

PUNCHI MENIKA AND ANOTHER
V.
MUDIYANSE AND OTHERS

SUPREME COURT

SHARVANANDA, J., VICTOR PERERA, J. AND COLIN-THOME, J.

S. C. No. 8/1982. C.A. NO. 177/73(F).

D. C. KURUNEGALA 3831/L.

SEPTEMBER 30, 1982

Actio Rei Vindicatio — Effect of final decree of partition on prior transfer of undivided share — Rectification of mutual mistake of parties.

Mistake — Mutual mistake — Power of court to correct mutual mistake

One Kiribanda, who was entitled to an undivided share of land which was the subject matter of a partition action, gifted the entirety of his interest to the defendants. Thereafter by final decree in the partition action, his undivided interest was wiped out and he was vested with new title in respect of a divided allotment. He sold this divided allotment of land to the Plaintiffs and after his death the defendants entered into possession. The Plaintiffs pleaded that the Defendants' deed of gift, even though executed earlier did not convey any interest as the undivided interest which it sought to transfer was wiped out by the final decree of partition.

Held —

It is competent for a court administering equity to correct mutual mistakes of parties, and the deed of gift on which the Defendants based their title could be rectified so as to regard what was conveyed by the said deed as the defined lot which was allotted to Kiribanda in the partition action.

Cases referred to :

1. *Perera v. Perera* — (1952) 53 N.L.R. 536
2. *Dona Elisahamy v. Don Julis* — 52 N.L.R. 332
3. *Jayarathne v. Ranepura* — 52 N.L.R. 499
4. *Don Andiris v. Sadinahamy* — 6 C.W.R. 64
5. *Fernando v. Fernando* — 23 N.L.R. 483.

Appeal from a judgment of the Court of Appeal.

Walter Jayawardena O.C. with Nimal Senanayake, S.A. and Miss S. M. Senaratne for the Plaintiffs - Appellants

J. W. Subasinghe S.A. with U.C.B. Ratnayake and D.J.C. Nilanduwa for the Defendants - Respondents.

Cur.adv.vult

January 13, 1983

SHARVANANDA, 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 (P3) of 8.7.54 in Partition action No. 5180 of the District Court of Kurunegala.

The position taken up by the Plaintiffs-Appellants in the Plaint is briefly : that the six contiguous allotments of land referred to in the schedule to the Plaint was the subject matter of Partition in case No. 5180, D. C. Kurunegala; that, by Final Decree dated 26.11.54, Herath Mudiyanse Kiribanda was allotted in lieu of his undivided interest in the said corpus, the divided Lot depicted as Lot 3 in Final Plan P3, that thereafter the said Kiribanda by deed P1 of 19.11.1965 sold and transferred the said Lot 3 to the Plaintiffs and the Plaintiff entered into possession thereof ; that a week after the death of the said Kiribanda, in May 1971 the defendants entered into wrongful occupation of the said Lot 3.

The Defendants-Respondents, on the other hand, maintain that the said Kiribanda was married to the sister of the 2nd Defendant, that both Kiribanda's wife and their only child died in the year 1964, that thereafter by deed D4 of 16.10.1964 the said Kiribanda gifted to the 1-4th Defendants the entirety of the interest that he (Kiribanda) was entitled to in the six contiguous allotments of land, morefully described in the schedule to the Plaint (together with certain other interest which Kiribanda has inherited from a deceased sister and which are not in dispute in this case), subject to his life interest; that the entirety of the interest which the said Kiribanda was entitled to from and out of the said contiguous allotments of land referred to in the Plaint and which the said Kiribanda intended to gift to the Defendants by

the said deed D4 is represented by and depicted as Lot 3 in the said Plan P3; that the Defendants upon the death of the said Kiribanda entered into possession of Lot 3 and are in lawful possession of the said land, by virtue of the said deed of gift D4 dated 16.10.64; that they alone are entitled to the entirety of the said Lot 3 in Plan P3.

The District Judge, after trial, held that in executing D3 "what Kiribanda intended to convey was his interest in the six lands which has since been converted into a single entity viz ; Lot 3 in P3;" that by the execution of D4, the entirety of Lot 3 had been transferred to the Defendants and that the Deed P1 did not operate to convey any interest to the Plaintiffs. He therefore dismissed the Plaintiffs' action.

