TYAGARAJAH AND ANOTHER
VS.
PERERA AND THREE OTHERS

SUPREME COURT.
SHARVANANDA, J., COLIN-THOME, J.
AND SOZA, J..
S.C.NO. 40/82-S.C.SPECIAL
L.A. NO. 57/82-
C.A. APPLICATION NO. 488/82.
FEBRUARY 2, 1983.

Execution of decrees against the estate of a deceased judgment debtor - Sections 341, 347 and 763 of the Civil Procedure Code - Application for a writ of execution and substitution - Writ issued without notice - Resistance by the respondents.

The plaintiffs (Appellants to this appeal) who were the owners of the premises No. 7, St. Albans Place, Colombo 4, instituted action against the defendant one Shyama de Silva to have her ejected from the said premises. On 28-11-79 the District Judge made an order ex parte in favour of the plaintiffs. A copy of the decree was served on the defendant on 6-2-80. She died on 18-2- 80.

An application was filed on 21-7-80 for a writ of execution of the decree and to substitute the 1st respondent as the legal representative of the deceased defendant. The Court ordered the substitution and directed notice of application for writ to be issued.

However the Court on 6-8-80 issued writ without service of notice. When the writ of possession was executed on 19-9-80, the Fiscal was resisted by the 2nd, 3rd and 4th respondents.

On 6-4-82 the District Judge directed the re-issue of the writ and also held that the 2nd respondent was none other than the substituted legal representative of the deceased judgment debtor (1st respondent to the appeal). The 2nd respondent filed an application in revision, in the Court of Appeal to set aside the said order.

The Court of Appeal set aside the orders of 6-8-80 and 6-4-82, directed the issue of the writ and held that the 1st and 2nd respondents are one and the same person.

The appellants in this appeal raised the following questions regarding the procedure that should be adopted in the execution of decrees against the estate of a deceased judgment debtor.

(1) Where the judgment debtor dies before execution of decree, is notice necessary before substitution of his legal representative?

(2) Should the person substituted as legal representative be noticed to show cause before execution issues?

(3) Is failure to issue notice before execution issues fatal where the legal representative becomes aware of the application for execution?

Held

(1)Where the judgment debtor dies before execution of decree, and where a legal representative should be substituted for the deceased judgment debtor, no service of notice

on the legal representative is necessary before the substitution. Execution and substitution should be asked for in one petition. Substitution will be ex parte and notice will issue.

(2)The person substituted as legal representative should receive the notice of the application for execution and also should be called upon to show cause against the said application. He can then in objecting to execution take up as one of his defences the plea that he has been wrongly substituted as legal representative.

(3)Where the legal representative becomes aware of the application for execution failure to issue notice before execution issues, is not fatal.

Cases referred to

(1) *Omer v. Fernando (1913) 2 C.A.C. 128*
(2) *Pathurpillai v. Kandappen (1913) 3 C.A.C 23*
(3) *Manuel Perera v. Palaniappa Chetty (1913) 1 S.C.D. 16*
(4) *Siriwardena v. Kitulgalla (1941) 42 N.L.R. 510*
(5) *Latiff v. Seneviratne (1938) 40 N.L.R. 141*
(6) *Sirimala Veda v. Siripala (1954) 55 N.L.R. 544*
(7) *Edward v. de Silva (1945) 46 N.L.R. 342*
(8) *Ragunath Das v. Sundar Das Khetri A.I.R. 1914 Privy Council 129. 131.*
(9) *Wimalasekera v. Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd., (1955) 58 N.L.R. 298.*
(10) *Perera v. Novisham (1927) 29 N.L.R. 242*

(11) Fernando v. Thambiraja (1945) 46 N.L.R.81
(12) Rodrigo v. Weerakoon (1957) 61 N.L.R.150
(13) Chandra Nath Bagchi v. Nabadwip Chandra Dutt A.I.R. 1931 Calcutta 476.
(14) Fakhrul Islam v. Bhubaneswari Kuer A.I.R. 1929 Patna 79
(15) Kannangara v. Peries (1928) 30 N.L.R. 78

APPEAL from the judgment of the Court of Appeal.

