

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

C.A. No.934/97 (F)  
Court of Appeal No.1620/P  
D.C. Horana

In the matter of appeal under and in terms of  
Section 835 of the Civil Procedure Code.

Don Peter Jayakody of  
Kumbuka, Gonapola Junction.

**Plaintiff - Appellant**

Vs.

1. Kumbukage Premaratna of  
Pitawila, Kumbuka,  
Gonapala Junction.
2. Kolambage Don Nandawathie of  
Pitawila, Kumbuka,  
Gonapala Junction.
3. Dona Gunawathie Jayakodi,  
Rerukana West, Bandaragama.
4. Thibbotuge Methias Perera
- 4A. Thibbotuge Jayantha Perera
5. Thibbotuge Jayantha Perera
6. Nanda Amaratunga nee Jayakodi  
All of 2<sup>nd</sup> Lane, Chandana Garden,  
Maharagama.
7. Lakshman Jayakody of  
Kumbukka, Gonapola Junction.
8. Bernard Jayakody of  
Kumbuka, Gonapola Junction.
9. Pushpakumara Jayakody of  
Kumbuka, Gonapola Junction.
10. Indrani Jayakody of  
Kumbuka, Gonapola Junction.
11. Chandrani Jayakody of  
Kumbuka, Gonapola Junction.
12. Kanaththage Lili Nona of  
Kumbuka, Gonapola Junction.
13. Deshanbandu Sarathchandra Athauda  
of Kumbuka, Gonapola Junction.
14. Kumbukage Karolis,  
14A. Kumbukage Seelawathie, of  
Kumbuka, Gonapola Junction.
15. Kolambage Don Babbu Singho of  
Kumbuka, Gonapala Junction.

16. Panagodage Chalo Singho of  
Kumbuka, Gonapola Junction.
17. Kolambage Baby Nona alias Ango Hamy
- 17A. Panagodage Piyadasa of  
Kumbuka, Gonapola Junction.
18. Ponsuge Don Themis Singho
- 18A. Ponsuge Dona Somawathie  
Gamage of  
Kumbuka, Gonapola Junction.
19. Hapuachchige Simon alias Piyasena.
- 19A. Hapuachchige Karunapala.
- 19B. Mebal Peris of  
Kumbuka, Gonapola Junction.
20. Hapuachchige Gomis
- 20A. Hapuachchige Karunarathna of  
Kumbuka, Gonapola Junction.
21. Ponniah Svariya of Dikhena, Horana.
22. Hettiarachchige Peter Perera of  
Kumbuka, Gonapola Junction.
23. Hettiarachchige Pemalatha of  
Kumbuka, Gonapola Junction.
24. Rajapitiyage Don Siriwardana of  
Kudella, Keselhenawa, Anguruwatota.
25. Rajapitiyage Don Premathilaka  
Siriwardana of  
3C42, Married Quarters, Army Housing  
Scheme, Anguruwatota.
26. Panagodage Piyadasa of  
Kumbuka, Gonapola Junction.
27. Chalo Nona Jayakody of Udumulla,  
Padukka.
28. Athaudage Don Leo Hemapala, of  
Kumbuka West, Gonapola Junction.
29. Athukoralage Kusumawathie Athukorala  
of Kumbuka West, Gonapola Junction.
30. H.A. Sumaqrathna of  
Kumbuka, Gonapola Junction.

**Defendants**

**Before:**

**Janak De Silva J.**

**&**

**N. Bandula Karunarathna J.**

**Counsel:**

Seetha Ranjanie Weerasinghe for the 29th Defendant - Appellant.

Srimath Iranganie Herath instructed by Uditha Malalasekara for the Substituted - Plaintiff -Respondent.

A.M.J. Hemantha for the 13a, 17b and 26a Defendant -Respondents

**Written Submissions:**

By the 29<sup>th</sup> Defendant- Appellants on 27/09/2019

By the Substituted – Plaintiff- Respondents on 27/09/2019

By the 13a, 17b and 26a Defendant-Respondents on 27.09.2019

By the 19B and 12<sup>th</sup> Respondents on 23.10.2019

**Argued on:**

21/06/2019

**Judgement on:**

29/06/2020

**N. Bandula Karunarathna J.**

The Substituted-Plaintiff-Respondent (hereinafter sometimes referred to as the “Plaintiff”) instituted the above styled partition action to partition the land called as “Kongahawatta” alias “Meegahawatta”.

