

HAMEED AND ANOTHER
v.
DHARMASIRI AND OTHERS

COURT OF APPEAL.

WIJETUNGE, J. AND WIJEWARATNE, J.

C.A. APPLICATION No. 1180/86 – D.C. KANDY 13880/L.

MARCH 7, 1990.

Civil Procedure – Code sections 394 (2), 398 (1) ;and 405 - Legal representative - Executor de son tort - Substitution of legal representative of deceased defendant - Vindictory suit.

When a defendant dies during the pendency of a suit, the suit may be said to be in a state of suspension. No orders except formal or processual orders can be made. The duty is cast on the plaintiff of seeing that the "legal representative" is substituted. The sections leave it to the plaintiff to apply that a correct "legal representative" is brought on the record. If he omits to bring the right person on the record, he will have to bear the consequences, as the proceedings will not bind the true "legal representative".

By judicial interpretation the term "legal representative" in section 394(2) of the Civil Procedure Code has received an extended meaning to include an executor *de son tort*. Section 405 provides for an *ex parte* application and it should be by petition and affidavit, so that there can be *prima facie* proof of the matters stated therein.

The court on being satisfied that there are grounds for substitution should enter the name of the legal representative on the record in place of such deceased defendant and shall issue a summons (in Form 71 of the Schedule to the Civil Procedure Code) on the legal representative to appear and defend the action.

The person so substituted may object that he is not the legal representative. Such objections may be filed separately and an inquiry thereon should be held expeditiously.

Cases referred to :

(1) *Dahanayake v. Jayasinghe* 71 CLW 112

(2) *Sockalingam Chettiar v. Seeman Appuhamy* 46 NLR 318, 320

(3) *Sarlin v. James Fernando* 63 NLR 34, 41

(4) *Thornton v. Velaitthan Chetty* 40 NLR 157

APPLICATION for revision of order of District Judge of Kandy.

A.K. Premadasa, P.C. with *G. Dayasiri* and *Miss S. Ubeyratne* for plaintiff - petitioners.

D.R.P. Goonetilleke with *N. Liyanage* for added - defendant - respondent.

Cur. adv. vult.

August 23, 1990.

WIJEYARATNE, J.

The plaintiffs-petitioners filed this action against P.G. Mendis Appuhamy (since deceased) as 1st defendant and Sunil Mallikarachchi (2nd defendant-respondent) as 2nd defendant for a declaration of title to the land and building situated at premises Nos. 47 & 47/1, Yatinuwara Veediya, Kandy, on the basis that these premises were let to the 1st defendant and that the premises were burnt down on 14.7.1983 and that the 2nd defendant is in possession of these premises with the approval of the 1st defendant but without the consent of the plaintiffs-petitioners.

The plaintiffs-petitioners have asked that they be declared entitled to these premises and the two defendants be ejected therefrom.

They have also averred that the two defendants were wrongfully and unlawfully attempting to put up another building and have prayed for an interim injunction restraining them from doing so.

The plaintiffs-petitioners filed an amended plaint on 27.9.83 stating that the subject-matter of the tenancy was completely destroyed by fire and the tenancy came to an end. They have added an alternative cause of action in the amended plaint and prayed that, in the event of the court holding that the tenancy between the plaintiffs-petitioners and the 1st defendant is yet subsisting and the 1st defendant has sublet the premises to the 2nd defendant in breach of section 10(2)(a) of the Rent Act, No. 7 of 1972, the ejection of both be decreed on that ground.

The 2nd defendant-respondent and P.G. Mendis Appuhamy objected to the proposed amended plaint.

On 25.4.1983 the said P.G. Mendis Appuhamy died and the plaintiffs-petitioners sought to substitute his son, the added defendant-respondent

(P.G. Dharmasiri), in place of the aforesaid deceased 1st defendant (Mendis Appuhamy). The application was supported on 10.5.85 and order was made to effect the said substitution (as seen by the proceedings of 10.5.85 which have been marked "X5"). An order was made to issue summons on the added defendant-respondent for 5.6.85.

Thereafter objections to this substitution were filed, dated 7.8.85, to the effect that the plaintiffs-petitioners have no right to make the substitution and that the plaintiffs-petitioners are not entitled to take this step.

An inquiry into these objections was held on 23.6.86 when only legal submissions were made. The learned Additional District Judge, by his order dated 25.9.86, upheld the objections of the added defendant-respondent holding that he is not the legal representative of the deceased 1st defendant, which order the plaintiffs-petitioners seek to revise in this application.

The procedure to be followed is spelt out in sections 398 and 405 of the Civil Procedure Code. The term "legal representative" is defined in section 394(2) of the Civil Procedure Code as meaning an executor, or administrator or in the case of an estate below the value of Rs. 20,000, the next of kin who have adiated the inheritance.

In the case of *Dahanayake v. Jayasinghe (1)* it was held that the term "executor" includes an executor *de son tort*. It was held in that case that there was ample evidence that the widow intermeddled with her late husband's estate and thereby constituted herself an executor *de son tort* and she could be substituted as the legal representative of her late husband who was the defendant.

