IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal with Leave to Appeal obtained from this Court.

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA
Lenagala, Weragala.

PLAINTIFF

SC Appeal No. 72/2012
SC/HCCA/LA/No. 33/2009
SP/HCCA/KAG/162/2007 (F)
D.C. Kegalle No. 24228/P

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita, Deraniyagala.
2. **SUDU HAKURAGE PUNCHI SINGHO**
   Andahena, Lenagala, Weragala.
3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARAMALAGE LEELAWATHIE
Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA**
   Lenagala, Weragala. (deceased)

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala.

5. **SUDU HAKURAGE JEELIS**
6. **SUDU HAKURAGE THEMIS**
7. **SUDU HAKURAGE PODINERIS**
8. **SUDU HAKURAGE GUNASENA**
9. **SUDU HAKURAGE JAYARATNE**
10. **SUDU HAKURAGE PODISINGHO** (deceased)

10A. SUDU HAKURAGE SWARNALATHA

11. **SUDU HAKURAGE SEDERIS**
12. **SUDU HAKURAGE ALPENIS**
13. **SUDU HAKURAGE ASILIN**
14. **SUDU HAKURAGE ARIYADASA**
15. **SUDU HAKURAGE RANASINGHE**

All of Lenagala, Weragala.

DEFENDANTS

AND BETWEEN

10A. SUDU HAKURAGE SWARNALATHA

14. SUDU HAKURAGE ARIYADASA

10A AND 14 DEFENDANT-APPELLANT-RESPONDENTS

VS.

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREM A

Lenagala, Weragala.

PLAINTIFF-RESPONDENT

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita, Deraniyagala.
2. **SUDU HAKURAGE PUNCHI SINGHO**
   Andahena, Lenagala, Weragala..
3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARAMALAGE LEELAWATHIE

Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA** (deceased)
   Lenagala, Weragala.

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala
5. SUDU HAKURAGE JEELIS
6. SUDU HAKURAGE THEMIS
7. SUDU HAKURAGE PODINERIS
8. SUDU HAKURAGE GUNASENA
9. SUDU HAKURAGE JAYARATNE
(deceased)
9A. PARANA MANNALAGE AMARA WIJESINGHE
9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE
10.SUDU HAKURAGE SEDERIS
(deceased)
11.SUDU HAKURAGE ALPENIS
12.SUDU HAKURAGE ASILIN
13.SUDU HAKURAGE RANASINGHE

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

9A. PARANA MANNALAGE AMARA WIJESINGHE
9B. SUDUSINGHE HEWAWITHARANALAGE CHAMIKA CHATHURANGA JAYARATNE
Both of Lenagala, Weragala.

9A AND 9B DEFENDANTS-RESPONDENTS-PETITIONERS

VS.

10A. SUDU HAKURAGE SWARNALATHA
14. SUDU HAKURAGE ARIYADASA

10A AND 14 DEFENDANTS-APPELLANTS-RESPONDENTS

SUDU HAKURAGE SAIMA ALIAS HETTIARACHCHIGE SUNIL ABEYWICKREMA (deceased)
Lenagala, Weragala.

PLAINTIFF-RESPONDENT-RESPONDENT

1A. WEERASURIYA AMARAWANSAGE JAYANTHAA JAYAWATHI
1B. THAMARA KUMARI ABEYWICKRAMA
1C. AJITH DHAMMIKA ABEYWICKRAMA
1D. NAYANA KUMARI ABEYWICKRAMA

SUBSTITUTED

PLAINTIFFS-RESPONDENTS-RESPONDENTS

1. **SUDU HAKURAGE HARAMANIS**
   Koskande, Viyana Ovita,
   Deraniyagala. (deceased)

1A. SUDU HAKURAGE GUNAWARDHANE
R13, Veediyawatte, Viyana Owita,
Deraniyagala.

2. **SUDU HAKURAGE PUNCHI SINGHO** (deceased)
   Andahena, Lenagala, Weragala.

2A. WINSON SENEVIRATNE
Pahala Lenagala, Weragala.

3. **SUDU HAKURAGE JAYASEKERA**
   Lenagala, Weragala. (deceased)

3A. VITHARANAMALAGE LEELAWATHIE
Lenagala, Weragala.

4. **SUDU HAKURAGE NANDORIS (alias) NANDUWA**
   Lenagala, Weragala. (deceased)

4A. SUDU HAKURAGE ALPENIS
Lenagala, Weragala.

5. SUDU HAKURAGE JEELIS
(deceased).

5A. KODAPOLAGE ASILIN

6. SUDU HAKURAGE THEMIS
(deceased).

6A. PARANAMANNAGE SOPIYA

7. SUDU HAKURAGE PODINERIS
(deceased).

7A. SUDU HAKURAGE GUNASENA

8. SUDU HAKURAGE GUNASENA

11.SUDU HAKURAGE SEDERIS
(deceased)

11A. SUDU HAKURAGE SWARNALATHA
Lenagala, Weragala.

12. SUDU HAKURAGE ALPENIS
(deceased).

12A. SUDU HAKURAGE SWARNALATHA
Lenagala, Weragala.

13. SUDU HAKURAGE ASILIN

15. SUDU HAKURAGE RANASINGHE
All of Lenagala, Weragala

DEFENDANTS-RESPONDENTS RESPONDENTS

BEFORE: Prasanna Jayawardena, PC, J.
Vijith K. Malalgoda, PC, J.
P. Padman Surasena, J.

COUNSEL: Manohara de Silva, PC with Ms. Pubudini Wickramaratne for the 9A and 9B Defendants-Respondents-Appellants.
Harsha Soza, PC with Athula Perera for the Plaintiff-Respondent-Respondent and the 2nd and 15th Defendants-Respondents-Respondents.

Ranjan Suwandaratne, PC for the 13th Defendant-Respondent-Respondent.
R. Wimalaweera for the 6A Substituted Defendant-Respondent.

WRITTEN SUBMISSIONS: By the Plaintiff-Respondent-Respondent on 13th July 2012.
By the 9A and 9B Defendants-Respondents-Petitioners/ Appellants on 17th May 2012.

ARGUED ON: 14th March 2019

DECIDED ON: 19th December 2019

Prasanna Jayawardena, PC, J,

The plaintiff is named Sudu Hakurage Saima. He also uses the name of H. Sunil Abeywickrema. The plaintiff filed this action seeking to partition a land named "Hitinawatte" situated in the village of Pahala Lenagala, which is located in the Keeraweli Pattuwa of the Kegalle District. The land is 1A 2R 18.8P in extent and is a highland. There is no dispute between the parties with regard to the identity of the land.

