COURT OF APPEAL

Punchi Menika and another

V.

Kirimudiyanse and another

C.A. (S.C) 177/73 (F) D.C. Kurunegala 3831/L

Misdescription in Deed. Construction of Language of Deed Rectification of mutual mistake Section 91 (2) of Evidence Ordinance

One Kiri Banda by Deed of Gift D4 dated 16.10.64 gifted to Defendant-Respondent the entirety of the interests he was entitled to in several contiguous allotments of land subject to his life interest (These allotments) are depicted as Lot 3 in Plan 3 Dft-respdts claimed that upon the death of K they entered into peaceful possession of Lot 3 and are in lawful possession.

Plantiff-appeallants state that by Partition Decree dated 26.11.54 Kiri Banda was allotted divided Lot 3 in P3 in lieu of his undivided interests in the larger lands. That by Deed P1 dated 19.11.65 Kiri Banda for valuable consideration transferred the said Lot 3 to them.

In an action for declaration of title the Judge found that in executing D4 Kiri Banda intended to convey his interests in the 6 lands which had since been converted into Lot 3 in P3 and that the entirety of Lot 3 had passed to Defendants, that P1 did not operate to convey any interests to Plaintiffs.

Plaintiffs appealed.

Counsel for Plaintiff-Appellants argued that final decree dated 26.11.54 wiped out all the interests in the undivided lands that K was entitled to and that the Final Decree vested in Kiri Banda a new title in respect of Lot 3.

Defendant-Respondents argued that the intention of Kiri Banda when he executed D4, was unmistakably to gift to the donees the entirety of the interests he was entitled to in all the contiguous allotments of land, which were the subject matter of the Partition action and which interests were now represented by divided Lot 3 in Plan 3.

That as a mistake had been made in Deed D4 in describing what was intended to be gifted the Court should in the exercise of its jurisdiction rectify or treat as rectified the deed D4 to bring it into line with the true intention of the parties to the Deed D4 and that the Court should grant this relief even though it was not prayed for in the plaint.

Held (following *Girigoris Perera* V *Rosaline Perera* 53 NLR 536) that the Deed of Gift D4 should be rectified or treated as rectified in respect of the mutual mistake made in order to bring the Deed D4 into line with the real intention of the parties.

APPEAL from Judgment of the District Court of Kurunegala

Before: Ranasinghe, J. and (B.E.) de. Silva, J.

Counsel: C. Ranganathan Q.C. with Nimal Senanayake
Miss. S.M Senaratne and
A. Somasunderam,
Plaintiffs-Appellants
H.W. Jayewardene Q.C., with
Hiran Jayewardene, and
Ronald Perera
Defendants - Respondents

Argued on: 23.11.1981, and 24.11.1981.

Cur. adv. vult.

Decided on: 12.1.1982

RANASINGHE, J.

The plaintiffs-appellants instituted this action against the defendants-respondents for a declaration of title to the entirety of a divided allotment of land, depicted as Lot 3 in final plan no: 6227 of 8.7.1954 in partition case no:5180 of the District Court of Kurunegala and a certified copy of which was produced at the trial marked P3, and for ejectment of the defendants-respondents therefrom, and for damages.

The position taken up by the plaintiffs-appellants in the plaint is briefly: that the several contiguous allotments of land referred to in the schedule to the plaint were the subject matter of partition in case no. 5180 of the District Court of Kurunegala : that, by the Final Decree dated 26.11.54, Herat Mudiyanselage Kiri Banda was allotted, in lieu of his undivided interests in the said corpus, the divided lot depicted as Lot 3 in the final plan P3: that thereafter the said Kiri Banda, by deed P1 of 19.11.65, transferred the said Lot 3 to the plaintiffs-appellants, and the plaintiffs-appellants entered into possession thereof; that, a week after the death of the said Kiri Banda in May 1971, the defendants-respondents entered into wrongful occupation of the said Lot 3.

