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

In the matter of an application for leave to Appeal against an order of learned Judge of High Court of Civil Appellate Kegalle dated 30.09.2015, under and in terms of Section 5C of the High Court of the provinces (Special Provisions) Amendment Act No. 54 of 2006 reads with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC/Appeal/18/2017
SC HCCA/LA /
Application No: 360/2015
SGP/HCCA/KG/APPEAL No: 69/2013 (F)
D.C. Kegalle Case No. 4702/L

Henaka Rallage Premachandra Bandara,
Alikapuwatte, Thiyambarahena,
Undugoda.

PLAINTIFF

vs

Kaluarachchilage Tikiri Mahaththaya
Alikapuwatte, Thiyambarahena,
Undugoda. (Deceased)

DEFENDANT

1.a Muruthen Rallage Nawarathne Bandara
Thiyambarahena,
Undugoda.

1.b Muruthen Rallage Ariyawathie
Thiyambarahena,

Undugoda.

1.c Muruthen Rallage Sumana Banda
Thiyambarahena, Thelijjagoda,
Undugoda.

SUBSTITUTED DEFENDANTS

{Purportedly under Section 341(1) of the Civil Procedure Code}

AND

Henaka Rallage Premachandra Bandara,
Alikapuwatte, Thiyambarahena,
Undugoda.

PLAINTIFF – PETITIONER

vs

Kaluarachchilage Tikiri Mahaththaya
Alikapuwatte, Thiyambarahena,
Undugoda. (Deceased)

DEFENDANT

1.a Muruthen Rallage Nawarathne Bandara
Thiyambarahena,
Undugoda.

1.b Muruthen Rallage Ariyawathie
Thiyambarahena,
Undugoda.

1.c Muruthen Rallage Sumana Banda
Thiyambarahena, Thelijjagoda,
Undugoda.

SUBSTITUTED DEFENDANTS – RESPONDENTS

{Purportedly under Section 341(1) of the Civil Procedure Code}

AND BETWEEN

1.a Muruthen Rallage Nawarathne Bandara
Thiyambarahena,
Undugoda.

1.b Muruthen Rallage Ariyawathie
Thiyambarahena,
Undugoda.

1.c Muruthen Rallage Sumana Banda
Thiyambarahena, Thelijjagoda,
Undugoda.

SUBSTITUTED DEFENDANTS – RESPONDENTS - APPELLANTS

{Purportedly under Section 341(1) of the Civil Procedure Code}

vs

Henaka Rallage Premachandra Bandara,
Alikapuwatte, Thiyambarahena,
Undugoda.

PLAINTIFF -PETITIONER-RESPONDENT

AND NOW BETWEEN

1.a Muruthen Rallage Nawarathne Bandara
Thiyambarahena,
Undugoda.

1.b Muruthen Rallage Ariyawathie
Thiyambarahena,
Undugoda.

1.c Muruthen Rallage Sumana Banda
Thiyambarahena, Thelijjagoda,
Undugoda.

SUBSTITUTED DEFENDANTS – RESPONDENTS – APPELLANTS - APPELLANTS

{Purportedly under Section 341(1) of the Civil Procedure Code}

vs

1. Henaka Rallage Premachandra Bandara,
Alikapuwatte, Thiyambarahena,
Undugoda. (Deceased)

PLAINTIFF -PETITIONER -RESPONDENT-RESPONDENT

1A. Korale Gama Ralalage
Sumanawathie,
1B. Darshana Saman Premachandra,
1C. Rajeewa Nilantha Thushara Premachandra,
1D. Dammika Niroshan Premachandra,

1E. Iresha Priyadarshani Premachandra,

All of Alikapuwatte, Thiyambarahena,
Undugoda.

SUBSTITUTED – PLAINTIFF- PETITIONER – RESPONDENT – RESPONDENTS.

BEFORE : S. Thurairaja, P.C., J.
Menaka Wijesundera, J &
M. Sampath K. B. Wijeratne J.

COUNSEL : J.M. Wijebandara with Ralani Edirisinghe, Dimithri Pandiwita & Parami Samudrika for the Substituted – Defendants – Respondents – Appellants - Appellants.

Sudarshani Coorey with Diana Stephnie Rodrigo for the Substituted – Plaintiffs – Petitioners – Respondents - Respondents.

