

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

SC (HC) CALA / 187 / 2016

WP/HCCA/MT 53/03 (F)

D.C. Mt. Lavinia Case No. 40/93/P

1. Vithanage Kusumawathie Perera
No. 492/A, Welipara,
Thalawathugoda
2. Vithanage Alice Perera (Deceased)
No. 97/16, Railway Mawatha,
Maharagama
- 2a. Meemanage Leelawathie
No. 97/16, Railway Mawatha,
Maharagama
3. H.D. Asilin
No. 352, Pannipitiya Road,
Thalawathugoda
4. P.G. Somapala Perera
No. 125, Hiripitiya
Pannipitiya
5. Meemanage Simon Perera
No. 383/15, Temple Road,
Thalapathipitiya,
Nugegoda.

PLAINTIFFS

Vs.

1. Bethmage Marynona
No. 20/14, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla
Nugegoda
2. Vithanage Jayasiri Perera,
No.20/14, Wetakeiyyawala Road,
Thalapathpitiya, Udahamulla
Nugegoda
3. Vithanage Asilin Perera
No. 20/25, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla,
Nugegoda
4. Vithanage Luis alias Brampy Perera
No. 171 Madiwela, Kotte (Deceased)

- 4a. Vithanage Piyasena Perera
5. Kurupugge Magilin Perera
6. Vithanage Premawathie Perera
7. Vithanage Gunapala Perera
8. Vithanage Nandawathie Perera
9. Vithanage Kanthilatha Perera
All of No. 492/A Welipara,
Thalawathugoda
10. Rupasinghe Arachchige Janenona
11. Vithanage Saranapala Perera
12. Vithanage Sugathapala Perera
All of No. 293/20, Thalapathpitiya,
Nugegoda
13. H.D. Premadasa Perera
No. 352, Pannipitiya Road,
Thalawathugoda
14. Vithanage Thigiris Perera,
No. 38, Pamunuwa,
Maharagama
- 14a. Vithanage Premawathie Perera,
No. 38, Pamunuwa,
Maharagama
15. Meemanage Siripala Perera
16. Memanage Piyadasa Perera
17. Meemanage Kusumawathie Perera
18. Meemanage Sirimawathie Perera
19. Meemanage Nandawathie Perera
20. Meemanage Gunawathie Perera,
All of, No. 383/15 Temple Road,
Thapalathpitiya
21. P.G. Thomas Perera,

No. 76/1, Mambulgoda,
Pannipitiya

- 21a. Galagedarage Lili Nona,
No.37, Mambulgoda,
Pannipitiya
- 22. P.P. Karolis Perera
890, Rukmale Road,
Kottawa
- 23. P.P. Podinona Perera,
76/1, Mambulgoda,
Pannipitiya
- 23a. Maddumage Indra Jayanthi,
76/1, Mambulgoda,
Pannipitiya
- 24. P.D. Premawathie Perera,
No. 1, Gajaba Place,
Colombo 6
- 25. Vithanage Charlis Perera,
No. 38, Pamunuwa Road,
Maharagama
- 25a. W. Babanona,
No. 38, Pamunuwa Road,
Maharagama
- 26. S.L. Podinona
- 27. Vithanage Seelani Perera
- 28. Vithanage Swarna Malanie Perera
- 29. Vithanage Sriyalatha Perera
- 30. Vithanage Jayasiri Perera
- 31. Vithanage Sivantha Perera
- 32. Vithanage Deepika Chandanie Perera
- 33. Vithanage Rupamala Perera
All of No. 38/1, New Hospital Road,
Pamunuwa, Maharagama
- 34. Vithanage Sayaneris Perera,

No. 38/2, Pamunuwa,
Maharagama

- 34a. Amarathunga Aarachchige Leelawathie
Perera,
No. 38/2, Pamunuwa,
Maharagama
35. Naranpitage Karunawathie
36. Vithanage Wimalawathie Perera
37. Vithanage Pathmawathie Perera
38. Vithanage Kusumawathie Perera
39. Vithanage Chandrawathie Perera
40. Vithanage Anulawathie Perera
41. Vithanage Jagath Sri Lal Perera
42. Vithanage Nihal Perera
43. Vithanage Sunil Perera
44. Vithanage Raja Perera
All of, No. 38/3, Pamunuwa,
Maharagama
45. Vithanage Piyasena Perera
No.39, New Hospital Road,
Pamunuwa, Maharagama
46. Vithanage Nihal Perera
No. 38/4, New Hospital Road,
Pamunuwa, Maharagama.

DEFENDANTS

AND BETWEEN

(Deceased)

1. Vithanage Kusumawathie Perera
No. 492/A, Welipara,
Thalawathugoda
2. Vithanage Alice Perera
No. 97/16, Railway Mawatha,
Maharagama

- 2a. Meemanage Leelawathie
No. 97/16, Railway Mawatha,
Maharagama
3. H.D. Asilin
No. 352, Pannipitiya Road,
Thalawathugoda
4. P.G. Somapala Perera
No. 125, Hiripitiya,
Pannipitiya
- 4a. Pattini Gamage Thilakarathna Perera
No.11/24, Hiripitiya,
Pannipitiya
5. Meemanage Simon Perera
No. 383/15, Temple Road,
Thalapathipitiya,
Nugegoda.

PLAINTIFF – APPELLANTS

Vs.

