

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

**C. A. 71/97 (F)**  
D. C. Kuliypitiya - 6372/P

N. M. Punji Banda,  
Ihala Moragana, Moragana Post

**PLAINTIFF**

**VS**

1. H. M. Appuhamy  
(Deceased)  
Dambuluwava,  
Moragana Post.
- 1A. H. M. Siriwardena,  
Dambuluwava.
2. H. M. Menikhamy,  
Nelibawa, Moragane Post.
3. H. M. Ukku Menika  
Nelibawa, Moragana Post
4. H. M. Dingiri Amma,  
Nelibawa, Moragane Post.
5. H. M. Muthumenike
6. H. M Karunaratne  
(Deceased)
- 6A. H. M. Shantha Arunaloka
7. H. M. Shantha Arunaloka
8. H. M. Gunarathhamy
9. E. L. Dingiri Menika  
(Deceased)
- 9 A.H. M. Muththubanda

10. H. M. Chithra Indumathie

11. H. M. Sarath Bandara  
(Deceased)

11A. H. M. Chithra Indumathie

12. H. M. Dasanayake,

*All of Dumbuluwawa,  
Moragana Post.*

13. H. M. Bandara Menika,  
Nilabawa, Moragana Post

14. H. M. Ranmenika,  
Nelibawa, Moragana Post

15. H. M. Abeyrathna,  
Dematawa, Moragana Post

16. H. M. Somarathna,  
Dumbuluwawa,  
Moragana Post.

17. H. M. Muthubanda  
Dumbuluwawa,  
Moragana Post.

## **DEFENDANTS**

### **AND NOW BETWEEN**

13. H. M. Bandara Menika,  
Nilabawa, Moragana Post.

13A. Tilaka Siri Basnayake,  
Kundalwawa, Illukhena,  
Kuliyapitiya

13B. Mallika Basnayake.  
Wee wewapalagama,  
Narammala

13C. Kithsiri Basnayake  
Ihala Nelibewa,  
Moragane

13D. Champika Basnayake,  
Ilukhena, Kuliypitiya

14. H. M. Ranmenika,  
Nelibawa, Moragana Post

15. H. M. Abeyrathna,  
Dematawa, Moragana Post.

**DEFENDANTS-APPELLANTS**

**VS**

N. M. Punji Banda,  
Ihala Moragana, Moragana Post

**PLAINTIFF-RESPONDENT**

1A. Indrani Kumari Navaratne of  
Anguruwagala, Mukulagama

1B. Chandrani Kumari Navaratne

1C. hemanthie Kumari Navaratne

1D. Ananda Navaratne

1E Kanthie Kumari Navaratne

All of Ihalamoragana, Moragane

**SUBSTITUTED PLAINTIFF-  
RESPONDENTS**

1. H. M. Appuhamy  
(Deceased)  
Dambuluwava,  
Moragana Post.

1A. H. M. Siriwardena,  
Dambuluwava.

2. H. M. Menikhamy,  
Nelibawa, Moragane Post.
3. H. M. Ukku Menia  
Nelibawa, Moragana Post
4. H. M. Dingiri Amma,  
Nelibawa, Moragane Post.
5. H. M. Muthumenike
6. H. M Karunaratne  
*(Deceased)*
- 6A. H. M. Shantha Arunaloka
7. H. M. Shantha Arunaloka
8. H. M. Gunarathhamy
9. E. L. Dingiri Menika  
*(Deceased)*
- 9 A.H. M. Muththubanda
- 10.H. M. Chithra Indumathie
- 11.H. M. Sarath Bandara  
*(Deceased)*
- 11A. H. M. Chithra Indumathie
- 12.H. M. Dasanayake,  
  
*All of Dumbuluwava,  
Moragana Post.*
- 16.H. M. Somarathna,  
Dumbuluwava,  
Moragana Post.
- 17.H. M. Muthubanda  
Dumbuluwava,  
Moragana Post.