K.N. Choksy Senior Attorney with *S. Mahenthiran* *A. Kirupaidasan* and *Miss. I.R. Rajepakse* for appellants.

H.L. de Silva Senior Attorney with *I. Mohamed* for 2nd respondent.

Other respondents absent and unrepresented.

Cur.adv.vult.

May 10, 1983.
SOZA, J.

This appeal raises an interesting question regarding the procedure that should be adopted in the execution of decrees against the estate of a deceased judgment-debtor. I will set out in brief outline the salient facts of this case which have given rise to this question.

The two plaintiffs who are the appellants before us instituted this suit against one Shyama de Silva to vindicate their title to premises No.7, St. Albans Place, Colombo 4 to have her ejected therefrom and to recover damages for wrongful occupation and costs. They also asked for an injunction and on being noticed in regard to this Shyama de Silva the defendant filed proxy and objections but did not pursue them. She made no further appearance in the case and hence ex parte trial was held and judgment entered for the plain-

tiffs as prayed for with costs on November 28, 1979. A copy of the decree was served on Shyama de Silva on February 6, 1980. On February 18, 1980 Shyama de Silva died. No application was made by Shyama de Silva or after her death by any representative of hers to have the decree set aside and therefore no question as to the validity of the decree can be entertained now. Nor indeed has any such question been raised before us.

On July 21, 1980 the appellants filed an application for a writ of execution of the decree entered in the case naming a Mrs. Malcolm Perera as respondent and seeking her substitution as legal representative as she had adiated the inheritance. The Court ordered the substitution and directed notice of the application for writ to issue but later changed its mind and on August 6, 1980 issued writ without service of notice. On September 19, 1980 the Fiscal repaired to the premises in suit to execute the writ of possession. One Mrs. Elizabeth Fonseka now the second respondent, Mr.T.M.R. Gunasekera, the third respondent and attorney-at-law Mr. Daya Wettasinghe resisted the Fiscal and this was reported to Court. The appellants then sought to have themselves put into possession and the second, third and fourth respondents dealt with for contempt of court. The second and third respondents filed objections and after a hotly contested inquiry the District Judge by his order of April 6, 1982 held that the second and third respondents had resisted the Fiscal on incorrect advice given by the fourth respondent and let them off with a warning and directed reissue of the writ. One important finding of the District Judge was that the second respondent was none other than Mrs. Malcolm Perera substituted as the legal representative of the deceased judgment-debtor and not a non-existent person as asserted by the second and third respondents. On the very day on which the District Judge delivered his order the second respondent alone of

the respondents filed an application in revision in the Court of Appeal seeking to have the order set aside and at the same time moved for and obtained an order staying execution. After hearing argument the Court of Appeal set aside the orders of 6.8.80 and 6.4.82 of the District Judge and the direction to issue writ but affirmed the finding that the second respondent and Mrs. Malcolm Perera are one and the same person. In these circumstances the challenge to the identity of Mrs. Malcolm Perera must be regarded as closed.

In this factual background this appeal poses three questions:

1. Where the judgment-debtor dies before execution of decree, is notice necessary before substitution of his legal representative?
2. Should the person substituted as legal representative be noticed to show cause before execution issues?
3. Is failure to issue notice before execution issues fatal where the legal representative becomes aware of the application for execution?

