THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2010] 1 SRI L.R. - PART 5

PAGES 113 - 140

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company (Printers) Ltd.

Price: Rs. 25.00

DIGEST

He relied on the decisions of our Court in *Corea v. Appuhamy* [26] and *Tillekeratne v. Bastian*,[27] and also referred to the decision in *Maria Fernando and Another v. Anthony Fernando* [28], in which at 360 Wignesweran, J. observes as follows:

> "Whether ouster may be presumed from long, continued, undisturbed, and uninterrupted possession depends on all the circumstances in each case. (*vide, Siyadoris v. Simon.*" [28(a)])

It is a well established principle in the Roman-Dutch Law that "the possession of one co–owner is, in law, the possession of the other," G. L. Pieris, *The Law of Property in Sri Lanka Vol. 1* at p. 359. In the celebrated case of *Corea v. Appuhamy (supra)* the Privy Council laid down in unequivocal terms that every co-owner must be presumed to be possessing in the capacity of co-owner, and that as Lord MacNaghten put it at 78 of his judgment –

> "His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In *Tillekaratne v. Bastian (supra)* a Full Bench of the Supreme Court drawing from the principles of the common law in Ceylon, as it then was, and in England, from where our Prescription Ordinance had drawn much influence, Bertram, C. J. set out that our law on prescription, both in situations arising out of co-ownership and otherwise, must be approached by equating the previously unknown and abstract term "ouster" to a simple question as to whether the possession in question was or has become "adverse". At 18 of his judgement, Betram, C. J. observed that –

"What, then, is the real effect of the decision in *Corea v. Appuhamy (supra)* upon the interpretation of the word "adverse" with reference to cases of co-ownership? It is, as I understand it, that for the purpose of these cases the word "adverse" must, in its application to, any particular case, be interpreted in the light of three principles of law:-

(i) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.

(ii) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.

(iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity."

While the first of the above principles is one of substantive law, the second and third principles are presumptions, and thus, principles of the law of evidence. It is the applicability of the third of these principles, which has been the basis of our decisions on this difficult area of law, and must decide question of the ownership of Porikehena. The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. In doing so, he is required not only to prove an intention on his part to possess adversely, but also a *manifestation of that intention to the true owner* against whom he sets up his possession. Considering recent decisions such as *Maria Fernando v. Anthony Fernando (supra)*,

authorities remain prone today as they were in 1918 as observed by Bertram, C. J., to emphasize the definite and heavy burden cast upon the assertor to prove "an overt unequivocal act."

However, it must not be forgotten that Bertram, C. J. himself acknowledged that there can be no hard and fast rules in this regard, and in particular, the evidentiary principle that a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity, might become unreal or "artificial" if it is accepted without qualification. In the course of his judgment in *Tillekaratne v. Bastian (supra)* at 20 to 21 he observed that –

> ". . . . . presumptions of the law of evidence should be regarded as guides to the reasoning faculty, and not as fetters upon its exercise. Otherwise, by an argumentative process based upon these presumptions, we may in any particular case be brought to a conclusion which, though logically unimpeachable, is contrary to common sense. It is the reverse of reasonable to impute a character to a man's possession which his whole behavior has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he had they have taken the whole produce of the property for themselves; and that these co-owners, have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed

adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense."

It is evident in this *dictum* that not only has this Court recognized the strong logical underpinnings for a counter-presumption of "ouster", but it has also laid down guidelines under which such a presumption may be made. With further reference to a line of cases beginning from the seminal judgement in *Corea v. Appuhamy (supra)*, all of which have been analyzed in the leading decision of this Court in *Gunasekera v. Tissera and Others*,[29] along with numerous references to be found in the Roman – Dutch law authorities, the case for declaring the principle to be part of our law was well established. Accordingly, in my view it is not only legitimate but necessary, wherever long-continued exclusive possession by one co-owner is proved to have existed, to delve into the question whether it is just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that separate and exclusive possession had become adverse at some point of time more than ten years before action brought.

It is in this light that one has to consider the submission made with great force by the learned President's Counsel for the Appellant that the amicable partition said to have been effected by Plan No. 1868 (3D1) by the heirs of Jeeris does not bind Haramanis or his heirs as they were not aware of the said Plan, and additionally, as no Partition Deed to which

all co-owners were parties had been entered into to give effect to the said Plan. In this context, learned President's Counsel invited the attention of court to the following *dictum* of Gunasekara, J. (with Gratiaen, J. concurring) in *Kobbekaduwa v. Seneviratne*,[30] at page 359:

> "..... The mere fact that one co-owner was in occupation of the entirety of a house which is owned in common and purported to execute deeds in respect of the entirety for a period of over ten years does not lead to the presumption of an ouster in the absence of evidence to show, that the other co-owners had knowledge of the transactions."

