

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

1b & 19a Suduhakuruge Magilin Nona of Elagalle

Undugoda.

1b and 19a Defendant-Appellant

CA Appeal No.552/99 (F)

Vs.

D.C.Kegalle Case No.18343/P

1. Suduhakuruge Babanis (Deceased)
- 1a. Suduhakuruge Simon (Deceased)
- 1b. Shelton Wijesinghe of Elagalle,Undugoda.
2. Suduhakuruge Allis (Deceased)
- 2a. Suduhakuruge Ilangaratne of Elagalle,Undugoda
3. Suduhakuruge Singha (Deceased)
- 3a. Suduhakuruge Sirineris (Deceased)
- 3b. Samarappuli Gedera Chandra Ranaseeli of Elagalle
Undugoda.
4. Suduhakuruge Kirineris (Deceased)
- 4a. Suduhakuruge Mavurarathne of Elagalle,Undugoda
5. Suduhakuruge Elisa (Deceased)
- 5a. Suduhakuruge Simon
- 5b. Suduhakuruge Pabilis
- 5c. Suduhakuruge Albert
- 5d. Suduhakuruge Lilina
- 5e. Suduhakuruge Somawathie
- 5f. Suduhakuruge Selenchina

5g. Suduhakuruge Saralawathie

5h. Suduhakuruge Subsena

5i. Suduhakuruge Ilangarithne

5j. Suduhakuruge Dharmarathne

5k. Suduhakuruge Pushpawathie ,All of
Elagalle,Undugoda.

Plaintiffs – Respondents

1a. Suduhakuruge Kira (Deceased)

1b. Suduhakuruge Magilin Nona

2a. Suduhakuruge Sunil

3a. Sunanda Siriwardena, of Elagalle, Undugoda.

4. Gallath Ralalge Dharmasena Gunesekara

5. Suduhakuruge Lami alias Sirisena

6. Gallath Ralalage Appuhamy (Deceased)

6a. Gallath Ralalage Dingiri Banda

7. Gallath Ralalage Ukku Banda (Deceased)

7a. Parana Gallath Ralalage Gunesekera

8. Gallath Ralalage Dingiri Banda

9. Parana Gallath Ralalage Appuhamy

10. Parana Gallath Ralalage Hethuhamy

11. Parana Gallath Ralalage Mudiyanse

12. Parana Gallath Ralalage Heen Banda

13. Parana Gallath Ralalage Punchi Banda

14. Parana Gallath Ralalage Amarisa (Deceased)

14a. Parana Gallath Ralalage Piyadasa

15. Marasinghe Ralalage Kiribanda

16. Suduhakuruge Jothiya (Deceased)
All of Elagalle, Undugoda.
- 16a. Suduhakuruge Martin Alias Manawasinghe
Samaradivakara, of "Fiscal Watta", Waldeniya,
Kegalle.
17. Suduhakuruge Baiya (Deceased)
- 17a. Suduhakuruge Piyasena
18. Suduhakuruge Kirisanda (Deceased)
- 18a. Suduhakuruge Sima
19. Suduhakuruge Kira (Deceased)
20. Parana Gallath Ralalage Ukku Banda (Deceased)
- 20a. Parana Gallath Ralalage Premawardena
21. Parana Gallath Ralalage Tikiri Banda
22. Parana Gallath Ralalage Kiri Banda
23. Marasin Arachchilage Dingiri Banda
24. Parana Gallath Ralalage Mudiyanse
25. Parana Gallath Ralalage Dingiri Appuhamy
(Deceased)
- 25a. Parana Gallath Ralalage Punchi Mahathmaya
26. Suduhakuruge Willam Singho, All of Elagalle,
Undugoda (Deceased)
- 26a. Tennegedera Leelawathie of No.148,314 Colony,
Weerapura, Thambala, Pollonnaruwa
27. Suduhakuruge Kirisanda (Deceased)
- 27a. Suduhakuruge Sima (Deceased)

27b. Suduhakuruge Dharmasinghe of Elagalle

Undugoda.

28. Parana Gallath Ralalage Pinchi Appuhamy of

Haloluwa, Hettimilla (Deceased)

28a. Parana Gallath Ralalage Heen Banda

29. Suduhakuruge Simon (Deceased)

29a. Suduhakuruge Piyadasa (Deceased)

29b. Hakurukatulandalage Ema Nona, All of Elagalle

Undugoda.

Defendants-Respondents

Before: M.M.A. Gaffoor J.

Janak De Silva J.

Counsel: Sudarshani Coorey for 1b and 19a Defendant-Appellant

L. Amerasinghe for 1b, 2b, 3b and 4a Plaintiffs-Respondents

Written Submissions tendered on:

1b and 19a Defendant Appellant on 10th January 2018

Argued on: 19th October 2017

Decided on: 15th February 2018

Janak De Silva J.

