

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

In the matter of an application for leave to appeal under section 5C of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

Asan Kalenderlebbe, (deceased)

Sinnaulla, Pottuvil.

**Plaintiff**

Ismail Fathima,

Sinnaulla, Pottuvil.

**Substituted Plaintiff**

**SC Appeal 48/2013**

**SC/C.H.C/LA 48/2013**

**EP/HCCA /KAL 241 /2011**

**DC Potuvil Case No. 298L**

**DC Kalmunai Case No. 2364L**

**Vs,**

1. Weeragoda Arachchige Pathmasiri Silva,  
No. 90/A/1, Rajapihilla Mawatha, Kandy
2. Srikathuge Sunantha Deepal Fernando,  
No. 43, Saranankara Street, Kandy
3. Srikathuge Wimalasurendra Fernando,  
Pasyala
4. Justin Chandrapala de. Silva,  
No. 102/1, Rajapihilla Mawatha, Kandy
5. Kalander Asiya Umma,  
Sinna Ulla, Arugambay, Pottuvil

6. Peter Goodman, (deceased)  
Star Dust Beach Hotel, Pottuvil

7. Mohomed Ismail Cadre Mohaideen,  
Pottuvil

**Defendants**

**And between**

Mohideen Bawa Abdul Cassim,  
Pottuvil

**Petitioner**

**Vs,**

1. Weeragoda Arachchige Pathmasiri Silva,  
No. 90/A/1, Rajapihilla Mawatha, Kandy

2. Srikathuge Sunantha Deepal Fernando,  
No. 43, Saranankara Street, Kandy

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Pasyala

4. Justin Chandrapala de. Silva,  
No. 102/1, Rajapihilla Mawatha, Kandy

5. Kalander Asiya Umma,  
Sinna Ulla, Arugambay, Pottuvil

6. Peter Goodman, (deceased)  
Star Dust Beach Hotel, Pottuvil

7. Mohomed Ismail Cadre Mohaideen,  
Pottuvil

**Defendants-Respondents**

**And between**

Kalander Asiya Umma,  
Sinna Ulla, Arugambay, Pottuvil

**5<sup>th</sup> Defendants-Respondents-Appellant**

**Vs,**

Mohideen Bawa Abdul Cassim,  
Pottuvil

**Petitioner-Respondent**

**And now between**

Kalander Asiya Umma,  
Sinna Ulla, Arugambay, Pottuvil

**5<sup>th</sup> Defendants-Respondents-Appellant-Petitioner**

**Vs,**

Mohideen Bawa Abdul Cassim,  
Pottuvil

**Petitioner-Respondent-Respondent**

1. Weeragoda Arachchige Pathmasiri Silva,  
No. 90/A/1, Rajapihilla Mawatha, Kandy
2. Srikathuge Sunantha Deepal Fernando,  
No. 43, Saranankara Street, Kandy
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Sinna Ulla, Arugambay, Pottuvil
6. Peter Goodman, (deceased)  
Star Dust Beach Hotel, Pottuvil
7. Mohomed Ismail Cadre Mohaideen, (deceased)  
Pottuvil

**Defendants-Respondents-Respondents**

7A Abdul Jabbar Nona Jesmine  
Pottuvil 01

7B Farzan Mohideen  
Pottuvil 01

7C Fowzi Mohideen

Pottuvil 01

7D Faizal Mohideen

Pottuvil 01

7E Farzana

Pottuvil 01

7F Firosa

Pottuvil 01

**Parties seeking substitution in place of the 7<sup>th</sup>**

**Defendant- Respondent-Respondent**

**Before: Hon. Justice Buwaneka Aluwihare PC**

**Hon. Justice Vijith K. Malalgoda PC**

**Hon. Justice Murdu N.B. Fernando PC**

**Counsel: Manohara de. Silva, PC with Ms. Pubudini Wickramaratne for the 5<sup>th</sup> Defendant-Respondent-Appellant-Petitioner**

**N.R. Sivendran with Ms. Anushiya Ramen for the Petitioner-Respondent-Respondent**

**Nuwan Rupasinghe with Ms. Dhanushka Elpitiya for the 7A-7F Substituted Defendant-Respondents-Respondents**

**Argued on: 18.02.2019**

**Decided on: 04.09.2019**

### **Vijith K. Malalgoda PC J**

This Appeal had been filed before the Supreme Court challenging the decision of the Provincial High Court of Civil Appeal of the Eastern Province holden in Kalmunai dated 13.09.2012 in HC CA Application No. 241/11.