In my opinion, while the question whether Haramanis and his heirs were aware of the partition effected by Plan No. 1868 (3D1) is most material, an important consideration that might affect the rights of the co-owners to the land is whether they acquiesced in the division effected thereby for a period of more than 10 years after it was implemented. As M. D. H. Fernando, J. in *Gunasekera v. Tissera and Others (supra)* observed at 258 –

> "If the division is not by all the co-owners, but is based on a plan prepared by one co-owner without the knowledge of the other co-owners, his possession of divided allotment is not adverse (*Ithohamy v. Karanagoda*,[31]) but prescriptive title can be acquired by virtue of possession for such a period and in such circumstances that the counter presumption applies"

It appears from the evidence led by the parties that Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya which was

situated about half a mile away from Porikehena. The version of the Respondent' that there existed an arrangement between Haramanis and Jeeris for the former to hold Kirigaldeniya and the latter to possess Porikehena exclusively, if accepted, would explain the logic behind the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1) whereby Porikehena along with Indiketiya and Mahakele Mukalana owned by Jeeris were put together and divided amongst his heirs. It is clear from the evidence led by both parties, that in 1940 when Porikehena was amalgamated with the said two adjacent lands and divided into 5 distinct lots, a significant *de facto* change in the manner of possession of the land occurred. Following the division effected in 1940, wire fences had been erected and constructions were made on the said lands (as depicted in Preliminary Plan No. 255) by the new holders, which was also admitted in her testimony by the Appellant Sopinona, who stated that the two houses on the land were occupied by Menchinona, the widow of Obias, and Cornelis, both grandsons of Jeeris. Furthermore, the Appellant's mother-in-law, Sethuhamy, directly participated in the division effected by Plan No. 1868 (3D1) in 1940 and conveyed, by Deed No. 1845 (3D3) executed on 23rd February 1950, the entirety of lot D of the said Plan No. 1868 (3D1) to Remanis, the deceased husband of the Appellant.

This court cannot also ignore the fact that the testimony of Carolis, who is the only descendant of Haramanis to testify in this case, goes more to establish the case of the Respondent. He stated in evidence that he lived in part of Kirigaldeniya, and that he used to go to Porikehena and "Charley Mama", who was one of Jeeris' sons and who was in occupation of the land picked coconuts and breadfruit and gave them to him as well as to other members of his family, acknowledging their rights as co-owners of Porikehena. It is noted that Carolis

stated in evidence that he went to Porikehena with his grand-mother: "මගේ ආච්චි සමඟ මම පොල් දෙල් එහෙම කඩා ගෙන එනවා" Although the point of time at which Carolis collected such produce from Porikehena was not elicited by Counsel for the Appellant, he has given a clue about the approximate date in his answers to questions put to him in cross-examination:

"ප්‍ර : පොරිකියාහේනට තමා ගොස් තිබේද?

උ : ඔව් කුඩා කාලයේ ගියා.

ප්‍ර : කුඩා කාලයේ ගියාට පසුව තමා අද වන තුරු එම ඉඩමට ගියේ නැහැ?

උ : අවුරුදු 15 තරම ගියාට පසුව ගියේ නැත."

It is relevant to note that at the time when Corolis testified in 1997 he was 72 years old, which means that he was born in 1925, and he *would have been 15 years old in 1940, the year in which the amicable partition was effected by Plan No. 1868 (3D1).* This gives credence to the testimony of Cornelis, the sole witness for the Respondents at the second trial, who testified that he was in possession of lot 'E' of 3D1 but he did not know Carolis and that he never exercised any rights of co-ownership over Porikehena.

"ඔහු කියන පිඹුරේ දකුණු පැත්තට ලොට්. E අක්ෂරය දරන කොටසේ අයිතිය තිබුණේ මට. 1940 සිට මා බුක්ති විඳ තියෙනවා. මා එහි පදිංචිවී ඉන්නවා. මේ නඩුවේ කරෝලිස් කියා කෙනෙක් පැමිණිල්ලට සාක්ෂි දුන්නා මතකයි. කරෝලිස් හා තව කට්ටියක් අත්සන් කර ඔප්පුවක් ඉදිරිපත් කලා 3D1 කියා. කරෝලිස් මේ ඉඩමේ කවදාවත් පොල් කොස් බුක්ති විඳින්නට ආවේ නැහැ. ඒ අය ඉඩම අවට ඉන්න කට්ටිය නෙමෙයි. කිට්ටුව නැහැ. මේ ඉඩමට ලඟ පාත අය නෙමෙයි. මා අයිතිවාසිකම් කියන කොටස වෙන කවුරුත් බුක්ති විඳ නැහැ."