1. Bethmage Marynona,
No. 20/14, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla
Nugegoda
2. Vithanage Jayasiri Perera
No. 20/14, Wetakeiyyawala Road,
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3. Vithanage Asilin Perera
No. 20/25, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla,
Nugegoda
4. Vithanage Luis alias Brampy Perera
No. 171 Madiwela,
Kotte (Deceased)
- 4a. Vithanage Piyasena Perera
5. Kuruppuge Magilin Perera
6. Vithanage Premawathie Perera

7. Vithanage Gunapala Perera
8. Vithanage Nandawathie Perera
9. Vithanage Kanthilatha Perera
All of, No. 492/A Welipara,
Thalawathugoda
10. Rupasinghe Arachchige Janenona
11. Vithanage Saranapala Perera
12. Vithanage Sugathapala Perera
All of, No. 293/20, Thalpathpitiya
Nugegoda
13. H.D. Premadasa Perera
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All of, No. 383/15, Temple Road,
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21. P.G. Thomas Perera,
No. 76/1, Mambulgoda,
Pannipitiya
- 21a. Galagedarage Lili Nona
No. 37, Mambulgoda,
Pannipitiya

22. P.P. Karolis Perera,
890, Rukmale Road,
Kottawa
23. P.P. Podinona Perera,
76/1, Mabulgoda,
Pannipitiya
- 23a. Maddumage Indra Jayanthi
76/1, Mabulgoda,
Pannipitiya
24. P.D. Premawathie Perera
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25. Vithanage Charlis Perera
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- 25a. W. Babanona,
No. 38, Pamunuwa Road,
Maharagama
26. S.L. Podinona
27. Vithanage Seelani Perera
28. Vithanage Swarna Malanie Perera
29. Vithanage Sriyalatha Perera
30. Vithanage Jayasiri Perera
31. Vithanage Sivantha Perera
32. Vithanage Deepika Chandanie Perera
33. Vithanage Rupamala Perera
All of, No. 38/1, New Hospital Road,
Pamunuwa, Maharagama
34. Vithanage Sayaneri Perera,
No. 38/2, Pamunuwa, Maharagama
- 34a. Amarathunga Aarachchige Leelawathie
Perera,
No. 38/2, Pamunuwa, Maharagama
35. Naranpitage Karunawathie

36. Vithanage Wimalawathie Perera
37. Vithanage Pathmawathie Perera
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45. Vithanage Piyasena Perera
No. 39, New Hospital Road,
Pamunuwa,
Maharagama
46. Vithanage Nihal Perera
No. 38/4, New Hospital Road,
Pamunuwa,
Maharagama.

DEFENDANT – RESPONDENTS

AND NOW BETWEEN

27. Vithanage Seelani Perera
No. 212, Horagala West,
Padukka
28. Vithanage Swarna Malanie Perera
No. 33, Bolawalana Mw,
Negombo
29. Vithanage Sriyalatha Perera
No.254, Daampe,
Meegoda
32. Vithanage Deepika Chandanie Perera
No. 89 G, Kumudu Mw,
Naampamunuwa,
Piliyandala.

33. Vithanage Rupamala Perera
No. 9, Polwatte Road, Pamunuwa,
Maharagama

46. Vithanage Nihal Perera
No. 38/4,
New Hospital Road,
Pamunuwa,
Maharagama.

**DEFENDANT – RESPONDENT –
PETITIONERS**

Vs.

1. Vithanage Kusumawathie Perera
No. 492/A, Welipara,
Thalawathugoda

2a. Meemanage Leelawathie
No. 97/16, Railway Mawatha,
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3. H.D. Asilin,
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4. P.G. Somapala Perera
No. 125, Hiripitiya,
Pannipitiya

4a. Pattini Gamage Thilakarathna Perera
No.11/24, Hiripitiya,
Pannipitiya

(Deceased)

5. Meemanage Simon Perera
No. 383/15, Temple Road,
Thalapathipitiya,
Nugegoda

5. (A). Meemanage Piyadasa Perera,

5. (B). Meemanage Nandawathie Perera,

5. (C). Meemanage Gunawathi Perera
All of, No. 383/15,
Temple Road,
Nugegoda.

**PLAINTIFF – APPELLANT –
RESPONDENTS**

(Deceased)

1. Bethmage Marynona,
No. 20/14, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla
Nugegoda
1. (A) Elvitigalage Gunawathie
1. (B) Vithanage Manjula Priyangani Perera
1. (C) Vithanage Thisara Dinesh Perera
1. (D) Vithanage Damayanthi Perera
1. (E) Vithanage Dumith Priyankara Perera
All of, No. 447, Werahera Road,
Boralesgamuwa

(Deceased)

2. Vithanage Jayasiri Perera,
20/14, Wetakeiyyawala Road,
Thalapathiptiya, Udahamulla
Nugegoda
2. (A) Alvitigalage Gunawathie
2. (B) Vithanage Manjula Priyangani Perera
2. (C) Vithanage Thisara Dinesh Perera
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3. Vithanage Asilin Perera
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Thalapathiptiya, Udahamulla,
Nugegoda
4. Vithanage Luis alias Brampy Perera
No. 171, Madiwela,
Kotte (Deceased)

(Deceased)

4. (A). Vithanage Piyasena Perera
4. (AA). Dona Sopi Hami
4. (AB). Vithanage Hemapala Perera,

