

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

In the matter of an appeal

6 (b) Sitti Nufeesa

6 (c) Fathima Rehana

6(d) Mohammed Ameen Imran

6 (b) to 6 (d) all are of Dedigama Road,
Nelundeniya.

**Substituted 6 (b) to 6 (d) Defendants-
Appellants. (Respondents in
654/2000 F)**

CA Appeal 654 & 655/2000 (F)

D.C. Kegalle No. 21185/P

Vs.

1(b) Kankanam Pathirannehelage Chandrasena.

1(c) Kankanam Pathirannehelage Gunathilake.

1(d) Kankanam Pathirannehelage Ariyawathi

1(e) Kankanam Pathirannehelage karunawathi.

1(f) Kankanam Pathirannehelage Somawathi

1 (b) to 1 (f) all are of Marapitiya,
Nelundeniya.

**Substituted 1 (b) to 1 (f) Plaintiffs-
Respondents.**

1 (a) Wickramaarachchilage Gamini
Wickramaarachchi,
Alawwa Road, Nelundeniya.

Substituted 1 (a) Defendant – Respondent.

2 (a) Wickramaarachchilage Abeya Banda,
Marapitiya, Nelundeniya.

Substituted 2 (a) Defendant – Respondent.

3(a)(a) Wickrama Arachchilage Abaya Banda
Marapitiya, Nelundeniya.

Substituted 3 (a) (a) Defendant-Respondent.

(b) Wickramaarachchilage Abeyarathne Banda
(c) Wickramaarachchilage Samarathunga Banda.
(d) Lekamralalage Bisomenika.
3 (a) to 3 (d) all of C/O Wickrama Stores,
Marapitiya, Nelundeniya.

Substituted 3 (b) to 3 (d) Defendant-Respondents

4. Hitihamilage Ukku Banda
Siyambalapitiya, Kegalle.
5. Hitihamilage Tikiri Mahattaya.
Edurupotha, Ganemulla.

4th and 5th Defendant – Respondents.

7. Ebunu Mohammed,
Nelundeniya.
8. Lebbe Marrikkar Mohammed Thawfeq
Nelundeniya.

- 9(a) Upali Chandra Kumara Perera
Mawathagama.
(Appellant in 654/2000/F)
10. Ganlathralalage Punchi Banda
Marapitiya, Nelundeniya.

**7th to 10th Defendant –
Respondents.**

- 11(a) Edirisingha Mudiyansele Wasana Rohini
Kumari
No. 895/1, Pitagaldeniya

**Substituted 11th (a) Defendant-
Respondent.**

- 12(a) Wickrama Arachchilage Abaya Banda
Marapitiya, Nelundeniya.

**Substituted 12th(a) Defendant
– Respondent.**

13. U.E. Abdulkhani
Kondagala, Nelundeniya.
14. Waidyaratne Mudiyansele Mohamed
Lebbe Marikkar Thweq,
Warakapola.
15. Wickrama Arachchilage Mantriratne alias
Gunawardena.
Marapitiya, Nelundeniya.

**13th to 15th Defendant –
Respondents.**

- 16 (a) Lekam Ralalage Bisomenika.

(b) Wickrama Arachchilage Shalitha
(c) Wickrama Arachchilage Shyamal

All of C/O Wickrama Stores, Marapitiya,
Nelundeniya.

Substituted 16 (a) to 16 (c)
Defendants – Respondents-
Respondents.

Before : E.A.G.R. Amarasekara, J.

Counsel : Mr. C. Ladduwahetti instructed by Lakni Silva for the 6b – 6d Defendant-
Appellants.

Mr. S.C.B. Walgampaya P.C. with Upendra Walgampaya for the Plaintiff
- Respondent.

Mr. J. Wickramanayake with Aruna Jayatilaka for the 1st Defendant –
Respondent.

Decided On: 03.08.2018.

E.A.G.R. Amarasekara, J.

