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

In the matter of an appeal under and in terms of Section 5C(1) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended

SC Appeal No. 242/2014
SC/HCCA/LA/218/2014
Uva/HCCA/BDL/05/2006(F)
DC Welimada No. L/854

Samsudeen Mohammed Khan,
Mahathenna,
Guruthalawa.

PLAINTIFF

- Vs -

M.A. Hameed Ibrahim Nachchiya,
Mahathenna,
Guruthalawa.

DEFENDANT

And Between

M.A. Hameed Ibrahim Nachchiya,
Mahathenna,
Guruthalawa.

DEFENDANT – APPELLANT

- Vs -

Samsudeen Mohammed Khan,
Mahathenna,
Guruthalawa.

PLAINTIFF – RESPONDENT

And now between

Mohammed Khan Abdul Kuthoos,
Mahathenna,
Guruthalawa.

1C SUBSTITUTED PLAINTIFF – APPELLANT

- Vs -

M.A. Hameed Ibrahim Nachchiya,
Mahathenna,
Guruthalawa.

DEFENDANT – APPELLANT – RESPONDENT

Samsudeen Mohammed Khan, [Deceased]
Mahathenna,
Guruthalawa.

PLAINTIFF – RESPONDENT

(1A) Majeed Jeithoon Bee [Deceased]

(1B) Mohammed Khan Washeela Umma

(1D) Mohammed Rasheena Bee Bee

(1E) Mohammed Khan Muvina Umma

(1F) Mohammed Khan Ishak

(1G) Mohammed Khan Ameena Umma

All of
Mahathenna,
Guruthalawa.

SUBSTITUTED PLAINTIFFS – RESPONDENTS

Before:	**Murdu N.B. Fernando, PC, CJ** **E.A.G.R. Amarasekara, J** **Kumudini Wickremasinghe, J** **Achala Wengappuli, J** **Mahinda Samayawardhena, J** **Arjuna Obeyesekere, J** **K. Priyantha Fernando, J**
Counsel:	Shyamal A. Collure with A.P. Jayaweera and Prabath S. Amerasinghe for the 1C Substituted Plaintiff – Appellant Navin Marapana, PC with Uchitha Wickremasinghe and Thanuja Meegahawatte for the Substituted Defendant – Appellant – Respondent
Argued on:	4th September 2023
Written Submissions:	Tendered by the 1C Substituted Plaintiff – Appellant on 21st January 2015 and 30th November 2023 Tendered by the Substituted Defendant – Appellant – Respondent on 20th May 2015 and 23rd October 2023
Decided on:	16th June 2025

Obeyesekere, J

The Plaintiff – Respondent [the Plaintiff] and the Defendant – Appellant – Respondent [the Defendant] are brother and sister. Their father, Ebrahim Samsudeen had been issued a permit by the State in 1955 under the Land Development Ordinance in respect of Lot No. 197 in Final Village Plan [FVP] No. 189. Ebrahim Samsudeen had nominated the Plaintiff as his successor. Upon the death of Ebrahim Samsudeen, the name of the Plaintiff had been inserted as the permit holder in 1987.

The Plaintiff filed action against his sister in the District Court of Bandarawela on 5th January 1990. The First Schedule to the plaint referred to Lot No. 197 in FVP No. 189. The Plaintiff claimed in his plaint that he allowed the Defendant to temporarily occupy part of the land referred to in the First Schedule, which part had been morefully referred to in the Second Schedule to the plaint, together with a building situated thereon, and that the Defendant had refused to vacate the said land occupied by her. The Plaintiff accordingly

prayed *inter alia* for a declaration that he is the owner of the land referred to in the Second Schedule, and for an order ejecting the Defendant from the said land referred to in the Second Schedule and to hand over vacant possession thereof to the Plaintiff.

Having denied in her answer almost the entirety of the averments of the plaint, the Defendant claimed that she has been in occupation of the said land for over 18 years and that she has effected improvements on the said land including the construction of a house. While moving for a dismissal of the plaint, the Defendant pleaded, in the event of Court holding with the Plaintiff, for compensation in a sum of Rs. 700,000 for improvements effected by her.

Death of the Plaintiff and substitution

The Plaintiff passed away on 16th November 1994 prior to the commencement of the trial. In his place, his wife and children, the present 1C Substituted Plaintiff – Appellant [1C Substituted Plaintiff] and the 1A, 1B and 1D – 1G Substituted Plaintiffs – Respondents [the 1A, 1B and 1D – 1G Substituted Plaintiffs] [collectively the Substituted Plaintiffs] were substituted on 24th July 1996. Issues were raised on 26th April 1999 and the case proceeded to trial, first in the District Court of Bandarawela and thereafter in the District Court of Welimada, pursuant to the case being transferred to the latter Court. By its judgment delivered on 19th May 2006, the District Court held with the Plaintiff and granted the aforementioned reliefs.

While most of the journal entries after the substitution of the Plaintiff contain the names of the Substituted Plaintiffs, some journal entries only contain the name of the Plaintiff. However, it does not appear that an amended caption has been filed before the District Court incorporating the names of the Substituted Plaintiffs in place of the deceased Plaintiff. The caption of the judgment delivered by the District Court contains only the name of the Plaintiff and does not contain the names of the Substituted Plaintiffs.

Appeal to the High Court

Aggrieved by the judgment of the District Court, the Defendant filed a notice of appeal and a petition of appeal. In the notice of appeal and in the caption of the petition of appeal, the Defendant had only named the Plaintiff as a respondent and had omitted to name the Substituted Plaintiffs as respondents, even though by the time the judgment

was delivered, the Plaintiff had already been substituted and the case had proceeded in the District Court in the name of the Substituted Plaintiffs.

Notices however had been issued by the Civil Appellate High Court of the Uva Province holden in Badulla [the High Court] to all Substituted Plaintiffs. The appeal had accordingly proceeded before the High Court with the Substituted Plaintiffs represented by an Attorney-at-Law who incidentally was the holder of the proxy of the Substituted Plaintiffs before the District Court. Even though oral and written submissions were made on behalf of the Substituted Plaintiffs, no objection was taken with regard to the failure to name the Substituted Plaintiffs in the notice of appeal or in the caption of the petition of appeal to the High Court. By its judgment delivered on 26th March 2014, the High Court set aside the judgment delivered by the District Court and allowed the appeal. The caption of the judgment of the High Court too only refers to the Plaintiff and the Defendant.

Appeal to the Supreme Court

Dissatisfied with the said judgment of the High Court, the 1C Substituted Plaintiff filed a petition of appeal on 2nd May 2014 in this Court, naming the Defendant and the 1A, 1B, 1D – 1G Substituted Plaintiffs as Respondents. Thus, all necessary parties are before this Court. The petition does not contain any complaint regarding the appeal of the Defendant proceeding before the High Court without naming the Substituted Plaintiffs as respondents. However, the 1C Substituted – Plaintiff sought and obtained leave to appeal on the following four questions of law:

(1) Has the High Court erred in law in failing to hold that the entire appeal of the Defendant was fatally defective in as much as the same has been preferred and prosecuted against a deceased party and does the said error vitiate the judgment dated 26th March 2014?

(2) Did the High Court err in law by not holding that the Defendant's notice of appeal and the petition of appeal were contrary to the provisions in Section 755 and 758 of the Civil Procedure Code?

(3) Has the High Court erred in law with regard to the identification of the corpus particularly in view of the testimony of the Surveyor and paragraph 2 of the Surveyor's Report?

(4) Is the judgment of the High Court contrary to law and the weight of the evidence led?

The following question of law was raised by the Defendant:

(5) Does the land referred to in P1 apply to the land surveyed in Plan P2? If not, is the Plaintiff entitled to maintain this action?

Pursuant to leave being granted, an application had been made by learned Counsel that this matter be referred to a divisional bench of this Court since conflicting views have been expressed by this Court with regard to the first, and more particularly the second question of law. Accordingly, His Lordship the Chief Justice had made an order on 7th June 2023 in terms of Article 132(3) of the Constitution constituting a bench of seven Judges of this Court to hear and determine this matter.

I shall at the outset consider the first and second questions of law and thereafter proceed to consider the third, fourth and fifth questions of law which relate to the factual circumstances of this appeal.

<u>First question of law</u>

The first question of law has three components. They are:

1) Has the appeal been preferred and prosecuted against a deceased party?

2) If so, is the entire appeal of the Defendant defective?

3) Does the said error vitiate the judgment of the High Court?

The submissions of the learned Counsel for the 1C Substituted Plaintiff reflects the above three components. He submitted that the appeal to the High Court has been preferred against a party who had passed away at the time the appeal was filed and thus, the appeal has been preferred against a non-existent person. He submitted that what followed thereafter was a complete nullity, and that the judgment of the High Court must be set aside on that ground alone. In support of his submission, the learned Counsel for the 1C Substituted Plaintiff has cited several decisions of this Court and of the Court of Appeal.

I shall consider each of the said authorities as each case, depending on the facts and circumstances peculiar to such case, gives rise to different scenarios. In doing so, I shall bear in mind that even though the essence of the said submission of the learned Counsel for the 1C Substituted Plaintiff is that the appeal had proceeded against a deceased party, the reality is that the Plaintiff had been substituted in the District Court with the Substituted Plaintiffs by the time the judgment of the District Court was delivered. This fact distinguishes each of the said cases cited by the learned Counsel for the 1C Substituted Plaintiff from this case. Thus, what transformed into the appeal before the High Court was the said District Court action of which the Substituted Plaintiffs were already parties and hence, this was not a case where there was a necessity to substitute the Plaintiff afresh in the High Court prior to the delivery of the judgment of the High Court.

I should perhaps start with the judgment of this Court in **Jeyaraj Fernandopulle v Premachandra De Silva and others** [(1996) 1 Sri LR 70]. The issue that arose was whether a Court, and specifically the Supreme Court, can be called upon to review or revise a matter once that matter has been decided. In the course of his judgment, Amerasinghe, J stated that:

> "*The court has inherent jurisdiction to vary or clarify an order so as to carry out the court's meaning or make the language plain, or to amend it where a party has been wrongly named or described unless this would change the substance of the judgment.* ***The court will treat as a nullity and set aside, of its own motion if necessary, a judgment entered against a person who was in fact dead*** *or a non-existent company or, in certain circumstances, a judgment in default or a consent judgment.* ***Where there has been some procedural irregularity in the proceedings leading up to the judgment or order which is so serious that the judgment or order ought to be treated as a nullity, the Court will set it aside***." [at page 105; emphasis added]

It must be stated that the above statement was not made in the context of the facts of that case but was more a general statement. Be that as it may, the important point was that all parties must be alive at the time of the delivery of the judgment.

Abeysinghe v Abeysekara [(1995) 2 Sri LR 104; at page 106] was a case where the defendant had died prior to the institution of action. Ranaraja, J in the Court of Appeal held that:

> "*An action filed against a sole defendant who was dead at the time is a nullity, and any substitution of his legal representative thereafter is also a nullity. The reason is that the action is not merely against a wrong person but against no person at all, and when the substitution of his legal representative is made it is not really a case of substitution but rather the filing of a new action against a new defendant.*
>
> *An action which is a nullity cannot receive ratification such as would retroactively render it valid from its commencement. The proceedings in the action have the effect of not having taken place at all. Hence the decree and the writ issued on the basis of that decree will be a nullity*."

It is in the above context that the Court of Appeal held at page 108 that, "*When there is no live defendant before Court, the Court has no jurisdiction to hear and determine the action. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non judice. A judgment entered by such Court is void and mere nullity*."

A situation similar to that in **Abeysinghe** arose in **Bengamuwa Dhammaloka Thero v Dr. Cyril Anton Balasuriya** [(2010) 1 Sri LR 193] where the 2nd defendant had passed away prior to the institution of action in the District Court. This Court affirmed the decision of the Court of Appeal that the decree entered in the case against the 2nd defendant was void.

In **Darley Butler and Company Limited v Anoos and others** [(2008) 2 Sri LR 149] a mortgage bond action was instituted seeking judgment against four defendants jointly and severally. The 2nd defendant in his answer contended that, due to the death of the 4th defendant prior to the institution of the action, the action become invalid in law and is null and void and action cannot be maintained even against the 2nd defendant. The Court of Appeal rejected this argument and held [at pages 151 - 153] that while the "*Situation would have been entirely different if it was a suit against a sole defendant since the suit filed against a sole defendant who was dead is a nullity.*" … "*Since this is a case where the*

defendants were sued on their joint and several liability as already observed, action has to proceed against the other defendants, but no substitution can be effected in the room of the deceased 4th defendant who was dead at the date of institution of the suit." … "Substitution could be effected only in the room of or on behalf of someone who was alive at the time of institution of the suit."

It would thus be seen that in each of the above three cases, the defendant had passed away prior to the institution of action, whereas in this case, the Plaintiff was alive at the time of institution of action in the District Court and upon his death, had been substituted with the Substituted Plaintiffs who thereafter became the parties to the action before the District Court. The question of proceeding against a dead party is therefore not the issue in this case.

Mariam Beebee v Seyed Mohammed [68 NLR 36] was a partition action but decided prior to the amendment effected to Sections 48(1)(b), 48(6), 81(1) and 81(9) of the Partition Act. Here, the 7th defendant had died prior to the trial commencing but no steps had been taken to substitute the 7th defendant. Having stated [at page 38] that, "… *it is clear that a partition decree which allotted a share to a party, but which was entered after the death of that party, is a nullity*", Chief Justice Sansoni proceeded to set aside all the proceedings that had taken place since the death of the 7th defendant, and remitted the case to the District Court for proper proceedings to be taken.

In **Rannaide v Wimalasooriya and others** [(2012) 1 Sri LR 206], the 1st substituted plaintiff had died on 03rd February 2003 while the appeal was pending but no substitution had been effected in his place, even though Section 760A of the Civil Procedure Code provides for the steps that must be taken after the death of a party while an appeal is pending. Argument had taken place thereafter on 13th January 2004 and judgment pronounced on 1st March 2004. A divisional bench of the Court of Appeal held as follows:

> "*the appeal cannot proceed without bringing the legal representatives of the deceased on the record, and the judgment pronounced by this Court on 01st March 2004 is a nullity as the record was defective by reason of the death of the 1st substituted-plaintiff-appellant and the Counsel who represented the said deceased party had no status to appear and/or represent the deceased party in this Court after the death* ***as no substitution had been effected***." [page 212; emphasis added]

> "***As in this case when the appellant was dead, there was no 'live appellant" before this Court****. When there is no live appellant before Court it has no jurisdiction to hear and determine the appeal. In other words in order to make the judgment valid this Court did not have jurisdiction of the persons. If the Court has no jurisdiction it is of no consequence that the proceedings had been formally conducted for they are Coram Non-Judice*." [page 213; emphasis added]

In **Munasinghe and another v Mohammed Jabir Navaz Careem** [(1990) 2 Sri LR 163], the judgment of the District Court had been entered in November 1975 and the plaintiff had passed away in July 1980 pending the hearing of the appeal. No steps had been taken to substitute the deceased plaintiff. The matter was argued before the Court of Appeal in January 1987 and the plaintiff had even been represented by Counsel. The judgment of the Court of Appeal was delivered in March 1987 and the plaintiff was substituted only after the case record was sent back to the District Court.

In an application for re-listing, it was argued that pursuant to the death of the plaintiff, the record was defective and that the judgment of the Court of Appeal was a nullity. In allowing the application for re-listing, Senanayake, J stated as follows:

> "*I am of the view that there is force in the argument. I am of the view that the defective record should have been cured before the pronouncement of the judgment. In the instant case the learned Counsel had no status to appear and mark his appearance on behalf of the substituted Plaintiff-Respondent. Therefore the proceedings of 27th January 1987 and the judgment of 27th March 1987 was a nullity.*" [page 166]

Thus, the facts of **Rannaide** and **Munasinghe** are different in that, (a) a party had passed away prior to the delivery of the judgment of the Court of Appeal, and (b) the deceased party had not been substituted, whereas in the present case, the deceased Plaintiff had been substituted prior to the delivery of the judgment of the District Court and thus, at the time the appeal was filed, there was a "live party", that being the Substituted Plaintiffs and the record was therefore not defective.

Karunawathie v Piyasena and others [(2011) 1 Sri LR 171] was an action filed under the Partition Act. The 15th respondent, who was also the 16A respondent for the deceased 16th respondent, had passed away on 30th May 2004 whilst the case was pending before the District Court. **Necessary steps for substitution had not been taken at the time**. Against the said final order of the District Court, an appeal had been filed in the High Court. Whilst the case was pending before the High Court, the 2nd respondent too had passed away on 06th September 2007. Admittedly **no steps had been taken to substitute a legal representative of the deceased 2nd respondent before the High Court**. The judgment of the High Court had been delivered on 13th October 2009. The question that arose was whether substitution in place of the deceased respondents could be effected before the Supreme Court.

Chief Justice Shirani Bandaranayake stated as follows:

> "*As has been stated earlier,* ***the record in the present appeal had first become defective before the Final Order of the District Court was given*** *and* ***thereafter prior to the Judgment of the High Court was delivered****. Accordingly it is evident that at the time leave to appeal application was filed before this Court,* ***the Record in question had become defective****.*
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> ***When a party to a case had died during the pendency of that case, it would not be possible for the court to proceed with that matter without bringing in the legal representatives of the deceased in his place****. No sooner a death occurs of a party before Court, his counsel loses his position in assisting court, as along with the said death and without any substitution he has no way in obtaining instructions. At that stage, the question arises, as to how and what are the steps that has to be taken in order to cure the defect."* [page 177; emphasis added]
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> *"****Accordingly it is evident that both those judgments are ineffective and therefore each judgment would be rejected as a nullity.*** *For the said reason the judgment of the High Court dated 13th October 2009 and the judgment of the District Court of Kegalle dated 20th May 2005 are both set aside.*
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> *This case is sent back to the District Court of Kegalle for the appellant to take steps according to law, for substitution.*" [page 180-181; emphasis added]

While the factual position in **Karunawathie** differs from the facts in this appeal in that the record was not defective at the time of the delivery of the judgment of the District Court, in **Indrani Mallika v Siriwardena and others** [SC Appeal No. 160/2016; SC minutes of 2nd December 2022] Samayawardhena, J with whom Murdu N. B. Fernando, PC, J [as she then was] and I agreed, held that the judgment of **Karunawathie** was *per incuriam* since Court failed to take cognizance of the provisions of Sections 48(1)(b), 48(6), 81(1) and 81(9) of the Partition Act which catered to the situation that had arisen in that case. However, the principle that a judgment of a Court is a nullity for the reason that substitution of a deceased party did not take place prior to the delivery of the judgment continues to be valid.

In **Jane Nona v Jayasuriya** [(1986) 1 CALR 315] the defendant had passed away by the time the District Judge made an order allowing the plaintiffs application for execution of the decree pending appeal. G.P.S.De Silva, J [as he then was] held that the order directing the issuance of the writ of execution was a nullity as it had been made after the defendant had died.

A careful consideration of the aforementioned judgments cited by the learned Counsel for the 1C Substituted Plaintiff demonstrates the following:

(a) An action filed against a party who had passed away at the time of the institution of such action is a nullity and the question of substitution does not arise;

(b) Where there are multiple defendants and one of them had passed away prior to the institution of action, the deceased defendant cannot be substituted but the action can proceed against the other defendants;

(c) The party before Court must be a "live party" in order for Court to exercise jurisdiction over such person;

(d) The moment a party to an action passes away, the record becomes defective and therefore steps must be taken to substitute the legal representative of such deceased person and cure the defect in order for the action to be prosecuted beyond that point;

(e) A judgment delivered after a party has passed away but without such deceased party being substituted is a nullity;

(f) A writ of execution issued after a party had passed away is a nullity.

I am in agreement with the above propositions. However, the facts of this case are different from the factual situations that have arisen in each of the above cases. While the situations in (a), (b) and (f) do not apply to this case, the situations in (d) and (e) too does not arise by virtue of the Plaintiff in this case being alive at the time of the institution of action and having been substituted in the District Court prior to such Court delivering its judgment. The critical point in this case is that the record was not defective, either at the time of delivery of the judgment of the District Court or at the time the appeal was filed in the High Court, as a result of the Plaintiff having been substituted.

The only issue is whether there was a "live party" before the High Court. In this regard, I must reiterate that the Plaintiff was substituted before the District Court with the Substituted Plaintiffs and for all intents and purposes **the proper party to the appeal** could only have been the said Substituted Plaintiffs and not the deceased Plaintiff. In other words, the "live party" in this case are the Substituted Plaintiffs. The fact that the notice of appeal and the petition of appeal does not refer to the Substituted Plaintiffs but instead refers only to the deceased Plaintiff does not, in my view, mean that the appeal was prosecuted against the deceased Plaintiff for the reason that the deceased Plaintiff had been substituted by then.

I must reiterate that the only "live party" at the time the appeal was filed in the High Court were the Substituted Plaintiffs, which then leads me to the second question of law, that being whether the failure to name the "live party" in the notice of appeal and the petition of appeal is curable in terms of the provisions of the Civil Procedure Code or whether such a defect was fatal to the maintainability of the appeal before the High Court, thereby rendering the entire appeal of the Defendant defective and vitiating the judgment of the High Court.

Provisions of the Civil Procedure Code

Chapter LVIII of the Civil Procedure Code contains the provisions relating to the filing of appeals in the Court of Appeal and the High Court [vide Section 5A(2) of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990, as amended by Act No. 54 of 2006] from judgments and orders delivered by the District Court.

In terms of Section 754(1), "*Any person who shall be dissatisfied with any judgment pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law*."

Section 754(3) provides that, "*Every appeal to the Court of Appeal from any judgment or decree of any original court, shall be lodged by giving notice of appeal to the original court within such time and* ***in the form and manner hereinafter provided***." Such notice shall be presented to the Court that pronounced the judgment within a period of fourteen days from the date the judgment appealed against was pronounced .

While Section 755 sets out the requirements of a notice of appeal,

(a) Section 755(1)(c) requires the names and addresses of the parties to the action to be stated in such notice;

(b) Section 755(1)(d) requires the names of the appellant and the respondent to be stated in such notice; and

(c) Section 755(2)(b) requires a copy of the said notice to be served on the respondent or on his registered attorney and for proof of service to be attached to the notice.

The requirement to file a petition of appeal is contained in Section 755(3). Such petition shall be presented to the Court that pronounced the judgment and shall set out the circumstances out of which the appeal arises and the grounds of objection to the judgment appealed against. It shall also contain the particulars required under Section 758 including the names of the parties to the action [Section 758(1)(b)] and the names of the appellant and the respondent [Section 758(1)(c)].

The Court that pronounced the judgment shall thereafter forward to the Court of Appeal the petition of appeal together with all the papers and proceedings in the case relevant to the judgment or decree appealed against as speedily as possible. Section 755(3) provides that on receipt of the petition of appeal, the Registrar of the Court of Appeal shall forthwith number the petition and **notify the parties concerned by registered post**.

In terms of Section 759(1), where the petition of appeal is not drawn up in the manner prescribed in Section 758, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court, or be amended then and there. Section 759(2) provides that, "*In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the **respondent** has not been **materially prejudiced**, grant relief on such terms as it may deem just*."

Nanayakkara v Warnakulasuriya [(1993) 2 Sri LR 289] was a case where the Court of Appeal had dismissed the defendant's appeal on a preliminary objection that he had failed to hypothecate the sum of Rs. 150 deposited as security for the respondent's costs of appeal. Kulatunga, J stated that, "*The power of the Court to grant relief under section 759(2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of the opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed*."

In **Somaratne v Dharmasena and others** [SC Appeal No. 29/2014; SC minutes of 6th April 2023], this Court considered whether the failure to name a party in the petition of appeal can be cured under Section 759(2). While there were eight defendants, that being a partition case the only contesting defendant was the 4th defendant. The District Court allotted shares to all parties. Aggrieved, the 4th defendant appealed to the High Court but did not name the other defendants as parties to the appeal. An objection taken that the necessary parties were not before the High Court was upheld by the High Court. In an appeal to this Court, it was sought to be argued that the failure to name the other defendants caused no material prejudice to those defendants who had not been named as they had not participated in the trial.

Samayawardhena, J with whom Murdu N.B. Fernando, PC, J [as she then was] and Thurairaja, PC, J agreed, rejected the argument that no material prejudice had been caused to those parties who had not been named, for the reason that shares had been allotted to such defendants as well and they were therefore necessary parties. More importantly, Court stated that:

> "*In my view, section 759(2) is inapplicable to cater to a situation such as the present one where the issue is failure to name necessary parties as respondents. A careful reading of section 759(2) reveals that it caters to a situation where the Court can grant relief to an appellant despite mistake, omission or defect 'if it should be of opinion that the respondent has not been materially prejudiced'.* ***When a necessary party has not been made a respondent, this section has no applicability.***
>
> *I am aware that relief has been granted for failure to make necessary parties as parties to the appeal under section 759(2) on the basis that no material prejudice has been caused by such failure. This seems to me not to be correct. The question is not whether prejudice has been caused to the named respondents by not naming necessary parties as respondents, which, to my mind, is meaningless. If that interpretation is given, the appellant can name only parties who support him as respondents and say no prejudice has been caused to them by the failure to name other parties as respondents*." [emphasis added]

I am in agreement with the view taken in **Somaratne** that Section 759(2) does not provide a solution to the situation that has arisen in this appeal. It however begs the question whether the failure to name the Substituted Plaintiffs is a mistake that cannot be cured at all in terms of the provisions of the Civil Procedure Code. The answer to this question is found in Section 770 of the Civil Procedure Code, which reads as follows:

> "*If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as hereinbefore provided,*
>
> *or*

if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, ***but who has not been made a party to the appeal****, is interested in the result of the appeal,*

the court may issue the requisite notice of appeal for service"

Section 770 thus reflects the intention of the legislature that failure to name as a party to the appellate process a person who was a party in the lower court is a defect that is curable, and that, at that stage Court is only mindful that such person must be heard. Hence, the requirement to notify such party. As pointed out by Sharvananda, J [as he then was] in **Ittepana v Hemawathie** [(1981) 1 Sri LR 476]:

"*Principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant*." [page 479]

"*Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant.* ***If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity.***" [page 484; emphasis added]

Although the above was stated in the context of summons not being served while an action was pending before the District Court, it would, in my view, apply with equal force in proceedings before an appellate forum.

I have already stated that the Plaintiff had been substituted with the Substituted Plaintiffs by the time the appeal was lodged with the High Court and that the party who should have been named as respondents in the High Court were the Substituted Plaintiffs. They being interested in the outcome of the appeal, and with them not being named, the course of action provided in Section 770 must be adopted and it is for the High Court to issue the requisite notice of appeal to such parties. While Section 770 requires the Court to issue the requisite notice of appeal on such parties, it does not appear from a plain

reading of Section 770 that the caption needs to be amended by adding the names of such parties. However, filing of an amended caption is not only desired, but in my view is mandatory. Be that as it may, on the face of it, the failure to name the Substituted Plaintiffs in both the notice of appeal and the petition of appeal is not fatal to the maintainability of such appeal and is curable under Section 770.

The evolution of Section 770 was exhaustively considered in **Somaratne v Dharmasena** [supra]. The starting point is **Dias and others v Arnolis and others** [17 NLR 200] where a Full Bench of the Supreme Court was called upon to consider whether the Court has the power, when the appeal was before it for argument, to act under section 770 of the Civil Procedure Code and order that any person who was a party to the action in the lower Court, but who has not been made a party to the appeal, be made a respondent to the appeal if the Court is satisfied that he is interested in the result of the appeal.

In response, Chief Justice Lascelles held [at pages 200-201] that:

> "*The only question which we have to decide here is whether the Judge before whom the appeal came had power under section 770 of the Civil Procedure Code to direct the third defendant to be made respondent to the appeal. There can, in my opinion, be no question but that this power is expressly and plainly conferred on the Judge by the above-named section*. …
>
> *Whether or not a respondent ought to be added in any particular case is a question for the decision of the Judge who hears the appeal. The proper course, in my opinion, is to remit the case to the Judge who heard the case, in order that he may exercise his discretion as to whether the third defendant should or should not be added as a respondent to the appeal*."

A much stricter approach was adopted in **Ibrahim v Bee Bee** [19 NLR 289]. In that case, an argument was taken that it is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and unless they are, the petition of appeal should be rejected.

Chief Justice Wood Renton held as follows:

> "*In case No. 359 the first defendant was, in my opinion, a necessary party to the appeal, as the share allotted to him in the plaint might be prejudicially affected by the result of the inquiry into the intervenients' claims. But the question remains whether, as a matter of discretion, we ought not to allow his name to be added under section 770 of the Civil Procedure Code. I have no doubt as to the power of the Supreme Court to dismiss an appeal, on the ground that it has not been properly constituted by the necessary parties being made respondents to it, and I am equally clear that that power should be exercised,* ***unless the defect is not one of an obvious character, which could not reasonably have been foreseen and avoided***." [page 291; emphasis added]

Thus, Chief Justice Wood Renton advocated a strict application of Section 770 and sought to circumscribe its applicability by stating that the defect should not have been obvious and could not have been reasonably foreseen and avoided.

Shaw, J however adopted a slightly more liberal view when he stated as follows:

> "*I feel no doubt that, under the provisions of Chapter LVIII of the Civil Procedure Code, it is necessary, for the proper constitution of an appeal, that all parties to an action who may be prejudicially affected by the result of the appeal should be made parties, and that, unless they are, the petition of appeal should be rejected.*
>
> *An appeal, defective owing to non-joinder of necessary respondents, can be remedied, in a proper case, by an order of the Court under Section 770 directing those parties to be added or noticed. Such order would seem to be entirely discretionary, and I should not myself be disposed to amend the proceedings when the appeal is actually before the Court for hearing,* ***unless some good excuse was given for the non-joinder or notice, or unless it was not very apparent that the parties not joined might be affected by the appeal***." [page 293; emphasis added]

Shaw, J was however willing to allow a defect to be cured where some good excuse was given or where it was not very apparent that the parties that had not been named may be affected.

The strict approach laid down by Chief Justice Wood Renton was followed over the years and had almost become the norm [Suwarishamy v Thelenis [54 NLR 28]; Gunasekera v Perera [74 NLR 163], Wijeratne v Wijeratne [74 NLR 193]], until the decision of the Supreme Court in **Kiri Mudiyanse and another v Bandara Menike** [76 NLR 371]. In that case, a preliminary objection was taken by the plaintiff that the appeal of the 4th and 5th defendants is not properly constituted as the 1st – 3rd and 6th – 8th defendants who had been granted shares in the judgment of the District Court had not been made respondents to the appeal and that only the plaintiff has been made a party respondent. Although it was conceded that the rights of the 1st – 3rd and 6th – 8th defendants would be prejudicially affected in the event of the appellants succeeding in the appeal, to all intents and purposes the contest was between the plaintiff and the 4th and 5th defendants regarding the corpus. While conceding that the appeal is defective owing to the non-joinder of necessary respondents, it was submitted that this defect could be remedied by an order of Court under Section 770 of the Civil Procedure Code directing that the defendants who had been omitted be added or noticed as respondents.

Pathirana, J stated that [pages 375-377]:

> "*Section 770, in my view, gives a very wide discretion to this Court and there is room for introducing other principles by which the Court can exercise its discretion.*
>
> *Intrinsically there is nothing in Section 770 either expressly or by necessary implication to inhibit the discretion to the principles that have been set out in the case of Ibrahim v. Beebee as to do so will be tantamount to saying that the exercise of the discretion is cribbed, cabined and confined exclusively to these principles, limiting the exercise of the discretion in a particular way, and thereby putting an end to the discretion itself.*
>
> *" … I am of opinion that the Court cannot be fettered in exercising a discretionary power which is given so widely by Section 770 by being bound to exercise the discretion only in conformity with the principles laid down in those cases.*
>
> *The case of Dias v. Arnolis had not laid down the principle which formed the decision in Ibrahim v. Beebee, namely, that the power of dismissal should be exercised unless*

the defect is not one of an obvious character which could not have been reasonably foreseen and avoided. On the other hand, the question whether or not the respondent ought to be added in a particular case is a question for decision of the judge who hears the appeal was laid down in the full bench case. Much the same flexible language was used by Shaw, J. in Ibrahim v. Beebee when he stated as the second reason for the exercise of the discretion, namely, unless some good cause is given for non-joinder."

… I would rather on the facts and circumstances in this case prefer to follow the principles laid down in the full bench case of Dias v. Arnolis and also the second reason given by Shaw, J. in Ibrahim v. Beebee by stating that the exercise of the discretion is a matter for the decision of the judge who hears the appeal in the particular case and also that it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously."

As to whether the discretion must be exercised in favour of the appellants, Court stated as follows [pages 377-378]:

"I was also very much impressed by the test suggested by Mr. Jayewardene who appeared for the appellants who submitted that this Court should adopt a principle analogous to that which was adopted by the Privy Council in Bilindi v. Attadassi Thero [47 NLR 276] where a practical approach was adopted, namely, whether the discretion should be exercised if the defect can be easily remedied without injustice to anyone.

I am of opinion that no injustice will be done at this stage by permitting the 1st – 3rd and 6th – 8th defendants to be added as parties, for the obvious reason, if the appeal is ultimately allowed, then it is because the Court exercised the discretion under Section 770 in their favour which enabled the appellants to win their rights. The defendants will also have had the satisfaction of having been given an opportunity of putting their arguments before Court. On the other hand, if the appeal is not allowed, then their rights are not prejudiced.

I agree with the submissions made by Mr. Jayewardene that where a matter could be easily remedied without injustice being done then the discretion under Section 770 can be exercised by this Court in appeal in an appropriate case."

Rajaratnam, J expressed the following view:

"*Section 770 of the Civil Procedure Code has survived intact all the authorities referred to above to give us still an unfettered discretion to adjourn the hearing of the appeal to a future date and to direct that the 1st – 3rd and 6th – 8th defendants be made Respondents and the requisite notices of appeal be issued to the Fiscal for service. We have done so in the interests of a just hearing of the appeal while being most respectfully mindful of the guiding principles laid down by this Court.* ***The plain meaning of this Section, however, shines with a clear and constant simplicity in the midst of all the wise observations made round it during the last half of a century***." [page 378; emphasis added]

Thus, in the present case, had an objection been taken before the High Court, it would have been in the interests of the Substituted Plaintiffs to have had their names inserted, even though by then, notices had been served on the Substituted Plaintiffs and they were before the High Court represented by an Attorney-at-Law.

Having considered the above judicial dicta, Samayawardhena, J stated in **Somaratne v Dharmasena** [supra] as follows:

"*In my view, Kiri Mudiyanse v. Bandara Menika was the watershed in the progressive development of the law in respect of defective appeals. The current trend of authority in the Supreme Court endorses this approach. Accordingly, mistakes, omissions, defects or lapses such as the failure to make necessary parties as respondents, naming deceased parties (without substitution) in the caption, naming parties incorrectly in the caption, failure to give notice to all named parties etc. are curable defects under sections 759(2) and 770 of the Civil Procedure Code.*

Whilst appreciating that the discretion of the Court shall not be circumscribed by self-imposed fetters, I must add that the Court shall not however allow defects or lapses to be cured on the application of either section 759(2) or 770 as a matter of course

or as a matter of routine ***unless the appellant gives a good reason to the satisfaction of the Court for such defect or lapse****, as otherwise the express provisions of the Civil Procedure Code under Chapter 58, which lay down the procedure for the proper constitution of an appeal, will be rendered nugatory*." [emphasis added]

An identical situation as in the present case arose in **Premaratna v Sunil Pathirana** [SC Appeal No. 49/2012; SC minutes of 27th March 2015] where Eva Wanasundara, J stated as follows:

"*The parties to the action in the District Court are the parties to the action in the appellate court, in this instance the High Court of Civil Appeals. The petition of appeal had not contained in the caption, the names of the substituted parties. I feel that, the mere fact that only the name of the dead person was mentioned in the caption, cannot be held against the party seeking relief from Court. It is a lapse on the part of the petitioner's Attorney-at-Law. The litigant who has come before Court for relief should not be deprived of his right to seek relief due to a lapse on the part of the lawyers preparing and filing the papers. In the case in hand, the dead person had been substituted promptly in the District Court and named as 1A and 1B defendants. It is only a lapse of not writing down the caption properly. I am of the view that this is a matter which should have been corrected by the High Court Judges ….* ***It is not an incorrigible defect, good enough for rejecting the petition of appeal***."[emphasis added]

However, faced with the identical facts as in this case, the Court of Appeal held in **Wimalasiri and another v Premasiri** [(2003) 3 Sri LR 330] that:

"*… citing the original plaintiff who was no longer living as the respondent to the notice of appeal as well as to the petition of appeal could only be construed as negligence and not as a mistake or inadvertence on the part of the defendants-appellants and their Attorney-at-Law. Such negligence in my opinion should not be condoned or in any manner encouraged. If not, it would be opening the flood gates for parties and the registered Attorney-at-Law to seek relief for their negligence in the guise of mistake or inadvertence."* [page 335]

"In the instant appeal, I would hold that the default of citing a person not living as the respondent in the notice of appeal and the petition of appeal which resulted from the negligence of the defendants-appellants and the registered Attorney-at-Law would render the notice of appeal and the petition of appeal void ab initio and liable to be rejected in limine. This defect being incurable the defendants-appellants cannot seek any relief in terms of section 759(2) of the Civil Procedure Code to amend the caption to bring in the person who should have been made respondent to the notice of appeal and the petition of appeal." [page 336]

Referring to the above passage, Samayawardhena, J stated in **Somaratne v Dharmasena** [supra], that the decision in **Wimalasiri** "*cannot be treated as good law in view of the Supreme Court judgment in Nanayakkara v. Warnakulasuriya [1993] 2 Sri LR 289 at 293, where Kulatunga J. held "In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply as in the cases of default curable under Sections 86(2), 87(3) and 771. Such negligence may be relevant but it does not fetter the discretion of the Court to grant relief where it is just and fair to do so."* ***In any event****, in Wimalasiri v. Premasiri* ***the Court of Appeal did not consider the applicability of section 770 at all***." [emphasis added]

I must also refer to the judgment of this Court in **Amarawathie and others v Perera** [SC Spl LA No. 198/2011; SC minutes of 10th December 2014]. In that case, the 5th defendant – respondent – petitioner had passed away while the appeal was pending before the Court of Appeal and he had been substituted. Judgment of the Court of Appeal had been delivered thereafter. Similar to this case, the caption in the judgment however contained the name of the deceased 5th defendant, and the petition of appeal had followed the caption in the judgment. An objection was taken that naming a dead person as a petitioner is a defect that cannot be cured and renders the petition, as opposed to the judgment, a nullity.

Dep, J [as he was then] stated that, "*In the case before us the initial mistake was done by the Court of Appeal by including in the judgment the name of the 5th Defendant Respondent who is dead. Petitioners had followed the same caption in the Application. I am of the view that the remaining Petitioners should not be non suited on account of this*

mistake. Therefore I overrule the preliminary objection and permit the remaining Defendant – Respondent Petitioners to proceed with this application."

Dep, J thereafter considered the manner in which the mistake could be rectified, and stated as follows:

> "*The question that arises in this case is when the Court of Appeal by mistake or due to inadvertence included a deceased party in the caption, could a petitioner on their own without following the same caption rectify the mistake. The proper course of action appears to be that the petitioner should have moved the Court of Appeal to rectify the error in the first instance or use the same caption and seek permission of this court to substitute or to delete the name of the deceased person and include the substituted party. The Petitioners belatedly followed the second course to amend the caption by adding the substituted 5th Defendant-Respondent-Petitioner*."

Thus, I am of the view that the failure to name the "live party" in the notice of appeal and the petition of appeal is a defect that can be cured in terms of Section 770 of the Civil Procedure Code. It was the responsibility of the Substituted Plaintiffs to have raised this matter before the High Court, which admittedly they did not do. One cannot fault the High Court, especially since the caption in the judgment of the District Court only contained the name of the Plaintiff. The 1C Substituted Plaintiff has not complained in the petition of appeal to this Court that the failure to name him and the other Substituted Plaintiffs as parties has deprived them of a hearing before the High Court or prejudiced them in any manner. However, since this issue has now been raised in the first two questions of law, I shall consider if this was a fit case where the High Court ought to have exercised their discretion vested in terms of Section 770 and allowed the Defendant to amend the caption, had an objection been taken before the High Court.

The Defendant has not given any specific reason for the defect, probably due to the fact that an opportunity to do so did not arise in the High Court. However, the learned President's Counsel for the Defendant drew our attention to the following matters:

(a) The Journal Entry of the High Court of 4th November 2008 which reads as follows: "අභියාචනා ගොනු සකස් කිරීමේ ගාස්තු කැඳවා මේම නඩුවේ පැමිණිලිකාර වගඋත්තරකරුවන් සහ ඔවුන්ගේ ලේඛනගත නීතිඥවරයා වෙත ලියාපදිංචි තැපෑල මගින් සිතාසි නිකුත් කරන ලදී"

(b) The fact that the record contains the numbers of the eight registered receipt articles by which the said notice was sent to the Substituted Plaintiffs and their Registered Attorney-at-Law, thus demonstrating that notices were in fact sent to the Substituted Plaintiffs.

(c) The journal entry of 11th November 2008 by which the 1A Substituted Plaintiff deposited the brief fees and the number of the receipt issued to her.

(d) The journal entry of 8th September 2009 by which all parties to the action and their Attorneys-at-Law were informed to be present in Court and the ten registered receipt articles which prove that notices have in fact been sent to the Substituted Plaintiffs.

(e) The notices by which each of the Substituted Plaintiffs have been informed to be present on 29th September 2009 and the fact that the Substituted Plaintiffs have been referred to as the Respondents in the caption of such notices.

(f) The journal entry of 8th September 2009 confirming that the appeal brief was handed over to the Attorney-at-Law for the Substituted Plaintiffs.

(g) The fact that the Attorney-at-Law to whom the Substituted Plaintiffs had granted their proxy at the time they were substituted in the District Court continued to appear for the Substituted Plaintiffs in the High Court, as borne out by all the journal entries commencing from 29th September 2009 until delivery of the judgment on 26th March 2014.

(h) The fact that written submissions have been tendered by the said Attorney-at-Law and that his appearance is reflected in the judgment of the High Court.

It was therefore the position of the learned President's Counsel for the Defendant that the Substituted Plaintiffs have not only been noticed to appear, their names appeared as respondents in the caption of such notices and the Substituted Plaintiffs have accordingly participated in the appeal by retaining Counsel and filing written submissions etc. It was

therefore his position that the 1C Substituted Plaintiff cannot now complain about the failure to name the Substituted Plaintiffs in the notice of appeal and petition of appeal.

I am in agreement with the said submission. I am satisfied that even though the names of the Substituted Plaintiffs had not been entered in the notice of appeal and the petition of appeal, they have been issued notices by the High Court and they have fully participated in the High Court and have been represented in the High Court. In these circumstances, I am of the view that:

(a) Had an objection been taken in the High Court, this was a fit case where the High Court could have exercised their discretion and allowed the Defendant to amend the caption in terms of Section 770;

(b) The defect being curable, the said defect was not fatal to the maintainability of the appeal before the High Court;

(c) The said defect does not vitiate the judgment of the High Court.

I would accordingly answer the first two questions of law in the negative.

The third, fourth and fifth questions of law

This brings me to the third, fourth and fifth questions of law that relate to the factual circumstances of this case. In considering the said questions, I shall at the outset briefly explain the basis for the High Court to have set aside the judgment of the District Court, thereafter examine the pleadings, the documents and the evidence in that regard and finally re-visit the two judgments in order to consider if the High Court erred when it set aside the judgment of the District Court.

The High Court took the view that there was a '*discrepancy*', between (a) the lot number of the land that was referred to in the First Schedule to the plaint which is the same lot number of the land that was to be surveyed as per the commission, and (b) the lot number that was eventually surveyed pursuant to such commission. For that reason, the High Court held that the Plaintiff had failed to identify the land and proceeded to set aside the judgment of the District Court. While this '*discrepancy*' arose solely out of the evidence

of the Surveyor and has culminated in, and formed the basis for the third, fourth and fifth questions of law, I must state that there was no dispute on the part of the Defendant with regard to the identity of the land. What had arisen from the evidence of the Surveyor was only a difference in the lot numbers which difference had been explained by the Surveyor and the Officer from the Divisional Secretary's Office, Welimada.

This being a *rei vindicatio* action, there are three things that a Plaintiff must prove in order to succeed, as clearly set out in the following paragraph in **Wille's Principles of South African Law** [9th Edition (2007); at page 539] referred to with approval by Samayawardhena, J in **Mihindukulasuriya Sudath Harrison Pinto and others v Weerappulige Piyaseeli Fernando and others** [SC Appeal No. 57/2016; SC minutes of 11th September 2023]:

> "*To succeed with the rei vindicatio, the owner must prove on a balance of probabilities, first, his or her* ***ownership in the property****. If a movable is sought to be recovered, the owner must rebut the presumption that the possessor of the movable is the owner thereof.* ***In the case of immovables, it is sufficient as a rule to show that title in the land is registered in his or her name****. Secondly,* ***the property must exist, be clearly identifiable*** *and must not have been destroyed or consumed. Money, in the form of coins and banknotes, is not easily identifiable and thus not easily vindicable. Thirdly,* ***the defendant must be in possession*** *or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration."* [emphasis added]

The Plaintiff had stated in the plaint that he was issued a permit bearing No. 177 in 1955 under the Land Development Ordinance, as amended, in respect of the land referred to in the First Schedule to the plaint, that being Lot No. 197 in FVP No. 189 [P1] in extent of approximately 1 acre. It however transpired in evidence that P1 had been issued in 1955 to Ebrahim Samsudeen, the father of the Plaintiff and the Defendant, and that Samsudeen had nominated the Plaintiff as his successor. Accordingly, with the death of Samsudeen, the name of the Plaintiff had been entered as the permit holder in 1987. Thus, on the face of it, the Plaintiff had title to the land referred to in the First Schedule to the plaint and with the land referred to in the Second Schedule to the plaint being part of the First Schedule, to the land in the Second Schedule, as well.

It was the position of the Plaintiff that he allowed the Defendant to temporarily occupy part of the said land referred to in P1, in extent of ½ rood, morefully set out in the Second Schedule to the plaint together with a building situated thereon, but that the Defendant had refused to vacate the said land occupied by her. Although the land from which ejectment of the Defendant was sought was identified by reference to P1, the First Schedule to the plaint did not contain the boundaries of the land referred to in P1 for the reason that P1 too does not refer to the boundaries of Lot No. 197. However, it goes without saying that the boundaries of the land would have been ascertainable from the FVP.

In her answer, the Defendant had admitted the residence of both parties but denied the rest of the averments of the plaint. While claiming compensation for the improvements effected by her, the Defendant had pleaded that the plaint is not in conformity with the provisions of Section 41 of the Civil Procedure Code which provides that, "*when the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds, or by reference to a sufficient sketch, map or plan to be appended to the plaint, and not by name only.*"

Issue No. 7 raised by the Defendant was whether the plaint is contrary to the provisions of Section 41. I must say that the land in the First Schedule was referred to by a FVP and that, in my view, was sufficient compliance for the purposes of Section 41. In any event, P2 had sufficiently identified the land in dispute.

Commission issued by the District Court

After the pleadings were completed, the Plaintiff sought a commission to survey Lot No. 197 in FVP No. 189. The survey had accordingly been carried out on 15th September 1994 by P.W. Nandasena, Licensed Surveyor. Plan No. 623 [P2] prepared by the Surveyor pursuant to such survey consists of Lot 'A' occupied by the Plaintiff and Lot 'B' occupied by the Defendant. Thus, the boundaries of the land occupied by the Defendant have been clearly identified in P2, and with the Defendant having admitted the residence of both parties and that she is occupying the land given to her by her father, there could not have been any doubt with regard to the identity of the land from which ejectment of the Defendant was sought.

The surveyors report [P2a] reads as follows:

> "පාර්ශ්ව කරුවන්ට ලේඛනගත තැපෑලෙන් දන්වා යවා 1994 – 09 – 15 දින උසාවි කොමිෂන් මැනීම් කර මගේ පිඹුරු අංක 623 පිළියෙල කර ඇත.
>
> **පැමිණිලිකරු ද විත්තිකාරිය ද පැමිණ සිටියහ.**
>
> **මැනීමට අදාල ඉඩම පෙන්වන ලදුව එය උසාවි කොමිෂන් පත්‍රයෙහි සඳහන් ඉඩම බවට හඳුනා ගන්නා ලදී.**
>
> උසාවි කොමිෂන්පත්‍රයෙහි සඳහන් වන්නේ අගපි 189 **හි** කැබලි අංක 197 ලෙසය. **එහෙත්** ඉඩම් කැබැල්ලෙහි නිවැරදි කැබිලි අංකය 336 වේ. **ආරවුලට හේතු වී ඇති ඉඩම බව දෙපාර්ශ්වයම විසින් දන්වන ලදී.**
>
> විත්තිකාරිය විසින් දැනට භුක්ති විඳින කොටස වෙන්ව පෙන්වීමට කොමිෂන් පත්‍රයෙහි දන්වා ඇත.
>
> එය කැබලි අංක බී ලෙස මගේ පිඹුරු අංක 623 මත පෙන්වා ඇත.
>
> අංක ඒ වශයෙන් පෙන්වන්නේ දැනට පැමිණිලිකරු භුක්ති විඳින කොටස වේ.
>
> මෙම අංක ඒ සහ බී කොටස් දෙකම ඒකාබද්ධ වූ විට අගපි 189 **හි** කැබලි අංක 336 සම්පූර්ණ වෙයි.
>
> මෙම ඉඩම බදුල්ල දිසාපතිතුමා විසින් නිකුත් කරන ලද **බ**ලපත්‍රයක් මත තමන්ට හිමි බව පැමිණිලිකරු දන්වා සිටියේය.
>
> **පැරණි මායිම් ගල් අටක් භූමියෙහි මැනීම්කර මනින ලද ඉඩම අගපි 189 හි කැබලි අංක 336 බවට නිර්ණායනය කරන ලද.**"

Thus, the fact that there was a difference in the lot numbers became evident only from P2a. The Surveyor very clearly stated however that even though the Commission referred to Lot No. 197, the correct lot should be Lot No. 336 in FVP No. 189, and that what he had surveyed was the land shown to him by the parties, that being Lot No. 336, with both parties agreeing that the land that was surveyed was the land referred to in the Commission and which land was the subject matter of the action.

<u>Admissions and Issues</u>

It was only after P2 was submitted together with P2a that admissions and issues were settled on 26th April 1999. The parties admitted the residence of the parties and the situation of the land [පාර්ශ්වයන්ගේ පදිංචිය සහ ඉඩමේ පිහිටීම පිළිගනී]. The Plaintiff had raised six issues of which the first issue reads as follows:

"පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩම රජය විසින් ඉඩම් සශ්‍රීක කිරීමේ ආඥා පනත යටතේ මියගිය මුල් පැමිණිලිකරු වන **සම්සුදින්** මොහොමඩ් කාන් පැමිණිල්ලේ උපලේඛනය සඳහන් ඉඩමේ බලපත්‍රදාරියා වශයෙන් සිටියේද"

The Defendant had raised four issues including an issue whether the provisions of Section 41 had been complied with. The Plaintiff did not seek to amend the First Schedule or to clarify the fact that Lot No. 336 is the same as Lot No. 197, probably for the reason that P2a was clear in that regard. The Defendant too did not raise an issue in respect of the identity of the land. I must therefore reiterate that neither party had raised any issue before the District Court with regard to the identity of the land.

Before I proceed to consider the evidence, I wish to advert to the judgment of this Court in **Neville Fernando and others v Sanath Fernando and others** [SC Appeal No. 180/2015; SC minutes of 19th July 2024; BALJ Vol. XXVII 78], where Samayawardhena, J stated as follows:

> *"A party to an action is subject to specific constraints in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. He cannot keep changing his position to suit the occasion. There must be an end to litigation. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by Court, a party cannot present a different case at the trial from what was raised by way of issues. Thirdly, once the judgment is pronounced by Court, the losing party cannot present a different case before the appellate Court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has developed in our Courts to entertain questions of fact for the first time on appeal subject to strict conditions*."

The above passage applies in all its force to the case of the Defendant, with the lack of consistency in the case of the Defendant being clear from the pleadings, the evidence and the arguments presented during the appeal. The Defendant did not raise the issue of identity of the land in her answer, nor was an issue in that regard raised, even after the receipt of the Commission report or after the evidence of the surveyor. As pointed out in

Neville Fernando, "*The identification of the land in suit is not a question of law but a question of fact.*"

Amerasinghe, J stated in **Dona Podi Nona Ranaweera Menike v Rohini Senanayake** [(1992) 2 Sri LR 180; at page 191] that:

> "*A matter that has not been raised before might, nevertheless, be a ground of appeal on which an appellate court might base its decision,* ***provided it is a pure question of law****; or,* ***if the point might have been put forward in the court below under one of the issues raised****, and the court is satisfied (1) that it has before it all the facts bearing upon the new contention,* ***as completely as would have been the case*** *if the controversy had arisen at the trial, and (2) that no satisfactory explanation could have been offered by the other side, if an opportunity had been afforded it, of adducing evidence with regard to the point raised for the first time in appeal. The opinion expressed on this matter by Lord Herschell in The Tasmania [(1890) 15 App. Cas. 223] has consistently formed the basis of our law on this question… Therefore, the question before us is not, with great respect, as it appears to have been supposed in Jayawickrama v David Silva [76 NLR 427], and by the Court of Appeal in this case, and by learned counsel in the matter before us, to be one depending simply on the issue whether the new point raised was one of law, on the one hand, or a question of fact or a mixed question of law and fact, on the other*." [emphasis added]

In **Sirimewan Maha Mudalige Kalyani Sirimewan v Herath Mudiyanselage Gunarath Menike** [SC Appeal 47/2017; SC minutes of 10th May 2024] and in **Neville Fernando** [supra], Samayawardhena, J having examined several judgments of this Court as well as judgments from India, South Africa, Australia and England, held as follows:

> "*… a question of fact can be raised for the first time in appeal if:*
>
> *(a) "it might have been put forward in the Court below under some one or other of the issues framed"; and*
>
> *(b) "if it is satisfied beyond doubt" that*

(i) "it [the appellate Court] has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial"; and

(ii) "no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box".

Applying the above test to the manner in which the Defendant conducted its case before the trial Court, to which I shall refer to later in this judgment, it is clear to me that the issue of identity of the land cannot be raised in this forum.

Evidence of the 1C Substituted Plaintiff

The trial commenced with the evidence of the 1C Substituted Plaintiff where he stated *inter alia* that a declaration of title is sought in respect of Lot 'B' of P2 and to have the Defendant ejected from the said Lot 'B'. This witness while cross examined at length with regard to a discrepancy in the name of the Plaintiff, was asked the following questions [at page 98 of the appeal brief]:

"ප්‍ර: තමුත් අයිතිවාසිකම් කියන්නේ **බලපත්‍රය ඇතුලේ තියෙන ඉඩම සම්පුර්ණයෙන්** ඔතැන ඒ. බී. වශයෙන් පෙන්නලා තියෙනවා?
උ: ඔව්.
ප්‍ර: **ඒකද බලපත්‍රයේ තියෙන සම්පුර්ණ ඉඩම?**
උ: **ඔව්.**
ප්‍ර: (පැ.1 පෙන්වා සිටි) මෙතැන තියෙනවා අක්කර එකක් වූ ඉඩමක් වශයෙන්?
උ: ඔව්.
ප්‍ර: ඒකේ තියෙනවා එෆ්ජ්.වී.පී 189 ලොට් අංක 197 කියලා?
උ: ඔව්.
ප්‍ර: මැනලා තියෙන ඉඩම එෆ්ජ්.වී.පී 189, ලොට් අංක 336?
තමුන්ගේ බලපත්‍රයේ තියෙන්නේ ලොට් අංක 197?
උ: ඔව්.
ප්‍ර: මැනලා තියෙනවා ලොට් අංක 336 ?
උ: ඔව්.
ප්‍ර: ඒ. බී. කියලා නොම්මර තියෙනවා. කොයි එකද තමුන් බුක්ති වින්දේ?
උ: ඒ කොටස.
ප්‍ර: ඒ. කොටසේ ගෙයක් නැහැ?
උ: දැනට තියෙනවා.
ප්‍ර: මැනිමේ හැටියට ඒ. කොටසේ ඇවිත් තමුන් බුක්ති විඳිනවා?

උ: ඔව්.
ප්‍ර: බී. කොටස ඇවිත් විත්තිකරුවන් බුක්ති විඳින්නේ?
උ: ඔව්.
ප්‍ර: තමුන්ගේ තාත්තගේ ගෙදර අල්ලපු ඉඩමේ තිබුනේ කොතැනද?
උ: බී කොටසේ පාරෙන් උඩ කොටසේ."

To my mind, the above questions clearly demonstrate two things. The first is Lots A and B shown in P2 formed the subject matter of the permit P1 and was clearly identifiable. The second is that the Defendant was not contesting the identification of the land nor did she have any issue with the fact that the land that had been surveyed and depicted in P2 was the land referred to in P1.

Evidence of the Divisional Secretary

After the evidence of the 1A and 1C Substituted Plaintiffs, the Plaintiff led the evidence of R. M. Karunasiri, a Clerk attached to the Divisional Secretary's Office, Welimada. He produced the following documents:

(a) A certified copy of the ledger pertaining to P1, marked P8, which confirmed that the land given to the Plaintiff's father by P1 was Lot No. 336 of FVP No. 189;

(b) The Final Village Supplementary Tenement List [P10] which confirmed that Lot No. 336 has been "*cultivated under the Land Development Ordinance by late E. Samsudeen of Mahatenna, Guruthalawa on permit, presently occupied by S. Mohammed Khan, son of allotee. For issue of Grant.*";

(c) Final Village Plan No. 189 [P9] which shows that Lot No. 336 is bounded on the north and the south by a roadway, similar to P2.

Karunasiri stated that the Plaintiff was the nominee of Ebrahim Samsudeen and that the name of the Plaintiff had been substituted in place of Ebrahim Samsudeen on 4th November 1987. While the above documents clearly establish that P1 comprises of Lot No. 336 of FVP No. 189, I must state that Karunasiri was not questioned on the difference between the lot numbers nor did the Defendant attempt to challenge the identity of the land that had been given by P1. Had she done so, a satisfactory explanation may have

been offered. Thus, even at this stage of the case, the Defendant had no issue with the identity of the land.

Evidence of the Surveyor

This brings me to the evidence of the Surveyor, P. W. Nandasena. He stated that having informed both parties by registered post of the intended survey, he visited the land on 14th September 1994, surveyed the land in the presence of both parties and submitted P2 and P2a. He stated further as follows:

> "මම ඉඩම මැනලා ඉදිරිපත් කර තිබෙනවා, අක්කර එකයි පරිවසි 7 යි කියා. හෙක්ටයාර් 0.424 කියා තිබෙනවා. එහි උතුරින් පාරක් තිබෙනවා. කරමැටියේ සිට ගල්ඒදණ්ඩ දක්වා එම පාර. දකුණට තිබෙනවා, බොරලු සහිත ගල්ඒදණ්ඩ දක්වා පාර. මම එය ඒ. සහ 'බී' වශයෙන් ඉදිරිපත් කර තිබෙනවා. පැමිණිලිකරු 'ඒ' බුක්ති විඳිනවා. 'බී' විත්තිකරු බුක්ති විඳිනවා. 'බී' කොටසේ ගොඩනැගිල්ලක් තිබෙනවා. ඉඩමේ නම 'මහතැන්නපතන'. මෙම ඉඩම අවසාන ගම් සිතියමේ අංක 189 යේ කැබැලි කැබලි අංක 336. පිහිටා තිබෙන්නේ ගුරුතලාව ගමේ. අ.ග.සි. අංක 189.
>
> මගේ වාර්තාවේ තිබෙනවා කැබලි අංක 197 කියා. අධිකරණ කොමිෂන් පත්‍රය තිබුනේත් කැබලි අංක 336 ට. ආරාවුලට අදාල ඉඩම එය බව දෙපක්ෂයම පිලිගත්තා කියාත් තිබෙනවා. විත්තිකාරිය බුක්ති විඳින කොටස 'බී' වශයෙන් ලකුණු කර තිබෙනවා. 'එ' සහ 'බී' කොටස් 2 ඒකාබද්ධ වූ විට අ.ග.සි. කැබලි අංක 336, සම්පුර්ණ වේ කියා තිබෙනවා. එහි ප්‍රමාණය අක්කර එකයි, පර්වස් 7 ක් කියා තිබෙනවා."

The following questions were thereafter posed to the Surveyor during cross examination:

"ප්‍ර: කොමිෂන් එකේ තිබෙනවා, "ගුරුතලාව ගම, අ.ග.සි. අංක 189, දරණ පිඹුරේ ලොට් 197 පෙන්නුම් කර ඇති අක්කරයක විශාලත්වය ඇති ඉඩම හා එහි තුල ඇති ගොඩනැගිලි සහ සියලුම දේ වේ". කියා?

උ: ඔව්.

ප්‍ර: ලොට් 197 තමයි පෙන්වන්න කියා තිබෙන්නේ?

උ: ඔව්.

ප්‍ර: ඔය ඉඩමට මායිම් සටහන් කර නැහැ:

උ: නැහැ.

ප්‍ර: එතකොට මිනින්දෝරු මහත්තයා මැන්නේ එම කොමිෂමේ සටහන් ඉඩම නොවෙයි? අ.ග.සි. 189 යේ, ලොට් 336 ?

උ: ඔව්.

ප්‍ර: සම්පුර්ණ වෙනස් ඉඩමක් නේද?

උ: කැබලි අංකය වෙනස්.

ප්‍ර: අංක 197 කියා වෙනම කොටසක් තිබෙනවාද ?

උ: වෙනම කැබලි අංකයක් ඇති. පරීශීලනය කලා ට පසුව ඒක කැබලි අංක 336 වෙනවා.

ප්‍ර: අංක 197 කියා එකක් තිබෙන බව කියන්න පුලුවන්ද?

උ: 197 කියා කැබැල්ලක් ඇති."

Whether there was another lot by the number of 197 is a question that should have been posed to the Divisional Secretary and not to the surveyor. Thus, the surveyor was being honest when he answered the final question. The evidence of the Surveyor is that after super imposition, it was evident that both lots 197 and 336 are the same. If the Defendant was of the view that (a) the Plaintiff had title to Lot No. 197 by virtue of P1 and not to Lot No. 336, or (b) the land in P1 is not the land that is occupied by the Defendant, or any other issue relating to the identity of the corpus, the Defendant ought to have raised an issue even at this stage. The Defendant did not do so nor did the Defendant raise this matter in the written submissions tendered on her behalf to the District Court.

Thus, I am of the view that the Plaintiff had discharged the burden cast on a plaintiff in a *rei vindicatio* action. As pointed out by Chief Justice Dep in **Preethi Anura v William Silva** [SC Appeal No. 116/2014; SC Minutes of 5th June 2017], a plaintiff in a *rei vindicatio* action "*need not establish the title with mathematical precision nor to prove the case beyond reasonable doubt as in a criminal case. The plaintiff's task is to establish the case on a balance of probability.*"

Evidence of the Defendant

The fact that the land which was the subject matter of the case was given to her father by P1 was confirmed by the evidence of the Defendant herself. In her **evidence-in-chief**, she stated as follows:

> "**මේ නඩු කියන ඉඩම ඉස්සෙල්ලාම මගේ පියාගේ නමට තිබුණ.** පියාගේ නම සම්සුදින්. **සම්සුදින්ට මේ ඉඩම ලැබුනේ ආණ්ඩුවේ ඉඩමක් ආණ්ඩුව මගින් ලැබුණා. සම්සුදින්ට ආණ්ඩුවේ බලපත්‍රයක් තියෙනවා.** මගේ තාත්තාගේ සම්පුර්ණ නම ඉස්මයිල් සම්සුදින්. ඉස්මයිල් සම්සුදින්ට ළමයි හය දෙනෙක් හිටියා.
>
> **මේ බලපත්‍රය තියෙන ඉඩම අක්කර 1 1/4 ක ප්‍රමාණයක්. මම එහි පදිංචිව හිටියා.** ඒ පදිංචි වෙලා හිටියේ, පියා මට විවාහ වෙන අවස්ථාවේ තෑග්ගක් වශයෙන් පියා මට දුන්නේ.
>
> මම කසාද බඳින්න ඉස්සෙල්ලා මගේ දෙමාපියන් මේ නඩු කියන ඉඩමේ තේ වගා කරලා තිබුණ."

During cross examination, the Defendant stated further that, "අපේ තාත්තාගේ ඉඩමේ අපි පදිංචි වෙලා ඉන්න බව සඳහන් කරලා උත්තරය දැම්මා."

Thus, the Defendant very clearly stated that the land which is the subject matter of this case had been given to her father on a permit and that at the invitation of her father, she occupied part of the land. With there being no evidence that Ebrahim Samsudeen had been given another permit by the State, it is clear that Lot 'B' in P2 occupied by the Defendant forms part of the land referred to in P1. Thus, the Defendant herself had no issue with regard to the identity of the land from which her ejection was sought.

Judgment of the District Court

Although no issue had been raised with regard to the identity of the land, the District Court considered the evidence in this regard and concluded as follows:

> "ආදේශිත විත්තිකාරිය බුක්ති විඳින ඉඩම නොව, වෙනත් ඉඩමක් මැන පිඹුරක් සකස් කර ඇති බව පෙන්නුම් කිරීමට මිනින්දෝරු පී.ඩබ්ලිව්. නන්දසේනගෙන් විත්තියෙන් හරස් ප්‍රශ්ණ අසා ඇතත් කොමිෂන් පත්‍රයෙහි, නඩුවට අදාල ඉඩම අංක 189 දරණ අවසාන ගම් පිඹුරේ කැබැලි අංක: 197 ලෙස සඳහන් කර තිබුණු නමුත් කැබැලි අංක 197 පරීශීලනය කලාට පසු නඩුවට අදාල ඉඩම් කැබැල්ල අංක: 336 වෙන බව මිනින්දෝරුවරයා සාක්ෂි දි ඇති අතර, ඔහුගේ වාර්තාවේද නඩුවට අදාල ඉඩම අංක: 336 දරණ කැබැල්ල බව සඳහන් කර ඇත. තවද පැ. 1 වශයෙන් ලකුණු කොට ඉදිරිපත් කර ඇති අංක: 177 දරණ බලපත්‍රයෙහි එම බලපත්‍රයට අදාල ඉඩම අංක: 189 දරණ අවසාන ගම් පිඹුරෙහි කැබලි අංක 197 ලෙස සඳහන් කර ඇතත්, අංක: 177 දරණ බලපත්‍රයට (පැ. 1) අදාල ඉඩම් කැබැල්ල, අංක: 189 දරණ අවසාන ගම් පිඹුරෙහි කැබැලි අංක 336 ලෙස එම අංක: 177 දරණ බලපත්‍රයට අදාල ලෙපරයේ සඳහන් කර ඇති අතර, අවසාන පරිපුරක ඉඩම් විස්තර ලැයිස්තුවෙන් ද එම බලපත්‍රයට අදාල ඉඩම අංක: 336 දරණ කැබැල්ල බව හෙලිදරව් ව ඇත. මේ අනුව මෙම නඩුවේ පැ. 1 වශයෙන් ලකුණු කොට ඉදිරිපත් කර ඇති අංක 177 දරණ බලපත්‍රයට අදාල ඉඩම කැබැලි අංක: 336 බව තහවුරු ව ඇත. මෙම අංක: 336 දරණ, කැබැල්ල මිනින්දෝරු පී. ඩබ්ලිව්. නන්දසේන හඳුනාගෙන ඔහු විසින් සකස් කරනලද නඩුවට අදාල අංක: 623 දරණ පිඹුරෙහි (පැ.2) එකී 336 දරණ කැබැල්ලේ, පැමැණිලිකරු බුක්ති වින්ද කොටස "ඒ" වශයෙන් ද, විත්තිකරු බුක්ති වින්ද කොටස "බී" වශයෙන් ද නිරූපණය කර ඇත."

The above findings of the District Court are clearly supported by the evidence that was led before the District Court.

The judgment of the High Court

The principle argument of the Defendant before the High Court was that the District Court erred when it decided that the identification of the corpus has been correctly proved. Although an issue with regard to identification had not been raised before the District Court, the High Court took the view that Issue No. 7 relating to non-compliance with

Section 41 was sufficient for the High Court to go into the question of identification of the corpus, which view, by itself, was erroneous.

The High Court thereafter stated as follows:

> "*The said surveyor in his testimony has clearly admitted that he has surveyed the land which was not described in the commission issued to him. The plan has been marked as P2 and in that the surveyor has clearly stated that he has surveyed Lot number 336 in FVP 189 whereas the commission issued to him ordering to survey lot number 197 in the same FVP. The substituted 1C Plaintiff too has admitted the same fact in his evidence in the trial [in page 98 of the appeal brief].*
>
> *This irresponsible and disobedient act of the surveyor could be clearly noticed from P2 in which he stated though he was asked to survey lot number 197 in the commission the correct number should be number 336. What were the materials he has used to make this mere statement has not been explained even in his evidence.*
>
> *Further the surveyor in his evidence has admitted that there can be a land by lot number 197 which has not been surveyed by him.*
>
> *The officer who was called to give evidence with regard to the ledger maintained in the office of the divisional secretary has failed to adduce any evidence as to the connection between lot numbers 197 and 336.*
>
> *Therefore it is my considered view that the plaintiff has failed to adduce evidence with regard to the identification of the land and on that, one ingredient he was expected to prove has not been complied with.*"

I am of the view that the High Court clearly erred on three grounds. The first is that it misread P2 and P2a, for the Surveyor has clearly stated in P2a and his evidence the basis for him to have concluded that lots 197 and 336 are one and the same. The second is that the 1C Substituted Plaintiff never made any such admission in his evidence at page 98, which I have re-produced earlier in this judgment. The third is that the Officer from the Divisional Secretary's Office clearly stated that P1 has been issued in respect of Lot No. 336. With the evidence being that the land occupied by the Defendant was the land given to her father by P1, there could not have been any doubt with regard to the identity of

the land in respect of which the declaration of title and ejectment was sought. In any event, this Officer from the Divisional Secretary's Office was not cross examined on the difference between the two lots, even though it was he who was in the best position to have clarified any doubt.

Quite apart from the above errors, the High Court erred when it failed to consider the evidence of the Defendant to which I have already referred to which would have made it clear that the identity of the land had been admitted by the Defendant and there was no dispute between the parties. In these circumstances, I am of the view that the High Court erred when it held that the Plaintiff has not identified the corpus and that the land referred to in P1 is not the land that has been surveyed and depicted in Plan P2. I would accordingly answer the third, fourth and fifth questions of law in the affirmative.

Summary

A divisional bench of this Court was constituted by His Lordship the Chief Justice in response to an application of the parties that there existed conflicting decisions of this Court in relation to the first, and more particularly the second question of law, that being whether the failure to name a "live party" in the notice of appeal and the petition of appeal is contrary to the provisions in Sections 755 and 758 of the Civil Procedure Code, and if so, whether such failure is fatal to the maintainability of such appeal.

Given the inter-relationship between the first and second questions of law, my analysis of the issue was structured in two parts. Firstly, I considered the decisions of this Court where a case had been preferred against a deceased party, and took the view that the record is defective from the outset and that Court has no jurisdiction at all to proceed with the case. However, in cases where a party was alive at the time of the institution of proceedings but has passed away during the course of the proceedings, my conclusion is that the record becomes defective no sooner such party passes away. Substitution must take place in order to cure this defect and proceed with the trial. If that is not done, the appellate Court has jurisdiction not only to set aside the judgment entered for/against the deceased party but must also set aside the proceedings that had taken place since the death of the party and direct that the defect be cured and for proceedings to re-commence from the point where the record became defective. The rationale for the above

course of action is that the party before Court must always be a “live party” in order for Court to exercise its jurisdiction.

Having explained the rationale behind the legal requirement for the substitution of a deceased party which in turn ensures that Court has jurisdiction over such case, I ventured to the second part of my analysis which specifically addresses the failure to name the substituted party in the notice of appeal and/or the petition of appeal and whether such failure is fatal, or curable under Section 770 of the Civil Procedure Code.

In my view, Section 770 reflects the intention of the legislature that failure to name as a party to the appellate process a person who was a party in the lower court is a defect that is curable. To put it differently, naming a deceased party in the caption who has already been substituted instead of naming the “live party” with whom the deceased party had been substituted is not fatal to the maintainability of such appeal. At that stage, Court is only mindful that such person must be heard before the appeal is decided, which then requires the parties who had not been named to be duly notified. Thus, Section 770 confers an unfettered discretion on the Judge who hears the appeal which discretion however should be exercised when some good reason or cause is given for the failure and where a matter could be remedied without any material prejudice being caused to the parties.

If I am to relate these summary findings to this case, the Plaintiff passed away while the case was proceeding before the District Court and substitution had taken place immediately thereafter, of the Substituted Plaintiffs, thus making the Substituted Plaintiffs the “live party” to the action. The failure to name the Substituted Plaintiffs in the notice of appeal and the petition of appeal is a defect that is curable and, given the facts and circumstances of this appeal to which I have already referred to, I am of the view that this was a fit case for the High Court to have exercised its discretion in favour of the Appellant and to have proceeded to hear and determine the appeal. This was the basis for my decision to answer the first and second questions in the negative.

I thereafter ventured to consider the third, fourth and fifth questions of law that required me to examine the facts of this case, the evidence and the judgments of the District Court and the High Court. The above three questions of law were answered in the affirmative only after a careful examination of such material.

Conclusion

In the above circumstances, the judgment of the High Court is set aside and the judgment of the District Court is hereby affirmed. Parties shall bear their own costs.

JUDGE OF THE SUPREME COURT

Murdu.N.B. Fernando, PC, CJ

I agree

CHIEF JUSTICE

E.A.G.R. Amarasekara, J

I agree.

JUDGE OF THE SUPREME COURT

Kumudini Wickremasinghe, J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT

Mahinda Samayawardhena, J

I agree.

JUDGE OF THE SUPREME COURT

K. Priyantha Fernando, J

I agree.

JUDGE OF THE SUPREME COURT