

KARUNAWATHIE
v
JABIR AND OTHERS

COURT OF APPEAL
DISSANAYAKE, J.
SOMAWANSA, J.
CA 573/97(F)
D.C. MT. LAVINIA 123/94 RE
AUGUST 27, 2003
OCTOBER 27, 2003

Civil Procedure Code, sections 27(2), 403 and 760(A) – Defendant-appellant dead – Abatement of appeal – Application for relisting – Locus standi-Rent Act, No. 7 of 1972, sections 36 and 36(2)(b) – Applicability – Law applicable when the appellant dies.

The petitioner filed an application to set aside the order abating the appeal and for an order to substitute the petitioner in the room of the deceased defendant-appellant and to relist the appeal.

The plaintiff-respondent contended that the defendant-appellant who is the wife of the deceased has no *locus standi* on the basis that the petitioner cannot succeed to tenancy in terms of section 36 of the Rent Act as the subject matter is a business premises.

Held:

- (1) While section 36 of the Rent Act lays down the substantive law with regard to succession to a tenancy upon the death of a tenant, it does not refer to continuance of an appeal upon the death of a party to an action.
- (2) The law applicable in a situation where the appellant dies is set out in section 769(A) of the Civil Procedure Code.
- (3) The petitioner being the legal wife and lawful heir of the deceased defendant-appellant is *prima facie* entitled in law to make an application for the substitution of herself in the room of the deceased defendant-appellant (husband) and is a fit and proper person to be substituted.
- (4) When the defendant-appellant dies the registered attorney-at-law has no capacity to act any more in the case.

APPLICATION for relisting of the appeal and substitution.

Case referred to:

Punchihewa v Abeywardane 1999 1 Sri LR 67 (distinguished)

Viraj Premasinghe for petitioner.

Riza Muzni for plaintiff-respondent.

Cur.adv.vult.

December 12, 2003.

SOMAWANSA, J.

The petitioner filed the instant application to set aside the order made by this Court on 07.05.2002 abating the appeal of the 1st defendant-appellant and for an order to substitute the petitioner in the room of the 1st defendant-appellant and to re-list the appeal for argument. When this application was supported on 11.07.2003 by the counsel for the petitioner the counsel for the plaintiff-respondent-respondent raised a preliminary objection that the petitioner who is the wife of the 1st defendant-appellant has no *locus standi* to make this application on the basis that the petitioner cannot succeed to the tenancy in terms of section 36 of the Rent Act No. 07 of 1972 as the subject matter is a business premises.

The relevant facts are the plaintiff-respondent instituted the instant action on the basis that the 1st defendant-appellant who was admittedly the tenant of the premises in suit had unlawfully and wrongfully sub-let the said premises to the 2nd to 5th defendants-respondents without the prior written sanction of the plaintiff-respondent. At the conclusion of the trial, the learned District Judge by his judgment dated 28.08.1997 held with the plaintiff-respondent-respondent and the 1st defendant-appellant appealed against the said judgment. While the appeal was pending on or about 30.01.2002 1st defendant-appellant died and

the plaintiff-respondent-respondent filed a motion in January 2002 and drew the attention of this Court to the fact that the 1st defendant-appellant was dead.

On 08.02.2002 this Court issued notice on the registered attorney-at-law of the 1st defendant-appellant on record. According to the minute dated 05.03.2002 the said notice was returned undelivered and as per minute dated 07.05.2002 the appeal was abated. One year later in May 2003 the petitioner had made the 30 instant application to substitute the petitioner in the room of the deceased 1st defendant-appellant and to re-list the appeal. When this application was supported by the counsel for the petitioner the said objection was taken by the counsel for the plaintiff-respondent-respondent and the parties agreed to resolve the matter by way of written submissions.

It is submitted by the counsel for the petitioner that the order abating this appeal was made at the instance of an application made by the plaintiff-respondent-respondent to this Court informing of the death of the 1st defendant-appellant and not in the ordinary 40 course of the appeal coming up for hearing and that the notices had been issued on the previous attorney-at-law who's proxy had been revoked in the District Court on 22.09.2002 and a new proxy of Mrs. Arulpragasam filed on 22.09.1998.