This order pertains to an application made by the 1b and 19a Defendant-Appellant (Appellant) for an order of Court under section 81(9) of the Partition Law No. 21 of 1977 (Partition Law) to declare that any orders or judgements made by this Court and any step, arguments or proceedings taken before this Court will not be invalid due to non-appointment of a legal representative to represent the estate of a deceased party or person in this appeal. In the alternative an order is

sought that any party who claims that a party in this matter has died should produce to this Court death certificates and other documents necessary for substitution.

The Appellant has in her affidavit sought to explain the background to this application. It is stated that the 8th, 9th, 11th, 12th, 13th, 15th, 21st, 22nd and 24th Defendants-Respondents (Defendants) have passed away and that except for the 11th and 24th Defendants, who are one and the same, the Appellant is unaware of the whereabouts of the other deceased parties as their families had left the village. Accordingly, the Appellant is unable to obtain the death certificates and other documentation to effect substitution on behalf of the deceased parties.

In this context it is important to consider the provisions of section 81(9) of the Partition Law which is relied on by the Appellant. It reads as follows:

“Notwithstanding that a party or person has failed to file a memorandum under the provisions of this section, and that there has been no appointment of a legal representative to represent the estate of such deceased party or person, any judgment or decree entered in the action or any order made, partition or sale effected or thing done in the action shall be deemed to be valid and effective and in conformity with the provisions of this Law and shall bind the legal heirs and representatives of such deceased party or person. Such failure to file a memorandum shall also not be a ground for invalidating the proceedings in such action.”

In *Chandrasiri v. Abusali et al*¹ the Supreme Court held that section 81(9) of the Partition Law has no retrospective operation. This partition action was filed on 10th July 1967. Hence the application made by the Appellant for an order of Court under section 81(9) of the Partition Law No. 21 of 1977 to declare that any orders or judgements made by this Court and any step, arguments or proceedings taken before this Court will not be invalid due to non-appointment of

¹ S.C.(HCCA)(LA) 172/2012 and 173/2012; S.C. Minutes of 19.11.2015

a legal representative to represent the estate of a deceased party or person in this appeal must be rejected on that ground alone.

However, there are other reasons as to why such an order cannot be made by this Court.

There are different statutory provisions which apply when a party dies during the pendency of a partition action in the District Court or the appeal in the High Court/Court of Appeal/Supreme Court.

Section 48(1) of the Partition Law as amended states as follows:

“Save as provided in subsection (5) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, and in the case of an interlocutory decree, subject also to the provisions of subsection (4) of this section, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever right, title or interest they have, or claim to have, to or in the land to which such decree relates and notwithstanding any omission or defect of procedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action; and the right, share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree.

In this subsection "omission or defect of procedure" includes an omission or failure -

(a) to serve summons on any party; or

(b) to substitute the heirs or legal representatives of a party who dies pending the action or to appoint a person to represent the estate of the deceased party for the purposes of the action; or

(c) to appoint a guardian ad litem of a party who is a minor or a person of unsound mind.”

This section applies only to the District Court proceedings and has no application to the High Court/Court of Appeal and the Supreme Court.² In *Karunawathie v. Piyasena and others*³ the Supreme Court held that 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 appointing a legal representative of the deceased in his place. That was a partition case. However, Chitrasiri J. in *W. Jane Nona v. D. Chalo Singho et al*⁴ held that *Karunawathie v. Piyasena and others*⁵ was decided *per incuriam* and that Section 48 of the Partition Law No. 21 of 1977 as amended by Act No. 17 of 1997 is drafted to ensure the final and conclusive nature of a decree in a partition action even if no substitution has been effected to represent a deceased party in such action.

Section 760A of the Civil Procedure Code, read with Article 169(2) of the Constitution, states as follows:

“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 Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, 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

² *Ibid.*

³ (2011) 1 Sri.L.R. 171

⁴ C.A. 499/98(F) & 499A/98(F); C.A. Minutes of 25.07.2013

⁵ (2011) 1 Sri.L.R. 171

of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.”

Hence where a party to an appeal in a partition case dies after the lodging of an appeal, substitution is regulated by Section 760A of the Civil Procedure Code read with Rule 38 of the Supreme Court Rules 1990.⁶ The purpose or manner of substitution in the Appellate Court is different from the purpose and manner of substitution in the original court. In the appellate court unlike in the original court substitution is allowed for a limited purpose of prosecuting or continuing with the action as the rights of the parties are already determined.⁷

In view of the different regimes that apply in a partition action or appeal, it is important for a Court to be appraised of the date on which a party dies. It is only then can a Court decide what steps, if any, should be taken in the action or appeal.

However, the Appellant has in the written submissions stated that the date of death of the parties are not known to her.

In the circumstances, I am of the view that the Appellant must furnish to Court the dates on which the deceased parties died in order to decide further steps according to law.

Application of the Appellant is rejected without costs.

Judge of the Court of Appeal

M.M.A. Gaffoor J.

I agree.

Judge of the Court of Appeal

⁶ *Chandrasiri v. Abusali et al* [S.C.(HCCA)(LA) 172/2012 and 173/2012; S.C. Minutes of 19.11.2015]

⁷ *Ibid.*