- (Deceased)
4. (AC). Vithanage Malani Pushpalatha Perera,
 4. (AD). Vithanage Rani Pushpalatha Perera,
 4. (AE). Vithanage Irangani Swarnalatha Perera
 4. (AF). Vithanage Thilekaratna Perera,
 4. (AG). Vithanage Senarath Perera
All of, No. 39 New Hospital Road,
Pamunuwa, Maharagama.
 5. Kuruppuge Magilin Perera
 5. (A). Withanage Premawathi Perera
No. 39/1, New Hospital Road,
Pamunuwa,
Maharagama
 5. (B). Withanage Kanthilatha Perera
No.380/10, Bodiraja Mawatha,
Habarakada,
Homagama
 5. (C). Withanage Nelum Priyankara Perera
 5. (D). Withanage Ruwani Tharagani Perera
Both of, No. 407/7, Pasal Mawatha,
Thalawathugoda,
Pannipitiya
 5. (E). Kuruppuge Pradeep Nishantha Perera
 5. (F). Kuruppuge Dilan Rangana Perera
 5. (G). Kuruppuge Uditha Priyanka Perera
 5. (H). Kuruppuge Nayomi Hansika Perera
All of, No. 492/A, Weli Para,
Thalawathgoda
 6. Vithanage Premawathie Perera
 7. Vithanage Gunapala Perera
 8. Vithanage Nandawathie Perera
 9. Vithanage Kanthilatha Perera

All of, No. 492/A, Welipara,
Thalawathugoda

(Deceased)

10. Rupasinghe Arachchige Janenona

10. (A). Vithanage Saranapala Perera

10. (B). Vithanage Sugathapala Perera
Both of, No. 293/20,
Thalapathpitiya, Nugegoda.

11. Vithanage Saranapala Perera

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All of, No. 293/20, Thalapathpitiya
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13. H.D. Premadasa Perera,
No. 352, Pannipitiya Road,
Thalawathugoda

(Deceased)

14. Vithanage Thigiris Perera,
No. 38, Pamunuwa,
Maharagama

(Deceased)

14a. Vithanage Premawathie Perera,
No. 38, Pamunuwa,
Maharagama

14. (A). Vithanage Premawathi Perera

14. (B). Vithanage Sugathapala Perera

14. (C). Vithanage Gunawathi Perera,
All of, No. 393/15, Temple Road,
Thalapathpitiya, Nugegoda.

15. Meemanage Siripala Perera

16. Memanage Piyadasa Perera

17. Meemanage Kusumawathie Perera

18. Meemanage Sirimawathie Perera

19. Meemanage Nandawathie Perera

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- | | |
|------------|--|
| | 21. P.G. Thomas Perera,
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| (Deceased) | 22. P.P. Karolis Perera,
890, Rukmale Road,
Kottawa |
| | 22. (A). Dodamgoda Arachchige
Nandawathie |
| | 22. (B). Paththani Gamage Kamala Kanthi |
| | 22. (C). Paththani Gamage Dayani Perera
All of, No. 890, Rukmale Road,
Kottawa,
Pannipitiya |
| | 23. P.P. Podinona Perera,
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| (Deceased) | 25. Vithanage Charlis Perera (Deceased),
No. 38, Pamunuwa Road,
Maharagama |
| (Deceased) | 25a.W. Babanona
No. 38, Pamunuwa Road,
Maharagama |
| | 25. (A). Vithanage Nihal Perera, |
| | 25. (B). Vithanage Indrakanthi Perera, |
| | 25. (C). Vithanage Lalith Perera, |
| | 25. (D). Vithanage Nayana Kumudu Perera.
All of No.38/4
New hospital Road, |

Maharagama

(Deceased)

- 26. S.L. Podinona
- 26. (A). Vithanage Seelani Perera
- 26. (B). Vithanage Swarna Malani Perera
- 26. (C). Vithanage Siriyalatha Perera
- 26. (D). Vithanage Sivantha Perera
- 26. (E). Vithanage Deepika Chandani Perera
- 26. (F). Vithanage Roopamala Perera
All of No.9, Polwatta Road,
Pamunuwa,
Maharagama

(Deceased)

- 30. Vithanage Jayasiri Perera
- 30. (A). Vithanage Seelani Perera
- 30. (B). Vithanage Swarna Malani Perera
- 30. (C). Vithanage Siriyalatha Perera
- 30. (D). Vithanage Sivantha Perera
- 30. (E). Vithanage Deepika Chandani Perera
- 30. (F). Vithanage Roopamala Perera
All of, No.9, Polwatta Road,
Pamunuwa, Maharagama
- 31. Vithanage Sivantha Perera
All of, No. 38/1, New Hospital Road,
Pamunuwa, Maharagama
- 34. Vithanage Sayaneris Perera
No. 38/2, Pamunuwa,
Maharagama
- 34a. Amarathunga Aarachchige Leelawathie
Perera,
No. 38/2, Pamunuwa,
Maharagama

(Deceased)