Any person who intermeddles with the property of a deceased person or does any other act characteristic of the office of executor by performing duties which are normally those of a legal representative and who has not been expressly or impliedly appointed by the will or who has not obtained letters of administration, becomes an executor *de son tort*, or an executor by his own wrong. This term is equally applicable in the case of an intestacy as in the case of testacy there being no such term known to law as an administrator *de son tort*.

Thus it is seen that by judicial interpretation the term "legal representative" in section 394(2) has received an extended meaning.

On the death of a defendant the court should bring in the legal representative on the record before proceeding with it.

The suit may be described to be in a state of suspension till then and no orders, excepting formal or processual, can be passed. If the suit is disposed of without impleading the legal representatives of a deceased party, re-trial will be ordered (Commentary on the Code of Civil Procedure by Chitaley and Rao, 7th Edition (1963), Volume III, page 3372).

The object of the application is that the fact of the death of the defendant is brought to the notice of the court and the court is appraised as to who are the legal representatives of the deceased.

By these sections the duty is cast on the plaintiff of seeing that the legal representative is substituted in place of the deceased defendant. These sections leave it to the plaintiff to apply that a certain person whom he alleges to be the legal representative be brought on the record. The plaintiff being *dominus litis*, it is incumbent on him to see that proper substitution is effected. If he omits to bring the right person on the record, he will have to bear the consequences as the proceedings will not bind the true legal representative. If improper substitution is made by the plaintiff, he does so at his own risk.

It is in the plaintiff's interest to see that this is done expeditiously so that the action can be continued as early as possible with a view to obtaining the relief sought for in the plaint. Section 405 of the Civil Procedure Code helps him in this respect by providing for an *ex parte* application in the case of the death of a defendant.

The application should be made by petition and affidavit. This is essential so that there can be *prima facie* proof of the matters stated therein.

Thereupon the court, on being satisfied that there are grounds for substitution, should enter the name of the legal representative on the record in place of such deceased defendant and shall issue a summons (in form 71 of the Schedule to the Civil Procedure Code) to the legal representative to appear and defend the action.

An order *nisi* or order absolute is not necessary under section 398 read with section 405 of the Civil Procedure Code. (See the observations of Keuneman, J. in *Sockalingam Chettiar v. Seeman Appuhamy*, (2)).

It has been held in the case of *Sarlin v. James Fernando* (3) that an improper substitution can nullify a subsequent sale in execution. Basnayake, C. J. at page 41 in the said case stated as follows:—

“The proceedings subsequent to the death of the defendant-appellant have therefore been against persons who in law cannot be substituted in place of the deceased in the suit. A person who is not entitled to take the place of the deceased defendant-appellant in the suit and whom the court has no power to appoint to take his place has no *locus standi in judicio*.”

By the proviso to section 398(1) the person who is made the defendant may object that he is not the legal representative of the deceased defendant or make any defence appropriate to his character as such representative.

I am of the view that such objections, if any, should be taken up at the earliest opportunity. As laid down in the case of *Thornton v. Velaitan Chetty* (4), the objection that a person is not the legal representative is one that should be taken up and determined in the first instance.

Such objections may be filed separately and inquiry held thereon as has been done in this case. Such inquiry should be held expeditiously.

The learned counsel for the plaintiffs- petitioners submitted that in this case the learned Additional District Judge has not given reasons for holding that the added defendant- respondent cannot be substituted in place of the deceased 1st defendant. He also submitted that the plaintiffs- petitioners could have led evidence, if necessary, to show that the added defendant- respondent intermeddled with the estate of the deceased, for which purpose an opportunity should have been given to lead evidence.

On a perusal of the order of the learned Additional District Judge dated 25.9.86, he has not given reasons for holding that the added defendant- respondent is not the legal representative of the deceased; nor is there material for such a contrary finding. Therefore I set aside the order of the learned Additional District Judge dated 25.9.86.

On a reading of the petition and affidavit of the 2nd plaintiff- petitioner dated 7.5.86 filed under section 398(1) of the Civil Procedure Code, there is sufficient material to satisfy a court of law that there are grounds for entering the name of the added defendant- respondent in the place of the deceased 1st defendant.

It is averred therein that P.G.Mendis Appuhamy died on or about 24.4.85 leaving an estate below Rs. 20,000 in value, that his wife predeceased him, that the added defendant- respondent is his son, and that he had adiated the inheritance. The added defendant- respondent has not placed any evidence or other material to the contrary.

I therefore make order directing that the aforesaid P.G. Dharmasiri (the added defendant- respondent) be added as the legal representative of the deceased 1st defendant and that he be numbered as the 1st added defendant.

It is open to him to file an answer under section 398(1) of the Civil Procedure Code and to defend the action. However, he is precluded from taking up the position that he is not the legal representative of the deceased 1st defendant, as the matter has been decided and is now concluded.

The added defendant- respondent will pay the plaintiffs- petitioners the costs of this application.

WIJETUNGA, J.— I agree.

Order of District Judge re substitution set aside.

Order for substitution made.
