

ASSOCIATED NEWSPAPERS OF CEYLON LTD.**vs.****FELICIA KARIYAKARAWANA**

COURT OF APPEAL.
IMAM, J.
SRISKANDRAJAH, J.
CALA 417/2003 (LG).
DC COLOMBO 15136/MR.
JULY 11, 25, 2005.

Civil Procedure Code - Section 86(2) - Section 392 - Actio Injuriarum - Action based on Defamation - Ex-parte decree entered - Vacation of ex-parte decree sought - Plaintiff dies - Wife substituted conditionally until an order was made regarding the vacation of ex-parte decree - Was the stage of "litis contestatio" reached ? - Actio personalis moritur cum persona.

The plaintiff (original) instituted action claiming damages on the ground of defamation. *Ex-parte* decree was entered. The defendant-petitioner sought to

vacate same, and after the inquiry was concluded the original plaintiff passed away. The wife of the original plaintiff was sought to be substituted. The defendant-petitioner objected on the ground that, the personal action filed is extinguished upon the death of a person in whose favour such a cause of action arose. The learned District Judge allowed the substitution only until an order was made regarding the vacation of the *ex-parte* decree. The District Judge vacated the *ex-parte* order, and permitted the defendant-petitioner to file answer. At the trial the issue was raised as to whether with the death of the plaintiff, the substituted plaintiff could have and maintain this action. This was answered in the affirmative by the District Judge. On leave being granted-

HELD:

- (1) The *actio injuriarum* is transmissible neither actively nor passively, except where *litis contestatio* has been reached.
- (2) When the *ex-parte* decree was vacated (15.02.96) the stage of *litis contestatio* had not been reached as the defendant had not filed answer and issues had not been framed. *Litis contestatio* is reached when pleadings are closed and matters are at issue between the parties.
- (3) Where the principle 'Actio Personalis Moritur cum persona' applied section 392 of the Civil Procedure Code will not apply. This maxim applies to every action for libel or slander and therefore where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative.
- (4) Provisions of section 392 will not apply and no cause of action would accede to the plaintiff's wife the substituted plaintiff-respondent and as at 15.02.1996, stage of *litis contestatio* had not been reached, and even the pleading are incomplete.

APPLICATION for leave to appeal from an order of the District Court of Colombo, with leave being granted.

Cases referred to :

1. *Deerananda Thero vs. Ratnasara Thero* 60 NLR 7

2. *John Fernando and Attorney General vs. Satarasinghe - 2002-2 NLR 113*

Navin Marapana with Ms. A. D. Samaraweera for Defendant-petitioner
Mahinda Ralapanawa with Ms R. N. N. Wijeratne for substituted plaintiff
respondent

Cur. adv. vult.

April 24th, 2006.

IMAM, J.

The Defendant-Petitioner (hereinafter referred to as the Petitioner) filed this application for leave to appeal against the order of the learned Additional District Judge of Colombo dated 22.10.2003 (XII) seeking to set aside the aforesaid order *inter-alia* other reliefs sought for in the prayer to the petition dated 10.11.2003. The facts of the case are briefly as follows; The Plaintiff Eamon Kariyakarawana instituted action bearing No. DC 15136/MR in the District Court of Colombo on 13.06.1994 claiming damages from the 'Petitioner' on the ground of Defamation with regard to an Article published in the "Silumina Newspaper" by the "Petitioner". On 18.03.1996 the Plaintiff and the Plaintiff counsel were present in Court, the Defendant ('Petitioner') was absent and unrepresented. *Ex-parte* Trial was concluded, and the *Ex-parte* order was served on the Defendant. Consequent to the *Ex-parte* Decree being served on the Defendant, the Defendant filed papers under section 86(2) of the Civil Procedure Code, sought the vacation of the *Ex-parte* decree and moved to file answer. The Defendant's Registered Attorney gave evidence and the inquiry concluded with written submissions being tendered. The Plaintiff apparently expired on 03.01.1997 which fact was not mentioned in the written submissions tendered by both sides.

When the Attorney-at-law appearing for the plaintiff sought to substitute the plaintiff's wife Mary Florence Felicia Kariyakarawana (hereinafter referred to as the 'Substituted Plaintiff-Respondent') the petitioner objected to the substitution on the basis that there was no marriage certificate filed along with her affidavit, besides many other grounds stated in the objections, and on the legal principle *Actio Personalis Moritur Cum Persona* which means that a personal action such as one based on Defamation, Libel, or slander is extinguished upon the death of a person in whose favour such a cause of action arose. By his order dated 26.09.1997 (X5) the learned Additional District Judge conditionally permitted the aforesaid substitution holding that "Regarding the matter whether the action survives, in a case

where a Decree though *ex-parte* is entered I am of opinion that the state of "Litis Contestatio" has been reached, because this stage is reached after affording proper opportunities to the Defendant, It may be that the Defendant may have a case to set aside that particular Decree. However at law upto the point a decision is made on the vacation of the *ex-parte* order the Petitioner has to be substituted in the place of the Plaintiff. The aforesaid order (X5) allowed the substitution only until an order was made regarding the vacation of the *Ex-parte* Decree. However, by order dated 19.03.1998 (X6) the learned Additional District Judge vacated the aforesaid *Ex-parte* Decree, and permitted the Defendant ('Petitioner') to file answer on 01.04.1998. On 01.04.1998 the Defendant ('Petitioner') filed answer which was more than one year after the Plaintiff had died.