It is well established that when the judgment-debtor dies before execution of decree the judgment-creditor must proceed under section 341 of the Civil Procedure Code - see the cases of *Omer vs. Fernando*(1) *Pathurupillai vs. Kandappen*(2) *Manuel Perera vs. Palaniappa Chetty*(3) and *Siriwardene vs. Kitugalla*(4). Section 341 provides that when the judgment-debtor dies before execution of decree, the decree-holder must apply for execution by petition to which the legal representative is made respondent. But neither in section 341 nor in any other section of the Civil Procedure Code is there any special procedure laid down for substitution of the legal representative. The practice and

procedure hitherto being followed is for such substitution to be made ex parte if sufficient material has been placed before the court to justify the making of such an order - see section 4 of the Civil Procedure Code. In the case of *Manuel Perera vs. Palaniappa Chetty* (supra) the judgment-creditor "moved to substitute the administrator as defendant, and writ issued against him." This was held to be a sufficient compliance with section 341 (p. 17 of the report). The substitution of the legal representative is merely a step in aid of execution. Nowhere in the Civil Procedure Code nor in the decided cases can support be found for the proposition that the proposed legal representative should be noticed to show cause why he should not be substituted. The Civil Procedure Code does not contemplate an application for substitution as distinct from an application for execution. All that is required is that the judgment-creditor file a petition moving for execution in which he names the legal representative and gives reasons which will satisfy the court that the person so named should be substituted in the room of the deceased judgment-debtor. The qualifications for appointment as legal representative are laid down in section 338(3) (b) of the Civil Procedure Code. He must be the executor or administrator or if the estate of the deceased judgment-debtor is below Rs. 20,000/- a next of kin who has adiated the inheritance. As will appear from my discussion of the next question for decision no injustice will take place by observance of the practice to effect the substitution of the legal representative ex parte. Execution, it must be borne in mind, is really against the estate of the deceased judgment-debtor and the legal representative will be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of.

When the judgment-debtor dies before execution of the decree the correct procedure then is

for the decree-holder to file a petition naming as respondent the legal representative of the deceased judgment-debtor and praying for execution to issue against such representative. In the petition itself the decree-holder should ask for substitution of the legal representative giving reasons. The court will treat the application for substitution as incidental to the application for execution and, if satisfied with the reasons, effect the substitution ex parte.

I will now turn to the second question whether the person substituted as legal representative should have notice before execution issues. At the outset it is well to remember that in execution proceedings the statutory procedures are so designed as to assist the judgment-creditor to recover the fruits of his judgment and not to afford facilities to the judgment-debtor to defeat or delay the execution of the decree of court. Hence the general principle is that notice is not required of an application for execution of a decree. The application for execution should conform to the requirements of section 224 of the Civil Procedure Code (Form 42 of the First Schedule to the Code). There is a stipulation to mention the names of the parties but no petition to which any party is named respondent is necessary.

Situations however arise from various causes when delay is occasioned as when the judgment-debtor dies before execution of decree or when the judgment-creditor himself is guilty of delay. Our Civil Procedure Code deals with such situations in a special way following the inspiration of the Indian Code. The scheme adopted by our Civil Procedure Code can be more clearly appreciated by comparing our section 341 and the related section 347 with the corresponding sections of the Indian Code of Civil Procedure, Act No.XIV of 1882 on which our Civil Procedure Code is modelled. As the text of the Indian provisions is not readily available I will reproduce them for the purposes of

comparison. Our section 341 corresponds to section 234 of the Indian Code of 1882 and section 347 to section 248 :

Section 341 C.P.C	Section 234 Indian Code of 1882
(1) If the judgment debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it, *by petition, to which the legal representative of the deceased shall be made respondent*, to execute the same against the legal representative of the deceased.	(1) If a judgment debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased.
(2) Such representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of ; and for the purpose of ascertaining such liability, the court executing the decree may on the application of the decree-holder compel the said representative to produce such accounts as it thinks fit.	(2)Such legal representative shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and for the purpose of ascertaining such liability, the court executing the decree may, *of its own motion or* on the application of the decree-holder, compel *such legal* representative to produce such accounts as it thinks fit.

(Emphasis mine showing the differences)

Perhaps I should add that the Indian Code of Civil Procedure, Act No. 5 of 1908 now in operation in India has in its section 50 adopted the old section 234 almost in toto. The only alterations are the following :

1. The word "Where" has been substituted for the word "If" at the beginning of sub-section (1).
2. The words "Where the decree is executed against such legal representative, he" have been substituted for the words "Such legal representative"at the beginning of sub-section (2).

