

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

In the matter of an application for special leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka..

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,
Colombo 4

Plaintiff

Vs.

SC Spl LA No. 198/2011
C.A 624/2001 (F)
D.C. Colombo Case No. 17515/L

1. Francis Rajeev Perera
2. Remy Alfred Perera
3. Reginold Perera
4. Mary Violet Perera
(deceased)
- 4(a) Princy Priyadarshanie
5. Henry Leonard Perera,

All at No. 1600, Cotta Road,
Colombo 08.

Defendants

And between

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,

Colombo 4

Plaintiff-Appellant

Vs

1. Francis Rajeev Perera
(Deceased)
- 1(a) Weerasinghe Arachchige
Amarawathie,
2. Remy Alfred Perera
(Deceased)
- 2(a) Karunawathie Ranasinghe
3. Reginold Perera
(Deceased)
- 3(a) M.W. Dharmawathie
4. Mary Violet Perera
(Deceased)
- 4(a) Princy Priyadarshanie
5. Henry Leonard Perera,
(Deceased)
- 5(a) Bopitiya Gamage Kapila
Dilhan Perera,

All at No. 1600, Cotta Road,
Colombo 08.

Defendant-Respondents

And Now Between

- 1(a) Weerasinghe Arachchige
Amarawathie,

2(a) Karunawathie Ranasinghe

3(a) M.W. Dharmawathie

4(a) Princy Priyadarshanie

5. Henry Leonard Perera

All at No. 1600, Cotta Road,
Colombo 08.

Defendant-Respondent-Petitioners

Vs.

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,
Colombo 4 .

Plaintiff-Appellant-Respondent

Before : Marsoof, PC, J
Dep, PC J
Sisira J. de Abrew J.

Counsel : Wijeyadasa Rajapakse, PC, with Gamini
Hettiarachchi for the Defendant-Respondent-
Petitioners

Gamini Marapana, PC, with Kirthi Sri
Gunawardana and Navin Marapana for the
Plaintiff-Appellant-Respondent.

Argued on : 13-10- 2014

Decided on : 10-12-2014

Priyasath Dep, PC, J

This Special Leave to Appeal Application was filed by the 1-5th Defendant-Respondent-Petitioners on 14th November 2011 against the judgment of the Court of Appeal dated. 3rd October 2011. It was disclosed that the 5th Defendant Henry Leonard Perera had died in 2007 when the appeal was pending in the Court of Appeal. He was substituted in the Court of Appeal. The Caption to the Special Leave to Appeal Application included the name of the deceased as the 5th Defendant –Respondent –Petitioner. This defect was subsequently detected and the Petitioners filed an amended petition on 23.01.2013 by amending the caption by including the name of Bopitiyagamage Kapila Dilhan Perera as 5A Substituted- Defendant-Respondent-Petitioner. Attorney-at-law for the Plaintiff-Appellant-Respondent filed a statement of objections and moved to dismiss the original petition and also the amended petition on following grounds:

- a) Original petition had cited a dead person as a petitioner rendering the petition a nullity and for that reason defect is not curable.
- b) The Petitioners had failed to obtain the permission of court to amend the petition.
- c) Although the court had directed the Petitioners to serve the amended petition to the Respondent through the registry, it was not complied with.
- d) In the motion filed by Defendant-Respondent Petitioners there is no reference to the proposed amendment.
- e) The amended petition filed on 23rd January 2013 more than one year after the date of filing of Petition dated 14th November 2011 and there is an inordinate delay.

Both parties filed written submissions regarding the preliminary objections raised by the Plaintiff-Appellant-Respondent. The Petitioners admitted that there was a mistake which is a bona fide mistake and submitted that it did not cause prejudice to the Respondent. Petitioners submit that though 5th Defendant-Respondent was substituted in the Court of Appeal, the Court of Appeal in its judgment due to inadvertence had included the name of the 5th Defendant who is dead. As the appeal is against the said judgment the Petitioners had adopted the same caption.

The Respondent's main contention is that the petition is bad in law for citing a dead person as a party and for that reason the application should be dismissed. The learned President counsel appearing for the Plaintiff-Appellant-Respondent had cited several decisions of this court in support of his argument.

In SC. SPL. LA. No. 39/2010, (Supreme Court Minutes dated 14.05.2010) then, Chief Justice J.A.N. de Silva (Sripavan J. and Ekanayake J. agreeing) dismissed the application upholding a preliminary objection that the application is defective for the reason that a dead person has been made a party.

In *Mariam Bee Bee vs. Seyed Mohamed* (68 NLR 36) it was held that 'A partition decree which allots a share to a party, but which is entered without knowledge of the death of that party is a nullity'

In *Bastian Vs. Andiris* (14 NLR 437) it was held that 'A fiscal transfer in the name of the purchaser after his death passes no title'

In *Illangakoon Mudiyanseelage Gnanathileke Illangakoon Vs. Anula Kumarihamy* S.C.H.C.L.A. 277/11, (SC Minutes of 21-012013,) Sripavan J (Hettige P.C. J. and Dep P.C.J. agreeing) upheld the preliminary objection and dismissed the Plaintiff's leave to appeal application for noncompliance with Rule 28 (2) of the Supreme Court Rules of 1990. In that case it was held that the Plaintiff has failed to set out the full title in the application which includes all the persons cited as parties in the proceedings below.

It is settled law that a party seeking relief and praying for a judgment should include all parties that will be affected by the judgment as Defendants. The question is whether this applies only to Petitioners or Plaintiffs. The learned President's Counsel for the Respondent argue that this will apply to both parties and especially when appealing against a judgment or Order the parties cited in the Court below should be included in the Caption. I agree with the submissions of the learned President's Counsel for the Respondent.

The learned President's Counsel for the Plaintiff-Appellant –Respondent, in addition to the cases cited above, in support of his argument cited the cases of *Munasinghe and another Vs. Mohomad Jabeer Nawaz Karim* (1990 2 SLR page 163) *Abeyasinghe v Abeysekera* (1995 2SLR 104) and *Waduganathan Chettiar v Sena Abdul Casim* (55NLR 184))

The learned President's Counsel for the Petitioners submitted that in the Court of Appeal, the 5th Defendant-Appellant who is dead was substituted and the caption was amended. However in the judgment of the Court of Appeal the original Defendant –Respondent was cited as the 5th Defendant-Respondent due to inadvertence or a mistake on the part of the Court. The same mistake was reflected in the caption to the petition due to the reason that the names were taken from the Court of Appeal judgment.

According to the Court of Appeal judgment, the judgment is against defendants respondents including a person who is dead. None of the counsel appearing for the respective parties submitted that the judgment is a nullity. This may be due to the fact that the substitution was duly effected in the Court of Appeal and the error was due to the fault of the Court.

In *Sivapathlingam vs. Sivasubramaniam* (1990) (1) SLR 378 following a long line of authorities held that:-

‘ A court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a court of original jurisdiction as well as by a superior court’.

The decision in *Gunasena vs. Bandarathileke* 2000 (1) SLR 293 followed the decision in *Sivapathlingam vs. Subramaniam* cited above.

In the case before us the initial mistake was done by the Court of Appeal by including in the judgment the name of the 5th Defendant Respondent who is dead. Petitioners had followed the same caption in the Application. I am of the view that the remaining Petitioners should not be non suited on account of this mistake. Therefore I overrule the preliminary objection and permit the remaining Defendant – Respondent Petitioners to proceed with this application.

The Plaintiff- Appellant –Respondents objected to the Court accepting the amended petition which included the substituted 5th Defendant-Appellant. The application to amend the petition was filed more than one year after the filing of the Petition and without indicating the nature of the proposed amendment and without notice to the Respondent in spite of clear directions given by this Court to issue notice on the Respondents. The Learned President’s Counsel for the Plaintiff- Appellant-Respondent submitted that the Application to amend the Petition was made one year after the filing of the original petition and long after the appealable period has lapsed and for that reason the court should not exercise its discretion and allow the application.

The question that arises in this case is when the Court of Appeal by mistake or due to inadvertence included a deceased party in the caption, could a Petitioners on their own without following the same Caption rectify the mistake. The proper course of action appears to be that the Petitioner should have moved the Court of Appeal to rectify the error in the first instance or use the same caption and seek permission of this court to substitute or to delete the name of the deceased person and include the substituted party. The Petitioners belatedly followed the second course to amend the caption by adding the substituted 5th Defendant-Respondent-Petitioner.

The learned President ‘s Counsel for the Plaintiff-Appellant -Respondent in support of his argument cited the case of *Waduganathan Chettiar v Sena Abdul Casim* (54 NLR 185) where it was held that:-

‘a court will refuse to allow a plaint to be amended so as to include a new cause of action if such amendment, by its relation back to the original date of the plaint is prejudicial to a plea of prescription which may be raised by the defendant in respect of the new cause of action.’

I find that the application to amend the caption was made belatedly without following the proper procedure. This is not an appropriate case for this court to exercise its discretion and accept the amended petition. I uphold the objection and reject amended petition which included the name of the 5th substituted Defendant –Responded –Petitioner .

However In view of the special circumstances of this case, this court exercising its inherent powers deletes the name of Henry Leonard Perera the 5th Defendant since deceased from the names of Defendant-Respondent-Petitioners included in the Petition. The Application dated 14th November 2011 to be fixed for support on a date agreed by the parties and subject to the convenience of this Court.

No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court