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

S.C. Appeal No. 44/2006
S.C. (Spl.) L.A. No. 252/2005
C.A. Appeal No. 455/99(F)
D.C. Negombo No. 3576/L

Bastian Koralage Denzil Anthony Chrishantha Rodrigo Weerasinghe Gunawardena,
"Villa Victoria",
Uswetakeiyawa,
Kandana.

Defendant-Appellant-Appellant

Vs.

1a. A. Ralph Senake Deraniyagala,
No. 15, Rajakeeya Mawatha,
Colombo 07.

2a. Hilda Niloo Edward de Saram,
No. 6/3, Wijerama Mawatha,
Colombo 07.

3. Shiran Upendra Deraniyagala,
No. 4, 36th Lane,
Borella,
Colombo 08.

Plaintiffs-Respondents-Respondents

4. Hasley Limited,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

5. N.K.Thambipillai,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

Added Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
P.A. Ratnayake, J.

COUNSEL Gamini Marapana, PC, with Keerthi Sri Gunawardena and Navin Marapana for Defendant-Appellant-Appellant

D.S. Wijesinghe, PC, with Kaushalya Molligoda for Plaintiffs-Respondents-Respondents

ARGUED ON: 23.03.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Appellant-Appellant : 11.05.2009
Plaintiffs-Respondents-Respondents: 11.05.2009

DECIDED ON: 03.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 13.10.2005. By that judgment the Court of Appeal had affirmed the judgment of the District Court of Negombo dated 30.03.1999, which had decided in favour of the plaintiffs-respondents-respondents (hereinafter referred to as the respondents) and had dismissed the appeal instituted by defendant-appellant-appellant (hereinafter referred to as the appellant).

The appellant preferred an application for Special Leave to Appeal, which was granted by this Court.

When this matter was taken up for hearing, learned President's Counsel for the appellant submitted that the main issue in this appeal was founded on the question as to whether on the basis of the documentary evidence placed before the District Court by the respondents, it is clear that the land, which was the subject matter of the action, had vested in the Land Reform Commission and whether the Land Reform Commission could have by their letter dated 19.01.1982 (P_{18}) divested itself of its title in favour of the respondents, by stating that the said land had been excluded from the category of 'agricultural land'. Accordingly, learned President's Counsel for the appellant contended that the main point of law on which the Supreme Court had granted special leave to appeal was on the following:

> "Whether the Land Reform Commission could divest itself of title to property vested in it, in the manner it had purported to do by the letter P_{18}."

Learned President's Counsel for the appellant also contended that this question was raised in the same form in the Court of Appeal, but the Court of Appeal had held that it was a new matter that had been raised for the first time in appeal and such mixed question of fact and law cannot be raised for the first time in appeal.

Learned President's Counsel for the respondents strenuously contended that the said question was a new point raised for the first time in the Court of Appeal, which was not a pure question of law.

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

The respondents had instituted action in October 1987, in the District Court of Negombo, claiming *inter alia* a Declaration of title to the land morefully described in Schedule 2 to the

Plaint. The respondents' position was that at one point of time, Justin Ferdinand Peiris Deraniyagala owned the said land and that upon his death in 1967, his Estate was vested in his brother and sister, namely the 1st and 2nd respondents and one P.E.P. Deraniyagala. The respondents had also stated that the interests of the said P.E.P. Deraniyagala had devolved on the 3rd respondent. They had produced the Inventory filed in Justin Deraniyagala's Testamentary case bearing D.C. Gampaha No. 948/T at the trial marked P_4. The said Inventory had revealed that the said Justin Deraniyagala had possessed agricultural land well in excess of 500 Acres (P_4). The respondents' position had been that they had made a request to the Land Reform Commission to have this land released to them as it was not agricultural land. In June 1978 the respondents by their letter dated 22.06.1978 (P_{28}) had requested the Land Reform Commission to exempt the land in question from the operation of Land Reform Law on the basis that it was a marshy land. The Land Reform Commission had, by its letter dated 15.10.1979 (P_{29}) refused the request of the respondents. The respondents, by their letter dated November 1979 (P_{24}) appealed against the said decision and the Land Reform Commission had decided to exclude the land from the definition of 'agricultural land'.

