

1960

Present : Weerasooriya, J., and Sansoni, J.

MORONTUDUWE SRI GNANESWARA DHAMMANANDA
NAYAKE THERA, Petitioner, and BADDEGAMA PIYA-
RATNA NAYAKE THERA *et al.*, Respondents

*S. C. 83, 124 and 133—Applications under Rule 26 of the Rules in
the Schedule to the Appeals (Privy Council) Ordinance in respect of
26 D. C. Colombo, 2882/L*

*Privy Council—Action instituted by a trustee to vindicate his legal title to certain
premises—Decree entered in favour of trustee—Death of trustee pending appeal
to Privy Council—Right of trustee's successor to be substituted as party—Abate-
ment of action—Appeals (Privy Council) Ordinance (Cap. 85), Schedule, Rule 26
—Civil Procedure Code. ss. 392, 395, 404—Trusts Ordinance (Cap. 72), ss. 13,
113 (1)—Appellate Procedure (Privy Council) Order, 1921, Rules 13 18.*

The plaintiff, as the duly appointed principal of a Buddhist educational institution (a *lirivena*), sought a declaration by Court that he, as trustee, was entitled to the premises and for an order ejecting the 1st defendant therefrom. Decree was entered in his favour by the District Court and, on appeal, by the Supreme Court. After the 1st defendant obtained final leave to appeal to the Privy Council the plaintiff died.

Held that the plaintiff's successor was entitled to a certificate under Rule 26 of the Schedule to the Appeals (Privy Council) Ordinance that he was the proper person to be substituted or entered on the record in place of the deceased plaintiff. In such a case it could not be contended that the action abated with the death of the plaintiff.

APPPLICATIONS under Rule 26 of the Schedule to the Appeals (Privy Council) Ordinance.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, for the petitioner in Applications Nos. 83 and 124.

E. B. Wikramanayake, Q.C., with *C. D. S. Siriwardene*, for the petitioner in Application No. 133.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte*, for the 1st respondent in Application No. 133.

Cur. adv. vult.

August 5, 1960. WEERASOORIYA, J.—

These three connected applications relate to an appeal which the 1st defendant in Case No. 2882 of the District Court of Colombo intends to prefer to Her Majesty in Council from the judgment¹ of this Court affirming the judgment and decree of the District Court in favour of the

¹ (1958) 59 N. L. R. 412.

plaintiff. In that action the plaintiff, as the duly appointed principal of a Buddhist educational institution known as the Vidyodaya Pirivena, sought a declaration that he is the trustee of a charitable trust created by deed No. 1259, dated the 9th March, 1876, for establishing and maintaining in the premises described in the schedule to the plaint a pirivena for the purpose of teaching Buddhism, that he holds the premises and is entitled to them as such trustee and for an order ejecting the 1st defendant therefrom. Under deed No. 1259 power was given to an unincorporated body of persons by the name of the Vidyadhara Sabha to appoint a principal of the Vidyodaya Pirivena whenever a vacancy in the office occurred. The persons who at the time of the institution of the action formed the Vidyadhara Sabha were also made parties defendants but no relief was claimed against them.

The 1st defendant in his answer asserted that the premises described in the schedule to the plaint formed a temple of which he is the lawful incumbent or viharadipathi, and to which the Vidyodaya Pirivena is appurtenant, that the appointment of a principal of the pirivena required his approval and that the purported appointment of the plaintiff as principal (presumably without his approval) was unlawful.

After the 1st defendant obtained final leave under the provisions of The Appeals (Privy Council) Ordinance (Cap. 85) to appeal to Her Majesty in Council, the plaintiff-respondent died (on the 15th February, 1960). Thereupon the 1st defendant filed Application No. 83 for a certificate under Rule 26 of the rules in the schedule to that Ordinance as to who, in the opinion of this Court, is the proper person to be substituted in place of the deceased plaintiff. He subsequently filed Application No. 124 for an order staying the further printing of the record (for the completion of which time had been granted till the 21st May, 1960) pending the decision of the question of the substitution of a person in place of the deceased plaintiff, stating as the reason for the application that with the death of the plaintiff the action had abated.

The petitioner in Application No. 133 claims that he was appointed principal of the Vidyodaya Pirivena in succession to the plaintiff by the Vidyadhara Sabha at a meeting held on the 4th March, 1960, and as such he applies for a certificate under Rule 26 that he is the proper person to be substituted or entered on the record in place of the plaintiff. It will be convenient to consider this application first.

