IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No.09A/2010
S.C. (HC) CA LA No. 309/2009
SP/HCCA/KAG/283/2007(F)
D.C. Kegalle No.24119/P

Gamarallage Karunawathie
of Mahena, Warakapola.

20th Defendant-Appellant-Petitioner-Appellant

Vs.

1a. Godayalage Piyasena
of Boyagama, Ambanpitiya.

Substituted-Plaintiff-Respondent-Respondent-Respondent

(Deceased) 1. Gamarallage Pinchiappuhamy
1a. Gamarallage Podiappuhamy
2. M.A. Jinaratne Banda
3. M.A. Podi Nilame
4. M.A. Gunaratne
(Deceased) 5. M.A. Jayathilake
5a. M.A. Sarath Manchanayake
6. M.A. Wijesinghe

(Deceased) 7. M.A. Seneviratne

7a. M.A. Wijesinghe

8. M.A. Nissanka

9. M.A. Chandrasiri Jayantha

10. M.A. Wasantha Jayasiri

11. M.A. Hemalatha

12. M.A. Sarath Manchanayake

13. M.A. Indrani Manchanayake

14. M.A. Latha Manchanayake

(Deceased) 15. M.A. Narangoda Lekamlage
Kiri Mudiyanse

(Deceased) 16. M.A. Appuhamy

(Deceased) 16a. M.A. Kiri Mudiyanse

17. Hewa Arachchillage Podihamy

18. Gamaraliage Podi Appuhamy
all of Boyagama, Ambanpitiya.

19. M.A. Podi Appuhamy
of Boyagama, Galigamuwa New Town.

21. Samel Welikanda

22. P.R. Gunarath Menike,
both of Boyagama, Galigamuwa New Town.

Defendants-Respondents-Respondents-Respondents

BEFORE	:	Dr. Shirani A. Bandaranayake, CJ. K. Sripavan, J. & S.I. Imam, J.
COUNSEL	:	Buddhika Gamage for Appellant.
		D. Jayasinghe for Substituted Plaintiff-Respondent.
		Srinath Perera for 1A, 17th and 18th Respondents.
		Rohan Sahabandu for 6th Respondent.
ARGUED ON	:	07.07.2011.
DECIDED ON	:	05.12.2011.

Dr. Shirani A. Bandaranayake, CJ

This is an application filed by the 20th defendant-appellant-petitioner-appellant (hereinafter referred to as the appellant) against the Judgment of the High Court of the Sabaragamuwa Province holden at Kegalle (hereinafter referred to as the High Court) dated 13.10.2009.

By that judgment the High Court had rejected the appeal of the appellant. The appellant came before this Court seeking leave to appeal against the said judgment, for which this Court had granted leave to appeal on 05.02.2010.

The parties thereafter had moved for time to consider a settlement; this appeal was not fixed for hearing, but was mentioned on two (02) occasions. On 09.06.2010 when this matter was considered in open Court, the 6th defendant-respondent-respondent-respondent (hereinafter referred to as the 6th respondent) had informed Court that 16a defendant-respondent is deceased and therefore the appellant had moved for time to take steps for substitution. At the same time this court had noted that the 2nd defendant-respondent-respondent-respondent (hereinafter referred to as the 2nd respondent) and the 15th defendant-respondent-respondent-respondent (hereinafter referred to as the 15th respondent) are dead and there had been no substitution in their place.

When this matter came up on 07.07.2011, all learned Counsel agreed that, in the first instance it would be necessary to consider substitution as the 15th respondent had died on 30.05.2004 and necessary steps were not taken in the District Court and the 2nd respondent had died on 06.09.2007 and no steps were taken in the High Court.

All learned Counsel agreed that the said 15th respondent, namely, Narangoda Lakamalage Kiri Mudiyanse had died on 30.05.2004, whilst the case was pending before the District Court and that necessary steps for substitution were not taken at that time. It was also submitted that the appellant had made an application under Section 48(4) A (v) of the Partition Law, which was taken for inquiry on 23.07.2000 and the Final Order had been made on 20.05.2005(A).

When the case was pending before the High Court of Sabaragamuwa Province, the 2nd respondent, namely, Manchanayaka Arachchilage Jinaratna Banda had died on 06.09.2007. It was submitted that no steps were taken to substitute in place of the said deceased 2nd respondent before the High Court of the Sabaragamuwa Province. The Judgment of the High Court had been delivered on 13.10.2009 (D). It is to be noted that the 15th respondent, who had died on 30.05.2004, whilst this matter was pending before the District Court was the 16A respondent as well. Learned Counsel for the appellant submitted that in order to dispose of this appeal, it has become necessary to effect substitution in the room of the deceased 2nd and 15th respondents.