In his plaint dated 20th May 1985, the plaintiff named 8 defendants, They are: the 1st defendant - Sudu Hakurage Haramanis, the 2nd defendant - Sudu Hakurage Punchisingho, the 3rd defendant - Sudu Hakurage Jayasekera, the 4th defendant - Sudu Hakurage Nandoris, the 5th defendant - Sudu Hakurage Jeelis, the 6th defendant - Sudu Hakurage Themis, the 7th defendant - Sudu Hakurage Podineris and the 8th defendant - Sudu Hakurage Gunasena. The plaintiff prayed that the land be partitioned as follows: a 6/24th share to the plaintiff; a 2/24th share each to the 1st to 3rd defendants; a 4/24th share to the 4th defendant; and a 2/24th share each to the 5th to 8th defendants.

Seven other persons filed Statements of Claim claiming shares of the land and were added as the 09th to 15th defendants. They are, namely: the 09th defendant - Sudu Hakurage Jayaratne, the 10th defendant - Sudu Hakurage Podisingho, the 11th defendant - Sudu Hakurage Sediris, the 12th defendant - Sudu Hakurage Alpenis, the 13th defendant - Sudu Hakurage Asilin, the 14th defendant - Sudu Hakurage Ariyadasa and the 15th defendant - Sudu Hakurage Ranasinghe.

It should be mentioned at the outset that it was common ground between all the parties that the original owners of the land were Singho and Dinenchiya, each of whom had a half share - *ie:* a 12/24th share each. It was also common ground that Singho's half

share devolved on Subaya, Puhula and Kirinerisa in equal 4/24th shares; and that Dinenchiya's half share devolved on Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares. Further, it was common ground that all the parties are governed by the Kandyan Law and that the land is *paraveni* property.

The plaintiff, the 2nd and 3rd defendants, the 10th to 14th defendants and the 15th defendant all filed Statements of Clam claiming shares in the land which they pleaded had devolved to them from Singho's half share which had been inherited by Subaya, Puhula and Kirinerisa in equal 4/24th shares.

The 4th defendant, the 5th to 8th defendants and the 9th defendant filed Statements of Claim claiming shares in the land which they pleaded had devolved to them from Dinenchiya's half share which had been inherited by Kirhonda, Siriwadiya and Jothiya in equal 4/24th shares. The 4th defendant claimed the 4/24th share which had been held by Jothiya. The 5th to 8th defendants claimed the aggregate 8/24th share which had been held together by Kirihonda and Siriwadiya. The 9th defendant also claimed the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya.

After a lengthy trial, the learned District Judge delivered judgment ordering that the land be partitioned between the following parties in the following shares and making some consequential Orders with regard to the allocation of the buildings and structures shown on the plan no. 415 marked "X" at the trial, at the time of the division of the land:

The plaintiff and the 1st to 3rd defendants	- a 3/24th share each [which was held to have devolved on them from the 12/24th share which had come to Subaya, Puhula and Kirinerisa, each of whom had a 4/24th share].
The 4th defendant	- a 4/24th share [which was held to have devolved on him from Jothiya who had a 4/24th share].
The 5th to 8th defendants	- a 2/24th share each [which was held to have have devolved on them from the aggregate 8/24th share held by Kirihonda and Siriwadiya.

Thus, the District Judge did not allot any shares in the land to the 9th, 10th to 14th and 15th defendants.

Even though the 9th defendant had claimed that the aggregate 8/24th share held by Kirihonda and Siriwadiya had come to him, he did not file an appeal in the High Court

seeking to set aside the judgment of the District Court which, as set out above, had allotted this aggregate 8/24th share to the 5th to 8th defendants.

However, the 10A defendant [who had been substituted in place of the 10th defendant who had died during the course of the trial in the District Court] and the 14th defendant had filed an appeal in the High Court of Civil Appeal Holden in Kegalle and claimed that they were each entitled to a 1/24th share of the land which had devolved upon them from Puhula's 4/24th share [which, as mentioned earlier, had been allotted to the plaintiff and the 1st to 3rd defendants by the District Court]. The respondents to this appeal were the plaintiff-respondent, the 1st to 9th defendants-respondents, the 11th to 13th defendants-respondents and the 15th defendant-respondent.

However, prior to the hearing of the 10A and 14th defendants-appellants' appeal in the High Court, the 9th defendant-respondent filed a written objection to the judgment and decree entered by the District Court, as provided for in section 772 read with section 758 (*e*) of the Civil Procedure Code. Such a written objection under section 772 is often referred to as a *"cross objection"* or *"cross appeal"*. The 9th defendant-respondent's aforesaid written objection was broadly in the form prescribed in section 758 (*e*) of the Civil Procedure Code and written notice appears to have been given prior to the hearing of the appeal, as required by section 772 Civil Procedure Code.

In that written objection, the 9th defendant-respondent stated that it was common ground between the parties that Dinenchiya's half share had devolved upon Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares; and that, in fact, the trial judge had answered issue no. 32 holding that Kirihonda, Siriwadiya and Jothiya had each been entitled to a 4/24th share of the land. The 9th defendant-respondent went on to state that the trial judge had erred by completely overlooking the clear and undisputed oral testimony of the 9th defendant-respondent and the undisputed deeds of transfer marked "9වි1" to "9වි4" which established that the aforesaid aggregate 8/24th share held by Kirihonda and Siriwadiya had come to the 9th defendant-respondent by the said deeds of transfer. Thus, the 9th defendant-respondent prayed in his written objection that the High Court corrects this error and allots that 8/24th share to him.

Thus, by way of his written objection filed under section 772 of the Civil Procedure Code, the 9th defendant-respondent only sought to challenge the District Court's judgment allotting to the 5th to 8th defendants-respondents, the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya. The 9th defendant-respondent did not challenge the relief sought in the appeal by the 10A and 14th defendants-appellants, who had filed the appeal.

This gives rise to the somewhat thorny question of whether, even though the 9th defendant-respondent had not filed an appeal, the 9th defendant-respondent had a *right* or *entitlement* to have his written objection filed under section 772 of the Civil Procedure Code and claim made thereby against the 5th to 8th defendants, determined by the High Court in appeal. This issue needs to be considered by us since it is a preliminary question which will determine whether the 9th defendant-respondent is entitled to pursue this appeal. Further, the principle which is at the root of the question is of some general importance and should be examined in this appeal.

Section 772 states:

"(1) Any respondent, though he may not have appealed against any part of the decree, may, upon the hearing, not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal, provided he has given to the appellant or his registered attorney seven days' notice in writing of such objection.

(2) Such objection shall be in the form prescribed in paragraph (e) of section 758."

Thus, where an appellant from a decree entered by an original Civil Court has filed an appeal seeking to set aside or vary that decree: the first limb of section 772 recognises the right of a respondent to that appeal to resist the appeal and support the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772; and the second limb of section 772 enables a respondent to the appeal who is dissatisfied with some specific finding in or aspect of the decree but has not filed an appeal to canvass it, to dispute that finding or aspect of the decree and seek to have it set aside or varied or decided in his favour by the appellate court, provided he has duly filed a written objection under section 772.

