

CHANDANA HEWAVITHARANE
vs.
URBAN DEVELOPMENT AUTHORITY AND ANOTHER

COURT OF APPEAL
WIMALACHANDRA J.
C. A. NO. 1490/2003(REV.)
D.C. COLOMBO 6209/SPL
DECEMBER 3, 20, 2004
JANUARY 31, 2005

Civil Procedure Code - Section 395 - 760(A) - Substitution in the Court of Appeal - Supreme Court Rules - Proper person-is it the Legal Representative? Executor - de-son tort?-Does the cause of action survive to the heirs? - Lex Aquilla - Patrimonial loss - Constitution Article 136

The Plaintiff Petitioner sought to revise the Order made by the trial Judge, where he had dismissed the Plaintiff's action, while the application in Revision was pending the original Plaintiff died and the son filed papers to be substituted. The Respondent objected to the application on the ground that -

- (1) the party proposed is not the legal Representative;
- (2) cause of action does not survive to his heirs.

Held:

- (i) The procedure to be followed where at any time after the lodging of an appeal in any civil action the death of a party to the appeal occurs, is spelt out in Section 760A of the Civil Procedure Code;
- (ii) Section 760(A) gives the Court of Appeal a discretion to determine, who in the opinion of the Court, is the proper person to be substituted. The Court may exercise its discretion in the manner provided in the Rules made by the Supreme Court.
- (iii) Section 760A should be read in conjunction with Supreme Court Rule 38, and the proper person should be the legal representative and by judicial interpretation includes 'an executor de son tort - in any event, he has obtained Letters of Administration while the Revision Application was pending.

The original Plaintiff filed action against the Defendants to recover a certain sum of money as damages for the demolition of the Petitioner's business premises. The Plaintiff had contended that, as a result of the demolition of the Business premises his income from the business was lost along with his property which was lying at the premises. Thereby the value of his estate diminished causing patrimonial loss.

Held further:

- (ii) If the business had continued it would have devolved on his heirs, therefore the heirs of the Plaintiff have a right to obtain damages from the Defendants.

'Where the wrongful loss has caused patrimonial loss and comes within the principles of *lex aquilia*, the action does not lapse with the death of the Plaintiff before *litis contestatio*, but enures to the benefit of the heirs.'

- (iii) This is not an action to establish the personal Rights of the Plaintiff.

In the matter of an Application for substitution under Section 760A.

Cases referred to:

1. *Dheerana Thero vs. Ratnasara Thero* - 60 NLR 7
2. *Ramsarup Das vs. Ram ashwar Das* - 1950 AIR (Patna) 184
3. *Fernando vs. Livera* - 29 NLR 246

I. S.de Silva for Plaintiff Petitioner

Vikum de Abrew, S. C. for 1st Defendant-Respondent.

Ms. M. de. Silva for 2nd Defendant Respondent.

cur. adv. vult.

March 4, 2005

WIMALACHANDRA J.

The plaintiff-petitioner (plaintiff) filed this application in revision from the order of the learned Additional District Judge of Colombo dated 21.08.2003 whereby the learned Judge dismissed the plaintiff's action. Whilst this application in revision was pending the original plaintiff died leaving his heirs, the proposed party to be substituted in place of the deceased plaintiff, his wife and two daughters. The first defendant-respondent (1st defendant) filed objections to this substitution.

The first defendant has objected to this substitution on two grounds.

- (1) the party proposed to be substituted (the petitioner) in place of the deceased plaintiff has no legal status in that he is not the legal representative of the deceased plaintiff.
- (2) the cause of action does not survive after the death of the original plaintiff.

I shall first deal with the first ground of objection urged by the first defendant. The learned counsel for the first defendant submitted that since the petitioner has not obtained the letters of administration he has no locus standi to intervene as he is not the legal representative of the deceased plaintiff.

Section 395 of the Civil Procedure Code deals with the substitution of the legal representative of the deceased plaintiff in the District Court, on the death of the sole plaintiff.

The procedure to be followed where at any time after the lodging of an appeal in any civil action the death of a party to the appeal occurs, spelt out in Section 760A of the Civil Procedure Code. Section 760(A) states as follows :

"Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record become defective by reason of the death or change of status of a party to the appeal, the Supreme Court may in the manner provided in the rules made by the Supreme Court under Article 136 of the Constitution 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 had died or undergone a change

of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid."

The Section 760(A) gives the Court of Appeal a discretion to determine, whom in the opinion of the Court, is the proper person to be substituted in place of the deceased plaintiff. The Court may exercise its discretion to determine who is the proper person to be substituted in the manner as provided in the rules made by the Supreme Court under Article 136 of the Constitution. Next I shall refer to the relevant rule of the Supreme Court Rules published in the Gazette of the Republic of Sri Lanka (Extra Ordinary) No. 665/32 - June 7, 1991.

Rule 38 is relevant to this application. It reads as follows. :

"Where at any time after the lodging of an application for special leave to appeal or an application under Article 136, or a notice of appeal, or the grant of special leave to appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on application in that behalf made by any person interested, or *ex mero motu*, require such applicant, or the petitioner or appellant, as the case may be to place before the Court sufficient material to establish who 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.