The defendants-respondents, on the other hand, maintained: that the said Kiri Banda was married to the sister of the 2nd defendant-respondant; that both Kiri Banda's wife and their only child died in the year 1964: that thereafter, by deed D4 of 16.10.64, the said Kiri Banda gifted to the 1st to 4th defendants-respondents the entirety of the interests he (Kiri Banda) was entitled to in the several contiguous allottments of land, more fully described in the schedule to the plaint (together with certain other interests which Kiri Banda had also inherited from a deceased sister and which are not in dispute in this case) , subject to his life-interest: that the entirety of the interests, which the said Kiri Banda was entitled to from and out of the said several contiguous allottments of land and which the said Kiri Banda intended to dispose of upon the said deed D4, are depicted as Lot 3 in the said Plan P3: that the defendants-respondents did, upon the death of the said Kiri Banda, enter into possession of Lot 3, and are in lawful possession of the said lot: that the defendants-respondents alone are entitled to the entirety of the said Lot 3 in Plan P3.

The Learned District Judge has, after trial, held that: in executing D4, "what Kiri Banda intended to convey was his interests in the 6 lands which had since been converted into a single entity, viz. Lot 3 in P3": that the entirety of Lot 3 has passed to the defendants-respondents, and that the deed P1, relied on by the plaintiffs-respondents, does not operate to convey any interests to the plaintiffs-respondents. On the basis of the said findings, the learned trial judge dismissed the plaintiffs-appellants's action with costs.

Learned Queen's Counsel appearing for the plaintiffs-appellants contended that the defendants-respondents' deed of gift D4, even though earlier in point of time, does not operate to convey to them any interests whatsoever in the said Lot 3 for the reasons: that D4 deals with undivided interests in the larger land as it stood before the Final Decree P2: that P2 operated to wipe out the earlier undivided interests the said Kiri Banda was entitled to, and to vest in Kiri Banda a new title in respect of Lot 3 in the said Final plan P3: that even though, according to several earlier authorities, D4 could have been construed as conveying a similar undivided share in the said Lot 3, yet, in this case, in view of the fact that Lot 3 came into existence as a separate entity not by prescription but by the final decree in a partition case even such a construction is not

permissible: that in any event no equitable relief should be given to the defendants-respondents as against the plaintiffs-appellants who have purchased the interests in question upon the deed P1 for valuable consideration, in a sum of Rs. 10,000/-.

Learned Queen's Counsel, appearing for the defendants-respondents seeks to support the decree appealed from on the basis: that the intention of the said Kiri Banda, when he executed the deed of gift D4, was unmistakably to gift to the donees the entirety of the interests he was entitled to in all the said contiguous allotments of lands, which were the subject-matter of this partition action,and which said interests were by then represented by the divided Lot 3 in plan P3: that, as a mistake has been made, in the deed of gift D4, in describing what was so intended to be gifted, this Court, could and should, in the exercise of the jurisdiction vested in the Court, either "rectify or treat as rectified" the said deed of gift in order to bring it into line with the true intention of the parties to the said deed, which said intention has, due to a mutual mistake not been correctly expressed in the said deed: that this Court has the power to grant such relief in this action itself, even though no such plea for relief had been put forward in the plaint.

It has been found to be not uncommon for persons, who have acquired title to distinct and divided lots from and out of larger lands in which such persons were once entitled to only undivided interests, to convey, even after the acquistion of title to such divided lots, undivided shares of such larger lands. The question, which had then arisen in respect of such deeds, is in regard to the precise interests which such deeds should, in law, be held to convey to the vendees. This question - approached at times only as a matter of pure construction of the relevant deed, and at other times as one involving "the nature and extent of the Court's power to give relief against mutual 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" – has engaged the attention of the Supreme Court from about seventy years ago, beginning in the year 1911 with the case of *Fernando vs Fernando, 14 N.L.R., 412* and down to the year 1952 when a Divisional Bench dealt with the question in the case of *Girigoris Perera vs Rosaline Perera, 53 N.L.R. 536*

The earliest authority, cited at the hearing of this Case in support of the determination of this question only from the stand-point of a simple construction of the terms of the deed, is the case of *Fernando vs Christian, 15 N.L.R p 321.* The plaintiff in that case, relying upon a deed which dealt with "an undivided 4/6 share of the third share of the southern portion" of a land called M., claimed the southern portion of the said land which, though said to be one acre in extent, was in fact only 27 perches; and it was contended that the deed was not inoperative, as the maxim falsa demonstratio non nocet was applicable. The Court, having rejected the plea that the said maxim was applicable, proceeded to hold: that there was only one description of the interests conveyed: that such description was perfectly intelligible: that whatever the parties may have intended to convey, the property in fact conveyed was an undivided 4/6 of 1/3 of the defined portion to the South and said to be 1 acre in extent, that as the said defined portion had contracted itself to 27 perches, the plaintiff is entitled to no more than 4/6 of 1/3 of the said defined extent of 27 perches. The plaintiff's claim to the entirety of the said defined southern portion of 27 perches was not successful. What weighed with the court was not what was said to be the actual intention of the parties, but only the "perfectly intelligible" description set out in the deed itself.