The present Plaintiff initially, was the original first Defendant when the case was filed in June 1981. However, since the original Plaintiff was unable to proceed with the action the present Plaintiff, who was the first Defendant earlier, by an amended Plaint dated 25.09.1992 moved Court to proceed with the action. Thereafter, rest of the Defendants also filed their respective amended statement of claims and the matter proceeded to trial on 2 admissions and 40 issues

The judgment was delivered by the Learned Trial Judge on 22.10.1997, where by making an order to partition the land in suit as per the schedule of shares contained therein for the reasons stated in the said judgment. The 29<sup>th</sup> Defendant-Appellant and the Plaintiff Appellant, have preferred two appeal to the Court of Appeal on 12<sup>th</sup> and 19<sup>th</sup> December 1997 respectively, against the said judgment as they were aggrieved by the same and arguing that, they were not been allotted correct shares in the said schedule of shares.

According to the Journal Entry dated 20.01.2012, it was informed to this Court that the Plaintiff Appellant is dead. After the substitution was done on the request of the 29<sup>th</sup> Defendant- Appellant, it was indicated in all the documents and even in the Amended Caption, that the Plaintiff- Appellant, as the “Substituted- Plaintiff- Respondent”. There was no application to confirm that the Substituted- Plaintiff has decided to withdraw or abundant the Appeal. The said Amended Caption could be considered as a typographical error. On the 21.06.2019 all parties agreed before us, to dispose this matter by way of Written Submissions. On that request Court allowed them to tender Written Submissions and conclude the arguments.

It is important to note that the substituted 29<sup>th</sup> Defendant-Appellant relates only to correctness of the calculation of the shares in the said judgment and challenging the findings

in relation to the miscalculation of shares by the Learned Trial Judge. Therefore, the Substituted 29<sup>th</sup> Defendant – Appellant through this action aims to examine the said judgment in respect of the misdirection on the part of the Learned Trial Judge in arriving at his conclusions as to the shares of the parties. This Appellant does not challenge the other findings or conclusions of the Learned Trial Judge.

According to the amended Plaintiff, that the land in suit had been owned and possessed by three original owners. They were, Karonchi Appu, Bastian Appu alias Babappu and Seemon Appu in equal shares (1/3<sup>rd</sup> each). The Substituted 29<sup>th</sup> Defendant Appellant says, that only the rights of Seemon Appu have consequently resulted in the miscalculation of the shares. The said Seemon Appu had died leaving his widow and 6 children as his intestate heirs. The said Seemon Appu had a child named Salan Appu. The widow of Seemon Appu, namely Punchihamy had transferred her ½ share to 4 children of Salan Appu by virtue of Deed bearing No.2565 in the year 1886.

The said children of Salan Appu were entitled to a share of  $1/3 \times 1/2 \times 1/4$  each, (1/24) in addition to the said rights the said 4 children of Salan Appu had derived a further share of 1/144 each on the demise of their father Salan Appu. One of the children of Salan Appu had died unmarried and issueless and his rights also had devolved on his 2 sisters and out of the said 2 sisters, one sister called Karlina, in the year 1919 and on Deed No.28980 had transferred all rights, shares and interests to the other sister. The two children of Salan Appu aforesaid have derived a share of  $1/24 + 1/72 = 4/72 = 1/18$  each from and out of the land in suit.

The said rights of those 2 children of Salan Appu had devolved on to the present 1<sup>st</sup> Defendant on a clear chain of deeds and thus the 1<sup>st</sup> Defendant (Original Plaintiff) was entitled to a share of  $2/18 = 1/9$  from and out of the corpus. The claim of the 29<sup>th</sup> Defendant-Appellant is that the 1<sup>st</sup> Defendant, Premaratne had transferred all his rights to her. The Appellant had adduced the deeds in relation to the said devolution of title unto her.

