

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

C.A 81/1998 (F)  
D. C. Mathugama 2685/1994/P

Premadasa Edirisinghe  
Levvanduwa, Welipanna.

**PLAINTIFF**

Vs.

1. K. G. Samadasa  
Kahamiyagala, Welipenna,
2. K. G. Samawathi  
Kahamiyagala, Welipenna,
3. I. Nomis  
Kahamiyagala, Welipenna,
4. H. L. Misi Nona  
Kevitiyagala, Polgampola.
5. M. Edirisinghe  
45, Salandarama Road,  
Nugegoda.

**DEFENDANTS**

**AND**

Premadasa Edirisinghe  
Levvanduwa, Welipanna.

**PLAINTIFF**

Vs.

2. K. G. Samawathi  
Kahamiyagala, Welipenna,
3. I. Nomis  
Kahamiyagala, Welipenna,  
**(DECEASED)**

3. (a) K. G. Samawthi  
Kahamiyagala, Welipenna,
3. (b) I. D. Ranjanie  
“Saman” Ella,  
Kandabeddegama.
3. (c) I. Sunil Sisira Kumara  
“Banumathie”, Kanatiyagala,  
Welipenna.
3. (d) I. Sandya Sepali Sirimanna  
654/16, Halgadeniya New Town,  
Gothatuwa.
3. (e) I. Gamini Kumara,  
407C, Gemunu Mawatha,  
Pelanwatta, Pannipitiya.

**2<sup>ND</sup> AND 3(a) TO 3(e)**  
**DEFENDANTS-APPELLANTS**

Vs.

Premadasa Edirisinghe  
Levvanduwa, Welipenna.

**PLAINTIFF-RESPONDENT**

**AND**

1. K. G. Samadasa  
Kahamiyagala, Welipenna,
2. H. L. Misi Nona  
Kevitiyagala, Polgampola.
3. M. Edirisinghe  
45, Salandarama Road,  
Nugegoda.

**DEFENDANTS-RESPONDENTS**

**BEFORE:** Anil Gooneratne J.

**COUNSEL:** A. Dharmaratne for the Plaintiff-Respondent  
W. Maduwalagama for substituted  
Defendant-Appellant

**WRITTEN SUBMISSIONS**

**FILED ON:** 02.08.2012 (Substituted-Defendant-Appellant - 3පැ)

**DECIDED ON:** 30.08.2012

**GOONERATNE J.**

This is a final appeal in a partition suit from the District Court of Matugama. Judgment was delivered in the Original Court on 22.1.1998. This case was mentioned in this court on several days. On 13.10.2011 learned counsel for Appellant and Plaintiff-Respondent informed this court that prior to entering judgment in the District Court of Matugama, the Plaintiff had expired and no steps were taken in the Original Court to substitute the proper legal representative of the deceased Plaintiff and judgment was entered by the learned District Judge without effecting proper substitution. As such the record would become defective and the judgment of the District Court is a nullity? Both learned Counsel agreed to provide

details of date of death, death certificate etc. Therefore this court invited counsel to file written submissions more particularly since the Supreme Court had delivered a judgment on a similar matter where parties were reported dead prior to entering judgment in the lower court. I have had the opportunity of perusing the judgment in S.C Appeal 20.09A/2010 decided on 5.12.2011.

Action was instituted in the District Court of Matugamma on 30.5.1994 by the Plaintiff Premadasa Edirisinghe. The Plaintiff died on 2.7.1994. Death Certificate A1 filed along with the affidavit of one Jagath Edirisinghe) No substitution was effected and judgment was delivered in the District Court on 22.1.1998. As such both learned counsel plead that the judgment is a nullity.

I would briefly refer to S.C. Appeal 9A/2010, which this court is bound to follow and apply. Some of the extracts from the judgment are incorporated for easy reference.