ARGUED ON : 17.06.2025

DECIDED ON : 25.09.2025

M. Sampath K. B. Wijeratne J.

Introduction

This appeal arises from the judgment of the Provincial High Court of Civil Appeal, Kegalle, dated September 28, 2015, whereby the learned Judges of the High Court affirmed the order of the learned District Judge delivered on April 23, 2013.

The substituted Defendants-Respondents-Appellants-Appellants (hereinafter referred to as the 'substituted Defendants-Appellants') sought leave to appeal to this Court against the aforesaid judgment of the High Court of Civil Appeal. Upon hearing the submissions of learned Counsel for the substituted Defendants as well as learned Counsel for the Plaintiff-Petitioner-Respondent-Respondent (hereinafter referred to as the 'Plaintiff-Respondent'), this Court granted leave to appeal on the questions of law set out in paragraph 19(a), (b), and (c).[1]

However, upon the conclusion of arguments, this Court decided to answer only the questions of law set out in paragraph 19(a) and (b) of the Petition. For clarity, I will now quote the two questions of law, which read as follows:

(a) Has the learned District Judge erred in law allowing the substitution of the Petitioner under section 341 of the Civil Procedure Code in the absence of a valid and executable decree?

(b) Can the substituted parties be compelled to purge a default of a deceased party?

At the stage of argument, both learned Counsel for the substituted Defendants – Appellants and for the Substituted Plaintiff-Petitioner-Respondent-Respondents (hereinafter referred to as the 'Plaintiff-Respondents') were heard, and judgment was reserved.

Since the questions of law were newly identified, both parties were permitted to file post-argument written submissions.

1 *Vide* proceedings dated June 17,2025.

Pleadings in the District Court

The Plaintiff instituted action in the District Court of Kegalle by his plaint dated July 2, 1991, against the original Defendant, seeking, *inter alia*, a declaration that he is entitled to use a footpath over the Defendant's land to access his residence; Rs. 5,000 as quantified damages; and Rs. 100 per month as future damages.

Upon service of summons, the Defendant appeared in Court and filed his answer dated June 3, 1992, seeking, *inter alia*, the dismissal of the Plaintiff's action and a declaration that the Plaintiff is not entitled to a right of way over his land.

Thereafter, the Plaintiff sought a commission to survey the *corpus*. Upon receipt of the plan and report, the Plaintiff filed an amended plaint on July 2, 1996, claiming the right of way depicted in the plan[2].

In response, the Defendant filed an amended answer on September 2, 1996[3].

Thereafter, on May 23, 1997, the Plaintiff again filed an amended plaint[4].

In the amended plaint, the Plaintiff claimed the right of way depicted as No. 1 in Plan No. 873, prepared by P. B. Wijesundara, Licensed Surveyor, on the basis of necessity, and sought, *inter alia*, a declaration of his entitlement to the said right of way; the removal of obstructions thereto; Rs. 5,000 as quantified damages; and Rs. 100 per month as future damages.

In reply, the Defendant filed an amended answer on October 10, 1997[5]. In his amended answer, the Defendant sought, *inter alia*, the dismissal of the

2 *Vide* journal entry No. 24 dated July 2, 1996, of the District Court record.

3 *Vide* journal entry No. 25 dated September 2, 1996, of the District Court record.

4 *Vide* journal entry No. 27 dated May 23, 1997, of the District Court record.

5 *Vide* journal entry No. 29 dated October 10, 1997, of the District Court record.

Plaintiff's action and a declaration that the Plaintiff was not entitled to a right of way over his land.

After the closure of pleadings, the case was fixed for trial. Following the second date of trial, the Plaintiff filed a draft amended plaint on July 22, 1999, which the Court accepted as the amended plaint[6]. Consequently, the Defendant amended his answer[7].

Thereafter, the case was again fixed for trial, and subsequently scheduled for trial and/or settlement on several occasions.

The *ex-parte* Trial, Judgment and the Decree

On the sixth date of trial, namely October 25, 2002, the Defendant was absent, and the Defendant's registered attorney informed the Court that he had no instructions from the Defendant. Accordingly, the learned District Judge rightly fixed the case for *ex-parte* trial against the Defendant, acting under Section 84 of the Civil Procedure Code.

On November 1, 2002, the case was taken up for *ex-parte* trial, and the Plaintiff gave evidence in support of his case. The *ex-parte* judgment was delivered on the same day granting the reliefs prayed for by the Plaintiff. Thereafter, the learned District Judge, acting under Section 85(4) of the Civil Procedure Code, ordered that a copy of the *ex-parte* decree be served on the Defendant. Under Section 86(2), the Defendant had fourteen days from the service of the decree to apply to the Court to purge his default. Accordingly, an *ex-parte* decree entered against a Defendant is not an executable decree until it is served on the Defendant who was in default.