The Plaintiffs thereafter preferred an appeal from the said judgment of dismissal of their action. After considering all the relevant authorities on the question in issue, Ranasinghe, J., with whom (B. E. de Silva, J., agreed) in a well-analysed and exhaustive judgment upheld the findings of the District Judge that the Defendants are entitled in Law to the entirety of Lot 3 in Plan P3 and dismissed the Plaintiffs' appeal. The Plaintiffs' have thereupon preferred this appeal to this Court.

The contention of counsel for the Plaintiffs-Appellants is that the Defendants' deed of gift D4, even though earlier in point of time, does not operate to convey to them any interest whatsoever in the said Lot 3, for the reason that D4 dealt with undivided interest in the original corpus as it stood before the Final Decree in partition case No. 5180 in the District Court, Kurunegala, P2 and that the said Decree P2 operated to wipe out the earlier undivided interest that Kiribanda was entitled to and to vest in Kiribanda a new title in respect of the distinct Lot 3 in the said Final Plan P3.

Counsel for the Defendants-Respondents rested his case on the ground that the intention of Kiribanda, when he executed the deed of gift D4, was unmistakably to gift to the Defendants, the donees, the entirety of his interest in the six contiguous

allotments of land, which was the subject matter of the partition action No.5180 and which said interest had, as a result of the partition decree P2, come to be represented by the divided Lot 3 in Plan P3; that a mistake had been made in the deed of gift D4 in describing what he intended to gift. He urged that, in the circumstances this court could and should, in the exercise of its equitable jurisdiction "rectify or treat as rectified" the said deed of gift D4 in order to make it accord with the true intention of the parties to the said deed of gift, which said intention had, due to mutual mistake not been correctly expressed in the said deed. Counsel submitted that our Courts, as courts administering equity, would in such a case have the deed rectified so that the real intention of the parties may be carried into effect. The sheet-anchor of counsel's submission was the majority judgment of the Divisional Court in the case of *Perera v. Perera*.¹

As observed by Ranasinghe, J. it has been found to be not uncommon for persons who have acquired title to distinct and divided lots from and out of large lands in substitution of their undivided interests, in the large corpus, to convey, even after the acquisition of title to such divided Lots, their undivided shares in the larger land to which they were originally entitled. This irregular practice has given rise to the problem of determining what in law, do such deeds, convey — is it the entirety of the distinct and divided lot, or, is it the transferee's undivided share in that defined lot ; or has the deed failed to convey anything? There was a conflict of views as to how such deeds should be construed.

In the case of *Dona Elisahamy v. Don Julis Appuhamy*,² Nagalingam, J., and Pulle J., took a legalistic view and held that whatever the intention of parties be, the parties are bound by the terms of their deed and could get no larger fraction of the divided lot than that set out in the deed, in respect of the larger corpus of which the divided Lot forms a part.

As against this view Gratiaen, J., and Gunasekera, J., in *Jayarathne v. Ranepura*,³ followed the case of *Don Andiris Sadinahamy*,⁴ and *Fernando v. Fernando*⁵ and held that it was not justifiable to take a too narrow view of the effect of the deeds and that a broad construction should be given to the

deeds so as to give effect to the true intention of the parties. Gratiaen, J., after a review of the earlier case law, concluded : "that the correct solution lay 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."

In view of this conflict the question came up for consideration by a Divisional Bench in 1952. The Divisional Court in *Girigoris Perera v. Rosalin Perera*,¹ by a majority preferred the view expressed in *Jayaratne v. Ranepura*,³ and held that where deeds dealing with shares in an allotment of land purported to convey undivided share of a larger land of which the allotment had at one time formed part, a Court administering equity has the power, in a partition action relating to the allotment, to rectify the mutual mistakes of the parties in the description of the property, even though no plea of mistake and claim for rectification is set up in the suit.

The Divisional Bench judgment thus preferred the "broad construction" favoured by Sampayo, J., in *Don Andiris v. Sadinahamy*,⁴ so as to give effect to the true intention of parties, by rectifying the mistake of the parties that resulted in the misdescription of the property intended to be conveyed or dealt with. It affirmed the decision of Bertram, C.J., in *Fernando v. Fernando*⁵.