It is possible to reconcile the apparent conflict in the testimony of Carolis and Cornelis on the basis of the period

of time during which rights of co-ownership were allegedly exercised by the heirs of Haramanis including Corolis. The only conclusion that one can reasonably arrive on the basis of the testimony of these witnesses is that none of the heirs of Haramanis excercised any rights over Porikehena after the amalgamation of that land with two other lands and the amicable partition effected by Plan No.1868 (3D1) in 1940. In fact, the totality of the evidence point to the fact that none had contested the separate possession established in 1940, and all respected the separation effected in 1940 and entered into various subsequent transactions on that basis.

It is important to note that the only other witness for the Appellant was Sopinona herself, who admitted in her testimony that she knew nothing herself about the manner in which Jeeris and Haramanis exercised rights over Porikehena, nor did she know personally about the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1). In fact, in the course of her testimony she admitted in cross examination that after 1940, the parties to the said Plan had abided by the division made thereunder. She answered a vital question as follows:

"ප්‍ර : මම යෝජනා කරනවා තමන් කියපු ඔප්පු වලින් මේ ඉඩමේ අයිතිවාසිකම් 3D1 - කියන පිඹුර අනුව ඔය කියපු එක 1, 2, 3, 19 යන විත්තිකරුවන් අරගෙන තියෙනවා කියලා?

උ : ඔව්."

In the context of all this evidence, the conclusion is irresistible that land named Porikehena which was referred in the scheduled to the plaint lost its separate identity by reason of the amalgamation and partition effected by Plan No. 1868 (P1) in 1940. It also transformed the character of the possession of Jeeris's heirs from one consistent with

co-ownership into what we may call "adverse" possession, which is essential for the acquisition of prescriptive title. By 1950, such possession had crystallized into ownership, which made it lawful for Sethuhamy to covey lot D of 3D1 to Remanis by Deed No. 1845 (3D3) in 1950. Furthermore, it is important to note that the heirs of Jeeris and Haramanis, who live not too far apart mainly in Porikehena and Kirigaldeniya respectively, have refrained from asserting rights of co-ownership in relation to the land held by the other, be it Porikehena or Kirigaldeniya, for a long time until coaxed into action by Remanis, who in 1967, perhaps as a prelude to the institution of this partition action, purported to buy from certain heirs of Haramanis rights in Porikehena under Deed No. 1874 (P2) in October 1967. It has to be observed that these heirs of Haramanis had themselves acquiesced in the division that had been effected by Plan No. 1868 (P1) in 1940, and the said division has remained substantially the same changing hands from parent to child or vendor to vendee for a period in excess of five decades at the point of time Sopinona, Carolis and Cornelis gave evidence at the second trial in 1996 and 1997.

There are two major difficulties that arise in the stand taken by the Appellant in this case. The first is that the claims of the Appellant for a share of Porikehena under a purchase from the heirs of Haramanis effected by Deed No. 1874 dated 28th October 1967, and a further share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris, are mutually inconsistent. The contradiction arising from the juxtaposition of these two claims is that in order to assert a "birth right" to the co-ownership of Porikehena as an heir of Jeeris, she has to disassociate herself from Plan No. 1868 (3D1), which she can ill afford to do as the ownership

to the divided lot D of the said Plan sought to be conveyed by Deed No. 1845 (3D3) is expressed in the deed itself to be based on the said amicable partition effected in 1940 and prescription.

Secondly, the Appellant has an even more serious problem in regard to the total extent of land that was taken to constitute the corpus sought to be partitioned in the impugned judgment of the District Court. The Appellant has failed to explain to this Court the basis on which Porikehena, which according to the plaint, and the evidence led in the case, consisted of 3 roods and 11 perches as stated in Crown Grant No. 30258 (P1) increased in size and extent to I acre and 16.85 perches as shown in the Preliminary Plan No. 255. The problem here is that there is no evidence of any paper title that establishes co-ownership between Jeeris and Haramanis to the extent beyond 3 roods and 11.9 perches covered by the Crown Grant.

In my view, the Learned District Judge has considered the relations between Jeeris and Haramanis as co-owners of the land they acquired through the Crown Grant of 1895 (P1) but her examination of the material relating to the amalgamation and amicable partition effected in 1940 and subsequent dealings and transactions that took place thereafter is lacking in depth. I am of the opinion that the evidence relating to the enjoyment and use of the property by the heirs of Jeeris and Haramanis over a period of at least 29 years leading up to the institution of the action in 1969 has not been adequately examined and analyzed by the learned District Judge. Accordingly, I answer question (a) on which special leave was granted in the negative, and hold that the original court has not conducted a sufficient investigation of title as required by law.

