
**SIMON AND ANOTHER
VS
GUNATILAKE AND ANOTHER**

COURT OF APPEAL
WIMALACHANDRA, J.,
C. A. 193/2004
D. C. EMBILIPITIYA No. 1743/L
JULY 5, 2004

Civil Procedure Code - Writ of execution - Defendant dead - Who can be substituted ? - Who is a legal representative - Execution and substitution together

The plaintiff-respondent filed action for the ejection of the 1st respondent. Judgment was entered in favour of the plaintiffs. The 1st defendant appealed against the judgment. The plaintiff sought writ pending appeal. When the inquiry into the said application was pending, the 1st defendant died. The respondents sought to substitute the petitioners in place of the deceased, which was allowed by court.

On leave being sought -

Held

- (i) The application for substitution was opposed on the ground that they are not the children of the deceased 1st defendant.
- (ii) If the judgment debtor dies before the execution of decree, section 341 of the Code provides that the decree holder can apply to court by petition in which the legal representative of the deceased must be made respondent to execute the decree against such legal representative.
- (iii) Admittedly the 1st and 3rd substituted defendants petitioners are in possession of the property possessed by the deceased judgment debtor.
- (iv) They come within the meaning of section 341(1) as the legal representative of the deceased 1st defendant. Legal representative includes any person intermeddling with the estate of the deceased.
- (v) A stranger in possession of a deceased judgment debtor's property but who claims no title from him may be proceeded against ... in execution as legal representative.

APPLICATION for leave to appeal.

Cases referred to :

1. *Tyagarajah vs Perera* - (1983) 1 SRILR, 384 at 390
2. *Baliram vs Mudiada* - A 1951 N 145
3. *Nesaratnam vs Vaithilingam* - 78 NLR 457

Anuruddha Dharmaratne for (Sub) 1st and 3rd defendant respondents petitioners

Palitha Kumarasinghe for plaintiff petitioner - respondent respondent

Cur.adv.vult

October 01, 2004

L. K. WIMALACHANDRA, J. :

The substituted 1st and 3rd defendants-respondents-petitioners (hereinafter referred to as the petitioners) filed this leave to appeal application against the order of the learned District Judge of Embilipitiya dated 20.05.2004.

The facts, as set out in the petition are briefly as follows :

The plaintiffs-petitioners-respondents (hereinafter referred to as the respondents) filed the action No. 1743/L for the ejectment of the 1st defendant (now deceased) from the land described in the schedule to the plaint. After the conclusion of the trial the judgment was entered on 21.09.2000 in favour of the plaintiffs, granting relief as prayed for in the amended plaint. The 1st defendant appealed against the judgment. The petitioners thereafter made an application for a writ of execution of the decree pending appeal. While the inquiry into the application for a writ of execution was pending appeal, the 1st defendant died. The respondents filed an application by way of petition and affidavit for the substitution of the petitioners in place of the deceased 1st defendant on 08.12.2003.

The application for substitution was opposed by the petitioners, on the ground that they are not the children of the deceased 1st defendant. After an inquiry the learned District Judge made order on 20.05.2004 substituting the petitioners as the substituted defendants in place of the deceased 1st defendant. It is against this order that the petitioners have filed this application for leave to appeal.

If the judgment-debtor dies before the execution of decree, section 341 of the Civil Procedure Code provides that the decree-holder can apply to the Court by petition, in which the legal representative of the deceased

must be made respondent, to execute the decree against such legal representative.

In the case of *Tyagarajah vs. Perera* ⁽¹⁾, Soza, J. held as follows :

“When the judgment-debtor dies before execution of the decree the correct procedure then is for the decree-holder to file a petition naming as respondent the legal representative of the deceased judgment-debtor and praying for execution to issue against such representative. In the petition itself the decree-holder should ask for substitution as incidental to the application for execution and, if satisfied with the reasons, effect the substitution *ex parte*”.

Soza, J. observed that the execution and substitution should be asked for in one petition. Substitution will be *ex-parte* and notice will issue. The notice should be to show cause against the application for execution and not against the application for substitution. In showing cause against the application for execution, one of the defences open to the party noticed could be that he has been wrongly substituted as legal representative.

