

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

Munasinghe Mudiyansele  
Sumanawathi

**C. A. No. 68/97 (F)**

**PLAINTIFF**

D. C. Kuliyaipitiya Case  
No. 6762/P

Vs.

1. Balasuriya Mudiyansele  
Kiribanda
- 1(ϕ) Mudiyansele Kirimenike  
Kumarihami
- 1 (a) Balasuriya Mudiyansele  
Seelawathi
- 1 (b) Ariyapperuma Arachige Don  
Alice Nona
- 1 (c) Balasuriya Muthiyansele  
Gunawathie
- 1 (d) Emage Karunawathi  
Werasinghe
- 1 (e) Basnayake Mudiyansele  
Gamini Athulaya Basnayake
- 1 (f) Emage Damith Samantha  
Basnayaka
- 1 (g) Emage Sudath Senaka  
Basnayake
2. Ariyapperuma Arachchige  
Dona Alice Nona (Same as 1  
(a) def.)
- 2 (a). Balasuriya Mudiyansele  
Seelawathie (same as 1 (a)  
def.)
3. Emage Gnawathi
4. Emage Seelawathi (same as 1  
(a) and 2 (a) def.)

5. Balasuriya Mudiyansele  
Karunawathi Weerasinghe
6. Emage pemawathi Dissanayake  
(Deceased)
- 6 (e) Basnayake Mudiyansele  
Piyaratne (Deceased)
- 6 (e) Emage Athulya Gamini  
Basnayake (same as 1 (e) def.)

**DEFENDANTS**

**AND NOW BETWEEN**

- 1 (a) Balasuriya Mudiyansele  
Seelawathi
- 1 (b) Ariyapperuma Arachige Don  
Alice Nona
- 1 (c) Balasuriya Muthiyansele  
Gunawathie
- 1 (d) Emage Karunawathi  
Werasinghe
- 1 (e) Basnayake Mudiyansele  
Gamini Athulaya Basnayake
- 1 (f) Emage Damith Samantha  
Basnayaka
- 1 (g) Emage Sudath Senaka  
Basnayake
- 2 (a). Balasuriya Mudiyansele  
Seelawathie (same as 1 (a) def.-  
appellants)
5. Emage Seelawathi (same as 1  
(a) and 2 (a) def.)
- 1 (a), 1 (c), 1 (d), 1 (e), 1 (f), 1 (g), 2  
(a), 4<sup>th</sup> and 5<sup>th</sup>

**DEFENDANT-APPELLANTS**

VS

Munasinghe Mudiyansele  
Sumanawathi

**PLAINTIFF-RESPONDENT**

3. Balasuriya Mudiyansele  
Gnanawathi

**BEFORE** : **M. M. A. GAFFOOR, J.**

**COUNSEL** : Srinath Perera P. C. for the 4<sup>th</sup> and 5<sup>th</sup> Defendant-Appellants

Plaintiff-Respondent absent and unrepresented

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 22.06.2018 (by the 4<sup>th</sup> and 5<sup>th</sup> Defendant-Appellants)

**DECIDED ON** : **22.10.2018**

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**M. M. A. GAFFOOR, J.**

This is an appeal from the judgment of the Learned District Judge of Kuliypitiya in respect of a Partition action bearing case Number 6762/P. The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') filed a Plaint on 31<sup>st</sup> August 1982, inter alia seeking the following reliefs:

- a) That the land described in the schedule Malhamige Kumbura in the Plaint be partitioned under the provisions of the Partition Act No. 21 of 1977.
- b) Seeking an order from the District Court that she is entitled to 3/4 of the land described in the schedule to the Plaint as she had become the owner of the said share by possessing the said share for a long period; and
- c) Costs of partition and all other reliefs that could be granted by Court

According to the said Plaint, the Respondent asserted that the 1<sup>st</sup> Defendant who was subjected to the provisions of the Kandyan Law had gifted 3/4 share of the said land to Kirimenike Kumarihami by Deed No. 2161 dated 5<sup>th</sup> July 1980. Later, the 1<sup>st</sup> Defendant had canceled the said transfer by deed No. 33964 dated 14<sup>th</sup> December 1981, and after cancelling this, he subsequently transferred his rights to the Respondent by Deed No. 33966 dated 15<sup>th</sup> December 1981.

According to the Statements of Claim of the 2<sup>nd</sup> to 6<sup>th</sup> Defendants, the *lis pendens* had not been registered in the correct folio. Therefore, they had taken up a position that this case cannot be maintained and sought a dismissal of this action (vide page 71 in the appeal brief).

