

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

Demuni Punchi Singho,

Pahalawatte,

Bopagoda,

Rathgama.

Plaintiff

Vs.

Court of Appeal Case No:CA 976/97(F)

DC Case No: 9421/P

Sammu Gunasena

Bopagoda,

Rathgama.

Defendant

AND BETWEEN

Sammu Gunasena

Bopagoda,

Rathgama.

Defendant – Petitioner – Appellant

Vs.

1. Demuni Punchi Singho(deceased),
Pahalawatte,
Bopagoda,
Rathgama.

1A. Demuni Kithsiri

1B. Demuni Kusalawathi

1C. Demuni Chandrani

All of Pahalawatte, Bopagoda,
Rathgama.

**Substituted Plaintiff – Respondent-
Respondents**

2. Sammu Patin de Silva (deceased)
Bopegoda, Rathgama

2A. Sammu Sriyani De Silva
Bopagoda, Rathgama.

**And other Defendant – Respondant –
Respondats**

BEFORE

: P.W.D.C. JAYATHILAKE, J

COUNSEL : Chula Bandara with Lashani de Silva for
the Defendant Appellant

Argued On : 18.09.2014

Decided On : 25.09.2014

P.W.D.C. Jayathilake J.

Sammu Gunasena, the Defendant, Petitioner, Appellant has made an application in terms of Sec. 189(1) of the Civil Procedure Code moving to rectify an arithmetical error in the judgement of the partition case No: 9421/P in the District Court of Galle. He has stated in his petition, although the Plaintiff in his evidence had stated that the Defendant Appellant was entitled to an undivided share of 882/15120 the actual amount that should have devolved should have been 3064/15120. After an inquiry held on this application, the learned District Judge has decided that the application of the appellant is belated, as it has been made after 3 years from the pronouncement

of the judgement. He has further stated in his order, however the amendment prayed for does not fall into Sec. 189 of the Civil Procedure Code. The reason given by the learned judge for arriving at this conclusion is that the judgement of the learned District Judge has been given after due consideration of the documents and evidence led in the trial. Though the learned judge has come to this conclusion on the said reason when examining the trial proceedings relevant to the particular judgement it is obvious that judgement and the schedule of shares have been given directly on the evidence of the Plaintiff as the evidence of the Plaintiff had been led without contest. However practically, it is impossible that a judgement is delivered in the open court examining the evidence and documents immediately after the evidence is led. The learned judge may have trusted the evidence of the Plaintiff as the other parties were also present and represented. Unfortunately even the District Judge who had made the order in respect of the application made under Sec. 189 too has not bothered to examine the evidence and the documents of the Plaintiff to ascertain whether there is a merit in the application of the appellant. Instead, the learned judge has given his mind to the fact that the said application had been made even after the final partition has been done.

Appellant's undivided share has been given as a fraction, not as an extent. Therefore he might have actually come to know about the extent of his share that has been allotted to him after the final partition. So that the court should have investigated

the complaint of the appellant. This court is of the view that it is the duty of the Plaintiff to assist court to rectify the error that had occurred in computing undivided shares of the co-owners. According to the schedule of the deed marked as 1V1 the undivided share of one fifth plus one three hundred and seventy eighth has been transferred by the vendors of the said deed to the vendee that is the Defendant Appellant. This fact has been testified by the Plaintiff Respondent in the trial. Therefore, this Court direct to take necessary steps to bring to the notice of substitute Plaintiffs to submit the schedule of shares calculated in accordance with the evidence and the documents led in the trial. It shall be the duty of the District Judge to investigate the shares according to the evidence and the documents and to make necessary amendments of the judgement and the interlocutory decree accordingly.

It is the Defendant Appellant who should take initial steps to issue notice on the substituted Plaintiffs.

Order set aside.

JUDGE OF THE COURT OF APPEAL