In this appeal, on 12.02.2014, the learned counsel for the substituted Defendant Appellants in Appeal No. 655/2000 (F) has informed this court that the 4th Defendant Respondent had died prior to the Judgment delivered in the District Court and in terms of a Judgment delivered in the Supreme Court no substitution could be done to proceed with the appeal (vide Journal Entry dated 12.02.2014 of this Court). A motion dated 10.02.2014 too has been filed moving to remit this appeal to the District Court for steps to be taken and continue with the proceedings

from the time of the occurrence of the death of the 4th Defendant. Parties were allowed to file written submissions on this preliminary issue.

6 (b) to 6 (d) Substituted Defendant – Appellants in Appeal No.655/2000 (F) have filed their written submissions with a motion dated 28.04.2014 (vide Journal Entry dated 29.04.2014) and 1C to 1F Plaintiff Respondents too have filed their written submissions dated 11.07.2014 (date stamped on 10.07.2014). As per the Journal entry dated 31.07.2014, 2 (a) and 3 (b) Defendant Respondent has filed his written submissions with a motion dated 30.07.2014.

1A Defendant Respondent also has filed his written submissions dated 01.08.2014 (vide Journal Entry dated 05.08.2014). Though this matter was fixed for inquiry on this preliminary issue, no oral arguments have taken place as many mention dates were given for various reasons such as substitution of parties. On 15.02.2018 parties consented to obtain an order on this preliminary issue without further inquiry, but on the written submissions already made.

The 6 (b) to 6 (d) Appellants have taken up the position that in view of section 760 (A) of the civil Procedure code (as amended) read together with Rule No. 38 of the Supreme Court, the Appellants cannot correct a defect in the record which occurred prior to the filing of this appeal and all the proceedings took place after the death of the 4th Defendant would be null and void since the record became defective due to non-substitution for the deceased party. They have relied on the Judgment of the Supreme Court made in the case of **Gamaralalage Karunawathie Vs. Godayalage Piyasena** S.C. Application No. 09A/2010 decided on 05.12.2011

reported in Bar Association Law Journal 2012 at Page 81, which was followed in **Willam Singho Vs Japin Perera** and others SC HCCA/LA No.143/2011 decided on 08.06.2012. The Appellants argue that the decision in **W. Jane Nona and others Vs Chalo Singho** C.A. Appeal No. 499/1998 (F) and 499 A/1993 (F) decided on 25.07.2013 reported in Galle Bar Association Law Journal 2013 which did not follow the said Supreme court decision stating that the Supreme Court decision was made in per-inquiriam is contrary to law and this Court is bound to follow the said Judgment in the Supreme Court in **Gamaralalage Karunawathie Vs. Godayalage Piyasena** until it is overruled by a larger bench of the Supreme Court.

All the Respondents who have filed their written Submissions rely on the decision of this court in the aforesaid **Jane Nona and others Vs Chalo Singho**. True copies of the aforesaid two Judgments are filed along with the written Submissions of 1C to 1f Plaintiff Respondents. The Respondent's position is that the Honourable Supreme Court has overlooked or failed to consider the specific provisions laid down in the Partition Law, No. 21 of 1977 as amended by the Partition (Amendment) Act No. 17 of 1997.

The Respondents bring to the attention of this court the Judgement in **Ramanathan Chettiar Vs Wickramarachchi and others** 1978 –1979 (2) SLR 395, **Moosajee Vs Carolis Silva** (1967) 70 NLR 217 **Rabot V de Silva** (1907) 10 NLR 144, e **Bandahamy Vs Sennanayaka** (1927) C.L Rec. 202 to show that this court is not bound to follow a decision made in per incuriam.

Section 48 (1) of the Partition Law No. 21 of 1977 provides as follows:

*“Section 48 (1) “ 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” shall include 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 purpose of the action; or***
- (c) To appoint guardian ad litem of a party who is a minor or a person of unsound mind.”*

In view of the aforementioned Section it is clear that an interlocutory decree or a final decree of a partition action shall remain final and conclusive notwithstanding

any omission or defect or procedure caused by a death of a party and the subsequent failure to substitute legal representatives but this finality and conclusiveness is subject to the decision of any appeal pending over them. On behalf of the 1A Defendant Respondent, the learned Counsel has cited **Solomon Ranaweera Vs. Solomon Singho** (1978)79 II NLR 136 which held that *a decree entered in a partition action is not rendered null and void by reasons of a party to the action being dead at the time of the decree being entered without proper substitution or by the failure to appoint a person to represent the estate of the deceased party.* It further has held that *an admission made by the counsel for one of the parties that such a decree was null and void for failure to make proper substitution is a mistaken admission in Law and is not binding on such party.*