Duty to Answer All Issues

It is now necessary to turn to the other two questions on which leave to appeal has been granted by this Court. Question (b) arising on this appeal is whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription. It is quite obvious that the duty of formulating issues is a responsibility of Court, and it is the duty of court to answer all issues arising in the case. As Lord Devlin observed in *Bank of Ceylon v. Chelliah Pillai* (32) at 27, "a case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is well settled that the framing of such issues is not restricted by the pleadings. .. ." In *Peiris v. Municipal Council, Galle* (33) at 556, Justice Tambiah remarked that even where the plaintiff fails to raise a relevant issue, it is the duty of the judge to raise the necessary issues for a just decision of the case. *A fortiori,* it follows that it is the duty of the judge to answer at the end of the trial *all* the issues raised in the case.

The only exception to this cardinal principle is found in Section 147 of the Civil Procedure Code wherein courts have been vested with a degree of discretion, where it is of the opinion that a particular matter may be decided on the issues of law alone, to try the issues of law first. In *Mohinudeen and Another v. Lanka Bankuwa, York Sheeet, Colombo 01* (34) at 299 Hector Yapa, J., cited with approval the following *dicta* of Wijeyaratna, J. in *Muthukrishna v. Gomes and Others* (35) at 8:

"Judges of original courts 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 (apart from formal evidence) can dispose of the case." *(Emphasis added)*

Making a further exception which will enable judges to avoid answering one or more of *issues of fact* – such as issues (2) to (9) in this case – on the basis that the answer to one of them will effectively dispose of all questions regarding which the parties are at variance, might be somewhat imprudent as they could lead to disastrous results. In fact, a careful examination of the issues formulated at the commencement of trial in this case shows that there was no way in which the court could have avoided answering all the issues raised at the commencement of the trial, and it is ironic that the learned trial Judge had gone through the entire trial but had chosen not to answer only issue (1). Indeed, if the learned Judge had focused even for a moment on the other 13 issues, she may have answered issue (1) differently.

The final question [question (c)] on which leave to appeal was granted in this case, is whether, if the answer to a single issue is in effect a complete answer to all the issues arising for determination in this action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. In this context, it is relevant to note that in terms of Section 187 of the Civil Procedure Code, a judgement should contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. As was observed by court in *Warnakula v. Ramani Jayawardena (supra)* at 208, "bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil Procedure Code." The judge must evaluate and consider the totality of the evidence, giving a short summary of the evidence of the

parties and witnesses and stating the reasons for his preference to accept the evidence of one party as opposed to that of the other. The learned District Judge in this case has totally failed to discharge this duty by failing to even attempt answering all of the very material issues raised on behalf of the Respondents, and has also failed to explain why, in her view, it was not necessary to answer the other very important issues.

I have no difficulty in answering questions (b) and (c) in the negative and in favour of the Respondents.

Conclusion

In the context of all these facts, I conclude that the learned District Judge has not only failed to carefully examine questions relating to the identity of the corpus and the adequacy of the *lis pendens* registered in the case, but also failed to properly investigate title and in particular examine the issues relating to prescription with the intensity that is expected in a partition case. Although for these reasons, I agree with the decision of the Court of Appeal that the judgment of the District Court cannot stand and should be set aside, I have also given anxious consideration to the question whether this case should be sent back to the District Court for trial *de novo*.

I have carefully considered the evidence led at the second trial before the District Court, and am of the opinion that on this evidence, it is clear that the possession of Jeeris's heirs became adverse to Haramanis's heirs after an amicable partition was effected through Plan No. 1868 (3D1) in 1940, and the persons to whom lots 'A' and 'E' of the said Plan were allocated, and their successors in title, had possessed the

said lots exclusively up to the time of institution of action in 1969 by Remanis. It is manifest that Porikehena, the land sought to be partitioned in this action and is described in the schedule to the plaint, which coincides with the said lots 'A' and 'E', had lost the character of co-owned property long before Remanis instituted the partition action from which this appeal arises, more than 40 years ago. Accordingly, I am of the firm opinion that the learned District Judge should have dismissed the action on the basis that the *corpus* sought to be partitioned was not co-owned property.