The 5<sup>th</sup> Defendant-Respondent-Appellant-Appellant (hereinafter referred to as the Appellant) who is the Petitioner in the instant appeal had raised several grounds in appeal but, leave was granted only on the following grounds of appeal.

1. The High Court erred in considering section 404 of the Civil Procedure Code as the relevant section applicable to the instant case for substitution of the Petitioner-Respondent and failed to give due consideration to the other provisions of Chapter XXV of the Civil Procedure Code
2. The High Court misdirected itself in failing to consider that the wording “other cases of assignment, creation or devolution of any interest pending the action” in section 404 denotes that the section would apply to a situation where the alternation of a party’s status has occurred other than by the modes stipulated in section 392 to 398 of the Civil Procedure Code and thus where there is assignment, creation or devolution of any interest other than due to the death of a party, section 404 would apply

3. The High Court failed to consider that the relevant sections under which the application for substitution should have been made by the Petitioner-Respondent are section 395 read with section 392 of the Civil Procedure Code

When this application was supported for leave, court granted permission for the learned President's Counsel who represented the contesting party i.e. substituted Petitioner-Respondent-Respondent (hereinafter referred to as the Respondent) to raise the following question of law

4. Has the High Court acted appropriately where there has been no contesting application for substitution in the circumstances of this case?

The deceased Plaintiff instituted action against the 1<sup>st</sup> to the 7<sup>th</sup> Defendants on 03.10.2000 and averred in his plaint that he become entitle to occupy and possess the land more fully described in the schedule to the plaint under and by virtue of a permit issued under the provisions of the Land Development Ordinance. The Plaintiff had further averred that the defendants are in unlawful possession of the same and prayed for declaration of title, ejectment and to set aside and declare the deed nos. 120 and 302 attested by S.M. Gaffoor Notary Public are null and void.

When the said trial was proceeding before the District Court, the original Plaintiff had passed away and steps were taken to substitute, the living spouse of the deceased plaintiff as the substituted Plaintiff and the trial proceeded to the end and the case was fixed for judgment on 01.08.2007.

The court delivered its judgment entering the judgment in favour of the Plaintiff.

Being dissatisfied with the said judgment the 7<sup>th</sup> Defendant to the District Court action had filed a petition of appeal and the said appeal was taken up before the High Court of Civil Appeal of the Eastern Province holden in Kalmunai. During the appeal before the said High Court it was revealed

that the Substituted Plaintiff had passed away prior to the delivery of the judgment by the District Judge on 01.08.2007. Accordingly the appeal was sent back to the District Court for substitution of the Substituted Plaintiff.

As revealed before us, prior to the death of the original Plaintiff, one Mohideen Bawa Abdul Cassim had been nominated as the successor for the said land under the provisions of the Land Development Ordinance by the deceased permit holder Asan Kalender Lebbe and the said Mohideen Bawa Abdul Cassim had filed a petition and affidavit before the District Court under section 404 of the Civil Procedure Code seeking the Court to substitute his name in the place of the deceased Substituted Plaintiff in order to continue with the said case.

The learned District Judge who inquired into the said Petition and affidavit filed by the Petitioner (before the District Court and the Petitioner-Respondent-Respondent or the Respondent before this court) allowed the said application for substitution on 14.12.2011.

The said order of the District Court allowing the application filed by the Respondent to be substitute in the room and place of the deceased substituted Plaintiff was challenged before the High Court of the Civil Appeal of the Eastern Province holden in Kalmunai by way of a leave to appeal application filed by the 5<sup>th</sup> Defendant Appellant.

By order dated 13.09.2012 the High Court of the Civil Appeal of the Eastern Province dismissed the appeal before the said court and affirmed the order of the District Court dated 14.12.2011.

Being dissatisfied with the said order of the High Court of the Civil Appeal of the Eastern Province, the 5<sup>th</sup> Defendant Appellant Petitioner had filed the instant application.

As revealed before us the subject matter before the District Court was based on a permit issued under the Land Development Ordinance in the name of the original Plaintiff Asan Kalender Lebbe.

As further revealed during the trial before the District Court, on 31<sup>st</sup> December 1964 the permit holder had nominated his daughter Cassia Umma as the successor to the land referred to the permit but, the said name was deleted on 27.06.2000 and the name of Mohideen Bawa Abdul Cassim, the grandson of the permit holder was inserted as the successor to the land referred to in the said permit.