**DEFENDANT-RESPONDENTS**

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

**COUNSEL** : R. Chula Bandara for the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup>  
Defendant-Appellants

M. C. Jayaratne with M. D. J. Bandara for the  
1<sup>st</sup>, 1C, 1D & 1E Substituted-Plaintiff-  
Respondents

**WRITTEN SUBMISSION  
FILED ON** : 15.10.2018 (by the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup>  
Defendant-Appellants)

**ARGUED ON** : 18.06.2018

**DECIDED ON** : **30.01.2019**

\*\*\*\*\*

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

The Plaintiff-Respondent filed the above styled action before the District Court of Kuliyaipitiya to partition the land (more fully described in the schedule to Plaint) called “Diwulgahakumbure Pillewa” which had been conveyed to 5 persons by virtue of a settlement (P1).

After filing of the statement of claims, the case proceeded to trial (on 16.12.1986) on 2 admissions and 11 issues. Having heard all the parties the learned District Judge on 12.02.1997 delivered the judgment in favour of the Plaintiff-Respondent.

Being aggrieved by the said judgment dated 12.02.1997, the 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Defendant-Appellants (hereinafter referred to as the Appellants) preferred this appeal on the ground that, the learned District Judge of Kuliyaipitiya had erred in law by allotting the share only to the 14<sup>th</sup> Defendant-Appellant from the corpus and thereby had failed to analyse the evidence adduced from the 15<sup>th</sup> Defendant-Appellant.

In this case, the identity of the corpus depicted in the preliminary plan as well as the fact that same had been conveyed by the State to 5 persons namely, Appuhamy, Tikiri Banda, Punchi Banda, Ukku Banda and Kiri Mudiyanse were recorded as admissions (*vide page 116 of the appeal brief*).

The Appellants stated that the said Appuhamy (1<sup>st</sup> Defendant-Respondent) sold his share in the corpus which is a part of the land in dispute to Tikiri Banda (father of the Appellants) by the document marked “**15 V1**”.

The 1A Defendant though did not raise a point of contest took up a position in his evidence that his father Appuhamy who was one of the 5 co-owners of the corpus had not conveyed his 1/5 share to Tikiri Banda by virtue of the deed marked 15 V5.

The learned Counsel for the Appellants submitted that though the learned Counsel for the 1A Defendant-Respondent by way of written submission raised an issue first time in Appeal on the basis that the boundaries included in **15 V1** is not a part of the corpus; such issue cannot be raised now since it is not a pure question of law.

I am of the view that the above raised issue of the 1A Defendant-Respondent cannot be stand in this appeal.

In **CANDAPPA vs. PONNAMBALAMPILLAI** [(1993) 1 SLR 184], it was held that a party cannot be permitted to present a different case in appeal from that presented in the trial court where matters of fact are involved which were not in issue at the trial, such case not being one which raises a pure question of law.

In **SETHA vs. WEERAKOON** [49 NLR 225] it was held that,

*“A new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more.”*

It also evident that the father of the 1A Defendant-Respondent had filed an action earlier to invalidate the said deed marked 15 V5 but it was dismissed as per the document marked on 15 V2 – V4.

A close examination of the impugned judgment reveals that the learned trial judge in the process of investigation of title has failed pay attention to said deed which was executed in 1940s upon which the Appellants said to have derived title on inheritance.

In these circumstances, I allow the appeal with costs whilst setting aside the impugned judgment and the case is remitted to the District Court for a re-trial. The learned Judge is directed to conclude the case as expeditiously as possible.

Further, the learned District Judge is hereby directed to pay attention to the strength of the deed marked 15 V5 judiciously. However, parties are permitted to make an application to adopt the evidence already led and call more witnesses once re-trial commenced if necessary.

The Registrar of this Court is directed to forward this record in Case No. 6372/P with a copy of this judgment to the respective Court forthwith.

*Appeal allowed,  
Re-trial ordered.*

**JUDGE OF THE COURT OF APPEAL**