I am also firmly of the opinion that, in any event, no useful purpose would be served by sending this case back to the original court for trial *de novo*, as directed by the Court of Appeal. This would constitute a third trial of this case more than four decades since the matter was first brought before the District Court. This fact in itself raises serious doubts regarding the possibility of securing witnesses with first hand knowledge of the material facts, considering the time which has already elapsed and the further time such fresh trial would take to make its way through the courts yet again. I note that Sopinona, Carolis and Cornelis, the witnesses presented before the courts in the second trial before the District Court of Homagama, would by now be more than 80 years old if they are living, and their descendants may not know about the facts of this case even to the extent Sopinona, Carolis and Cornelis knew.

Considering therefore all the circumstances of this case, and in particular, the uncertainty regarding the identity of the *corpus*, the failure to register *lis pendens* for the larger land of 1 acre and 16.85 perches, the weakness in the case of the Appellant as presented at the trial, the difficulty of funding witnesses who can testify at a fresh trial, and the evidence

led at the trial which show that the land sought to be partitioned was not co-owned property, I am of the opinion that it is appropriate to make order setting aside the judgement of the Court of Appeal dated 22nd November 2002 as well as the judgement of the District Court dated 4th September 1998, and substitute therefore an order that the action filed in the District Court by the substituted Appellant should stand dismissed. I do not make any order for costs in all the circumstances of this case.

Judgment of the Court of Appeal and District Court set aside.

Appeal dismissed

By majority decision trial de Novo stands.

Appeal dismissed

SOMAWATHIE VS. WILMON AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.,
AMARATUNGA, J., AND
RATNAYAKE, J.
S.C. APPEAL NO. 2/2009
S.C. (H.C.) C.A.L.A. NO. 110/2008
H.C.C.A. NWP/HCCA/KUR NO. 16/2001 (F)
D.C. MAHO NO. 4241/P
MAY 4TH, 2009

New Ground Raised For The First Time In Appeal - acceptance of a deed of Gift - Mandatory? - Partition law - Section 4(1) d

The appellant instituted action in the District Court of Maho for the partition of the land described in the schedule to the plaint. After trial, the learned District Judge by his judgment dated 22.1.2001 had declared that appellant was entitled to an undivided 1/3rd share of the land and had left the remaining 2/3rd share unallotted. Being aggrieved by judgment of the District Judge, the 4th respondent had preferred an appeal to the High Court. The High Court had allowed the 4th respondent's appeal and dismissed the appellant's action. Being aggrieved by the decision of the High Court, the appellant appealed to the Supreme Court. The Supreme Court granted leave to appeal on the following questions.

(1) Has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?

(2) Has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donee?

(3) Was the High Court wrong in law in considering the question of non acceptance of the Deed of Gift since there was a failure to raise as issue on that ground in the District Court or lead any evidence to that effect?

The question of non-acceptance of the Deed of Gift (P2) was raised for the first time in appeal. The three questions on which leave to

appeal was granted by the Supreme Court are based on the Deed of Gift marked as P2 at the trial in the District Court.

Held

(1) A new ground cannot be considered for the first time in appeal, if the said new ground has not been raised at the trial under the issues so framed. However, the Appellate Court could consider a point raised for the first time in appeal if the following requirements are fulfilled.

(a) the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact.

(b) the question raised for the first time in appeal, is an issue put forward in the Court below, under one of the issues raised, and

(c) the Court which hears the appeal has before it all the material that is required to decide the question.

Held further

(2) The essence of a Deed of Gift is to convey movable or immovable property as a gratuitous transfer. Therefore for the purpose of making the donation complete, the gift has to be accepted.

(3) The High Court had erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees, when it was clearly stated in the said Deed that the gift was accepted by the mother of the donees on behalf of the donees and she had also signed the said Deed of Gift.

(4) The High Court was wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect.

Cases referred to:

(1) Talagala v. Gangodawila Co-operative Stores Society Ltd., - (1947) 48 NLR 472

(2) Gunawardena v. Deraniyagala and others – S. C. (application) No. 44/2006, S.C. Minutes of 3.6.2010.

(3) Seetha vs. Weerakoon – 49 NLR 225

(4) *The Tasmania* (1890) A. C. 223

(5) *Appuhamy v. Nona* (1912) 15 NLR 311

(6) *Manian v. Sanmugam and Arulampillai v. Thambu* (1944) 45 NLR 457

(7) Nagalingam v. Thanabalasingham (1948) 50 NLR 87

(8) *Senanayake v. Dissanayake* (1908) 12 NLR 1

APPEAL from the High Court of Civil Appeal (North Western Province).

Lakshman Perera with *Anusha Gunaratne* for Plaintiff – Respondent – Appellant

Ranjan Suwandaratne for 4th Defendant – Appellant- Respondent.

Cur.adv.vult.