I will now quote section 347 of our Code and its counterpart in the Indian Code of 1882 - section 248 :

Section 347 C.P.C.	Section 248 Indian Code of 1882.
In cases where there is no respondent named in the petition of application for execution, if more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor, and shall proceed thereon *as if he were originally named respondent therein*: Provided that no such service shall	The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the Court, why the decree should not be executed against him - (a) if more than one year has elapsed between the date of the decree and the application for its execution, or (b) if the enforcement

be necessary if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed or from the date of the last order against the party, against whom execution is applied for, passed on any previous application for execution.

of the decree be applied for against the legal representative of a party to the suit in which the decree was made:

Provided that no such notice shall be necessary - in consequence of more than one year having elapsed between the date of the decree and the application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be executed, or if the last order against the party against whom execution is applied for, passed on any previous application for execution, or in consequence of the application being against the legal representative of the judgement-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him. Explanation.-In this section the phrase,

"the Court," means the Court by which the decree was passed unless the decree has been sent to another Court for execution, in which case it means such other Court.

Section 248 appears in the Indian Code of 1908 as Order XXI Rule 22(1) with many differences in transposition and a new sub-rule (2). The explanation given in section 248 is dropped. It should be observed that in our section 347 there is no provision relating to applications for execution against a legal representative of a deceased judgment-debtor and even in regard to the provision for notice where one year has elapsed after the entry of the decree there is the qualification that this is necessary only "in cases where there is no respondent named in the petition of application for execution". It is only if no respondent is named and notice is thought necessary by the Legislature that a special provision for notice is included. Our Legislature has proceeded on the footing that by providing for a party to be named respondent it is impliedly providing for notice to such party. The Indian approach is different. For such situations as where a decree is one year old or where execution has to be issued against the legal representative of a deceased judgment-debtor special provision is made for notice. Both systems achieve the same result. In this connection the observations of De Kretser J in the case of Siriwardene v. Kitugalla (supra) appear very relevant:-

"It is only section 341 which deals with the execution of decrees after the death of the judgment-debtor. Section 50 of the present

Indian Code corresponds fairly closely with section 341 of our Code but there is a vital difference in that it does not require the legal representative to be made a respondent to the application. Section 50 replaced a somewhat similar provision of the old Code. It was section 248, now replaced by O.XXI R. 22 (corresponding somewhat with section 347 of our Code) which required the Court to give notice to the legal representative before allowing execution to issue. We have taken away from section 347 the part which related to legal representatives and we have added that part in substance to section 341." (pp.511, 512).

The section of the old Indian Code which the present section 50 replaced was section 234 to which reference has already been made.

Two other occasions when our Legislature has adopted the device of stipulating the naming of respondents instead of expressly providing for notice can be found in section 339 and section 763 of the Civil Procedure Code.

Our section 339 deals with applications for execution of a decree by a transferee of title to the decree. This section corresponds to section 232 of the Indian Code of 1882 (replaced with minor alterations by Order XXI Rule 16). Under both the old and new Codes in India notice to the transferor and judgment-debtor where the transfer is by assignment is expressly stipulated as an essential step prior to the issue of execution. Our section 339 requires the transferee whether the transfer is by assignment or operation of law to apply for execution of the decree " by petition, to which all the parties to the action or their representatives shall be made respondents." But if the transfer is by operation of law the transferor need not be made a respondent. What is required under this section is that the transferee should

file a petition praying for execution to issue and of course stating the grounds on which he claims to be a transferee. The parties to the action including the judgment-debtor must be named respondents to the petition and the Court after noticing them and affording them an opportunity to raise their objections if any will allow the application or reject it, - see the cases of *Latiff vs. Seneviratne*(5) and *Sirimala Veda vs. Siripala* (6). Fernando A.J. said in the latter case referring to section 339 "The principal object of the section" is "not so much to permit objections to the issue of execution but to permit challenge of the validity of the assignment." (p. 548).