When Section 760 A of the Civil Procedure Code (as amended) is read with Rule 38 of the Supreme Court Rules, 1990 it is abundantly clear that the applications made under the said provisions are in matters which are either before the Supreme Court for special leave to appeal, or an application under Article 126, or a notice of appeal, or the grant of special leave to appeal or the grant of leave to appeal by the Court of Appeal.

It is therefore apparent that, Section 760 A of the Civil Procedure Code (as amended) read with Rule 38 of the Supreme Court Rules, 1990 deal with Records which have become defective by reason of the death or change of status of a party to the proceedings in an application before the Supreme Court or Court of Appeal. According to the said provisions, the Record would have become defective at a time when the applications had been filed on appeal before the Supreme Court or the Court of Appeal.

The present application before this Court, however is different. 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. In such circumstances, it is quite clear that the provisions in Section 760 A of the Civil Procedure Code (as amended) read with Rule 38 of the Supreme Court Rules, 1990 cannot be applicable to this appeal and it would be necessary to consider as to the validity of the Final Order and the Judgment given by the District Court and the High Court respectively.

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.

This question had been considered by several decisions in India.

In *State of Punjab v Nathu Ram* (AIR 1962 SC 89), land belonging to two brothers L and N jointly was acquired for military purposes. The two brothers had

refused to accept the compensation offered to them and the State Government had referred the matter for inquiry to an arbitrator. The arbitrator had passed a joint Award granting a higher compensation. The State Government had appealed against the said Award to the High Court. During the pendency of that appeal L died and his legal representative were not substituted.

It was decided that since the legal representatives were not brought on record after the death of L, the appeal abated against him. The question that had arisen at that time was whether the appeal also abated against N.

I am compelled to include in this order several passages from the judgment of Her Ladyship the Chief Justice for the reason that, this court is bound and obliged to follow the dicta in the Supreme Court judgment.

A similar view was taken once again in *Kanailal Manna and Others v. Bhabataran Santra and Others* (AIR 1970 Calcutta 99) where one of the plaintiffs had died before the appeal was filed against a joint decree passed in their favour was heard by the lower Appellate Court. The court without the knowledge of the death had dismissed the appeal and had passed the decree. It was held that the decree abates and cannot be considered in law to be effective in any way and the proper procedure to be followed by the High Court is to set aside the ineffective decree and remand the case to the court where abatement has taken effect, keeping it open to the parties to move that court for an opportunity to have the abatement set aside if the parties could satisfy that they are so entitled in law.

The same issue was again considered in *Achhar Singh and Others v Smt. Ananti* (AIR 1971 Punjab & Haryana 477). While considering the appeal, reference had been made to the decision in *State of Punjab v Nathu Ram* (Supra) and *Swaran Singh Puran Singh v Ramditta Badhwa* (Supra). Referring to the above, *Tewatia, J* had held that, in an appeal filed against an Appellate decree, which was a nullity in that it was passed in ignorance of the death of one of the defendants during the pendency of that appeal and when that

appeal had abated totally, the proper course for the second Appellate Court is to set aside the decree and to remand the case to the lower Appellate Court. If there is an entitlement, it could be kept open for the parties concerned to take steps to get the abatement set aside. Expressing his view, Tawatia, J had said that.

“In our opinion, the uniform procedure followed by the other High Courts as referred to hereinbefore should be accepted, namely, that the ineffective decree passed by the Court of Appeal below should be set aside and the appeal should be remanded to the said Court keeping it open to the appellants to move the said Court for an opportunity to have the abatement set aside if the appellants could satisfy the said Court that they are so entitled in law”.

In view of the dicta in the above Supreme Court judgment I would hold that the judgment of the District Court is a nullity. However I do not wish to make any reference to Section 48(6) of the Partition Law as this Section would also involve a question of interpretation. In all the circumstances I make Order to send the case back to the District Court of Matugama with a direction to the learned District Judge to hear the case expeditiously and take steps according to law. I make no Order as to costs. Registrar of this is directed to return the original record to the respective District Court along with the order of Court.

Case returned to the District Court.

JUDGE OF THE COURT OF APPEAL