Counsel for the Plaintiffs-Appellants contended that the defendants are barred by the provisions of Section 92 of the Evidence Ordinance from leading evidence to vary the terms of a document. This argument overlooks the proviso (1) of Section 92 of the Evidence Ordinance which provides that any fact may be proved which would entitle any person to a decree or order relating thereto such as mistake in fact or law. However, counsel contended that the plea of mistake is not available to the defendants. It cannot be disputed that where it is proved that, owing to a mistake the written contract does not substantially represent the real intention of the parties, the Court has jurisdiction to rectify the written agreement. In this case there is no doubt as to what Kiribanda, the donor intended to convey

by the deed D4. For, in case No. 2364, D.C. Kurunegala, filed by the donor, Kiribanda on 27.3.66, against the defendants praying for a declaration that the deed of gift D4, dated 16.10.64 is "void and of no effect in law as the plaintiff was induced to execute the same by fraud and the exercise of undue influence by the defendants" and for the revocation of the said deed. He stated in evidence "I executed a deed of gift No. 2373 of 19th October 1964, by which I purported to give all my properties in favour of the defendants." Though the deed of gift D4 purports to convey the undivided interest of Kiribanda in the six lands, the interest that Kiribanda did in fact have in the six lands in 1964 was the interest which he had in Lot 3, which was a divided portion of corpus consisting of the six lands. Kiribanda had no interest other than what was allotted to him in the partition decree. Therefore it is clear what Kiribanda, the donor, intended to convey and what the defendants, the donees, intended to accept was Lot 3, as the donor's property, which was substituted as a result of the partition decree for the undivided interest which Kiribanda had in the larger corpus, which was the subject of the partition action.

On Mr. Jayawardena's argument, that one has to look only to the terms of the deed to ascertain what it conveys, it would appear that the deed of gift D4 was a futile exercise; for, after the partition decree in 1956 the undivided interest that Kiribanda had in the contiguous six lands and which was sought to be conveyed by deed of gift D4 has ceased to exist. However it is clear that Kiribanda intended to donate and the defendants intended to accept all the undivided interest of Kiribanda in the original corpus and since the partition decree had substituted Lot 3 for this undivided interest in the larger land, Lot 3 takes the place of Kiribanda's share in the larger land. The parties were agreed as to the subject matter of the donation, but they had made a mistake in not correctly describing the subject of the donation. Equity affords relief in cases of such mutual mistake. Proviso 1 of Section 92 sanctions the admission of evidence to correct such error. By this process the Court is not in fact rectifying the contract; what it seeks to do is to rectify the instrument purporting to have been made in pursuance of the

terms of contract, in order to give correct expression to their real intention.

It has long been an established rule of equity that where a contract has, by reason of a mistake common to the contracting parties, been drawn up so as to militate against the intention of both, the Court will rectify the contract so as to carry out such intention, otherwise the party who receives the benefit of the mistake will be enabled to resist the claims of justice to commit a fraud. Such mischief will be done if relief is refused in such cases of mutual mistake.

With all respect to the dissenting judgment of Nagalingam J., in the case of *Perera v. Perera*,¹ I prefer the view expressed by Gunasekera, J. and Choksy, A.J., in that case. I hold that it is competent for a Court administering equity to rectify mutual mistakes of parties in describing the property that is the subject of conveyance. I find that the majority decision has restricted the exercise of the equitable jurisdiction of the Court to treat mutual mistakes in conveyances as rectified to cases arising in partition actions. I do not agree that the equitable jurisdiction of a Court to rectify should be confined to partition actions. I agree with Nagalingam J., that the construction of a deed does not depend on the nature of the action in which the question arises whether it is a partition action or whether it is a *rei vindicatio* action — 53 N.L.R. 536 at 542. The principles of construction in both cases are the same. The jurisdiction of a Court to rectify or to treat as rectified, documents in which, by a mutual mistake, the true intention of the parties is not expressed can be invoked in the course of any action, when such a question arises irrespective of whether the action is a partition action or a *rei vindicatio* action, provided that all the parties who would be affected by the exercise of that jurisdiction are before Court. The present is a *rei vindicatio* action and it is competent for the

Court to treat the deed of gift D4 on which the defendants based their title, as rectified so as to regard what was conveyed by the said deed was the defined Lot 3 which was allotted to Kiribanda in the partition action on account of his undivided interests in the larger corpus and not what it purports to convey viz; undivided interests of the donor in the larger land.

I affirm the judgment of the Court of Appeal and dismiss the appeal with costs.

Victor Perera, J., — I agree

Colin-Thome, J. — I agree

Appeal dismissed.