

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

*In the matter of an Application for Special
Leave to Appeal against the Judgment of the
Court of Appeal dated 04.12.2018 in terms of
Article 128(2) of the Constitution of the
Democratic Republic of Sri Lanka*

S.C. (S.P.L.) L.A. 16/2019

CA 877/98(F) Domingo Hewage Gunapala
D.C. Tangalle P/2218 Goyambokke,
Tangalle.

PLAINTIFF

Vs.

1. Kankanamge Don Titus Dharmaratne,
Kottekada, Nugegoda.
2. Upali Gunasekera,
M/s Palm Paradise Cabanas,
Goyambokke,
Tangalle.
Presently of No. 19/2, Sunandrama Road,
Kalubowila, Dehiwala.
3. Punyasiri Wickramasinghe,
Goyambokke, Tangalle.

4. Pllakkara Gamage Martyn,
Goyambokke, Tangalle.

DEFENDANTS

AND BETWEEN

Domingo Hewage Gunapala,
Goyambokke,
Tangalle.

PLAINTIFF-APPELLANT

Domingo Hewage Premachandra,
Goyambokke,
Tangalle.

SUBSTITUTED PLAINTIFF-APPELLANT

Vs.

1. Kankanamge Don Titus Dharmaratne,
Kottegoda, Nugegoda.
2. Upali Gunasekera,
M/s Palm Paradise Cabanas,
Goyambokke,
Tangalle.
Presently of No. 19/2, Sunandrama Road,
Kalubowila, Dehiwala.

3. Punyasiri Wickramasinghe,

Goyambokke, Tangalle.

4. Plakkara Gamage Martyn,

Goyambokke, Tangalle.

1ST TO 4TH DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Upali Gunasekera,

M/s Palm Paradise Cabanas,

Goyambokke,

Tangalle.

Presently of No. 19/2, Sunandrama Road,

Kalubowila, Dehiwala.

2ND DEFENDANT-RESPONDENT-

PETITIONER

Domingo Hewage Premachandra,

Goyambokke,

Tangalle.

SUBSTITUTED PLAINTIFF-

APPELLANT-RESPONDENT

Vs.

1. Kankanamge Don Titus Dharmaratne,
Kottekoda, Nugegoda.
2. Punyasiri Wickramasinghe,
Goyambokke, Tangalle.
3. Pllakkara Gamage Martyn,
Goyambokke, Tangalle.

1ST, 3RD AND 4TH DEFENDANT-
RESPONDENT-RESPONDENTS

BEFORE:

**S. THURAIRAJA, PC, J.
KUMUDINI WICKREMASINGHE, J AND
K. PRIYANtha FERNANDO, J.**

COUNSEL:

Manohara de Silva, PC with Hirosha Munasinghe, Ms. Harithriya Kumarage, Sasiri Chandrasiri, Ms. Kaveesha Gamage, Senal Kariyawasam and Ms. Dilmini De Silva instructed by Upendra Gunasekera for the 2nd Defendant-Respondent-Petitioner.

Navin Marapana, PC with Uchitha Wickremasinghe and Saumya Hettiarachchi instructed by Mahinda Wickramarathna for the 1st Defendant-Respondent-Respondent.

Amindika Rathnayaka for the Substituted Plaintiff-Appellant-Respondent.

ARGUED ON: 22nd October 2024.

DECIDED ON: 29th November 2024.

THURAIRAJA, PC, J.

The instant Appeal emanates from a case which was initially filed in District Court Tangalle bearing 2218/P. Judgment in the said case was delivered by the District Court on 27th October 1998, and the Plaintiff-Appellant had Appeal against the same by Petition of Appeal dated 21st December 1998.

As the Court of Appeal Case bearing No. 877/98 was pending pursuant to the said Petition, the Court was informed on 07th July 2006 that the 2nd Defendant-Respondent Upali Gunasekera had passed away months back. Following an application to substitute the said deceased party, Palm Paradise Cabanas (Pvt) Limited of Goyambokke, Tangalle was substituted and the caption was amended to reflect the same.

As apparent from the Court of Appeal Brief, on 31st July 2008, 2nd Defendant-Respondent had given notice of cross-appeal under and in terms of Section 772(1) of the Civil Procedure Code.

The Court of Appeal, having considered the Appeal as well as the Cross-Appeal, delivered its judgment on 04th December 2018. The matter is now appealed to the Supreme Court

by way of Petition of Appeal dated 14th January 2019. The said Petition of Appeal indicates Upali Gunasekara, who is now deceased, as the Petitioner. The Court perused the motion, Petition of Appeal as well as the Affidavit thereto, and all carry the same of the 2nd Defendant-Respondent-Petitioner as Upali Gunasekara.

It is also observed by the Court that subsequent correspondence carries the name of the Petitioner as Palm Paradise Cabanas.

Mr. Navin Marapana, PC raised a preliminary objection to the effect that there is no proper appeal before the Court for the Petition carries a name of a person who is not among the living as the Petitioner. He contends that this Petition is bad in law and that it should be dismissed *in limine*.

Learned Counsel for the Petitioner Mr. Manohara De Silva, PC submitted the same to be a typographical error. He submitted several judgments to support the position that it is a curable non-fatal defect. However, the Court is of the view that these precedents can be distinguished from the case at hand.

One such judgment the learned Counsel cited was **Jayasinghe v. Gnanawathie Menike (1997) 3 Sri L.R. 410**. In this case Jayasuriya, J. opined, on p. 416, that "...where a party to transaction or the subject of a transaction, is actually and corporeally present, the calling of either by a wrong name is immaterial, for praesentia corporis tollit erroneous nominis, et veritas nominis tollit errorem demonstrationis [The presence of the body cures the **error** in the name; the truth of the name cures an **error** in the description]." In this case, the caption of the particular action had described one Gnanawathie Manike as "Gunawathie Manike", and the caption was subsequently amended to correct the error.

The learned President's Counsel also submitted the case of **Shammary v. Premier Airline Agencies (Pvt) Ltd. (1998) 2 Sri L.R. 162**. This case involves an application to amend the caption containing a misnomer/misidentification and the disputes emanating therefrom.

He further cited ***Bank of Ceylon v. Vellaiyan Ramasamy*** (1986) 1 CALR 481, which has been cited in ***Shammari v. Premier Airline Agencies (Pvt) Ltd. (Supra)***. It was held in the ***Vellaiyan Case*** that a mistake could be corrected where the mistake was in the name, description or designation of the defendant which does not mislead the parties on the question of identity of the person intended to be sued. This case is very clearly not applicable to the instant case for the instant case is not one concerned with the name, description or designation of a defendant nor a question of identity of the person to be sued.

We are of the view that the instant case is one entirely different to the cases cited by the learned President Counsel appearing for the 2nd Defendant-Respondent-Petitioner. The Petition of Appeal before this Court was filed in the name of a deceased person. He had passed away in the early months of 2006. This Petition of Appeal was filed on 14th January 2019. Subsequent to the substitution of Palm Paradise Cabanas (Pvt) Limited of Goyambokke, Tangalle as the 2nd Defendant-Respondent—in fact, well over two years later—the 2nd Defendant-Respondent, had given notice of cross-appeal on 31st July 2008. In spite of the active involvement of the said party in the proceedings before the Court of Appeal, the Petition of Appeal before this Court was filed in deceased Gunasekara's name.

Despite the error being such a patent one, no application was made to this Court by the said party to cure the defect. In fact, the 2nd Defendant-Respondent-Petitioner has covertly changed the caption in subsequent documents without seeking permission from the Court. In doing so, the said party has acted in bad faith.

For the aforementioned reasons, the Court takes the view that the Preliminary Objection should be upheld and the Petition should be dismissed *in limine*.

Petition dismissed.

JUDGE OF THE SUPREME COURT

KUMUDINI WICKREMASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE SUPREME COURT