

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

SC Appeal 172/16

SC (SPL) LA 113/2016

CA Case No. 541/2000(F)

DC Kandy Case No.14564/P

In the matter of an Application to substitute made under and in terms of Section 404 of the Civil Procedure Code read with Section 79 of the Partition Law No.21 of 1977

Kalukapuge Thomas Perera,
612, Desingghhe Mawatha,
Thalangama South,
Battaramulla

Plaintiff

Vs.

1. Kalukapuge Engalthina,
2. Kalukapuge Simiyan,
Both of No.612,
Desingghhe Mawatha,
Thalangama South,
Battaramulla
- 3.Lanka Lands Company Ltd
No.347, Union Place,
Colombo 02

Defendents

AND BETWEEN

Lanka Lands Company Ltd

No.347, Union Place,

Colombo 02

3rd Defendant Appellant

Vs.

Kalukapuge Thomas Perera,

612, Desinghe Mawatha,

Thalangama South,

Battaramulla

Plaintiff-Respondent (Deceased)

Kalukapuge Karthelis Perera

622/A, Desinghe Mawatha,

Thalangama South,

Battaramulla

Substituted Plaintiff -Respondent

1. Kalukapuge Engalthina,

2. Kalukapuge Simiyan,

Both of No.612,

Desinghe Mawatha,

Thalangama South,

Battaramulla

1st and 2nd Defendant-Respondents

AND BETWEEN

Communication and Business Equipment
(Pvt) Ltd,
(Now known as Apogee International(Pvt)
Ltd)
No.99/6 Rosmead Place,
Colombo 07

Petitioner

Vs.

Lanka Lands Company Ltd,
(Now not a legal person)
No.347, Union Place,
Colombo 02

3rd Defendant- Appellant
- Respondent

Kalukapuge Thomas Perera,
No.612, Desinghe Mawatha,
Thalangama South

Plaintiff- Respondent-Respondent
(Deceased)

Kalukapuge Karthelis Perera
No.622/A, Desinghe Mawatha,
Thalangama South

Substituted Plaintiff-Respondent
-Respondent

1. Kalukapuge Engalthina,

2. Kalukapuge Simiyan,

Both of No.612,

Desinghe Mawatha,

Thalangama South,

1st and 2nd Defendant-Respondent

- Respondents

AND NOW BETWEEN

Communication and Business Equipment

(Pvt) Ltd,

(Now known as Apogee International(Pvt)

Ltd)

No.99/6 Rosmead Place,

Colombo 07

Petitioner-Petitioner

Vs.

Lands Company Ltd,

(Now not a legal person)

No.347, Union Place,

Colombo 02

3rd Defendant- Appellant-Respondent

-Respondent-Respondent

Kalukapuge Thomas Perera

No.612, Desinghe Mawatha,

Thalangama South

Plaintiff- Respondent-Respondent

-Respondent (Deceased)

Kalukapuge Karthelis Perera
No.622/A, Desinghe Mawatha,
Thalangama South

Substituted Plaintiff-Respondent

-Respondent-Respondent

1. Kalukapuge Engalthina,
 2. Kalukapuge Simiyan,
- Both of No.612,
Desinghe Mawatha,
Thalangama South,

1st and 2nd Defendant-Respondent

- Respondent-Respondents

Before: L.T.B Dehideniya J.

S. Thurairaja PC, J.

Achala Wengappuli J.

Counsels: Nihal Jayamanna PC with Ms. Noorani Amarasinghe for Appellant- Appellant

Dr. Jayatissa de Costa PC with Mr. Chanuka Ekanayake for substituted Plaintiff-
Respondent-Respondent - Respondent

Argued on: 12.11.2021

Decided on:17.12.2021

L.T.B. Dehideniya, J.