6 *Vide* journal entry No. 33 dated July 22, 1999, and Journal Entry No. 34 dated November 5, 1999, of the District Court record.

7 *Vide* journal entry No. 35 dated March 24, 2000, of the District Court record.

The Plaintiff's registered attorney had submitted a draft decree on several occasions, but it was not issued to the Defendant due to various defects.[8] Finally, the learned District Judge made the order to 'take steps and move.' After a long delay, a decree in order was submitted by the Plaintiff's registered attorney and signed by the learned District Judge. At that time, the Plaintiff informed the Court that the Defendant had passed away after the *ex-parte* trial. Thereafter, on January 21, 2012, the Plaintiff's registered attorney made an application to execute the *ex-parte* decree, and the learned District Judge, notwithstanding that the Defendant was deceased before the decree was served, ordered it to be issued through the Fiscal. The Fiscal proceeded to execute the writ and reported to the Court that the Defendant was dead and that a house had been built across the disputed right of way.

Consequently, the learned District Judge granted a date for the Plaintiff to consider effecting substitution in place of the deceased Defendant for the purpose of executing the decree. Accordingly, the Plaintiff moved to substitute the 1st to 5th Respondents named in the Petition in the room and place of the deceased Defendant[9]. Upon service of notice of substitution to the 1st to 5th legal representatives of the deceased Defendant, the 1st, 2nd, 4th, and 5th Respondents filed their objections. They sought to dismiss the Plaintiff's application for substitution and execution of the writ on the following grounds.

(i) The 4th and 5th Respondents are not children of deceased Defendant.

(ii) The Plaintiff has an alternative road.

(iii) The 4th Respondent had built his dwelling house about six years ago, and the Plaintiff who did not object to the construction made this application with the intention of demolishing it.

The 3rd Respondent, who appeared in Court and sought to file a proxy and objections, did not file either the proxy or the objections.

8 *Vide* from Journal entry No.45 dated April 02, 2003 to Journal entry No.50 dated July 17,2010, of the District Court record.

9 *Vide* journal entry No. 57 dated March 9, 2011, of the District Court record.

Thereafter, the 1st, 2nd, 4th, and 5th Respondents filed their written submissions.

Although the Respondents raised questions regarding the merits of the Plaintiff's case in their objections, in an inquiry for substitution, consideration of such merits clearly falls outside the scope.

The learned District Judge, having considered that the inquiry had been disposed of on written submissions, delivered the order allowing the substitution of the 1st, 2nd, and 3rd Respondents. Accordingly, they were substituted as 1එ, 1ඵ, and 1ඒ substituted Defendants[10].

The Defendant's default, *ex- parte* decree and continuation of Proceedings against the substituted Legal Representatives.

In the case at hand, the Defendant died on December 16, 2002, after the *ex-parte* judgment was entered but before the decree was served on her. The substituted Defendants-Respondents-Appellants-Appellants (hereinafter referred to as the 'substituted Defendants-Appellants') contended that, since the Defendant died before the decree was entered, no confirmed decree existed against her in law.

However, Section 188 of the Civil Procedure Code reads that "*as soon as may be after the judgment is pronounced, a* ***formal decree bearing the same date as the judgment shall be drawn up by the court….***" [Emphasis added]

In addition to that, as per the interpretation section of the Civil Procedure Code, a decree is *'the* ***formal expression of an adjudication*** *upon any right claimed or defence set up in a civil court.....'* [Emphasis added]

Accordingly, even if a decree is entered subsequently, it should relate back to the date of the judgment, and it is the responsibility of the Court to enter the

10 *Vide* Order dated February 2, 2012 at p. 126 of the District Court record.

decree in accordance with its judgment. It is true that, over the years, a practice has developed whereby parties prepare the decree and submit it to the Court for the judge's signature. However, such practices cannot override the statutory responsibility conferred on the Courts. The Court of Appeal rightly observed in *Pathirana v. Induruwage*[11] that the entering of a decree is a ministerial act, and it is the duty of the learned District Judge to enter the decree.