Provided that where the party who has died or undergone a change of status is the petitioner or appellant, as the case may be the Court may require such applicant or any party to place such material before the Court.

The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid.

Nothing hereinbefore contained shall prevent the Supreme Court itself *ex mero moto*, where it thinks necessary, from directing the substitution or addition of the person who appears to the Court to be the proper person therefor."

It seems to me that section 760(A) should be read in conjunction with Rule 38. Accordingly, the Court shall determine the person to be substituted in place of the deceased plaintiff who appears to the Court to be the proper person.

In my view the proper person should be the legal representative of the deceased plaintiff. By judicial interpretation the term "legal representative" has

been extended to include "executor de son tort." Any person who intermediates with the property of a deceased person or does any other act characteristic of the office of executor by performing duties which are normally those of a legal representative can be regarded as 'executor de son tort'.

The party proposed to be substituted (petitioner) in place of the deceased plaintiff (petitioner) is the son of the deceased plaintiff. The other heirs are the deceased plaintiff's wife and daughters. The petitioner filed the petition and affidavit in the District Court of Mount Lavinia seeking Letters of Administration to administer the estate of his father, the deceased plaintiff, (vide the document marked "XI") at the same time, he sought the substitution in place of the deceased plaintiff, in the revision application in this court. The petitioner also annexed the documents marked X2(a), X2(b), X2(c) and X2(d) in proof of publication of the notice relating to the application made by the petitioner under section 528 of the Civil Procedure Code. The petitioner in his counter objections stated that all the other heirs of the deceased plaintiff had consented to his appointment as the administrator of the estate of the deceased. In any event whilst this inquiry into the objections filed by the first defendant to the said substitution was pending the Letters of Administration were issued to the petitioner on 02.09.2004 and a certified copy of the same was filed with the motion dated 12.10.2004. Accordingly, the petitioner has now obtained the Letters of Administration and is now entitled to be substituted in place of the deceased plaintiff.

The second argument of the learned counsel for the defendant is that the cause of action does not survive to the heirs of the deceased plaintiff. In support of his argument he cited the case of *Dheerananda Thero vs. Ratnasara Thero*⁽¹⁾ In this Supreme Court case the plaintiff's suit against the defendant was mainly to establish his personal right to an office and the cause of action was purely personal. It was held in this case that if the action was for a declaration of status simpliciter, the cause of action would not survive.

In the instant case the facts are different from the aforesaid case of *Dheerananda Thero vs. Ratnasara Thero* (Supra). This is not an action filed to establish the personal rights of the plaintiff. The plaintiff filed this action against the first and second defendants to recover Rs. 50,000,000 as damages from the defendants for the demolition of the petitioner's business premises which was situated at 122, Sir James Peiris Mawatha, Colombo 2. The learned counsel for the plaintiff rightly pointed out in the written submission that as a result of the demolition of the petitioner's business premises by the first and second defendants, his income from the business was lost along with his property which was lying at the premises and if the business had continued it would have devolved on his heirs. Therefore the heirs of the plaintiff have a right to obtain damages from the first and second defendants for their wrongful and unlawful act which has caused loss to the estate of the deceased plaintiff.

In *Dheerananda Thero vs. Ratnasara Thero* (Supra) T. S. Fernando, J. cited with approval the observation made by Sinha, J. in the Indian decision in *Ramsarup Das vs. Ramashwar Das* ⁽²⁾

"If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will therefor abate."

The learned counsel for the plaintiff also referred to the case of *Fernando vs. Livera* ⁽³⁾ where it was held that in an action to recover damages for injuries implicated by the defendant, and the plaintiff died after the service of summons, the action may be continued by the heirs in respect of the claim for patrimonial loss to the estate of the deceased.

The original plaintiff (now deceased) filed action in the District Court of Colombo against the 1st and 2nd defendants for a sum of Rs. 50,000,000 as damages for the demolition of the petitioner's business premises which was situated at 122, Sir James Peiris Mawatha, Colombo 2 on the basis that as a result of the demolition, his income from the business was lost along with his property, and thereby the value of his estate diminished causing patrimonial loss.

In the aforesaid case of *Fernando vs. Livera* (Supra), Drieberg, J. at 248 made the following observation.

"Where the wrongful loss has caused patrimonial loss and comes within the principles of Lex Aquilia the action does not lapse with the death of the plaintiff before litis contestatio, but enures to the benefit of the heirs."

In the circumstances, it is my considered view that in the instant case the cause of action survives on the death of the original plaintiff.

For these reasons the petitioner, Chandana Hewawitharana, who has now been appointed by the District Court of Mount Lavinia as the Administrator of the deceased plaintiff's estate should be substituted in place of the deceased plaintiff. Accordingly I reject the objections filed by the defendants and order that the said Chandana Hewawitharana be appointed as the substituted plaintiff. The petitioner is entitled to recover the incurred costs of this inquiry from the first defendant respondent.

Application for substitution allowed.