The original Plaintiff instituted the partition action bearing No. 14564/P in the District Court of Colombo against the Defendants to Partition the land more fully described in the 2nd schedule to the plaint in terms of the Partition Act No.21 of 1997. Subsequently, the 3rd Defendant- Appellant- Respondent-Respondent-Respondent, Lanka Lands (Pvt) Ltd intervened in the partition action and filled its statement of claim seeking the dismissal of the plaint. After the trial, the learned District Court Judge delivered the judgement dated 04.07.2000 allowing the partition of the land in the manner set out in the judgement. Being aggrieved by the said judgement, 3rd Defendant- Appellant-Respondent-Respondent-Respondent company, appealed to the Court of Appeal. Meanwhile, Assistant Company Registrar informed the substituted Plaintiff-Respondent-Respondent-Respondent (hereinafter sometime referred to as Respondent) by letter dated 29.07.2010 that the name of the 3rd Defendant- Appellant Company had been struck off from the company register on account of the fact that, the company had not been re-registered under the new Companies Act No. 07 of 2007.

When the above appeal was taken up for hearing on 15th July 2011, the Respondent raised a preliminary objection that, since the Lanka Lands (Pvt) Ltd has ceased to exist, the appeal cannot be maintained. With regard to the preliminary objections of the Appellant company, Petitioner-Appellant (hereinafter sometime referred to as the Appellant),Communication and Business Equipment (Pvt) Ltd (Now known as Apogee International (Pvt) Ltd) filed an Application in terms of Section 404 of the Civil Procedure Code to have itself substituted in the room of the 3rd Defendant- Appellant-Respondent-Respondent-Respondent, which was struck off from the company register and therefore ceased to exist, on the ground that 3rd Defendant- Appellant- Respondent-Respondent-Respondent transferred all its rights related to the subject matter to

Communication and Business Equipment (Pvt) Ltd by deed of transfer No. 907 dated 19.08.1994. Considering the submissions of both parties, Court of Appeal delivered the judgement dated 25.05.2016 in favour of the Respondent, refusing the application of the Appellant to be substituted in the room of the 3rd Defendant- Appellant-Respondent-Respondent-Respondent. The Learned Appeal Court judge further held that, since the substitution was sought eighteen years after the transfer deed was registered, the Appellant had been sleeping over its own rights. It is from the aforesaid judgement that this appeal is preferred.

This Court granted leave to appeal on the following question of law;

- 1) Is there a delay and/or lack of *uberrima fides* on the part of the Appellant in making the application for substitution under section 404 of the Civil Procedure Code?
- 2) Did the Court of Appeal fail to appreciate that the Petitioner was in law entitled to invoke the provisions of Section 404 of the Civil Procedure Code any time before the final decree?

The Appellant's application is based on the ground that the Appellant company has a legal right to sought the substitution in the room of the Lanka Lands (Pvt) Ltd, under the Section 404 of the Civil procedure Code, in order to prosecute the appeal. The Appeal Court had expressed the opinion of the court on the key issues raised in the application. Firstly, the Learned Appeal Court Judge examined whether the Appellant is entitled to seek substitution in the room of a company which was ceased to exist, under Section 404 of the Civil Procedure Code. The Appeal Court held that, since the transfer of interests by deed No.907 had taken place in 1994, whereas substitution was sought in 2012, the Appellant had delayed the substitution for eighteen years. The Appeal Court further emphasized that the Appellant has failed to assert his rights in a timely manner has resulted in the claim being barred by laches.

As per the submissions tendered by the Appellant, in the eyes of the law, it is essential for a Court in a partition action to determine the rights of parties. The rights of the parties must be determined as at the date of the filing of the action and/or the filing of the statements of claim. Appellant further contends that the Court cannot simply shut one party out without hearing, especially the Appellant in this application. With a view to the aforesaid context, it is incumbent upon this Court to determine whether the Appellant is entitled to invoke Section 404 of the Civil Procedure Code.

When considering the case law jurisprudence, similar legal issues, elements and legal provisions to the present application has been discussed and accepted in a range of Indian case law. The legal principles outlined in the said decisions and the opinion of the court can be adopted as directives for the present application.

Bank Kreiss AG v. Mr. Ashok K. Chauhan [decision dated 23 October 2007 -High Court of Delhi in CS (OS) No. 675 of 1999] at para 4 per Badar Durrez Ahmed, J.,

“Three interesting questions arise for consideration in these applications. They are:

(1) Whether a merging company, upon merger with another company and thereby ceasing to exist as an independent entity, could be construed as having "died" upon such merger in the context of Order 22 of the Code of Civil Procedure, 1908?..