In the case of *Perera et al. v. Fernando et al.*,[12] De Sampayo A.J. observed that,

"the failure of the Court to do a (....) ministerial act (....) in time should not affect the parties, and when a formal decree is entered and signed, it should be taken to be operative as from the date of the judgment. [Emphasis added]

As I have already stated above in this judgment, in the instant case there was a long delay in entering the proper decree. However, as correctly submitted by the Plaintiff, the sole responsibility for the delay cannot be attributed to the Plaintiff.

In the instant case, the principal contention of the substituted Defendants -Appellants was that they were not in a position to purge the default committed by the diseased original defendant (hereinafter sometimes referred to as 'the original defendant'), as the reasons for such default were within the personal knowledge of the original Defendant. However, it is important to note that in the objections filed by the 1ඒ, 1ඓ, and 1ඔ substituted Defendants-Appellants, along with two others, they categorically stated that the original Defendant's default at trial was due to her prolonged illness caused by cancer.[13] Hence, it is clear that the reason was well within the knowledge of the substituted Defendants-Appellants. In these circumstances, I am of the view that the substituted Defendants-Appellants should not be allowed to approbate and reprobate, or to blow hot and cold.

11 [2002] 2 Sri L.R. 63.
12 17 N.L.R. 300.
13 *Vide* at page 93 and 95 of the District Court record.

Nevertheless, for the purpose of addressing Question of Law No. 2 sets out above in this judgment, the broader issue of whether a substituted Defendant may be compelled to purge the default of a deceased Defendant will be considered below.

Section 398 of the Civil Procedure Code in force at the time relevant to this case, provided as follows[14];

> 398 (1) *If there be more defendants than one, and any of them die before entering decree and the right to sue on the cause of action does not survive against the surviving defendant or defendants alone, and also in case of the death of a sole defendant, or sole surviving defendant, where the right to sue survives, the plaintiff may make an application to the court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead. The court shall thereupon, on being satisfied that there are grounds therefor, enter the name of such representative on the record in the place of such defendant, and shall issue a summons to such representative to appear on a day to be therein mentioned to defend the action, and the case shall thereupon proceed in the same manner as if such representative had originally been made a defendant, and had been a party to the former proceedings in the action:*
> *Provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.*
>
> (2) *The legal representative of a deceased defendant may apply to have himself made a defendant in place of a deceased defendant, and the provisions of this section, so far as they are applicable, shall apply to the application and to the proceedings and consequences ensuing thereon.*

14 Amendment No 08. of 2017 to the Civil procedure Code repealed Section 398, and a new section was adopted thereby.

In the Court of Appeal case of *Hameed and Another v. Dharmasiri and Others*[15], Wijeyaratne J. held;

"Thus, it is seen that by judicial interpretation the term "legal representative" in section 394(2) has received an extended meaning. On the death of a defendant the court should bring in the legal representative on the record before proceeding with it.

The suit may be described to be in a state of suspension till then and no orders, excepting formal or processual, can be passed. If the suit is disposed of without impleading the legal representatives of a deceased party, re-trial will be ordered (Commentary on the Code of Civil Procedure by Chitaley and Rao, 7th Edition (1963), Volume III, Page 3372)."

At this stage, it is pertinent to consider the point at which proceedings may be continued against the legal representatives following the death of the original Defendant.

The decision in *Muheeth v. Nadarajapillai Et Al*[16] lucidly draws the distinction between the point at which *litis contestatio* is reached in an action in rem as opposed to an action in personam. The Court held:

"An action became litigious, if it was in rem, as soon as the summons containing the cause of action was served on the defendants; if it was in personam, on litis contestatio which appears to synchronize. with the joinder of issue or the close of the pleading"

In *Executors of Meyer v. Gericke*[17], the Supreme Court of the Cape of Good Hope, which also followed Roman-Dutch law as the common law, dealt with the important question of the stage at which, in an action for defamation or

15[1990] 1 Sri L.R. 410.
16 19 NLR 461 at 462.
17 (1880) ZASCCGH 4 (2 February 1880) at page 16,17,18.

other personal injury, the death of one of the parties brings the action to an end, and made the following observation:

"*at what stage of the action does the litis contestatio take effect? Broadly stated, the answer must be that it takes effect as soon as the case is ripe for hearing, or,* ***if the defendant is in default, as soon as he is debarred by law from defending the action.*** *Allowing for differences in the system of pleading, this answer will apply equally to the Roman Law, the Dutch Law, and the law of this Colony. In regard to the Roman system of civil process it is well known that the mode of procedure underwent great changes from the early times of Rome to the time of Justinian. Throughout these changes, however, it was always considered necessary that the time when a contested right was to be considered as really made the subject of litigation should be carefully marked. In the time of Justinian an action was begun with the denunciatio actionis, by which the plaintiff announced to a magistrate that he wished to bring an action. and furnished a short statement of his case. This statement might be oral or in writing, and was sent by the Magistrate, through a bailiff of the Court, to the defendant. The parties or their procurators appeared before the Magistrate, and he then and there decided the case. (...) The litis contestatio took place directly the Magistrate began to hear the cause.*

In Holland the mode of procedure was far more cumbrous, and the difficulty of marking the exact time when the litis contestatio took place was proportionately greater than under the Roman system. In summary causes (such as actions for a decree of civil imprisonment, or for a decree of perpetual silence) there was not much difficulty, for as soon as the defendant had objected to the plaintiff's claim, the litis contestatio was held to have taken effect (....), for the Court might then hear and decide the case without further pleadings.

Again, a kind of fictitious litis contestatio was, according to Voet, admitted when a defendant remained in default after three edictal citations had been issued against him (Comm. 5, 1, 145, and 47, 10, 22), for the effect of his

default was that he was thereafter debarred from defending the action, unless leave was given to him by the opposite party, or by the Court, to purge his default. In ordinary defended cases, however, the rule was that the litis contestatio was not complete until after duplicatio was pleaded (...) - Now the duplicatio or duplique of the Dutch law corresponds with the rejoinder of our law (...) the-litis- contestatio in an ordinary defended suit may be considered to take place as soon as the pleadings are closed." [Emphasis Added]

Accordingly, in an action where the Defendant appears before the Court, *litis contestatio* occurs when the Defendant pleads. However, in a case where the Defendant defaults, *litis contestatio* takes effect at the time of the Defendant's default.

Despite the fact that the reasons for the original Defendant's default were within the knowledge of the substituted Defendants in this case, the argument that the reasons for the default lie solely within the personal knowledge of the Defendant is devoid of merit in law. It is a well-established rule that, even in an action in personam, an heir is bound by his predecessor in interest once the action has reached the stage of *litis contestatio*.

Once an heir is substituted in a case, they cannot alter or modify the position held by the deceased predecessor. Proceedings before the Court must continue from the point where the predecessor left them. Procedural rules should not obstruct justice or legitimize any injustice. In such circumstances, the Petitioner's only available course of action is to file an application to set aside the *ex-parte* decree, provided there are valid reasons either on their own behalf or on behalf of their predecessor. Unless, in my view, permitting the legal heirs of the original Defendant at this stage to 'set the clock back' would cause grave prejudice to the Plaintiff.

Therefore, I am of the view that once legal representatives' step into the shoes of a deceased Plaintiff or Defendant, as the case may be, they must adopt the position occupied by their predecessor.

The legal representatives, therefore, must proceed with the litigation from the stage at which the death of the Defendant or Plaintiff occurred. They are legally bound by the pleadings or non-pleadings of their predecessors-in-interest in whose place they have been substituted.

In the instant case, as the original Defendant passed away before having an opportunity to purge the default, the substituted Defendants-Appellants may continue the proceedings by purging the default of the said original defendant as the next step. In the event of their failure to do so, the decree will be made absolute.

Impugned Orders of the learned District Judge and the learned High Court Judges

Having effected substitution in place of the original Defendant as aforesaid, the learned District Judge ordered that the decree be served on the substituted Defendants-Appellants. Following service of the decree, the substituted Defendants-Appellants filed a petition supported by an affidavit seeking to set aside the *ex-parte* decree.[18].

Thereafter, the matter was fixed for inquiry on November 6, 2012[19].

Before the date fixed for inquiry, on October 11, 2012, the Plaintiff made an application seeking an interim injunction and a mandatory injunction against the substituted Defendants-Appellants, restraining them from erecting buildings that obstruct the right of way claimed by the Plaintiff, and a mandatory injunction directing them to remove the glass debris placed on the said right of way[20]. Accordingly, the learned District Judge issued notice of interim injunction to the substituted Defendants-Appellants.

18 *Vide* journal entry No. 69 dated June 5, 2012 and the Petition at page 95 and the affidavit at page 99. of the District Court record.

19 *Vide* journal entry No. 70 dated June 21, 2012 of the District Court record.

20 *Vide* journal entry No. 72 of the District Court record.

