

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

In the matter of a Leave to Appeal application in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 as amended by Act No.54 of 2006.

In the matter of Testamentary Estate of Kanapathi Pillai Kandiah Pillai of No. 79, Halpe Mawatha, Kandana.

SC APPEAL NO.142/2018
SC (H.C.C.A./L.A No.525/2016)

H.C. Civil Appeal No.
WP/HCCA/GAM/08/2013.

Kandiahpillai Shanmuganathan
(Deceased) of 'Guildford', Halpe
Mawatha,
Kandana

PETITIONER

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 06.

Presently at No.24, St. Augustine's
Avenue, Wembley, Middlesex,
United Kingdom.

SUBSTITUTED PETITIONER

Vs

1. Kandiahpillai Vythilingam,
No. 23, Rajasthan,
Halpe Mawatha,
Kandana.

2. Kandiahpillai Sivasubramaniam,
Kandana.
3. Kandiahpillai Muthurajah,
Karainagar.
4. Kandiahpillai Thambiyah alias
Kandiahpillai Thangarajah,
Karaigar.
- 4a. Kandiahpillai Muthurajah,
Karainagar.
5. Kandiahpillai Thanaluxmi,
Karainagar.
6. Kandiahpillai Punithawathi,
Karainagar.
7. Kandiahpillai Sundarambal,
Karainagar.
8. Nesaratnam.(Deceased)
(widow of Kanapathipillai
Kandiahpillai),
Kandana
9. Velupillai Aivapatham,
Hunupitiya,
Wattala.
10. Velupillai Paramasothi,
Prince Street,
Colombo.
11. Nallamma Vartharajah.
Kandana.

12. Velupillai Nadarajah,
Dik-Oya.

RESPONDENTS

AND

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 6.
Presently at No.24, St. Augustine's
Avenue, Wembley, Middlesex,
United Kingdom.

**SUBSTITUTED PETITIONER –
PETITIONER**

-VS-

1. Kandiahpillai Vythilingam,
No. 23, Rajasthan,
Halpe Mawatha,
Kandana.
2. Kandiahpillai Sivasubramaniam,
Kandana.
3. Kandiahpillai Muthurajah,
(should read as Kandiahpillai
Thambiyah) alias
Kandiahpillai Thangarajah,
Karainagar.
4. Kandiahpillai Thambiyah alias
Kandiahpillai Thangarajah,
Karaigar.
- 4a. Kandiahpillai Muthurajah,
Karainagar.

5. Kandiahpillai Thanaluxmi,
Karainagar.
6. Kandiahpillai Punithawathi,
Karainagar.
7. Kandiahpillai Sundarambal,
Karainagar.
8. Nesaratnam (Deceased).
Kandana.
9. Velupillai Aivapatham,
Hunupitiya,
Wattala.
10. Velupillai Paramasothi,
Queen Street,
Colombo.
11. Nallamma Vartharajah.
Kandana.
12. Velupillai Nadarajah,
Dik-Oya.

RESPONDENTS- RESPONDENTS

AND NOW BETWEEN,

Velupillai Nadarajah,
Formerly, Dik-Oya and presently at
No.186/14, Karunathar Lane, Point
Pedro Road,
Jaffna.

**12TH RESPONDENT-RESPONDENT-
APPELLANT**

-VS-

Joseph Sri Rogers Shanmuganathan,
No.13 1/1, 55th Lane, Wellawatte,
Colombo 6.

Presently at No.24, St. Augustine's
Avenue, Wembley, Middlesex,
United Kingdom.

SUBSTITUTED PETITIONER-
PETITIONER- RESPONDENT

1. Kandiahpillai Vythilingam
(Deceased),
No. 23, Rajasthan,
Halpe Mawatha,
Kandana.
2. Kandiahpillai Sivasubramaniam
(Deceased),
Kandana.
3. Kandiahpillai Muthurajah,
Now at No.20A, 3/1, Station
Road, Colombo 06.
4. Kandiahpillai Thambiyah alias
Kandiahpillai Thangarajah,
Karaigar.
- 4a. Kandiahpillai Muthurajah,
Now at No.20A, 3/1, Station
Road, Colombo 06.
5. Kandiahpillai Thanaluxmi,
Now at No.26/9,

Karuwapulam Lane,
Kokuvil.