It is to be noted that the petitioners have not filed a copy of the application made by the judgment-creditor for execution of the writ against the substituted defendants in place of the deceased 1st defendant-judgment-debtor. In any event it appears that the respondent's application was objected to by the petitioners, on the ground that they are not the children of the deceased 1st defendant, by filing objections to the respondent's application.

After an inquiry the learned District Judge delivered the order on 20.05.2004 and held that the petitioners are the legal representatives of the deceased 1st defendant and made order to substitute them as the substituted defendants in place of the deceased 1st defendant.

In his order the learned Judge has referred to the evidence given by the deceased 1st defendant at the inquiry held in respect of the original application for a writ of execution pending appeal. At the inquiry the 1st defendant (now deceased) said that the petitioners (1st to 3rd substituted defendants) were his children and living in houses built by them in the same premises (vide page 2 of the proceedings dated 29.01.2003 marked 'P9'). Moreover, the deceased 1st defendant also filed an affidavit marked P8(b), wherein he stated that the substituted defendants were his children and they were living in the same premises in three different houses built by them. The learned Judge has specifically observed, that at the aforesaid

inquiry Mrs. S. Pathirana who was the registered attorney of the 1st defendant (deceased) appeared for the 1st defendant. It was Mrs. Pathirana along with counsel Mr. Farook who led the evidence of the 1st defendant.

Thereafter when the case was called on 30.01.2003 in respect of the substitution of a legal representative in place of the deceased 1st defendant, the very same attorney-at-law, Mrs. S. Pathirana appeared for the 1st - 3rd substituted defendants and informed Court that they were not the children of the deceased 1st defendant. Mrs. S. Pathirana also filed objections on behalf of the petitioners (1st to 3rd substituted defendants) to the application made by the respondents for execution of the writ and substitution of the petitioners in place of the deceased 1st defendant on the basis that they were not the children of the deceased 1st defendant.

It appears that their main ground of objection to the substitution of the petitioners in place of the deceased 1st defendant is that they are not the children of the deceased 1st defendant, and hence they cannot be treated as the legal representatives of the deceased. If it is so, the best evidence to prove that fact would have been the production of their birth certificates, which they failed to produce at the inquiry. Accordingly, the logical conclusion that could be arrived at is that, had they produced their birth certificates it would have been adverse to them.

Admittedly, the petitioners (1st to 3rd substituted defendants) are in possession of the property possessed by the deceased judgment-debtor, but claim no title from him.

Our section 341 (1) corresponds to section 50 of the Indian Code of 1908. I shall now quote section 341 of our Code and its counterpart in the Indian Code of 1908.

Section 341 (1) of the Civil Procedure Code :

"If the judgment-debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it, by petition, to which the legal representative of the deceased shall be made respondent, to execute the same against the legal representative of the deceased."

Section 50 (1) of the Indian Code of 1908 :

"Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased."

Sarkar's *Law of Civil Procedure*, 8th edition; Volume 1, at page 220 has made the following observation on the Indian section 50 (1) which is identical to ours :

"A stranger in possession of deceased judgement-debtor's property but who claims no title from him may be proceeded against in execution as legal representative under section 50 [*Baliram Vs. Mukiada*⁽²⁾]"

The property possessed by the judgement-debtor is now in the hands of the petitioner (1st to 3rd substituted defendants). It seems to me, that they come within the meaning of section 341(1), as the legal representatives of the deceased 1st defendant. The legal representative includes any person who intermeddles with the estate of the deceased.

In the case of *Nesaratnam vs. Vaithilingam*⁽³⁾ in a majority judgement, Pathirana, J. held that an executor *de son tort* is a legal representative of the deceased within the meaning of section 341 (1) of the Civil Procedure Code.

Pathirana, J. observed at page 468 ;

"The trend seems to favour an extended meaning to be given to the term executor or administrator as to include an executor *de son tort*. Both reason and logic seem to favour this view, particularly in interpreting section 341 of the Civil Procedure Code. If for example, a debtor owes money to another and the debtor dies, it is settled law that the creditor can proceed against a person who intermeddles with the estate of the deceased [1901] 4 NLR at page 353".

For these reasons, I see no reason to interfere with the order made by the learned District Judge dated 20.05.2004. I would therefore affirm the order of the learned judge and dismiss the application for leave to appeal with costs fixed at Rs. 2,500

Application dismissed.
