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

In the matter of an Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with the section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act, No. 54 of 2006.

SC Appeal No:	John Lanka Deshapriya Ferdinando
38/2020	alias, Rasamanukula Warnakuladiya
	Kurukulasuriya Kolamba
SC/HCCA/LA No:	Mahapatabendi Mahavidanelage
395/2018	John Lanka Deshapriya
	Ferdinando,
Civil Appellate High Court No:	No. 31/5, 1st Lane, Galle Road,
WP/HCCA/MT/44/2016/LA	Moratuwella, Moratuwa.
D.C. Moratuwa Case No:	Currently residing at-
823/2015/L	No. 5, Bis Rue de La Charmoie 77810,
	Thomery, France.

Appearing by his Power of Attorney

holder,

Derin Shermila Perera,

No. 3/11, Duwana, Kochchikade.

PLAINTIFF

John Andre Shevin Ferdinando,

No. 5, Bis Rue de La Charmoie 77810,

Thomery, France.

MINOR PLAINTIFF

Appearing by his next friend

Derin Shermila Perera,

No. 3/11, Duwana, Kochchikade.

Vs.

Mary Anne Koongahage,

31/5, 1st Lane, Moratuwella,

Moratuwa.

DEFENDANT

AND BETWEEN

1. John Lanka Deshapriya Ferdinando
   alias, Rasamanukula Warnakuladiya
   Kurukulasuriya Kolamba
   Mahapatabendi Mahavidanelage
   John Lanka Deshapriya
   Ferdinando,
   No. 31/5, 1st Lane, Galle Road,
   Moratuwella, Moratuwa.

   Currently residing at-
   No. 5, Bis Rue de La Charmoie 77810,
   Thomery, France.

   Appearing by his Power of Attorney
   holder,
   Derin Shermila Perera,
   No. 3/11, Duwana, Kochchikade.

   PLAINTIFF-PETITIONER

2. John Andre Shevin Ferdinando,
   No. 5, Bis Rue de La Charmoie 77810,
   Thomery, France.

   MINOR PLAINTIFF-PETITIONER

Appearing by his next friend

Derin Shermila Perera,

No. 3/11, Duwana, Kochchikade.

Vs.

Mary Anne Koongahage,

31/5, 1st Lane, Moratuwella,

Moratuwa.

DEFENDANT-RESPONDENT

AND NOW BETWEEN

1. John Lanka Deshapriya Ferdinando
   alias, Rasamanukula Warnakuladiya
   Kurukulasuriya Kolamba
   Mahapatabendi Mahavidanelage
   John Lanka Deshapriya
   Ferdinando,
   No. 31/5, 1st Lane, Galle Road,
   Moratuwella, Moratuwa.

   Currently residing at-
   No. 5, Bis Rue de La Charmoie 77810,
   Thomery, France.

Appearing by his Power of Attorney holder,

Derin Shermila Perera,

No. 3/11, Duwana, Kochchikade.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

2. John Andre Shevin Ferdinando,

No. 5, Bis Rue de La Charmoie 77810,

Thomery, France.

PLAINTIFF-PETITIONER-APPELLANT

Appearing by his Power of Attorney holder,

Derin Shermila Perera,

No. 3/11, Duwana, Kochchikade.

Vs.

Mary Anne Koongahage,

31/5, 1st Lane, Moratuwella,

Moratuwa.

DEFENDANT-RESPONDENT-RESPONDENT

Before	**:**	Kumudini Wickremasinghe, J.
	:	A.L. Shiran Gooneratne, J.
	:	Sampath B. Abayakoon, J.
Counsel	**:**	Rohan Sahabandu, P.C., with Ms. Chandrika Elvitigala and Ms. S. Senanayake instructed by Ms. Subhashini for the Plaintiff-Petitioner-Appellant.
	:	Achala Senevirathna for the Defendant-Respondent-Respondent.
Argued on	**:**	17-10-2025
Written Submissions	**:**	30-10-2025 and 26-06-2020 (By the Plaintiff-Petitioner-Appellant)
	:	10-11-2025 and 27-04-2021 (By the Defendant-Respondent-Respondent)
Decided on	**:**	05-02-2026

Sampath B. Abayakoon, J.

This is an appeal preferred by the 1st and 2nd plaintiff-petitioner-appellants (hereinafter referred to as the plaintiffs) on being aggrieved of the judgment pronounced on 11-10-2018 by the Provincial High Court of the Western Province holden in Mount Lavinia while exercising its civil appellate jurisdiction.

From the said judgment, the High Court affirmed the order dated 29-11-2016 pronounced by the learned Additional District Judge of Moratuwa in the case bearing No. 823/2015/L, wherein the learned Additional District Judge

dismissed the action of the plaintiffs having accepted a preliminary objection raised on behalf of the defendant-respondent-respondent (hereinafter referred to as the defendant) as to the maintainability of the action in terms of section 406(2) of the Civil Procedure Code.

When this matter was considered on 10-03-2020 before this Court for the granting of leave to appeal from the impugned judgment, leave was granted on the questions of law as set out in para 16(b), (c), (d) and (f) of the petition of appeal dated 19-11-2018.

The said questions of law read as follows-

1. Whether Their Lordships of the Civil Appellate High Court of Mount Lavinia have erred in law by dismissing the appeal of the petitioners on the basis that the petitioners have failed to comply with the Court of Appeal (Appellate Procedure) Rules of 1990.
2. Whether the learned Additional District Judge of Moratuwa as well as Their Lordships of Civil Appellate High Court of Mount Lavinia have erred in law by failing to appreciate the fact that the petitioners had reserved the right to file a fresh action at the time of withdrawing the action bearing No. 783/13/L.
3. Whether the learned Additional District Judge of Moratuwa as well as Their Lordships of the Civil Appellate High Court of Mount Lavinia misunderstood and or misinterpreted the provisions of Section 406 of the Civil Procedure Code and thereby erred in law.
4. Whether the learned Additional District Judge of Moratuwa as well as Their Lordships of the Civil Appellate High Court of Mount Lavinia have erred in law by failing to take into consideration the fact that the 2nd petitioner was not a party to the previous cases referred to by the respondent and therefore the principle of *res judicata* does not apply as far as the 2nd petitioner is concerned.

At the hearing of this appeal, this Court heard the submissions of the learned President's Counsel on behalf of the plaintiffs, and also the submissions of the learned Counsel made on behalf of the defendant.

This Court also had the benefit of considering pre-argument as well as post-argument written submissions tendered by the parties for the purpose of this judgment.

The facts that led to the order of the learned Additional District Judge can be summarized in the following manner.

The plaintiffs, being the father and son, have initiated this action as a *rei vindicatio* suit against the defendant seeking a declaration of title to the land morefully described in their plaint for the 2nd plaintiff, and also for the ejectment of the defendant from the land and the building situated thereon. The 1st plaintiff has sought a declaration that he is the life interest holder.

They have pleaded their title stating that their predecessor in title John Augustine Fernando became the owner of the allotment of land depicted as Lot A in plan bearing No. 1530 prepared by Shelton W. Peiris Licensed Surveyor upon deed bearing No. 663 dated 05-09-1963, attested by H. J. C. Perera Notary Public.

The said Augustine Fernando has gifted the said property to the 2nd petitioner subject to the life interest of the 1st petitioner by the deed of gift bearing No. 434 attested by Athulya Palihapitiya Notary Public. It has been averred that the said property consists of 5 housing units bearing a single assessment number and the said Augustine Fernando was occupying one such unit until his demise on 02-11-2012.

It has been claimed that after his death, the defendant, acting illegally and unlawfully, took over the control of the whole building and commenced disputing the ownership rights of the petitioners, which resulted in them instituting the action in question before the District Court of Moratuwa, praying for the reliefs as sought.

It has been disclosed that the 1st plaintiff instituted two previous actions bearing No. 262/2012/SPL and 783/13/L for the same purpose of ejecting the defendant from the premises in suit. It has been stated that the 1st plaintiff withdrew the said actions with liberty to file a fresh action which has resulted in the plaintiffs filing action bearing No. 823/2015/L before the District Court

of Moratuwa, which was the action dismissed based on the preliminary objections raised.

The 1st plaintiff has instituted this action before the District Court through his power of attorney holder and the 2nd plaintiff, being a minor, through his next friend.

The defendant filing her answer before the District Court had prayed for the dismissal of the action on the basis that the previous action No. 783/13/L was instituted in relation to the same property, and since the case has been withdrawn without reserving a right to file a new action, and the previous action bearing No. 262/2012/SPL was also dismissed subject to several conditions, the plaintiffs cannot maintain the instant action against her before the Court.

It is clear that the said objection has been raised based on the provisions of section 406(2) of the Civil Procedure Code.

The learned Additional District Judge of Moratuwa of his order dated 29-08-2016 has agreed with the contention of the defendant, and has determined that the journal entry of the relevant case record where the action of case No. 783/2000 has been withdrawn does not bear any note to suggest that the Court has granted permission to the plaintiff in that action to reserve the right to file a fresh action. It has been determined that since the previous action had been between the same parties in relation to the same property based on the same cause of action, the plaintiffs in this action cannot maintain the action as the 1st plaintiff who was the plaintiff in the previous action has failed to reserve the right to file a fresh action when the said action was withdrawn. Accordingly, the action instituted by plaintiffs had been dismissed.

When this order was challenged before the Provincial High Court of the Western Province holden in Mount Lavinia, the learned Judges of the High Court have granted leave to appeal on the question whether the learned Additional District Judge erred in dismissing the action against the plaintiff.

The matter has been decided based on the written submissions tendered by the parties. The judgment of the High Court suggests that there had been an objection as to the maintainability of the leave to appeal application itself on the basis that it should be a final appeal that can be entertained and not an application for leave to appeal, for which the High Court has correctly determined that it should be by way of a leave to appeal application and the appellants before the High Court can maintain the appeal.

However, having determined so, the High Court was of the view that the appellants have failed to follow the Court of Appeal (Appellate Procedure) Rules of 1990, and had failed to make available all the materials that were available to the learned Additional District Judge when he made the impugned order, and therefore, the leave to appeal application is liable to be dismissed.

However, it is clear from the High Court judgment that the High Court has gone into all the material facts relevant to the dismissal of the District Court action by the learned Additional District Judge, which shows that all the relevant material that was necessary for the High Court to grant the initial leave to appeal and to finally decide the matter were available. Otherwise, there cannot be a basis to pronounce a considered judgment on the order of the learned Additional District Judge if the relevant material is not available to the High Court.

It has been determined by the High Court that after having considered the relevant section 406(2) of Civil Procedure Code, rather than being *res judicata*, the plaintiffs in this action are barred by a positive rule of law, namely the statutory restriction imposed by section 406(2) of the Civil Procedure Code as to the maintainability of the action instituted for the 2nd time. It has been determined that the appellant's position that one of them, the 2nd appellant, was not a party to the previous action and the action cannot stand *res judicata* in relation to him has no basis.

It has also been determined that the present action and the previous action were between the same parties in relation to the same cause of action and since the plaintiff in the 1st action has failed to reserve his right to initiate a

fresh action, the order of the learned Additional District Judge was correct and need not be disturbed.

Having considered the above factual matrix and the relevant law, it is quite clear to me that the learned Additional District Judge has based his order relying on the provisions of section 406(2) of Civil Procedure Code in relation to the withdrawal of the previous District Court action No. 783/13/L, though the High Court has also considered the maintainability of the leave to appeal application on Appellate Rules Procedure in their determination.

Therefore, I find it relevant to consider whether the High Court can be termed correct in determining that the appellants before the High Court have failed to follow the relevant Appellate Procedure Rules, and thereby, holding that the application before the High Court is liable to be dismissed before proceeding to consider the actual relevant facts as to both the judgment and the order pronounced by the learned Additional District Judge.

It appears from the judgment that the High Court has decided in that manner on the basis that the appellants have failed to submit copies of the written submissions tendered by each party before the District Court and some other material documents which the High Court has not specified. It is clear from the petition filed before the High Court that the appellants, being the petitioners, have filed the plaint and the answer, and also the objections as to the maintainability of the action as P1, P2, and P3 respectively. They have also annexed the certified copy of the relevant order as P4. The previous order relied on by the defendant to challenge the maintainability of the action which appears in the form of a journal entry of the previous case record was also available in the High Court case record marked as R2. It is my view that these are the necessary documents that should be made available to the Court in determining whether to grant leave to appeal or not, and also material documents to determine the final outcome of the appeal.

It is my view that written submissions tendered by the parties can only assist in a determination but are not material in determining a matter. A trial Court or an appellate forum for that matter should focus their attention on the

relevant material placed before the Court by the respective parties in order to advance their cause rather than relying on what is stated in a written submission.

In that context, I am of the view that the learned Judges of the High Court were totally misdirected in considering that not producing the written submissions tendered by the parties before the lower Courts amount to a failure by the plaintiffs to comply with the Court of Appeal (Appellate Procedure) Rules of 1990.

Having determined so, I will now focus my attention to the order of the learned District Judge and whether there is any justification to allow it to stand as determined by the learned Judges of the High Court.

In that context, I find it relevant to reproduce section 406 of the Civil Procedure Code in its full for the better understanding of this judgment, although the learned District Judge has relied on section 406(2) for his order.

The said section reads as follows,

> **406. (1) If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff –**
>
> > **(a) that the action must fail by reason of some formal defect, or**
> >
> > **(b) that there are sufficient grounds for permitting him to withdraw from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned,**
>
> **the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.**
>
> **(2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission, he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh for the same matter or in respect of the same part.**

(3) Nothing in this section shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others.

I find that the defendant has raised objections in relation to two previously filed and withdrawn cases before the District Court. However, the matter has been decided only in relation to the withdrawal of the previous District Court action No. 783/13/L on the basis that no prior permission has been obtained for such withdrawal in terms of section 406(2) as reproduced above.

It is clear from the document marked R2 that on 10-09-2013, when the said case No. 783/13/L was mentioned before the District Court, an application has been made to withdraw the action with the right to file a fresh action, which has been allowed subject to the taxed cost.

The relevant journal entry reads as follows-

(3)

2013 -09-10

උත්තරය සඳහා නියමිතයි.

පැමිනිල්ල නැවත නඩු පැවරීමේ අයිතිය

රඳවා තබා ගෙන ඉල්ලා අස් කර ගැනීමට

අවසර පතයි.

පැමිනිලිකාරිය සිටී.

තක්සේරු ගාස්තුවට යටත්ව නඩුව

නිෂ්ප්‍රභා කරමි.

අත්/...

අත්/ කලේ අති. දිසා මහේ මොරටුව.

The above journal entry clearly establishes the fact that, the 1st appellant had in fact sought the permission of the Court to withdraw the action with the right to file a fresh action.

Although the learned Additional District Judge who allowed that application had failed to specifically state whether that application was allowed or not, in my view, the fact of dismissing the action subject to taxed cost clearly denotes that the said application has been allowed. If otherwise, it was the duty of the learned Judge to state that he is disallowing the application to withdraw with the right to file a fresh action to give reasons as to why he is not allowing the application.

I find that the learned Additional District Judge has gone on a highly technical basis to give his own interpretation in order to negate the plaintiffs' action and to dismiss it. The High Court has also followed suit, which in my view was not warranted given the facts and the circumstances of the case.

At this juncture, I find it relevant to cite **S. C. Sarkar** on the ***Law of Civil Procedure,* 7th ed., Vol. 2** cited by the learned President's Counsel in his written submissions, where at page 771, several Indian judgments on the same issue have been cited.

In the case of **Marudachala Nadar Vs. Chinna Muthu Nadar AIR 1932 MADRAS 155(1)**, it was held that;

Per Curgenven, J.,

> "*I think there is no doubt that an application of this kind must be treated as an indivisible whole and if a party is not allowed liberty to institute a fresh suit his pending suit should not be dismissed, but the application should be refused altogether and the suit should be treated upon the file.*"

In **Naru Vs. Mst. Noji AIR 1959 RAJ 53**, it was held that;

> "*I am of the opinion that the prayer under Sub-rule (2) must be treated as one whole and the Court may either reject the entire prayer, namely refuse the withdrawal of the suit with liberty to bring a fresh suit or allow the entire prayer i.e. permit the withdrawal of the suit with liberty to bring a fresh suit. The reason for this is obvious. If the plaintiff wants to withdraw a suit with liberty to file a fresh suit and if this prayer is*

refused, he will go on with the suit as it is and the suit will be tried out to a finish.

But if, on the other hand, the Court grants him the permission to withdraw but refuses the permission to institute a fresh suit, the result would be that the plaintiff would be deprived of carrying on with the suit as best as he can and would also not be permitted to file a fresh suit on the same cause of action."

It is my view that both the Courts have erred when determining that the 1st plaintiff had failed to obtain prior permission to withdraw the previous action with the right to re-file it based on a mere technicality in the wordings of the learned Additional District Judge who allowed the application to withdraw the previous action.

I am of the view that if an application to withdraw an action with liberty to file a fresh action is refused, it is incumbent upon a trial Judge to give reasons for his decision so that a plaintiff can decide whether he is going to continue with his action in the present form or withdrawing it altogether. This is an option a plaintiff should be granted in such a situation.

In the instant action, it is abundantly clear to me that when the specific application was made to withdraw the action with liberty to file a fresh action, the learned Judge who presided over has allowed the application since he has not given any reasons for refusal.

I find no basis to agree with the conclusion of the learned Judges of the High Court that the previous action was between the same parties and on the same causes of action. In the previous action, the plaintiff had been the 1st plaintiff of the present action where he has sought a declaration that he is the life interest holder of the property described in the plaint.

In the present action, apart from seeking a declaration that the 1st plaintiff is a life interest holder, the 2nd plaintiff has sought a declaration of title to the land and ejectment of the defendant based on his title to the land which in my view is a different cause of action accrued to the 2nd plaintiff although the property remains the same.

For the reasons as considered above, I hold that the learned Additional District Judge was misdirected as to the relevant law when he decided to dismiss the action based on the objection raised under the provisions of section 406(2) of the Civil Procedure Code.

I hold that the learned Judges of the High Court of the Western Province holden in Mount Lavinia were also misdirected as to the relevant facts and law when the order of the learned Additional District Judge was upheld for the reasons stated in their judgment.

Hence, I answer the questions of law under which leave to appeal was granted by this Court in the affirmative.

Accordingly, I set aside the judgment dated 11-10-2018 pronounced by the High Court, as well as the order dated 29-08-2016 pronounced by the learned Additional District Judge of Moratuwa, and dismiss the said objection.

I order that the learned District Judge of Moratuwa should take necessary steps to proceed with the trial, consider the evidence on its merits, and pronounce a suitable judgment as expeditiously as possible, considering the time period it has taken for the conclusion of the initial order pronounced by the trial Court.

There will be no costs of this appeal.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court