In the case of *Bernard vs. Fernando 16 N.L.R p 438* a vendee, who, having obtained only undivided interests in a land, which had, prior to such transfer, in fact been partitioned and the vendor allotted a divided lot in lieu of his undivided interests in the larger land, claimed the entirety of such divided lot, had to be content with only a corresponding fractional share in such divided lot.

The decisions in *Christian's case (supra) and Bernard's case* (supra) were referred to by Bertram C.J. in the case of *Fernando vs Fernando 23 N.L.R. p 483* where two parties had acquired the whole interests of a shareholder in certain proportions and the deeds described such interests as an undivided interest, and it transpired that a specific portion of the land has in fact, been held by the person through whom they both claim as his portion for the prescriptive period. The question which arose for decision in that case, as stated by His Lordship, was not what is the precise share stated in the deeds of the plaintiff, but in what proportion as between the plaintiff and the defendant is the land to be divided; and it was decided "that justice requires that, as between those parties this specific portion must be

divided in the same proportions as those described in their deeds." Such a situation does not really arise in this case now before us.

The plaintiff, in the case of *Fernando vs. Podi Sinno, 6 C.L. Rec. 73*, who had obtained a conveyance of undivided interests from and out of a larger land, instituted an action for declaration of title in respect of two divided lots of the said large land, which were referred to as "C" and "D", and been possessed exclusively by N, one of the original co-owners of the large land and through whom the plaintiff claimed, in lieu of his undivided interests and to which N had also prescribed. The Supreme Court, however, held that the plaintiff was entitled only to similar undivided shares in Lots C and D. Bertram C.J., referring to the case of *Don Andiris vs Sadinahamy, 6. C. W. R 64* (infra) observed that the principle enunciated in that case was applied in a partition case where it could be conveniently applied and that His Lordship did not feel able to enunciate the converse of that principle in a rei vindicatio action. His Lordship also referred to the case of *Fernando vs. Fernando, 23 N.L.R. 483 (infra)* as a case in a contrary direction, and further refused an application, made on the authority of *Fernando vs. Fernando, 23 N.L.R. p 266*, for equitable relief on the basis that such a course would change the whole nature and scope of the action instituted by the plaintiff, even though His Lordship was satisfied that, in conveying the fractional shares, the vendors had really intended to convey Lots C and D. Nevertheless, in holding that the plaintiff was entitled only to an undivided 1/12 plus 1/6 (which were the fractional shares referred to in his title deed) of the said lots C and D., His Lordship expressly stated that such decision should not prejudice the plaintiff's right to claim in a later action the remaining interests in the said lots after joining all the necessary parties.

The decision in *Fernando vs Podi Sinno* (supra) was followed in the year 1931 in the case *of Perera vs Tenna, 32 N.L.R. 228* where the plaintiff, who had obtained a conveyance of an undivided 1/2 share of the whole land, comprising lots A-D and D1, from one of two co-owners, who had dividedly possessed the whole land, claimed a declaration of title to the entirety of the two lots D and D1 which had been dividedly possessed by his vendor, it was held that the plaintiff could not claim, upon the said deed, the entirety of the said lots but was entitled only to a similar share, viz. undivided 1/2, of of the said lots D and D1. Akbar J., expressed the view that the

case of *Mensi Nona vs. Neimalahamy, 10 C.L. Rec.159,* (infra) had no application, as it is the converse of *Podi Sinno's case* (supra) and was an action for partition and not for declaration of title.