After hearing all learned Counsel on the limited question as to how the substitution could be effected, the order on the said limited issue, was reserved.

It is not disputed that the 15th respondent, namely, Narangoda Lekamalage Kiri Mudiyanse, who was the substituted 16A respondent for the deceased 16th respondent in the District Court had died on 30.05.2004. It is also not disputed that the Final Order of the District Court was delivered only on 20.05.2005. It is therefore cannot be disputed that at the time the Final Order was delivered in the District Court, the 15th respondent who was appearing not only for himself, but also for the deceased 16th respondent as the 16a respondent, had been dead. As stated earlier, the 2nd respondent, namely, Manchanayaka Arachchilage Jinaratna Banda, had died on 06.09.2007, prior to the delivery of the Judgment of the High Court on 13.10.2009.

In such circumstances, since leave to appeal had been granted by this court and the appeal has been fixed for argument, the question arises as to whether substitution in the room of the deceased respondents could take place before the Supreme Court.

In deciding this question, our attention was drawn to Section 760 A of the Civil Procedure Code (as amended), in support of the fact that the substitution in the room of the deceased respondent could be made in the Supreme Court.

The said Section 760 A of the Civil Procedure Code (as amended) is contained in Chapter LVIII, which deals with Appeals and Revisions and the said section refers to death or change of status of party to appeal and is as follows:

> "Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Supreme Court under Article 136 of the Constitution determine, who, in the opinion of the Court is the proper person to be substituted or entered on the record in place of or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid."

The said Section 760 A of the Civil Procedure Code (as amended), clearly shows that the applicability of the said section is for matters where the record has become defective by reason of the death or change of status of a party to the appeal after the lodging of an appeal. Moreover Article 136 of the Constitution had clearly referred to the Rules of the Supreme Court stating that such Rules would give guidance to the manner in which the said application for substitution should be made. Rule 38 of the Supreme

Court Rules, 1990 accordingly, deals with applications when the Record had become defective by reason of the death or change of status of a party to the proceedings.

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 Judgement 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 representatives 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.

The Supreme Court of India had decided that the subject matter for which the compensation had been awarded was one and the same land and the assessment of compensation as L was concerned having become final, there could not be different assessments for compensation for the same block of land and therefore the appeal against N also cannot proceed.

It is however to be noted that in **Nathu Ram**'s case (Supra), the question that had to be decided by the Supreme Court was as to whether the appeal had abated against N as well.

Reference was made to the decision in **State of Punjab v Nathu Ram** (Supra) in **Swaran Singh Puran Singh and another v Ramditta Badhwa** (dead) **and others** ((AIR 1969 Punjab & Haryana 216). In **Swaran Singh** (Supra), the decision in **Nathu Ram** (Supra) was clearly analyzed and the Court had laid down the following proposition on the basis of the decision given in **Nathu Ram** (Supra):

> "1. On the death of a respondent, an appeal abates only against the deceased, but not against the other surviving respondents;
>
> 2. in certain circumstances an appeal on its abatement against the deceased respondent cannot proceed even against the surviving respondents and in those cases the Appellate Court is bound to refuse to proceed further with the appeal and must, therefore dismiss it;
>
> 3. the question whether a Court can deal with such matters or not will depend on the facts and circumstances of each case and no exhaustive statement can be made about those circumstances;
>
> 4. the abatement of an appeal means not only that the decree between the appellant and the deceased respondent has become final, but also

as a necessary corollary that the Appellate Court cannot in any way modify that decree directly or indirectly."

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, Tewatia, J had said that.

> "In our opinion, the uninform 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 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.

Accordingly it is evident that both those judgments are ineffective and therefore each judgment would be rejected as a nullity. For the said reason the judgment of the High Court dated 13.10.2009 and the judgment of the District Court of Kegalle dated 20.05.2005 are both set aside.

This case is sent back to the District Court of Kegalle for the appellant to take steps according to law, for substitution. The District court is directed to hear the matter expeditiously. Subject to the above, the appeal is dismissed.

I make no order as to costs.

Chief Justice

K. Sripavan, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court