Our Courts have taken the view that the general rule is that section 772 of the Civil Procedure Code can be invoked and resorted to by a respondent to an appeal against only the *appellant* and in instances where that respondent disputes particular determinations of fact or law made in the decree and seeks to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*. Thus, in RABOT vs. DE SILVA [8 NLR 82 at 89], Middleton J stated with regard to section 772, *"The section to my mind divides itself into two parts, comprising support of and objection to the decree. No notice is required except upon an objection to the decree. ….. By giving seven days' notice the respondent may take any objection to the decree which he could have taken by way of appeal, but without notice he may not only support the decree on grounds decided in his favour in the Court below, which goes without saying, but also on the grounds decided against him."* Accordingly, in MARIKAR vs. PUNCHI BANDARA [43 NLR 261] it was held that, where the District Court had entered decree for the plaintiff in a lesser amount than had

been prayed for in the plaint and the plaintiff appealed, the defendant was not entitled to canvass in that appeal, the District Court's dismissal of his claim in reconvention, without filing a written objection under section 772. A similar view was taken in SOLOMON vs. MOHIDEEN PATHUMMA [64 NLR 227]. The decision of the Court of Appeal in WIJERATNE vs. GUNASEKERE [1997 2 SLR 291] is an illustrative example of when section 772 can be properly resorted to by a respondent to an appeal. In this case, the plaintiff filed action in the District Court to eject the defendant from the premises. The defendant filed answer pleading that the action should be dismissed on two grounds. The District Court upheld the defendant's first ground and dismissed the plaintiff's action, but rejected the second ground relied on by the defendant. The plaintiff appealed. The defendant resisted the appeal and also filed a written objection under section 772 praying that the Court of Appeal decides the second ground she had urged in the District Court in her favour in the appeal. Wigneswaran J with Weerasekera J agreeing, when both their Lordships were in the Court of Appeal, held that the District Court had erred when it dismissed the action on the first ground taken by the defendant, but upheld the validity of the second ground urged in the District Court by the defendant and pursued in appeal by way of the written objection filed by the defendant under section 772; and dismissed the plaintiff's action on that second ground.

The aforesaid analysis of section 772 enunciated by Middleton J in RABOT vs. DE SILVA proceeds on the basis that section 772 envisages instances where a respondent invokes section 772 against the *appellant*. Other early decisions also took the view that section 772 can be invoked by a respondent to an appeal, only against the appellant and *not* to challenge a finding in the decree in favour of another *respondent*. Thus, in CROOS vs. FERNANDO [1913 1 Bal. Notes 84], Woodrenton ACJ held that section 772 *"does not enable one respondent to file a cross notice of objections against another."*.

However, a perusal of the subsequent decisions on section 772 suggests that this Court has recognised that there may be *exceptional situations* in which one respondent to an appeal [in which there are more than one respondent], can invoke section 772 to challenge a determination in the decree in favour of *another respondent* to the appeal. Thus, in PALDANO vs. HORATALA [3 Times of Ceylon LR 58 at p.59] Jayewardene J, with Schneider J agreeing, expressed the view that there could be exceptions to the general rule that section 772 does not enable a respondent [who has not filed his own appeal] to dispute a finding in the decree in favour another respondent. In the later case of DOLOSWELA RUBBER AND TEA ESTATE CO. vs. SWARIS APPU [31 NLR 60 at p. 63], Drieberg J, with Dalton J agreeing, referred to instances where there is an identity of interests between the appellant and the respondent against whom the written objections under section 772 are filed, as exceptional circumstances in which one respondent [who has not filed his own appeal] would be entitled to have the Appellate Court consider objections filed by him under section 772 disputing the entering of the

decree in favour of another respondent. However, in the subsequent case of JURY vs. ATTORNEY-GENERAL [39 NLR 416 at p. 424-426], Maartensz with Abrahams CJ agreeing, took the more stringent view that section 772 permits a respondent to file a written objection only against the appellant and doubted the correctness of a proposition that a respondent may be permitted to dispute the entering of the decree in favour of another respondent in exceptional circumstances.

A different view was expressed *obiter* in BRITISH CEYLON CORPORATION LTD vs. UNITED SHIPPING BOARD [36 NLR 225]. In this case, the plaintiff had filed action in the District Court against the 1st and 2nd defendants. The District Court dismissed the plaintiff's action against the 1st defendant and entered judgment only against the 2nd defendant. Only the 2nd defendant appealed, naming the plaintiff and the 1st defendant as respondents to that appeal. Prior to the hearing of the appeal, the plaintiff-respondent filed written objections under section 772 seeking to canvass the dismissal of its case against the 1st defendant-respondent and seeking judgment against the 1st defendant-respondent too. The 1st defendant-respondent took up the position that the plaintiff-respondent was not entitled to do so without filing a separate appeal against the 1st defendant-respondent. MacDonell CJ appears to have taken a broad view of the scope of section 772 when His Lordship commented [at p. 243] *"The section seems to say that where there is an appeal, whether against a decree or an order, objection may be taken to anything appealable in the decree out of which the appeal rises ….. I am of the opinion then that it was permissible to the plaintiff company to bring this objection, namely that the decree was wrong in dismissing its claim as against the first defendant, and to have it determined."*. However, this appeal was eventually decided on the insufficiency of Stamp Duty and this observation by MacDonell CJ was made *obiter*.

The attention of MacDonell CJ does not seem to have been drawn to the previous decisions of this Court in RABOT and CROOS which had taken the view that one respondent to an appeal [who has not filed his own appeal] cannot invoke section 772 to challenge a determination in the decree in favour of another respondent to the appeal and the later cases of PALDANO and DOLOSWELA RUBBER AND TEA ESTATE CO which had expressed the view that this could be permitted in exceptional circumstances. I would add, with respect, that the aforesaid observation by MacDonell CJ in BRITISH CEYLON CORPORATION LTD does not reflect the correct position with regard to the scope of section 772. I would also state, with respect, that I am unable to agree with the `absolute' interpretation accorded by Maartensz J in JURY that section 772 cannot be invoked even in exceptional circumstances to enable a respondent [who has not filed his own appeal] to dispute a decree entered against another respondent. As set out later, the consistent approach of the Courts in India to the provision in the Indian Civil Procedure Code which is comparable to our section 772, fortifies the view I have taken.

I would add in support of the construction of section 772 set out in RABOT and CROOS and later modified in PALDANO and DOLOSWELA RUBBER AND TEA ESTATE CO and by this Court in the present case before us, that a party to an action in the trial court who is dissatisfied with a judgment entered in favour of one or more parties to the case, has a right of appeal against that party or parties within the specified time period allowed for an appeal. If a party who is dissatisfied with the judgment, fails or neglects to exercise that right of appeal or sees no need to exercise that right of appeal, he should not, *other than in exceptional circumstances*, be given a *carte blanche* to belatedly resort to section 772 in an appeal filed by another party to which he is a respondent and *re-agitate his dispute with the other respondents* in whose favour the judgment was entered. As Malik J, as he then was, stated in the Allahabad High Court in MOHAMED HASAN vs. MOHAMED HAMID HASAN [AIR 1946 All. 395 at para.9] *"It sometimes happens that a party may content himself with what he has got, even if the Court did not give him what he wanted, rather than take the trouble and incur the expense of going up to the Court of appeal. But where he is dragged there by the other side ….. There seems to be no sufficient reason, however, why a respondent should be given a second chance to file an independent appeal by way of cross-objection against another respondent when at the time the decree was passed both respondents were satisfied with the decree and did not file an appeal against it, so that it had become final so far as they were concerned."*.