The decision in *Bernard's case* (supra) was followed in the case of *Mudalihamy vs. Appuhamy, 36 N.L.R. 33.* In that case the plaintiff had, in 1927, taken in mortgage an undivided 2/3 share of two contiguous fields. In January 1930 the defendant instituted an action to partition the two contiguous fields which were treated as one entity; and, in August 1930, final decree was entered allotting to the plaintiff's mortgagor, who was held to be entitled only to a 1/2 share of the corpus, the divided lot A. In January 1931 the plaintiff put his bond in suit; and, in January 1932, obtained a Fiscal's Conveyance in respect of the undivided shares mortgaged to him and which he had purchased at the execution sale. In the meantime, however, the defendant had taken out a writ, in April 1931, against the mortgagor for pro rata costs due to him and purchased the said lot A; and the defendant had also obtained a fiscal's conveyance in April 1931. The plaintiff's claim for declaration of title to the entirety of Lot A was rejected; and they were held to be entitled to only a 2/3 share of the said lot A.

An examination of the decisions referred to above shows: that the deeds, which dealt with undivided shares and upon which the entirety of the specific divided portions possessed by the vendor (or the predecessor-in-title) were claimed, were not held to be ineffective to convey any interests whatever: that, such deeds were held to convey ie fractional shares specified therein: that, in *Christian's case (supra), Bernard's case* (supra), and *Mudalihamy's case* (supra) there was no consideration whatever of relief by way of rectification: that in *Podi Sinno's case (supra),* although the principle enunciated in *Don Andiris's case* (supra), was approved, yet it was not applied in that case as it was a rei vindicatory action and not a partition action: that in *Tenna's case (supra)* too the fact it was an action for declaration of title and not an action for partition seems to have been an important factor: that both in *Bernard 's case* (supra) and in *Mudalihamy's case (supra)* the undivided interests, referred to in the relevant deeds, had been converted into divided lots, by decrees entered in partition proceedings, before the execution of the said deeds – just as in this case before us.

The last decision in this line of authority – apart from the dissenting judgment of Nagalingam, A.C.J, in *Girigoris Perera's case* (infra) – is the judgment of Pulle J (with which Nagalingam A.C.J. agreed), delivered on 7.12.1950 in the case of *Elisahamy vs Julis Appuhamy 52 N.L.R p 332*. The facts of that case were: T, who was entitled to an undivided 1/2 share of a large land of 24 acres, possessed, as a separate and divided block, a portion of the larger land, referred to as block "X", and acquired title to it by preseription. After the death of T. some of her heirs, who were entitled to shares in the said block X, conveyed their interests to the plaintiff. These interests were described as fractions not of block X (i.e. not as 1/7 of 1/4 of the 2 acre block X), but of the larger land (i.e. 1/7 of 1/4 of the larger land of 24 acres). The plaintiff then instituted an action for partition of block X, claiming the fractional share, (1/7 of 1/4) set out in the deed of conveyance to him, from and out of the corpus, block X. The Court, however, applying the aforesaid principle laid down by Bertram C.J. in *Podi Sinno's case* (supra), held that the plaintiff could get no larger fraction of block X than that set out in respect of the larger land of 24 acres-i.e. only 1/7 of 1/4 of 1/12 of the corpus (block X) sought to be partitioned. It has, therefore, to be noted that in this case too the deeds in question were held to convey undivided interests, though not in the manner contended for by the plaintiff. Here too the question was considered merely as one of construction of the terms of the deed in question. No pleas of mistake, and the availability of relief by way of rectification were considered.

If, however, this is the correct approach, even then the defendant - respondent's claim, at any rate to a 2/3 share of Lot 3 in P3, seems irresistible. Learned Queen's Counsel appearing for the plaintiffs - appellants also indicated to this court that, he would have conceded that the defendants-respondents' deeds would operate to convey to them a 2/3 share of Lot 3 but for the existence of the Final Decree P2. He submitted that the fact that the title of the plaintiffs-respondents' vendors to the said divided allotment, Lot 3, has vested in them not by virtue of prescriptive possession but by virtue of a final decree in a partition case, operated to distinguish this case from the cases in which such deeds were held to convey similar fractional shares in the divided allotments. It has, however, to be noted that both in *Bernard's case (supra)*, and *Mudalihamy's case (supra)*, which figure in the first group of decisions referred to earlier by me, the title to

the lots, which the vendors obtained in lieu of the undivided interests, which they had in the larger land and which were also the interests described in the deeds in question, had vested in such vendors not by virtue of prescriptive possession but under and by virtue of final decrees entered in proceedings instituted to partition the larger lands.