June 24th, 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the judgment of the High Court of Civil Appeal of the North Western Province (hereinafter referred to as the High Court) dated 21.08.2008. By that judgment the High Court allowed the appeal preferred by the 4th defendant-appellant-respondent (hereinafter referred to as the 4th respondent) and dismissed the action filed by the plaintiff-respondent-appellant (hereinafter referred to as the appellant) on which the District Court by its decision has allotted an undivided 1/3 share of the corpus to the appellant and left the balance undivided portion unallotted.

Being aggrieved by the judgment of the High Court, the appellant preferred an application to this Court on which leave to appeal was granted by this Court on the following questions:

1. has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?;

2. has the High Court erred in law in failing to consider that the Deed of Gift on the fact of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donees?;

3. was the High Court wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect?

The facts of this appeal, as submitted by the appellant, *albeit brief*, are as follows:

The appellant instituted action on 06.05.1996 for the partition of the land morefully described in the schedule to the Plaint. The appellant, in his Plaint had set out that an undivided one-third (1/3) share of the said land, was owned by one Maniki, who by Deed No. 4059 dated 10.01.1944, attested by one Illangaratne, Notary Public had sold the said undivided share to one Singappuliya. The said Singappuliya, by a Deed of Gift, No. 22372, dated 04.03.1962, attested by T. G. R. de S. Abeygunasekera, Notary Public had gifted his undivided one third-share to Peter, Martin and Laisa. The said Peter, Martin and Laisa, by Deed No. 11560 dated 16.12.1994, attested by Mrs. C. M. Balalla, had transferred the said undivided share to the appellant. The appellant is unaware as to the original owners of the remaining two-thirds (2/3) of the undivided share of the land. The 1st, 2nd and 3rd defendants-respondents – respondents (hereinafter referred to as 1st, 2nd and 3rd respondents) are the present owners of undivided one-third (1/3) share of the land and the 5th defendant-respondent-respondent (hereinafter referred to as the 5th respondent) is the present owner of the remaining undivided one-third (1/3) share of the land. The 4th respondent, according to the appellant, is the nephew of the

5th respondent and has no right or title to the land, although he has been cultivating a portion of the land.

Although all the respondents had been present and represented before the District Court, only the 4th respondent had filed a statement of claim. In his statement of claim the 4th respondent had stated, inter alia, that,

1. The land sought to be divided had been possessed by the 4th respondent's maternal grandfather, one Samara Henaya, about 60 years ago and thereafter about 25 years prior to the institution of this action in the District Court, the said land had been possessed by the 4th respondent with the said Samara Henaya;

2. In 1982, the 4th respondent had built the house depicted as 'B' in Plan No. 3270/96, dated 15.12.1996 made by B. G. Bandutilake, Licensed Surveyor, filed of record and lived in that house with his family. Later in 1992 he had built on the said land and had been living in that house depicted as 'A' in the said Plan;

3. The 4th respondent had acquired prescriptive title to the land in dispute as he had continuous and undisturbed possession adversely to the rights of all others for over a period of 15 years.

At the trial the appellant and one of the appellant's predecessors in title, one Peter had given evidence on behalf of the appellant. The 4th respondent had led the evidence of the Surveyor Bandutilake, the 5th respondent, two farmers, namely Kiriukkuwa and Rajapaksha and the Grama Niladari, viz., Hemamali Rajapaksha.

Learned District Judge, Maho, by the judgment dated 22.01.2001 had declared that the appellant was entitled to an

undivided one-third (1/3) share of the land and had left the remaining two-thirds (2/3) share unallotted. It was further held that the plantations and buildings on the land should be allocated among the parties as they had claimed before the Surveyor in the Report marked 'Y'.

Being aggrieved by the aforementioned judgment of the learned District Judge dated 22.01.2001, the 4th respondent had preferred an appeal to the High Court. The High Court by its judgment dated 21.08.2008, had held that the predecessors in title of the appellant could not be held to have derived title by the said Deed of Gift. Accordingly the High Court had allowed the 4th respondent's appeal and dismissed the appellant's action.

Being aggrieved by the said judgment of the High Court dated 21.08.2008 the appellant preferred an application before the Supreme Court.

Having stated the facts of the appeal, let me now turn to consider the questions on which leave to appeal was granted by this Court.

The High Court after considering the provisions contained in section 4(1)d of the Partition Law, No. 21 of 1977, had held that the appellant had sufficiently pleaded the pedigree in compliance with the provisions of section 4(1)d of the Partition Law. However, on the question of whether the appellant had proved the pedigree pleaded by her in compliance with the law, the High Court had held that the Deed of Gift marked as P2 had not been accepted by the donees on the face of it, but has only been signed by the donor and the holder of the life interest and that the appellant had not sought to adduce any evidence to establish acceptance by the donees.

