

**CAREEM**  
**v**  
**SIVASUBRAMANIAM AND ANOTHER**

COURT OF APPEAL  
UDALAGAMA, J. AND  
NANAYAKKARA, J.  
CA 66/93 (F)  
D.C. COLOMBO CASE NO. 7552/RE  
AUGUST 1, 2002

*Civil Procedure Code, section 760A – appellant dies pending appeal – Substitution – Mode of filing application – Affidavit only – Is it valid? – Who is a “proper person to be substituted” – Purpose of substitution – Rules under Article 136 of the Constitution – Rent Act, section 27.*

The plaintiff-appellant instituted action under section 27 of the Rent Act to eject the defendant-respondent. The action was dismissed. The plaintiff appealed. Pending appeal, the plaintiff died. The petitioner moved court by filing an affidavit to be substituted on the basis of a deed of gift in her favour.

**Held:**

- (i) Section 760A does not specify the mode of filing an application; an affidavit only is valid; it need not accompany a petition.
- (ii) In the event of the death of a party substitution would be for the purpose of representing the deceased solely for the purpose of prosecut-

ing the action and nothing more.

- (iii) The inquiry to determine a “proper person” under section 760A is one to ensure the continuation of the appeal after the change of status in the action and not to decide the rights of parties.

*Per Udalagama, J.*

“Although the Court of Appeal need to determine who the “proper person” would be by reference to Rules made under Article 136, no such Rules have been in fact made in regard to substitution in a pending case in appeal.”

- (iv) The “proper person” need not be a heir, executor or administrator but would include a person who had been gifted with the premises by the deceased on a deed of gift - he is substituted for only the specific purpose of prosecuting the appeal.

An **APPLICATION** for substitution pending appeal.

**Cases referred to:**

1. *Dheerananda Thero v Ratnasara Thero* - 60 NLR 7
2. *Ghouse v Ghouse* - (1988) - 1 Sri LR 25
3. *Attorney - General v Chandrasena* - (1991) 1 Sri LR 85
4. *Lawana Gunasekera v Hemawathie & others* - CA 476/95 (F) Cam 9.9.02

*A.A.M. Marleen, P.C., with Shanaas Maharoo* for petitioner.

*Harsha Soza* for respondent.

*Cur.adv.vult*

October 29, 2002

**UDALAGAMA, J.**

The plaintiff-appellant filed D.C. Colombo case No.7552/RE under the provisions of section 27 of the Rent Act, No. 7 of 1972, *inter alia*, to eject the defendant-respondent from the premises morefully described in the schedule to the plaint. 01

The learned Additional District Judge dismissed the plaintiff’s action and the plaintiff appealed therefrom. While the appeal was pending the plaintiff-appellant died on or about 02.05.2000. The petitioner to this application moves this court for substitution in the room of the deceased plaintiff-appellant to which application the defendant-respondent objects. This order pertains to that objection. 10

The learned Counsel for the defendant-respondent raised 2 objections to this application, namely, that there is no valid application before this court and that the deed of gift No. 381 dated 25.10.1995 on which the petitioner claims title to the rights of the original plaintiff-appellant is bad in law and that in any event the petitioner is statutorily barred from making this application.

The submission of the learned Counsel for the defendant-respondent appears to be that in the absence of a petition accompanying an affidavit admittedly filed of record that there is no valid application for substitution. 20

It is conceded that the applicable provision in an instance of a change of status of a party when an action is pending in the Court of Appeal is the provisions of section 760A of the Civil Procedure Code.

It is also undisputed that the said provisions do not specify the mode of filing of such application and I would reject the contention of the learned Counsel for the respondent that an affidavit only is not a valid application and that an application to rectify a defect in the record requires a petition to accompany an affidavit. In the instant case the affidavit filed of record on 17.06.2000 contains all the necessary details including reasons necessitating the substitution. In the instant case the petitioner moves to be substituted in the room of the deceased plaintiff on the basis of the aforesaid deed of gift. Importantly, annexed with the affidavit is the relevant certificate of death of the plaintiff-appellant, marked X1, confirming thereby the death of the original plaintiff-appellant, and consequently that the record is rendered defective. It is also observed that this court had on an earlier occasion, apparently to regularize the application consequent to this objection had directed the petitioner to file a petition even though at a later stage which petition filed thereafter appears to be identical in respect of the averments appearing in the affidavit referred to above. Paragraph 7 of the affidavit refers to the relief claimed and the application of the petitioner is unambiguous. 30 40