On November 6, 2012, the case was fixed for inquiry into the application made by the substituted Defendants-Appellants to purge the default of the original Defendant and to set aside the *ex- parte* decree. On the said date, the Court removed the case from the inquiry roll[21]. Thereafter, on February 8, 2013, the substituted Defendants-Appellants filed objections to the Plaintiff's application for an interim injunction and a mandatory injunction[22]. On the same date, the learned District Judge granted a date for the parties to file written submissions on the question of whether an inquiry could be held under Section 86 of the Civil Procedure Code, mandating the substituted Defendants-Appellants to purge the default of the deceased original Defendant.

Accordingly, the parties filed their written submissions on March 15, 2013[23]. Thereafter, on April 23, 2013, the learned District Judge delivered her order[24] on the issues concerning the interim injunction, the mandatory injunction, and the question as to whether an inquiry could be held under Section 86 of the Civil Procedure Code.

It appears that the learned District Judge completely lost sight of the fact that a prior application to set aside the *ex- parte* decree was still pending inquiry.

Directions were given for submissions to be made, in accordance with which the substituted Defendants-Appellants filed their submissions.

The order of the learned District Judge reads as follows:

> *"සිවිල් නඩු විධාන සංග්‍රහයේ 86 වගන්තිය ප්‍රකාර විත්තිකරුට නීත්‍යු ප්‍රකාශය භාර ගැනීමේන් අනතුරුව ගත හැකිව තිබූ ක්‍රියා මාර්ග ගැනීම සඳහා ආදේශිත විත්තිකරුවන්ටද හිමිකම් ඇත. ඔවුන් ඒ සඳහා පියවර ද ගෙන ඇත. නමුත් ඔවුන්ම ඔවුන්ගේ 2012.12.12 වෙනි දිනැති කරුණු දැක්වීම් හා විරෝධතා ප්‍රකාශයෙන් අයැද සිටිනුයේ දැනට පැවැත්වීමට නියමිත සිවිල්*

21 *Vide* Journal Entry No. 74 of the District Court record.

22 *Vide* journal entry No. 76 and the Petition and Affidavit at pages 112-121 of the District Court record.

23 *Vide* journal entry No. 77 of the District Court record.

24 *Vide* journal entry No. 78 of the District Court record.

නඩු විධාන සංග්‍රයේ 86(2) වගන්තිය යටතේ වන විමසීම නිෂ්ප්‍රභ කරන ලෙසය.

එම පාර්ශවයම 86(2) වගන්තිය ප්‍රකාර ඉල්ලීම කර ඇති බැවින් ද. එම විමසීම් නිෂ්ප්‍රභ කරන ලෙස එම පාර්ශවයම ඉල්ලා ඇති බැවින් ද අධිකරණයට එකී ඉල්ලීම් පවත්වා ගෙනයාමට හැකියාවක් නැත. ඒ අනුව ආදේශිත විත්තිකරුගේ ඉල්ලීම මත 86(2) වගන්තිය යටතේ එන විමසීම් සඳහා වන ඉල්ලීම නිෂ්ප්‍රභ කරමි."

The learned District Judge, and subsequently the learned Judges of the High Court of Civil Appeal in affirming the District Judge's order, held that since the Defendants, who had initially sought to purge the default, subsequently adopted a different stance and sought to have the hearing to purge the default dismissed, the *ex- parte* decree would automatically become absolute.

However, I am unable to agree with positions taken by learned District Judge and the learned High Court Judges. Because, as the said relief has been sought by the Defendants as a consequential relief among others in seeking to get the order dated February 2, 2012 to substitute the Defendants in place of the original defendant and to move the Court to exercise its inherent powers under section 839 to correct alleged defects in the case record as main reliefs. This was a fact which the District Judge was completely ignorant of when delivered the order depriving the substituted Defendants-Appellants an opportunity to purge the default.

It is noteworthy that the substituted Defendants-Appellants have prayed for setting aside the inquiry under section 86 of the Civil Procedure Code only as a consequential relief to the aforementioned main reliefs but not as a substantive relief. This misunderstanding could have been easily avoided if the substituted Defendants-Appellants were mindful to plead alternatively to continue with the purge default inquiry in case their main reliefs were not granted.