The three (3) questions on which leave to appeal was granted, referred to above, are all based on the Deed of Gift marked as P_2 and since the 3rd question states that there were no issues raised in the District Court on the basis of the non-acceptance of the Deed of Gift, let me first consider that question before proceeding to consider the questions No. 1 and 2.

(a) Was the High Court of Civil Appeal wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court, or to lead any evidence to that effect?

At the outset of the trial, one admission had been recorded and 14 issues were raised by the appellant and the 4th respondent, which were accepted by Court. It is to be noted that there was no issue raised at the trial as to whether the Deed of Gift P2 was invalid for want of acceptance. Accordingly, no evidence was led regarding the acceptance or non-acceptance of the Deed of Gift marked as P2. A careful perusal of the proceedings before the District Court clearly reveals the fact that there was no opportunity at the trial to have led evidence on the question of non-acceptance, since there was no such issue raised by either party.

In the light of the above, it is quite evident that the question of non-acceptance of the Deed of Gift (P_2) was raised for the first time in appeal.

The question of examining a new ground for the first time in appeal was considered in several decided cases. In considering this question, Dias, J., in *Talagala v. Gangodawila Co-operative Stores Society Ltd.,*[1] had clearly stated that as a general rule it is not open to a party to put forward for the

first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court hearing the appeal has before it all the requisite material for deciding the question.

The question as to whether a matter that has not been raised as an issue at the trial could be considered in appeal was examined in detail in *Gunawardena v. Deraniyagala and others*[2] where attention was paid to several decided cases (*Setha v. Weerakoon* [3], *The Tasmania*[4], *Appuhamy v. Nona*[5], *Manian v Sanmugam and Arulampillai v. Thambu* [6]).

After a careful examination of the aforementioned decisions, it was clearly decided in *Gunawardena v. Deraniyagala and others (supra)*, that according to our procedure a new ground cannot be considered for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. Accordingly the Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.

a. *The question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;*

b. *The question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised; and*

c. *The Court which hears the appeal has before it all the material that is required to decide the question.*

It was not disputed that no issue was raised on the non-acceptance of the Deed of Gift. It is also to be noted that the respondent had not contested the validity of the Deed of Gift as to whether there was acceptance by the donees, at

the time of the trial in the District Court. Since no such issue was raised, the District Court had not considered the said non-acceptance of the Deed of Gift and therefore there was no material before the High Court on the said issue. In the circumstances, the High Court was in error when it considered the question of non-acceptance of the Deed of Gift, which was at most a question of mixed law and fact.

Questions No. 2 and 3 both deal with the issue of the non-consideration by the High Court the acceptance of the Deed of Gift by the donees. Accordingly, both the said questions, listed below, could be considered together.

2. Has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?

3. Has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder had signed in acceptance on behalf of the donees?

The Deed of Gift in issue is that Deed No. 22372 marked P_2, dated 04.03.1962 attested by T.G.R. de S. Abeyagunasekera, Notary Public.

By that Deed as stated earlier, Singappuliya had gifted his undivided one-third (1/3) share to Peter, Martin and Laisa. The said gift was subject to the life interest of the donor and his wife, Muthuridee, the mother of the three donees.

Learned Counsel for the 4th respondent strenuously contended that by the said Deed of Gift, the donor had conveyed the life interest of the said property to the said Muthuridee. Accordingly learned Counsel for the 4th respondent contended that the said Deed of Gift has to be accepted formally by the

said Muthuridee, and it was necessary for her to have signed the said Deed of Gift in order to accept the life interest, which was gifted to her by the donor. Further it was submitted that the said Muthiridee had been acting in dual capacity as she had to accept the Deed of Gift on behalf of her three children in addition to accepting it on her own behalf and accordingly it was necessary for her to have signed twice indicating the acceptance on behalf of her children and on her own behalf. Since, the said Muthuridee had only signed once on the Deed of Gift, learned Counsel for the 4th respondent contended that the said gift had not been accepted by the donees.

Learned Counsel for the 4th respondent further contended that the learned High Court Judges had considered the question as to the acceptance of the Deed of Gift by the donees and had come to the conclusion that the said Deed of Gift had not been accepted by the donees, as only the donor and the holder of the life interest had signed it. The High Court had been of the view that a donation is not complete unless it is accepted by the donees and that the appellant had not sought to adduce any evidence to establish that the gift in question was accepted by the donees.