- 35. Naranpitage Karunawathie Perera
- 35. (A). Vithanage Wimalawathi Perera

35. (B). Vithanage Kusumawathi Perera
35. (C). Vithanage Chandralatha Perera
35. (D). Vithanage Dagasiri Perera
35. (E), Vithanage Nihal Perera
35. (F). Vithanage Raja Perera
35. (G). Vithanage Pathmawathi Perera,
35. (H). Vithanage Anulawathi
35. (I). Alawaththe Gamaralalage Sandya
Kumari Abeyratna
35. (J). Vithanage Gayathri Madushika
Perera
35. (K). Vithanage Himali Madushika
Perera
35. (L). Vidanage Kavindi Madushika
Perera
All of No.38/2 New Hospital Road,
Pamunuwa,
Maharagama
36. Vithanage Wimalawathie Perera
37. Vithanage Pathmawathie Perera
38. Vithanage Kusumawathic perera
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41. Vithanage Jagath Sri Lal Perera
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44. Vithanage Raja Perera
All of No.38/3, Pamunuwa,
Maharagama
- (Deceased) 45. Vithanage Piyasena Perera
No. 39, New Hospital Road,

Pamunuwa, Maharagama

45. (A). Dona Sopi Hami

45. (B). Vithanage Hemapala Perera,

45. (C). Vithanage Malani Pushpalatha
Perera,

45. (D). Vithanage Rani Pushpalatha Perera,

45. (E). Vithanage Irangani Swarnalatha
Perera

45. (F). Vithanage Thilekaratna Perera,

45. (G). Vithanage Senarath Perera
All of No. 39 New Hospital Road,
Pamunuwa,
Maharagama.

**DEFENDANT – RESPONDENT –
RESPONDENTS**

Before : P. Padman Surasena, J.

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

Kumudini Wickremasinghe, J.

Counsel : Ranjan Suwandarathne, PC. with Anil Rajakaruna and Ms.
Dulna De Alwis for the 27th, 28th, 29th, 32nd, 33rd, & 46th
Defendant – Respondent – Petitioners.

Ikram Mohamed, PC. with Lal Matarage instructed by S.B.
Dissanayake Associates for the 1st, 2A & 4A Plaintiff –
Appellant – Respondents.

Nayani P. Dayaratna for the 24th Defendant – Respondent –
Respondents.

Argued on : 27.01.2023

Decided on : 23.05.2025

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

When this matter was taken up on 16/09/2022 before this Court, this Court made ‘no order’ as the Defendant-Respondent-Petitioners (hereinafter referred to as the “Petitioners”) were not ready to support the case on that date. In fact, as per the minutes dated 26.05.22 and Journal Entry dated 06.09.2022 (Hereinafter referred to as “J.E”), the Counsel for the Petitioners had moved to file fresh substitution papers, and those papers appeared to have been filed. What was due on said 16/09/2022 was to support those substitution papers. Further, it appears that the said substitution was to be taken place in accordance with the application made on behalf of the Petitioners on 12/03/2021 and the direction made on that date in that regard. On that date, namely 12.03.2021, a junior counsel for the Petitioners had moved to file substitution papers for the 3rd Plaintiff – Appellant – Respondent and 13th Defendant – Respondent – Respondent who were dead. Thus, on this application, Court had given 6 weeks to file substitution papers and to support those on 04/06/2021. As per the J.E. dated 15/10/2021 made by the Registry, those substitution papers had not been tendered to Court even by that date. As per the minute dated 31/01/2021, the Petitioners had moved for a further 4 weeks’ time. As per the J. Es dated 13/01/2022 and 18/01/2022, it appears some papers have been filed. However, when the matter was mentioned on 21/01/2022, the Petitioners have moved to amend the said papers and Court has directed to file them within one month. Anyhow, J.E. dated 04/03/2022 states that the said amended papers were not filed within the given time. As per the minute dated 08.03.2022, the Counsel for the Petitioners has moved for further time to file papers for substitution as they had received the ID copies on a date close to that date. One week had been again given to the Petitioners by the Court. As per the J.E. dated 29.04.2022, the Petitioners had moved for further time, and 4 weeks had been given. When this matter was mentioned on 26.05.2022, Counsel for the Petitioners had moved for further time to file fresh substitution papers along with necessary documents. Again, 6 weeks had been granted by the Court. As per the J.E. dated 06.09.2022, it appears that the said substitution papers had been filed by that date, but as indicated above, when it was to be supported on 16/09/2022, the Counsel was not ready to support it which made the Court to make ‘no order’. The said decision to make ‘no order’ itself

indicated the dissatisfaction of the Court towards the aforesaid conduct of the Petitioners in regard to the way the Petitioners had been moving time to file and support said intended substitutions. However, not making an order for dismissal indicates that the Court, at that moment, did not wish to dismiss the application, *per se*, perhaps giving one more chance to come fully ready within a reasonable time with a reasonable explanation and support the said applications. However, since 16/09/2022, no application was made to relist and support the said papers for substitution until the Petitioners filed two new sets of substitution papers on 17/01/2023 by way of a Petition and Affidavit along with a motion, which was 4 months after the said date of making no order, requesting to substitute one, K.P Priyanthi, for the 3rd Plaintiff – Appellant- Respondent and 13th Defendant Respondent-Respondent.

The Attorney-at-law for the Plaintiff – Appellant has also filed a motion dated 18/01/2021, moving to vacate the ‘no order’ made as aforesaid, and make an order dismissing the application for leave to appeal on the ground of lack of showing due diligence to pursue the application for leave to appeal, since 24/10/2016 several dates have been granted for substitution.