The learned High Court Judges observed that the learned District Judge has made the order for the substitution of the Defendant under wrong section, which was Section 341, when in fact the substitution should have done under

section 398 of the Civil Procedure Code. Nonetheless such accidental slip by the District Judge would not make the order *per se* devoid of law as long as the Court has the authority to issue such an order, the reasoning to which I am inclined to agree.

For the foregoing reasons, I am of the view that learned High Court Judges were correct in upholding the validity of the substitution of Defendants in place of the deceased original Defendant, though his subsequent finding to deprive the Defendants to purge their default under section 86(2) of the Civil Procedure Code is incorrect.

Writ of Execution: Possibility of Issuance After Ten Years from Decree

Although this point was not contested, the question arises as to whether a writ of execution may be issued, as ten-year time period has elapsed since the decree.

Simply stated, in terms of Section 337(1), no application to execute a decree shall be allowed after ten years from the date of the decree, or, if there was an appeal, after ten years from the date on which the decree was affirmed on appeal. In cases where the decree or any subsequent order directs the payment of money in installments or the delivery of property on a specified date, the ten-year period is calculated from the date of default in making such payment or delivering such property.

However, as per section 337(2) of the Civil Procedure Code if the judgment-debtor has by fraud or force prevented the execution of the decree within that period, the rigidity of this rule is relaxed. In such circumstances, the ten year period begins to run from the date of removal or cessation of such malady or disability.

If the aforementioned statutory bar applies to this case, any consequential steps taken following this judgment would be futile.

In the Supreme Court case of *Mohamed Azar v. Idroos*,[25] Amaratunga J. held:

25 [2008] 1 Sri LR 232 at 241.

"The time bar prescribed by section 337(1) commences to operate only from the date on which the judgment creditor becomes entitled to execute the writ, and as such it has no application to a case where the judgment creditor is prevented by a rule of law from executing the writ entered in his favour. The time bar will apply in cases where the judgment creditor after becoming entitled to obtain the writ has slept over his rights for ten years

Under Section 337(3), which was introduced by Act No. 53 of 1980, a writ of execution remains in force for one year from the date of issuance. It may be renewed before its expiration for another year from the date of such renewal, and so on, continuously. If renewal is not sought within the year, fresh writs may be issued until the decree is satisfied, provided the application is made within the ten-year period mentioned above. Before the said amendment, once an application to execute a decree had been allowed under Section 337(1), no subsequent application could be made unless the Court was satisfied that 'due diligence' had been exercised on the last preceding application to procure complete satisfaction of the decree. However, this requirement was removed by the aforesaid amendment. Irrespective of due diligence, the judgment-creditor may now make successive applications for writs until the decree is satisfied. If the judgment-creditor did not or could not make an application under Section 325 in case of resistance, obstruction, hindrance, or ouster, they may make an application under Section 337 within ten years for a fresh writ or re-issuance of a writ, subject to Section 347.

In the case at hand, the date of the decree should be November 1, 2002. The first application to serve the decree on the Defendant was made on April 2, 2003, well within the ten-year period, but it was not in order. As stated above in this judgment, a decree in proper form was submitted by the Plaintiff only on November 1, 2011, after a long delay. Although the Plaintiff informed the Court that the Defendant was passed away, the Court inadvertently ordered the decree to be served on the Defendant. Since it was the duty of the Court to enter the decree, I am of the view that the ten-year period under Section 337 should commence from the date the **formal decree** was entered, which was the date from which the Plaintiff could take steps to serve the decree on the Defendant.

Conclusion

In light of the reasoning provided above, the Questions of Law raised are answered in the following manner: -

(1) Has the learned District judge erred in law allowing the substitution of the Petitioner under Section 341 of the Civil Procedure Code in the absence of valid and executable decree?

The learned District Judge acted under the wrong section in allowing the substitution of the Petitioner under Section 341 of the Civil Procedure Code in the absence of valid and executable decree. Nonetheless, it does not affect the validity of the order as the Court still has the jurisdiction to issue such an order under Section 398 (1).

(2) Can the parties be compelled to purge a default of a deceased party?

Yes, the Substituted Defendants-Appellants who have stepped into the shoes of the deceased original Defendant can be compelled to purge the default of the deceased party.

The appeal is partly allowed with costs and the case is remitted back to the High Court of Civil Appellate of Kegalle to be sent back to the District Court of Kegalle to proceed with the purge default inquiry as per this judgment.

JUDGE OF THE SUPREME COURT

S. Thurairaja, P.C., J.
I Agree.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.
I Agree.

JUDGE OF THE SUPREME COURT