In opposing this application Mr. Jayewardene who appeared for the 1st defendant submitted that (as stated in Application No. 124) the action abated with the death of the plaintiff. For this submission he relied on sections 392 and 395 of Chapter XXV of the Civil Procedure Code entitled "OF THE CONTINUATION OF ACTIONS AFTER ALTERATION OF A PARTY'S STATUS" and on the decision of a Divisional Bench of this Court in *Deerananda Thero v. Ratnasara Thero*¹. The plaintiff in

¹ (1953) 60 N. L. R. 7.

that case, as the incumbent of a Buddhist temple, sued the defendant alleging that the latter was unlawfully disputing his right to the incumbency, was disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent. He prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple. The defendant, who filed answer claiming to be the lawful incumbent of the temple, died after the trial commenced but before it was concluded. At the instance of the plaintiff another monk who was residing in the temple was substituted by the District Judge on the basis that any rights which the deceased may have had to the incumbency devolved after the deceased's death on the party substituted. The trial then proceeded and judgment was given declaring the plaintiff to be the incumbent and ordering the ejection of the substituted defendant from the temple. On appeal by the substituted defendant the Divisional Bench held that the cause of action did not survive on the death of the original defendant and that the action had, therefore, abated. This decision appears to have proceeded on the basis that as the action was one for declaration of a status the maxim *actio personalis moritur cum persona* applied to the case.

I do not think, however, that it is possible to take a similar view in regard to D. C. Colombo Case No. 2882. The averments and the prayer in the plaint in that case (the issues on which the trial proceeded are not before me) make it clear that the action was one in which the plaintiff, as trustee, sought to vindicate his legal title to the premises in suit. If the averments are true the trustee was bound under section 13 of the Trusts Ordinance (Cap. 72) to maintain the action. There can be no question that on the death of a sole trustee who has filed such an action the right to sue on the cause of action would survive to his successor in the office of trustee. By virtue of Section 113 (1) of the Trusts Ordinance the title to the trust property would in such a case devolve on the successor without the need for any conveyance or vesting order. The continuation of a pending action in these circumstances appears to be specially provided for in section 404 in Chapter XXV of the Civil Procedure Code. This section is substantially the same as Rule 22, order 10 of the Indian Civil Procedure Code. It was held in *Thirumalai Pillai v. Arunachella Padayachi*¹ that where a trustee dies or retires and another is elected in his place the devolution of the trust estate on the new trustee is a devolution of an interest within the meaning of rule 10. See also the local case of *Sabapathipillai v. Vaithialingam*².

In my opinion, if the petitioner in Application No. 133 is the duly appointed principal of the Vidyodaya Pirivena he would, under section 404 of the Civil Procedure Code, be the proper person to continue the action had it been pending. It was held in *Kulasekere Appuhamy v. Malluwa*³ that the words "pending the action" in section 404 mean during the

¹ (1926) A. I. R. Madras 540.

² (1938) 40 N. L. R. 107.

³ (1926) 28 N. L. R. 246.

progress of the action and before final decree. But although the provisions of that section may not be available to the petitioner for the purposes of getting himself substituted as a party in D. C. Colombo Case No. 2882, inasmuch as the decree in that case has already been entered, what we are concerned with now is whether the petitioner is the proper person to be substituted or entered on the record in place of the deceased plaintiff under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance. The reason for this rule is stated by Bentwich as follows in *The Practice of the Privy Council in Judicial Matters* :¹

“ The Privy Council must have proper parties before it or its decrees will not be binding. Where, therefore, it becomes known before the lodging of the petition at the Council Office that either a party appellant or respondent has died since the date of the order finally giving leave to appeal to the Sovereign in Council, an Order of Revivor must be obtained before the petition of appeal can be lodged. Under the Judicial Committee Rules it is for the Court below to determine who are the right parties ”.

No attempt has been made by the 1st defendant to contradict the statement in the affidavit of the petitioner that he is the duly appointed principal of the Vidyodaya Pirivena. Although Mr. Jayewardene suggested that the matter be referred under Rule 13 of the rules in the Appellate Procedure (Privy Council) Order, 1921, to the District Court of Colombo for inquiry and report as to who, if any, is the proper person to be substituted in place of the deceased plaintiff, I do not think that in the circumstances it is necessary to do so. In my opinion, the petitioner is entitled to a certificate under Rule 26 of the rules in the schedule to The Appeals (Privy Council) Ordinance that he is the proper person to be substituted or entered on the record in place of the deceased plaintiff, and I therefore order that such a certificate issue in his favour. The 1st defendant will pay the petitioner the costs of this application.

In view of the above order there appears to be no need to make any order in the other two applications (Nos. 83 and 124). I leave it open, however, to the 1st defendant, if he is so advised, to make an application based on proper material under Rule 18 of the rules in the Appellate Procedure (Privy Council) Order, 1921, for such extension of time as may be necessary for the prints of the record to be delivered to the Registrar.

SANSONI, J.—I agree.

Application No. 133 allowed.

No order in applications Nos. 83 and 124.

¹ 9th Edition 195.