The District Court had held in favour of the respondents and the Court of Appeal had affirmed the said order of the learned District Judge.

Learned President's Counsel for the respondents contended that the respondents, being the plaintiffs in the District Court of Negombo case, had instituted action against the appellant seeking inter alia a declaration of title to the land described in Schedule II to the Plaint and for ejectment of the defendant, who is the appellant in this appeal from the said land. The respondents had traced their title to the land described in Schedule II to the Plaint, known as Muthurajawela, from 1938 onwards through a series of deeds. The respondents had also made a claim for title based on prescriptive possession. The appellant had filed answer and had taken up *inter alia* the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The appellant had taken up the position that his father had obtained a lease of the land in question from Justine Deraniyagala, who was the respondents' predecessor in title, which lease expired on 01.07.1967. The appellant had

further claimed that his father and the appellant had overstayed after the expiry of the lease adversely to the title of the respondents and he had further stated that he had rented out part of the land to the added respondents.

Learned President's Counsel for the respondents referred to the issues framed both by the appellant and the respondents before the District Court and stated that on a consideration of the totality of the evidence of the case and having rejected the evidence of the appellant as 'untruthful evidence'; the learned District Judge had proceeded to answer all the issues framed at the trial in favour of the respondents.

It was the contention of the learned President's Counsel for the respondents that although the appellant had preferred an appeal to the Court of Appeal, the appellant had not urged any of the grounds stated in the Petition of Appeal, but instead informed Court that he will confine his submissions to the question with regard to the maintainability of the action on the ground that title to the land in suit remains vested in the Land Reform Commission and that the respondents are not entitled to succeed in that action.

The contention of the learned President's Counsel for the respondents was that, the submission of the learned President's Counsel for the appellant on the basis of the question, which was referred to at the outset, was not taken up in the District Court as there was no issues to that effect nor was it referred to in the Petition of Appeal to the Court of Appeal. Therefore the learned Counsel for the respondents had objected to that matter being taken up in the Court of Appeal, as it was not a pure question of law, which could have been raised for the first time in appeal.

Learned President's Counsel for the appellant strenuously contended that the main point on which the Supreme Court had granted special leave to appeal was based on as to whether the Land Reform Commission could divest itself of title to property vested in it in the manner it had purported to by the letter marked as P_8 and the said matter was taken up in the same form in the Court of Appeal. Learned President's Counsel for the appellant contended that

although the Court of Appeal had held that the said question was a new matter, which was raised for the first time in appeal and that mixed questions of fact and law cannot be so raised for the first time in appeal, that not only the appellant, but also the respondents had taken up the issue in question in the District Court.

Accordingly it is evident that the main issue in question is to consider whether the question of vesting of the land with the Land Reform Commission was urged before the District Court, and it would be necessary to consider the said question in the light of the decision of the Court of Appeal.

Learned President's Counsel for the appellant referred to the documents marked as P_{18}, P_{24}, P_{28}, P_{29} and P_{36} and stated that the main issue in this appeal, which is raised on the basis as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of letter P_{18} was taken up before the District Court, although learned District Judge had misunderstood the question.

The trial had commenced in June 1989 and in the absence of any admissions, issues 1-6 were raised on behalf of the respondents and issues 7-9 were raised on behalf of the appellant. The said issues were as follows:

1. Does the ownership of the land described in Schedule II to the amended Plaint vest with the plaintiffs [respondents in this appeal] as stated in the amended Plaint?

2. Has the defendant [appellant in this appeal] claimed title to the said land by making a false and illegal declaration by deed No. 897 as stated in paragraph 9 of the amended Plaint?

