**1952** *Present :* **Nagalingam A.C.J., Gunasekara J. and Choksy A.J.**

GIRIGORIS PERERA, Appellant, *and* ROSALINE PERERA, Respondent

*S. C. 99—D. C. Colombo, 3,640*

*Partition action—Transfer of undivided interests in larger land—Vendor entitled in fact to divided interests in smaller allotment of the larger land—Construction of deed—Mistake—Power of Court to give relief—Principles of jusitce and equity—Evidence Ordinance, s. 92, proviso (1).*

*Held* by Gunasekara J. and Choksy A.J. (Nagalingam A.C.J. dissenting): Where deeds dealing with shares in an allotment of land purport to convey undivided shares of a larger land of which the allotment had at one time formed a 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.

APPEAL from a judgment of the District Court, Colombo. This case was referred to a Divisional Bench in view of the conflict between the decisions in *Dona Elisahamy v. Don Julis Appuhamy* (*1950*) *52 N. L. R. 332* and *Jayaratne v. Ranapura* (*1951*) *52 N. L. R. 499*.

This was an action for the partition of an allotment of land described as lot F in a plan made at an amicable partition in 1914. Lot F was a divided portion of a larger land and was assigned to one Kirinelis and another co-owner in equal shares in lieu of their undivided interests. Notwithstanding the division, Kirinelis by deed 8D1 of 1914 gifted to the 8th and 9th defendants in equal proportions an undivided one-tenth share of the larger land. In 1937, by deed 8D3, the 9th defendant conveyed to the 8th defendant "an undivided one half of an undivided one-tenth share" of the larger land although he was not in possession of any undivided interests in the larger land and his possession was confined to the divided lot F. The trial Judge awarded to the 8th defendant a half of the half share of lot F, which represented the entirety of the interests of the 9th defendant in lot F. In appeal it was contended on behalf of the 9th defendant that deed 8D3 was effectual to convey only a one-twentieth share of lot F.

*Austin Jayasuriya*, for the 9th defendant appellant.

*N. E. Weerasooriya, Q.C.*, with *E. S. Amarasinghe* and *W. D. Thamotheram*, for the 8th defendant respondent.

*Cur. adv. vult.*

May 28, 1952. NAGALINGAM A.C.J.—

This case has been referred to a Divisional Bench in view of the divergent views expressed in the cases of *Dona Elisahamy v. Don Julis Appuhamy* [1] and *Jayaratne v. Ranapura* [2] as to the effect of deeds conveying undivided interests in larger lands where the vendors are in fact entitled to divided interests in smaller allotments thereof.

[1] *(1950) 52 N. L. R. 332.* [2] *(1951) 52 N. L. R. 499.*

This is a partition action, and the point arises for determination in view of the conflicting claims made by the 8th and 9th defendants; they are the children of one Kirinelis who admittedly was entitled to a half share of the land called Gorakagahawatte depicted in Plan P1 filed of record. This lot was part of a larger allotment bearing the same name, and at an amicable division effected in 1914 among the co-owners of the larger allotment was allotted to Kirinelis and another co-owner in lieu of their undivided interests. Notwithstanding the division, Kirinelis by deed 8D1 of 1914 gifted to the 8th and 9th defendants an undivided one-tenth share of the entirety of the land, which was the correct fractional share to which he was entitled in the entire land, while, as stated earlier, under the division he became entitled to a half share of the lot in dispute. In 1937, by deed 8D3, the 9th defendant conveyed " an undivided one half of an undivided one-tenth share " of the entire land, but it should be noted that the 9th defendant was not in possession of any undivided interests in the larger land and that his possession was confined to the divided lot. The 8th defendant claims that the deed was operative to convey to her a half of a half share of the divided lot, which would represent the entirety of the interests of the 9th defendant in the land sought to be partitioned; whereas the 9th defendant contends that the deed is effectual to convey only a one-twentieth share of the land in dispute, though the description of the parcel conveyed by him may relate to the bigger land.

The question is what is the interest that the deed in fact conveys. This depends upon a simple construction of the deed, and one has only to look to its terms to ascertain what it conveys without letting oneself be influenced by any extraneous considerations such as those allowable in the case of a will. Here, the parcel that is conveyed is " an undivided one half of an undivided one-tenth share " of the land called Gorakagahawatte, which is described by metes and bounds and which is said to contain an extent of land sufficient to plant eight hundred coconut trees, that is, an extent of about eight acres. Can there be any doubt that the conveyance is of an undivided one-twentieth share in the larger land ? The description of the interest conveyed is, in the language of Pereira J., " a perfectly intelligible description ", and it is the only description of the land in the deed on which the 8th defendant bases her title. But what the 8th defendant desires the Court to do is to read it quite differently and to substitute another description which would run as follows for what is contained therein: " an undivided one half of an undivided one-half share of the divided part of Gorakagahawatte within the metes and bounds detailed in Plan P1 and of the extent of about one and a half acres ". It would be manifest that such a substitution of the description of the parcel conveyed will be totally illegitimate and unsupported by any known canon underlying the interpretation of documents.

As observed in the case of *Simpson v. Foxon* [1], " What a man intends and the expression of his intention are two different things. He is bound and those who take after him are bound by his *expressed intention.*" Construing the deed, which in its terms are clear, unambiguous, and

[1] *(1907) Probate 54.*

precise, the only conclusion one can come to is that the deed conveyed to the 8th defendant a 1/20 share of the larger land, and if the vendor had no title to the entirety of the larger land, but title only to a smaller portion of it, the deed can only convey to the vendee the same fractional share in the smaller lot, and the deed must be held to be operative only to the extent of a 1/20th share in the lot now in dispute.