Section 62 of the Land Development Ordinance which allows the fresh nomination of successor reads as follows;

**Section 62**     **1)** After the registration of a document whereby a person is nominated as successor to a holding or a land alienated on a permit, a document which purports to nominate any other person as successor to that holding or land shall not be registered unless the nomination effected by the registered document has been duly cancelled by the registration of a document of cancellation.

Provided that it shall be lawful in one and the same document to cancel a registered nomination and to make some other nomination in lieu thereof; and in that event, notwithstanding anything in this section contained, the document in which such cancellation and nomination are combined may be registered and shall upon due registration operate both as cancellation of a previously registered nomination and as a nomination of a new nominee.

During the trial before the District Court of Kalmunai, several officers from the Divisional Secretariat Pothuvil including the Land Officer, Divisional Secretary, Clerk attached to the land division at the Divisional Secretariat were called to give evidence with regard to the cancellation of the previous nomination and the registration of the fresh nomination.

In the said circumstances it is clear that, Mohideen Bawa Abdul Cassim was considered as the lawful nominee by the permit holder at the time the permit holder instituted proceedings before the District Court on 03.10.2000.

As far as the present case is concerned, the matter to be decided is the substitution and nothing else. However the main case that was pending before the District Court and was appealed to the Provincial High Court of Civil Appeal was, with regard to a permit that was issued under the provisions of the Land Development Ordinance in the name of the original plaintiff Asan Kalender Lebbe. Relevant government officials were summoned during the District Court trial and their evidence was led to establish that fact. As observed by this court, the District Court had entered judgment in favour of the Substituted Plaintiff and what was appealed against was the said decision. In the said circumstances until otherwise decided by a competent court, it was accepted that the land in question is state land which was granted to the deceased Plaintiff by way of a permit. The Land Development Ordinance has its own provisions with regard to the succession and therefore what should follow after the death of a permit holder is the provisions of the Land Development Ordinance and not the principles of General Law.

Section 170 of the Land Development Ordinance provides that,

“No written law (other than this Ordinance) which provides for succession to land upon an intestacy and no other law relating to succession to land upon an intestacy shall have any application in respect of any land alienated under this Ordinance”

In the case of Dharmalatha Vs. Davis De. Silva (1995) 1 Sri LR 259 it was held that,

“Under section 170 of the Land Development Ordinance, no written or other law which provides for succession to land upon intestacy has application in respect of land alienated under the Land Development Ordinance.”

Section 48A (1) of the Land Development Ordinance refers to a right of a wife of a permit holder as follows;

Section 48A (1)        Upon the death of a permit holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A the spouse of that permit holder, whether he or she has or has not been nominated as successor by that permit holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to such spouse.

The rights of a person who was nominated, other than the spouse of the permit holder and at what time he can succeed to such property is referred to in section 49 of the Land Development Ordinance as follows;

Section 49;            Upon the death of permit-holder who at the time of his or her death was paying an annual sum by virtue of the provisions of subsection (3) of section 19A or of an owner of a holding, without leaving behind his or her spouse, or, where such permit holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land alienated to that permit holder on the permit or holding or upon the death of such spouse, a person nominated as successor by such permit holder or owner shall succeed to that land or holding.

In the said circumstances it is clear, that according to the above provisions of the Land Development Ordinance, a nominated person can only succeed to a land to which he is lawfully nominated, is either after the death of the spouse or when the said spouse failed to succeed to the said property. When going through the above provisions it is further observed that the nominee is not entitled by law to succeed to a property until the death (or failure to succeed to the land) of the spouse of the original permit holder. In other words he becomes entitled by law to succeed to the property only after the death (or failure to succeed) of the spouse of the original permit holder.

Section 404 of the Civil Procedure Code provides that;

“In other cases of assignment, creation or devolution of any interest pending the action, the action may, **with leave of the court**, given either with consent of all parties or after service of notice in writing upon them, and hearing their objections, in any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from it has passed; as the case may require.”

As observed by this court the above provision of the Civil Procedure Code makes provision for a person acquiring an interest pending the action, continue with the action with leave obtained from that court ***Paaris and another Vs. Bridget Fernando 1992 (1) Sri LR 36.***

As discussed in this judgment, a person nominated to succeed to a state land, which is on a permit issued under the Land Development Ordinance will only “acquire interest” at the time of the death of the spouse (or failure to succeed) of the original permit holder and therefore the correct cause of action available to him is to act under section 404 of the Civil Procedure Code, at the time he acquire such interest.

