

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

Hettige Don Thilakaratne of  
Dodamulla, Galapatha.

**Plaintiff**

**Vs.**

SC/HCCA/LA/119/2015  
PHC Appeal NO;  
WP/HCCA/KT/4/2005(F)  
D.C Kalutara Case No. 6377/P

1. Kumarapattiyage Don Allis Pieris of  
Panapitiya, Waskaduwa
2. Bamunuge Premawathie
3. Amarathungage Don Siriwardena
4. Kahawalage Nandawathie
5. Amarathungage Don Lionel
6. Hettige Don Allis Singho  
All of,  
Dodamulla, Galapatha.
7. Ariyapala Wilbert Amarathunga of  
Paraduwa, Galapatha.
8. Amarathungage Dona Pyaseeli
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddhadasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa
13. Amarathungage Don Gamini
14. Amarathungage Dona Susila Khanthi
15. Amarathungage Dona Jayanthi
16. Hettige Don Lilson
17. Amarathungage Dona Masilin Nona
18. Amarathungage Dona Karunawathie
19. Amarathungage Dona Wimalawathie
20. Amarathungage Don Carolis

21. Mallika Amarathunga
22. Lambert Amarathunga
23. Leelaratne Amarathunga
24. Pattiyawatage Henry Perera  
All of Dodamulla, Galapatha.

**Defendants**

**AND BETWEEN**

Hettige Don Thilakaratne of  
Dodamulla, Galapatha.

**Plaintiff – Appellant**

**Vs.**

1. Kumara Pattiyage Don Allis Pieris of  
Panapitiya, Waskaduwa. (Deceased)
- 1A. Kumarapattige Hemasiri Pieris of,  
“Sunil Paya”, Panapitiya, Waskaduwa  
And others,
2. Bamunuge Premawathie
3. Amarathungage Don Siriwardena
4. Kahawalage Nandawathie (Deceased)
- 4A & 5. Amarathungage Don Lionel  
(Deceased)
- 4B & 5A. Gamatige Dona Leelawathie
6. Hettige Don Allis Singho,  
All of Dodamulla, Galapatha.
7. Ariyapala Wilbert Amarathunga of  
Paraduwa, Galapatha (Deceased)
8. Amarathungage Dona Piyaseeli
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddhadasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa
13. Amarathungage Don Gamini
14. Amarathungage Dona Susila Kanthi

15. Amarathungage Dona Jayanthi
16. Hettige Don Lilson
17. Amarathungage Dona Masilin Nona  
(Deceased)
18. Amarathungage Dona Karunawathie
19. Amarathungage Dona Wimalawathie
20. Amarathungage Don Carolis
21. Mallika Amarathunga
22. Lambert Amarathunga
23. Leelaratne Amarathunga
24. Pattiyawatage Henry Perera  
All of Dodamulla, Galapatha.

**Defendant – Respondents**

**AND NOW BETWEEN**

2. Bamunuge Premawathie
4. Kahawalage Nandawathie (Deceased)
- 4A & 5. Amarathungage Don Lionel  
(Deceased)
- 4B & 5A. Gamatige Dona Leelawathie  
Both of Dodamulla, Galapatha.
8. Amarathungage Dona Piyaseeli  
Dodamulla, Galapatha.  
Now at, “Chandanie”,  
Panapitiya, Waskaduwa.
9. Amarathungage Don Karunasena
10. Amarathungage Don Cyril Buddadhasa
11. Amarathungage Don Chandradasa
12. Amarathungage Don Tissa  
All of Dodamulla, Galapatha.
14. Amarathungage Dona Susila Kanthi  
Dodamulla, Galapatha.  
Now at, “Anusha Stores”,  
Panapitiya, Waskaduwa. (Deceased)

14A. Liyana Arachchige Don Noel Ranjith  
No. 893,  
Panapitiya, Waskaduwa.

15. Amarathungage Dona Jayanthi  
Dodamulla, Galapatha.  
Now at, Temple Road,  
Panapitiya, Waskaduwa.

18. Amarathungage Dona Karunawathie

19. Amarathungage Dona Wimalawathie

20. Amarathungage Don Carolis  
All of Dodamulla, Galapatha.

**Defendant – Respondent – Petitioners**

**Vs.**

Hettige Don Thilakaratne of,  
Dodamulla, Galapatha

**Plaintiff – Appellant- Respondent**

3. Amarathungage Don Siriwardena

6. Hettige Don Allis Singho

22. Lambert Amarathunga

23. Leelarathne Amarathunga

24. Pattiyawattage Henry Perera

All of Dodamulla, Galapatha.

