

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

In the matter of an appeal from the  
judgment of the District Court of  
Gampaha in Case No. 22395/P.

**Case No. CA/DCF/356/97**

D.C. Gampaha Case No. 22395/P

Kirindiwala Sumananda Thero  
Jayasumanaramaya  
Kammalwatte,  
Delgoda.

**Plaintiff**

**Vs.**

1. Balasin Pedige Juwani *alias*  
Dharmadasa  
Kammalwatte,  
Delgoda
  
2. Balasin Pedige Pesona *alias*  
Asilin,  
Kammalatte,  
Delgoda

**Defendants**

**AND**

Balasin Pedige Pesona *alias*  
Asilin,  
Kammalatte,  
Delgoda (deceased)

**2<sup>nd</sup> Defendant-Appellant**

**Vs.**

Kirindiwala Sumananda Thero  
Jayasumanaramaya,  
Kammalwatte,  
Delgoda (Decesed).

**Plaintiff-Respondent**

Balasin Pedige Pesona *alias*  
Asilin,  
Kammalatte,  
Delgoda

**1<sup>st</sup> Defendant-Respondent**

**AND NOW**

In the matter of an application  
for substitution, consequently  
for an order to set aside the  
abatment order dated  
08.07.2011 and for a  
direction/order to restore the  
appeal to the role of the Court of  
Appeal and to list the appeal for  
hearing.

M.P. Harischandra  
No. 28, Kammalwatte,  
Delgoda

(Party seeking to be substituted  
in the room and place of the  
deceased 2<sup>nd</sup> Defenfant-  
Appeallnat)

**Petitioner**

**Vs.**

Kirindiwala Sumananda Thero  
Jayasumanaramaya,

Kammalwatte,  
Delgoda (Deceased).

**Plaintiff-Respondent**

Bomeeriya Athulasiri Thero  
Abinawaramaya,  
Jayasumamaramaya

**Party sought to be substituted  
in the room and place of the  
deceased Plaintiff-Respondent**

Balastin Pedige Juwani *alias*  
Dharmadasa (Deceased)  
Kammalawatte,  
Delgoda

**1<sup>st</sup> Defendant-Respondent**

Balasinghe Pedige  
Gunawardena *alias*  
Siriwardhana  
No. 6/2, Kammalawatte,  
Delgoda

**Party sought to be substituted  
in the room and place of the  
Deceased 1<sup>st</sup> Defendant-  
Respondent.**

Before: **M. T. MOHAMMED LAFFAR, J. and  
S. U. B. KARALLIYADDE, J.**

Counsel: S.N. Vijithsinghe, instructed by C.G. Liyanage for the  
Petitioner

Supported on: 15.11.2021.

Decided on: 21.01.2022.

**MOHAMMED LAFFAR, J.**

The Petitioner, in his petition dated 05.08.2021, seeking reliefs, *inter alia*, to vacate the abatement order made by this Court on 08.07.2011, restore the appeal and substitute the Petitioner in place of the deceased 2<sup>nd</sup> Defendant-Appellant (hereinafter referred to as the 2<sup>nd</sup> Defendant).

We heard the learned Counsel for the Petitioner in this regard.

**The facts in a nutshell**

The Plaintiff-Respondent (hereinafter referred to as the “Plaintiff”) instituted action in the District Court of Gampaha to partition the land which is morefully described in the schedule to the plaint. After trial, the learned District Judge of Gampaha delivered the Judgment dated 25.04.1997 to partition the land amongst the co-owners.

Being aggrieved by the judgment, the 2<sup>nd</sup> Defendant had preferred an appeal bearing No. CA/DCF/356/97 to the Court of Appeal.

During the pendency of the appeal, the 2<sup>nd</sup> Defendant died. When the matter was mentioned in this Court on 08.07.2011, the daughter of the deceased 2<sup>nd</sup> Defendant informed Court that the heirs of the 2<sup>nd</sup> Defendant were not interested in proceeding with the appeal. Accordingly, the Court made the impugned order to abate the appeal. The abatement order is re-produced as follows:

“ *Anil Gooneratne, J.*

*Since the minute of 30<sup>th</sup> March, 2011 and 02<sup>nd</sup> of April, 2011, it is recorded that the Appellant and the Respondent have expired and this Court granted time to effect substitution. However, today the daughter of the 2<sup>nd</sup> Defendant-Appellant namely M.P.Kalyanawathi appears in this Court and inform to Court that the Appellant’s party was no longer interested in the appeal and would not be taking steps*

*for substitution. In the above circumstances, this Court has no alternative but to abate this appeal. Accordingly, appeal abated.”*

The contention of the Petitioner was that the 2<sup>nd</sup> Defendant died, leaving six children including the Petitioner. The Petitioner was suffering from delusional disorder for a period of 11 years from 2010, and he was obtaining treatment for his mental illness in the District General Hospital of Gampaha and the Petitioner is currently in remission and can perform normal activities. The medical certificate is produced as P1 (a).

### **Determination**

In partition actions, when a party to the action demise, all the heirs need not be substituted in place of the deceased party. In terms of section 81 of the Partition Law. No. 21 of 1977 (as amended), only one legal heir of the deceased party to be substituted.

In the instant action, the eldest daughter of the deceased 2<sup>nd</sup> Defendant who had *locus standi* to represent the deceased, informed Court that the heirs of the deceased party was not interested in proceeding with the appeal. In the circumstances, the Court rightly made the impugned abatement order. As such, the Petitioner, after 10 years from the date of the abatement order, as an heir of the deceased 2<sup>nd</sup> Defendant has no legal right to move this Court to set aside the said abatement order. The Petitioner as an heir of the deceased 2<sup>nd</sup> Defendant cannot be permitted to have a “second bite of the same cherry”. The "bite" can entail appealing through the hierarchy of courts, but once the parties have exhausted or abandoned their appeals, they cannot re-litigate the same dispute.

Accordingly, I am of the view, that this Court taking the requirements of the due administration of justice into account, was justified in ordering to abate the Appeal on 25.03.2014.

Moreover, it is revealed from the submissions of the learned Counsel for the Petitioner that the wife of the Petitioner has already been substituted in the place of the deceased 2<sup>nd</sup> Defendant in the District Court of Gampaha, and thereafter, the final decree has been entered. In the circumstances, to my mind, the question of substitution does not arise.

It is trite law that the abatement amounts to a dismissal. Accordingly, this Court is of the considered view, that we have no jurisdiction to vacate the abatement order made by this Court 10 years ago.

For the foregoing reasons, I dismiss the petition of the Petitioner without costs.

*Application dismissed.*

**JUDGE OF THE COURT OF APPEAL**

**S. U. B. KARALLIYADDE, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**