It is, however, said that while this would be the correct result on a strict construction of the deed, nevertheless the Court should give effect to the intention of the parties. But " it is not the functon of the Court to ascertain the intention otherwise than from the words used in the deed ". See *Shore v. William* [1] and *Skelton v. Younghouse* [2]. And the intention which is being given effect to must be ascertained in accordance with established principles—*R. v. City of London Court Judge* [3] and *London and Indian Docks Co. v. Thames Steam Tug and Lighterage Co.* [4]. Besides, the Court's powers " do not extend to making such alterations as are necessary to bring the document in accord with the Judge's idea of what is right or reasonable "—*Abel v. Lee* [5]. I do not understand the use of the term " strict interpretation " where a deed employs language not obscure but perfectly plain and the construction placed thereon is in accordance with its plain meaning. In such a case you give neither a strict nor a broad construction. You interpret it simply according to the plain language that has been used, and then it is neither a strict nor a broad interpretation of the words but the one and only interpretation of them. The contention that the intention of the parties as gathered from facts and circumstances *de hors* the language of the deed should prevail is a very slender argument to lean upon, for no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed. That the intention must be gathered from the words used is a well defined high road along which generations of Judges have travelled, guided by signposts of numerous cases, to reach the destination of the real intention of parties to an unambiguous document that any deviation thereupon would lead the lone traveller along by-paths into a morass of speculative intentions wherein he would get bogged without any hope of extricating himself therefrom.

I shall now pass on to a consideration of the various authorities cited and shall first deal with the cases which illustrates the principle that a deed should be construed according to its plain meaning unfettered by extraneous considerations.

The first case is that of *Fernando v. Christina* [6] where Pereira J. was invited as in the present case to construe a conveyance of an " undivided four-sixths of one-third share of the defined southern portion of Mawatabadawatta " as conveying the entirety of the divided portion of the land which the vendor had possessed in lieu of his undivided interests. The learned Judge refused to accede to the request and held, " Whatever

[1] *(1842) 9 Cl. & Find. 355.*
[2] *(1942) A. C. 571.*
[3] *(1892) 1 Q. B. 273.*
[4] *(1909) A. C. 15.*
[5] *(1871) L. R. C. P. 365.*
[6] *(1912) 15 N. L. R. 321.*

the parties may have intended to convey, the property in fact conveyed was an undivided four-sixths of one-third of that portion ", that is, of the divided lot.

The next case to the same effect is that of *Bernard v. Fernando* [1] where too the vendor who was entitled to two divided lots A and D in lieu of his undivided interests in a larger land conveyed a one-fifth share of the larger land, and where it was contended that the deed must be construed as conveying to the vendee the entirety of the lots A and D. Pereira J., with whom de Sampayo J. was associated, in delivering judgment said in emphatic terms:—

> " *It is, of course, obvious* that, having purchased an undivided share in the entirety, they *cannot* establish title to the divided lots A and D."

A similar view was taken in *Fernando v. Podi Sinno* [2]. In this case the Court was called upon to construe a deed conveying undivided shares in a bigger extent of land as in fact conveying divided lots to which the vendors were entitled. Bertram C.J., with whom Jayawardene J. was associated, repelled the contention and expressed himself thus:

> " If persons who are entitled by prescription of a land persist *after they have acquired that title*, in conveying an undivided share of the whole land of which what they have possessed is a part; and if the persons so deriving title pass on the same title to others, then the persons claiming under that title, unless they can show that they themselves acquired a title by prescription must be bound by the terms of their deeds."

Dalton and Akbar JJ. arrived at a like conclusion in respect of this question in *Perera v. Tenna* [3]. The facts here were that the vendors conveyed an undivided half share of the entire land when in point of fact they were entitled to two divided lots D and D1. The Judges rejected the argument that the deed must be construed as operating to convey the divided lots D and D1.

The next case is that of *Mudalihamy v. Appuhamy* [4] where Maartensz A.J. used language which is self-explanatory of the facts. The learned Judge said:—

> " Having purchased an undivided $\frac{2}{3}$ share of the whole land, when the execution debtor was entitled to lot A 3 he is only entitled to an equivalent share, namely, $\frac{2}{3}$ of A 3."

Dalton J. expressed the same view when he said that the plaintiff " himself purchased only an undivided $\frac{2}{3}$ share in the entirety, he is entitled as a result to an undivided $\frac{2}{3}$ share only in the share in severalty ".

All the cases hitherto considered are cases instituted for declaration of title. The last case in this series is one under the Partition Ordinance,

[1] *(1913) 16 N. L. R. 438.*
[2] *(1925) 6 C. L. Rec. 73.*
[3] *(1931) 32 N. L. R. 228.*
[4] *(1934) 36 N. L. R. 33.*

and that is the case of *Dona Elisahamy v. Don Julis Appuhamy* (*supra*). That was a case decided by Pulle J. and me. There, to take one of the deeds dealt with, the conveyance was of a 1/7 of ¼ of 1/12 of a land of 24 acres. The vendees claimed a 1/7 of a ¼ of a divided allotment in extent 2 acres, to which divided allotment the vendor's predecessor-in-title had acquired title by prescription. The conveyance was held to be effective to convey 1/7 of ¼ of 1/12 of the divided extent of two acres and no more.