**Defendant – Respondent- Respondents**

Before : L. T. B. Dehideniya J,  
S. Thurairaja, PC J,  
E. A. G. R. Amarasekara J

Counsel : J. A. J. Udawatte with Anuradha Pannamperuma and Ganga Wanigarathne for the 2<sup>nd</sup>, 4B, 5A, 8<sup>th</sup> to 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup> to 20<sup>th</sup> Defendant – Respondent – Petitioners.

Athula Perera with Poorni Rupasinghe and Dimithri Wijesinghe for the Plaintiff – Appellant – Respondent.

Argued on : 13.11.2019

Decided on : 21.10.2021

**E A G R Amarasekara, J.**

Plaintiff – Appellant – Respondent (hereinafter sometimes referred to as the Plaintiff) instituted an action in the District Court of Kalutara by plaint dated 27.07.1997 praying for partitioning of the land called “Laulugahawatte Kebella” described in the schedule to the plaint amongst the Plaintiff (1157/2160 shares), 1<sup>st</sup> defendant (90/2160 shares), 2<sup>nd</sup> to 3<sup>rd</sup> defendants (504/2160 shares) and 4<sup>th</sup> to 5<sup>th</sup> defendants (121/2160 shares). Learned District Judge by his judgment dismissed the action filed by the Plaintiff. Being aggrieved, the Plaintiff preferred an appeal to the Civil Appellate High Court and by the judgment dated 12.02.2015, the learned High Court Judges held in favour of the Plaintiff and decided to partition the said land allotting shares to the Plaintiff and the 6<sup>th</sup> Defendant giving them 1208/2160 shares and 71/2160 shares respectively and leaving 881/2160 shares unallotted. The present application before this court is a leave to appeal application filed by the 2<sup>nd</sup>, 4(B)& 5(A), 8<sup>th</sup> to 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup> to 20<sup>th</sup> Defendant – Respondent – Petitioners (hereinafter referred to as the Defendant – Petitioners) aggrieved by the said judgment of the Civil Appellate High Court.

When this matter was taken up for support for leave to appeal before this court on 12.02.2016, learned counsel for the Plaintiff raised a preliminary objection to

the effect that all the parties named in the Civil Appellate High Court are not cited as parties in the leave to appeal application and it is violative of Rule 4 and 28(5) of the Supreme Court Rules 1990. Thus, the parties were directed to file written submissions in this regard within two months from that date. However, it can be seen that the Plaintiff who took up the preliminary objection did not file written submissions within the given time even though the Defendant Petitioners filed their written submissions as per the said direction. Inquiry on the preliminary objection was rescheduled on many occasions due to various reasons and on behalf of the Plaintiff, written submissions have been tendered later on 07.11.2018. It should be noted that in these written submissions filed on behalf of the Plaintiff, the Plaintiff has later taken up the position that the Defendant Petitioners have violated the provisions in Rule 28(2) and 28(5) of the Supreme Court Rules 1990. Thus, it appears that the Plaintiff has taken up the position that the present application is violative of Rule 28(2) for the first time through these written submissions filed after the Defendant Petitioners' written submissions, for which the Defendant Petitioners did not have any opportunity to address the court through their written submissions. This court originally directed to file written submissions and fixed the matter for inquiry on the preliminary objection raised on 12.02.2016 which objections did not contain any objection under Rule 28(2). Nevertheless, parties had the opportunity to make their oral submissions during the inquiry held on 13.11.2019. As the preliminary objections are based on three different supreme court rules, namely Rule 4, 28(2) and 28(5) of the Supreme Court Rules 1990, this court has to consider those Rules and see whether this application is violative of the stipulations made therein by those Rules.

#### **Rule 4**

The aforesaid Rule comes under the Part I A of the Supreme Court Rules made in relation to special leave to appeal applications and the present application is not a special leave to appeal application but a leave to appeal application made against the judgment of the Civil appellate High Court of Kalutara in terms of Section 5C of the High Court of the provinces (Special Provisions) (Amendment Act) no.54 of 2006.

