

Nagaria v. Gulamhussein and others

COURT OF APPEAL.

RANASINGHE, J. AND RODRIGO, J.

C. A. (S.C.) 448/71 (F)—D.C. COLOMBO 2319/ZL.

SEPTEMBER 10, 1979.

Death of plaintiff—Action for restoration to possession of premises and for damages consequent on trespass—Does cause of action survive—Whether widow entitled to be substituted as legal representative.

The original plaintiff sued the defendants seeking to be restored to possession of certain premises he alleged to have occupied or possessed at the material time and sought to establish his rights as against the defendants to possession of this property. He also claimed damages for the loss caused to him by defendants jointly by their collusive acts of trespass. The original plaintiff died pending the action and his widow as legal representative sought to be substituted in his place. The defendants objected on the ground that the cause of action on which the plaintiff had come to court did not survive and this objection was upheld by the learned trial Judge.

Held

The appellant who was the widow of the original plaintiff was entitled to be substituted both by reason of the fact that he was seeking to establish his rights as against the defendants to possession of the property in question and also because his claim for damages was based on delict and these causes of action survived to his legal representative.

Cases referred to

- (1) *Deerananda Thero v. Ratnasara Thero*, (1958) 60 N.L.R. 7.
- (2) *Ramasarup Das v. Rameswar Das*, (1950) A.I.R. Patna 184.
- (3) *Fernando v. Livera*, (1927) 29 N.L.R. 246.

APPEAL from the District Court, Colombo.

S. Kanagarajah, for the plaintiff-appellant.
Ben Eliyathamby, for the defendants-respondents.

Cur. adv. vult.

September 19, 1979.

RODRIGO, J.

The appellant is the widow of the plaintiff who died pending the trial of the action. There is no dispute that she is the legal representative of her late husband. Her substitution, however, in place of the deceased-plaintiff was resisted on the ground that the cause of action on which the plaintiff came to Court has not survived. The learned trial Judge upheld this objection and this appeal has been preferred from that order.

The plaintiff was seeking damages from the defendants for his unlawful eviction from the premises in suit by them and for recovery of possession. It has transpired in evidence that he had been a sub-tenant of one Rahuman who is alleged to be the lawful tenant of the premises. Having become a sub-tenant, however, he had in turn sub-let the premises to the 2nd defendant against whom he had obtained judgment for recovery of possession of the premises. The premises were business premises. Writ of possession having been taken out, he had been resisted by the defendants. This action had been instituted by him against the defendants when he discovered that he had been deprived of his possession by the defendants acting collusively. As to why he did not pursue his remedy in the writ proceedings itself is another matter.

The plaintiff has not instituted this action for any breach of contract of tenancy between him and his immediate landlord Rahuman. As long as the tenancy between the plaintiff's immediate landlord Rahuman and Rahuman's landlord, the owner of the premises who is the 1st defendant in the case, continued, the plaintiff in this case was entitled to be in possession and claim the recovery of possession from whomsoever that deprived him of his possession. It is urged that in the course of the trial it had transpired that Rahuman's tenancy with the 1st defendant, the owner of the premises, had been terminated by Rahuman's death as far back as 1965 while the action by the plaintiff had commenced only in 1970. If this were so, consideration may arise

as to whether the plaintiff could have successfully maintained this action against the 1st defendant, the owner of the premises. Even so, the considerations that will arise as against the 3rd, 4th and 5th defendants will still be different. Whether the plaintiff could maintain his action against any one or more of the defendants is immaterial for determining the issue arising on this application. What is required is to determine the character of his cause of action as framed by him. He is seeking restoration of the possession of the premises alleged to have been in his occupation or possession at the material time and was seeking to establish his rights as against the defendants to the possession of the property. This kind of cause of action survives on the death of a plaintiff. In the case of *Deerananda Thero v. Ratnasara Thero* (1) at 10, Sinha J. is cited as having observed in *Ramsarup Das v. Rameshwar Das* (2) that,

“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 representatives can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal.....”

The plaintiff was also claiming damages for the loss caused to him by the defendants jointly by their collusive acts of trespass. The claim is based in delict and it has been held in the case of *Fernando v. Livera et al.* (3) that the cause of action to recover damages for trespass survives to the legal representative of the plaintiff. It is there stated,

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

The learned trial Judge had dealt with the application for substitution on the footing that the action by the plaintiff was a tenancy action pure and simple and that with the death of the plaintiff his contractual rights of tenancy terminated, without the plaintiff's cause of action, based as it were, in his view, on his contract of tenancy with his immediate landlord, surviving to the petitioner. We are of the opinion that the learned Judge has taken an erroneous view of the nature of the cause of action averred by the plaintiff when its character is as set out above. In the circumstances, the petitioner is entitled to be substituted in place of the deceased-plaintiff as his legal representative to continue the action.

We, therefore, allow the appeal and set aside the order of the learned Judge refusing the application for substitution. We make order that the petitioner be substituted in place of the deceased plaintiff. The petitioner is entitled to the costs of this appeal and the costs of her application in the trial Court.

RANASINGHE, J.—I agree.

Appeal allowed.
