

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

C. A. No. 861/97(F)

D.C. Kurunegala Case No. 4010/L

T.C.P. Kirunayake

Petitioner

Vs.

P.Y. James

Respondent

C. A. No. 861/97(F)

D.C. Kurunegala Case No. 4010/L

Before : K. T. Chitrasiri, J &

W.M.M. Malinie Gunarathne, J.

Counsel : Ranjan Suwandarathne for the Plaintiff-Appellant.

Mahanama de Silva with Ms. Nadeeka Senanayake

For the Substituted-Defendant-Respondent

Argued &

Decided on : 19.09.2014

K. T. Chitrasiri, J.

Learned Counsel for the Substituted-Defendant-Respondent raising a preliminary objection submits that the order made on the 13.06.1997 by the learned District Judge substituting Kaluarachchilage Wimalawathie as the Substituted-Defendant is erroneous. He further submits that in the application made on 13.06.1997, in order to have the aforesaid Wimalawathie substituted, the plaintiff has failed to mention that the person sought to be substituted is the legal heir of the deceased- defendant. Learned Counsel for the appellant concedes that the defendant Wimalawathie who was substituted was not legally married to the deceased defendant.

Section 398(1) of the Civil Procedure Code stipulates that if the surviving defendant die before the decree is entered and when the right to sue in the cause of action survives, it is the duty of the Court to substitute any person in place of the deceased-defendant whom he alleges to be his/her legal representative. In Section 394(2), the words legal representative is defined. Accordingly, the legal representative means “an executor or administrator or in the case of an estate below the value of Rs. 20,000/= the next -of-kin who have alienated to the inheritance.”

At this stage, it is necessary to note that in the petition dated 13.06.1997 an application had been made for the purpose of substituting the heirs of the deceased defendant stating that the person sought to be substituted namely Wimalawathie was the widow of the deceased defendant. However, neither the marriage certificate nor any other evidence had been produced to court in order to establish that she is the legal representative of the deceased defendant. We also have perused the journal entry made by the learned District Judge by which substitution had been effected and found that the Counsel who appeared for the petitioner has orally mentioned that she is the wife of the deceased defendant. Counsel for the respondent submits that the deceased was not legally married Wimalawathie. Those facts are not being disputed by the learned Counsel for the appellant too.

In the circumstances, we are of the view that the learned District Judge, on 13.06.1997 has failed to consider the provisions contained in the Civil Procedure Code when he made order substituting Kamalawathi in the room of the deceased-defendant. Accordingly, we set aside the order dated 13.06.1997 made by the learned District Judge substituting Kaluarachchilage Wimalawathie

In view of the order made today, all the proceedings recorded, on 13.06.1997 and thereafter including the judgment dated 02.10.1997 are made invalid and those will have no effect or force. Accordingly, we direct the learned District Judge to effect the substitution in terms of the law referred in section 398 read with 394 when an application is made in that connection by the plaintiff and then to proceed with the action.

Judgment of the learned District Judge of dated 02.10.1997 is set aside. There will be no costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

M.M.M. Malinie Gunarathne, J.

I agree

JUDGE OF THE COURT OF APPEAL

AKN