6. Kandiahpillai Punithawathi,
Neelippanthanai, Karainagar.
7. Kandiahpillai Sundarambal,
Neelippanthanai, Karainagar.
8. Nesaratnam (Deceased).
Kandana.
9. Velupillai Aivapatham,
Now at No.20A, 3/1, Station
Road,
Colombo 06.
10. Velupillai Paramasothi
(deceased),
Queen Street,
Colombo.
11. Nallamma Vartharajah .
(deceased)
Kandana.

RESPONDENTS- RESPONDENTS-
RESPONDENTS

BEFORE : **BUWANEKA ALUWIHARE, PC, J.**
VIJITH K. MALALGODA, PC, J. AND
S. THURAIRAJA, PC, J.

COUNSEL : N.R. Sivendran with D. Jayasuriya and A. Ranasinghe for the 12th
Defendant-Respondent-Appellant.

Dr. S.F.A. Cooray for the Substituted Petitioner-Petitioner – Respondent.

C. Hewamanngge for the 3rd Respondent-Respondent-Respondent.

M.A. Sumanthiran, PC, with K. Pirabakaran for the 5th -7th Respondent-Respondent- Respondent.

ARGUED ON : 29th April 2019.

WRITTEN SUBMISSIONS: Substituted Petitioner-Petitioner – Respondent on 08th October, 2018.

12th Defendant-Respondent-Appellant on 9th October, 2018.

DECIDED ON : 11th September 2019.

S. THURAIRAJA, PC, J.

The Appellant preferred this against the Judgment of the High Court of the Western Province holden in Gampaha (hereinafter referred to as the “High Court”) in a Testamentary Case bearing No. WP/HCCA/GAM/08/2013. This judgment will be confined to the issues in appeal.

Velupillai Nadarajah is the 12th Respondent- Respondent-Appellant, Velupillai Nadarajah. He had obtained letter of Administration at the Testamentary Case bearing No. 4356/T in the District Court of Negombo and filed the list of Inventory. Parties concerned had disputed to the same and raised their objections. The District Court had ordered on 6/10/1998 and all the parties agreed to dispose this matter on written submissions and the same had being stated at the journal entry. Since, it is directly involved with the question of appeal it is reproduced below for easy reference.

”එබැවින් විමසීමකින් තොරව පාර්ශවකරුවන්ට ලිඛිත දේශනා ගොනු කරන ලෙසටත් එලෙස පාර්ශවකරුවන් ඉදිරිපත් කරන ලිඛිත දේශනා මත නියෝගය දීමට පාර්ශවකරුවන් එකඟ වෙයි.

ඒ අනුව පාර්ශවකරුවන්ට ලිඛිත දේශනා ගොනු කිරීමට අවවාද කරමි.

ලිඛිත දේශනා-1998.10.06 ”

(Reproduced of journal entry dated 14th August 1998)

(Emphasis added)

Subsequently, Kandiahpillai Shanmuganathan, the original petitioner had died and his son, Joseph Sri Rogers Shanmuganathan substituted in the said testamentary action. He submitted to Court that, there are disputes regarding the inventory. Therefore, he made an application to re-inquire the matter and to submit oral evidence. The 12th Respondent- Respondent – Appellant objected and by order dated 1/3/2013 Learned District Judge decided not to allow the fresh submissions.

Being unsatisfied with the said decision Substituted Petitioner-Petitioner-Respondent appealed to the Provincial High Court of Gampaha and order dated 21/09/2016 the Learned Judges of the Civil Appellate Court allowed the appeal and dismissed the order of the District Judge and allowed the Substituted Petitioner-Petitioner-Respondent to lead oral and/documentary submissions.