Even though there are certain Rules made under the heading “Leave to Appeal” in the aforementioned Supreme Court Rules from Rule 19 to 27 under Part 1 B, they appear to be the rules relevant to appeals from the Court of Appeal where leave has been granted by the Court of Appeal. Hence the Rules relevant to the appeals from Civil Appellate High Courts or the High Court of the Provinces exercising civil appellate jurisdiction are the Rules that fall under Part 1 C of the said Supreme Court Rules under the topic ‘Other Appeals’. In **L.A. Sudath Rohana and another Vs. Mohamed Cassim Mohamed Zeena and another S.C.H.C.C.A.L.A No.111/2010 (S. C. Minutes of 14.07.2010)**, Dr. Shirani A. Bandaranayake, J. (as she then was) held as follows;

*“Part I of the Supreme Court Rules 1990, refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in section C of Part 1 of the Supreme Court Rules are described in Rule 28(1) which is as follows:*

*‘Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.’*

*The High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and High Court of the Provinces (Special Provisions) (Amendment) Act no. 54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules 1990 thus establishing the fact that section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Court of the Provinces.”*

Even in the case of **Jumburegoda Gamage Lakshman Jinadasa Vs Pilitthu Wasam Gallage Pathma Hemamali and others S.C.H.C.C.A.L.A No. 99/2008 (S.C. Minutes of 8.11.2010)**, this Court re-iterated that an application for leave to appeal from

the judgment of the High Court of the Provinces, would fall within Section C of Part I and not Section A of Part I of the said Supreme Court Rules.<sup>1</sup>

Thus, it is clear that Rule 4 has no relevance to the present application before this Court other than its similarity to Rule 28(5) which Rule will be discussed later on in this order.

### **Rule 28(2) and Rule 28 (5)**

As said before the Plaintiff has raised a preliminary objection through his belated written submissions based on Rule 28(2) found in the Supreme Court Rules 1990. The said Rule 28 (2) reads as follows;

*“Every such appeal shall be upon a petition in that behalf lodged at the Registry by the appellant, containing a plain and concise statement of the facts and the grounds of the objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be typewritten, printed or lithographed on suitable paper, with a margin on the left side, and **shall contain the full title and number of the proceedings in the Court of Appeal or such other Court or tribunal, and full title of the appeal.** Such appeal shall be allotted a number by the Registrar.”*

The objection based on Rule 28(2) is that the full title of the leave to appeal application made to this court is defective.

The aforesaid Rule 28(5) reads as follows;

*“In every such petition of appeal and notice of appeal, **there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal,** and the names and present addresses of the appellant and the respondents shall be set out in full.”*

The objection based on Rule 28(5) is that some of the parties in the lower court who are necessary parties to this appeal were not made Respondents to the present application.

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<sup>1</sup> Also see *Illangakoon Mudiyanseelage Gnanathilaka Illangakoon Vs Anula Kumarihamy S.C.H.C.C.A.LA. 277/11, S.C. Minutes dated 05.04.2013* which refers to these judgments.

The objections based on aforesaid Rules 28(2) and (5) will be considered together as both these objections relates to the constitution of the caption of the present application.

In this regard, now I would consider the nomenclature of the parties in the different parts of the caption of the petition to this application. Page 1-3 of the petition and up to the words "AND BETWEEN" at the beginning of the 4<sup>th</sup> page of the petition contains the first part of the caption which represents the caption of the original court. It contains the name of the Plaintiff in the original court and the names of the 1<sup>st</sup>-24<sup>th</sup> Defendants in the original court. It appears that there is no allegation that there is any error in this part of the caption.

From the words "AND BETWEEN" on the 4<sup>th</sup> page of the petition up to the words "AND NOW BETWEEN" on the 7<sup>th</sup> page of the petition contains the second part of the caption which is apparently included to indicate the caption or the parties in the appeal made to the Civil Appellate High Court Kalutara. In that part the Plaintiff has been named as the Plaintiff Appellant as he was the appellant before the Civil Appellate High Court and that part contains 24 slots to name Defendant Respondents out of whom 4<sup>th</sup> and 5<sup>th</sup> Defendant Respondents appears to be deceased and substituted as 4B and 5A Defendant Respondents. However, 1<sup>st</sup>, 7<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendant Respondents have been named there as deceased Respondents but without naming any substituted parties on behalf of them. (However, after the direction given by this court to file an amended caption after allowing the application to substitute for 14A Defendant Respondent, other than adding 14A Defendant Respondent, the Petitioners have tendered an amended caption adding 1A Defendant Respondent to this second Part of the caption without any order to bring in 1A Defendant Respondent to the caption who was not in the caption in the petition.)