3. Has the defendant [appellant in this appeal] interrupted the possession of the plaintiffs [respondents in this appeal] on or about November 1985, as stated in paragraph 10 of the Plaint?

4. Has the defendant [appellant in this appeal] caused damage/losses to the said land as stated in paragraph 4 of the Plaint?

5. If the issues 1, 2 and/or 3 and/or 4 above are answered in favour of the plaintiffs [respondents in this appeal] are the plaintiffs [respondents in this appeal] entitled to the relief claimed in the prayer to the Plaint?

6. If so, what are the damages that the plaintiffs [respondents in this appeal] are entitled to?

7. Has the defendant [appellant in this appeal] acquired a prescriptive title to the land described in Schedule II to the amended Plaint?

8. If issue No. 7 is answered in the affirmative, should the action of the plaintiffs [respondents in this appeal] be rejected?

9. If the issues of the plaintiffs [respondents in this appeal] are decided in favour of the plaintiffs [respondents in this appeal] is he [the defendant] [appellant in this appeal] entitled to the sum claimed by him in respect of improvements – what is that amount?

As stated earlier, learned District Judge had answered all these issues in favour of the respondents.

A careful examination of the issues clearly reveals that the issue as to whether the land in question, being vested in the Land Reform Commission, had not been raised before the District Court. It is also to be noted that when the matter was before the District Court, the appellant had failed to plead that the property in question was vested in the Land Reform Commission. Instead, the appellant had denied the title of the respondents and had pleaded title upon prescriptive possession.

This position could be clearly seen, when one examines the proceedings before the District Court.

The appellant took up the position in the District Court that although the respondents had declared both agricultural and non-agricultural land to the Land Reform Commission, they had not made a declaration regarding the land in question as the said land did not belong to them. The respondents at that time had taken the position that, they had not taken steps to declare the land in question to Land Reform Commission, as it was not agricultural land within the meaning of Land Reform Law. Considering the title of the respondents, learned District Judge had clearly stated that,

> "Another attack on title of the plaintiffs was launched on the basis that the 1st plaintiff had not declared this land as another land belonging to them under the Land Reform Law of 1972. To substantiate this, the defendant produced D_1 of 1st November 1972 and D_2 of same date and D_8 to D_{11} of 19th September 1973. These documents show that the plaintiffs have not declared this land as part and parcel of their property under the Land Reform Law.
>
> But the 1st plaintiff by letters addressed to the Chairman of the Land Reform Commission in November 1976 (P_{24}) and letter of 22nd June 1978 (P_{28}) informed the Commission.
>
> P_{28} discloses all the circumstances why this land has not been declared and why it should be regarded as a non-agricultural land. They also submitted the plan and report made by A.F. Sameer dated 03.11.1977, 03.04.1979, respectively.

> In response to these the Commission has taken various steps as evidenced by their documents P_{36} dated November 1981, P_{37} dated 6th November 1981
> and P_{39} dated 17th August 1981, respectively.
>
> By P_{29} dated 15.10.1979 the Commission originally rejected the plea of the plaintiffs.
>
> Thereafter the Commission has decided that this land is a non-agricultural land by their documents P_{18} dated 19.11.1982 and P_{38} dated 27th November 1981."

After considering all the aforementioned documents for the purpose of ascertaining as to the ownership of the land in question, learned District Judge clearly had stated that,

> "It is abundantly clear from these documents listed above that the plaintiffs and their predecessors-in-title were the owners of this land for a long period of time."

Except for the aforementioned paragraphs, the District Court had not considered as to whether the land in question was vested in the Land Reform Commission by operation of the provisions of the Land Reform Law. Learned President's Counsel for the respondents, correctly submitted that, for the Court to determine whether any land had been vested in the Land Reform Commission by operation of the provisions of the Land Reform Law, the Court has to decide two preliminary issues in terms of section 3(2) of the Land Reform Law, No. 1 of 1972, viz.,

1. whether the land was agricultural land under the provisions of Land Reform Law of 1972;

2. if so, whether the land in question had vested in the Land Reform Commission by operation of law.

