a surveyor, who does not have any such qualification, must be examined next.

This contention need not be considered in detail as the trial Court did not necessarily base its finding on the constructive trust on this report. But it must be pointed out that when the 5th Defendant, during cross-examination by the 2nd Defendant, stated that the property in P9/5V34, was worth more than Rs. 150,000.00 at the time of execution of that notarial instrument (vide page 266 of the appeal brief), there was no challenge

coming from the 2nd Defendant to the said factual assertion made by the 5th Defendant. The 2nd Defendant, who had all the opportunity to counter that claim with relevant material, chose not to when his opponent made a specific claim of value. Thus, the facts that have not been challenged during cross-examination could be acted on by Courts as proved in terms of Section 3 of the Evidence Ordinance.

With that factual backdrop in mind, I now turn to consider the question of the claim of prescription taken up for the first time in appeal by the 2nd Defendant.

Neither the 2nd Defendant nor the Plaintiff have taken the issue of whether the claim of constructive trust is prescribed in their respective pleadings that were tendered before the trial Court. Similarly, no point of contest was raised before the trial Court by either party, in spite of the fact that the 5th Defendant, primarily relied on the claim of constructive trust, in order to retain the rights that were '*transferred*' to *Priyantha* by execution of deed P9. Thus, the 5th Defendant had no opportunity whatsoever to counter any position taken by the others who wants the Court to rule that his claim of constructive trust was already prescribed. The trial Court too, in the absence of any point of contest on this aspect of the 5th Defendant's case, confined its judgment to the dispute identified by the parties and set out in their respective points of contest. After considering the totality of the evidence, the District Court decided to accept the 5th Defendant's said claim.

Being aggrieved by the said judgment, the 2nd Defendant, in his petition addressed to the High Court of Civil Appeal set out several

grounds of appeal on which he intends to challenge the validity of the impugned judgment of the trial Court. The Petition of Appeal of the 2nd Defendant dated 09.12.2013, does not contain any ground of appeal on the issue that the claim of constructive trust is prescribed. This is understandable, as there was no specific finding made by the trial Court, determining this particular aspect, in either way. Thus, it is reasonable to conclude that the 2nd Defendant raised the question; whether the claim of constructive trust is prescribed, was before the appellate Court for the first time, and that too only at the argument stage.

Learned Counsel for the 5th Defendant referred to the treatise by Prof. C.G. *Weeramantry* on Law of Contract (at p 866), along with the *dicta* of the judgments *Brampy Appuhamy v Gunasekera* (1949) 50 NLR 253 and *Tilakaratne v Chandrasiri and another* (*supra*) where the principle; an issue of prescription could not be taken up by a party for the first time in appeal, was explicitly laid down. He further contended that the exception to this prohibition is, if it is only a pure question of law, as recognised in *Tilakaratne v Chandrasiri and another* (*supra*).

In this instance, learned Counsel submitted, that the determination of the issue of prescription of the claim of constructive trust raised by the 5th Defendant is dependent on the following questions of facts mixed with law, in addition to several others similar questions;

- a. Were the deeds executed subject to a verbal promise to re-transfer?
- b. Was a demand made for the re-transfer from the original transferee?

- c. Were demands for re-transfer made from the subsequent transferees?
- d. Has the promise of re-transfer been subsequently acknowledged?

Learned Counsel for the 2nd Defendant sought to counter this contention by placing reliance on the quotation from *Arulampikai v Thambu* (1944) 45 NLR 457 reproduced by *Jayawardena J* in *Tilakaratne v Chandrasiri and another* (*supra*) which states that a new issue may be raised in appeal only if “... it might have been put forward in the Court below under some, one or other, of the issues framed” and the point of contest No. 15 satisfies that requirement. I am unable to agree with that contention for the reason, that the context in which the said Point of Contest was framed, relates to the circumstances that might have a bearing on his effort to establish a constructive trust over deed P9. It is also to note that it was framed before the trial Court by the 5th Defendant and not the 2nd Defendant.

Perusal of the evidence of the 5th Defendant indicate that he made several demands to have the property re-transferred from *Priyantha* as well as from his mother, being the parties whom he knew from childhood. The 5th Defendant admitted that he made several such demands before making his application to the Debt Conciliation Board for relief. The High Court of Civil Appeal reckoned the period of prescription from the date of dismissal of that application. The application was dismissed by the Board on 05.11.1996 (5V29).

But the evidence is clear on the point that the 5th Defendant has made repeated requests to re-transfer even thereafter.