As per the journal entries dated 22.10.2012 and 05.02.2013 in the document marked 'B', it appears that substitution for 7<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> defendants have taken place before the Civil Appellate High Court. Such substitutions are not reflected in the aforesaid second part of the caption to this court. However, when one looks at the Petition of Appeal in the appeal made to the Court of Appeal filed by the Plaintiff, who raises this objection in this court, it can be observed that he himself has not mentioned 1<sup>st</sup>, 7<sup>th</sup>, 16<sup>th</sup>, and 17<sup>th</sup> Defendants as respondents to

the said petition of appeal- vide pages 6 and 7 of the appeal brief of the court below marked as 'A'. As per the endorsement made by the Registrar at the end of 'A' it is certified that it is a true copy of the case record of Kalutara District Court Case No. P/6377 and Kalutara Civil Appeal High Court Case No.4/5. However, this certified case record marked "A" does not contain the written submissions and proxies filed by the parties, minutes made by the judges in the Civil Appellate High Court or the judgment delivered by the Learned High Court Judges. The brief contains three more sets of documents marked 'B', 'C', and 'D'. D is the certified copy of the judgment delivered by the learned High Court Judges. At the end of the document marked as 'C', it is certified that it is a true copy of the written submission filed by the Defendant before the Civil Appellate High Court- (In fact the title to the said written submissions states that it is the submissions for 2<sup>nd</sup> to 5<sup>th</sup> and 8<sup>th</sup> to 20<sup>th</sup> Defendants. However, the notice of appeal filed for that appeal found at page 1 of "A" indicates that 4<sup>th</sup>, 5<sup>th</sup>, 13<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> defendants were dead). At the end of document marked 'B', the registrar has endorsed that it is a true copy of the journal entries annexed to, and the written submissions tendered by the Defendants in the appeal brief no. 4/5(F) when in fact it is the written submissions tendered by the Plaintiff to the Civil Appellate High Court case record. Hence, it appears that the said certifications are inaccurate and there is no certification by a registrar of the Civil Appellate High Court to indicate that the documents found in this brief contains the complete case record of the Civil Appellate High Court. What is available in the brief is some piecemeal certification of different parts of the lower court case records with some inaccuracies as indicated above. In this backdrop, it should be also noted that even though the journal entry dated 2014.04.24 in the set of documents marked 'B' states that an amended caption was tendered by the Plaintiff's attorney-at-law after the substitution for 4A and 5<sup>th</sup> defendants were done on 24.03.2014, the said amended caption cannot be found among the documents tendered to this court. Thus, whether any deficiency found in the aforesaid second part of the caption to this court is a reflection of the errors in the said amended caption tendered by the Plaintiff himself, who raises this objection, or not, cannot be decided at this moment. If it is an error caused due to an error made by the plaintiff in the lower court, he should not be allowed to capitalize on it by raising preliminary objections with regard to the second part of the caption in this court which reflects the caption of the Civil Appellate High Court. There is nothing to show

that the said amended caption tendered by the plaintiff's lawyer in the lower court is the correct one as it is not available. Thus, to hold in favour of the plaintiff in relation to any errors in the said second part of the caption, this court cannot satisfy itself that the correct caption was there before the lower appellate court and the Plaintiff has not contributed to the errors alleged in the second part of the caption. However, a party making an appeal should be vigilant to peruse orders made by the court to substitute and amend the caption.

As already shown above, the Plaintiff has not made 1<sup>st</sup>, 7<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants in the caption to the petition of appeal filed for his appeal to the Appeal Court which was later adjudicated by the Civil Appellate High Court. There is nothing to show that any substitution took place in relation to 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants in the court below except for the 7<sup>th</sup>. Thus, if there is an error in not showing 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants or their substituted parties in the 2<sup>nd</sup> part of the caption in this court, it may be the result of not making them parties by the plaintiff himself to the appeal he made to the appellate court below. The journal entries in 'B' do not indicate that the Plaintiff made any attempt to bring those parties to the Appeal he made except for substituting for the 7<sup>th</sup> Defendant who was not made a party to the caption of the appeal he made to, from the original court decision.

Though, it appears that certain substitutions have been done in relation to the 7<sup>th</sup>, 23<sup>rd</sup> and the 24<sup>th</sup> Defendants as indicated above, as explained above there is no certification to say that the complete record of the appellate court below is available before this court. The amended caption tendered by the Plaintiff on 24.04.2014 and the proxies of the parties as well as the applications for substitution before the court below are not available before this court for its perusal. It is not clear whether the correct caption was tendered by the Plaintiff on that date or not and whether the Defendant Appellants blindly followed the caption filed by the Plaintiff. Since this court cannot be satisfied that the complete case record of the court below is before this court as shown above, this preliminary objection should not be allowed owing to the alleged defects in the second part of the caption in this court as last amended caption in the lower court is not available. Perhaps, even the errors in the second part of the caption by not showing the substitutions done in relation to 7<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants before

the Civil Appellate High Court might have been resulted from the caption filed in the lower court by the Plaintiff.

