

THE MAHAKANDE HOUSING COMPANY LTD.

v.

DUHILAMOMAL AND OTHERS

COURT OF APPEAL.

SOZA, J. AND SENEVIRATNE, J.

C.A./L.A. 8/78—D. C. COLOMBO 2408/RE.

SEPTEMBER 10, 1981.

Partnership—Action against three persons carrying on business in partnership—Death of a defendant pending action—Clause in partnership deed that death of partner shall not dissolve partnership—Whether right to sue survives against remaining defendants—Civil Procedure Code, sections 15, 393, 398.

The plaintiff-company sued three defendants who were carrying on business in partnership and 1st defendant died pending the action. On an application by the plaintiff under the provisions of section 393 of the Civil Procedure Code for an order directing that the action do proceed against the surviving defendants, namely 2nd and 3rd defendants, the Court on objection taken by these defendants made order refusing the plaintiff's application. It directed the plaintiff to take steps to substitute the legal representative of the deceased 1st defendant under section 398(1) in order to proceed with the action. The plaintiff applied for and obtained leave to appeal to the Court of Appeal from this order.

Held

(1) The use of the word "alone" in section 393 of the Civil Procedure Code is merely for the purpose of indicating that the survivor should be entitled to sue or to be sued independently without any other party being joined and does not mean that no one other than the survivor should be entitled to sue or to be sued. The question in the present case was whether the plaintiff has a cause of action against the surviving defendants alone.

(2) As the cause of action in this case was based on a contract of tenancy between the plaintiff and the three partners of a firm, who were the defendants, the obligations on the contract are joint and on the death of one, the liability to be sued survives against the remaining defendants. The provisions of the partnership deed in this case provide that the death of a partner shall not dissolve the partnership between the surviving partners and the partnership will be deemed accordingly to continue as between the remaining partners. Although there was provision for the admission of the deceased partner's widow as a partner, the surviving partners will carry on the partnership until then, in view of the provisions of the said deed. A cause of action therefore survives against the 2nd and 3rd defendants alone and the provisions of section 393 of the Civil Procedure Code will therefore apply. In such a situation the Court must grant permission to proceed against the surviving defendants and the order appealed from should therefore be set aside.

Cases referred to

- (1) *Sankru Mahto v. Bhoju Mahato, A.I.R., (1936) Patna 548.*
- (2) *Maung Bynung v. Mg. Shew Baw, A.I.R., (1924) Rangoon 376.*
- (3) *Gajanand v. Sardarmal, A.I.R., (1961) Rajasthan 223.*
- (4) *Lilaram v. Tikamdas, A.I.R., (1929) Sind 225.*

- (5) *Bisheh Das V. Ram Labhaya, A.I.R., (1916) Lahore 133 (2).*
- (6) *Kerrdall v. Hamilton, (1879) 4 App. Cas. 504; 41 L.T. 418; 48 L.J.Q.B. 705.*
- (7) *Bishop v. Church, (1751) 2 Ves. Sen. 371; 28 E.R. 238.*
- (8) *Burn v. Burn, (1798) 3 Ves. 573; 30 E.R. 1162.*
- (9) *Beresford v. Browning, (1875) 20 Eq. 564; 24 W.R. 120.*
- (10) *Re Hodgson, (1885) 31 Ch. D. 177; 55 L.J. Ch. 241; 54 L.T. 222.*
- (11) *Adamalay & Co. v. Asiya Umma, (1924) 2 Times of Cey. L.R. 223.*

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with C. Ranganathan, Q.C., and Miss P. Seneviratne, for the plaintiff-appellant.

H. L. de Silva, with M. Devasagayam, for the 2nd and 3rd defendants-respondents.

Cur. adv. vult.

September 18, 1981.

SOZA, J.

In this case the plaintiff a housing company sued the present 2nd and 3rd respondents naming them as 2nd and 3rd defendants along with one Assudamal Duhilamomal named as the 1st defendant to the action. When the case was pending the 1st defendant died and the plaintiff then applied under the provisions of section 393 of the Civil Procedure Code for an order of court directing that the action do proceed against the surviving defendants, namely, the present 2nd and 3rd defendant-respondents. The 2nd and 3rd defendant-respondents objected to this application and the Court made order on 14.9.77 refusing the plaintiff's application and directing the plaintiff to take steps under section 398(1) of the Civil Procedure Code for the substitution of a legal representative of the deceased 1st defendant for the purpose of proceeding on with the action. From this order the plaintiff appeals having earlier obtained leave to appeal.