It will thus be seen there is a long series of cases in which the view was taken that a deed must be construed according to the ordinary connotation of the language used in it and the intention ascertained from the words employed by the parties.

Now I shall proceed to consider the cases that are said to take a contrary view.

The first of these cases is that of *Don Andris v. Sadinahamy* [1] decided by de Sampayo J. and Schneider J. The facts in this case are the converse of what have been considered in the previous cases. Here the vendor, who was entitled to an undivided share in the land, purported to convey not his undivided interests nor even lots allotted to him under a scheme of partition but *koratuwas* or portions which he had possessed for purposes of cultivation. It is to be stressed that there was no contest between the parties as to the proportions in which they were entitled to the land as the defendants admitted the shares claimed by the plaintiff and accepted the shares allotted to them. The trial Judge on a perusal of the deeds held that as the deed of conveyance in favour of the plaintiff was for specific portions an action for partition did not lie, and from that judgment the case came up in appeal. The Court in these circumstances felt it could very well decree partition on the basis of the admitted claims of the parties. No legal principles were discussed, for such a course was rendered unnecessary in view of the agreement of parties as to their respective shares, but it is true that de Sampayo J. declared in that case:—

> "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."

It is to be observed that counsel has not been able to cite any other case on similar facts decided prior or subsequent to it.

The next case is that of *Fernando v. Fernando* [2] which came up before a Bench consisting of Bertram C.J. and de Sampayo J. This was also a case under the Partition Ordinance. Plaintiff claimed a ¾ share and allotted to the defendant a ¼ share but the deed of the plaintiff gave him a ⅝ of the larger land of which the *corpus* sought to be partitioned was about half. It was contended on behalf of the defendant that as the plaintiff's deed gave him a ⅝ of the whole, he could not have more

[1] *(1919) 6 C. W. R. 64.* [2] *(1921) 23 N. L. R. 483.*

than a $\frac{3}{8}$ of any particular portion of the whole. Bertram C.J., who delivered the judgment of the Court, took care to say in reference to this argument, not that it was not good in law but that—

> " the question here is 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."

It will be apparent, therefore, that the learned Chief Justice accepted the contention in regard to the construction of the deed as sound but proceeded to decide the case upon other grounds. In fact, that the learned Chief Justice understood this judgment in this sense is abundantly clear from his observations in the later case of *Fernando v. Podi Sinno* (*supra*).

Although I have already compendiously stated the point decided in that case, it is necessary to advert to it a little more fully, to appreciate what was laid down in *Fernando v. Fernando* (*supra*). Depending upon the observation of de Sampayo J. in *Don Andris v. Sadinahamy* (*supra*) already quoted, the Court was invited to lay down the converse of that principle. The learned Chief Justice in reference to this argument said:

> " That principle was, however, enunciated in a partition action, where it would be conveniently applied. But I do not feel able to enunciate the converse of that principle in an action *rei vindicatio*."

He went on to say, and this is what is important:

> " There are other cases in a contrary direction, see *Fernando v. Fernando* and the cases there cited."

Now, if *Fernando v. Fernando*, which was an action for partition, decided that a deed conveying an undivided share in the larger allotment should be construed as conveying the divided interests of the vendor, the case cannot be said to have been decided in a contrary direction to that of *Don Andris v. Sadinahamy* (*supra*); so that it is clear that even in a partition action, such as *Fernando v. Fernando* (*supra*) in reality was, the learned Chief Justice considered that the view he had taken in respect of the construction of the deed had been in a sense contrary to that laid down in *Don Andris v. Sadinahamy* (*supra*) and that he had adjudicated upon the rights of parties in that case on other grounds. This case, therefore, cannot be regarded as an authority for the proposition that in a partition case it is permissible to transmute the shares conveying undivided interests in a larger land into larger shares, fractional or otherwise, of divided portions of it. It is to be emphasised that Bertram C.J. himself never attempted the discovery of the intention of the parties for the purpose of construing the deed by reference to circumstances outside the language used in the deed.

We now come to the last case, decided by Gratiaen J. and Gunasekara J., namely, that of *Jayaratne v. Ranapura* (*supra*). In this case the plaintiff claimed a 1/6 share of the *corpus* which was a defined portion of a larger

land by virtue of a deed which conveyed to him an undivided 1/36 share in the entirety. Gratiaen J. in delivering the judgment of the Court. after making the observation that:

> " The amicable partition to which I have referred had already taken place, but this circumstance does not seem to have been brought to the notice of the notary who drafted the conveyance. The interests of Babanis and Charles ultimately passed, by a series of deeds in which various successive purchasers were concerned, to the plaintiff by the deed P 10 of 1947. The evidence establishes very clearly that each such purchaser in turn possessed, by virtue of his title, the outstanding 1/6 share of the *corpus* and made no claim to possess any interests in the other allotments comprising the larger land. Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors-in-title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided 1/36 of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P. 10 executed in favour of the plaintiff "

and purporting to follow what was believed to have been decided in *Fernando v. Fernando* (*supra*) held that *the plaintiff's deed should be given effeect to as if it conveyed a* 1/6 *share in the divided allotment.*

I have said enough already to indicate that it is not permissible to draw an inference as to the intention of the parties by reference to extraneous circumstances, such as that the Notary does not appear to have been apprised of the amicable partition which had taken place prior to his attestation of the deed or that the successive vendees possessed a 1/6 share in the defined allotment or that there was an error in the execution of the deed. Gratiaen J. also further stated:—

> " 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 construing written instruments."