..The difficulty that arises in the present case is because the plaintiff was a corporate entity or in other words, a juristic person and not a natural person. There is no difficulty with the term "death" when applies to a natural person. But, what is meant by death in the context of a company needs to be examined.

According to the learned Counsel for the defendants, the moment a company ceases to exist by virtue of dissolution consequent upon winding up or by virtue of having merged into another entity, it would mean that the company died. Several decisions were cited on both sides on this and other aspects of the matter. Before I examine those decisions, it would be necessary to note that Order 22 Rule 3 CPC has no reference to the word "person" or "persons". The reference is only to the plaintiff/ plaintiffs. However, a reading of Order 1 Rule 1 CPC would make it clear that a plaintiff has to be a person. Therefore, it is safe to assume that the expressions plaintiff or plaintiffs refers to person or persons who institute the suit. Section 3(42) of the General Clauses Act, 1897 provides that in the said Act, and in all central acts and regulations made after the commencement of the said Act, unless there is anything repugnant in the subject or context, inter alia, "person" shall include any company or association or body of individuals, whether incorporated or not. Thus, a company would also be regarded as a person unless such meaning is repugnant to the context of the statute."

at para 7

"..In the cases of assignment, creation or devolution of interest during the pendency of a suit referred to in Rule 10 of Order 22 CPC, the original party, that is, the assigner or the one who creates or from whom the interest devolves continues to exist (to be alive) even after such assignment, creation or devolution of interest. This is clear from the observation that if the person on whom the interest has been assigned or devolved upon, has the option of continuing the

suit with the leave of the Court or of letting the original plaintiff continue the same.”

When adapting the existing law in Sri Lanka to the aforesaid legal interpretation, it becomes apparent that, in a case where assignment, creation and devolution of interests during pendency of a suit, cannot be brought to an end merely because the interests of a party in the subject matter of suit has devolved upon another during its pendency. Therefore, the Appellant has a fair right to invoke Section 404 of the Civil Procedure Code in order to seek substitution in the room of the Lanka Lands (Pvt) Ltd. When reading Section 404 of the Civil Procedure Code together with Section 760 (A) it appears that, Court of Appeal has the authority, provided by the Supreme Court Rules, to determine who is a ‘proper person’ to be substituted in place of, or in addition to the party who has died or undergone a change of status after lodging an appeal in any civil action, and the name of such a party shall thereupon be allowed to be substituted.

Section 404

“In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the court, given either with the consent of all parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for the person from whom it has passed, as the case may require.”

Section 760(A)

“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 Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, 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 has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.”

According to the submissions, Appellant contends that ‘proper person’, would be by reference to the Rules made under Article 136, no such Rules have been in fact made in regard to substitution in a pending case in appeal. The Appellant refers to **Careem Vs. Sivasubramaniam and Another** [2003] 2 Sri L.R 197 where Udalgama J. held that the proper person need not to be a heir, executor or administrator but would include a person who had gifted with premises by the deceased on a deed of gift. It is also not disputed that such determination as to who the ‘proper person’ to be substituted in the place of a deceased party would be based on the opinion of the Court on a finding of fact.

A similar view was expressed in the case of **K.R Sumanawathie Vs. S. Seelawathie** (SC Appeal No.199/2014, decided on 22nd June 2017) at p.7 per Prasanna Jayawardena J.,

“Section 760A provides that, where at any time during the pendency of an appeal, one of the parties to the appeal dies or undergoes a change of his legal status, the Court before which the appeal is pending may determine, in the manner provided in the Supreme Court Rules, “... 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.” In terms

of Rule 38 of the Supreme Court Rules, that determination has to be made upon “sufficient material” submitted to the Court which establishes that the person who seeks to be substituted is the “proper person” to be substituted in the place of the deceased party to the appeal before that Court...Thus, the High Court, before which the appeal was pending, had the discretion to substitute, in place of the deceased plaintiff, such person whom the High Court, after examining the material submitted to it, deemed ‘is the proper person to be substituted’”