On the other hand, action filed in the original court was a partition action and the Partition Act was amended by the Act No. 17 of 1997. Section 27 of the said Act replaced the Section 81 of the principal enactment with a new Section 81 which required every party to a partition action to file a memorandum nominating legal representatives. Section 29 of the said amending Act states that every pending partition action on the commencement of the said amending Act, shall, so far as the circumstances permit, be continued and proceeded with final judgment and decree under the provisions of the principal enactment as amended by the said Act, (including the provisions requiring the filing of memoranda nominating legal representatives by parties to the action and others) in the same manner and every respect as if the same had been originally instituted after the date of commencement of this Act. Thus, nominating a legal representative has become a responsibility of the relevant party in new cases as well as pending cases after the said amendment. As per subsections 81(9) and (10) of the Partition Act, failure to file a memorandum and not appointing a legal representative cannot make any judgment, decree, order, sale, partition or a thing done in a partition action invalid. Section 81(12) of the Partition Act states that no proceedings under the partition law shall be postponed or adjourned nor any step in the action be postponed by reason of a death of a party required to file a memorandum. Thus, it is clear that after the said amendment brought in 1997 August, it was the duty of the relevant party to nominate his legal representative and death of a party could not make the proceedings postponed or invalid when there is no nomination. Hence, one can say that, now, the Plaintiff or any other party carrying on with the case is not burdened with taking steps to substitute. In this backdrop, now I prefer to look at the aforesaid second part of the caption again. As said before, the Defendant Petitioners have named the Plaintiff Appellant as he was the appellant in the Civil Appellate High Court and also named all the defendants in the original court as the Defendant Respondents in this second part but 1<sup>st</sup>, 7<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> has been named as deceased parties without substitution. It must be noted that the Plaintiff who raises the preliminary objection had not even mentioned 1<sup>st</sup>, 7<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants as Respondents to his petition of appeal to the Court of Appeal for some reason.

Perhaps, they might have been dead at the time he made the appeal and there were no nominations made as per the amendment. Even the notice of appeal found at page 1 of "A" indicates that they were dead even at the time of filing the notice of appeal in the District Court. Thus, if there is any failure on the part of the Defendant Petitioners with regard to the second part of the caption which is to indicate the full title of the appellate court below, it is that they have failed to name the substituted parties in the Civil Appellate High Court for the 7<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendant Respondents in this second part of the caption, since others, namely 1<sup>st</sup>, 16<sup>th</sup>, 17<sup>th</sup> perhaps the 13<sup>th</sup> defendants were not apparently alive during the appeal and no substitution was done before the court below.

With regard to the 1<sup>st</sup>, 13<sup>th</sup>, 16<sup>th</sup> and the 17<sup>th</sup> Defendant Respondents, to name any substituted parties, it is not established that there were any nominations done by the deceased parties and on the other hand, it is not shown that they or any substituted parties on behalf of them were even made parties to the Appeal made by the Plaintiff to the Civil Appeal High Court. The counsel for the Defendant Petitioners in his written submission states that the same counsel appeared for the 14<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup> Defendants before the Civil Appeal High Court. Even the document marked "C" indicates that it was the written submissions for 2<sup>nd</sup> to 5<sup>th</sup> and 8<sup>th</sup> to 20<sup>th</sup> Defendants (which includes 13<sup>th</sup>, 14<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants), but no proxy tendered in the court below for the said parties is found in the brief and the aforesaid notice of appeal which is not challenged by any party indicates that, out of 2<sup>nd</sup> to 5<sup>th</sup> and 8<sup>th</sup> to 20<sup>th</sup> Defendants, 4<sup>th</sup>, 5<sup>th</sup>, 13<sup>th</sup>, 16<sup>th</sup> and 17<sup>th</sup> were dead at that time. Thus, it is doubtful and cannot be accepted that the 16<sup>th</sup> and 17<sup>th</sup> Defendants were represented by the same counsel before the Court below as stated by the Counsel for the Defendant Petitioners.

Now it is necessary to see whether not naming the substituted Defendant Respondents who were substituted in the Civil Appellate High Court in the places of deceased 7<sup>th</sup>, 23<sup>rd</sup> and the 24<sup>th</sup> Defendant Respondents in the second part of the caption has to be considered fatal to this application. The aforesaid second part of the caption is basically to indicate the parties who were before the Court which heard the appeal from the original Court. Parties made to the present appeal by the Petitioners to this appeal are mentioned in the third part of the caption which starts from the words "AND NOW BETWEEN" on the 7<sup>th</sup> page of the petition to the end of the caption on the 9<sup>th</sup> page of the petition. Hence, notices