It was argued that the 29<sup>th</sup> Defendant Appellant has lost a substantial portion of the land due to the said misdirection and misinterpretation of the relevant evidence by the Learned Trial Judge

It is evident that one of the children of Salan Appu had died unmarried and issueless and his rights also had devolved on his 2 sisters and out of the said 2 sisters, one sister called Karlina in the year 1919 and on Deed No.28980 marked as 29 V 5, had transferred all rights shares and interests to one Samaranayaka. Thus, on the said pleadings, it will be observed that the two children of Salan Appu aforesaid have derived a share of  $1/24 + 1/72 = 4/72 = 1/18$  each from and out of the land in suit.

The complaint of the 29<sup>th</sup> Defendant Appellant therefore does not amount to, not assigning the rights of Punchihamy which she had transferred to the children of Salan Appu but the Learned Trial Judge wrongly, by assigning to the 7 children of Seemon Appu. The Plaintiff in giving evidence had adverted to the aforesaid Deed bearing No.2565 dated 03.05.1886 and marked and produced the said deed at the trial as, 'P25'. However, after the conclusion of the trial, although the said deed was marked in evidence, the same had not been tendered to Court by the Plaintiff for reasons better known to him.

Hence, the said marked document was not before the Learned Trial Judge at the time of entering the judgment. It looks like the initial mistake on the part of the Learned Trial Judge.

The reason was that he had failed to call for the said deed prior to entering the judgment as it was a marked document and a part of the case record.

It was held in *Podiralahamy v. Ranbanda* 1993 (2) SLR 26, that "there is a duty cast on Court to take the document tendered and marked at the trial to its custody and keep them filed of record. Documents marked in evidence become part of the record".

It was held in *Chandraratna Vs Piyasena* 1999(3) SLR 201, that; According to section 114 (2) of Civil Procedure Code, every document so proved/admitted shall be endorsed with a number/letter, the Judge shall then make an entry on the record to the effect that such document is proved/admitted, the document should then be filed as part of the record; there is a duty cast on Court to take the documents tendered and marked to its custody and keep them filed of record as the documents marked are, become part of the record.

114(3). It is the duty of a Trial Judge to direct all parties after the trial to tender all documents to Court with a list attached before writing the judgment; he had failed to do so in this instance.

It is important to mention that according to the provisions of the Civil Procedure Code and the long line of judicial precedents it has now become well settled law that once a document is marked and produced at a trial, the same forms a part of the case record and if the same had not been tendered to Court, a Trial Judge should call for the same from the party who had produced the same at the trial.

It is clear that the Learned Trial Judge had failed in his duty to call for the said document, P25 prior to the entering of judgment and since the non-consideration of the contents of the said document by the Learned Trial Judge is erroneous in law. Furthermore, the Learned Judge had arrived at an erroneous conclusion that the deed marked 'P25' was a deed executed in the year 1986. Whereas the said deed was not a deed executed in the year 1986 but a deed executed in the year 1886. He had further misdirected himself in arriving at the erroneous conclusions that since the present action had been instituted in the year 1981, Deed 'P25' had been executed pending this action and as the same had been not produced for his perusal, aforesaid rights of Punchihamy should devolve unto all her children. This conclusion is completely wrong.

Hence, the entire share of said Punchihamy which ought to have devolved on the 1<sup>st</sup> Defendant through whom the 29<sup>th</sup> Defendant Appellant derives her title, had been assigned to other parties on the said erroneous conclusion of the Learned Trial Judge. He had accepted all the other deeds adduced by the 29<sup>th</sup> Defendant – Appellant and then had arrived at the conclusion that all the rights of the 1<sup>st</sup> Defendant (Original Plaintiff) had devolved on to the 29<sup>th</sup> Defendant but due to the aforesaid misdirection on the part of the Learned Trial Judge the 29<sup>th</sup> Defendant Appellant had lost a 1/6<sup>th</sup> share from and out of the land which is a substantial amount of land.

At the time of lodging the instant appeal, the 29<sup>th</sup> Defendant- Appellant has filed on the 15.12.1997, a copy of the said deed bearing No. 2565 dated 03.05.1886. On perusal of the said deed, it can be clearly observed that the averments contained in the amended Plaint in relation to the rights of Punchihamy and the predecessors in title of the Appellant are correct and a great injustice had occurred to the 29<sup>th</sup> Defendant Appellant, due to the said

misdirection on the part of the Learned Trial Judge. The appeal of the 29<sup>th</sup> Defendant-Appellant relates only to correctness of the calculation of the shares in the said judgment and challenging only the findings in relation to the miscalculation of shares by the Learned Trial Judge.