So far as section 763 of our Civil Procedure Code goes its counterpart in the Indian Code of 1882 (section 546) and in the Code of 1908 (Order XLI Rule 6) is differently formulated and no useful comparison can be made. Our section 763 provides that in the case of an application being made by the judgment-creditor for execution of a decree which is appealed against the judgment-debtor shall be made respondent. In the case of *Edward vs. de Silva* (7) Soertsz A.C.J. interpreted the provision to mean that the judgment-debtor "shall be brought before the Court or shall be given the opportunity of coming before the Court by being served with a notice calling upon him to show cause, if he has any cause to show, against the application for execution." (p.345). Our Courts have repeatedly held that the purpose of making a judgment-debtor a party respondent to an application under section 763 is to enable him to show cause against it.

A comparative examination of the provisions of our Civil Procedure Code on the question of execution of decrees can leave no doubt that the provision in section 341 to make the legal representative a party respondent is there to ensure that he receives notice of the application for execution. It should be emphasised that the

notice under this section should call upon the legal representative to show cause why the decree should not be executed against him - see the Privy Council decision of *Ragunath Das vs. Sundar Das Khetri* (8) decided in connection with section 248 of the Indian Code of 1882. The notice should be to show cause against the application for execution and not to the application for substitution. In showing cause against the application for execution one of the defences open to the party noticed could be that he has been wrongly substituted as legal representative.

Now to turn to the third question. There is the highest authority for the proposition that execution without notice where notice is expressly or impliedly stipulated, is void for want of jurisdiction and not merely voidable. So Soertsz A.C.J. held in the case of *Edward vs. de Silva* (supra) and K.D. de Silva J. in *Wimalasekera vs. Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd.*(9) with reference to section 763 of the Civil Procedure Code. In *Ragunath Das vs. Sundar Das Khetri*(supra) the Privy Council held that a notice under section 248 (of the Indian Code of 1882 which corresponds generally to our section 347) is essential for the Court to clothe itself with jurisdiction to proceed to execution against the legal representative of a deceased judgment-debtor. Our local decisions on section 347 are to the same effect - see for instance the cases of *Perera vs. Novishamy* (10), *Fernando vs. Thambiraja*(11) and *Rodrigo vs. Weerakoon*(12). The same principle will apply where notice is not issued of an application for execution against the legal representative of a deceased judgment-debtor under section 341 of the Civil Procedure Code.The issue of execution without notice will be null and void for want of jurisdiction.

But a further question arises. Although notice in due form has not been issued will the execution proceedings be null and void even where the legal representative has become otherwise aware of the application for execution? Fernando A.J. in the case of Sirimala Veda v. Siripala (supra) observed that the Court will not be disposed to interfere with execution proceedings on merely technical grounds when the requirements of the statute have been substantially fulfilled. Again in the case of *Latiff vs. Seneviratne* (supra) Hearne J. (with whom Soertsz J. agreed) said that execution proceedings will not be set aside upon technical grounds when the execution has been substantially right. As Soonavala says in his treatise on *Execution Proceedings* (1958) at page 850 :-

> "The object of the rule is to give the j.d. an opportunity to show cause why the execution should not proceed, and if the j.d. is aware of the proceeding, the Court has jurisdiction to hold the sale. Consequently if though no notice is served, he appears and contests the application or if he was served with a notice under Rule 66 and was thus aware of the application pending against him, the object of the rule is achieved and the proceedings are valid."

