

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

H. M. Kuda Banda
Baoruwa, Panagama

PLAINTIFF

C.A 256/1997
D.C. Kurunegala 3422/P

Vs.

Kaluwadewayalage Jinadasa
Ogodapola
Pihimbuwa

DEFENDANT

Kaluwadewayalage Jinadasa
Ogodapola
Pihimbuwa

DEFENDANT-RESPONDENT

Vs.

H. M. Kuda Banda
Baoruwa, Panagama

PLAINTIFF-RESPONDENT

K.S Rathnasiri
Pahala Ogodapola
Pihimbuwa
Rideegama.

**SUBSTITUTED-DEFENDANT-
APPELLANT**

Vs.

H. M. Kuda Banda
Baoruwa, Panagama

PLAINTIFF-RESPONDENT

K.S Rathnasiri
Pahala Ogodapola
Pihimbuwa
Rideegama.

**SUBSTITUTED-DEFENDANT-
APPELLANT-PETITIONER**

Vs.

1. H. M. Samarakoon
2. H. M. Chandrawathi
3. H. M. Nandawathi
4. H. M. Kumarihami
5. H. M. Jayathissa

All of Baoruwa, Panagamuwa

RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Mahanama de Silva for the Substituted-Defendant-Appellant
J.C Boange for the Plaintiff-Respondent

ARGUED ON: 23.11.2011

DECIDED ON: 03.02.2012

GOONERATNE J.

This is a partition suit. Judgment in the District Court of Kurunegala was delivered on 23.4.1997. Defendant-Appellant by his Petition of Appeal dated 28.5.1997 preferred an appeal to this court. Learned Counsel Mr. Mahanama de Silva for Substituted-Appellant in his oral submissions and as well as in the written submissions filed in this court emphasized, the fact that there is no valid appeal and the substitution effected in this court in the room of the deceased Defendant is void for the reason that Plaintiff was dead by 15.4.1997 (Death Certificate 'x'), prior to delivery of the judgment (23.4.1997) in the District Court. He submits that

the judgment dated 23.4.1997 is ab initio void for the reason of death of a party. The learned Counsel Mr. Silva relies in the authority reported in the Bar Association Law Reports 2007 at pg. 97 a decision of a Divisional Bench of 3 Judges of the Court of Appeal.

The 1st substituted plaintiff-appellant having died on 03.02.2003 no substitution had been effected in the room of the deceased appellant. With the death of the said party the record had become defective and further all steps taken in this matter since the death of the above appellant are defective and of no avail in law. In the aforesaid premises it was contended that the petitioner who was an heir be substituted in the room of the deceased 1st substituted plaintiff-appellant and the judgment delivered in this matter be pro forma set aside and re-delivered.

Held that –

- (a) when the term ‘nullity’ is to be considered one has to be mindful of the fact that – ‘nullity’ can be absolute or relative;
- (b) when the appellant was dead, there was no ‘live appellant’ before this Court. When there is no live appellant before Court it has no jurisdiction to hear and determine the appeal. In other words in order to make the judgment valid this Court did not have jurisdiction of the persons;
- (c) if the Court has no jurisdiction it is of no consequence that the proceedings had been formally conducted for they are Coram Non-Judice. So judgment entered is void and is a nullity.
- (d) The principle – ‘Nunc pro tunc’ (now for them) applies to acts allowed to be done after the time when they should be done, with a retroactive effect, cannot succeed.
- (e) Court has inherent powers to set aside its own judgment which is an absolute nullity.

I have also perused the case of Munasinghe & another Vs. Mohamed Jabir Navaz Carim 1990(2) SLR 163 ...

Plaintiff respondent died in July 1980 during the pendency of an appeal lodged by the 17th and 18th defendant-appellants – petitioners on 14.11.1975. The appeal was argued on 27.01.1987 and dismissed on 27.03.1987. Counsel marked his appearance for the substituted plaintiff-respondent on 27.01.1987. Substitution had taken place on 20.11.1987 after the record was sent back to the District Court of Kalutara after the judgment of the Court of Appeal. Counsel could not have made his appearance in court for the substituted plaintiff-respondent as no substitution had been made in terms of Rule 4 or Rule 5 of the Supreme Court rules gazetted in Gazette Extraordinary of the Republic of Sri Lanka No. 44/23 dated 23.01.1974. The action of the counsel misled the Court and the parties to the action.