It is to be borne in mind that the respondents had instituted action in the District Court against the appellant and had prayed for a declaration of title and for ejectment of the appellant and in his answer dated 02.09.1986 the appellant took up the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The documents referred to by learned President's Counsel for the appellant (P_{18}, P_{24}, P_{28}, P_{29} and P_{36}) all were documents filed by the respondents in the District Court. Out of them the appellant had made specific reference to P_{18} to show the decision taken by Land Reform Commission.

All the aforementioned letters referred to by the appellant, deal with correspondence regarding the exemption of the land in question from the operation of the Land Reform Law on the basis that the said land being a non-agricultural land.

The document marked P_{18} is dated 19.01.1982, which was addressed to the 1st respondent and reads as follows:

ඉඩම් ප්‍රතිසංස්කරණ පනත

ඉහත සඳහන් පනතේ 18 වන වගන්තිය යටතේ ඔබ විසින් ඉදිරිපත් කරන ලද ප්‍රකාශණය හා බැඳේ.

ඔබගේ ප්‍රකාශණයේ විස්තර කර ඇති ඉඩම් අතුරෙන් පහත උප ලේඛණයේ දී ඇති ඉඩම/ඉඩම් කෘෂිකාර්මික ඉඩම් ඝනයෙන් බැහැර කර ඇති බව කොමිෂන් සභාවේ අණ පරිදි දක්වනු කැමැත්තෙමි.

උප ලේඛණය

ඉඩමේ නම	පිහිටීම	ප්‍රමාණය
මුතුරාජවෙල එග එෆ්ග සමීර් ගේ පිඹුරු අංක 1886 හි	මීගමුව	අග 16 රැග 02 පර්ග 23

ලොට් ඩී$_1$ සහ ඩී (කොටසක්)		

මෙයට,

විශ්වාසී,

ප්‍රග අධ්‍යක්ෂ,

සභාපති වෙනුවට,

ඉඩම් ප්‍රතිසංස්කරණ කොමිෂන් සභාව."

It is to be noted that this letter was sent to the original 1st respondent. It refers to a declaration made by the 1st respondent, but the Administrative Assistant of the Land Reform Commission, who gave evidence on the declarations made by the 1st respondent had stated in the cross-examination that the 1st respondent had not made a declaration in respect of the land in question either as an agricultural land or as a non-agricultural land. Accordingly, it is evident that the document marked P_{18} is contradictory to the direct evidence given by the officer of the Land Reform Commission. It is also to be borne in mind that there had been no evidence that the land in question was agricultural land in terms of the provisions of the Land Reform Law, No. 1 of 1972. The obvious reason for the said lack of evidence as to the status of the land was due to the fact that there was no issue raised by the parties as part of the case in the District Court.

A careful perusal of the proceedings before the District Court and the judgment of the District Court of Negombo, clearly reveal that the question as to whether the land in issue was agricultural or not in 1972 was not raised as an issue before the District Court and therefore the said issue had not been considered by the District Court.

In such circumstances it is clearly evident that the question whether the land in issue was vested in the Land Reform Commission and/or whether the land in question was agricultural or not in 1972, was taken up for the first time by the appellant in the Court of Appeal.

In **Talagala v Gangodawila Co-operative Stores Society Ltd.** ((1947) 48 N.L.R. 472), the question of considering a new ground for the first time in appeal was considered and Dias J., 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 of Appeal has before it all the requisite material for deciding the question.

The same question as to whether a new point could be raised in appeal was again considered by Howard C.J., and Dias. J. in **Setha v Weerakoon** ((1948) 49 N.L.R. 225), where it was held that,

> "a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

There are similarities in the facts in **Setha v Weerakoon** (supra) and the present appeal. In **Setha** (supra) learned Counsel for the appellant had sought to raise a new point, which was neither covered by the issues framed at the trial, nor raised or argued at the trial. Learned Counsel for the respondent had objected either to this new contention being raised or argued at that stage.