The Appellant further contends that, when applying Section 404 of the Civil Procedure Code, it does not provide that when a party has failed to obtain leave of the Court to continue the action, should dismissed. This view was accepted in the case of ***Brunswick Exports Ltd Vs. Hatton National Bank Ltd*** (CA/Application No. 581/93, Decided on 5th May 1994- Bar Association Law Journal [1994] Vol 5 Part 2 at p.1). Ranaraja J. held that, Section 404 of the Civil Procedure Code makes provision for a person acquiring an interest in an action to continue with it having obtained leave of court. It does not provide that, if he does not obtain the leave of court to continue the action, the action should stand dismissed and the Plaintiff is still entitle to continue the suit and his successor will be bound by the result of the litigation even though he is not represented at the hearing. Further, in ***Kusumawathie Vs. Kanthi*** [2004] 1 Sri L.R 350, Somawansa J. held that, though in the original Court the person entitled to be substituted is the next of kin who has derived the inheritance, there is no such requirement in the case of an appeal. In the circumstances, the Court can consider the Appellant to be a fit and proper person to be substituted in the room of the deceased party.

In accordance with the above discussed legal materials, it is clear to this court that, Lanka Lands (Pvt) Ltd is no longer a legally existing entity and that there is no legal impediment to the Appellant to seek substitution in the room of Lanka Lands (Pvt) Ltd as a party who has died or undergone a change of status. Therefore, it is evident that the Appellant is entitled to invoke Section 404 of the Civil procedure Code, in order to prosecute the appeal from the District Court Judgement dated 04.07.2000.

The Learned Counsel for the Respondent repeatedly raised the question that, whether there is a delay and/or lack of *uberrima fides* on the part of the Appellant in making the Application for the substitution under Section 404 of the Civil Procedure Code. It was submitted that; the Appellant is guilty of lack of *uberrima fides* and as per the doctrine of laches, the Appellant exhibits an unreasonable delay in seeking substitution. The Respondent contends that Lanka Lands (Pvt) Ltd was struck off from the company register in 2010, and the preliminary objections of maintainability of the Appeal was taken up in 2011. The application for substitution was made in 2012, one year after the date of objections and two years after the Lanka Lands (Pvt) Ltd was struck off. The transfer of interest by deed of transfer No. 907 had taken place in 1994 where as substitution was sought in 2012, eighteen years after the transfer. Therefore, it is necessary to examine whether there was indeed a delay on the part of the Appellant in making the application for substitution and whether the appellant had violated the principle of *uberrima fides*.

The legal maxim *uberrima fides* refer to utmost good faith. Underlying principal that governs this maxim is that all human acts should be backed by good faith. Talking about contracture *uberrima fides*, phrase means that all kinds of contracts (commercial transactions) must be free from any kind of concealment, misrepresentation and fraud. The maxim majorly governs the insurance contracts. It is noteworthy to mention that, the legal maxim of *uberrima fides* cannot be applied in

an event where the Section 404 of the Civil procedure Code comes into play. Accordingly, legal maxim of *uberrima fides* cannot set in motion in the present application.

By carefully considering the aforesaid legal provisions and case law jurisprudence pertaining to the legal issue in question, can it be decided whether there is a delay on the part of the Appellant in making the application for substitution under Section 404 of the Civil Procedure Code? In the eyes of law, considering the legal effect of a transfer of a property while the partition action is pending before the court, whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party. The transferor is a party and his rights will be determined in the present action, the transferee of the yet undermined rights is not a necessary party. It cannot be accepted that the transferee has prima facie right to the property and that he is therefore entitled to be added as a party in terms of s.69 (1) b of the Partition Law. This legal interpretation is laid down in the case of ***Sirinatha Vs. Sirisena and others*** [1998] 3 Sri L.R 19.

Sirinatha Vs. Sirisena and others [1998] 3 Sri L.R 19 at p.24 per Ismail J.,

“Considering the legal effect of a transfer of whatever rights that will be allotted to the transferor by a final decree in a partition action, the transferee cannot justifiably claim to be added as a necessary party. The transferor is a party and his rights will be determined in the present action. The transferee of the yet undetermined rights is not a necessary party to the action. I do not accept the submission of counsel that the 3rd defendant-respondent Jayasiri has a prima facie interest in the land and that he is therefore entitled to be added as a party in terms of section 69 (1)(b) of the Partition Law as one claiming an ‘interest in the land’.

