**1950** *Present:* **Nagalingam J. and Pulle J**

NALLAKARUPPEN CHETTIAR *et al.*, Appellants, *and* HEPPONSTALL, Respondent

*S. C. 96 (Inty.)—D. C. Colombo, 3,455*

*Partition action—Death of plaintiff—Termination of plaintiff's interest in the land with his death—Right of a defendant to be made party plaintiff—Abatement—Procedure governing partition action—Civil Procedure Code, ss. 18, 396, 839.*

In a partition action, if the plaintiff dies while the action is pending and his interest (e.g., fiduciary interest) in the land sought to be partitioned terminates with his death, one of the defendants cannot be made a party plaintiff for the purpose of continuing the action, when such defendant does not claim any interest under or in succession to the deceased plaintiff. Neither section 18 nor section 396 of the Civil Procedure Code permits such procedure. The proper order to be made in the circumstances would be one of abatement.

The Civil Procedure Code governs procedure to be followed in partition actions and it is not competent to a Court to devise procedure of its own unless such a course becomes necessary and permissible under section 839.

[1] *Pt. 1 Bk. III, Chapter I, p. 156 (1921 ed.)*

APPEAL from an order of the District Court, Colombo.

*C. Thiagalingam*, K.C., with *V. Arulambalam*, for the 8th and 9th defendants appellants.

*H. V. Perera*, K.C., with *C. R. Gunaratne*, for the 7th defendant respondent.

*Cur adv. vult.*

November 15, 1950. NAGALINGAM J.—

This appeal is preferred by the 8th and 9th defendants from an order made by the learned Additional District Judge of Colombo granting the application of the 7th defendant respondent to be made a party plaintiff in order to continue the action in place of the deceased plaintiff.

The plaintiff who instituted the action, it is common ground, had only a fiduciary interest in the land sought to be partitioned and which terminated with his death. The action was instituted on June 29, 1944, the defendants at that stage being the 1st to 6th defendants. On his intervention the 7th defendant-respondent appears to have been made a party defendant on November 21, 1945. Thereafter the present appellants, the 8th and 9th defendants, have also been brought on the record as parties defendant.

The trial of the case commenced on August 2, 1949, and after being partly heard was adjourned for further hearing to November 17, 1949, when it was brought to the notice of the Court that the plaintiff had died in the meantime. The Court then put the case off for December 7, for steps to be taken, on which date the 10th and 11th defendants, the children of the deceased plaintiff, appearing by Proctor, stated that they did not wish to proceed with the case. Thereupon the Court again put off the case for February 1, 1950, for steps to be taken, and on this date the 7th defendant-respondent filed papers to have himself made a party plaintiff in order to proceed with the action. It must be noted that the 7th defendant does not claim any interest under or in succession to the deceased plaintiff. Of the defendants to the action, the present appellants alone took objection to the application of the 7th defendant-respondent, and after investigation the learned Judge made order adding the 7th defendant as a party plaintiff for the purpose of " proceeding with this action in order to a final determination ".

Two sections of the Civil Procedure Code have been referred to by the learned Judge as enabling him to make the order which he did. Section 18 is stated by him to be wide enough to cover such a case as the present one. In the first place, this section is one of a group of sections that deals with questions, stated very broadly, as to who may be parties to an action, and not with questions that may arise on the death of a party to the suit. In the second place section 18 in particular does not deal with the question of substitution in place of a deceased plaintiff but is confined to questions of striking out, adding or transposing parties.

An order of transposition under section 18 would ordinarily be made where in the case of several plaintiffs one of the plaintiffs declines at any particular stage to continue with the action or to be associated with the

other plaintiffs, when he may be made a party defendant or, in the case of defendants, where a party defendant has been erroneously made such or otherwise it becomes necessary to add him as a party plaintiff. I do not, however, think that a sole plaintiff can be made a party defendant because the resultant position would be that there would be no party who could be said to make an application to Court for any relief; nor conversely can a sole defendant be made also a party plaintiff. I need only observe that these remarks apply to a regular action as distinct from special applications to Court that are permitted by law. It is essential, therefore, to constitute a regular action, that there should be always on the record a party plaintiff or party defendant. It is, however, possible in an extreme case where a sole plaintiff has to be made a defendant to bring either simultaneously or by means of an anterior order a new party as plaintiff, or even make a party defendant a party plaintiff. The Indian case referred to by the learned Judge is one which deals with the transposition of parties without death supervening and altering the status of parties.