The authorities relied on by learned Queen's Counsel appearing for the defendants-respondents in support of the availability of a plea of mutual mistake of the parties resulting in an incorrect expression, in the deed, of their true intention, and the power of the Court "to rectify or treat as rectified" the relevant deeds, commence from the case of *Fernando vs Fernando 14 N.L.R. p 412* the judgment in which was delivered by Lascelles, C.J., sitting alone as far back as June, 1911. In that case, S, who was entitled to a divided lot of land under a partition decree, leased to F after the said partition decree, an undivided share of the larger land of which the said divided lot had once formed a portion. F assigned the lease to the plaintiff who then instituted an action to be put into possession during the pendency of the lease. Rejecting a defence plea that the lease to F was wholly ineffective as the lease purports to grant an undivided share in the land, although S's interests, at the date of such lease, consisted of the specific share which had been alloted to S under the partition decree, Lascelles, C.J. held that the intention of the lessor was plain and unmistakable, and that the said lease was not invalid by reason of the misdescription.

An action for partition instituted by the plaintiff in the case of *Don Andris vs Sadinahamy 6 C.W.R. 64* was dismissed by the learned District Judge as he took the view that, although the land had at one time been possessed undividedly, yet, it had for some years been divided into "koratuwas" and possessed by various co-owners in that way, with some of them purporting to dispose of the "koratuwas" instead of undivided shares of the whole land. In setting aside the judgment of the learned District Judge and sending the case back for the entering of a partition decree as directed, de Sampayo, J. observed (on 11.3.1919) that the learned District Judge had taken a narrow view of the effect of the deeds and that:

> "It is not uncommon for co-owners to dispose of their interests by reference to particular portions or 'koratuwas' of which they had been in possession. But if the real

intention is to dispose of the interests of the persons in the entire land, this Court has found no difficulty in giving a broad construction to such deeds and to deal with the rights of the parties on the original footing."

True it is that, in that case, both parties prayed for a partition of the entire land. Even so, it does not, in my opinion, detract from the importance and clarity of the principle so laid down. It was this principle which, as stated above, Bertram C.J. stated in *Podi Sinno's case* (supra) dealt with the converse position and could conveniently be applied in a partition case but not in a rei vindicatory action. Such a distinction, however, did not meet, as will be seen later, with the approval of Nagalingam A.C.J in His Lordships dissenting judgment in *Girigoris Perera's case* (infra). *Don Andiris's case* (supra) was followed in the year 1959 in the case of *Dias vs. Dias, 61 N.L.R. 116.*

In the case of *Fernando vs. Fernando, 23N.L.R 266,* the plaintiff's vendors intended to lease the entirety of a land to the defendant, but by mistake only the southern portion of the land was included in the deed. Thereafter the plaintiff purchased the land. At the time of such purchase the plaintiff was aware of the lease and made his purchase in the belief that the entirety of the land was subject to such lease. Four years later, however, the plaintiff discovered the mistake in the deed and instituted the action to restrict the rights of defendant to the portion described in the deed. The defendant's defence was a plea of estoppel. Bertram C.J., with Garvin, A.J. agreeing, expressed the view that the defendant's plea was misconceived, and that the defendant ought to have claimed in reconvention that the lease should be rectified on the footing that the lease has been drawn up in its present form through mutual mistake of the parties, and that the plaintiff knew the true extent of the lease and was bound by the same equity as his vendors, and proceeded to give relief on that footing. Bertram C.J followed two Indian cases - *Dagdu valad Jairam vs Bhana valad Jairam, (1904) 28 Bomb L.R p 429,* and *Rengasami Ayyangar vs Souri Ayyangar, (1915) 39 Mad. 792,* both of which were also cited by learned Queen's Counsel appearing for the defendants-respondents in this case. These two Indian judgments are based upon an interpretation of sec. 92(a) of the Indian Evidence Act, the provisions of which are identical with the provisions of the corresponding section of our Evidence Ordinance, namely provise (1) of sec 92 and proceeded on the footing that: "If two persons contract,

and they really agree to one thing, and set down in writing another thing, and afterwards execute a deed on that wrong footing, the Court will substitute the correct for the incorrect expression, in other words, will rectify the deed". Relief by way of rectification was given, even though such relief had not been claimed, because ".....as a Court guided by the principles of justice, equity, and good conscience, we can give effect as a plea to these facts, which in a suit brought for this purpose would entitle a plaintiff to rectification."