Held:

- (1) The record was defective and the judgment delivered by the Court of Appeal was a nullity. Counsel had no status to appear for the substituted plaintiff-respondent as at that time no substitution had been made.
- (2) The Court has inherent powers to set aside its own judgment which is a nullity.
- (3) In the interest of justice the appeal should be re-listed for hearing.

At Pg. 166...

The learned Counsel for the Petitioners submitted that as the record was defective the judgment delivered by the Court of Appeal was a nullity I am of the view that there is force in the argument. I am of the view that the defective record should have been cured before the pronouncement of the judgment. In the instant case the learned Counsel had no status to appear and mark his appearance on behalf of the substituted Plaintiff-Respondent. Therefore the proceedings of 27.1.1987 and the judgment of 27.3.1987 was a nullity.

I heard submissions opposed to the views expressed above by learned Counsel for Substituted-Appellant. Mr. Boange for Substituted-Plaintiff-Respondent in his reply referred to the provisions of the partition (Amendment Act) No. 17 of 1997. He submitted that this being a partition action the views expressed above will not apply and this court need to consider Section 27 (memorandum nominating legal representative) of the above Act which introduced a new Section in place of the earlier Section 81. It was his position that although it became law in August 1997 by Section 29 (transitional provisions) of the Amending Act, it has been made retrospective in operation and as such Section 81 operates as far as the case in hand is concerned.

The following Sections need to be noted very carefully from the above Amendment Act.

Section (3) of the above Act which amend Section 4 of the principal Act.

(2) There shall be appended to every plaint presented to a court for the purpose of instituting a partition action, a memorandum substantially in the form set out in the Second Schedule to this Law, nominating in accordance with section 81, a person to be the legal representative of the plaintiff for the purposes of the action, in the event of his death pending the final determination of the action”.

Section 27 of the above Act repealed Section 81 of the principal Act.

Section 81 (1) Every party to a partition action or any other person required to file a memorandum under this Law, (hereinafter referred to as "the nominator") shall file, or cause to be filed in court, a memorandum, substantially in the form set out in the Second Schedule to this Law, nominating at least one person, and not more than three persons, in order of preference, to be his legal representative for the purposes of the action in the event of his death pending the final determination of the action.

Section 81 (3) The court may at any time before the final determination of the action, on its own motion or on the application of any party, require a party to the action or any person required to file a memorandum under the provisions of this Law, to file such memorandum on or before a date appointed for such purpose by court.

The transitional section, namely Section 29 may also be noted.

Section reads thus:

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.

This court observes that by the time the District Court delivered the judgment Plaintiff was dead. As such the judgment is a nullity. Although the above transitional Section in the above Amendment Act it appears that

non of the parties to the action took any steps in terms of Section 81 (as amended) of the above law.

The Partition (Amendment) Act No. 17 of 1997 has amended some sections of the Partition Law No. 21 of 1977. (After about 20 years). The amendments in operation has sought to remedy a situation which very frequently occur in our courts especially in partition cases having several parties to the action, where one or more of them expire during the pendency of an action. These provisions stated above would ease the burden to a very great extent where judgments are delivered without the courts being notified of a death of a party in a partition suit, otherwise which result in a re-trial or starting the process all over again, and add to long delays in the disposal of actions.

However when I consider the Amendment Act No. 17 of 1997, it appears that all necessary steps as contained in Section 27 which replace Section 81 of the principal enactment and substituting Sections 81(1) to 81(4), necessarily apply to partition actions tried in the District Court prior to the appeal stage. In the case in hand the learned District Judge had not been informed about the death of a party prior to delivery of the judgment (23.4.1997). The Plaintiff died (x certificate) on 15.4.1997 which is about 8

days prior to judgment. It would not have been possible for the Registered Attorney to convey this to the learned Judge by way of motion etc. As such notwithstanding the above provisions of the Amendment Act, the judgment of the District Court is a nullity. I also vacate the orders made in this court. As such I hold that the judgment of the District Court is a nullity and send the case back to the District Court to enable the parties concerned to take steps as required by Section 81 of the Act. Since the parties to the suit had gone a long way the learned District Judge would decide the best course of action to be adopted after substitution of parties, and decide this case according to law.

Registrar of this court is directed to forward this order to the Registrar of the respective District Court, along with the original case record.

JUDGE OF THE COURT OF APPEAL