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

C.A. L.A. Application
No.509/2005

D.C. Colombo Case No.5066/SPL

Commercial Bank of Ceylon Limited

No. 21, Bristol Street,

Colombo 01.

CREDITOR-PETITIONER

-Vs-

1. Saravanapawan Sriskandanathan
2. Pathirage Yohan Srinath Perera
3. Chandranath Priyanka Jayathilake
4. Timothy John Surendraraj Rajakarier

Joint liquidators of Magpek Exports Ltd., all of
KPMG Thornton & Company of No.32A, Sir
Mohamed Mear Marker Mawatha, Colombo 03.

5. K.G. Jothipala

RESPONDENTS

AND

K.G. Jothipala (deceased),

No. 200/1, Althugama,

Bogamuwa, Yakkala.

5th RESPONDENT-PETITIONER

-Vs-

Commercial Bank of Ceylon Limited

No. 21, Bristol Street, Colombo 01.

CREDITOR-PETITIONER-RESPONDENT

1st RESPONDENT

2. Saravanapawan Sriskandanathan
3. Pathirage Yohan Srinath Perera
4. Chandranath Priyanka Jayathilake
5. Timothy John Surendraraj Rajakarier

Joint liquidators of Magpek Exports Ltd., all of
KPMG Thornton & Company of No.32A, Sir
Mohamed Mean Marker Mawatha, Colombo 03.

2nd to 5th RESPONDENTS

AND NOW

An application for substitution for the deceased
5th Respondent-Petitioner, in terms of Section 760
of the Civil Procedure Code.

Kodithuwakku Arachchige Sugala Priyangani

No.200/1, Aluthgama,

Bogamuwa, Yakkala.

Petitioner Sought to be Substituted

Commercial Bank of Ceylon Limited

No. 21, Bristol Street, Colombo 01.

CREDITOR-PETITIONER-RESPONDENT-
RESPONDENT

1st RESPONDENT

2. Saravanapawan Sriskandanathan
3. Pathirage Yohan Srinath Perera
4. Chandranath Priyanka Jayathilake
5. Timothy John Surendraraj Rajakarier

Joint liquidators of Magpek Exports Ltd., all of
KPMG Thornton & Company of No.32A, Sir
Mohamed Mcan Marker Mawatha, Colombo 03.

2nd to 5th RESPONDENT-RESPONDENTS

7. Nelum Priyadarshani Jothipala
8. Chathuri Kanchanamala Jothipala

Both of 200/1, Althugama

Bogamuwa, Yakkala.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : M. Ikram Mohamed, PC with Jagath
Wickramanyake and Migara Doss for the
Petitioner sought to be substituted

N.R. Sivendran with Sankamali Somarathna and T.
Sivanandaraja for the 2nd to 5th Respondent-
Respondents

Romesh de Silva, PC with Hiran M.C. de Alwis for
Creditors-Petitioner-Respondent-Respondent
(1st Respondent)

Written Submission on: 28.09.2017 (Petitioner sought to be substituted)
31.07.2017 (2nd to 5th Respondents and Creditors-
Petitioner-Respondent-Respondent)

Decided on : 23.07.2018

A.H.M.D. Nawaz, J.

After this Court had granted leave to appeal in this matter on 18.03.2009, the appeal proper stood for argument and rehearing when the 5th Respondent-Petitioner (who had since become the Appellant after the grant of leave) passed away on 25.04.2016. His widow has made this application under Section 760A of the Civil Procedure Code seeking to be substituted as Appellant.

The original action in the District Court of *Colombo* bearing No.5066/Spl had been instituted for the purpose of winding-up of the Company known as *Magpek Exports Ltd.* The Company was ordered to be liquidated and the 2nd to 5th Respondent-Respondents were appointed as the liquidators. It would appear that in regard to the disposal of sales of assets of the company, the 2nd to 5th Respondent-Respondents called for public tenders and the deceased 5th Respondent-Appellant had submitted a bid for Rs.3 million. It is apparent that by its order dated 15.10.2004 the District Court of *Colombo* directed the 2nd to 5th Respondents to award the tender to the deceased 5th Respondent-Petitioner as his bid was the highest and had been made within the time period.

Subsequently, a joint application dated 01.11.2004 had been filed in the District Court by both the Creditor-Respondent and the 2nd to 5th Respondents seeking to have the order dated 15.10.2004 stayed.

It is consequent to this application that on 07.12.2005 the District Court vacated the order dated 15.10.2004, thus allowing the sale of the subject-matter by way of public auction as per the agreement between the Creditor-Respondent and the 2nd to 5th Respondents.

It is against the order of the learned District Judge dated 07.12.2005 that the deceased Petitioner had filed this application for leave to appeal in this Court. He was granted leave.

As I said before, when the appeal was pending before this Court after the leave had been granted, the 5th Respondent-Appellant (deceased Petitioner) passed away on 25.04.2016 during the pendency of the appeal.

The demise of the 5th Respondent-Appellant was brought to the notice of this Court on 05.05.2016 and by a petition and affidavit dated 03.08.2016, the proposed substituted Petitioner (the widow of the Appellant) made this application moving that she be substituted in the room of the deceased Appellant.