The plaintiff, who instituted an action for partition, in the case of *Goonesekara vs Pioris, 28 N.L.R p 228,* found that there was, in the deeds relied on by him, a misdescription of the corpus and its boundaries. The defendants contended that, until the deed is rectified the plaintiff would have no title and that, therefore the plaintiff's action cannot be maintained. The Court, however, took the views that the mistake was capable of rectification and that for that purpose, the action should be converted into one rei vindicatio to which all parties to the deeds or their representatives should be added; and accordingly the plaintiff's action was converted by court into as action rei vindicatio with a prayer for rectification.

The case of *Mensi Nona vs Neimalhamy, 10 C.L. Rec 159,* which Akbar J, did, in *Tenna's case (supra),* think is the converse of *Podi Sinno's case (supra),* is a case where, after the co-owners of a land had, consequent upon an informal amicable division among themselves acquired prescriptive title to their respective lots, a co-owner who so become entitled to a separate lot, did, in dealing with his interests by deed, refer to those interests as a fractional share of the larger land. In dismissing as action for partition of the larger land the Supreme Court held that the execution of such a deed dealing with fractional shares of the larger land did not have the effect of consolidating the vendor's separate lot with any or all of the other separate lots so as once again to form the common land.

In *Lucihamy vs Perera, 40 N.L.R. 232,* the larger land, of which the corpus sought to be partitioned was a portion, had been amicably divided into an eastern half and a western half and was so possessed. A subsequent conveyance of the eastern half share, however, described it as being undivided. The vendor, who was called at the trial, admitted that he intended to pass his rights to the whole of such eastern share, which was the corpus. The Court, having taken the

view that, although the deed purported to convey a share in an undivided western half it was a misdescription, and that what was intended to be conveyed, and what legally passed, was a share in that which was regarded as the eastern half which was represented by the corpus shown in the plea (P16) made for the purpose of the case, proceeded to hold that the conveyance in question passed title to the portion possessed as the eastern half share as a distinct corpus.

Then came the judgment of Gratiaen, J. (with Gunasekra, J, agreeing), on the 19th June 1951, in the case of *Jayaratne vs Ranapura, 52 N.L.R. 499.* In that case the co-owners of a land amicably divided it into six separate allotments and each such co-owner thereafter possessed exclusively the separate allotment granted to him at such division. C., who was one such co-owner who so acquired prescriptive title to one such allotment, executed a conveyance in which the interests being conveyed were described as an undivided 1/36 share of the larger land, even though he did in fact intend to convey an undivided 1/6 share in the smaller corpus, the divided allotment, which the plaintiff, to whom the interests C. had so conveyed had ultimately passed, sought to partition in that case. Although it was conceded on behalf of the defence that the deeds in question were intended to convey a 1/6 share in the corpus, it was nevertheless contended that it was not open to a Court to give effect to this intention unless and until such mistake is rectified by a notarially executed deed, and reliance was placed on several of the authorities refered to by me earlier -*Bernard's case. Podi Sinno's case* and *Elisahamy's case.* Gratiaen J was satisfied that the real intention of the vendors was to convey an undivided 1/6 share of the corpus, and seek the view that the decision in *Fernando's case (supra - 23 N.L.R. 483)* was on all fours with that case. In dissenting from the judgment in *Girigoris Perera's case (supra)*, Gratiaen, J, stated as follows:

> I must confess that, if the question was at large, I might find some difficulty in justifying a departure from the strict rules laid down for costruing written instruments. But this Court seems for many years to have preferred to adopt a more generous approach in situations where it is manifest that no prejudice could result to the interests of others. Possibly the correct solution may lie in the jurisdiction of a Court to rectify, or treat as rectified, documents in which, by a mutual mistake, the true intention of the parties is

not expressed. *Fernando vs Fernando 23 N.L.R. 266.* Be that as it may, I consider that I cannot legitimately refuse to follow the earlier precedents, where, in precisely similar circumstances, Judges of great experience have declined, on equitable considerations, to pay too scrupulous a regard to the language of a written instrument."