In the Court of Appeal decision in ***Brunswick Exports Ltd. Vs. Hatton National Bank Ltd CA 581/93*** CA minute dated 05<sup>th</sup> May 1994 BALJ 1994 Vol. V part II, a bench comprising of S.N. Silva P/CA (as he was then) and Ranaraja J had considered the term “assignment” in section 404 as follows;

Section 404 of the Civil Procedure Code makes provision for a person acquiring an interest in an action to continue with it having obtained leave of court. It does not provide that, if he does not obtain the leave of court to continue the action, the action should stand dismissed. The Plaintiff is still entitled to continue the suit and his successor will be bound by the result

of the litigation even though he is not represented at the hearing. (See ***Chittambaram Chettiar V. Fernando, 49 NLR 49***)

It is also settled law that a right of action can be assigned after *litis contestatia*. In such an event section 404 of the Civil Procedure Code applies. (See ***Pless Pol V. De Soysa, 10 NLR 252***, where Hutchinson, C.J. observed “On these authorities it does not seem to me quite clear that the Roman Dutch Law forbids such an assignment. But if it did, think it cannot have been intended to make the transaction altogether illegal and void as between the parties to it, but that the rule was only a rule of procedure and that section 404 overrides it. That section gives the court power to allow the assignee to be added as a party when the assignment was made any time pending the action; and the court ought to do so in proper case when it appears convenient and possible without prejudice to the other party.”

On the facts of the present case, it was open to the 2<sup>nd</sup> Respondent to continue with the action or as was done for the 1<sup>st</sup> Respondent to seek leave of court to be substituted in place of the 2<sup>nd</sup> Respondent. The court has the discretion to permit such a course provided it was convenient and possible without prejudice to the Petitioner.

The learned President’s Counsel for the Petitioner submitted that the 1<sup>st</sup> Respondent had no status as an assignee to be substituted in place of the 2<sup>nd</sup> Respondent for the five reasons that the mortgage bond No. 2245 did not provide for an assignment of the mortgage to third parties. In terms of the bond, one of the parties, namely the Union Bank of the Middle East was to include only the said bank and its “successors”. It was submitted the word “successors” does not include assigns,-Stroud’s Legal Dictionary. 5<sup>th</sup> Ed. p203 defines the word “assign” thus:

“So generally, of assignable contracts eg.: ordinary trade contracts, and those contracts which can be performed “vicariously” (per Knight –Bruce L.J.) and involve no element of personal skill or confidence through “assigns” be not named, the contracts should be read and construed as through it contained an interpretation clause extending its operation to the heirs (where lands of inheritance are concerned), executors, administrators and assigns of the parties respectively and, if a company, its successors and assigns (per Lord Macnaghten-Tolhurst vs. Associated Portland Cement Manufacturers (1903 AC 417 at p420).”

I would prefer to adopt the broader definition given above of the word “assigns” and hold that the term “successors” used in the relevant Mortgage Bond would also include “assigns”, thus covering the 1<sup>st</sup> Respondent to the present application”

The learned President’s Counsel who represented the Appellant before us, whilst relying on section 68 (1) (2) of the Land Development Ordinance had further argued that both the spouse and the nominee had failed to succeed to the land held by such permit holder and had also failed to obtain a permit under section 84 (1) and (2) of the said Ordinance and therefore not entitled to succeed to the land held by the original permit holder.

However when going through the questions of law under which this court had granted leave, I see no relevance in the said argument to the questions before this court but as observed by me the said argument does not hold water, for the reason that the original Plaintiff was before the District Court seeking declaration of title and possession with regard to the land in question by virtue of a permit issued under the provisions of the Land Development Ordinance at the time of his death. The right acquired by the deceased Plaintiff, his spouse and the nominee under the said permit was explained before court by the official witnesses summoned before court.

When considering the matters considered above, I answer the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> questions of law raised on behalf of the 5<sup>th</sup> Defendant-Respondent-Appellant in negative and dismiss this appeal with costs.

Appeal dismissed with costs.

**Judge of the Supreme Court**

**Hon. Justice Buwaneka Aluwihare PC**

**I agree,**

**Judge of the Supreme Court**

**Hon. Justice Murdu N.B. Fernando PC**

**I agree,**

**Judge of the Supreme Court**