need not be served on the names found in the second part of the caption unless they were made parties to the third part of the caption which part shows the Petitioners to this court and the Respondents to this application. If there is any error in this second part, allowing to correct it will not harm or prejudice any party as it is only there to depict the parties to the appeal in the court below. On behalf of the Plaintiff Appellant certain decisions have been cited to state that the failure to set out full title or complying with rule 28(2) and (5) is fatal.<sup>2</sup> However, it appears that those cases refer to situations where a person who should have been a party respondent to an appeal and entitled to receive notices had been omitted to be included in the caption. However, the situation discussed above was with regard to the 2<sup>nd</sup> part of the caption which is there only to indicate parties to the court immediately below in this leave to appeal application, and no notices are expected to be issued under that part.

On the other hand, as shown above, the omission is that the substituted defendant Respondents for the 7<sup>th</sup>, 23<sup>rd</sup>, and 24<sup>th</sup> Defendants as per the substitution done in the Civil Appellate High Court were not named in the second part after naming the 7<sup>th</sup>, 23<sup>rd</sup>, and the 24<sup>th</sup> Defendant Respondents. As per section 81(14) of the Partition Act, a legal representative means a person who represents the estate of the deceased person. Generally, in a partition action shares are given or rights are granted to the original party and if the party is dead, the legal representative gets it not for him/her but on behalf of all the heirs of the deceased or for the person/s entitled under the original deceased party. Thus, since the Defendant Petitioners have named the original deceased party in the 2<sup>nd</sup> part of the caption which is not there for the naming of the Respondents who must be served with notices, one can say that they have sufficiently complied with the rule 28(2) though not perfectly complied with. Since it is an omission that can be cured without any harm to any party and no notice is expected to be issued under that part of the caption, I do not think that this Court should reject the appeal on the omission of not naming the Substituted Defendant Respondents in the second part of the caption as per the substitutions done in the Civil Appellate High Court.

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<sup>2</sup>Illangakoon Mudiyanseelage Gunathillake Illangakoon Vs Anula Kumarihamy SC/HCCA/LA/277/2011, Ibrahim V Nadaraja (1991) 1Sri. L R 131, .

Now it is necessary to consider the preliminary objections with regard to the 3<sup>rd</sup> part of the caption to this appeal which represents the parties to this application, namely the Petitioners and the Respondents. If any party who should be included in this part is omitted from mentioning, it will be a defect in the full title of the application of this court as well as a breach in complying with rule 28(5) mentioned above. As mentioned above, this third part starts at page 7 of the Petition after the words "AND NOW BETWEEN". In this part the Defendant Petitioners have named 2<sup>nd</sup>, 4B & 5A, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> who were the original Defendants and/or Respondents before the Civil Appellate High Court bearing the respective numbers as Defendant Respondents. And this part of the caption indicates that the named Respondents are the Plaintiff who was the appellant in the appeal before Civil Appellate High Court and the 3<sup>rd</sup>, 6<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, and 24<sup>th</sup> Defendants. It must be noted that one Maddage Dona Tilda and Pattiyawatte Nimala Nandanie Perera had been substituted for 23<sup>rd</sup> and 24<sup>th</sup> Defendant Respondents respectively by the Civil Appellate High Court as per the Journal entries dated 22.10.2012 and 05.02.2013. However, while deciding that 23<sup>rd</sup> and 24<sup>th</sup> defendants should be respondents to this appeal, the Defendant Petitioners have omitted to make the relevant substituted Defendant Respondents who were appointed to safeguard the rights of those original Defendant parties to this appeal.

Further, it can be observed that the person substituted for the 7<sup>th</sup> Defendant in the Civil Appellate High Court as per Journal entry dated 22.10.2012, or 1<sup>st</sup>, 13<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, and 21<sup>st</sup> Defendants who were parties before the original court have not been made parties to this appeal. One may say, since 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants were not parties to the petition of appeal to the Civil Appellate High Court and have not been brought in as parties later on either by substitution or otherwise as per the journal entries filed, they need not be Respondents to this appeal since this is an appeal against the judgment of the Civil Appeal High Court. Be that as it may, still, substituted 7<sup>th</sup> defendant, 13<sup>th</sup> and 21<sup>st</sup> Defendants have not been made party Respondents to this appeal. Again, the 13<sup>th</sup> defendant, even though named as a party to the petition of appeal to the Civil Appellate High Court, appears to have been dead even at the time of filing notice of appeal as indicated above. One may say since there was no nomination, there need not be a naming of any substituted party in place of the 13<sup>th</sup> defendant, but still

substituted 7<sup>th</sup> defendant and the 21<sup>st</sup> defendants have not been made respondents to this application. Supreme Court Rule 28(5) makes it clear that the party appellant has to name as respondents all the parties,

- in whose favour the judgment or order complained against was delivered, or
- adversely to whom such appeal is preferred, or
- whose interests may be adversely affected by the success of the appeal.

