

1971 Present : H. N. G. Fernando, C.J., and Thamotheram, J.

U. SURAWEERA *et al.*, Appellants, and A. K. JAYASENA, Respondent

S. C. 60/69 (Inty.)—D. C. Galle, 1810/P

*Partition action—Death of a defendant pending action—Interlocutory decree entered before substitution of heirs—Power of Supreme Court to grant relief in revision.*

Where interlocutory decree is entered in a partition action after the death of a contesting defendant and before substitution of his heirs, the Supreme Court may grant relief in revision at the instance of one of the heirs of the deceased defendant.

**A**PPEAL from an order of the District Court, Galle.

G. D. C. Weerasinghe, with Peter Jayasekera and Mervyn Kularatne, for the 52nd, 53rd and 54th defendants-appellants.

A. Mampitiya, for the plaintiff-respondent.

June 25, 1971. H. N. G. FERNANDO, C.J.—

The 52nd defendant in this partition action had filed a statement of claim together with the 53rd and 54th defendants, setting up what appears to be a substantive defence in the action. He was absent on the trial date, 2nd November 1966. Towards the end of the same month, the present petitioner, who is one of the heirs of the 52nd defendant, made an application to set aside the interlocutory decree on the ground that the 52nd defendant had died on 26th September 1966. We must agree with the trial Judge that he had no jurisdiction to set aside the decree on this ground, but there have been instances of the exercise of powers of revision of this Court in a situation such as this.

In the case reported in 68 N. L. R. 36, the majority of a Bench of five Judges held that a partition decree which allots a share to a party who is dead at the time is a nullity. It seems to us that a partition decree which denies rights to a party who happened to have died before the date of the decree would also be a nullity. In the instant case, however, we do not think it necessary to decide that the decree was a nullity. In the exercise of revisionary powers, it is open to this Court to afford relief to a person in the position of the present petitioner, because rights which could have accrued to him on the death of his father were the subject of adjudication in proceedings in which he should have been substituted as a party.

The interlocutory decree is therefore set aside and the record is sent back to the District Court for a fresh trial to be held after due notice. The heirs of the deceased 52nd defendant will of course have to be noticed and may be made parties on their application; but apart from the statements of claim from heirs of the 52nd defendant, the District Judge will not entertain any fresh statements of claim.

THAMOTHERAM, J.—I agree.

*Case sent back for further proceedings.*

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