This case must therefore be regarded as having been wrongly decided and must be overruled.

An undercurrent of thought appeared to prevail during the argument that in construing a deed which comes up for construction in a partition action different principles from those applicable to a deed in an action *rei vindicatio* could be applied. I do not think any such distinction can be drawn, for a partition action is in reality a large number of actions *rei vindicatio* rolled together, not merely among the parties *inter se* but as against the whole world, coupled with a prayer for relief of a special kind. The principles of construction in both cases are therefore identical.

Before concluding this judgment I should wish to make one or two observations in regard to certain ancillary matters.

In the first place, Proviso (1) to section 92 deals with the reception of evidence on the ground *inter alia* of mistake but not in regard to ambiguity

in a deed. I need not say that ambiguity is far removed from mistake. Ambiguity is something which is inherent in the language used in the document leading to an uncertainty as to what was intended by it. A mistake, on the other hand, deals with an entirely different problem. It proceeds on the basis that the document as constituted is perfectly clear and plain but that it does not reflect truly the intent of the parties to the document.

In the second place, at the argument learned Counsel for the respondent did not attempt to support the judgment on the ground of either ambiguity or mistake in the deed 8D3, and this for good reasons. The deed is precise and clear, presenting no difficulties of construction, and the meaning is quite plain. Mistake in the execution of the deed was not put forward, for neither in the pleadings nor when the points in dispute came to be formulated was any suggestion made that the deed contained an error. The 8th defendant claimed that a ½ share had been transferred on deed 8D3. The 9th defendant denied the execution of the deed, and there the matter rested so far as the evidence of the parties was concerned. The 8th defendant did not give evidence of any mistake.

In these circumstances it is difficult to see how, without even the 9th defendant being given an opportunity of meeting a plea of mistake, the rights to which he would be entitled to after giving full effect to the deed of conveyance could be denied to him.

The case of *Fernando v. Fernando* [1] is clearly distinguishable. There, though no plea of mistake was set up, the defendant set up estoppel instead, an estoppel based on facts which in law did not satisfy the requirements of such a plea, but he relied upon circumstances which encompassed within them facts from which the existence of mistake could have been inferred, and the plaintiff was thereby given an opportunity of presenting his case in relation to the facts which constituted the ground of mistake, and it is worthy of note that Bertram C.J. said:

> " Strictly speaking, the defendant should have asked for this relief in his answer and by reconvention."

I do not therefore think in the present circumstances it is within the power of the Court, without any proper material before it, and without an opportunity being given to the 9th defendant, to take upon itself the duty of pronouncing upon the existence of a non-alleged mistake in the deed.

Finally, I wish to observe that it cannot be said that the case of *Jayaratne v. Ranapura* (*supra*) was decided on any other ground than that of the interpretation of the relevant deed, for if it was, there would have been no conflict between that case and that of *Dona Elisahamy v. Don Julis Appuhamy* (*supra*), and the necessity for referring this case to a Divisional Bench would not have arisen.

In view of the foregoing, I would hold that deed 8D3 is operative to convey only a 1/20 share of the land in dispute and that the 9th defendant is entitled to the balance of his interests. The decree would be amended on this basis.

The 8th defendant will pay to the 9th defendant the costs of appeal and of the contest in the Court below.

[1] *(1921) 23 N. L. R. 266.*

GUNASEKARA J.—

I have had the advantage of reading the draft of the Acting Chief Justice's judgment and, if I may say so with respect, I agree with what he has said regarding the interpretation of deeds. It seems to me, however, that, rightly understood, the controversy with which we are concerned relates 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.

As for the admissibility of evidence of such mistake it would not be correct, I think, to state as a general proposition without qualification that " no authority can be found that in the absence of ambiguity in the deed evidence could be received of the existence of facts and circumstances tending to contradict or modify the terms of the deed ". In terms of the first proviso to section 92 of the Evidence Ordinance, any fact, such as mistake, may be proved which would entitle any person to any decree or order relating to the deed. The Ordinance itself gives the following illustration [1]:—

> A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, on the ground that that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

Under the corresponding provision in the Indian Evidence Act it has been held that in an action for the recvery of land included in an estate conveyed to the plaintiffs by the defendant oral evidence is admissible to prove that the property in question was included in the conveyance as a result of a mutual mistake of the parties; and that in such a case a Court administering equity will interfere to have the deed rectified so that the real intention of the parties may be carried into effect and will not drive the defendant to a separate suit to rectify the instrument. *Woodroffe and Ameer Ali's Law of Evidence (9th edition) p. 663*, citing *Mohendra v. Jogendra* [2]. (The report of this case is not available to me.) See also *Rangasami v. Souri* [3].

A similar view, both as to the effect of the first proviso to section 92 of the Evidence Ordinance and as to the powers of a Court to grant relief against mistake, was taken by this Court in the case of *Fernando v. Fernando I* [4], decided by Bertram C.J. and Garvin J. The plaintiff in that case had purchased land which was at that time subject to a lease from his vendors to the defendant. The parties to the lease had intended that it should apply to the whole of the property, but by a mistake in the drafting of the deed the subject of the lease was described as comprising only the southern portion. The plaintiff himself, at the time of his purchase, thought that he was buying the property subject to a lease of its entirety. When he discovered the mistake in the deed of lease, however, he sued the defendant for recovery of the half that was not

[1] *Section 92, Illustration (e).*
[2] *(1897) 2 C. W. N. 260.*
[3] *(1916) 39 Mad. 792.*
[4] *(1921) 23 N. L. R. 266.*

included in the description of the property leased. The defendant pleaded estoppel. It was held that this plea was misconceived and that " What the defendant ought to have pleaded was that the lease was drawn up in its present form through a mutual mistake of the parties thereto, and a claim in reconvention ought to have been made that the lease should be rectified so as to represent the true intent and meaning of the parties ; and he should further have pleaded that the plaintiff knew the true extent of the land leased, and was bound by the same equity as his vendors. " The Court held that it had power to grant the defendant relief upon this footing though he had not asked for it, and dismissed the plaintiff's action. In his judgment in that case Bertram C.J. cited with approval the case of *Rangasami v. Sour (supra)* and another Indian case, *Dagdu v. Bhana* [1], in which Jenkins C.J. said:

> " It is true that rectification is not claimed in this suit as a relief by the defendants . . . . but 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 that purpose would entitle a plaintiff to rectification. "

The case of *Jayaratne v. Ranapura* [2] was concerned with an instance of a common form of mutual mistake resulting in misdescription of the property dealt with in a deed, where the parties erroneously describe interests in an allotment of land as a fractional share of a larger estate of which that allotment at one time formed a part. The action was one for the partition of an allotment which was one of six lots into which a larger property held in common in equal shares by six groups of persons had been informally partitioned by the co-owners, each group of whom thereafter possessed one of the lots exclusively in lieu of their undivided one-sixth share, abandoning their interests in the other lots. The allotment that was the subject of the action had been possessed in this manner by the successors in title to one Cornelis, who had been the owner of a one-sixth share of the larger property, and this group had in due course acquired title to it by prescription. In 1947 the defendant became entitled to a 5/6 share of this allotment, representing 5/36ths of the larger property which had passed from Cornelis to his daughters. The remaining 1/36 Cornelis had transferred in 1908 to two persons named Babanis and Charles. The interests of these two persons passed through successive purchasers ultimately to the plaintiff (who acquired them in 1947 by the deed P10), and each purchaser had in turn possessed the outstanding 1/6 share of the allotment in question and had made no claim to possess any interests in the other allotments. " Unfortunately, however, as so often happens in loose notarial practice, the shares which Babanis and Charles and their successors in title purported to deal with in their respective deeds were described on each occasion *with reference to the undivided* 1/36 *of the larger land* and not, as they were intended to do, the undivided 1/6 share in the smaller *corpus*. The same error was perpetuated in the deed P10 executed in favour of the plaintiff." Upon this chain of deeds the plaintiff successfully claimed before the District Judge an undivided 1/6 share of the allotment that was the subject of the

[1] *(1904) 28 Bom. L. R. 420.*

[2] *(1951) 52 N. L. R. 499.*

action. In appeal the defendant's counsel conceded that " these notarial instruments were intended to convey the 1/6 share in the *corpus* which the plaintiff and his predecessors in title had successively possessed by virtue of these deeds ", but he submitted that it was " not open to a Court to give effect to this intention unless and until the manifest error is corrected by a notarially executed deed of rectification ".

The appeal was dismissed upon the authority of the decision of Bertram C.J. and de Sampayo J. in *Fernando v. Fernando II* [1]; but an answer to this argument of Counsel is also provided by the decision in *Fernando v. Fernando I* [2] which too is cited in the judgment of Gratiaen J. and which is authority for the view that where the facts entitle a party to rectification of a deed a Court administering equity has power to grant him relief upon that footing even though it has not been claimed in the suit.

The case of *Fernando v. Fernando II* [1] cannot be distinguished from *Jayaratne v. Ranapura* [3] on the facts. That too was an action for the partition of an allotment of land that had at one time formed a part of a larger property. It had been possessed exclusively by a co-owner of the larger property in lieu of an undivided half share to which he was entitled, and he had acquired a title to it by prescription. His interests ultimately devolved on the plaintiff and the defendant. The question for decision was whether the plaintiff, whose claim was based on a deed that purported to convey to him a $\frac{3}{8}$ share of the larger property, was entitled to a $\frac{3}{4}$ share of the allotment in question or only to a $\frac{3}{8}$ share of it, and it was held that he was entitled to a $\frac{3}{4}$ share. The cases of *Fernando v. Christina* [4] and *Bernard v. Fernando* [5] were cited in support of the contrary view, and Bertram C.J. said:

> " If I understand these cases aright, the principle which they lay down is that a purchaser who acquires an undivided share of a land is only entitled to the same undivided share of any specific portion of the land when the partition of that portion is under consideration. But that is so where other undivided interests come into consideration. Where, however, two parties have acquired the whole interest of a shareholder in certain proportions, and their deeds describe the interest of such a shareholder as an undivided interest, and it transpires 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, and the question then arises as to the proportion in which that specific portion has to be divided, it seems to me that justice requires that, as between those parties, this specific portion must be divided in the same proportions as those described in their deeds."