The present dispute must be resolved by interpreting section 393 of the Civil Procedure Code. According to this section if there is more than one defendant and any one of them dies during the pendency of the suit and if the right to sue on the cause of action survives against the surviving defendant or defendants alone the court shall on application being made by way of summary procedure make an order to the effect that the action do proceed against the surviving defendant or defendants. The question then is does the cause of action survive against the surviving defendants alone. Much of the argument that was advanced on behalf of the 2nd and 3rd defendants-respondents revolves round the rights of

succession to the dead defendant. The question, as I see it, should be resolved not so much by considering the rights of succession to the dead defendant but rather by considering whether the cause of action survives, in other words, by considering whether the cause of action as formulated in the suit is so affected by the death of the deceased defendant that it cannot be prosecuted against the surviving defendants alone. Our section 393 was borrowed from section 362 of the old Indian Procedure Code No. XIV of 1882. In the Indian Code of Civil Procedure (1908) the parallel provision is Order 22 Rule 2 which reads as follows:

“Where there are more plaintiffs or defendants than one, and any of them dies, and where the right to sue survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants”.

It will be seen that the Indian provision and ours are essentially similar. The Indian provision has been analysed in several cases. In the case of *Sankru Mahto v. Bhoju Mahato* (1) Mohamed Noor, J. (with whom Macpherson, J. agreed) formulated the test that should be applied very succinctly at page 549:

“The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiff can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively”.

The language of section 393 of our Civil Procedure Code justifies the adoption of the same test. No doubt the word ‘alone’ is there in this section for the sake of emphasis. The meaning sought to be achieved by this word ‘alone’ is that the survivor if a plaintiff should be entitled to sue independently without the addition of any other party or if a defendant be liable to be sued independently without any other party being joined. It does not mean that none else than the survivor should be entitled to sue or be liable to be sued. If authority is needed for this interpretation it will be found in the cases of *Maung Byaung v. Mg. Shew Baw* (2) and *Gajanand v. Sardarmal* (3). It may be added that the word ‘survive’ so far as it concerns the parties to the suit is not used in

section 393 of the Civil Procedure Code in any technical sense, but in the ordinary sense of 'outlive'—*Lilaram v. Tikamdas* (4).

In the case before us the question is whether the plaintiff has a cause of action against the surviving defendants alone. It must be remembered that the plaintiff is dominus litis. By virtue of section 15 of the Civil Procedure Code he may at his option join as parties to the same action all or any of the persons severally or jointly and severally liable. In a suit founded upon joint and several liability the right to sue survives against the survivor where of the array of defendants one dies. Thus where in a partnership under Indian Law one of the partners dies before the institution of the suit the remaining partners can be sued. Hence what difference would it make if the suit was instituted against all the partners and one of them died when the action was pending? The suit can go on against the remaining partners—see the observations of Bhandari J. in *Gajinand v. Sardarmal* (*supra*) at p. 227 (col. 1). In the case of *Bishen Das v. Ram Labhaya* (5) it was held that the liability of joint tortfeasors is joint and several and consequently on the death of one the cause of action survives against the other. The same can be said of the liability of joint-contractors and joint trustees in breach of their trust. A fortiori the principle will apply where the liability is joint only.

The case we have before us concerns a partnership. By section 3 of the Civil Law Ordinance (Cap. 79) which deals with the introduction of the law of England into Sri Lanka it is stipulated that the law to be administered regarding all questions or issues which have to be decided in Ceylon (as Sri Lanka was then known) from the date on which the Ordinance came into operation, that is, 1st July, 1853, with respect to the law of partnerships, should be the same as would be administered in England in a like case, at the corresponding period, if such question or issue had arisen or had to be decided in England unless other provision has been enacted to be operative. We do have a Partnership Ordinance (Cap. 83) in Sri Lanka which is mainly concerned with providing that certain classes of persons should not be regarded as partners. It does not affect the provisions of section 3 of the Civil Law Ordinance that the law of partnership obtaining in Sri Lanka is the English law.