Examining the question at issue, Dias, J., referred to a decision of the House of Lords and a series of decisions of the Supreme Court.

In **Tasmania** ((1890) 15 A.C. 223) considering the question of raising a new point in appeal, Lord Herschell had stated that,

> "It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box."

The decision in **The Tasmania** (supra) was followed in **Appuhamy v Nona** ((1912) 15 N.L.R. 311), in deciding whether it could be allowed to raise a point in appeal for the first time. Examining the said question, Pereira, J., clearly held that,

> "Under our procedure all the contentious matter between the parties to a civil suit is, so as to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under someone or other of the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the **Tasmania** may well be observed."

The question of raising a matter for the first time in appeal came up for consideration again in **Manian v Sanmugam** ((1920) 22 N.L.R. 249). In that case, for the first time in appeal, learned Counsel for the appellant, in scrutinizing the record had found that the evidence was formally

insufficient to justify the finding of the lower Court on that particular item. In that matter, at the hearing, the plaintiff swore that he gave defendant some jewellery. Defendant's Counsel stated that he could not cross-examine on this point, but that he would call the defendant to deny it and leave it to the Court to decide on the credibility of the parties. The defendant, however, was not called as a witness. The Judge decided for the plaintiff on that matter. On appeal Counsel urged that the evidence was formally insufficient to justify the finding, as the plaintiff did not say in express terms that he supplied the jewellery.

Considering the matter in question, Bertrem, C.J., had held that as the point was not taken in the lower Court, that point could not be taken in appeal. It was further held that,

> "The point is, in effect, a point of law . . . . The case seems to me to come within the principles enunciated in the case of **The Tasmania** ((1890) 15 A.C. 223)."

The same question as to a point raised for the first time in appeal came up for consideration in **Arulampikai v Thambu** ((1944) 45 N.L.R. 457), where Soertsz, J., had held that the Supreme Court may decide a case upon a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material upon which the question could be decided.

On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Courts may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question.

The contention of the learned President's Counsel for the appellant was that the Court of appeal should have considered the question as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of P_{18}. As has been described in detail

earlier, except for the declaration made by the 1st respondent, there is no evidence as to whether the land in question had been declared in a section 18 declaration by the 2nd and 3rd respondents. Further as stated by the officer from the Land Reform Commission, the 1st respondent had not made a declaration in respect of the said land either as an agricultural land or as a non-agricultural land. The document marked P_{18} refers to a declaration made by the 1st respondent, which is contradictory to the direct evidence led through the officer of the Land Reform Commission. The Committee of Experts, which had been appointed to inspect the land and to report to the Land Reform Commission, had informed that the said land was a non-agricultural land. The Land Reform Commission had taken into consideration the fact that the said land was a non-agricultural land in 1982 and on that basis had written P_{18} stating that it could not have been an agricultural land even in 1972. However, it is to be borne in mind that no evidence had been led to ascertain whether the land was in fact an agricultural land in terms of the provisions of Land Reform Law in 1972.

Accordingly, it is not disputed that there has been no evidence to establish as to whether the land was agricultural or not in 1972 and whether it was vested or not in the Land Reform Commission in 1972.

Learned District Judge had not come to any of such findings since there were no issues framed by the appellant and/or reported in the District Court regarding the said aspects. An issue should have been raised on the basis as to whether the land in question was agricultural land in 1972, before the District Court for both parties to adduce evidence and for the learned District Judge to arrive at a finding in the District Court.

Considering all these circumstances of the appeal it is abundantly clear that the question of vesting of the land with the Land Reform Commission was not urged before the District Court and therefore the Court of Appeal did not have before it all the material that is required to decide the question. Accordingly the Court of Appeal had correctly refrained from considering an issue that was raised for the first time in appeal, which was at most a question of mixed law and fact.

For the reasons aforesaid, the judgment of the Court of Appeal dated 13.10.2005 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Saleem Marsoof, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court