

DARLEY BUTLER & Co. Ltd
v
ANOOS AND OTHERS

COURT OF APPEAL.
CHANDRA EKANAYAKE, J.
GOONERATNE, J.
CA 506/95 (F)
DC COLOMBO 15527/MB
September 10, 2007

Civil Procedure Code -Defendants sued jointly and separately – One defendant dead as at the date of institution of action – Could the suit be proceeded against the other – Should there be substitution? Action nullity? Caram non iudice – Civil Procedure Code – Section 18 – Section 14A – Amendment 6 of 1990 – Jurisdiction?

The plaintiff-appellant instituted mortgage bond action seeking judgment against the 1-4 defendants-respondents jointly and severally in a certain sum with interest. The 2nd defendant in his answer contended that, due to the death of the 4th defendant prior to the institution of the action, the suit/plaint become invalid in law and is null and void and action cannot be maintained. The District Judge dismissed the action against the 1-3 defendants.

Held:

- (1) When the defendants were sued on their joint and several liability action has to proceed against the other defendants but no substitution can be affected in the room of the deceased 4th defendant who was dead at the date of institution of the action.

Per Chandra Ekanayake, J.

"By substitution, one person is placed under another to do something. It is clear that to substitute a legal representative another person should have existed – in the instant case when the 4th defendant was dead as at the date of institution of action no substitution could be effected".

- (2) The death of the 4th defendant prior to the institution of the action does not render the action against the others a nullity. Action could be proceeded with against the other defendants – but not against the legal representative of the 4th defendant.

(3) Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it. Jurisdiction divides itself into three heads. In order to the validity of the judgment – the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. If the Court has no jurisdiction it is of no consequence that the proceedings had been formally conducted for they are *coram non iudice*.

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to-

- 1) *Dassanayake v People's Bank and others* CALA 169/96.
- 2) *Pratap Chand Meheta v Smt. Krishan Devi Meheta* 1988 Delhi 267,271.
- 3) *Nevandra v D.A. Gandhi* AIR Bom. 589.
- 4) *Ittapana v Hemawathie* 1981 1 Sri LR 483.

Nigel Hatch PC with *K. Geekiyanage* for plaintiff-appellant.
Hemasiri Withanachchi for 2nd defendant-respondent.

Cur.adv. vult

November 2, 2007

CHANDRA EKANAYAKE, J.

The plaintiff-appellant (hereinafter sometimes referred to as the plaintiff) had instituted the action bearing No. 15527/MB seeking *inter alia*, judgment and decree against the 1st to 4th defendant-respondents (hereinafter sometimes referred to as the 1st to 4th defendants) jointly and severally in a sum of Rs. 350,852.89 with interest thereon as mentioned in sub-paragraph(a) of the prayer to the plaint, a declaration that the land and premises morefully described in the scheduled to the plaint is bound and executable and the other reliefs sought by sub-paragraphs (d) to (j) of the prayer to the plaint.

The 2nd defendant in his answer dated 09.10.1992 whilst denying the averments in the plaint had taken up the position that, due to the death of the 4th defendant prior to the institution of the action, the suit and/or plaint becomes invalid in law or null and void and therefore the action cannot be had and maintained. In the aforesaid premises 2nd defendant had sought a dismissal of the action of the plaintiff.

When the trial commenced against the 2nd defendant in the absence of any admissions between the parties, the issues 1 to 14 and 15 to 18 had been raised by the plaintiff and the 2nd defendant respectively. Issues 15(a) and (b) of the 2nd defendant being considered as preliminary issues those had been tried by the learned trial Judge first. By the order dated 22.08.1995 the learned Judge having answered those issues 15(a) and 15(b) in favour of the said defendant had proceeded to dismiss the action of the plaintiff. This is the judgment which has been impugned by this appeal.

At the hearing of this Appeal this Court had the benefit of hearing oral submissions of Counsel who represented both parties.

It was strenuously urged by the Counsel for the plaintiff that as this was an instance where the 4th defendant being one of the defendants sued in this action jointly and severally with the other defendants and he was dead as at the date of institution of the action, the suit can be proceeded with against the other defendants and legal representatives of the deceased 2nd defendant after substitution. In view of this contention an unreported decision of this Court i.e. – *Dassanayaka v People's Bank and 3 others*⁽¹⁾ was cited.

Situation would have been entirely different if it was a suit against a sole defendant since the suit filed against a sole defendant who was dead is a nullity. In law of Civil Procedure – 8th Edition – Part - 2 at page 1162 – Sarkar states thus -

"The suit filed against a sole defendant who was dead is a nullity and the plaintiff cannot be allowed subsequently to amend the suit and substitute the legal representatives in place of the defendant. [Pratap Chand Mehta v Smt. Krishna Devi Mehta]⁽²⁾."

In this case it had been brought to the notice of the District Court that as at the date of institution of the action the 4th defendant had been dead. Here also the 4th defendant was a person sued jointly and severally with the other defendants to obtain reliefs sought by the prayer to the plaint. It is common ground that the said defendant was dead as at the date of the action (20.8.1987). This position was supported by the Death Certificate subsequently

tendered to the District Court after trial commenced. As evidenced by the death certificate of the 4th defendant, the date of death is 18.12.1986, which is definitely after the institution of the action.