It is also necessary to consider the decision of this Court in RATWATTE vs. GOONASEKERA [1987 2 SLR 260]. In that case, the District Court entered judgment for the plaintiff on the ground of *laesio enormis* pleaded by the plaintiff and rejected the ground of undue influence which the plaintiff had also relied on at the trial. When the defendant appealed seeking to set the decree aside, the plaintiff defended the decree entered on the ground of *laesio enormis* and also sought to canvass, in appeal, the District Court's rejection of the ground of undue influence. However, the plaintiff had not filed a written objection under section 772 giving notice to that effect. The defendant objected to the plaintiff being heard in the appeal with regard to the ground of undue influence because the plaintiff had not filed a written objection under section 772.

Sharvananda CJ was of the view that the Appellate Court should take into account the interests of justice when determining whether the plaintiff was entitled to canvass in appeal the rejection of the ground of undue influence by the District Court despite the plaintiff's failure to file a written objection under section 772. The learned Chief Justice stated [at p.267], *"This section requires the respondent, if he had not filed a cross-appeal to give the appellant or his Proctor seven days notice in writing to entitle him to object to the decree or any part of the decree, entered by the trial court. Only if he had duly given the said notice, will he have a* ***right*** *to object to the decree; if he had failed to give such notice, he cannot claim,* ***as a matter of entitlement****, the right to take any objection to the decree; but the provision does not bar the court, in the exercise of its powers to do complete justice between*

the parties, permitting him to object to the decree, even though he had, failed to give such notice. The Court of Appeal has inherent jurisdiction to grant or refuse such permission in the interest of justice. If however the respondent is not taking any objection to the decree, it is competent to him without filing any cross objections to support the decree not only on the grounds decided in his favour but also on the grounds decided against him, by asserting that the points decided against him should have been decided in his favour; he may thus challenge a finding against him although the decree may be in his favour. But a respondent cannot attack the decree in the appellant's favour without filing a cross-appeal or cross-objections under this section.". [emphasis added by me].

It has to be kept in mind that Sharvananda CJ was considering an appeal by the plaintiff against the only defendant - *ie:* a case where there was only a single respondent. The learned Chief Justice was not considering or referring to an instance where there were several respondents to an appeal and one respondent [who had not filed his own appeal] sought to invoke section 772 in the appeal to challenge the decree entered against *other respondents*. Thus, the decision in RATWATTE vs. GOONASEKERA has no bearing on the view expressed earlier in the present judgment that, *other than in exceptional circumstances*, section 772 cannot be invoked by a respondent to an appeal [who had not filed his own appeal] to challenge a finding in the decree in favour of *another respondent*.

As mentioned earlier, the position is similar in India where the provision which is comparable to section 772 of our Civil Procedure Code is found in Order 42 r. 22 of the (First) Schedule to the Indian Civil Procedure Code. Order 42 r. 22 is on broadly similar lines to our section 772. The Indian Courts have consistently laid down the general rule that Order 42 r. 22 can be invoked by a respondent only against the *appellant* and where that respondent disputes particular determinations of fact or law made in the decree and seeks to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*. However, the Indian Courts too have recognised that there could be *exceptional circumstances* in which a respondent [who has not filed his own appeal] may be permitted to invoke Order 42 r. 22 in order to dispute a decree entered in favour of *another respondent*. Thus, Justice Takwani on Civil Procedure [6th ed. at p. 478-479] states *"Ordinarily, cross-objections may be filed only against the appellant. In exceptional cases, however, one respondent may file cross-objections against the other respondents, for instance, when the appeal by some of the parties cannot be effectively disposed of without opening the matter as between the respondents inter se; or in a case where the objections are common as against the appellant and co-respondent."*. Sarkar states [Law of Civil Procedure 8th ed. Vol. 2 p.1502] *"As a general rule respondent's right to urge cross-objections should be limited to urging them against the appellant. In exceptional cases it maybe urged against co-respondents, eg, in questions which cannot be disposed of completely without matters being allowed to be opened up as between co-respondents."*.

Since the question of the scope of section 772 is of some importance, it will be useful to cite a few of the decisions in India which enunciate aforesaid principles regarding the scope of Order 41 r. 22, which is equivalent to our section 772. These principles enunciated by the Courts in India are of direct relevance when determining the scope of section 772 of our Civil Procedure Code.

In VADLAMUDI VENKATESWARLU vs. RAVIPATI RAMAMMA [AIR 1950 Mad. 379], Rajamannar CJ, speaking for a Bench of five Judges of the Madras High Court, carefully examined the history of decisions on Order 41 Rule 22. Having done so, the learned Chief Justice, referring to the nature of an objection that can be raised under Order 41 r. 22, held [at para. 27] that *"In my opinion, such an objection should, as a general rule, be primarily against the appellant. In exceptional cases, it may incidentally be also directed against other respondents."*. The learned Chief Justice cited with approval, the following words of Malik J in MOHAMED HASAN vs. MOHAMED HAMID HASAN [at para. 7] *"Mehdi Hasan, whose contentions were overruled [in the trial Court] , submitted to the decree and did not file an appeal. In the appeal filed by defendant, Saiyed Mohammad Hasan, he was impleaded as one of the defendants-respondents. This cross-objection of Saiyed Mehdi Hasan is not against the defendant-appellant, Saiyed Mohammad Hasan, but is a cross-objection really aimed at the plaintiff-respondent, Saiyed Hamid Hasan. So far as this Court is concerned, the law is now well settled that as a general rule a respondent can file a cross-objection only against an appellant and it is only in exceptional cases where the decree proceeds on a common ground or the interest of the appellant is intermixed with that of the respondent that a respondent is allowed to urge a cross-objection against a co-respondent."*. In the later decision of the Supreme Court of India in PANNALAL vs. STATE OF BOMBAY [1963 AIR SC 1516 at para. 16], Das Gupta J held *"In our opinion, the view that has now been accepted by all the High Courts that Order 41, r. 22 permits as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that the relief against the appellant cannot be granted without the question being reopened between the objecting respondent and other respondents, that an objection under Or. 41, r. 22 can be directed against the other respondents, is correct."*. In MAHANT DHANGIR vs. MADAN MOHAN [AIR 1988 SC 54] at para. 15], the Supreme Court of India referred with approval to Das Gupta J's above enunciation of the scope of Order 41 R.22.

