

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

In an application for Leave to Appeal in terms of section 5 (c) (1) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/HCCA/LA/No. 351/2022

HC/CA (Kegalle) No. SP/HCCA/KEG/68/2020(F)

DC Kegalle Case No. 27490/P

Soma Weerasinghe

1/64, Polgahawela Road, Polgahawela.

PLAINTIFF

Vs.

1. Leela Edirisinghe
1/64, Polgahawela Road, Polgahawela.
2. Karuna Edirisinghe
"Somi Kalum", Egoda Kuleepitiya,
Polgahawela.
3. Nelundeniyalage Godwin Samarasinghe
Uraulla, Ambanpitiya.
4. Nelundeniyalage Kamalawathie
Kaduradeniya, Gepalagedara.
5. Nelundeniyalage Lesli Amarasinghe

(Deceased)

Galigamuwa Town, Ambanpitiya,
Suwashakthigama.

6. Nelundeniyalage Nandawathie
Galigamuwa Town, Suwashakthigama
Ambanpitiya,
7. Nelundeniyalage Samarasinghe
Galigamuwa Town, Ambanpitiya.
8. Nelundeniyalage Chandra Padmini
Galigamuwa Town, Ambanpitiya,
Suwashakthigama.
9. Nelundeniyalage Pushpa Padmini,
Galigamuwa Town, Labugala,
Dammala.
10. Nelundeniyalage Kusuma Weerasinghe
Galigamuwa Town, Labugala,
Dammala.
11. Nelundeniyalage Amaris
853/3, Ambanpitiya, Uraulla.
12. Alankarage Somadasa alias
Aththanayakalage Dambullawatte
Sunil Somadasa
Galigamuwa Town, Ambanpitiya,
Weralugolla.
13. Nelundeniyalage Yasawathie Dissanayake
Makura, Abepussa.

DEFENDANTS

AND THEN BETWEEN

1. Nelundeniyalage Godwin Samarasinghe
Uraulla, Ambanpitiya.
2. Nelundeniyalage Kamalawathie
Kaduradeniya, Gepalagedara.
3. Nelundeniyalage Lesli Amarasinghe
(deceased)
Galigamuwa Town, Abanpitiya,
Suwashakthigama.
4. Nelundeniyalage Chandra Padmini
Galigamuwa Town, Abanpitiya,
Suwashakthigama.
5. Nelundeniyalage Pushpa Padmini
Galigamuwa Town, Labugala,
Dammala.
6. Nelundeniyalage Kusuma Weerasinghe
Galigamuwa Town, Labugala,
Dammala.
7. Nelundeniyalage Amaris
853/3, Ambanpitiya, Uraulla.
8. Alankarage Somadasa alias
Aththanayakalage Dambullawatte Sunil
Somadasa
Galigamuwa Town, Ambanpitiya,
Weralugolla

9. Nelundeniyalage Yasawathi Dissanyake
Makoora, Ambeypussa.

**3rd, 4th, 5th and 8th to 13th DEFENDANT-
APPELLANTS**

Vs.

Soma Weerasinghe
1/64, Polgahawela Road, Polgahawela.

PLAINTIFF-RESPONDENT

1. Leela Edirisinghe
1/64,
Polgahawela Road, Polgahawela.
2. Karuna Edirisinghe
"Somi Kalum", Egoda Kuleepitiya,
Polgahawela.
3. Nelundeniyalage Nandawathie
Galigamuwa Town, Suwashakthigama
Ambanpitiya.
4. Nelundeniyalage Samarasinghe
Galigamuwa Town, Ambanpitiya.

**1st, 2nd, 6th and 7th DEFENDANT-
RESPONDENTS**

AND NOW BETWEEN

1. Nelundeniyalage Godwin Samarasinghe

Uraulla, Ambanpitiya.

**3RD DEFENDANT-APPELLANT-
PETITIONER**

Vs.

Soma Weerasinghe

1/64, Polgahawela Road, Polgahawela.

PLAINTIFF-RESPONDENT-RESPONDENT

1. Nelundeniyalage Kamalawathie
Kaduradeniya, Gepala Gedara.
2. Nelundeniyalage Lesly Samarasinghe
(deceased)
Galigamuwa Town, Ambanpitiya,
Suwashakthigama.
3. Nelundeniyalage Chandra Padmini
Galigamuwa Town, Abanpitiya,
Suwashakthigama.
4. Nelundeniyalage Pushpa Padmini
Galigamuwa Town, Labugala,
Dammala.
5. Nelundeniyalage Kusuma Weerasinghe
Galigamuwa Town, Labugala,
Dammala.
6. Nelundeniyalage Amaris
853/3, Ambanpitiya, Uraulla.