Being aggrieved with the said order of the Provincial High Court 12th Respondent-Respondent – Appellant preferred this appeal and leave granted on the following questions of law set out in paragraph 76 (a) and (c) of the Petition dated 28th October 2016.

(a) Have their Lordship of the Provincial Civil Appellate High Court of the Western Province Holden in Gampaha erred in law when they failed to appreciate that the Substituted Petitioner-Petitioner-Respondent's father the original petitioner having accepted that no oral evidence is required

with regard to the inquiry into the determination of the Inventory, Substituted Petitioner-Petitioner- Respondent was not thereafter entitled to take a different stand;

- (c) *Have their Lordships of the Provincial Civil Appellate High Court of the Western Province Holden in Gampaha erred in law when they failed to appreciate that the Substituted Petitioner-Petitioner- Respondent is not entitled to deny and is estopped in law from taking a contrary and/or inconsistent position to that of the Original Petitioner to whom he succeeded.* (Sic erat scriptum)

Considering the aforementioned questions of law, this Court has to decide whether a substituted party in an action can deny the acceptance of the original party in a court of law. Further, is the substituted party estopped from taking a contrary or inconsistent position to that of the original party to the action?

In terms of Section 395 of the Civil Procedure Code Act reads as follows:

"In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action."

In terms of Section 395, on the death of a sole plaintiff, the legal representative may be substituted by the Court on his application, if the right to sue survives. It is observed that, the Substituted Petitioner- Petitioner- Respondent substituted in the name of the original petitioner namely, Kandiahpillai Shanmuganathan.

It is my considered view that, the parties substituted will get the same rights, privileges and responsibilities as the original party. This is subject to the provisions of

the respective law as stated above. Further, I am of the view that, when the original party agreed to certain arrangements before the Court, the substituted party is estopped and bound by the said arrangements. Legal representative must continue litigation on the cause of action sued by the deceased.

I find support for this view in Sarkar's Law of Civil Procedure 8th edition volume 2 at page, 1148, where the following observations have been made on the Indian Order XXII Rule 2 of which the second part is identical with ours (S. 395):

***"Pleas available to a Legal Representative-** The legal representative can only prosecute the cause of action as originally framed; similarly a defendant cannot raise any defence which he could not have raised against the deceased plaintiff himself [Shamchand v. Bhyaram, 22 C 92; Subbaraya v. Manicka, 19 M 345; Md Naindu v. Ummanakani, A 1930 M 593]. If the original plaintiff did not raise the objection regarding the pecuniary jurisdiction before the trial court at any stage, his legal representatives cannot raise that question for the first time before the appellate court [Shioprasad v. Smt. Mohanabai, A 1989 Bom 349, 352].*

Legal representative has merely right to continue the suit and he cannot make any claim to which the original plaintiff was not entitled [Gurdial Singh v. Gurdev Singh, AIR 1991 P & H 240, 241].

(Emphasis added)

Gurdial Singh v. Gurdev Singh, AIR 1991 P H 240, (1992) 101 PLR 111, it was held that,

"There is no quarrel with the proposition that legal representative has merely right to continue the suit and he cannot make any claim to which the original plaintiff was not entitled to..."

In these circumstances, I am of the view that the order made by the District Court on 1/3/2013 is correct. Accordingly, I allow the appeal and set aside the order of the Learned High Court Judge dated 21/09/2016 and direct the District Court to proceed as per the order dated 1/3/2013.

It is also observed that, this case was instituted in 1966 which is more than 53 years ago hence, I further direct the Learned Judge of the District Court to expeditiously conclude and the parties are directed to cooperate with the Learned District Judge to conclude this case as earliest as possible.

Appeal allowed.

JUDGE OF THE SUPREME COURT

BUWANEKA ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

VIJITH K. MALALGODA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT