

Mr. Dayaratne, has strenuously contended that the aforesaid questions relating to “the validity of the Power of Attorney marked P7 and the deed produced marked P1”, have been raised for the first time in the Supreme Court at the stage of application for special leave, and that these being mixed questions of law and fact, they cannot be raised for the first time on appeal. He has invited our attention to the decision of a Five Judge Bench of this Court in *Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha* [1988] 1 Sri LR 99 in which it was held that a question which is not a pure question of law, but a mixed question of fact and law, cannot be taken up for the first time on appeal, and stressed that the apex court, which does not have the benefit of the findings and reasoning of a lower court, should not be compelled to go into a question of fact or mixed question of fact and law, raised for the first time on appeal.

Mr. Faisz Mustapha, PC., did not contest the correctness of the proposition of law urged by Mr. Dayaratne, but submitted that that the questions raised are pure questions of law, and that in any event, they had arisen for consideration in the District Court itself. In this connection, it is necessary to observe at the outset that question 1(a) and (b) on which special leave to appeal has been granted in this case, do not raise the question of *validity* of the Power of Attorney marked P7 and the deed produced marked P1 as stated in question 3, but the first of these deals with the *proof* of the said Power of Attorney and second with the *construction* and *legal implications* of the Deed marked P1. It is also necessary to observe that these questions arise from the very first issue raised at the trial, which was as follows:-

1. පැමිණිල්ලේ උපලේඛනයේ විස්තර කොට ඇති ඉඩම පැමිණිල්ලේ 2 සිට 10 දක්වා පෙදුමේ ප්‍රකාර පැමිණිලිකරන්නට ඇතිවිද ?

It is this issue which was subsequently reformulated as issues 6 and 7 (quoted in full earlier in this judgement) in the light of the plans and reports furnished by the commissioned surveyors.

It is noteworthy that paragraphs 2 to 10 of the petition filed by the Respondents in this case narrate the alleged chain of title of the Respondents, all of which have been denied in the Answer of the Appellants, and in particular paragraph 7 refers to the Power of Attorney P7 and paragraph 8 to the Deed P1. Furthermore, the Power of Attorney P7 was marked “subject to proof”, and Mr. Mustapha, has stressed that it has never been proved, and that therefore the Deed P1 could not have conveyed any title to the Respondents. He has submitted further that the action from which this appeal arises, being an action for declaration of title which has been treated by both the District Court and the Court of Appeal as a *rei vindicatio* action, the onus was clearly on the Respondents to prove the aforesaid instruments and demonstrate how the Respondents derived title to the land described in the schedule to the petition. Mr. Dayaratne, has contended that an action for declaration of title is distinguishable from a *rei vindicatio* action which required stricter standards of proof, and that the instant case is only an action for declaration of title in which the Respondents would succeed if the Appellants cannot establish a stronger title or a right to possess.

A curious feature of this case is that it commenced as an action for declaration of title in which ejectment was not prayed for by either of the contending parties in their initial pleadings, and a new prayer was introduced into the replication without any express prayer for ejectment for additional relief by way of damages in a sum of Rs.