The Civil Appellate High Court held in favour of the Plaintiff and the 6<sup>th</sup> Defendant allotting them shares and also kept certain number of shares unallotted. The Plaintiff and the 6<sup>th</sup> Defendant have been made parties. As mentioned before, this appeal has been preferred against the Plaintiff, 6<sup>th</sup> Respondent and 23<sup>rd</sup> and 24<sup>th</sup> Respondents but without making the substituted Respondents of the 23<sup>rd</sup> and 24<sup>th</sup> Respondents parties. It must be taken into account that, since this is a partition action, unallotted shares can be claimed in the same action by parties, if their claims fit into or not in conflict with the original ownership or the pedigree approved by the judgment which gave rights to the plaintiff and the 6<sup>th</sup> defendant. In a partition action when a judgment is given allotting shares to some parties it not only decides the rights of those parties to the corpus of the action but also decides the identity of the corpus as well as a pedigree flowing from an original ownership or part of such pedigree as part of a judgment in rem. As such, if there is any party who can tender an application for unallotted shares, his rights also may be affected by the success of this appeal since the prayer in the application is to set aside the judgment of the Civil Appellate High Court. Since the original action was filed as a partition action whatever may be the claim in the original court made by any party, once a decision is given to partition the land with unallotted shares it is always better to make all the parties, who claimed shares in the land, respondents in appeal since they may get a chance to claim rights in unallotted shares without filing a fresh action through the practice developed by our courts.

In this backdrop, I will consider the parties not named as respondents to this appeal in the third part of the caption by the 2<sup>nd</sup>, 4B, 5A, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup>, 14<sup>th</sup>, 15<sup>th</sup> 18<sup>th</sup> 19<sup>th</sup> and 20<sup>th</sup> Defendant Petitioners and whether they are in breach

of rule 28(2) and 28(5) in relation to the full title of the present application as well as rules relating to naming of the Respondents to the present application.

- 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants have not been made Respondents in the third part of the caption which indicates the parties to this appeal by the Defendant Petitioners. However, notice of appeal found at page 1 of the document marked "A" shows that they were dead at the time of filing the notice of appeal by the Plaintiff for his appeal to the Civil Appeal High Court. Even his petition of appeal to the Civil Appellate High Court indicates that they were dead and no substitutions have been done. Documents available in this brief do not indicate that anyone was substituted on behalf of them during the appeal before the Civil Appellate High Court. Thus, the Plaintiff should not be allowed to raise preliminary objections in relation to not making the 1<sup>st</sup>, 16<sup>th</sup>, and 17<sup>th</sup> Defendant Respondents parties to this application when it appears that he himself has not made them parties to his appeal to the court below or when he has not taken steps to substitute for them in the court below. On the other hand, there is no material before this court to show that 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants nominated any legal representatives for them as per the requirements of the Partition Act as amended. As per section 81(9) and (10) of the Partition Act, proceedings cannot be invalidated due to non-appointment of legal representatives when a party failed to file a memorandum of nominees. Even if an application to substitute is made and appointment is made thereon, the legal representative would be bound by the proceedings up to the time of such appointment. Thus, I am not inclined to consider the preliminary objection in relation to not making the 1<sup>st</sup>, 16<sup>th</sup> and 17<sup>th</sup> Defendants party Respondents to this application.
- Substituted 7<sup>th</sup> Defendant has not been made a party Respondent to this case by the Defendant Petitioners. It is true that in the notice of appeal filed by the Plaintiff in the district court, 7<sup>th</sup> Defendant has been described as a deceased party but as explained before and as per the journal entry dated 22.10.2012 found in document marked B, one Rosalin has been substituted in the place of the 7<sup>th</sup> Defendant. Thus, the substituted 7<sup>th</sup> Defendant was a party to the appeal before the Civil Appellate high Court.