I respectfully agree with my lord the Acting Chief Justice's view that Bertram C.J. " accepted the contention in regard to the construction of the deed as sound but proceeded to decide the case upon other grounds ". These other grounds were that it had transpired, from evidence outside the deeds, that the common predecessor in title of the plaintiff and the defendant, whose entire interests had been acquired by them in certain proportions, had prescribed to a specific portion of the larger property holding it in lieu of an undivided half share, and the question that then

[1] *(1921) 23 N. L. R. 483.*
[2] *(1921) 23 N. L. R. 266.*
[3] *(1951) 52 N. L. R. 499.*
[4] *(1912) 15 N. L. R. 321.*
[5] *(1913) 16 N. L. R. 438.*

arose 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 ". In these circumstances it was held that *justice required* that the specific portion that represented the common predecessor's half share must be divided between the plaintiff and the defendant in the same proportions as those described in their deeds. The result of deciding the case not in accordance with the intention mistakenly expressed in the deeds but upon other grounds, and in accordance with what justice required notwithstanding the terms of the deeds, was to give effect to the real intention of the parties to the deeds, ascertained from an examination of circumstances outside the instruments themselves. It seems to me that the true explanation of the judgments in this case and the case of *Don Andris v. Sadinahamy* [1] is that suggested by Gratiaen J. in *Jayaratne v. Ranapura* [2] when he said (citing the case of *Fernando v. Fernando I* [3]) 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 ". It is that jurisdiction that enables a Court of law which is also a Court of equity to make in such cases an order that is in accordance with what " justice requires ".

*Don Andris v. Sadinahamy* (*supra*), which too was an action for partition of land, provides an instance of the converse of the case of *Fernando v. Fernando II.* [4]. The parties to the deeds that were considered in that case had purported to deal with separate allotments into which the *corpus* that was the subject of the action had been divided, though their actual intention (ascertained again from evidence outside the instruments themselves) was to deal with corresponding undivided shares in the entire *corpus*. De Sampayo J., with whom Schneider J. agreed, said:

> " It is not uncommon for co-owners to dispose of their interests by reference to particular portions or *koratuwas* of which they have had 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."

The " broad construction " that is referred to can only be a process that involves rectification and not merely interpretation of the documents, and therefore an exercise of the Court's jurisdiction in equity to which Gratiaen J. refers.

Whether relief can be granted on this footing in the case of a misdescription of the kind with which we are here concerned must of course depend on the circumstances in which the question arises. Hence it was that in the case of *Fernando v. Podi Sinno* [5] Bertram C.J., quoting the above passage from de Sampayo J.'s judgment in *Don Andris v. Sadinahamy* [1], said:

" We are asked in this case to lay down the converse of that principle. That principle was, however, enunciated in a partition action, where it could conveniently be applied. But I do not feel able to enunciate the converse of that principle in an action *rei vindicatio*."

[1] *(1919) 6 C. W. R. 14.*
[2] *(1951) 52 N. L. R. 499.*
[3] *(1921) 23 N. L. R. 266.*
[4] *(1921) 23 N. L. R. 483.*
[5] *(1925) 6 C. W. R. 73.*

The case of *Dona Elisahamy v. Don Julis Appuhamy* [1] was—like the cases of *Don Andris v. Sadinahamy* [2], *Fernando v. Fernando II* [3] and *Jayaratne v. Ranapura* [4]—a partition action. The facts of that case are similar to those of the two last mentioned cases. The *corpus* sought to be partitioned had at one time formed part of a larger property and was approximately 1/12th of it in area. The predecessors in title of the parties to the action had been the owners of an undivided 1/12th share of the larger property and had possessed this allotment exclusively in lieu of that share and acquired a prescriptive title to it. All the deeds, however, upon which the parties claimed shares in the *corpus* that was the subject of the action described the shares conveyed as fractions of the 1/12th share of the larger property. The plaintiff, whose deeds purported to convey to him a fraction of that 1/12th share, claimed however to be entitled to that fraction of the *corpus* that was to be partitioned. It was held that he could be allotted only that fraction of 1/12th of the *corpus* and not that fraction of the *corpus*. It appears to have been appreciated that what was claimed by the plaintiff was no more than what justice required, but the Court appears to have felt that it was powerless to grant equitable relief. Pulle J., who delivered the judgment in that case, said—

> " Much as one would wish to give to the plaintiff shares according to his mode of calculation, the authorities are against him ",

and he cited the case of *Fernando v. Podi Sinno* [5] in support of that view. He went on to say:

> " I am not unmindful of the fact that certain inconvenient results would flow from the interpretation which I have placed on the deeds as, for example, the unallotted shares might give rise to further disputes and fresh litigation. The parties and their predecessors are entirely to blame for this situation and I do not think it would be proper to help them out of it by construing their instruments of title in a sense contrary to that laid down by this Court."

With all respect to the learned Judges who decided that case, it seems to me that they have taken an erroneous view that the Court had no power to grant relief against the mistakes of the parties to the deeds that resulted in a misdescription of the property that was dealt with. The authorities, in particular the decision in *Fernando v. Fernando II* [3] (which is precisely in point but which is not cited), support the contrary view.

In my opinion the case of *Jayaratne v. Ranapura* [4] was correctly decided. In this view of the law the appeal fails. I would therefore dismiss the appeal with costs.