There are other provisions of the Code which deal with situations that may arise on the death of a party. It is to one of these sections that the learned Judge refers as " the other section ", upon which the order made by him could be based. The section referred to by him is section 396. This section, however, is confined to a case where the right to sue survives, as will be apparent by reference to the commencing words of the section, " if no such application "; " such application " there referring to the application that may be made in the case of the death of a sole plaintiff or sole surviving plaintiff by the legal representative to have his name entered on the record where *the right to sue survives*. In fact sections 392 to 398 deal with the continuation of actions after alteration of a party's status, where the right to sue survives and not where the right is extinguished by the death of a sole surviving plaintiff.

Neither of the sections referred to by the learned Judge can be called in aid to support this order. In fact, learned Counsel who appeared for the 7th defendant-respondent did not seek to sustain the order on the basis of these sections. Learned Counsel, however, even went further by contending that the Civil Procedure Code did not govern partition actions. This contention is advanced because if the Civil Procedure Code did apply then it would be apparent that the Code does not enable a party to be brought on record as party plaintiff in place of a deceased sole plaintiff whose right to sue ceased on his death.

I do not think this contention is sound. At the date the Civil Procedure Code was passed, there were rules of procedure governing the conduct of business in the Courts. Those rules were repealed by section 2 of the Code, and the new procedure laid down in the Code came into operation and governed the procedure to be followed in regard to actions instituted subsequent to the date of its enactment. It will be noticed that the Civil Procedure Code is a later enactment than the Partition Ordinance, and no exclusion has been made with regard to proceedings in partition cases. Besides, the provisions of the Code have since the date the Civil Procedure Code became law been uniformly applied to partition actions.

Jayawardene in his work on the Law of Partition [1] lays down the proposition thus, that "a partition sought under the Ordinance is an action under the Civil Procedure Code and the Courts Ordinance", and refers to a number of sections of the Code which should be worked together with the Partition Ordinance, and in particular refers to sections 18 and 396 as two of the sections that do apply to partition actions.

I therefore hold that the Civil Procedure Code governs procedure to be followed in partition actions, and the Code being an exhaustive enactment, it is not competent to a Court to devise procedure unless such a course becomes necessary and becomes permissible under section 839.

I next proceed to consider another argument that was advanced based on the rulings of this Court that in a partition action a party defendant is practically a plaintiff in respect of the interest he claims, and that therefore there can be no objection to permitting the party defendant to continue the action. Counsel for the respondent, however, was not prepared to go to the length of saying that without making the 7th defendant a party plaintiff an order could or should be made permitting him to continue the action. For, if such a course was adopted, the position already adverted to, namely, that there would be a regular action pending without the existence of a party seeking relief would result. It was, however, said that by making the 7th defendant a party plaintiff the Court would thereby be enabled to look to one of the parties as the person who would be responsible for the conduct of the proceedings. But I think the consequences would be much larger and cannot be limited in this way.

If the 7th defendant be made a party plaintiff, the plaint must in terms of section 21 of the Code be amended. Any amendment made in these circumstances would be to substitute for the original plaint an entirely different plaint setting out an entirely different devolution of title and claiming an entirely different relief from that claim by the original plaintiff, and in fact an entirely different cause of action, to use this phrase in a very wide sense. In fact, it would be to allow the filing of a fresh plaint having nothing in common with the old plaint.

In the next place, there would be repercussions on the rights of parties themselves in regard to the application of principles of the law of prescription. Where, for instance, Plaintiff A institutes a partition action against the other co-owners B and C. the date up to which the defendants could set up title by prescription would be the date of the filing of the plaint, though *inter se* as between B and C other considerations may have applied. If there was a contest between the two defendants B and C as regards the prescriptive right of one of them, even such a right would have to be determined as at the date of the filing of the plaint. The effect of making B a party plaintiff would be to enable him to get the benefit of the date of the plaint as the date up to which the prescriptive rights of parties have to be determined, while if B had to bring a fresh action, the effective date would be the date of the filing of the new plaint by him.

I do not, therefore, think that the order of the learned Judge can be upheld.

[1] *2nd ed. at p. 17.*

There is another question that arises as to what is the proper order to be made in the circumstances. It would be correct to say that once the plaintiff is dead and no other party is brought on record in his place, no valid order can be made either of dismissal or of abatement. This, no doubt, creates a difficulty in clearing the rolls of the Court of dead actions. It should, however, be possible to make " no order " and at the end of the year to enter an order of abatement. This will leave it open to any representative of the deceased plaintiff who may claim that the right to sue survives to challenge the validity of the order at a later stage. But as in the circumstances of this case no such party can come forward, the order of abatement would operate to remove the case from the category of pending cases.

For the foregoing reasons I set aside the judgment of the learned District Judge. The appellants will be entitled to the costs of appeal and of the proceedings had in relation to the application of the respondent to be made a party plaintiff.

PULLE J.—I agree.

*Appeal allowed.*