

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

Mahood Marikkar Mohamed Marzook,
No. 8, Anderson Road,
Colombo 5.

Plaintiff

C.A. No. 449 / 98 F

Vs.

D.C. Kalutara No. 5619 / P

1. Mahmood Marikkar Ummu Razina,
(deceased)

1a. Mahmood Zulfan Raleen,
No. 191, Quarry Road, Dehiwala.

And 07 Others.

Defendants

AND NOW BETWEEN

Mahmood Marikkar Ummu Majeed,
No 21, New Road (Aluthpura)
Dharga Town.

2nd Defendant Appellant

Vs

Mahood Marikkar Mohamed Marzook,
No. 8, Anderson Road,
Colombo 5.

Plaintiff Respondent

1. Mahmood Marikkar Ummu Razina,
(deceased)

1a. Mahmood Zulfan Raleen,
No. 191, Quarry Road, Dehiwala.

And 12 Others.

Defendant Respondents

BEFORE : UPALY ABEYRATHNE, J.
COUNSEL : Dinesh De Alwis instructed by Rakitha
Abeysinghe for the 2nd Defendant Appellant
Wilshantha Sirimanna for the 1b, 1e, 1f and 1g
substituted Defendant Respondents.
Senany Dayarathne with E. Mendis for the 4th
Substituted Plaintiff Respondent.
N. M. Subry with N. M. Sainas for the 4th
Defendant Respondent.

ARGUED ON : 03.07.2013

DECIDED ON : 27.11.2013

UPALY ABEYRATHNE, J.

The Plaintiff Respondent (hereinafter referred to as the Respondent) instituted the said action against the Defendants in the District Court of Kalutara seeking to partition the land described in the schedule to the plaint. The 2nd Defendant Appellant (hereinafter referred to as the Appellant) has filed his statement of claim praying for a dismissal of the Respondent's action.

When the case was taken up for trial on 16.07.1993 the parties have settled their differences and a judgment dated 07.09.1993 has been delivered by the learned District Judge. Accordingly the interlocutory decree has been entered and a commission has been issued for the final survey of the corpus.

Thereafter, on 30.05.1994, when this case was called before the successor of the learned District judge who delivered the judgment dated 07.09.1993, of consent of the parties the learned District Judge has made an order to vacate the judgment dated 07.09.1993 and to commence a trial afresh. Accordingly issues have been raised, evidence has been led and a judgment dated 26.05.1998 has been delivered by the learned District Judge.

Being aggrieved by the said judgment dated 26.05.1998 the Appellant has appealed to this court.

No need to say that the judgment dated 26.05.1998 is *ultra vires*. The learned District Judge has no jurisdiction to vacate his judgment dated 07.09.1993. It must be done by a court having an appellate jurisdiction. Hence the proceedings commenced upon the order dated 30.05.1994 inclusive of said order and the judgment dated 26.05.1998 are null and void.

In the said circumstances I set aside the order of the learned district judge dated 30.05.1994 and the judgment of the learned District Judge dated 26.05.1998. The learned District Judge is directed to proceed with the interlocutory decree dated 07.09.1993. Accordingly the prayer (a) of the petition of appeal is allowed without costs.

Appeal partly allowed.

Judge of the Court of Appeal