CHOKSY A.J.—

In view of the agreement of counsel on both sides at the hearing of the appeal before Dias S.P.J. and Gunasekara J., that on the main point involved in this appeal there was a conflict between the decisions in *Dona Elisahamy v. Don Julis Appuhamy* [1] and *Jayaratne v. Ranapura* [4], this appeal was referred by the Chief Justice to a bench of three Judges.

[1] *(1950) 52 N. L. R. 332.*
[2] *(1919) 6 C. W. R. 14.*
[3] *(1921) 23 N. L. R. 483.*
[4] *(1951) 52 N. L. R. 499.*
[5] *(1925) 6 C. W. R. 73.*

I agree with the view of My Lord the Acting Chief Justice that the three deeds, namely, 8D1 of 1914, 8D2 of 1933 and 8D3 of 1937 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. The authorities, both English and local, conclude that matter.

The first judgment of the District Court, which was set aside *pro forma* on an application for *restitutio-in-integrum* made by the present 8th defendant-respondent, and the judgment of the District Court on the subsequent hearing, dealt with the case on the footing that although the deeds of the parties to the action on the face of them purport to deal with undivided shares in the larger land, the parties in fact intended to deal with shares in the divided portion of land which from 1914 was allotted to the original owner of an undivided one-tenth share in the larger land.

The land forming the subject matter of this action is lot F in a plan made at the amicable partition in 1914. It is of the extent of 1 Acre 1 Rood and 36 Perches, and all the evidence presented to Court was to the effect that lot F represented the undivided one-tenth share in a larger land, of the extent of 7 acres, which undivided one-tenth share belonged to the common predecessor-in-title of all the parties to this action.

I am satisfied upon a consideration of the evidence led in the case, the basis on which parties presented their respective cases to the lower Court, and the basis on which the learned Judge whose judgment is now under appeal dealt with the matter, that although the deeds dealt with undivided shares in the larger land the intention of the parties was to deal with shares in the smaller land. The only contest has been raised by the 9th defendant who sought to cling to the literal wording of the deeds 8D1, 8D2 and 8D3 and that too at the hearing of the appeal. Even his petition of appeal does not raise the point now urged.

I agree with my brother Gunasekara J. that the question with which 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 interested in this *corpus*, including the 9th defendant-appellant, whenever interests were dealt with upon deeds although the deeds undoubtedly do not reflect that real intention.

In is true that in *Don Andris v. Sadinahamy* [1] the position was made easy as both sides prayed that the entire land be partitioned although some of the deeds dealt with *koratuwas* or divided portions.

It is correct to say that Bertram C.J. in *Fernando v. Fernando* [2] agreed that the *deeds* had to be construed as giving the plaintiff only three-*eighths* of the whole and the defendant one-*eighth* of the entire land, but he awarded to the plaintiff three-fourths and the defendant one-fourth of the smaller land because the question was not "what is the precise *share* stated in the deeds . . . . . but in what *proportion* as between plaintiff and the defendant is the land to be divided". He agreed that the principle laid down in earlier decisions was that "a purchaser who acquires an undivided share of a land is only entitled

[1] *(1919) 6 C. W. R. 64.* [2] *(1921) 23 N. L. R. 483.*

to the same undivided *share* of any specific portion of the land when the partition of that portion is under consideration ". He, however, points out that in certain circumstances justice requires that the specific portion must be divided in the same *proportions* as the shares set out in the deeds bear to one another. The shares were left undisturbed as they appeared on the deeds but in dividing the smaller *corpus* he gave the land to the respective parties in the same proportions which the share of each bore to the share of the other. As plaintiff got on his deeds proportionately three times as much as the defendant got, he gave the plaintiff three times as much as he gave the defendant.

In the present case the 8th and 9th defendants held their interests in lot F in equal proportions. By 8D2 and 8D3 all interests of the 9th defendant in lot F, in the smaller land (or for that matter even in the larger land), passed to the 8th defendant. Therefore applying the decision in *Fernando v. Fernando* [1] the 9th defendant should get nothing and the 8th defendant should get half of lot F as awarded to him by the learned District Judge in the judgment under appeal. Our Courts being also Courts of equity, Bertram C.J. did that justice between the parties which equity and good conscience required should be done between them. It was clear in that case, as it is here, that what the parties intended to do was not what appeared on the face of the deeds, and what appeared on the deeds was not through intention or design but due to an inaccuracy in description. It is possible that the foundation of the order made by Bertram C.J. may be based on another ground than the jurisdiction of the Court to rectify an erroneous description and make order in accordance with the true intention of the parties —namely section 96 of the Evidence Ordinance. The deeds here (as there) refer to undivided shares in a larger land which has ceased to exist as a separate and distinct entity, in the present case 19 years prior to 8D2 and 23 years prior to 8D3. See *Mensi Nona v. Neimalhamy* [2]. These deeds may therefore be regarded as " unmeaning in reference to existing facts ". The parties were dealing with interests in a land of 1 Acre 1 Rood and 36 Perches (which at the dates of these deeds had the metes and bounds depicted on the relative plan) and not with interests in the larger land as it was previous to the amicable division in 1914. If at the respective dates of these deeds the parties to this contest, namely, the 8th and 9th defendants, were asked whether they were dealing with undivided interests in the larger land their answer would undoubtedly have been an emphatic negative.