It has brought to the notice of this court that the Supreme Court in delivering its Judgement in the aforesaid **Gamaralalage Karunawathie Vs. Godayalage Piyasena** has not considered the relevant statutory provisions found under Section 48(1) of the Partition Law No. 21 of 1977 as amended, and the aforesaid decision in **Soloman Ranaweera Vs Solomon Singho**. However, this court observes that the partition judgment considered in the decision in **Solomon Ranaweera Vs Solomon Singho** was a decision taken in a different action but not in the appeal of the same action. One can still argue that the finality and conclusiveness considered in aforequoted section 48(1) is subject to this appeal and therefore the respondent cannot meet the argument of the Substituted Appellants on the strength of the provisions in the aforesaid section 48(1).

Furthermore, this court observe the provision that existed as section 48(4)(a) (iii) was repealed by the amendment to the Partition Law done in 1997 by Act No. 17 of 1997. The said section 48(4)(a)(iii) provided an opportunity for an application to prove title even after the entering of the interlocutory decree by heirs or a duly appointed legal representative of the deceased party's estate when there had been no substitution prior to the interlocutory decree. By repealing that provision, the legislature has shown its intention that after the aforesaid amendment interlocutory decree and final decree should not be disturbed due to non - substitution of a legal representative for a deceased party.

This court also observes that due to the introduction of new Section 81, the proceedings cannot become defective due to a death of a party or non-substitution. Specially Section 81(12) states as follows;

“(12) No proceedings under this Law shall be postponed or adjourned or any step in the action postponed by reason of the death of a party or person required to file a memorandum under this Law.”

As per the Section 81(10)(b), an application to appointment of legal representative shall not be a ground for postponement.

Furthermore, as per Section 81(9) any Judgement, decree, order or anything done in a partition action deemed to be valid and effective even if there is a failure to file a memorandum of nomination of legal representative as prescribed by the amending act and no appointment of a legal representative has been made to represent the estate of a party deceased.

Even if this court remit this case to the district court, the learned district judge has to follow the law as at today after the aforesaid amendments. As law stands today it is the duty of the party to nominate his representatives through a memorandum filed in courts. In such a backdrop there is no provision to force any other party to file papers for the substitution of legal representatives to represent a deceased party. There is no assurance that the legal representatives or heirs of the deceased will come forward to make an application to be substituted in the place of the deceased. The learned district judge will have to proceed with the trial without postponing or adjourning to allow substitution which may, at the end of day, produce the same result. The argument of the Substituted Appellants is that the case record became defective due to the non-substitution for the deceased party but it is my considered view that section 48 and the new section 81 clearly show that in a partition action the case record cannot become defective due to the death of a party and non-substitution to represent rights of the party deceased.

This court observes that the honorable supreme court in making the decision in **Gamaralalage Karunawathie Vs Godayalage Piyasena** has not considered the amendments brought to the Partition Law by the amending act No.17 of 1997. Especially it has not considered the provisions of section 48(1) and section 81 of mentioned before in this order. K.T. Chithrasiri J. Judge of the court of appeal (as he then was) in the aforesaid Judgement **Jane Nona and others V. Chalo singho** has discussed in detail a similar situation and has considered the Judgement in **Gamaralalage Karunawathie Vs. Godagelage Piyasena** is not absolutely binding on this court as it was given in per incuriam, since the Supreme Court failed to consider the specific provisions in the Partition Law. I too agree with the view that the

aforesaid decision of the supreme court was made in per incuriam. For the reasons mentioned before, I am of the view that this court need not follow the aforesaid decision of the Supreme Court as it was made in per incuriam without considering of the relevant statutory provisions.

Hence, I disallow the application to have this case remitted back to the District Court.

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E.A.G.R. Amarasekara,
Judge of the court of Appeal