

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

C.A 838/98 F

D.C Kegalle Case No: 23792/P

1. Patirannahalage Dingiri Banda, Atugoda.
2. Patirannahalage Punchi Banda, Atugoda.

Defendant- Appellants

1. Patirannahalage Alias Madurusighe
Arachchillage Punchirala
2. Gamaralalage Punchi Menika, (deceased)
- 3 &2A .Madurusighe Arachchilalage Jayatilaka Banda
4. Madurusighe Arachchillage Shanthi Podimenika,
All of Atugoda

**1,3,4 Plaintiff-Respondents and 2A
Substituted-Plaintiff-Respondents**

2. Madurusighe Arachchillage Sadi Banda
3. Madurusighe Arachchillage Punchi Banda
4. Madurusighe Arachchillage Kiri Banda
5. Ganearachchillage Gunasekara

2nd-5th Defendant-Respondents

C.A 838/98 F**D.C Kegalle Case No: 23792/P**

Before : K.T. Chitrasiri, J.

Counsel : Sunil Abeyrathne with Buddhika
Alagiyawanna instructed by Wimal
Udalagama for the 1st
Defendant-Appellant.

Ajith Munasinghe for the 2nd and 3rd
Defendant- Respondents.

J.P. Gamage for the Plaintiff –
Respondents.

Argued & Decided on : 05.11.2013.

K.T.Chitrasiri, J.

All three counsel appearing for the parties concerned, bring to the notice of court that the learned District Judge having answered the issue No: 06 affirmatively where he has accepted the prescriptive claim of the 1st and 6th Defendant-Respondents made in respect of the entire land sought to be partitioned, has finally allocated shares to the Plaintiff, 1st Defendant and to the 2nd, 3rd and 4th Defendant-Respondents. Therefore, they submit that the judgment on the face of it cannot stand. They further submit that the learned District Judge in the first paragraph of his judgment dated 13.10.1998 has observed that no statements of claim have been filed by the Defendants in this case whereas the 1st and

the 6th Defendants and the 2nd and 3rd Defendants have filed their statements of claim. Therefore, it is seen that even at the very outset, the learned Judge has misdirected himself when he stated that no statements of claim have been filed by the defendants. In the circumstances, all three counsel move that this matter be sent back for re-trial.

Issues bearing Nos: 1, 4, and 8 suggested by the three sets of parties are to determine the original owner of the land sought to be partitioned. Learned District Judge has not considered the evidence to determine those three issues. It is the submission of all three counsel as well. Furthermore, the deeds marked '3V1' to '3V6' also have not been considered by the learned District Judge.

In the circumstances, it is seen that no reasons are assigned by the learned District Judge to have come to the final conclusions referred to in the impugned judgment. Neither has he properly evaluated the evidence led.

At this stage, it is brought to the notice of court that the 4th Defendant had died in the year 1993 whilst the case was pending in the District Court. Counsel for the 2nd and 3rd Defendants informs court that

the deceased 4th Defendant is the father of the 2nd and 3rd Defendant-Respondents. The appeal brief does not show any substitution effected in place of the deceased 4th Defendant –Respondent. Therefore, it is seen that no opportunity was afforded to present the case of the deceased 4th Defendant –Respondent after his death even when the case was pending in the original court.

Accordingly, it is appropriate to make an order to have a trial *de-novo* as suggested by all three counsel. For the aforesaid reasons, the judgment dated 13.10.1998 is set aside. The learned District Judge of Kegalle is directed to have a trial *de-novo*. He is also directed to hear and conclude this case expeditiously.

Learned District Judge is further directed to ascertain the parties who are dead and to direct the Plaintiff to take necessary steps in order to substitute the heirs of those deceased parties. Accordingly, this appeal is allowed without costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL.

Vkg/-