When this matter was taken up on 27/01/2023, on behalf of the Plaintiff – Respondents as well as on behalf of the Petitioner – Respondent, Counsel made their oral submissions, and the Parties have thereafter filed their written submissions.

In response to the allegation of lack of due diligence, the Petitioners have stated that they took steps to effect substitution of 15 deceased parties, some of whom were deceased even prior to the delivery of judgement by the learned High Court Judges. In this regard, the Petitioners further have stated that they took steps to serve notices on 72 parties that were substituted on 11.02.2019. Whether it is necessary to substitute 72 parties for the deceased 15 parties will be discussed later in this order. It is true that many parties were substituted on 11.02.2019 (vide minute dated 11.02.2019), but it shows that for a deceased one person several were substituted, and it further shows that even when a substituted party was deceased instead of appointing a person to represent the original party several were appointed as substituted parties. (For the above observations, see the minute dated 11.02.2019 and the relevant directions made for the substitution of various parties; especially substitution made for the deceased 4A Defendant – Respondent – Respondent and 25A Defendant – Respondent – Respondent). Whether it is needed to substitute several legal representatives for one party, when a party or substituted

party is deceased, will be discussed later. Above observations are important, since bringing in unnecessary parties consumes time to collect information, make applications and to go through the necessary papers and make orders. However, the J.E.s and minutes show that even during that time, the Petitioners took considerable time to file papers for the substitutions done on 11.02.2019.

However, aforesaid making of ‘no order’ and thereafter the application to dismiss the matter for lack of due diligence happened due to not taking effective steps for a considerable period to substitute for the deceased 3rd Plaintiff –Appellant-Respondent and 13th Defendant – Respondent – Respondent. In this regard, how the time was moved to take such steps from 12/03/2021 to the date this court made ‘no order’ and taking further 4 months thereafter to file papers for substitution had been already explained at the beginning of this order.

With regard to the substitution for the deceased 3rd Plaintiff-Appellant-Respondent, what has been stated in the written submissions of the Petitioners is that there were discrepancies regarding the name of the 3rd Plaintiffs –Appellant- Respondent and as for the directions made by Court, the Petitioners had to take steps to file Affidavits etc. As per the minutes and/or J. Es after 12/03/2021, I cannot find any direction given by Court regarding the substitution papers other than on many applications the Court has granted time. Even if the Court found such discrepancies and made directions, it shows the lackadaisical approach of the Petitioners and their representatives had in preparing the substitution papers. This Court has a responsibility in substituting persons in the place of deceased persons, and the identity of the person to be substituted is one among other considerations that this Court should satisfy itself when substituting for a deceased person. It is the duty of the person/s or their lawyers, who move for substitution, to prepare necessary papers and present facts in a manner sufficient to satisfy Court for the intended substitution. Their own fault cannot be used as a reason to show that there was no lack of due diligence. As far as the application for substitution for the 3rd Plaintiff-Appellant – Respondent and the 13th Defendant – Respondent – Respondent are concerned (irrespective of time taken and application made regarding the substitutions done previously), I have no hesitation to say that the Petitioners and their lawyers before this Court have not shown due diligence to take steps in pursuing their own applications for substitution. As explained later, they have also not shown due regard to the applicable law relating to substitution in partition cases. However, I observed that not only the Petitioners, but even the Respondents, failed to bring to the notice of Court, the applicable law in relation to substitution

in partition actions. It is regrettable, even the Court, may be due to the lack of time when these applications were made moving for further time in open courts, had not considered whether it is necessary to grant time for such a long period without taking the main matter for support. In this regard I would now refer to the applicable law in relation to the substitution in partition actions.

Substitution in Partition Actions

Prior to the amendment made to the Partition Law by Act No. 17 of 1997, Section 81 of the Act provided that when a party died after the institution of the action that a Court may on an *ex parte* application of any other party, appoint **a person** to represent the estate of deceased for the purpose of the action. It only required **'a person'** to be appointed as the legal representative but not all the heirs or persons who may derive title through the deceased person. Such appointment was to be made only if the court was satisfied that such appointment was necessary or desirable for the purpose of enabling the Court to proceed with the action with a view to its speedy determination. Thus, the law before the amendment made in 1997 expected only one person to be appointed to represent the estate of the deceased party. The amendment brought in by the Act No. 17 of 1997 made provisions for a party (the plaintiff, defendants, intervenient or added parties etc.) to file memorandum nominating, in accordance with Section 81, **a person** to be his legal representative for the purpose of the action, in the event that party dies **pending the final determination of the action** – vide Sections 4, 19 and 69 as amended by the said amending Act. The new Section 81, which repealed the previous Section 81 which is quoted below, provided that every party to a partition action shall file a memorandum at least nominating **one person**, and not more than three persons, in order of preference, to be his legal representative for the purpose of the action in the event of his death pending the final determination of the action.

“81. (1) Every party to a partition action or any other person required to file a memorandum under this Law, (hereinafter referred to as "the nominator") shall file, or cause to be filed in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal representative for the purposes of the action in the event of his death pending the final determination of the action.

(2)(a) One of such nominees shall, in the order of preference in which their names are set out in the memorandum, be deemed to be the legal representative of the nominator for the purposes of the action, on the death of such nominator.

(b) In the event of the death or incapacity of any of the nominees whose names are set out in the memorandum, the person next nominated in order of preference shall be deemed to be the legal representative for the purposes of the action, in the event of the death of the nominator.