It is contended by the counsel for the plaintiff-respondent-respondent that the revocation of the proxy of the earlier attorney-at-law for the 1st defendant-appellant and the appointment of the new registered attorney-at-law had been done in the original Court and not in this Court. Hence the notice issued by the registry of this Court had gone on the registered attorney-at-law whose name 50 appeared in this Court and that the lapse was clearly on the part of the deceased 1st defendant-appellant who had failed to file the new proxy in the registry of this Court. Be that as it may, irrespective of whether the deceased 1st defendant-appellant revoked the proxy of his registered attorney-at-law and appointed a new registered attorney-at-law or not in terms of section 27(2) of the Civil Procedure Code when the 1st defendant-appellant died the registered Attorney-at-law had no capacity to act any more in this case. In the circumstances, it was submitted by counsel for the

plaintiff-respondent-respondent that in view of the decision in *Punchihewa v Abeywardena*⁽¹⁾ that notice of the entering of an order of abatement must be given to a party to the action and not to an outsider and as the petitioner was not a party to the action she was not entitled to notice. However I am unable to agree with this submission for in that case the Supreme Court considered the position where a case was abated where both parties were still alive and the order for abatement entered by court *ex mero motu* without notice to the plaintiff or his registered attorney-at-law. The position where the party prosecuting the matter dies has not been considered in that case and hence the said case has no application to the instant action.

Counsel for the plaintiff-respondent-respondent also contends that the petitioner on her own showing has no status to make the present application either to have the abatement order vacated or to have herself substituted in the room of the 1st defendant-appellant as the abatement order could be vacated only in terms of section 403 of the Civil Procedure Code by a spouse or child of the deceased appellant who fulfils the conditions specified in section 36(2)(b) of the Rent Act, as amended and this *locus standi* cannot be conferred on an individual whom the relevant statute, in the instant case the Rent Act, refuses to recognize, due to the non fulfillment of the conditions specified therein and the application of the petitioner has to fail at the threshold itself. Here again, I am unable to agree with the submission of the counsel for the plaintiff-respondent-respondent. For it is not substantive law that would be applicable to the issue at hand but procedural law. The substantive law lays down the rights and duties of parties and matters that give rise to causes of action while the procedural law sets out the procedure that should be adopted and followed by an aggrieved party to seek redress from the Court. The provisions of the Civil Procedure Code lays down the procedure to be adopted and matters incidental thereto, as for instance the death of a party pending the action.

It is to be seen that the instant appeal is from the judgment of the learned District Judge of Mt. Lavinia dated 28.08.1997. In the instant

appeal the matter for determination or the scope of the appeal is whether the learned District Judge has come to a correct finding. In the instant inquiry what we have to determine is whether the petitioner has the capacity to be in the room of the 1st defendant-appellant, being his legal wife solely for the purpose of continuance of the present appeal. It appears that matters raised in the written submissions tendered on behalf of the plaintiff-respondent-respondent invites us to inquire into matters that had taken place even after the judgment was delivered and also to apply substantive law and determine the rights of parties at this stage which is manifestly beyond the scope of the present inquiry or the appeal.

It is to be noted that there is a distinct difference between substitution and succession. While section 36 of the Rent Act lays down the substantive law with regard to succession to a tenancy upon the death of a party to an action, the marginal note clearly indicates that this section deals with 'continuance of tenancy upon the death of tenant' which in fact sets out the mode of succession and also prescribes a cause of action to the land to treat the occupants of rental premises as trespassers and to evict them if they do not qualify to succeed to the tenancy as set out therein.

It is to be seen that the law applicable in a situation where the appellant dies is set out in section 760(A) of the Civil Procedure Code. The said section reads as follows:

"Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid".

It is common ground that the 1st defendant-appellant died on or about 30.10.2001 leaving the petitioner and the minor daughter as the 1st defendant-appellant's heirs. The fact that the petitioner was the legal wife of the petitioner is borne out by the Marriage

Certificate marked P1. It appears that the petitioner has made this application in terms of section 760(A) of the Civil Procedure Code read with the provisions of the Supreme Court Rules to substitute the petitioner in the room of the deceased 1st defendant-appellant in this appeal for the purpose of prosecuting this appeal.

In the circumstances I would over-rule the objections raised by the plaintiff-respondent-respondent and hold that the petitioner¹⁴⁰ being the legal wife and lawful heir of the deceased 1st defendant-appellant is *prima facie* entitled in law to make this application for the substitution of herself in the room of the deceased 1st defendant-appellant and that she is a fit and proper person to be substituted in the room of the defendant-appellant. Accordingly the application for substitution is allowed and the petitioner is substituted in the room of the 1st defendant-appellant as 1A Substitute defendant-appellant. The substitution is made solely for the purpose of prosecuting this appeal. The Registrar is directed to amend the caption accordingly. The 1A substituted defendant-¹⁵⁰ appellant is entitled to costs of this inquiry fixed at Rs. 5000/-.

DISSANAYAKE, J. - I agree.

Application for substitution allowed.