Thus, the 29<sup>th</sup> Defendant Appellant's share, has to be re calculated and should be adjusted accordingly.

Now I wish to consider the arguments of the Substituted-Plaintiff-Respondent (it should be the Plaintiff Appellant) who states that there was no corpus dispute as the corpus to be partitioned was admitted by all parties. It was also admitted that the original owners of the corpus were Athawudage Karonchi Appu, Athawudage Bastian alias Babappu and Athawudage Simon Appu.

The Original Plaintiff contented that one Manis, a grandchild of one of the original owners Karonchi, gifted his share of the land to his six (06) children, namely, Jinoris alias Jayaneris, Babun Nona, Jane, Mary, John and Abilian, by deed of gift No. 2274 dated 1992.12.22. The said Manis had 6 children only.

The contention of the 14 (a) Defendant was that, Manis was having a total of 6 brothers and sisters bring the total of 7 children to Manis's father, namely Davith. Names of the Davith's 7 children are; Kirineris, Singnoappu, Pinhamy, Singnohamy, Kechchohamy alias Manchohamy, and Manis. Then he had another child by the name of Nonchihamy. The share of said Nonchihamy had devolved on the 14 (a) Defendant. Therefore, the Original Plaintiff states that the Learned Trial Judge in his judgment dated 1997.10.22 had completely gone wrong, in fact and in law, and had decided that one Davith had 7 children. The Plaintiff states that it appears that the Learned Trial Judge had mistakenly considered Manis as Davith, and had arrived at an erroneous finding. But I strongly believe that Learned Trail Judge has decided it correctly. Shares of Davith and his son Manis were calculated by the trail Judge and given properly to their children.

The Learned District Judge, however, has overlooked the fact that the partition action proceeded on oral as well as on documentary evidence, and had erred in fact by not considering that the original first Defendant later got in to the shoes of the Plaintiff and proceeded with the partition Action.

The Learned Trial Judge had mistakenly considered that the present first Defendant namely Kumbukage Premarathne as the original first Defendant. It is worth mentioning that, as at the date of the preliminary plan, the matter had not proceeded to trial and the first Defendant as at the date of the preliminary plan was Don Peter Jayakody (Present Plaintiff.) Therefore, the foundation marked D should go to the present Plaintiff namely, Don Peter Jayakody.

In this connection it is worth re capturing the issue No. 2 raised on behalf of the Plaintiff (Don Peter Jayakody);

“(2) මූලික පිඹුරු අංක 292 පැමිණිලිකරු ඒනම් පිඹුර මනින අවස්ථාවේ 1 වැනි වින්තිකරු ඉල්ලා ඇති අයිතිවාසිකම් ඔහුට හිමිවිය යුතුද?



In his judgment dated 1997.10.23 the Learned Trial Judge had erroneously observed as follows.

“අංක 1 දරණ කොටසේ වගාවට 1 වෙනි විත්තිකරු සහ 14 වෙනි විත්තිකරු අයිතිවාසිකම් පා ඇත. අංක 1 වගාව 1 වෙනි විත්තිකරුට ලැබිය යුතු බවට පැමිණිලිකරු හඬ ප්‍රශ්නයක් යෝජනා කර ඇති නමුත්, ඒ සම්බන්ධයෙන් පැමිණිලිකරු සාක්ෂි දෙන අවස්ථාවේ වචනයක් හෝ පවසා නැත.”

It is evident that the Learned Trial Judge had failed to consider the words “මූලික පිඹුර මතින් අවස්ථාවේ 1 වන විත්තිකරු” in its proper perspective and had erroneously awarded the cultivation of lot 1 and 2 to the present first Defendant (Kumbukage Premarathne), when in fact it is the Plaintiff (Don Peter Jayakody) who had claimed for the said cultivation of lot 1 and 2 as appears at the commission report of the Preliminary Plan dated 11.10.1981. Thus, the erroneous finding cannot stand and this Court has to correct the mistake committed by the Learned Trial Judge and award the cultivation of lot 1 and 2 for its rightful claimant, the Plaintiff, namely, Don Peter Jayakody who has claimed for it and also had raised an issue in respect of the cultivation.

