

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

Lansakara Kulatunga Mudiyansele Punchi
Banda of Hewanpola, Ambakote.

PLAINTIFF

C.A. Case No. 267/1999 (F)

-Vs-

D.C. Kurunegala Case No.4121/P

Dissanayake Mudiyansele Yaso Menika of
Kolambalamulla, Pothuhera

and 10 others.

DEFENDANTS

AND NOW BETWEEN

Ratnayake Mudiyansele Karunaratane
Banda of Hewanpola, Ambakote

6D DEFENDANT-APPELLANT

-Vs-

Lansakara Kulatunga Mudiyansele Punchi
Banda of Hewanpola, Ambakote

PLAINTIFF-RESPONDENT

1. Dissanayake Mudiyansele Yaso Menika of
Kolambalamulla, Pothuhera
2. Dissanayake Mudiyansele Muthubanda
(Deceased)

3. Dissanayake Mudiyansele Piyasena Banda (Deceased)
4. Samarakoon Mudiyansele Ranbanda of Hewanpola, Ambakote.
- 5A. Dissanayake Mudiyansele Punchi Menike of Malama Gedara, Kumbukwewa.
- 7A. Dissanayake Mudiyansele Herath Banda,
- 8A. Dissanayake Mudiyansele Punchi Menike of Malama Gedara, Kumbukwewa.
- 9A. D.M.T.B. Dissanayake of Malama Gedara, Kumbukwewa.
10. R.M. Bandara (Deceased) of Hewanpola, Ambakote.
11. Wijerathna Banda of Hewanpola, Ambakote.

DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Thishya Weragoda with Niluka Dissanayake
for the 6D Defendant-Appellant
Sunanda Herath for the Plaintiff-Respondent
and 5A and 7A Defendant-Respondents

Decided on : 02.11.2017

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent instituted action for the partition of the land morefully described in the Schedule to the Plaint dated 19.01.1970. The matter proceeded to trial and judgment was delivered on or about 05.01.1999. The appeal has since been preferred by the 5th Defendant-Appellant.

It has since transpired that three deaths of parties had occurred during the pendency of the trial in the District Court. The 2nd Defendant-Respondent had passed away on 04.07.1982 and the 10th Defendant-Respondent had expired on or about 02.08.1991. The 3rd Defendant-Respondent crossed the great divide on or about 27.11.1994. In proof of the aforesaid deaths, copies of the death certificates of the said parties have been tendered to the Court marked as 'X1', 'X2' and 'X3' annexed to the motion dated 25.05.2015. It is a given that no substitution had been effected prior to the delivery of judgment. The aforesaid deaths had occurred prior to the promulgation and coming into effect of the Partition (Amendment) Act, No. 17 of 1997. Is the trial vitiated by virtue of non substitution of deceased parties or is it saved by Section 81(9) of the Partition Law, No. 21 of 1977 as amended by Partition (Amendment) Act, No. 17 of 1997? This is the issue that arises in the case.

It appears from the record that the entire trial had proceeded without effecting any substitution in respect of the deceased 2nd, 3rd and 10th Defendant-Respondents. These Defendants were not allotted any shares by the learned District Judge when he pronounced his judgment on 5.01.1999. It has to be borne in mind that the plaint designates the deceased 2nd Defendant-Respondent and 3rd Defendant-Respondent as original Defendants and proceeds to allot shares for them. In such an event the investigation of title has no doubt got to be conducted with the participation of these parties or their privies or representatives. Undoubtedly when the learned District Judge pronounced judgment, it would appear that only the Plaintiff, 4th Defendant, 5th Defendant and 9th Defendant were allotted shares. Neither the 2nd nor the 3rd nor the 10th Defendant-Respondent was allotted any shares. If they had been allotted shares despite the fact that they had passed away during the pendency of the trial, Section 48(6) of the Partition Law, No. 21 of 1977 would have saved those shares for their legal representatives. The fact that the deceased parties were not substituted for would not be a bar for their legal representatives to claim the awarded shares for Section 48(6) of Partition Law, No. 21 of 1977 states as follows:

Where by an interlocutory decree or final decree a right, share or interest has been awarded to a party but such party was dead at the time, such decree shall be deemed to be a decree in favour of the representatives in interest of such deceased person at the date of such decree.

In fact Section 81(9) of the Partition Law, No. 17 of 1977 as introduced by Partition (Amendment) Act, No. 17 of 1997 strengthens this position. Section 81(9) goes 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 a deceased party or person, any judgement 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 my view the provisions in an Act have to be harmoniously construed and thus both Sections 48(6) and 81(9) of the Partition Law, No. 17 of 1977 as amended would apply to a situation where a particular party had been dead at the time when the judgment was pronounced but he was nonetheless awarded shares by the learned District Judge.

Even the transitional provision Section 82 of the Partition Law, No. 17 of 1977 which was Section 29 of the Partition (Amendment) Act, No. 17 of 1997 has to be given an interpretation in consonance with the above construction. Section 82(1) of the Partition Law states as follows:

Every partition action, application or other matter instituted and pending in any Court, on the date of commencement of this Act, shall, so far as the circumstances permit, be continued and proceeded with to final judgment and decree under the provisions of the principal enactment as amended by this Act, (including the provisions requiring the filing of memoranda nominating a legal representative by parties to the action and others,) in the same manner and

in every respect as if the same had been originally instituted after the date of commencement of this Act.