A consideration of the decisions set out above and relied on in support of the "broad construction" approach, it is clear: that, when, as a result of mutual mistake, an instrument executed by the parties contains a misdescription and does not correctly set out the true intentions of the parties, then, where it would not cause prejudice to the interests of others, this Court could, in the exercise of its jurisdiction "to rectify or treat as rectified", so construe the document as to give effect to the true intention of the parties: that, where the requisite circumstances exist, such relief could be given even where the party entitled to such relief has not in fact claimed such relief, and irrespective of whether the proceedings in which the matter comes up for consideration be partition or rei vindicatory: that such relief could be given whether the deed or deeds in question be those relied on by the plaintiff or by the defendants in the case.

It was in this state of the law in regard to this question that the Divisional Court assembled, in the case of *Girigoris Perera vs Rosaline Perera, 53 N.L.R. p 536,* to resolve the conflict between the two aforesaid decisions in *Dona Elisahamy's* and *Jayaratne's case*. The facts and circumstances of that case were: that, at an amicable division of a land between its co-owners in 1964 a divided lot, marked F, had been allotted to a person named K. . and another in equal shares: that, notwithstanding such division K. gifted, upon the deed 8D1 an undivided 1/10 share (which was the correct fractional share K had in such larger land) of the larger land to the 8th and 9th defendants:thereafter, by deed 8D3 of 1937, the 9th defendant conveyed "an undivided 1/2 of an undivided 1/10 share" of the larger land to the 8th defendant: that, in the action for partition, whilst the 8th defendant claimed that the deed 8D3 was operative to convey to her the entirety of 9D's interests in the divided lot, the corpus, the 9th defendant, on the other hand, contended that the said deed 8D3 operates to convey to the 8th defendant only a 1/20 share of the corpus. In resolving this contest, Nagalingam A.C.J., representing the minority view, approached (as set out in the line of authorities

firstly referred to by me) it as a question dependant "upon a simple construction of the deed, and one has only to look to its trem to ascertain what it conveys without letting oneself be influenced by any extraneous consideration such as these allowable in the case of a will". (p 537). Gunsekara J. on the other hand, considered it (as reflected in the second line of authorities set out above by me) as one relating "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." (page 544). Choksy, A.J., though he agreed with Nagalingam A.C.J. that the deeds 8D1-8D3, relied on by the 8th defendant, cannot be construed as deeds dealing with shares in the smaller land, as, on the face of them, they purport to deal with different shares in a larger land yet, agreed with Gunasekara J. and thereby constituting the majority view, that "the question we have to deal goes beyond the construction of the deeds and relates to the point as to whether the Court can, upon any legal basis, give effect to what appears from the material on the record to have been the real intention of all the parties ....." (p549: Approaching the problem from that angle both Gunasekera, J. and Choksy, A.J. re-affirmed the principle enunciated by Gratiaen J. in *Jayaratne's case (supra)*, and referred to earlier, that:

> "The correct solution may lie in the jurisdiction of a Court to rectify or treat as rectified, documents in which by a mutual mistake the true intention of the parties is not expressed"

The decision in Girigoris Perera's case (supra) is that of a Divisional Bench of the Supreme Court, and was pronounced, as already stated, in 1952 - over a quarter century ago. It still remains the most authoritative decision upon this question. It has also to be noted that, at page 542 of the judgment of Nagalingam A.C.J., His Lordship disagrees with the "undercurrent of thought" that, in the matter of construction of a deed, a distinction should be drawn in regard to the nature of the proceedings, and expressed the view that the principles of construction in both cases should be identical. As already indicated earlier, *Lucyhamy's case (supra)* and *Jayaratne's case (supra)*, in both of which the Court granted relief, were both partition actions. Although *Don Andris's case* (supra) and *Mensi Nona's case*(supra)

have been considered to lay down the converse principle, yet, they were both cases in which the Court gave effect to what was considered to be the real intention of the parties to the deeds under consideration; and they were both actions for partition.