I find that the appeal had been argued several times and it was during this period that the Appellant passed away.

This situation attracts Section 760A of the Civil Procedure Code, which reads thus:-

“Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name, of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.”

In terms of this section, the Court of Appeal has to form an opinion as who is the proper person to be substituted or entered on the record in place of the party who has passed away. The section refers to the passing away of a party to the appeal and Section 760 A of the CPC requires the substitution to be effected in the manner provided in the rules made by the Supreme Court and oftentimes Rule 38 of the Supreme Court is cited as the appropriate Rule.

“Where at any time after the lodging of an application for special leave to appeal, or an application under Article 126, or a notice of appeal, or the grant of special leave to appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may on application made in that behalf

by any person interested, or ex mere motu, require such applicant or the petitioner or the appellant as the case may be, to place before Court sufficient material to establish who is the proper person to be substituted or entered on the record in place of or in addition to the party who has died or undergone a change of status;

Provided that where the party has died or undergone a change of the status is the Petitioner or Appellant, as the case may be the Court may require such applicant or any party to place such material before the Court.”

It is clear that Rule 38 in this instance refers to a situation where a party has passed away after the grant of leave to appeal by this Court and since it is the case in this instant application, the requirement is that sufficient material must be placed before this Court to establish that the person seeking to be substituted is the proper person in place of the deceased Appellant.

Section 760A of the Civil Procedure Code has been interpreted in the past.

In *Kusumawathie v. Kanthi* (2004) 1 Sri.LR 350 at 354 the Court of Appeal (Somawansa J with Ekanayake J agreeing) stated that the intent and purpose of section 760 of the Civil Procedure Code as well as Rule 38 of the Supreme Court Rules is substitution for the purpose of prosecuting the appeal. Though in the original Court the person entitled to be substituted is the next of kin who has derived the inheritance, there is no such requirement in the case of an appeal.

The Supreme Court held in *Gamarallage Karunawathie v. Godayage Piyasena* (2011) 1 Sri.LR 171 that Section 760A of the Civil Procedure Code can be applied for matters where the record has become defective upon the death or change of status of a party to the appeal after the lodging of the appeal.

In *De Silva v. De Croos* (2002) 2 Sri.LR 409 the Court of Appeal observed that if the substitution is not effected, the judgment becomes an absolute nullity.

In the case of *Jayakumar v. Gunasekara* C.A. L.A. No.258/2003, D.C. Colombo No. 2112/Spl (C.A. Minute dated 02.11.2004) the plaintiff died pending appeal and his son,

the petitioner, was substituted in place of the original plaintiff in terms of Section 760A of the Civil Procedure Code and Rule 38 of the S.C. Rules. The Supreme Court, having set aside the judgment of the District Court and the Court of appeal, entered judgment in favor of the defendant, that he be restored to possession of the premises.

The Petitioner moved to stay the writ on several grounds, *inter alia*, that:-

- (a) he had acquired undivided rights to the property in suit and those rights have been acquired independently and not through the deceased Plaintiff;
- (b) as a co-owner of the premises in suit he has a right to be in possession.

It was held that when a person is substituted under Section 760A of the Civil Procedure Code and Rule 38 of the Supreme Court Rules, in place of a deceased party to a pending appeal, he becomes the legal representative of such deceased party for the purpose of such appeal. He, as the legal representative of such party, is entitled to all benefits arising out of such appeal. Similarly, he has to accept all liabilities, if any, arising from the judgment in appeal. Until the decree passed in the appeal is satisfied, he continues to be the deceased party's legal representative.

In *Jayakodi Arachchilage Rannaide v. Jayakodi Arachchilage Priyanbka Wimalasooriya and Others* (2012 Galle Law Journal Vol.1 308 at 312) Ekanayake, J. stated that when there is no 'live appellant', the Court has no jurisdiction to hear and determine the appeal.

All these cases highlight the necessity to have a substituted Appellant for the purpose of prosecuting the appeal and it would appear therefore in terms of Section 760A of the Civil Procedure Code, coupled with the Supreme Court Rule 38, what the Court should look for is a fit and proper person to be substituted for the prosecution of the appeal. If the person to be substituted appears to the Court to be the fit and proper person (as the doublet goes in the section), it would be sufficient for the purpose.

The present application for substitution has been made by no less a person than the widow of the deceased Appellant who left behind the Petitioner and his two children- the children having been cited as the 6th and 7th Respondents to the application for

substitution. Sufficient material in the form of marriage certificate of the Petitioner and birth certificates of the 6th and 7th Respondents have been filed with the petition marked "X2" and "X4" and they go to establish a nexus between the Petitioner and the deceased Appellant.

The children have not objected to their mother being substituted in the room of their father. The liquidators too have consented to the substitution being effected.

I take the view that the Petitioner is a fit and proper person in terms of Section 760A of the Civil Procedure Code to continue the appeal and this Court allows the substitution of the Petitioner. The Petitioner is directed to file an amended caption reflecting the substitution within two weeks and the Registrar is directed to notice the parties in terms of the amended caption and take steps to mention this matter in the appropriate court to fix the appeal for argument.

JUDGE OF THE COURT OF APPEAL