The essence of a Deed of Gift is to convey movable or immovable property as a gratuitous transfer. The intention of the donor is to convey the movable or immovable property to the donee. Therefore for the purpose of making the donation complete, the gift has to be accepted. Considering the question of the validity of a Deed of Gift, Canekaratne, J., in *Nagalingam v Thanabalasingham* [7] stated thus:

> "The donor may deliver the thing, e.g., a ring or give the donee the means of immediately appropriating it, e. g., delivery of the deed, or place him in actual possession of the property."

Regarding the question of acceptance, it is thus apparent that such acceptance could take different forms. In *Senanayake v Dissanayake*[8], Hutchinson, C. J., considered the question of acceptance of a Deed of Gift and had held that it is not essential that the acceptance of a Deed of Gift should appear on the face of it, but that such acceptance may be inferred from circumstances. In arriving at the said conclusion, Hutchison, C. J., had stated that,

> **"The deed does not state that the gift was accepted; but that is not essential.** It is an inevitable inference from the facts which are above stated that Kachchi was in possession, with the consent of the grantor, at the date of the sale of her interest; and thereafter the purchaser of her interest possessed it during the rest of her life. It is the natural conclusion from the evidence that Ukku Menika, with the consent of the grantor, accepted the gift for herself and her children, (emphasis added)"

Canekaratne, J., in *Nagalingam v Thanabalasingham (supra)* had also considered the question of acceptance of a Deed of Gift. On a careful consideration of the facts and circumstances of that appeal, Canekeratne, J. had clearly stated that,

> "There is a natural presumption that the gift was accepted. Every instinct of human nature is in favour of that presumption. **It is in every case a question of fact whether or not there are sufficient indications of the acceptance of gift"** (emphasis added).

It is not disputed that in the present appeal, the mother of the three donees, had accepted the said Deed of Gift on behalf of the donees. It is specifically stated in Deed No. 22372 (P2) that,

"තවද ඉහත කී තෑගි ලැබුම්කාර තිදෙනා වෙනුවට ඔවුන්ගේ මෑණියන් වූ එකී නිකවැවේ පදිංචි, නවරත්න හේනයලාගේ කව්වා හේනයාගේ මුතුරිදී වන මම ඉහත සඳහන් කළ පරිත්‍යාගය ප්‍රත්‍යාදර ගෞරවයෙන් හා ස්තුතියෙන් මෙයින් පිළිගනිමි."

The said Muthuridee had signed the Deed of Gift No. 22372 dated 04.03.1962.

Furthermore, the donees had been in possession of the land in question for a period of over 30 years. The evidence of Peter, one of the donees, clearly clarified this position.

"මම මේ නඩු කියන ඉඩම දන්නව. මේ ඉඩම අපි වික්කා. වික්කෙ සෝමාවතීට. එන්. එච්. පීටර්, එන්. එච්. මාටින්, එන්. එච්. ලයිසා කියන අපි වික්කෙ. (ඔප්පුව පෙන්වා සිටී. එය හඳුනා ගනී.) මට අයිති වුණේ තාත්තා අරන් තිබුණා. කේ. සිංගප්පුලියා තාත්තා. 4940/59 දරන ඔප්පුව ඊට පස්සේ අපට තාත්තා ලියා දුන්නා. අයිතිවාසිකම් අපි වික්ක. අපි මේ ඉඩම බුක්ති වින්දා. පැමිණිලිකරුට වික්කෙ 94. විකුණන තෙක් අපි බුක්ති වින්දා. 1/3 පංගුවක් බුක්ති වින්දා"

It is therefore evident that after the execution of the Deed of Gift the donees had possessed and had enjoyed the land in question.

Considering the totality of the circumstances in this appeal, it is abundantly clear that at the time of the execution of the Deed of Gift, it was clearly stated in the said Deed that the gift was accepted by the mother of the donees on behalf of the donees and she had also signed the said Deed of Gift. Moreover, the donees had possessed and had enjoyed the land in question for more than 30 years. Considering the dicta enumerated in *Senanayake v Dissanayake (supra)* and *Nagalingam v Thanabalasingham (supra)* the aforementioned facts clearly show that they are sufficient indications that the donees had accepted the Deed of Gift.

For the reasons aforesaid the questions on which leave to appeal was granted by this Court are answered as follows:

1. yes, the High Court had erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees;

2. yes, the High Court had erred in law in failing to consider that the Deed of Gift on the fact of it clearly indicated that the life interest holder had signed in acceptance on behalf of the donees;

3. yes, the High Court was wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect.

The judgment of the High Court dated 21.08.2008 is set aside and the judgment of the District Court dated 22.01.2001 is affirmed. This appeal is accordingly allowed.

I make no order as to costs.

AMARATUNGA, J. – I agree.

RATNAYAKE, J. – I agree.

Appeal allowed.