(c) The person or persons so nominated shall subscribe his or their signatures to the memorandum signifying consent to be so appointed as legal representative. The signatures of the nominator and those of the nominee or nominees so consenting to be appointed shall be witnessed by an Attorney-at-Law or Justice of the Peace or a Commissioner of Oaths:

Provided however, that failure to file such memorandum shall not by such failure alone render the plaint, statement of claim, or application to be added as a party defective or, notwithstanding anything in section 7, be a cause or ground for rejecting such plaint, statement of claim or any application to be added as a party.

(3) The court may at any time before the final determination of the action, on its own motion or on the application of any party, require a party to the action or any person required to file a memorandum under the provisions of this Law, to file such memorandum on or before a date appointed for such purpose by court.

(4) A nominee may, at any time prior to the death of the nominator apply, with notice to the nominator, to court by way of motion to withdraw his consent to be such nominee and in such event the court shall make order that he ceases to be the nominee of the nominator and shall cause the name of such nominee to be struck off the memorandum filed by the nominator.

(5) A nominator may, subject to the provisions of subsection (1) of this section, at any time before the final determination of the action make application, with notice to the nominees, to tender a fresh memorandum nominating one or more nominees. On the filing of such new memorandum, the previous memorandum of such nominator shall stand revoked and the nomination contained in such fresh memorandum shall forthwith take effect

(6) On the death of a nominator, the person first nominated in the memorandum filed by the nominator in order of preference, shall be deemed to be the legal representative of such nominator for the purposes of the action from the time of his death.

(7) A nominee deemed to be the legal representative of a deceased nominator shall be entitled to take all such steps for the purposes of the action as the deceased nominator would have been entitled to take had he been alive.

(8)(a) A nominee shall not decline to act as the legal representative of the deceased nominator. He may however with the leave of the Court first had and obtained, by way of petition and after notice to the other nominees if any, of such nominator, apply for permission from court to be released from the office of legal representative of such nominator.

(b) In the event of the court granting such permission, the nominee who is next in order of preference in the memorandum filed by the nominator shall be deemed to be the legal representative of such deceased nominator, for the purposes of the action.

(c) Where an application under paragraph (a) of this subsection is made by a nominee who was the sole nominee or sole remaining nominee of a deceased nominator, such nominee shall notice the heirs of such deceased nominator regarding his application and in the event of the court granting permission as aforesaid, such court shall appoint a consenting heir of such deceased nominator to act as the legal representative of such deceased nominator for the purposes of the action.

(9) 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.

(10)(a) On the death of a party or person who had failed to file a memorandum as required by this section, any party or person may apply to court by an ex parte application, requesting that a person be appointed as the legal representative of such deceased party or person and the court may, on being satisfied after inquiry that such appointment is necessary, appoint a suitable person to be the legal representative of such deceased party or person for the purposes of the action. Such legal representative shall be bound by the proceedings had up to the time of such appointment.

(b) Such application and appointment shall not be a ground for the postponement of the trial or proceedings;

Provided that the court may, in its discretion, after recording reasons therefor and on the prepayment of costs, allow a postponement of the trial if in the opinion of court, it is in the interests of justice to do so

(c) In ordering pre-payment of costs, the court shall take into account the date of institution of the action and the dates on which trial was held prior to such application and the stage at which the action is and any other matters which the court considers relevant.

(11)(a) An heir of a deceased nominator may, at any time after the death of such nominator, apply to court to have the legal representative of such deceased nominator removed and to have another person named in such application or the person next named in order of preference in the memorandum filed by the deceased nominator, appointed as such legal representative. The person who for the time being is the legal representative of the deceased nominator shall be made a respondent to such application.

(b) The court may, upon being satisfied that it is in the interests of the heirs of the deceased nominator to do so, remove such legal representative and appoint the person next named in order of preference in the memorandum filed by the deceased nominator or if there are sufficient grounds for doing so, appoint the person named in the application, as the legal representative of the deceased nominator.

(c) An application under this section shall be by way of petition and affidavit and the court may in its discretion, issue notice of the application to the other heirs, if any, of the deceased nominator;

(12) No proceeding under this Law shall be postponed or adjourned nor any step in the action postponed by reason of the death of a party or person required to file a memorandum under this Law.

(13) An application under subsections (4), (5), (8)(a), (10) or (11) shall not be aground for the postponement of the trial. The court may however grant a postponement on the payment of costs by the person making the application, if it is of the opinion that it is in the interests of justice to allow such postponement.

(14) For the purposes of this section "legal representative" means, a person who represents the estate of a deceased party or person, for the purposes of the action, by virtue of a nomination, or of an appointment by court under this section.” (highlighted by me to emphasize)

The above Section 81 brought in by the amending Act also shows that, at a given time the law requires only **one legal representative** to represent the estate of the deceased party. The present caption to this Court in contrast to the said requirement shows that several persons have been appointed as legal representatives to some parties who are dead on the request of the Petitioners. As said before the collection of material, presenting substitution papers and supporting such substitutions consume considerable time.

(It must be noted that in a partition action, shares and rights are granted at the end to the original party, and the legal representative, if any, gets it not for him/her personally but on behalf of all the heirs of the deceased party or for the person/s entitled under the deceased party – see **Don Alfred Weerasekara V Gonakoladeniya Gamage Pantis Appuhamy** S.C. Appeal No. 172/2017 S C Minutes 30.01.2024. Thus, appointing one legal representative at a given time is more than sufficient).