Admittedly Jayasiri claims to have a contingent interest in the land upon deed No. 406 dated 19.10.93. But there is no basis for the interpretation that the phrase 'interest in the land' in section 69 (1)(d) includes also his contingent interest. As the 3rd defendant-respondent has no present interest in the land and as no opinion could justifiably be formed by court that he should be made a party, the order permitting him to be added as a party to the action cannot stand."

In the present application, the original partition action was instituted on 02.10.1986. As per the submissions, Lanka Lands (Pvt) Ltd had transferred all its rights in the subject matter to the Appellant by the deed of transfer No.907 dated 09.08.1994. The Learned Judge of the District Court of Colombo Delivered the Judgement dated 04.07.2000 in favor of the Respondent and subsequently, Lanka Lands (Pvt) Ltd filed notice of Appeal on 04.07.2000. When considering all the above time lines and the legal context discussed above it appears that, since the transfer of the property took place after the institution of the partition action in 1986, there was no legal necessity for the Appellant to seek substitution in the room of the Lanka Lands (Pvt) Ltd. Further, seeing that, being aggrieved by the decree of the District Court, Lanka Lands (Pvt) Ltd has filed notice of Appeal, it is clear to this court that there was no compulsion in seeking substitution until the notice of the company registrar informing that the Lanka Lands (Pvt) Ltd had been struck off from the company register in 2010. Accordingly, it cannot be concluded that there was eighteen years delay from 1994 to the application of the substitution in 2012. And in fact, under the above legal context, the Appellant is not entitled to make such an Application, as long as Lanka Lands (Pvt) Ltd exists as a legal entity. Therefore, the Learned Judge of the Court of Appeal had erred in concluding evidence by deciding that there was a delay on the part of the Appellant in making the application for substitution and the Appellant has been sleeping on its rights.

The Appellant's position is that, deed of transfer No. 907 dated 19.08.1994 has not been executed for individual shares and it conveys divided and defined extend of the land. Accordingly, the said deed is for a divided and defined land what includes the entire corpus and not a deed which deals with or convey undivided shares and therefore not an infringement of Section 66 of the Partition Law. The Appellant further states that, the Appellant is the single owner of the land in suit and no *lis pendens* was registered under the folios of the Appellant's property. Appellant further states that its rights to the land in question is derived from a different pedigree, and the Appellant is of the persuasion that the single owner of the land in suit is the Appellant company.

Section 66 (1) of the Partition Law

“(1) After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the enter of a decree of partition under section 36 or by the entry of a certificate of sale.”

The learned counsel for the respondent submits that, once the *lis pendens* is duly registered under Section 66(1) of the Partition Law, no alienation can be registered and a divided undefined land cannot be a part of the subject matter of the action. However, when carefully observing the original partition action, 3rd Defendant (Lanka Lands (Pvt) Ltd) intervened in the partition action with the purpose of seeking the dismissal of the plaint. Further, the Appellant as well as its predecessor, Lanka Lands (Pvt) Ltd has not claimed that it too should be allocated a portion of the land by the final decree of the partition action. 3rd Defendant's (Lanka Lands (Pvt) Ltd) stand was that, 3rd

Defendant was the single owner of the subject matter and no *lis pendens* was registered under the folios of the Appellant's property. Accordingly, Lanka Lands (Pvt) Ltd had transferred all the rights and interests related to the subject matter to the Appellant company by the deed of transfer No.907 dated 09.08.1994, believing that he is the sole owner of the land. Therefore, the Learned Counsel for the Respondent's submission on the Section 66 of the Partition Law is questionable.

I answer the questions of law as follows,

- 1) No
- 2) Yes

By considering above circumstances, I set aside the order of the Court of Appeal and allow the Appellant to be substituted in the room of the 3rd Defendant-Appellant-Respondent-Respondent-Respondent.

Judge of the Supreme Court

S. Thurairaja PC, J.

I agree

Judge of the Supreme Court

Achala Wengappuli J.

I agree

Judge of the Supreme Court