It was further argued that the Learned Trial Judge had completely gone wrong by depriving the present plaintiff of his rightful entitlement to the foundation marked D in the Preliminary Plan, for which he has claimed before the surveyor on 11.10.1981. The foundation referred to as “D” in the preliminary plan and referred to as “D” in the preliminary report was claimed by the original first Defendant (Don Peter Jayakody). He had claimed for the foundation which is 25 years old, as at the date of the Preliminary Plan. It is worth considering that the original first Defendant, namely Don Peter Jayakody later got in to shoes of the Plaintiff since the Original Plaintiff (Kumbukage Premarathne) indicated to Court, his unwillingness to proceed with the action.

The Learned Trial Judge had completely gone wrong by depriving the present Plaintiff of his rightful entitlement to the foundation for which he has claimed for. The present first Defendant (Kumbukage Premarathna) had transferred his rights to the 29<sup>th</sup> Defendant namely, Athukoralage Kusumawathie Athukorala. However, the original first Defendant (present Plaintiff) had not alienated any of his rightful entitlement to the 29<sup>th</sup> Defendant. Thus, the finding of the Learned Trial Judge, to the effect that, the foundation marked as “D” be devolved on the 29<sup>th</sup> Defendant, is erroneous and cannot be stand. It should be corrected and the present Plaintiff is entitled for it and the Plaintiff should be given the said foundation marked D in the Preliminary Plan. The Learned Trial Judge had completely gone wrong by depriving the present Plaintiff of his rightful entitlement to the foundation for which he has claimed for.

The 13a, 17b and 26a Defendant-Respondents state that the Learned District Judge has carefully analyzed the title that has been accrued to them by evaluating the evidence led before him and Deeds produced in evidence and ordered to partition the said corpus. The 19<sup>th</sup> B and 12<sup>th</sup> Defendant Respondents also accepted the Judgment given in the present District Court case No. 1620/P and have no objection regarding the same.

The findings of the Learned District Judge are purely based on reasons which are emanating from evidence and the Learned Trial Judge has arrived at his findings after a careful evaluation of all evidence placed before him and through investigation of title. It is my opinion that the Learned District Judge has considered all the deeds that have been produced in evidence and

oral evidence led before him. Further he has carefully analyzed all the evidence placed before him. Therefore, the said Judgment of the Learned District Judge clearly reveals that he has carefully investigated the title of the subject matter.

However, there has been a " slip or omission " in allotting the shares of the 29<sup>th</sup> Defendant Appellant. Clearly, there has been a mistake of the Trial Judge. Obviously, that slip or omission was not deliberate. It may be accidental mistake.

I therefore believe that considering the aforesaid, the distribution of shares should be amended and be allotted as follows;

1. Plaintiff ( Don Peter Jayakody )	- 32623 / 126,000
2. 9 <sup>th</sup> Defendant	- 133 / 126,000
3. 12 <sup>th</sup> Defendant	- 2833 / 126,000
4. 13 <sup>th</sup> Defendant ( 30 <sup>th</sup> Defen.)	- 23927 / 126,000
5. 14 <sup>th</sup> A Defendant	- 6719 / 126,000
6. 17 <sup>th</sup> A Defendant	- 1750 / 126,000
7. 18 <sup>th</sup> Defendant	- 16587 / 126,000
8. 19 <sup>th</sup> Defendant	- 10300 / 126,000
9. 20 <sup>th</sup> Defendant	- 10275 / 126,000
10. 26 <sup>th</sup> Defendant	- 6327 / 126,000
11. 29 <sup>th</sup> Defendant Appellant	- 12146 / 126,000
12. Unallotted	- 2380 / 126,000

Subject to the above-mentioned amendments the Judgment of the Learned District Judge dated 22.10.1997, is affirmed.

Considering the circumstances, No Order for Cost.

Interlocutory decree may enter, accordingly.

The Registrar of this Court is directed to forward the original case record of P 1620 to the Registrar of the District Court – Horana, along with a copy of this Judgment, forthwith.

**Judge of the Court of Appeal**

**Janak De Silva , J**

**I agree.**

**Judge of the Court of Appeal**