**4th, 5th and 8th to 11th DEFENDANT-
APPELLANT-RESPONDENTS**

1. Leela Edirisinghe
1/64, Polgahawela Road, Polgahawela.
2. Karuna Edirisinghe
"Somi Kalum", Egoda Kuleepitiya,
Polgahawela.
6. Nelundeniyalage Nandawathie
Galigamuwa Town, Abanpitiya,
Suwashakthigama.
7. Nelundeniyalage Samarasinghe
Galigamuwa Town, Ambanpitiya.

**1st, 2nd, 6th and 7th DEFENDANT-
RESPONDENT-RESPONDENTS**

BEFORE : **P. PADMAN SURASENA, J**
E. A. G. R. AMARASEKARA, J &
KUMUDINI WICKREMASINGHE, J

COUNSEL : Chrishmal Warnasuriya with Dushantha Kularatne and
G.A.D. Ginigaddara and M. Fernando instructed by
M.I.M. Iynullah for the 3rd Defendant-Appellant-
Petitioner.

Ms. Sudarshani Cooray for the Plaintiff-Respondent-
Respondent.

Akila Aluthwatte for the 2nd Defendant-Respondent-
Respondent.

ARGUED &
DECIDED ON : 30th January 2024

P. PADMAN SURASENA, J.

Court heard the submission of the learned Counsel for the 3rd Defendant-Appellant-Petitioner, the submission of the learned Counsel for the Plaintiff-Respondent-Respondent and also the submission of the learned Counsel for the 2nd Defendant-Respondent-Respondents.

Having considered the submissions, Court decided to grant Leave to Appeal in respect of the questions of law set out in paragraphs **11 (h)** and **11 (i)** of the Petition dated 22-11-2022. The said questions of law can be reproduced as follows:

Whether the High Court of Civil Appeal, erred by concluding that the Notice of Appeal is defective simply because one of the Appellants named therein is deceased?

Can the appeal be maintained by the other appellants when the name of one Appellant, who is deceased, has been mentioned in the caption of the Petition of Appeal and the Notice of Appeal?

With the concurrence of the learned Counsel for all the parties, Court decided to hear and determine the instant Appeal forthwith in terms of Rule 16 of the Supreme Court Rules. Submissions of Counsel were heard and the argument was concluded.

Being aggrieved by the Judgment of the District Court, the 3rd Defendant of this case, together with certain other Defendants (the 4th, 5th and 8th to 13th Defendants), have appealed to the Provincial High Court of Civil Appeals. When that Appeal came up before the Provincial High Court of Civil Appeals, it was revealed that the 5th Defendant had passed away long prior to the Judgment being delivered in the District Court and no steps had been taken to effect any suitable substitution with regard to the death of the 5th Defendant. It was on that basis that the learned Counsel for the 1st and 2nd Defendants had taken up a preliminary objection against the maintainability of that Appeal before the Provincial High Court of Civil Appeals.

Having considered the arguments, the learned Judges of the Provincial High Court of Civil Appeals by their Judgment dated 13-10-2022, had upheld the said preliminary objection and proceeded to dismiss the Appeal of the 3rd, 4th, 5th and 8th to 13th Defendants with costs.

We observe that the provision of law in this regard is clear in Section 81 (9) of the Partition Act which is as follows;

"Notwithstanding that a party or person has failed to file a memorandum under the provisions of this Section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action."

Thus, a person who has failed to file a memorandum under the provisions of this Section is also bound by any Judgment or order made by Court in such circumstances.

We also observe that Section 759 (2) of the Civil Procedure Code has empowered the Appellate Court to grant relief to the party in such situation where the Respondent has not been materially prejudiced. The said provision of law is as follows:

"In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just."

The learned Counsel for the 2nd Defendant and the learned Counsel for the Plaintiff were not able to counter this argument with any acceptable provision of law. This is because the above provision of law is clear in its meaning, requiring no more clarifications. In these circumstances, we proceed to answer the questions of law in respect of which we have granted Leave to Appeal as follows:

The High Court of Civil Appeal has erred in dismissing the Petition of Appeal of the 3rd, 4th, 5th and 8th to 13th Defendants as it had disregarded the provisions in Section 81 (9) of the Partition Act and Section 759 (2) of the Civil Procedure Code in coming to the said conclusion.

In view of the above conclusion, I would not proceed to answer the second question of law because answering the first question of law would be sufficient for the disposal of this Appeal.

In those circumstances, the dismissal of the aforesaid Appeal by the Provincial High Court of Civil Appeals is not justifiable.

For the aforesaid reasons, we proceed to set aside the order dated 13-10-2022, pronounced by the Provincial High Court of Civil Appeals. We direct the Provincial High Court of Civil Appeals to proceed to fix this case for argument; thereafter consider the merits of the case and then come to a final conclusion according to law.

The Registrar is directed to send the copy of this Judgment to the Provincial High Court of Civil Appeals ***forthwith.***

JUDGE OF THE SUPREME COURT

E. A. G. R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

LB/-