JAYASINGHE AND ANOTHER

vs

PEDRIS AND ANOTHER

COURT OF APPEAL,
AMARATUNGA, J., AND
WIMALACHANDRA, J.,
C. A./MR.172/03
D. C. 24640/ MR
23rd APRIL, AND 22nd JUNE, 2004

Civil Procedure Code, sections 395 and 754(2)- Death of a party–Right to sue survives - Substitution - Executors right whether probate has been obtained or not to be substituted - Revision - Exceptional circumstances - Negligence of attorney-at-law - Is it a ground for relief ?

On the death of the sole plaintiff, the executors of his Last Will, were substitued, After the order for substitution, the respondents objected and court dismissed the objections on the ground that already there is an order substituting the exceutors in the place of the decased plaintiff. The defendant moved by way of revision.

HELD:

(i) When the sole plaintiff dies leaving a Last Will, and when the right to sue survies, the executor appointed therein has a right to have himself substituted whether probate has been obtained or not at the time of application for substitution.

(ii) This is an appeallable order under section 754(2). The defendants do not disclose exceptional circumstances warranting the exercise of the revisionary jurisdiction. The only excuse given is that the defendant's attorney-at-law had taken down the wrong date, it is not an excuse, and his negligence cannot be considered as an exceptional circumstance.

APPLICATION in revision from an order of the District Court of Colombo.

Cases referred to :

1. *Rustom vs Hapangama & Co,* - (1978 - 79) 25 NLR 255
2. *Ekanayake vs Gunasekera* - (1986) CALR 2 - 250 at 255
3. *Packeer Mohideen* vs *Mohamed Cassim* - 4 NLR 299
4. *Scharrengnivel* vs *Orr* - 28 NLR 302
5. *Ramasamy* vs *Murugan Kanawade* - (1986) CALR 2-37
6. *Anang Paul* vs *Peareylal* (1986) - P & H 87
7. *Ajith* vs *Rathindra* - (1980) C. 117

Faizer Musthapa for defendant petitioner

Champaka Ladduwahetty for substituted plaintiff respondent

Cur. adv. vult.

November 4, 2004

WIMALACHANDRA, J

This is an application in revision filed by the petitioner on 03.02.2003 from the order made by the Additional District Judge of Colombo on 07.10.2002. Briefly, the facts relevant to this application are as follows :

Dr. D. J. Devapriya Pedris instituted the action bearing No. 24640/MR in the District Court of Colombo against the defendants-petitioners (hereinafter referred to as the defendants) to recover a sum of

Rs. 2,855,000/- which included the capital and interest on a sum of Rs. 2,000,000/- lent to the defendants who were carrying on a partnership business.

The defendants admit in their answer that they borrowed the said sum of money from the said D. J. Devapriya Pedris, but state that they paid a sum of Rs. 1,240,000/- to one Rupa Saluwadana, a person who was nominated by the said Dr. Pedris to accept the money on behalf of him. The said Dr. Pedris, the original plaintiff died in February, 2001 and the 1st and 2nd respondents (hereinafter referred to as the substituted-plaintiffs) made an application to Court to have themselves substituted in place of the deceased original plaintiff, Dr. Pedris. The substitued-plaintiffs made that application for substitution on the ground that the deceased original plaintiff has left a last will and that they were appointed as the executors under the said will. The said application for substitution being supported on 04.05.2001, the learned judge made the order on 04.05.2001 allowing the application for substitution in place of the deceased plaintiff. After the learned judge made the said order, the attorney-at-law of the defendants objected to the substitution and the Court permitted them to file objections. When the matter came up on 07.10.2002 before the Additional District Judge of Colombo, the learned judge dismissed the objections taken by the defendants to the said order on 04.05.2001, by which the 1st and 2nd substituted plaintiffs were substituted in place of the deceased plaintiff, on the ground that his predecessor had already made the order substituting them (1st and 2nd substituted plaintiffs) as the substituted plaintiff. It is against this order the defendants have filed this application in revision.

There is a right of appeal against the said order with the leave of this Court in terms of section 754(2) of the Civil Procedure Code. However the plaintiffs without exercising the statutory right of appeal have filed this application in revision. In these circumstances, the revisionary powers of this Court will be exercised only if the defendant's application discloses exceptional circumstances warranting the exercise of the revisionary jurisdiction of this Court.

In Rustom vs *Hapangama & Co.*[1] Vythialingam, J. after an exhaustive analysis of all the authorities on this question held that power of revision conferred on the Appellate Court is very wide and can be exercised only in exceptional circumstances or when there is something illegal about the order made by the trial judge which has deprived the petitioner of some right.

It is to be observed that the defendants have filed this application on 03.02.2003, nearly four months after the impugned order dated 07.10.2002 had been made. The only exceptional ground urged by the defendants is found in paragraph 10 of the petition. The defendants state that their attorney-at-law on record had inadvertently taken down the wrong date as the date on which the order was to be delivered and as such a leave to appeal application could not be filed within the stipulated time period in terms of section 754(2). It is no excuse to say that the defendants' attorney-at-law had taken down a wrong date as the defendants would have been there in Court when the said order was delivered. There is no averment in the petition that they were not present in Court on that day. In any event the negligence of the attorney-at-law for not taking down the correct date cannot be considered as an exceptional circumstance.