The relevant parties to the case namely 2nd, 3rd and 10th Respondents passed away long before the Amendment Act came into operation. Long before the operative date i.e. 12.08.1997 of the Amendment Act, the 2nd Defendant had passed away on 04.07.1982 and the 10th Defendant had expired on 02.08.1991, whereas the 3rd Defendant expired on 27.11.1994. It was incumbent in those circumstances upon the Plaintiff to have effected the substitution. Though the Partition Amendment Act treated this pending case in 1997 as if it was instituted under the 1997 amendment, the proceedings in the District Court had already become a nullity when the 1st demise took place in 1982. Assuming that this partition action instituted on 19.01.1970 became a partition action fictionally so as if it was instituted under the 1997 Amendment by virtue of the transitional provision, it had long become a nullity with the death of the parties prior to 1997.

The legislature attempted to take away this nullity by enacting in Section 48(6) of the Partition Law that despite the death the interlocutory or final decree would be valid in favour of the legal representatives of the deceased provided some right, share or interest has been awarded to the deceased party. Though Section 81(9) of the Partition Law as amended does not speak to awarding of shares, this is implicit in that section as both Sections 48(6) and 81(9) of the Partition Law have to be harmoniously interpreted. Section 81(9) of the Partition Law has to necessarily apply in a situation where shares have been awarded to a deceased party and not otherwise.

Upon a reading of the Amendment Act, No. 29 of 1997, it is clear that the legislature has not removed the nullity of proceedings that would arise in respect of those deceased parties who were not allotted any right, share or interest, despite the fact that the Plaintiff had allotted in the plaint shares for them or they had filed statements of claim. The investigation of these claims, as I said before, must have taken place with their participation or legal representatives who were duly substituted. It is more than likely that their claims in the absence of their

participation were added to the interests of others who eventually got allotted with shares. This likelihood deprives the trial of due process which is bound to result in a denial of justice for those deceased parties.

After all, the concept of a judgment *in rem* loses its vitality in partition cases in the situation that arose in this case and conceived in the view I have taken of the facts specific to this case, the nullity of the proceedings arose in this case with the death of the parties and the failure to effect substitution. This nullity has not been cured at all and if this is one of the lacunae that the legislature wished to remedy, I must observe that it has not been effected effectually.

No doubt in *Gamaralalage Karunawathie v. Godayalage Piyasena*¹ Dr. Shirani Bandaranayake C.J. held *inter alia* 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 bringing in the legal representatives of the deceased in his place.”*²

In the present appeal, as clearly stated earlier, prior to the judgment of the District Court dated 20.05.2005, the 15th respondent who was the 16A respondent as well had died on 30.05.2004. No steps were taken for substitution of parties.

*Thereafter, an appeal was taken before the High Court and its Judgment was delivered on 13.10.2009. However the 2nd respondent had died prior to that on 06.09.2007.*³

But without commenting on the merit of this decision, I must observe I see nullity in the proceedings of the case before me on a different ground namely the instant case under appeal does not fall within Sections 48(6) and 81(9) of the Partition Law as amended.⁴

¹SC Appeal No 09A/2010 SC minutes of 5.12.2011-Bar Association Law Reports 2012 page 8

²*ibid*, at page 7

³*ibid*, at page 11

⁴See a good account of this case by Mr. Ananda Wickremasekara in his *Substitution-The Way Forward* Galle Law Journal (2013) Volume 2 page 113 at 155

Chitrasiri J's exposition of the legal import of the Amendment Act, No. 17 of 1997 in *Jane Nona v. Chalo Singho*⁵ is quite pertinent;

"Therefore, it is clear that Section 48 of the Partition Law No.21 of 1977 as amended by the 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 an action.

It must also be mentioned that by the Partition (Amendment) Act No. 17 of 1997, a new Section was substituted in place of Section 81 of the Partition Law No.21 of 1977 whereby a new process had been introduced for the appointment of legal representatives to represent the parties in a partition action upon their death. Under Section 81(1) to Section 81 (8) of the said Act, it has been made mandatory to file a memorandum by every party to a partition action or any other person, nominating at least one person [but not exceeding 3] to be his legal representative in the event of his death pending the determination of the partition action.⁶

Therefore, with the introduction of new Section 81 by the Partition (Amendment) Act No.17 of 1977, it is crystal clear that a judgment shall be deemed to be valid and effective and in conformity with the provisions of the Law and shall bind the legal heirs and representatives of such deceased party or person, despite the non appointment of a legal representative in place of a deceased party."⁷

Chitrasiri J. in *Jane Nona v. Chalo Singho* was dealing with a situation where a death of a party in a partition action occurs after the effective date of the Partition (Amendment) Act, No. 17 of 1977 but on the view I have taken of both Sections 48(6) and 81(9) of the Partition Law, this case cannot be a candidate to be matched within the parameters of *Jane Nona v. Chalo Singho* as *Jane Nona* did not deal with non allotment of shares to a deceased party.

Conceived in those circumstances, the proceedings and judgment delivered by Court on 05.01.1999 are *ex facie* bad in law and null and void.

⁵ CA No 499/98F & 499 A/98 (F) decided on 25.07.2013

⁶ *ibid*, at page 10

⁷ *ibid*, at page 11

Accordingly I would set aside the judgment dated 05.01.1999 and remand the case to the District Court to enable the parties concerned to take steps as mandated by Section 81 of the Partition Law as amended. Upon substitution of parties it is open to the learned District Judge to adopt the evidence that has already been led and permit substituted parties to adduce further evidence that would establish their case. The learned District Judge of Kurunegala is not restricted to adoption of evidence alone and it is open to him to adopt any procedure that would best suit the resolution of the issues raised by parties and decide the case according to law having regard to the fact all representatives of deceased parties are given an opportunity to place their case before Court.

JUDGE OF THE COURT OF APPEAL

Case sent back