What needs consideration now is the contention of the 2nd defendant's Counsel that in view of the Journal Entry dated 03.01.1989 since Fiscal had reported that the 4th defendant was dead by that time, the 2nd defendant had the full knowledge of the death of the 4th defendant at the time of filing the answer. Whether the 2nd defendant had the knowledge of the death of the 4th defendant or not is immaterial since it is undisputed that the 4th defendant was dead as at the time of institution of the action. This Court has to be mindful of the position that case at hand is a suit which was filed not against a sole defendant who was dead as at the date of institution of the suit. Therefore what has to be determined is since this being a case where the 4th defendant was sued jointly and severally with the other defendants on their joint and several liability and the 4th defendant was only one of the 4 defendants, whether the suit could proceed against the other defendants and the legal representatives of the deceased 4th defendant after due substitution. On the other hand proceedings of 30.09.94 makes it amply clear that the case had being fixed for trial only against the 2nd defendant. Thus trial commenced only against that defendant. Further it is undisputed that on that day issues were raised on behalf of that defendant namely the 2nd defendant. As such it is not proper to have raised an issue such as 15(b) which being an issue covering the suit against the other defendants also. However issue No. 15(b) had been allowed by the trial Judge.

Since this is a case where the defendants were sued on their joint and several liability as already observed, action has to proceed against the other defendants, but no substitution can be effected in the room of the deceased 4th defendant who was dead at the date of institution of the suit. In this regard the meaning of the word '*substitute*' needs consideration. According to Stroud's Judicial Dictionary of words and Phrases (6th Edition) – Vol. 3 at page 2557.

"SUBSTITUTE. – "Substitute, '*substitutus*', one placed under another to transact or do some business" "

By substitution, one person is placed under another to do something So it is amply clear that to substitute a legal representative another person should have existed. In the present case when the 4th defendant was dead as at the date of institution of the suit, there was no person in existence/alive. So no substitution could be effected. Substitution could be effected only in the room of or on behalf of some one who was alive at the time of institution of the suit. So this situation has to be distinguished from an instance such as bringing on record the heirs of a deceased defendant. Probably that has to be considered under an application made under Section 18 of the Civil Procedure Code. In this context it would be appropriate to consider the decision in *Nevandra v D.H. Gandhi*³⁾, which being a case dealt with an application to bring on the record under O.1.R. 10 of Civil Procedure Code 1908. Further it appears that the relevant clause of the said rule being clause (2) which appears to be identical with the provisions of Section 18 of our Code. In the above case at 592 it was observed as follows:-

In the present case it is the admitted position that some of the defendants are alive and it is not as if defendant No. 1 was the only real defendant in the suit and in such a case, in my view, it is the settled position as shown by the decisions referred to earlier, that the mere fact that one of the defendants was dead at the time of the institution of the suit does not render the suit a total nullity so that the heirs of the deceased defendant cannot be brought on record at all."

Having observed as above the application for bringing the heirs of the deceased defendant No. 1 (in that case) was allowed.

A careful review of the above decisions would demonstrate that when the defendant who was dead as at the institution of the suit is not the sole defendant still no substitution can be effected in his room, but the action could proceed against other defendants. However one has to be mindful of the position that an application made to bring the legal heirs on record by invoking remedies to wit – under Section 18 or Section 14(A) of the Civil Procedure Code (amended by Act No. 6 of 1990) could be considered.

However in the case at hand, the learned Trial Judge by his judgment had proceeded to answer issues 15(2) and 15(b) of the 2nd defendant in the affirmative. The above 2 issues are reproduced below:

15(a) මෙම නඩුව පැවරීමට පෙර පැමිණිල්ලේ නම් සඳහන් 4වන විත්තිකරු මියගියේද?

(b) එසේ නම් මෙම නඩුව මුල් සිටම නිතිමයක් බලඥාන සහ යෝදාධරණය?

Obviously the answer to issue 15(a) has to be – Yes, because it is common ground that the death of the 4th defendant had occurred prior to the institution of the action and further same was well supported by the death certificate of the 4th defendant already filed of record.

With regard to issue 15(b) the death of the 4th defendant prior to the institution of the action does not render the action against the others a nullity. With regard to validity of a judgment the observation of the Supreme Court in *Ittapana v Hemawathie*⁽⁴⁾ would be of importance here. *Per* Sharvananda, J. (as he then was) at 483.

"..... Therefore, a Court is always clothed with jurisdiction to see whether it has jurisdiction to try the cause submitted to it.

Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit; upon a defendant who has never been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are *coram non jure*. A judgment entered by such Court is void and a mere nullity (Black on Judgments – P.261)"

In the present case there was no 4th defendant in existence/alive as at the date of the institution. So in the light of the above principle of law, in any event the District Court was not

clothed with jurisdiction to try the cause submitted to it with regard to the 4th defendant.

From the very inception the action was instituted against several defendants on their joint and several liability. Therefore action could be proceeded with against the other defendants (1 to 3 defendants). In view of the above, answer given to issue 15(b) is erroneous and it should have been answered as – "No."

For the above reasons my considered view is that the learned Trial Judge had erred when concluding that plaintiff's action was liable to be dismissed (which means action against 1 to 3 defendants).

For the reasons stated as above I am unable to agree with the submissions of the learned Presidents Counsel for the plaintiff that the suit can be proceeded with against the other defendants and the legal representatives of the deceased 4th defendant after due substitution. Definitely suit can proceed against the other defendants (1 to 3).

In the light of the above this becomes a fit instance to set aside the aforesaid judgment and same is hereby set aside. I would accordingly allow the appeal and the learned District Judge is directed to proceed with the action according to law against the other defendants. However no order is made with regard to costs of this appeal.

Registrar of this Court is directed to forward the original record in D.C. Colombo Case No. 15527/MB to the Registrar of the respective District Court with a copy of this judgment forthwith.

GOONERATNE, J. – I agree.

Appeal allowed.

District Judge directed to proceed against the 1 - 3 defendants.