The Supreme Court has time and again held that the negligence of the attorney-at-law is not a ground for relief. In the case of *Ekanayake vs. Gunasekera*[2] Perera, J. made the following observation at page 255 :

> "In interpreting the parallel provisions of the Civil Procedure Code the Supreme Court has in no uncertain terms, held that a party to a civil action must indeed suffer, for the negligence of his lawyer. In *Packeer Mohideen v. Mohammed Cassim* [3] this principle was clealy laid down by Bonser, C. J. In this case the Defendant after filing answer took no steps to get ready for trial. The case proceeded ex-parte and a Decree Nisi was entered against him. The proctor appeared in Court, and said that he had no instructions, and withdrew from the case. The Defendant said that he had mistaken the date of trial. It was held that it was the duty of the Proctor, to have informed the Defendant, of the proper date of the trial and to have asked for instructions and that as the Proctor did not appear to have done his duty he, was to be blamed for the absence of the Defendant, and the Defendant must suffer for the fault of his Proctor."

Perera, J. in the aforesaid case of *Ekanayake* vs. *Gunasekera (supra)* referred to the Supreme Court case of *Scharrengnivel* vs. *Orr* [4] where it was held that, where a judgment is entered against a party by default, it is not a sufficient excuse for his absence that his proctor had failed to inform him of the date of the trial.

In *Ramasamy vs. Murugan Kanawadi* [5], the Court of Appeal took the following view :

"On a date fixed for trial the defendant being absent the case was heard ex-parte and decree nisi was entered. A copy of the said decree nisi being served on the Defendant, the Defendant filed papers to set aside the decree nisi but was disallowed from so doing.

The learned District Judge held that the Defendant's attorney-at-law being negligent in keeping track of the case was not a reasonable ground for the Defendant's default and ordered that the decree be made absolute.

The learned District Judge having taken the view that the Appellant had failed to satisfy him that there were reasonable grounds for default, on an examination of the order and the material, there were no grounds for the view that his order was wrong."

The written submissions filed by the learned counsel for the defendants contended that the order made by the Court substituting the 1st and 2nd substituted plaintiffs in place of the deceased plaintiff was not a proper order as the 1st and 2nd substituted plaintiffs had not obtained limited probate in order to have themselves substitured as the legal representatives of the deceased plaintiff in terms of the Section 395 of the Civil Procedure Code.

Section 395 of the Civil Procedure Code reads as follows :

"In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to Court to have his name entered on the record in place of the deceased plaintiff, and the Court shall thereupon enter his name and proceed with the action"

In terms of Section 395, on the death of a sole plaintiff, the legal representative may be substituted by the Court on his application, if the right to sue survives. This being an action to recover money, the right to sue survives. The deceased plaintiff, Dr. Devapriya Pedris died leaving a last will, executed on 20.01.2001 bearing No. 3934 attested by A. R. Mathew N. P. In the said last will the 1st and 2nd substituted plaintiffs were appointed as the executors.

In my view when the sole plaintiff dies leaving a will, and when the right to sue survives, the executor appointed therein, has a right to have

himself substituted whether probate has been obtained or not at the time of application for substitution.

I find support for this view in Sarkar's *Law of Civil Procedure* 8th edition volume 2 at pages, 1144-1145, where the following observations have been made on the Indian Section Or. XXII Rule 3(1) of which the second part is identical with ours (S. 395) :

> "Where the applicant claims to be legal representative of the deceased plaintiff on the basis of a will executed prior to suit, the cause would be covered under Or. 22 R. 3 (Anang Paul Vs. Peareylal[6])
>
> An executor of a will can be substituted in place of deceased plaintiff and can institute or prosecute an action but no decree can be passed before probate is obtained *(Ajith* Vs. *Rathindra*[7])

In these cirucumstances, I am of the view that the order made by the District Court on 04.05.2001 is correct. It is to be noted that it is only after the said order substituting the 1st and 2nd plaintiffs in place of the deceased plaintiff was made the defendants moved to file objections. By then the learned judge had already made the order. In any event the learned judge's order is in accordance with Section 395 of the Civil Procedure Code.

Thereafter when the matter came before the present Additional District Judge on 07.10.2002 he correctly held that his predecessor had already made the order for substitution and made order dismissing the objection. In my view there is nothing illegal about the order made by the learned judge.

In any event, the order made on 04.05.2001 and the impugned order dated 07.10.2002 will not in any way prejudice the defendants, The person substituted will only be the legal representative of the estate. If the defendants loose their case it is the estate of the deceased and not the substituted plaintiffs that is entitled to recover the monies from the defendants.

However, the learned counsel for the 1st and 2nd substituted plaintiffs informed this Court, that they have now obtained the probate in the Testamentary Action filed in respect of the estate of the deceased original plaintiff, Dr. D. J. Devapriya Pedris.

Accordingly, it is my view that there is no illegality in the aforesaid orders made by the Court. Moreover, by those orders the defendants have not been deprived of some right.

In view of the reasons set out above, I refuse the petitioner's application in revision. The application is accordinaly dismissed with costs fixed at Rs. 7,500/-

AMARATUNGA, J. — I agree.

Application dismissed.