The law of England on partnerships is to be found mainly in the Partnership Act of 1890 of that country. The liability of

partners for debts and obligations arising in contractu and for wrongs ex delicto is stipulated to be joint by sections 9 and 12 respectively of this Act. But tortious liability can be several under the circumstances set out in sections 10 and 11 of the Act but these do not arise for consideration at this stage and need not detain us. In respect of debts and obligations ex contractu the estate of a deceased partner can by the provisions of s. 9 be severally liable in the due course of administration but only so far as they remain unsatisfied and subject to the prior payment of his separate debts. The principle that every partner in a firm is liable jointly with the other partners for debts and obligations arising in contractu became established after the decision of the House of Lords in the case of *Kendall v. Hamilton* (6). At the same time by a long series of cases notably *Bishop v. Church* (7), *Burn v. Burn* (8), *Beresford v. Browning* (9) and *Re Hodgson* (10), which are in no way affected by *Kendall v. Hamilton* it became accepted that a creditor of a firm who sues the surviving partners and recovers judgment against them can yet obtain payment of his demand out of the assets of a deceased member of the firm—see Lindley on Partnership 12th Ed. (1962) pp. 237 to 239. It is these principles that are embodied in section 9 of the English Partnership Act, 1890 which runs as follows:

“Every partner in a firm is liable jointly with the other partners, and in Scotland severally also, for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject in England or Ireland to the prior payment of his separate debts.”

In the instant case the cause of action is based on a contract of tenancy between the plaintiff and the three partners of the firm of W. Lalchand & Co. The obligations on the contract are joint and accordingly the liability to be sued on the death of one of the partners survives. Further the partnership deed No. 111 of 14.11.1955 marked X annexed to the affidavit of 4.5.72 of the 2nd and 3rd defendants puts matters beyond controversy. In clause 15 of annex X it is provided that the death or retirement of any partner shall not dissolve the partnership between the surviving or remaining partners. The general law is that on the death of one of several partners the partnership stands dissolved—see the case of *Adamalay & Co. v. Asiya Umma* (11). But it is always open

to the partners to have their own agreements regarding the continuance of the partnership upon the death of one of the partners. Hence by a valid stipulation in clause 15 of Deed X it is provided that if one partner dies the partnership will be deemed to continue as between the remaining partners. By clause 17 of the same document in the event of the death of the 1st defendant the surviving defendants were obliged to admit his widow as a partner. Until the admission of the 1st defendant's widow as a partner, and we are not told that she has been so admitted, the surviving partners will carry on the partnership in view of clause 15. In the written submissions which have been filed on behalf of the 2nd and 3rd respondents it is stated that these premises were occupied for the purpose of carrying on the partnership business—see the undated submissions of the 2nd and 3rd respondents appearing at folio page 90 of the original record. It is here stated that the tenancy of the said premises has been treated both by the plaintiff and the tenants as an asset of the partnership business and it was submitted that the tenancy of the premises is in the law an asset of the partnership business.

In this state of the facts before this Court it is clear that the partnership is today being carried on between the surviving partners, that is, the 2nd and 3rd defendants alone in accordance with clause 15 of the deed of partnership marked X. The cause of action therefore survives against the 2nd and 3rd defendants alone.

To my mind section 2(4) and section 36 of the Rent Act, No. 7 of 1972, become relevant only in a case when the 1st defendant's heirs-at-law so far as the contract of tenancy goes have to be determined. For the matter before us these provisions are irrelevant, and need not be discussed. However this is not to say that I agree with the analysis of these provisions by the learned trial Judge.

The plaintiff's application to proceed against the 2nd and 3rd defendants on the basis of the cause of action surviving as against the 2nd and 3rd defendants alone is entitled to succeed. In this situation it is obligatory on the court to grant permission to the plaintiff to proceed against the surviving defendants. We therefore allow this appeal. We set aside the order appealed from and make

order that the action do proceed against the surviving 2nd and 3rd defendants. The 2nd and 3rd defendants will pay the costs of this appeal to the plaintiff.

SENEVIRATNE, J.—I agree.

Appeal allowed.