The identity and integrity of the larger land of 7 acres, as a separate and distinct land, in which Johanis Perera (the common predecessor of all the parties to this action) and others with him had shares—Johanis having only one-tenth—had vanished. Their status as co-owners of that larger land had been put an end to by common consent. The several co-owners of it had cut themselves adrift from one another. The land itself had been fragmented into many lots—up to lot J at least. Therefore, to hold them or any of them as still thinking in terms of fractions of the larger land and dealing with those shares, 19 and 23

[1] *(1921) 23 N. L. R. 483.*

[2] *(1927) 10 C. L. Rec. 159.*

years later, is to produce an unrealistic result. No doubt one can " reconstruct " the picture as it was prior to the partition in 1914 but parties in 1933 and 1937 were bent on dealing with a land as it then existed. When these deeds therefore contained a description of a land of seven acres, and which could not apply to the existing entity, could it not be said that their language was " unmeaning in reference to *existing facts* "?

It would be unreasonable to impute to parties an intention which is inconsistent with their whole conduct in reference to the transaction in question. In his evidence the 9th defendant never said that he intended to deal with an undivided half of one-tenth of the larger land. He pretended that he did not know anything about these deeds which he admitted he nevertheless signed. He also took up the disingenuous position that his signature was obtained on the footing that he was conveying the house on this land that is the *corpus*. He did not even cross-examine the 8th defendant on the footing that what she was buying on 8D2 and 8D3 were interests in an undivided one-tenth share of the larger land of 7 acres. As I have said, the present contention was not even put forward in the 9th defendant's petition of appeal.

I however do not wish to decide this case on the basis of section 96 of the Evidence Ordinance as it was not dealt with in the argument before us although it could be used even perhaps to support the decision in *23 N. L. R. 483*. By applying that decision and holding that the 8th defendant gets the entirety of the interests of the 9th defendant, one does not run the risk in this case of " any inconvenient results " referred to by Pulle J. in *Dona Elisahamy v. Don Julis Appuhamy* [1]. All the interested parties are before Court. No others are affected. The vendor himself is before Court although he seeks to make an unconscientious use of what is after all an erroneous description, unlike the vendor in *Lucyhamy v. Perera* [2] who frankly admitted the true position.

I agree with the observations of Gratiaen J., quoted by my brother Gunasekara J. from *Jayaratne v. Ranapura* [3], that 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 ". The reference in *Don Andris v. Sadinahamy* [4] to " the real intention of the parties . . . . . " by de Sampayo J. seems to confirm that view.

The question is what is the relief that the Court should grant in these circumstances. I am in agreement with the view of my brother Gunasekara J. that this Court has power to grant relief against a mistake in the deeds of parties which results in a misdescription of the *corpus* which parties intended to and believed themselves to be dealing with. In that view of the matter I feel that the Court could have granted the relief which was asked for by the plaintiff in *Dona Elisahamy v. Don Julis Appuhamy* [5].

I have considered whether the case should be sent back to enable the necessary plea to be put forward in a formal manner and further proceedings thereon. I do not think it necessary to do so more especially

[1] *(1950) 52 N. L. R. 332.*
[2] *(1938) 40 N. L. R. 232.*
[3] *(1951) 52 N. L. R. 499.*
[4] *(1919) 6 C. W. R. 64.*
[5] *(1950) 52 N. L. R. 332.*

as there has already been considerable delay, including two trials and an application for *restitutio* in between. I am also influenced in this decision particularly having regard to the course which the matter has taken. In her answer in June, 1946, the 8th defendant set up her claim to the whole of the one-fourth of the 9th defendant to lot F. In his answer the 9th defendant, in July, 1946, took up the position that Kirinelis the father of the 8th and 9th defendants was entitled to an undivided half of the *corpus* (not an undivided half of one-tenth of the larger land) and that on 8D1 of 1914 he got half of Kirinelis' interests and that the 9th defendant had been in possession of one-fourth of the *corpus* sought to be partitioned, that is lot F and not the larger land, since 1914, and claimed prescriptive title to one-*fourth* of the *corpus*. It is true that he pleaded that 8D2 and 8D3 do not refer to the *corpus* and stated further that these two deeds were not acted upon but he led no evidence on these points at either trial.

In *Fernando v. Fernando* [1] this Court granted rectification without any plea asking for it and without sending the case back despite the fact that the lessor upon the lease which was treated as rectified by the Appeal Court was not even a party to the case, whereas we have both the vendor and the vendee before us and it is the vendor who has put forward a claim which is " thoroughly unconscientious ".

In *Goonesekera v. Van Rooyen* [2], Jayawardena J. held that a deed on which the plaintiff relies could be rectified in the course of a partition action provided all the necessary parties were before the Court if a mistake in the deed is discovered after the institution of the action, as was the case here also. In the circumstances of that case he converted a partition action into an action for declaration of title because certain parties who were necessary to the rectification were not before the Court and could not be made parties to a partition action. Even in sending it back he made it clear that the appellants who had absolutely no merits were to be bound by the finding of the Appeal Court that they had intended to convey two lots instead of one and that plaintiffs there were entitled to a rectification and that it would not be open to the appellants to raise those questions again as a result of the case being remitted to the lower Court. I do not think it makes a difference that here it is the deed of the defendant that is being treated as rectified. In the absence of circumstances justifying a remission to the Court below, I am not prepared to send the case back.

I agree that the appeal should be dismissed with costs.

*Appeal dismissed.*

[1] *(1921) 23 N. L. R. 266.*

[2] *(1926) 7 C. L. Rec. 88.*