To conclude this discussion on the scope of section 772, it seems to me that the following principles can be extracted from a reading of section 772, the decisions of this Court cited earlier and also the aforesaid decisions of the Courts in India:

(i) A respondent to an appeal can resist the appeal and support the entirety of the decree on any grounds including those decided against him by the trial court, without filing a written objection under section 772;

(ii) A respondent to an appeal who disputes particular determinations of fact or law made in the decree which is canvassed in appeal by the appellant and wishes to have them set aside or varied or decided in his favour by the appellate court *vis-à-vis* the *appellant*, can do so by duly filing a written objection in terms of section 772 of the Civil Procedure Code;

(iii) The general rule is that section 772 of the Civil Procedure Code can be invoked by a respondent to an appeal only against the *appellant* and in the manner and for the purpose described in (ii) above;

(iv) A respondent to an appeal who wishes to invoke and resort to section 772 in the aforesaid circumstances and in the manner and for the purpose set out in (ii) and (iii) above, will have a *right* or *entitlement* to do so only if he has duly filed a written objection under section 772 and given due notice to the appellant. However, it was held in RATWATTE vs. GOONASEKERA that, even in the absence of a duly filed written objection under section 772, an Appellate Court has the discretion, in the interests of justice, to permit the respondent to an appeal to canvass his objections to a specific finding in or specific aspect of the decree with which he is dissatisfied *vis-à-vis* the *appellant*;

(v) Section 772 cannot be invoked by a respondent to an appeal [who has not filed his own appeal], to challenge a finding in the decree in favour of *another respondent other than in exceptional circumstances* such as: in instances where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the respondents; or where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

It is necessary to now apply the aforesaid principles to the 9th defendant-respondent's written objection under section 772 filed in the High Court and ascertain whether the 9th defendant-respondent had a *right* or *entitlement* to have his written objection considered by the High Court.

As stated earlier, the 9th defendant-respondent sought to challenge by way of his written objection filed under section 772, the District Court's decree entered in favour of other *respondents* - namely, the 5th to 8th defendants-respondents, without the 9th defendant-respondent filing his own separate appeal to that effect.

It is evident from the principles set out earlier that the 9th defendant-respondent could not do so *other than in exceptional circumstances* such as: where a determination of the relief sought by the appellant will necessarily require the Appellate Court to examine the lawfulness of the reliefs granted in the decree *inter se* the respondents; or, where the interests of the appellant and the interests of the respondent against whom a written objection under section 772 is filed, are identical or substantially similar.

Accordingly, it is necessary to examine whether such exceptional circumstances existed in the 9th defendant-respondent's favour.

In this regard and as mentioned earlier, in their appeal to the High Court, the 10A and 14th defendants-appellants claimed a 1/24th share each of the 4/24th share which had come to Puhula from Singho who was the original owner of a half share in the land. The 10A and 14th defendants-appellants only challenged in their appeal, the allotting of shares to the plaintiff-respondent and the 1st to 3rd defendants-respondents who had also claimed the 4/24th share which had come to Puhula from Singho.

However, the 9th defendant-respondent only sought to challenge, by way of his written objection filed under section 772, the District Court having allotted to the 5th to 8th defendants-respondent, the aggregate 8/24th share held by Kirihonda and Siriwadiya which had devolved to Kirihonda and Siriwadiya from Dinenchiya who was the original owner of the *other* half share in the land. Thus, the 9th defendant-respondent did not dispute the claim made in the appeal by the 10A and 14th defendants-appellants to a part of the 4/24th share which had come to Puhula from Singho.

Accordingly, it is clear that the determination of the 10A and 14th defendants-appellants' appeal by the High Court would not have required the High Court to examine the lawfulness of the allotment of shares which had devolved from Dinenchiya *inter se* the 9th defendant-respondent and the 5th to 8th defendants-respondents. Therefore, it cannot be said that the first type of exceptional circumstance described above, existed.

Next, for the reasons set out above, it is also clear that there was no identity of interests between the 10A and 14th defendants-appellants who claimed under Singho's half share; and the 5th to 8th defendants-respondents to whom the District Court had allotted a part of the other half share held by Dinenchiya, which allotment was challenged by the 9th defendant-respondent by way of his written objection filed under section 772. Therefore, it also cannot be said that the second type of exceptional circumstance described above, existed.

Consequently, the conclusion must be that the the 9th defendant-respondent did not have a *right* or *entitlement* to have his written objection under section 772 determined by the High Court.

Nevertheless, the factual position is that the 9th defendant-respondent's written objection under section 772 was filed in the High Court in broadly the correct form and with notice being given and that all the parties to the appeal were well aware of the 9th defendant's written objection. It is clear that none of the other parties to the appeal objected, at any stage, to the 9th defendant-respondent's written objection being determined by the High Court. Further, the High Court has not made an Order rejecting the 9th defendant-respondent's written objection filed under section 772, nor made a statement to such effect in its Judgment.

Next, when this application for leave to appeal was filed in this Court by the 9th defendant, none of the respondents to the application took up the position that the 9th defendant was not entitled to appeal or to have the matters set out in his written objection under section 772 determined by this Court in appeal. The questions of law now before this Court arise specifically from the matters set out in the 9th defendant's written objection filed under section 772. None of the respondents have objected, at any stage, either by way of a motion or in their written submissions or during their oral submissions during the hearing of this appeal, to the determination of those questions of law. To the contrary, all the learned counsel who appeared at the hearing of this appeal agreed that the questions of law before us now should be determined upon the facts and merits of the 9th defendant's appeal to this Court.

In those circumstances, it is too late to now deprive the 9th defendant of a determination by this Court, of the facts and merits of the questions of law which are now before us. I would add that a lack of an *entitlement* or a *right* of the 9th defendant to have filed a written objection under section 772 did not amount to a patent lack of jurisdiction on the part of the High Court to determine the matters set out in that written objection. Instead, the High Court had the jurisdiction to determine the matters set out in the 9th defendant-respondent's written objection unless one of the other parties had objected to the written objection being determined and the High Court upheld that objection or the High Court chose to reject the written objection *ex mero motu* on the ground that it was outside the scope of section 772, and made Order to such effect.

In this regard, I am of the view that any objection to an Appellate Court considering a written objection under section 772 filed by a respondent to the appeal, must be taken up at the earliest opportunity or, at the latest, at the commencement of the Hearing, so that the Appellate Court can make an Order either rejecting the written objection or

holding that the respondent filing the written objection is entitled to have them considered by the Court. If no such objection is raised and no Order is made by the Appellate Court rejecting the written objection filed under section 772, the respondent filing the written objection is entitled to have its merits determined by the Appellate Court.