The father of the 5th Defendant has registered a caveat in respect of land in which the parties have entered into a settlement (5V45). He was informed by the Land Registry on 10.06.1998, that the Deed No. 4903 (P11) was presented to that office for registration (5V42). Thus, if at all the date of reckoning should have been 10.06.1998. This factor would not have helped the 5th Defendant, if the issue of prescription was taken up at the correct time, but the High Court of Civil Appeal made a factual error, when it ignored 5V42 and the 5th Defendant's admission that he did not take any action despite that notice, to count the starting of the prescriptive period.

The 5th Defendant asserted that whenever he met *Priyantha*, he repeatedly requested him for the re-transfer and he was ready to redeem the property, after payment of monies due to the transferee in full. During cross-examination by the 2nd Defendant, the 5th Defendant maintained the position that he repeatedly made efforts to have the property re-transferred and even visited *Priyantha's* sister, who resides in *Gonapinuwala*, and pleaded with another brother of *Priyantha* called *Shantha* in this regard but was unsuccessful. This evidence clearly indicates that attempts were made by the 5th Defendant after the dismissal of his application by the Debt Conciliation Board. However, there is no probing into these claims made by the 5th Defendant, when he was cross-examined by the 2nd Defendant seeking to clarify when exactly these efforts were made by him.

Basnayaka CJ, in Brampy Appuhamy v Gunasekera (supra) has held that (at p. 255); “[I]t is settled law that when, as in the case of Sections 5, 6, 7, 8, 9, 10 and 11 of the Prescription Ordinance, the effect of the statute is merely to limit the time in which an action may be brought and not to extinguish the right, the Court will not take the statute into account unless it is specially pleaded by way of defence”.

The underlying rationale to this principle is clearly set out by *Jayawardena J, in Tilakaratne v Chandrasiri and another (supra)* when his Lordship observed that;

“[I]n view of the aforesaid nature of the defences of prescription set out in Sections 5 to 10 of the Prescription Ordinance, the long standing rule is that such a defence should be raised at the trial so that the Plaintiff has a fair opportunity of meeting it by leading evidence to counter the defence that his claim in that action is time barred or, if the Defendant has shown the action to be plainly time barred, choosing to abandon the action and seek another avenue of relief without delay. As Chitty [Contracts 25th Ed., at p.1051-1052] points out, ‘... the effect of limitation under the Limitation Act 1980 is merely to bar the plaintiff’s remedy and not to extinguish his right. Limitation is a procedural matter, and not one of substance, and it has to be specially pleaded by way of defence’. Further, it hardly needs to be stated that, a Plaintiff who has no inkling that the Defendant intends to rely on a defence on prescription, will be unfairly subjected to grave prejudice if he has to confront an issue of prescription raised for the first time in appeal, which he had no opportunity of countering at the trial.”

It is clear from the multiple factors referred to above in this judgment that the issue of prescription in relation to the claim of constructive trust in this instance is not purely a question of law but a question of law mixed with facts. In the pronouncement made by this Court in *Tilakaratne v Chandrasiri and another* (*supra*) to the effect that “... a new issue may be raised in appeal only if it is “a pure question of law” and that a “mixed question of law and fact” cannot be raised for the first time in appeal” is undoubtedly applicable to the circumstances in the instant appeal as well.

I am fortified in my said view, as this Court, in the judgment of *Ranaweera Menike v Rohini Senanayake* (1992) 2 Sri L.R. 180, held (at p.181) that “ [A] matter that has not been raised before might, nevertheless, be a ground of appeal on which the appellate Court might base its decision, provided it is a pure question of law; or; if the point might have been put forward in the Court below under one of these issues raised, and the Court is satisfied (1) that it 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 (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal.” (emphasis added). The 2nd Defendant’s plea of prescription taken up first time in appeal cannot be taken as a one that qualifies any of these factors.

In view of the reasons set out in the preceding sections of this judgment, I now proceed to answer the two questions of law; on which the instant appeal was heard and referred to at the very outset of this judgment in the affirmative, and in favour of the 5th Defendant.

The impugned judgment of the High Court of Civil Appeal is accordingly set aside and the judgment of the District Court is hereby restored.

The appeal of the 5th Defendant is accordingly allowed with costs. The District Court is directed to expeditiously proceed with the partition of the land in terms of its judgment, according to law.

JUDGE OF THE SUPREME COURT

S. THURAIRAJA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT