

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

**LANKA**

In the matter of an application for Leave to Appeal in terms of Section 5C (1) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

**SC/HCCA/LA/378/17**

SC/HCCA/MA Appeal No. 36/2014(F)

DC Matara Case No. L/6664

Ransegoda Wimalasiri Thero,  
of Morawaka Sriwijaya Pirivena  
known as Ganegoda Rajamahaviharaya,  
Morawaka

**Plaintiff**

**Vs.**

Dellawa Sisiela Thero (Deceased),  
of Ganegoda Rajamahaviharaya,  
Morawaka

**Defendent**

Dellawa Suneetha Thero,  
of Ganegoda Rajamahaviharaya,  
Morawaka

**Substituted Defendant**

**AND BETWEEN**

Dellawa Suneetha Thero,  
of Ganegoda Rajamahaviharaya,  
Morawaka

**Substituted-Defendant-  
Appellant**

**Vs.**

Ransegoda Wimalasiri Thero,  
of Morawaka Sriwijaya Pirivena  
known as Ganegoda Rajamahaviharaya,  
Morawaka

**Plaintiff-Respondent**

**AND NOW BETWEEN**

Ransegoda Wimalasiri Thero (Deceased),  
of Morawaka Sriwijaya Pirivena  
known as Ganegoda Rajamahaviharaya,  
Morawaka

**Plaintiff-Respondent-Petitioner**

**Vs.**

Dellawa Suneetha Thero,  
of Ganegoda Rajamahaviharaya,  
Morawaka

**Substituted Defendant- Appellant-  
Respondent**

*An application for substitution on behalf  
of the deceased Plaintiff-Respondent-  
Petitioner Thero*

Edandukitha Gnanasiri Thero,  
Sri Wijaya Piriven Wiharaya,  
Morawaka

**Petitioner**

**Vs.**

Dellawa Suneetha Thero,  
of Ganegoda Rajamahaviharaya,  
Morawaka

**Substituted Defendant-Appellant-  
Respondent- Respondents**

Before: Jayantha Jayasuriya, PC, CJ.

L.T.B Dehideniya, J.

Murdu N.B Fernando, PC, J.

Counsels: Ranjan Suwandartha, PC for the Plaintiff-Respondent-Petitioner

Lakshman Perera, PC with Upendra Walgampaya for Defendant-Appellant-  
Respondent

Argued on: 05.12.2019

Decided on:08.03.2022

**L.T.B. Dehideniya, J.**

Plaintiff-Respondent-Petitioner (hereinafter sometime referred to as the Plaintiff) instituted this action in the District Court seeking for a declaration, that he is the Viharadhipathi of Ganegoda Rajamahaviharaya and for an order to evict the Defendant. The District Court delivered the Judgement in favour of the Plaintiff. While the case was pending before the District Court, the

Defendant Thero passed away and the present substituted Defendant-Appellants-Respondent's (hereinafter sometime referred to as the Respondent) name was entered in the room of the said deceased Defendant.

The Respondent appealed to the High Court of Civil Appeal and the said court set aside the judgement of the District Court. The Plaintiff filed the present leave to appeal application, challenging the said decision.

The law related to the substitution of a deceased Plaintiff was amended by the Civil Procedure Code Amendment Law No. 20 of 1977 when the Administration of Justice Law was repealed and the Civil Procedure Code was re-enacted. By the said law, only a next of kin of the deceased person was permitted to be substituted. This law has been changed several times and by the Civil Procedure Code (Amendment) Act No. 08 of 2017, the requirement to be a next of kin was removed. The scope of the Section was widened and the legal representative was permitted to be substituted.

The new Section reads as follows;

**Section 398**

*“In case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name substituted on the record in place of the deceased plaintiff and the court shall thereupon cause an entry to that effect to be made on the record and proceed with the action.”*

The Section 398 applies only for a substitution in original Courts. For a substitution in the Appellate Court, Section 760(A) of the Civil Procedure Code applies. Section 398 has no

relevance in such a situation. The Section 760(A) was introduced to Civil Procedure Code by Civil Procedure Code (Amendment) Act No. 79 of 1988.

The Section reads as follows;

**Section 760(A)**

*“Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the supreme court may in the manner provided in the rules made by the supreme court under article 136 of the Constitution determine. who, in the opinion of the court is the proper person to be substituted or entered on the record in place of, on in addition to the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid.”*

Under this Section there is no requirement for the legal representative to be a next of kin. The only requirement is that the Court in its opinion consider whether a person is ‘proper person’ to be substituted and the idea of substitution is only to prosecute the Appeal. The Appellate Court will decide the rights and entitlements of the substituted person. The Supreme Court, by Supreme Court Rules of 1990 as promulgated the Rule No. 38 in relation to the substitution.

The Rule reads thus;

*“ where at any time after the lodging of an application for special leave to appeal, or an application on the Article 126, or a notice of appeal, or the grant of special leave to appeal, or a grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may , on application in that behalf made by, any person interested ,or ex mero motu, require such applicant , or the petitioner or appellant, as the case may be, to place before*

*the Court sufficient material to establish who is the proper person to be substituted or entered on the record in place of, or in addition to the party who has died or undergone a change of status;*

*Provided that where the party who has died or undergone a change of status is the petitioner of appellant, as the case may be the Court may require such applicants or any party to place such material before the Court.*

*The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid. Nothing hereinbefore contain shall prevent the Supreme Court itself ex mero motu, where it thinks necessary, form directing the a substitution or addition of the person who appears to the Court to be the proper person therefore.”*

The Supreme Court also ruled that a proper person be substituted. There is no requirement to be a next of kin.

In the case of ***Kusumawathie Vs. Kanthi*** [2004] 1 Sri L.R 350, Somawansa J. held that, though in the original Court the person entitled to be substituted is the next of kin who has derived the inheritance, there is no such requirement in the case of an appeal. In the circumstances, the Court can consider the Appellant to be a fit and proper person to be substituted in the room of the deceased party, solely for the purpose of prosecuting the Appeal.

The counsel for the Respondent argued that, it has been decided in the case of ***T.Pannanada Thero Vs. G. Sumangala Thero*** 68 NLR 367 that, only a lawful pupil of the deceased Viharadhipathi can be substituted. When this case was argued, Section 760(A) was not in the Civil Procedure Code. Section 760(A) initially came into operation by Section 113 of the Civil

Procedure Code (Amendment) Law No. 20 of 1977 and was later substituted by Section 50 of the Civil Procedure Code (Amendment) Act No.79 Of 1988.

At the time that the said case was argued (in 1965) Section 760(A) was not the law. It was the Civil Procedure Code even prior to the Administration of Justice Law. Under the said law, procedure in the Appellate Court was to send the case back to the District Court to enter substitution. In this case when it was sent to the District Court, the Learned Judge of the District Court has refused application for substitution on the basis that there was no legal provision which enabled the Petitioner to have himself substituted by way of summary procedure. Considering this situation, His Lordship, Justice H.N.G Fernando held that;

at p.368

*“In my opinion the difficulty is met by Section 404 of the Civil Procedure Code. The title to temple property is vested by law in the controlling Viharadhipathi for the time being (subject of course to certain exceptional cases). Therefore, on the assumption that the deceased-plaintiff was the incumbent of the Vihare, then, on his death, the title to the temple property is vested by law in his successor. If, therefore, the present Petitioner is the lawful successor of the plaintiff, the title to the property, which is the subject of this action, has now vested in him. The position taken up by the petitioner, therefore, is that there has been by operation of law a creation or a devolution in his favour of interests in the lands which are the subject of this action; and if he can establish to the satisfaction of the District Court that he would be the successor in title to the incumbency upon the assumption that the deceased-plaintiff himself had been the incumbent, then the petitioner will be entitled to substitution under section 404. The*

*correctness of that assumption will of course have to be decided in the substantive appeal.”*

In the present action, the original Plaintiff in the plaint stated that the first Viharadhipathi who started the Ganegoda Rajamahaviharaya was Akmeemana Sobhitha Thero and on his demise his most senior pupil Wallakke Saddhananda Thero became the Viharadhipathi. The Saddhananda Thero had passed away in 1947 and the Plaintiff being the only pupil of the said Thero, he became the Viharadhipathi. The Petitioner's contention is that he being the most senior pupil of the deceased Plaintiff, he is entitled to be substituted.

As per the said decision in the *T.Pannanada Thero Vs. G. Sumangala Thero*, the Petitioner in present case is also the Thero who is entitled to be the Viharadhipathi, if the Plaintiff succeeds this action. Therefore, subject to the establishment of the correctness of the argument of the Plaintiff, the Petitioner becomes entitled to this substitution.

The Petitioner has tendered his Certificate of Higher Orientation (Declaration regarding Upasampada Bhikshu Under Section 41 of the Buddhist Temporalities Ordinance, No. 19 of 1931) marked as X7. Respondents argue that the tutor's name entered in the 7<sup>th</sup> paragraph of the said certificate is Ven. Wallakke Saddhananda Thero and the signature appearing W. Saddhananda in English characters had been placed in the certificate. Said Wallakke Saddhananda Thero had passed away in 1947 and there was no opportunity for the said Thero to sign this document. The Plaintiff also admitted that Wallakke Saddhananda Thero died in 1947 in paragraph 5 of the plaint. Therefore, if the Petitioner is relying on this Higher Ordination Certificate, he will have to establish the authenticity of the document. For the purpose of substitution, Court need not to rely on the document marked X7. The said deceased Plaintiff Thero by way of the deed No.4310 dated 10.03.2015 attested by D.A Pathma Shyamalee, Notary Public, appointed the Petitioner as the



controlling Viharadhipathi of the temple in issue. Under this circumstances the Petitioner has *prima facie* established that he is entitled to be substituted.

By considering above circumstances, I am of the view that the Petitioner is entitled to be substituted as the Substituted Plaintiff-Respondent-Appellant for the purpose of prosecuting this application. Further, after the substitution, this court orders to permit the Petitioner to file the amended caption and fix for support to Application for Leave to Appeal.

**Judge of the Supreme Court**

**Jayantha Jayasuriya PC, CJ.**

**I agree**

**Chief Justice**

**Murdu N.B Fernando PC, J.**

**I agree**

**Judge of the Supreme Court**