The said new Section 81 shows that;

- Failure to file a memorandum nominating a legal representative does not invalidate any judgement, sale, order or thing done in the action, and the legal heirs and representatives

of the deceased person are bound by them. Further such failure is not a ground to invalidate the proceedings.

- If there was a failure to file a memorandum by the deceased party, any party may apply to court to appoint a legal representative for the deceased party, but with the appointment, such legal representative shall be bound by the proceedings had up to the time of such appointment.
- It is only an heir of the deceased nominator who could apply to remove a nominee or nominees named in the memorandum and move to appoint a new person.
- Any application for appointment made under Section 81 shall not be a ground for postponement and postponement of trial has to be made only on payment of costs and sometimes only on the prepayment of payment of costs.

Even though, it is not mentioned in the said Section 81 of the Partition Law that the nomination made through memorandum are relevant and applies to the appeals made after the District Court proceedings, Samayawardhena J. in **Subasinghe Mudiyansele Rosalin Bertha of Dummalasooriya v Maththumagala Kankanamlage Juwan Appu of Dummalasooriya SC App. No. 160/2016 SC Minutes 02.12.2022** expressed the view that these provisions are equally applicable in proceedings before the Court of Appeal or the Supreme Court. I also agree that these provisions apply to the proceedings during an appeal for the reasons mentioned below. However, I prefer to limit their applications to proceeding in appeal over the decisions in the original court since revisions are distinct applications that originates not in the original court but in the Court that has revisionary powers where exceptional circumstances to make that application exists and miscarriage of justice has been occurred. Since the revision application originates in a different court, in such applications the applicant may have to name all the parties who may be affected by the said applications. In contrast, a direct appeal originates in the original court by filing notice of appeal and petition of appeal and it is a continuation of the same proceeding. On the other hand, a leave to appeal application is not filed in the original court but when it is refused it confirms the decision in the first appeal and if granted it will be a continuation of the appeal made in the original court making it a continuation of the same appeal process. However, till the leave is granted, it is a new

application filed before the relevant Appellate Court. Thus, in the matter in hand, this leave to appeal application is a new application before this Court until leave is granted to continue with the original appeal made. In such a situation, Supreme Court rules relating to such applications also have to be considered.

Following are the reasons for me to state that the provisions relating to substitution in the Partition Law as brought in by the amending Act are equally applicable to the proceedings during appeal:

1. As per Section 4 and 81 of the Partition Law as amended, memorandum is filed nominating legal representatives for one to be appointed in the event of the nominators' death pending the final determination of the action. If an appeal is filed, the judgement or decree of the original court does not become final till the determination of the Appeal, and the finality depends on the decision of the appeal. Thus, the word 'proceedings' found in Section 81(a), 10(a), (b), has to be interpreted to include the proceedings in appeal.
2. If it is interpreted to say that the filing of memorandum and provisions relating to nominations contained therein is applicable only till the delivery of the judgement by the original court, any aggrieved party who intends to appeal against the judgement will face an immense difficulty since the case record is not defective till the pronouncement of judgement, but causing that party to find suitable legal representatives for the deceased parties who have not filed their respective memorandums and get them substituted and to serve notice of appeal within 14 days as per Section 755(2)(b) of the Civil Procedure Code. Taking such steps within 14 days is impractical and may be impossible unless details relating to such legal representatives are known to the said aggrieved party. Law does not expect one to do impractical and impossible things. Final determination of a Partition Action reaches only with the allocation of shares and giving them to the relevant parties, but, if an appeal is pending, that is subject to the finality reached through the decisions of the Courts with Appellate Powers.

Hence, as indicated above, I also hold the view that provisions related to substitution in partition actions as amended by Act No. 17 of 1997 are applicable to proceedings in appeal. Aforesaid amending Act No. 17 of 1997 was certified on 12/08/1997. This partition action was

pending before the District Court by that time and the trial commenced only after 23/04/1998. The terminology in Section 81(1) brought in by the said amending Act does not exclude pending action. Thus, the said provisions in said Section 81 also applies to the case at hand. As explained above, provisions of Section 81 of the Partition Law as amended applies until the decision of the first Appeal by the Civil Appellate Court, and since no leave has still been granted in the matter in hand, there is no continuation of the first Appeal or the original action until leave is granted. Hence, it is important to observe how the substitution has to be done if it becomes necessary. It must be reiterated that if leave is granted, it will be the continuation of the original action or the first appeal subject to the decision being given in the final appeal. Thus, any substitution that is going to be taken until the leave is granted should not be in conflict with original scheme contemplated by Section 81 of partition law as amended. For example, if the deceased has nominated a person to be appointed as the legal representative in a memorandum filed, if a new person is substituted, once the leave is granted, new substitution will be in conflict with the nomination made through the memorandum and there will be issues as to who has the right to represent the deceased's interests.

The instant appeal is an appeal made in terms of section 5C introduced to High Court of The Provinces Act No. 19 of 1990, by Section 2 of the High Court of the Provinces (Special Provisions) (Amendment) Act, No54 of 2006. There is no specific Rules made by the Supreme Court in this regard. Thus, it is the Part I sub part C relevant to 'Other Appeals' (Rule 28) and Part II (General Provisions Regarding Appeals and Applications) in the Supreme Court Rules 1990 that will be relevant to this leave to appeal application from the Civil Appeal High Court.

