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

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**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**

Rajapaksha Mudiyanselage Somawathie, Nikawewa,
Moragollagama.

**Plaintiff-Respondent-Appellant**

Vs.

N.H.B. Wilmon,
Nikawewa,
Pahala Elawatta,
Moragollagama.

**4th Defendant-Appellant-Respondent**

1. N.H. Asilin,

2. N.H. Ranjith Nawaratna,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.

3. N.H. Pulhiriya,
   Nikawewa, Serugasyaya,
   Moragollagama.

4. N.H.B. Wilmon,

5. N.H. Simon Pulhiriya,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.
   **Defendants-Respondents-Respondents**

**BEFORE** : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
P.A. Ratnayake, J.

**COUNSEL** : Lakshman Perera with Anusha Gunaratne for Plaintiff-Respondent-Appellant

Ranjan Suwandaratne for 4th Defendant-Appellant-Respondent

**ARGUED ON**: 04.05.2009

**WRITTEN SUBMISSIONS**
**TENDERED ON**: Plaintiff-Respondent-Appellant : 15.06.2009
4th Defendant-Appellant-Respondent : 08.06.2009

**DECIDED ON** : 24.06.2010

**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 face 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 Meniki, 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 $P_2$ 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 $P_2$ was invalid for want of acceptance. Accordingly, no evidence was led regarding the acceptance or non-acceptance of the Deed of Gift marked as $P_2$. 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.,** ((1947) 48 N.L.R. 472) 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** (S.C. (Application) No. 44/2006 – S.C. Minutes of 03.06.2010), where attention was paid to several decided cases (**Setha v Weerakoon** ((1948) 49 N.L.R. 225), **The Tasmania** ((1890) 15 A.C. 223), **Appuhamy v Nona** ((1912) 15 N.L.R. 311), **Manian v Sanmugam and Arulampillai v Thambu** ((1944) 45 N.L.R. 457)).

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 has signed in acceptance on behalf of the donees?

The Deed of Gift in issue is the 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 Muthuridee 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** ((1948) 50 N.L.R. 97) 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** ((1908) 12 N.L.R. 1), 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, Hutchinson, 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 a 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 ($P_2$) that,

**"තවද ඉහතකී තැගි ලැබුම්කාර තිදෙනා වෙනුවට ඔවුන්ගේ මෑණියන්වූ එකී නිකවැවේ පදිංචි, නවරත්න හේනයලාගේ කව්වා හේනයාගේ මුතුරිදි 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 සොමාවතිට. එන්. එච්. පීටර්, එන්. එච්. මාටින්, එන්. එච්. ලයිසා කියන අපි වික්කෙ. (ඔප්පුව පෙන්වා සිටී. එය හඳුනා ගනී.) මට අයිති වුනේ තාත්තා අරන් තිබුනා. කේ. සිංගප්පුලියා තාත්තා. 4940/59 දරණ 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 face 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.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court