The learned District Judge has in this case found that "what Kiri Banda intended to convey was his interests in the 6 lands which had been converted into a single entity, viz lot 3 in P3". This finding is, in my opinion, supported by the evidence placed before him at the trial. D1 is a copy of the plaint filed by the deceased Kiri Banda on 27.3.66 - about 4 months after the execution of P1 -, in case no 2364/L of the District Court of Kurunegala against the defendants-respondents praying for a declartion that the deed of gift D4 of 16.10.64 is " void and of no effect in law as the plaintiff was induced to execute the same by fraud and exercise of undue influence by the defendants acting jointly and in concert." According to D2, that action was dismissed by the District Court on 15.9.67; and, according to D3, an appeal to the Supreme Court by the plaintiff (the said Kiri Banda) had also been dismissed on 14.12.69. D6 is an extract from the evidence given by the said Kiri Banda on 16.7.67, at the trial of the said case, in the course of which Kiri Banda has stated, with reference to D4, that he executed D4 at the request of his wife, and that, by D4 he purported to gift all his properties in favour of the defendants (the present defendants-respondents) in that case. D6 was not objected to at the time it was led in evidence at the trial. In view of the respective positions taken up at the trial, D6 would have been admissible under sec. 32 (3) Evidence Ordinance. Furthermore, before the institution of the plaint D1, Kiri Banda had, by deed D5 of 30.12.65-about 2 months after the execution of P1 -, purported to revoke the deed of gift D4. In D4, however, Kiri Banda had renounced his right to revoke the said gift. An examination of the recitals contained in D4 shows that therein Kiri Banda has, inter alia, stated: that he was the owner of all lands described in the schedule to D4: that he donated the said lands and premises to the defendants-respondants in consideration of the love and affection he bore towards the said donees: that the said donees "are ungrateful and they are plotting against his life": that D4 was written by the exercise of fraud and or undue influence. The six allotments of land described in paragraph 2 of the plaint P4 are all included in D4. All these items of evidence do, in my opinion, justify the finding arrived at by the learned District Judge on this point.

Neither of the two donees - the two plaintiffs-respondents - gave evidence at the trial. The only oral evidence led at the trial on behalf of the plaintiffs-respondents is that of H.A. Dingiri Banda and of G. Gunatilaka, the two attesting witness to P1. Dingiri Banda, who is a relation of Kiri Banda and whose son is married to a daughter of the 1st plaintiff-respondent, stated in his evidence: that he was aware that, prior to the execution of P1, Kiri Banda had gifted some of his lands, and that Kiri Banda had also filed an action, before the execution of P1, to have a deed of gift granted by him to the defendants-respondents revoked: that the land registry had been searched before the consideration set out in P1 was paid. An examination of P6, the extracts from the relevant encumbrance sheets, shows that D4 has been registered, in respect of all six allotments of land, in folios connected with the folio in which the aforesaid partition action no: 5180/D.C. Kurunegala, referred to above, has been registered, and that D5, the deed of revocation referred to earlier, has also been registered, in respect of at least 5 of said six allotments of land, in the folios in which D4 had earlier been registered. Any search of the folios, in which the aforementioned earlier partition action was registered, would have disclosed the existence of both D4 and D5. In these circumstances I do not think that the plaintiffs-appellants could be heard to complain of any prejudice, if this Court were to "rectify or treat as rectified" the said deed D4.

The plaintiffs-appellants have, in their plaint, averred that, after the execution of P1, they entered into possession of the said lands, and that a week after the death of Kiri Banda the defendants-respondents entered into wrongful occupation of the land and of the building thereon. If the plaintiffs-appellants had entered into possession after the execution of P1, then the defendants-respondants could have thereafter entered into occupation thereof only by dispossessing the plaintiffs-appellants. There is no evidence of any complaint made by the plaintiffs-appellants to any person in authority of any such forcible dispossession. Furthermore, no evidence, either oral or documentary, was led at the trial to substantiate the aforementioned averment contained in the plaint that the plaintiff's-appellants were placed in possession after the execution of P1. It has to be noted that D4 is subject to the life-interest of Kiri Banda, and the defendants-respondents could have entered into possession on the basis of that deed only after the death of the said Kiri Banda.

On a consideration of the foregoing it appears to me that all the facts and circumstances necessary for the granting of relief in respect of the deed of gift D4, as set out in the Divisional Bench decision in *Girigoris Perera's case* (supra), (and in the other decisions included in the second line of authorities referred to earlier by me), have been established in this case, and that this Court should "rectify or treat as rectified" the said deed of gift D4, in order to bring it into line with the real intention of the parties to D4.

In this view of the matter, I am of opinion that the finding of the learned District Judge, that the defendants-respondents are entitled, in law, to the entirety of lot 3 in the plan P3, should stand, and that the decree of the District Court dismissing the action of the plaintiffs-appellants, should be affirmed. The appeal of the plaintiffs-appellants is accordingly dismissed with costs.

B.E. DE SILVA J. — I agree.

Appeal dismissed