However, in a very brief judgment, the learned High Court Judges only considered the appeal filed by the 10A defendant and 14th defendant and dismissed that appeal and affirmed the judgment of the District Court. The High Court made no reference whatsoever to the 9th defendant's written objection to the decree which had been filed under section 772 and was before the High Court, nor to the 9th defendant's claim to a 8/24th share of the land and the evidence in support of that claim. Thus, as discussed earlier, the High Court erred when it failed to consider and determine the 9th defendant-respondent's written objections filed under section 772.

The 9th defendant had died during the pendency of the appeal in the High Court and the 9A and 9B defendants had been substituted in his place. They filed an application in this Court seeking leave to appeal from the judgment of the High Court and prayed that the judgment of the High Court be set aside and that this Court makes Order that the 9A and 9B defendants are entitled to a 8/24th share of the land.

This Court has granted the 9A and 9B defendants leave to appeal on the following questions of law [rephrased for the sake of brevity]:

(i) Is the judgment of the High Court of Civil Appeal is contrary to law ?

(ii) Did he High Court err in failing to consider the written objections raised by the 9th defendant under and in terms of section 772 of the Civil Procedure Code ?

(iii) Did the High Court fail to consider the testimony of the 9th defendant and the deeds of transfer produced in evidence by the 9th defendant ?

(iv) Did the High Court fail to consider that the trial judge had answered issue no. 32 in the affirmative and, despite doing so, proceeded to answer issue no. 33 to issue no. 36 by stating *"Not Proved"* ? [By way of an explanation, issue no. 32 asked whether Kirihonda, Siriwadiya and Jothiya each held a 4/24th share in the land, while issue no. 33 to issue no. 36 specifically asked whether the aggregate 8/24th share held by Kirihonda and Siriwadiya had come to the 9th defendant by the deeds of transfer marked "9වි1" to "9වි4"] ?

(v) Did the High Court err by failing to consider the manner in which the shares on Siriwadiya and Kirihonda had devolved ?

For the reasons set above, I will proceed to determine these questions of law. I would add that, in the light of the evidence led at the trial, the provisions of section 25 (1) of the Partition Law make it incumbent on this Court to determine questions of law no.s (iii) to (v) in the exercise of its jurisdiction under Article 127 of the Constitution.

The devolution of Dinenchiya's half share will be considered first since the 9th defendant's appeal before us relates to the devolution of that half share.

As mentioned at the outset, it was common ground between all the parties that Dinenchiya's 12/24th share [half share] had devolved to Kirihonda, Siriwadiya and Jothiya in equal 4/24th shares. As also mentioned at the outset, the 4th defendant claimed the 4/24th share which had been held by Jothiya. The 5th to 8th defendants on the one hand, *and* the 9th defendant on the other hand, claimed the aggregate 8/24th share which had been held by Kirihonda and Siriwadiya.

Only the 4A defendant [who had been substituted in place of the deceased 4th defendant - Sudu Hakurage Nandoris] and the 9th defendant gave evidence in support of their claims under Dinenchiya. The 5th to 8th defendants did not give evidence in support of any claim they may have had to a share in the land. No documents were produced in support of their claim.

With regard to the 4/24th share held by Jothiya, there is no dispute between the parties that this 4/24th share has devolved upon the 4th defendant - Sudu Hakurage Nandoris. The learned District Judge has correctly allotted that 4/24th share to the 4th defendant and this determination was affirmed by the High Court.

With regard to the remaining aggregate 8/24th share held by Kirihonda and Siriwadiya, the learned District Judge upheld the claim made by the 5th to 8th defendants in their joint Statement of Claim that: (i) the 8/24th share held together by Siriwadiya and Kirihonda had devolved upon Suwaris; and (ii) that this 8/24th share held by Suwaris had devolved upon the 5th to 8th defendants, who were his four children. On that basis the learned District Judge allotted a 2/24th share of the land each to the 5th to 8th defendants. The High Court has affirmed that determination in appeal.

However, both the District Court and the High Court completely overlooked the 9th defendant's clear testimony that Kirihonda and Siriwadiya had, during their lifetime, transferred their aggregate 8/24th share in the land to Kumarapeli Arachchilage Don

Davith Singho by the deed of transfer no. 535 marked “9වි4”; thereafter, the said Don Davith Singho transferred that 8/24th share to Niyadurupola Hakurage Sinchina by the deed of transfer no. 1437 marked “9වි3”; thereafter, the said Sinchina transferred that 8/24th share to Sudu Hakurage Githona by deed of transfer no. 9330 marked “9වි2”; and, finally, the said Githona transferred that 8/24th share to the 9th defendant - Sudu Hakurage Jayaratne - by deed of transfer no. 4231 marked “9වි1”. All these deeds were executed long prior to the institution of this action in 1985. Further, it is evident from the Surveyor’s Report that the 9th defendant - Jayaratne - had been in possession of a substantial part of the land and had preferred a claim to that part of the land at the Survey.

All these deeds of transfer marked “9වි1” to “9වි4” were produced in evidence without any challenge to their validity or requirement of further proof. These deeds of transfer clearly establish that the 9th defendant was entitled to the 8/24th share of the land which had devolved upon Kirihonda and Siriwadiya. Further, a perusal of the proceedings shows that this fact was not disputed by any party at the trial.

Despite, it having been clearly established that the 8/24th share previously held by Kirihonda and Siriwadiya had come to the 9th defendant by the deeds of transfer marked “9වි1” to “9වි4”, the learned District Judge has erroneously held that the 9th defendant had failed to establish his claim to a 8/24th share in the land and erroneously answered the aforesaid issue no.s 33 to 36 in the negative.

Instead, the learned District Judge has proceeded to allot the aggregate 8/24th share previously held by Kirihonda and Siriwadiya to the 5th to 8th defendant on the basis that they were the heirs of Kirihonda and Siriwadiya. However, as mentioned earlier, the 5th to 8th defendants did not give evidence and no documents were produced to support any claim by them to a share of the land. Further, it is evident from the Surveyor’s Report that the 5th to 8th defendants were not in possession of any part of the land. In fact, the Report states that the 5th and 6th defendants, who had been present at the time of the Survey, had not preferred a claim to the land.

Upon a perusal of the proceedings, it is evident that the learned District Judge has allotted a 2/24th share each to the 5th to 8th defendants relying solely on the averments in the plaint which stated that the aggregate 8/24th share held by Kirihonda and Siriwadiya had devolved to the 5th to 8th defendants and the plaintiff’s passing statement to that effect in his evidence-in-chief. However, the learned District Judge failed to take into account the fact that, when the plaintiff was cross-examined by learned counsel for the 9th defendant, the plaintiff admitted that the shares held by Kirihonda and Siriwadiya had been transferred to Sinchina, who had transferred those shares to Githona by the

deed of transfer no. 9330 marked “9වි2” and that, thereafter, Githona had transferred these shares to the plaintiff by the deed of transfer no. 4231 marked “9වි1”.

