

1967 *Present: Manicavasagar, J., and Tennekoon, J.*

D. TIKIRI and others, Appellants, and D. LAMAYA  
and others, Respondents

*S. C. 468/64—D. C. Kurunegala, 13619/P*

*Partition action—Death of a plaintiff pending appeal—Procedure thereafter—Partition Act (Cap. 69), ss. 71, 76:*

Where, pending an appeal in a partition action, one of the plaintiffs-appellants dies, and no steps are taken to substitute a person to represent the deceased, the Court must endeavour to compel the parties to bring the action to a termination: it may dismiss the action only in the event of the parties, duly represented, not prosecuting the appeal with due diligence.

**A**PPEAL from a judgment of the District Court, Kurunegala.

No appearance for the plaintiffs-appellants.

*N. E. Weerasooria (Jnr.)*, for the 1st defendant-respondent.

*Cur. adv. vult.*

<sup>1</sup> (1938) 40 N. L. R. 169.

<sup>2</sup> (1958) 3 W. L. R. 304.

February 25, 1967. MANICAVASAGAR, J.—

When this appeal from the judgment of the District Judge of Kurungala dismissing the plaintiffs' action for a partition of the land depicted in preliminary plan X of 19.8.57 was taken up for hearing on a previous occasion, the Bench was informed that one of the plaintiffs-appellants (numbered 1E) was dead. The Court thereupon directed that the case record be returned to the District Court " for proper substitution of the deceased "

The action was filed by two plaintiffs, one of whom the 2nd was subsequently made the 5th defendant as her interests were adverse to the plaintiffs : the 1st plaintiff died before the trial in the District Court, and in her place, her children were substituted as plaintiffs and numbered 1A to 1D : of them 1B to 1D were minors and were represented by their father, plaintiff 1E, as next friend.

When the record was once again before the District Judge, he found that the respondents to the appeal were unwilling to take steps—an attitude which I have often found amongst respondents in a similar situation, induced by the hope that this may lead to an easy way of disposing of the appeal. The District Judge, realising that this was a partition action, directed notice to issue on the plaintiffs : the notice was served on the erstwhile 2nd plaintiff (she was at that time the 5th defendant-respondent), and purported to be served on the 1st plaintiff who had died even before the trial. The 2nd plaintiff appeared in response to the notice, and told the Judge that she is not taking steps as she was not interested in the appeal. The District Judge, without endeavouring to take any further steps to effect substitution, returned the case record to this Court.

The appeal is again before us without the appellants, three of whom, according to the affidavit of the deceased plaintiff 1E were minors on 25.2.62, being represented by a next friend. Mr. Weerasooria (Jnr.) for the respondents moves that the appeal be dismissed with costs as the appellants are not present either in person or by counsel. This would have been a proper application if we were not confronted by the fact of minority : but in the circumstances to which I have adverted the application must be refused : nor, for the same reason, is this a suitable case for dismissal of the partition action itself on the ground of non-prosecution under Section 71 of the Partition Act, though it may be contended that such dismissal shall not operate as a bar to the institution of a fresh action for partition, by virtue of the provisions of section 76 of the Act. In my opinion, this being a partition action, the Court must endeavour to compel the parties to bring the action to a termination : it may dismiss this action only in the event of the parties, duly represented, not prosecuting the appeal with due diligence.

The record must therefore go back for the appointment of a next friend, if plaintiffs 1B to 1D are still minors : it appears to me that the District Court might as a first step cause notice to issue on plaintiff-appellant (numbered 1A), who has attained majority, and is a brother of 1B to 1D : for he may agree to represent them as his interests are the same, or he may apprise the Judge that one or more of them have attained majority, in which event, they should be noticed to prosecute the appeal if they elect to proceed with the action. I desire to make it clear that the District Judge need not confine himself to the suggestion I have made : there may be other effective courses of action which may occur to him to have this appeal prosecuted, if the parties desire to do so.

The record should be returned to this Court after diligent endeavours are made to comply with the foregoing directions.

TENNEKON, J.—I agree.

*Sent back for further proceedings.*

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