As per the case record marked 'A', the 7<sup>th</sup> Defendant had filed a statement of claim disputing the corpus and the plaintiff's rights and praying for a dismissal of the plaintiff's action and partitioning of the land in accordance with his pedigree. He has not appealed against the district court judgment when it dismissed the plaintiff's claim. Proceedings before the District Court does not show that he took part in the trial. Since the Defendant Petitioners pray through this appeal to set aside the judgment of the Civil Appeal High Court, one may argue that the result of this appeal does not affect adversely to this substituted defendant and therefore, it is not necessary to make him a respondent. I am not in total agreement with that argument. It must be observed that the 7<sup>th</sup> Defendant though filed a contesting statement of claim to the plaintiff's claim, he did not contest the plaintiff's case at the trial. In the same manner the substituted 7<sup>th</sup> defendant did not file an appeal against the High Court Judgment. However, he is a person who by a statement of claim asked for shares in the corpus. Thus, he is a party who may be entitled to claim from the unallotted shares without filing a fresh action. Hence, the substituted 7<sup>th</sup> defendant is a party who can be considered as a person whose interests may be adversely affected by the success of this appeal. In my view, not making him a party to this appeal as a Respondent affects the full title of this application as well as is not in compliance with the aforesaid Supreme Court Rule 28(5) because it is for the substituted 7<sup>th</sup> defendant to decide whether he claims from the unallotted shares or ignore his claims.

- 13<sup>th</sup> defendant has not been made a respondent to this appeal by the Defendant Petitioners. However, the aforesaid notice of appeal found at page 1 of the case record marked "A" indicates, by hand writing, that he was dead at the time the notice of appeal was tendered. If he was dead, he cannot be considered as a party before the Civil Appellate High Court for the appeal that was before it as there is no indication of a substitution. If so, what I said with regard to not making 1<sup>st</sup>, 16<sup>th</sup>, and 17<sup>th</sup> Defendants party respondents to this appeal mutatis mutandis applies for not naming the 13<sup>th</sup> Defendant as a respondent. On the other hand, the Plaintiff in his plaint has not given any share to the 13<sup>th</sup> Defendant nor has any other party through their statement of claims. Even the 13<sup>th</sup> Defendant has not

filed a statement of claim indicating that he has any right to the corpus. Thus, there is nothing to think that he may be able to tender a claim on unallotted shares. Hence, I have no material to consider that he may be adversely affected by this appeal. Thus, I am not inclined to consider the preliminary objection in favour of the Plaintiff on the basis of not making the 13<sup>th</sup> Defendant a party Respondent to this appeal.

- 21<sup>st</sup> Defendant has not been named as a Respondent to this appeal. However, it appears that it was the 7<sup>th</sup> Defendant who has revealed the 21<sup>st</sup> Defendant as a person entitled to shares in the land but without indicating her share. The 21<sup>st</sup> Defendant has not filed a statement of claim in the original court claiming her entitlement. Thus, I do not see at this moment that there is sufficient material to say that she is a possible claimant for unallotted shares. Thus, I am unable to consider that the result of this appeal would adversely affect her rights.
- Not making substituted 23<sup>rd</sup> and 24<sup>th</sup> Defendant Respondents to this appeal; The Defendant Petitioners have made the 23<sup>rd</sup> and 24<sup>th</sup> Defendant Respondents to this application but they are dead and substitutions have been done in the Civil Appeal High Court. This shows that the Defendant Petitioners for some reason preferred to file this application against 23<sup>rd</sup> and 24<sup>th</sup> defendants making them Respondents. Rule 28(5) allows all parties adversely to whom such appeal is preferred to be made Respondents to the appeal. After filing the appeal, now the Defendant Petitioners should not be allowed to say that they did not intend to prefer this appeal against them. In such a situation, not making the substituted 23<sup>rd</sup> and 24<sup>th</sup> Defendants parties to this application can be considered as non-compliance of Rule 28(5) since it is the Defendant Petitioners themselves who preferred to file this application adversely to them.

In my view, Section 759 (2) of the Civil Procedure Code has no application to the present issue as this is not an appeal from the original court to the first appellate court and this application, as said before, is subject to the stipulations made by Supreme Court Rule 28.

For the foregoing reasons, I am of the view that the Defendant Petitioners are in breach of Rule 28(2) and (5), since they did not make the substituted defendants for 7<sup>th</sup>, 23<sup>rd</sup>, and 24<sup>th</sup> Defendants party respondents to this application. As per Rule 28(3), respondents are the parties who are entitled to receive notices. Until notices are served, a court may not have jurisdiction to adjudicate over such parties. Thus, not naming substituted 7<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendants as respondents have to be considered as fatal to this application.

Thus, while upholding the preliminary objection with regard to not making the substituted 7<sup>th</sup>, 23<sup>rd</sup> and 24<sup>th</sup> Defendant party respondents, I dismiss this leave to appeal application.

No Costs.

Judge of the Supreme Court.

L. T. B. Dehideniya, J.

I agree.

Judge of the Supreme Court.

S. Thurairaja PC, J.

I agree.

Judge of the Supreme Court.