Rule 66 refers to proclamations of sales in execution by public auction. Soonavala is here discussing Order 21 Rule 22 which provides also for notice to the legal representative of a deceased judgment-debtor before execution issues but is otherwise similar to our section 347. On the Indian Rule there is the very illuminating judgment of Rankin C.J. in the case of *Chandra Nath Bagchi vs. Nabadwip Chandra Dutt* (13). This was a case where the judgment-debtor appearing on notice under Rule 66 pleaded absence of notice under Rule 22 although he had actively participated in the

proceedings for two years. Citing another case where the facts were similar Rankin C.J. said :

> "There was a case somewhat similar to this before the High Court of Patna, namely the case of Fakhrul Islam v. Bhubaneswari Kuer (14). In that case, execution had proceeded and an appeal was taken to the High Court on the ground of absence of notice under R.22 and the High Court set aside the execution proceedings. The case went back to the executing Court and, after further proceedings, a sale was directed. Thereupon an objection was taken that, even so, no notice yet had been served under O.21, R. 22 and still the sale was bad. Dealing with that kind of objection, the learned Judge Kulwant Sahay,J., said :-
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> 'All that O.21, R.22 requires is that an opportunity should be given to the judgment-debtors against whom the execution is taken out more than a year after the decree to show cause why execution should not proceed.'

In my judgment, that is the substance and the meaning of the requirement." (pp.477, 478).
And a little later on in his judgment Rankin C.J. after affirming the principle that there would be no jurisdiction without notice at least in substance to the party entitled to notice, made the following trenchant remarks :-

> "It appears to me to be merely piling unreason upon technicality to hold upon the circumstances of this case that it is open to the judgment-debtors on these grounds to object to the jurisdiction of the Court because they have not got a formal notice to do something, namely to dispute the execution of the decree when in point of fact they were busy disputing

about it in all the Courts for the best part of the last two years. I decline to push the doctrine so far as that and it seems to me that the execution should proceed." (p.478)

The same reasoning will apply to execution proceedings under section 341 of our Civil Procedure Code. In the instant case no notice of the application for execution was issued or served on the legal representative of the deceased judgment-debtor before writ was first issued on August 6, 1980. If Mrs. Malcolm Perera and Mrs. Elizabeth Fonseka are one and the same person as they have been held to be, then the second respondent can rightly complain that she had no notice of the application for execution and the issue of writ was bad. The resistance to the Fiscal offered by the second respondent cannot then be visited with penal consequences.

I might add here that if Mrs. Elizabeth Fonseka is not the legal representative of the deceased judgment-debtor, then she is not a person entitled to notice of the application for execution. The order to issue writ of execution as against her would not then be void. As Drieberg A.J. said in *Kannangara vs. Peries* (15) at page 80 :-

"Notice is required in the interests of parties against whom execution is sought, and the absence of notice makes the execution proceedings void as against them and not merely voidable, but I do not think they can be regarded as void as against persons not parties to the action *and who were not entitled to notice.*" (emphasis mine).

The second respondent received notice in connection with the proceedings taken against her for resisting the Fiscal. At the inquiry that

ensued she denied she was the same person as Mrs. Malcolm Perera and challenged the validity of the substitution and issue of writ. The question of her identity has been resolved against her. She made full use of the opportunity given to her to oppose the issue of writ of execution. To insist on fresh notice of the application for execution being issued would be tantamount to giving the second respondent a second bite at the same cherry. The second order for the reissue of writ was made after the second respondent had been afforded every opportunity of opposing the application for execution and the substitution. She made full use of this opportunity and on the facts has been worsted. To put it euphemistically she has in addition no recognisable right to be in possession of the premises in suit.

Therefore the first order to issue writ made on 6.8.1980 was bad and I uphold the decision of the Court of Appeal in regard to this order. My conclusion in regard to the second order to issue writ made on 6.4.1982 is that it is unexceptionable and valid. I allow the appeal in regard to this second order to issue writ of execution. I direct that writ of execution as ordered on 6.4.1982 by the District Judge do issue. In order to bring the name of the respondent into line with the findings of the District Judge and the Court of Appeal I direct that the name of the respondent be amended to read as Mrs. Malcolm Perera alias Mrs. Elizabeth Fonseka. In view of the fact that all these protracted proceedings are attributable to the failure to issue notice on the first occasion, I direct that the parties bear their own costs both here and in the Courts below.

Appeal dismissed re.order of 6.8.1980.
Appeal allowed re.order of 6.4.1982.