As per Rule 28 (5) found in said sub part C 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 interest may be adversely affected by the success of the appeal, and names and present addresses of the appellant and the respondents shall be set out in full.”

The above shows what is intended is to make the parties that may be affected by the Appeal to be made respondents. Does this mean that the aggrieved party who intends to file a leave to appeal application must find legal representatives for all the deceased parties? I think in finding an answer one should not go against the scheme introduced by Section 81 as amended as the

ultimate goal is to continue the same action or first appeal if the leave is granted until a final decision is given by this Court sitting in appeal. Thus, if a necessary Party as contemplated by aforesaid Rule 28(5) is deceased prior to or after the High Court Judgment, what the aggrieved party who intended to appeal against the judgment of the Civil Appeal High Court should do is to bring the nominee in the memorandum as the legal representative. If there is no such memorandum has been filed, it is true that the aggrieved party can make application to substitute, but it cannot be said that the law expects that aggrieved party to go on a voyage of discovery to find who the proper legal representative is as it is obnoxious to the intention of the legislature not to delay partition actions on the ground of substitution. What the legislature intended to avoid should not be allowed to be disturbed through a leave to appeal application which is filed with the expectation of continuing the same appeal process. Thus, interpretation and application of the Supreme Court Rules also has to be done in that background.

On the other hand, if the law has provided a mechanism for a party to safeguards his or his legal representatives' interest in a certain way, the disregard of such provision by that party should not affect the rights of other parties to cause delay in enforcing or enjoying their rights. Thus, what the Petitioners should have done in this application was to name the nominees in the memorandums (if any) for the deceased parties and proceed to support the application for leave. On the other hand, if no one has been nominated for deceased parties, if the petitioners knew who should be the legal representatives, moved to substitute them without moving for time and to support their application for leave. Instead, as explained above, time has taken to substitute several legal representatives for the original Parties including substitution for the substituted parties. If there was any difficulty to find legal representatives, it was the duty of the Petitioners to enlighten the Court as to the present state of law as to the substitution of parties in partition cases and get the application fixed for support for leave. Instead, from 2016, this application is still pending for owing to applications for substitution for deceased parties. In a way it evinces showing lack of due diligence to the applicable law as well proper interest to proceed with their application for leave.

Even if it is considered for the sake of argument that the Petitioners are bound to bring in legal representatives for the deceased parties, irrespective of whether memorandums have been filed in the original Court or not, following will establish the lack of due diligence in prosecuting their applications for leave to proceed. (For this it is sufficient to consider what has happened even after their application to substitute for the deceased 3rd Plaintiff -Appellant-Respondent

and 13th Defendant-Respondent -Respondent, from the date they moved to take such steps, namely 12/03/2021 to the date they file last sets of papers for substitution after this court made ‘no order’, even though the time taken for previous substitutions are also indicative of such lack of due diligence).

- On 12.03.2021 only 6weeks were given to file substitution papers but they have not been tendered even until 15.10.2023- vide J.E dated 15.10.2021.
- The Petitioners have not given proper instructions even till 21.10.2021 – vide minutes dated 21.10.2021.
- Even though some papers have been filed by 10.01.2022 and 13.01.2022 and 18.01.2022 (vide J. Es dated 13.01.2022 and 18.01.2022), they seem to be not in order as they wanted to amend it – vide minutes dated 21.01.2022.
- No such amended papers were filed within one month as per the directions given – vide J.E dated 04.03.2022
- Further on week time given on an undertaking given by the Counsel – vide minutes dated 08.03.2022 but further time has been moved – vide J.E dated 29 .04.2022 and accordingly 4 weeks has been given, but further time has been moved to file fresh papers – vide minutes dated 26.05 2022 indicating their previous papers are insufficient and inadequate or not in order.- Again 6 weeks have been given but papers were not filed within 6 weeks but belatedly filed on 02.09.2022-vide J.E dated 06.09.2022 but the Counsel was not ready to support it and ‘no order’ was made - - vide minutes dated 16.09.2022
- What the Petitioners should have done after the ‘no order’ was to file a motion as soon as possible and support the said papers but have taken four months and filed a motion with new two sets of papers and moved to support them – vide J.E dated 19.01.2023 indicating that moving on counsel’s ground on the previous occasion lacks clarity. It appears that, in fact, they needed to file fresh papers again for some reason. If it was the reason, on the day this Court make ‘No Order’, this Court would have dismissed the application on that day itself. Just after the filing of this application to relist for support for substitution based on those new papers, the Plaintiff Respondents has also filed the application to dismiss the main application for not showing due diligence, and the above facts speaks for itself to indicate the lack of due diligence on the part of the

Petitioners and their lawyers to support their application for leave to proceed expeditiously.

What is discussed above indicate that the Petitioners failed to show due diligence to proceed with their application for leave to proceed. Thus, this Court has to uphold the objections raised by the Plaintiff- Appellant- Respondents.

Hence, this application for leave to proceed is dismissed for not showing due diligence to support the main application.

Application Dismissed. No Costs.

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Judge of the Supreme Court

P. Padmen Surasena, J.

I agree.

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Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

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Judge of the Supreme Court