The impugned judgment had been delivered by the District Judge on 19<sup>th</sup> February 1997 in favour of the Plaintiff-Respondent. Being aggrieved by the said judgment this appeal is preferred to this Court by the Defendant-Appellants

When this appeal was taken up before this Court, (before Salam, J) on 12.10.2010 case was fixed for argument on 30.03.2011 and on that date Counsel for the Defendant-Appellants moved for a date and argument was fixed on 06.07.2011. After that this case had been called before this Court on several dates.

And on 11.10.2012 when this case was called before Sarath de Abrew, J. 4<sup>th</sup> and 5<sup>th</sup> Defendants were present but the Respondent was absent and unrepresented. Therefore, the Court had directed the Registrar to issue notice on the Respondent, returnable on 16.01.2013 and to fix a date for argument.

According to Court Appeal minutes dated 11.01.2013, the Court was informed that the Attorney-at-Law of the Respondent had passed away. And the Court on several occasions had taken steps to notice the Respondent and her Registered Attorney. On 27.06.2013 court also was informed that the Respondent's Attorney-at-Law passed away.

Journal entry of 06.08.2013 indicates that Appellants are represented by counsel and Respondent is absent and unrepresented; further, it was informed again that the Registered Attorney for Respondent had passed away.

On several dates, the case had been called and finally on 22.06.2018 counsel for 4<sup>th</sup> and 5<sup>th</sup> Defendants had tendered their written submissions and Judgment reserved for 22.10.2018 before me.

Accordingly, it is to be noted that although this Court had taken steps to hear the parties involved in the case, there seems to be no interest shown by the said parties to pursue their case.

In the above back drop, this Court is only provided with the written submission of the 4<sup>th</sup> and 5<sup>th</sup> Defendants-Appellants.

It is noted that the Respondent had summoned several witnesses to testify on behalf of him; even she was not to do so.

Considering this appeal, the Respondent's main contention was that Kiribanda by deed No. 33964 had invalidated the gift under the provisions of the Kandyan Law and thus Kiribanda became the owner of 3/4 shares which he had sold to the Respondent. The balance 1/4 share was owned by Kiribanda's brother Punchi Appuhamy (marked as P8). All these facts, testified by the witness - Ukkubanda had given evidence and had asserted that Malhamige Kumbura was possessed by Kiribanda (Alice Nona's husband) – (vide pages 93-97 in the appeal brief).

The bone of contention of this case was in regard to the invalidated Deed of Gift given under the Kandyan Law Ordinance (Act No. 39 of 1939). Section 5 of the said Ordinance spells out that the gift under the said ordinance cannot be invalidated.

**Section 5(1)** of the said Act read as follows:

*Notwithstanding the provisions of section 4 (1), it shall not be lawful for a donor to cancel or revoke any of the following gifts where any such gift is made after the commencement of this Ordinance:-*

- (a) .....
- (b) *any gift in consideration of and expressed to be in consideration of a future marriage, which marriage has subsequently taken place ;*
- (c) .....

*(d) any gift, the right to cancel or revoke which shall have been expressly renounced by the donor, either in the instrument effecting that gift or in any subsequent instrument, by a declaration containing the words " I renounce the right to revoke " or words of substantially the same meaning or, if the language of the instrument be not English, the equivalent of those words in the language of the instrument:*

Therefore, the submissions of the 4<sup>th</sup> and 5<sup>th</sup> Defendant-Appellants were that this invalidation is illegal and therefore the observation of the Learned District Judge was wrong. On this point, I am of the opinion that this submission holds the matter as regards to the invalidation of the said Deed of Gift.

Further, it is contented that the **Malhamige Kumbura** and **Weboda Kumbura** refers to the same land. And the Learned District Judge had not given his mind to this issue. The conclusion arrived at regarding this point too is erroneous. This fact is demonstrated by witness Sumanapala, Secretary, Govi Karaka Sabava that both these names refer to the same land. (*Vide page 99 to 103 in the appeal brief*)

In the circumstances as contended by the 4<sup>th</sup> and 5<sup>th</sup> Defendant and the reasons set out above, I think the only course open to me now is to set aside the Judgment of the District Judge.

Therefore, the appeal is allowed and the Judgment of the District judge dated 19<sup>th</sup> February 1997 is set aside.

*Appeal Allowed.*

**JUDGE OF THE COURT OF APPEAL**