Thus, it is clear that the learned District Judge erred when he allotted a 2/24th share each to the 5th to 8th defendants and failed to allot to the 9th defendant, the 8/24th share previously held by Siriwadiya and Kirihonda. This is a manifest error committed by the District Court, which should have been corrected when the High Court heard the appeal. It is unfortunate that the learned High Court Judges have failed to do so. Section 25 (1) of the Partition Law placed a duty on the High Court, when hearing the appeal, to consider whether the District Court had correctly examined the evidence and to consider whether the District Court had correctly determined the issue of the 9th defendant’s claim to a 8/24th share of the land. It is to be regrettable that the learned High Court Judges failed to perform that duty.

For the reasons set out above, I answer the aforesaid five questions of law raised by the 9A and 9B defendants in the affirmative and hold that that 9th defendant - Sudu Hakurage Jayaratne - was entitled to a 8/24th share of the land which has come to him from the 8/24th share held by Kirihonda and Siriwadiya. Further, I hold that none of the 5th to 8th defendants are entitled to any shares in the land.

To now consider the devolution of Singho’s half share: as mentioned at the outset, it was common ground between all the parties that Singho’s 12/24th share [half share] had devolved to Subaya, Puhula and Kirinerisa in equal 4/24th shares.

The position of the plaintiff and the 1st to 3rd defendants and 15th defendant was that both Puhula and Kirinerisa had died without legitimate issue and that, as a result, Subaya, who was the brother of Puhula and Kirinerisa, became the sole owner of Singho’s half share [*ie:* 12/24th] of the land. The plaintiff and the 1st to 3rd defendants and 15th defendant stated that Subaya had six children - *ie:* four sons, namely: the plaintiff - Saima, the 1st defendant - Haramanis, the 2nd defendant - Punchisingho and the 3rd defendant - Jayasekera, and two daughters, namely, Soyda and Seelawathie.

The plaintiff, the 2nd defendant and the 3rd defendant gave evidence at the trial. The 2nd defendant stated that he also gave evidence on behalf of the 15th defendant, who was his son and with whom he had filed a joint Statement of Claim. The 1st defendant did not enter an appearance at the trial

In his plaint and when he gave evidence, the plaintiff’s claimed that all six of Subaya’s aforesaid children inherited Subaya’s half share of the land in equal 2/24th shares. The plaintiff went on to claim that his two sisters - *ie:* Soyda and Seelawathie - transferred

their shares in the land to him by the deed of transfer no. 22853 dated 22nd October 1983 marked "පැ1". Thus, the plaintiff claimed that he had a 6/24th share of the land and that his three brothers - namely, the 1st to 3rd defendants - each had a 2/24th share in the land.

However, the position of the 2nd, 3rd and 15th defendants in their Statements of Claim and when the 2nd and 3rd defendants gave evidence was that both Soyda and Seelawathie had married in *diga* during the lifetime of their father, Subaya, and that, therefore, Soyda and Seelawathie did not inherit any share in the land since all parties to this case are governed by the Kandyan Law. On that basis, the 2nd and 15th defendants stated that the aforesaid deed of transfer no. 22853 marked "පැ1" was of no force or effect in law. Accordingly, the position of the 2nd and 15th defendants was that Subaya's half share [12/24th] of the land was inherited, in equal 3/24th shares by the plaintiff and the 1st to 3rd defendants.

In this regard, when the plaintiff was cross-examined at the trial, he admitted that Soyda and Seelawathie had contracted *diga* marriages and admitted the related marriage certificates which were marked "2වි1" and "2වි2". The plaintiff had earlier stated in his evidence-in-chief that his father, Subaya, who was also the father of Soyda and Seelawathie, had died in 1968. The marriage certificate marked "2වි1" establishes that Soyda married in *diga* on 17th November 1941 and the marriage certificate marked "2වි2" establishes that Seelawathie married in *diga* on 05th December 1964.

It is a well-known principle of the Kandyan Law that a daughter who marries in *diga* during the lifetime of her father, inherits no part of her father's immovable property if he dies intestate. Thus, Hayley's Kandyan Law [at p.379] states *"The general rule is that neither a diga-married daughter, nor her children can compete with other children of the same mother, or their descendants, in the distribution of a deceased's intestate estate."*. Similarly, Dissanayake and De Soysa [Kandyan Law and Buddhist Ecclesiastical Law [p.156-157] state *"A daughter will be incapacitated from inheriting landed property from her father, by being given away in diga marriage by her father, it being premised that she remained settled in diga until her father's death."*. and *"The general rule is that when a woman marries in diga she forfeits her right to inherit any portion of her father's estate."*. Basnayake J observed in SIRISENA vs. DINGIRI [45 CLW 24 at p.25-26], referring to the devolution of the immovable property of the intestate deceased in that case, *"….. if [the deceased] had married only once and had five daughters each of whom married in deega in his lifetime they would not inherit his immovable property"* . I should add here that, there was also no evidence before the District Court of the occurrence of any events *after* Soyda and Seelwathie contracted their *diga* marriages

which might have revived their claim to inherit their father's immovable property, as contemplated in the Kandyan law.

For these reasons, the learned District Judge correctly held that the deed of transfer no. 22853 marked "ඈ1" under which the plaintiff claimed the alleged 2/24th shares of both Soyda and Seelawathie, was of no force or effect in law.

Consequently, the learned District Judge correctly held that Subaya's half share [12/24th] of the land was inherited, in equal shares by the plaintiff - Saima, the 1st defendant - Haramanis, the 2nd defendant - Punchisingho and the 3rd defendant - Jayasekera - *ie:* that the plaintiff and the 1st to 3rd defendants each had inherited a 3/24th share of the land. On that determination, the learned District Judge allotted a 3/24th share each in the land to the plaintiff and the 1st to 3rd defendants.

However, it had been clearly established by the evidence of the 2nd defendant that the 1st defendant - Haramanis - [who was the 2nd defendant's brother] had transferred his 3/24th share to the 15th defendant- Ranasinghe - by the deed of transfer no. 2215 dated 16th March 1980 marked "15වි1", five years prior to the institution of the action. "15වි1" states that the 1st defendant was entitled to a 3/24th share in the land by paternal inheritance from his father, Subaya, and that the 1st defendant has transferred the entirety of that 3/24th share to the 15th defendant. This deed marked "15වි1" was not disputed by any party at the trial. The 1st defendant - Haramanis - did not enter an appearance at the trial and did not prefer any claim when the Survey was done. On the other hand, the 15th defendant preferred his claim to the Surveyor. Further, in cross examination, the plaintiff specifically admitted the aforesaid deed of transfer no. 2215 marked "15වි1" by which his brother, the 1st defendant, had transferred the entirety of his share in the land to the 15th defendant.

In these circumstances, the learned District Judge had correctly answered in the affirmative, issue no. 31 which specifically asked: *"Has the 1st defendant had transferred his share of the land to the 15th defendant - Ranasinghe - by the deed of transfer no. 2215 dated 16th March 1980 [ie: "15වි1"] ?"* However, despite having done so and despite the unequivocal and undisputed evidence that the 1st defendant had transferred his 3/24th share to the 15th defendant by the deed marked "15වි1", the learned District Judge has erred and allotted a 3/24th share to the 1st defendant - Haramanis - instead of allotting that 3/24th share to the 15th defendant - Ranasinghe.