On 25.03.2003 the 'Substituted-Plaintiff-Respondent' and the Defendant "Petitioner" were present and represented by counsel, and the trial commenced with 6 admissions being recorded, 7 issues being raised on behalf of the Plaintiff, and on primary legal issue being raised on behalf of the Defendant as to whether with the death of the Plaintiff, the Substituted-Plaintiff could have and maintain this action, the learned Additional District Judge accepted issue No. 8 as a Primary Legal issue, and invited both sides to tender written submissions in this regard, which was complied with. Consequently the learned Additional District Judge by order dated 22.10.2003 (XII) answered the aforesaid primary legal issue No. 08 in the affirmative and fixed the case for further trial. It is against this order that the Defendant-'Petitioner' has tendered this leave to appeal application.

On 03.08.2004 when Counsel for the 'Defendant-Petitioner' and counsel for the Substituted-Plaintiff-Respondent were present in this Court, the latter counsel consented to leave being granted, consequent to which leave to appeal was granted, and this case fixed for argument. The contention of the Petitioner was that a state of 'Litis Contestatio' was reached only when pleadings are completed, and the dispute between the parties was clear. It was further averred by the Petitioner that in the order dated 26.09.1997 (X5) the learned Additional District Judge held that 'Litis Contestatio' was reached only because at the time of death of the Plaintiff, there was an *Ex-parte* decree in favour of the plaintiff. The 'Petitioner' further contended that in accordance with the order of the learned Additional District Judge dated 19.03.1998 (X6) the aforesaid *ex-parte* decree was vacated, and since then the status quo in this case reverted back to the position that remained on 15.02.1996 when this case was first fixed for *ex-parte* trial. The Petitioner averred that on this date 'Litis Contestatio' could not have been reached as the Petitioner had not even filed an answer, the

answer being filed on 01.04.1998 which was approximately 2 years after the plaintiff had died and that even issues had not been framed at that point of time, and thus sought remedy by way of appeal to set aside the order of the Learned Additional District Judge dated 22.10.2003 (XII)

The Substituted-Plaintiff-Respondent was of the view that as the learned Additional District Judge came to a finding that the stage of 'Litis Contestatio' had been reached as per order of the learned Additional District Judge (X5) dated 26.09.1997, that order cannot be changed now, and that the order of the learned Additional District Judge dated 22.10.2002 was a correct order and sought that the case be fixed for further trial at the District Court.

I have examined the application of the petitioner and the position taken up by the Substituted-Plaintiff-Respondent.

A preliminary legal objection taken up by the 'Petitioner' is set out in Issue No. 8 raised on behalf of the Defendant-'Petitioner' on 25.03.1993, The original Plaintiff died on 03.11.1997 which is more than one year before the Defendant-Petitioner filed answer, and the question to be determined is whether the Substituted-Plaintiff-Respondent can maintain this action. C. F. Amerasinghe in his book, Defamation and other aspects of the *Actio Injuriarum* in Roman Dutch Law" at page 315 states that "The *Actio Injuriarum* is transmissible neither actively nor passively, except where *litis contestatio* has been reached, the Plaintiffs heir may continue the action" The learned Additional District Judge by his order dated 26.09.1997 (X5) held that a point of *Litis Contestatio* had been reached only because at the time of death of the Plaintiff there was an *ex-parte* Decree in favour of the Plaintiff. The very same Additional District Judge by order dated 19.03.1998 (X6) vacated the *ex-parte* decree in favour of the Plaintiff, consequent to which in my opinion the status quo in this case reverted back to the position that remained on 15.02.1996 when this case was first fixed for *Ex-parte* trial. It is my view that on 15.02.1996 the stage of "Litis Contestatio" had not been reached as the Defendant had not filed Answer and Issues had not been framed. The Answer of the Defendant was only filed on 01.04.1998, and Issues were framed on 25.03.2003, which is long after 15.02.1996, An Introduction to Roman Dutch Law by R. W. Lee 5th edition at page 442 states that "..... Litis Contestatio, which in modern practices is reached when the pleadings are closed and matters are at issue between the Parties."

In Principles of Southern African Law by Wille 5th Edition page 530 states that "Death of a party-Upon the death of either party to the *Actio Injuriarum* the cause of action lapses ; The maxim "*Actio Personalis mortitum cum persona*" applies unless the action has reached the stage of "*Litis Contestatio*" (*ie* close of pleadings) in which event the action passes to the Executor of the wronged person or persists against the Executor of the Wrongdoer, as the case may be"

In *Deerananda Thero vs. Ratnasara Thero*¹ His Lordship T. S. Fernando J. held that in a case where the principle *Actio Peronalis Moritur Cum Persona* applied, section 392 of the Civil Procedure Code (which applies only when the cause of action survives) will not apply.

In *John Fernando and Attorney General Vs. Satarasinghe*⁽²⁾ at 113, His Lordship Weerasuriya, J held that the maxim '*Action Personalis Moritur Cum Persona*' applies to every action for libel or slander and therefore where a libel or slander has been published by any person and such person dies, no cause of action survives either for or against his personal representative'.

Section 392 of the Civil Procedure Code states that 'The death of a Plaintiff or Defendant shall not cause the action to abate if the right to sue on the cause of action survives'

However, in the present case it is my view that as at 15.02.1996 the stage of *litis contestatio* had not been reached between the parties, and even the pleadings were incomplete.

Hence, the provisions of section 392 of the Civil Procedure Code will not apply and no cause of action would accrue to the Plaintiff's wife, the Substituted-Plaintiff-Respondent

Hence, the order of the Learned Additional District Judge dated 22.10.2003 (XII) is contrary to law and is against the weight of the case law and evidence.

Thus for the aforesaid reasons I allow the appeal of the Petitioner and set aside the order of the learned Additional District Judge of Colombo dated 22.10.2003 (XII) without costs

SRISKANDARAJAH, J. — I agree.

Appeal allowed.