I am inclined to the view that the basis for an application under the provision of section 260A referred to above, in the event of the death of a party would be for the purpose of representing the

deceased, solely for the purpose of prosecuting the action and nothing more. In this context the argument of the learned Counsel for the defendant-respondent challenging the application of the petitioner for substitution on the basis that the original action being one under the provisions of the Rent Act and that the action being one of a personal nature and ought to abate on the demise of the plaintiff is a matter to be determined at the argument and I would hold that such matter would not be relevant to an inquiry to appoint a "proper person" to be substituted or entered in the record in place of or in addition to the party who died as provided for by the provisions of the said section 760A. 50

This inquiry to determine a "proper person", under the provisions of section 760A referred to above, in my view, is one to ensure the continuation of the appeal after the change of status in the action and not to decide the rights of parties. 60

I would also hold that the authorities as cited by the learned Counsel for the respondent more particularly the facts as referred to in the judgments of *Dheerananda Thero v Ratnasara Thero*<sup>(1)</sup> and *Ghouse v Ghouse*,<sup>(2)</sup> would be relevant at the argument and to be considered at this stage would be premature. As significantly conceded by the learned Counsel for the defendant-respondent the relevant statutory provisions in section 760A as referred to above under which substitution is effected during the pendency of an appeal is the provisions of section 760A of the Civil Procedure Code and no other, and also as stated in the written submission of the learned Counsel for the defendant-respondent the Court of Appeal would be making a determination on a question of fact only as to whether the petitioner is a "proper person" to be substituted in the place of the deceased-appellant. 70

Although the Court of Appeal needs to determine who the "proper person" would be, by reference to Rules made under Article 136 of the Constitution, it is conceded that no such Rules have been in fact made in regard to substitution in a pending case in appeal. It is also not disputed that such determination as to who the "proper person" to be substituted in the place of a deceased party would be based, as stated earlier, on the opinion of the Court, on a finding of fact. I would also disagree with the learned Counsel for the defendant-respondent that the affidavit filed by the petitioner on 80

17.06.2000 as referred to above, did not support the petition filed 3 months later on the direction of court, as firstly there appears to be no such direction in the provisions of section 760A referred to above, that such application need to be filed by way of a petition and an affidavit. The authority of *Attorney General v Chandrasena*<sup>(3)</sup> cited by the learned Counsel for the defendant-respondent would not apply. Secondly, for the reason that the affidavit already filed contains adequate material to enable court to consider the application and as in any event the petition would only re-iterate the material averred in the affidavit, the necessity to file a petition in addition to the affidavit would not in any way prejudice the defendant-respondent. 90

The petitioner is in any event seeking to be substituted in the place of the deceased solely for the purpose of prosecuting the appeal (paragraph 7 of the affidavit) and I would disagree with the learned Counsel for the defendant-respondent that the petitioner by this application is seeking to represent the estate of the deceased. As would be directed by this court in pursuance of the application the only order that this court could make would be that the "proper person" to be substituted in place of the deceased-appellant would be the petitioner for the limited purpose of prosecuting the appeal and nothing more. 100

In the circumstances this court would not deem it proper to consider the rights of the petitioner to be so substituted *vis-a-vis* the proper adoption of the petitioner in accordance with the Muslim law or the statutory bar as purportedly contained in the provisions of section 27 of the Rent Act referred to above. 110

This court would only consider whether or not the petitioner is in the opinion of court a proper person to be appointed in the place of the deceased party, to prosecute the appeal. There appears to be no allegation that the petitioner is mentally unsound or that she is a minor unsuitable to be substituted in the place of the deceased appellant to prosecute the appeal.

As held by this court on somewhat similar circumstances in *Lawana Gunasekera v Hemawathie & others*,<sup>(4)</sup> decided on 09.09.2002- in the absence of any direction vide provisions of section 760A aforesaid, the "proper person" to be substituted need not 120

be a heir, executor or administrator, but as also held in that case, a person who had been gifted with the premises, the subject matter of the suit, by the deceased on a deed of gift which on the face of the document, as in the instant case, appeared to have been properly attested and executed could be declared a "proper person" to be substituted in place of the plaintiff-appellant solely to prosecute the appeal.

I would allow with costs this application of the petitioner to be substituted in the place of the deceased-appellant solely for the purpose prosecuting this appeal. It must also be mentioned that in any event a matter for decision at the argument proper would be the rights of parties as at the date of the institution of this action and therefore no prejudice could be caused to the rights of parties as at the date of the institution of the action. 130

**NANAYAKKARA, J.** – I agree.

*Application allowed.*