This is a manifest error which should have been corrected when the High Court heard the appeal. It is unfortunate that, in this instance too, the learned High Court Judge have failed to do so.

In these circumstances, this Court is obliged to correct the error. In my view, the requirements of section 25 (1) of the Partition Law read with the appellate jurisdiction vested in this Court by Article 127 of the Constitution, justify the correction of this manifest error by this Court in appeal.

For the reasons set out above, I hold that the 15th defendant - Sudu Hakurage Ranasinghe is entitled to a 3/24th share of the land which has devolved to him from Subaya. I also hold that the 1st defendant - Sudu Hakurage Haramanis - is not entitled to any share in the land.

With regard to the 10th, 11th, 12th 13th and 14th defendants - namely, Podisingho, Sediris, Alpenis, Asilin and Ariyadasa - their Statement of Claim averred that Puhula and Kirinerisa died leaving legitimate issue to whom the 4/24th shares of Puhula and Kirinerisa had devolved. The 10th to 14th defendants claimed that: (i) upon Puhula's death, his 4/24th share had devolved upon his four legitimate children - namely, one Haramanis and the 10th to 12th defendants, each of whom, thereby, became entitled to a 1/24th share in the land and, subsequently, the said Haramanis had died intestate and his 1/24th share in the land had come to his son, the 14th defendant. The 13th defendant claimed that upon Kirinerisa's death, his 4/24th share in the land had devolved to her as his legitimate daughter.

The plaintiff and the 2nd and 3rd defendants had all expressly denied that Puhula and Kirinierisa had any legitimate issue. As mentioned earlier, it is undisputed that the land is *paraveni* property and it is a principle of Kandyan Law that illegitimate children of an intestate deceased do not inherit the *paraveni* property of that intestate deceased - *vide:* section 15 (*a*) of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, as amended, which states *"When a man shall die intestate after the commencement of this Ordinance leaving an illegimate child or illegitimate children - (a) such child or children shall have no right of inheritance on respect of the paraveni property of the deceased;"*. In these circumstances, the burden was firmly placed on the 10th to 14th defendants to prove that they were the legitimate issue of Puhula and Kirinierisa.

Only the 11th defendant gave evidence on behalf of himself and the 10th, 12th and 14th defendants. The 13th defendant did not give evidence despite the 11th defendant having expressly stated that he does give evidence in support of the 13th defendant's claim.

However, the 11th defendant did not produce a marriage certificate which established that Puhula had contracted a lawful marriage and did not produce any of the birth certificates of the aforesaid Haramanis and the 10th to 12th defendants, to prove that they were Puhula's children. The 13th defendant's birth certificate was also not produced.

The 11th defendant has referred in his evidence to the documents marked "9වි1" to "9වි8" which were some extracts from the case records in case no.15 and case no. PA 11795 which had been previously filed in the District Court of Kegalle. The 11th defendant took up the position that it had been held in these two cases that the aforesaid Haramanis and the 10th to 12th defendants are the children of Puhula and that these findings amounted to *res adjudicata* with regard to the aforesaid Haramanis and the 10th to 12th defendants being the legitimate children of Puhula. However, a perusal of "9වි1" to "9වි8" shows that these are only a few of the documents which would have been in the case records of these two cases and, more importantly, that these documents do not establish that there was a judicial determination in either case that the aforesaid Haramanis and the 10th to 12th defendants are the legitimate children of Puhula.

Further, a perusal of the evidence of the 11th defendant shows that, as the learned District Judge has noted, the credibility of the evidence of the 11th defendant was shaken in cross examination. When learned counsel for the 2nd, 3rd and 15th defendants specifically put to the 11th defendant that he, the aforesaid Haramanis and the 10th and 12th defendants were not Puhula's children, the 11th defendant had no answer. Thereafter, when learned counsel for the plaintiff specifically put to the 11th defendant that Puhula did not have any legitimate issue, the 11th defendants answered saying he did not have any such knowledge.

In these circumstances, the learned District Judge held that the 10th to 14th defendants had failed to prove that they were the legitimate issue of Puhula and Kirinerisa and rejected their claims. The High Court affirmed that view. I see no reason to take a different view. In any event, the 10th to 14th defendants have not sought leave to appeal to this Court from High Court's affirmation of decision of the District Court to reject their claims to shares in the land. In these circumstances, I need not further examine the 10th to 14th defendants' claims.

To conclude, I set aside the judgments of the District Court and High Court and hold that the following defendants are entitled to shares in the land as set out below:

The plaintiff	-	3/24th
2nd defendant	-	3/24th
3rd defendant	-	3/24th
4th defendant	-	4/24th
9th defendant	-	8/24th
15th defendant	-	3/24th

Based on the aforesaid determination with regard to the parties entitled to shares in the land and taking into account the claims preferred by the parties at the time of the Survey as set out in the Surveyor's Report which was submitted to the District Court, I order that the following be given effect to, as far as is practically possible, at the time of the division of the land into lots: (i) the buildings and structure marked A and B on Lot No. 1 in the plan no. 415 marked "X" at the trial and the Kohila Plantation on the 2.5 perch extent of land shown as Lot No. 2 in the said plan, to be within the portion of land allotted to the plaintiff - Sudu Hakurage Saima; (ii) the buildings and structures marked C, D, E and F in the said plan, to be within the portion of land allotted to the 4th defendant - Sudu Hakurage Nandoris; (iii) the buildings and structures marked G, H, I, J and K in the said plan to be within the portion of land allotted to the 3rd defendant - Sudu Hakurage Jayasekera; and (iv) the buildings and structures marked L, M, N, O and P in the said plan to be within the portion of land allotted to the 9th defendant - Sudu Hakurage Jayaratne.

Accordingly, the land shown as Lot No. 1 and Lot No. 2 in plan no. 415 marked "X" is to be partitioned between the plaintiff, 2nd to 4th, 9th and 15th defendants in the aforesaid shares determined by this Court and subject to the aforesaid orders will regard to the manner of partition and subject to compensation for improvements and any necessary owelty to be paid, as assessed by the Surveyor and determined by the District Court in terms of the law, to the parties named in the Surveyor's' Report submitted to the District Court.

The District Court is directed to enter an Interlocutory Decree in terms of this judgment. This case has been pending in the Courts for more than three decades and the District Court is directed to take all necessary subsequent steps to expeditiously conclude these proceedings in compliance with the provisions of the Partition Law. In the circumstances of this case, the parties will bear their own costs.

Judge of the Supreme Court

Vijith K. Malalgoda, PC, J.
I agree

Judge of the Supreme Court

P. Padman Surasena, J.
I agree

Judge of the Supreme Court