

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

Kulasiri Senaratne Jayasinghe,
No. 410/8, Bauddhaloka Mawatha,
Colombo 7.

PETITIONER

C.A. Appeal No.1470/2002 (F)

D.C. Homagama Case No.200/P

-Vs-

Premalatha Weerakkody

Substituted PLAINTIFF-RESPONDENT

1. Althuge Charlis

and Others

DEFENDANT-RESPONDENT-
RESPONDENTS

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

COUNSEL : Dr. Sunil Coorey with Edward Ahangama for
the Petitioner

Nihal Jayamanne, PC with Noorani
Amarasinghe for the Plaintiff-Respondent

J.P. Gamage for the 1st, 2nd and 4th Defendant-
Respondent-Respondents

Written Submissions on: 18.10.2016 (for the Petitioner)

Decided on : 17.01.2018

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

This application pertains to an appeal that has had a tortuous path and when one navigates through its chronology it is interesting to note that at one stage the case had been heard and fixed for judgement but when the date for judgment got postponed on several occasions, eventually the judgment became incapable of being delivered as the learned Judge who heard the case went into retirement. Thereafter when the argument of the appeal was finally scheduled for 28.06.2011, long after it had been put off on several dates, the inevitable occurred in that the substituted Appellant before this Court one Emali Irene Abeysinghe crossed the great divide and that death occurred, according to the records, just five weeks before the appeal stood scheduled for argument on 28.06.2011. The Journal Entry for 28.06.2011 indicates that Dr. Sunil Coorey who had hitherto represented the aforesaid Appellant brought to the notice of this Court that the Appellant who was also the 4th and 5th Defendant-Appellant had passed away and he was ready with substitution papers.

This Court, on that day namely 28.06.2011, however directed the counsel to file fresh substitution papers, as the application that had already been filed was not in order-see the J.E. for 28.06.2011. In fact, the court had directed the filing of the fresh substitution papers by way of a motion with notice to the other side.

The next Journal Entry has been minuted by the registry of the Court of Appeal to the effect that the Petitioner had filed a motion dated 20.12.2012 together with a certified copy of the proceedings in the District Court of Kesbewa Case No.T/16. The Registrar of this Court subsequently brought this fact to the notice of the then President of the Court of Appeal and the Registrar's Journal Entry reads thus:

“As per JE dated 28.06.2011 the counsel for the appellant had been directed to file substitution papers by way of a motion and move Court with notice to the other side. But the necessary steps have not been taken by the counsel for the petitioners and such has been submitted for Your Lordship's directions.”

The Honourable President of the Court of Appeal made directions to have the matter listed for 02.09.2013 in Court No.302 after notice to the Appellant-Respondent (*sic*). Then the Registry complied with this order by dispatching notices to the Appellant (*sic*) and the Respondents by registered post and some notices dispatched to several Respondents returned undelivered. When the matter came up on 02.09.2013, the Attorney-at-Law who appeared for the Petitioner brought to the notice of Court that he had filed “substitution papers” and in addition a certified copy of the proceedings of the District Court of Kesbewa Case No.T/16 instituted by one Kulasiri Senarathna Jayasinghe had also been filed. The person Kulasiri Senarathna Jayasinghe who had filed the testamentary case in the District Court of Kesbewa was identified to Court as the nephew of the deceased appellant. In response to this intimation, the learned Counsel for the Plaintiff-Respondent made an application to file a statement of objections -see the J.E. dated 02.09.2013. The Attorney-at-Law’s statement to Court that he had filed “substitution papers” does not seem to reflect the correct position as those papers which he represented to Court were filed had been found to be wanting by this Court on 28.06.2011 and the J.E. on that date reflects him to have been present on that date when the Court made the observation that fresh papers had to be filed as the papers that had already been filed were defective. The question before this Court is whether these new papers had been filed by 02.09.2013. It appears that the fresh papers had not been filed by 02.09.2013 as the next Journal Entry for 13.12.2013 clearly indicates.

Indication as to the existence of fresh Papers for substitution

It was only on 13.12.2013 that Attorney-at-Law for the Petitioner informed Court that papers for substitution would be filed in the course of the day-see J.E. dated 13.12.2013. This Court then fixed the matter for mention on 12.03.2014. This Court observes that it is only 4 days later namely 17.12.2013 that a motion dated 13.12.2013 accompanied by a petition, affidavit and a copy of a probate had been tendered and

on the same day namely 17.12.2013 the Attorney-at-Law for the Plaintiff-Respondent filed his objections accompanied by a document marked "A" objecting to the substitution papers.

What happened on 12.03.2014?

When the matter came up on 12.03.2014, the substitution papers and objections thereto had been filed and the Court fixed this matter for inquiry with the reservation of liberty to file written submissions.

Whilst the application to substitute the Petitioner in the room of the substituted 4th and 5th Respondent was thus pending, Dr Sunil Coorey the Attorney-at-Law for the Petitioner informed Court on 24.03.2015, the Plaintiff-Respondent too had passed away and thus he sought permission to have the daughter of the deceased Plaintiff-Respondent -one Premalatha Weerakody substituted. The Court gave the date namely 06.07.2015 for support.

The Attorney-at-Law for the Petitioner had filed a motion dated 20.11.2012 together with a certified copy of the proceedings in the District Court of Kesbewa Case No.T/16.

Objections to the application for substitution have been raised on the following grounds:-

1. Though the Counsel for the Appellant informed Court on 13.12.2013 that the papers would be filed in the registry within the course of day, there was a failure to comply with this undertaking and the said papers had not been filed within the course of 13.12.2013 but instead this application for substitution had been filed only on 17.12.2013 and the said application is dated 13.12.2013.
2. There was a failure initially to comply with the order the court made on 28.06.2011 -namely the substitution papers must be filed afresh by way of a motion with notice to the other side.
3. The Petitioner has not taken any steps to file papers until 17.12.2013.

The substance of the objections raised on behalf of the Respondents is that since no steps have been taken to effect substitution in terms of the order made by the Court of Appeal on 28.06.2011, the appeal has abated.

Quite independent of the argument for abatement, it is contended on behalf of the Plaintiff-Respondent that *prima facie* the Petitioner has not established a connection and/or relationship he bears to the deceased.

The overriding consideration in re-listing applications in my view would be whether justice would be denied to parties by making an order of abatement, when Attorney-at-Law representing the parties states incorrect facts or gives undertakings as to the filing of an application on behalf of those parties and later on, either through negligence or forgetfulness, reneges on the undertaking. No doubt in this application the learned Attorney-at-Law incorrectly stated that substitution papers had been filed whereas the only substitution papers that had been filed were the ones that this Court found wanting and whose rectification this Court ordered.

So, he could not have stated to Court that substitution papers had been filed, when no such papers had in fact been filed. The Attorney-at-Law concerned could have been more prudent in his statement to Court and should have sought an extension of time, to file substitution papers. This is the culpability that the Petitioner-Respondent's Counsel cites as a reason that should compel this Court to reject the application for substitution.

In addition, this Court ordered substitution papers to be filed on 26.08.2011. The argument is that substitution papers had been filed only on 17.12.2013.

Is there a contumacious failure to comply? I have looked at the facts and cumulatively the following facts emerge.

1. Dona Emeli Irene Abeysinghe -the substituted 4th Defendant and 5th Defendant-Appellant in this appeal dies on 16.05.2011.

2. In this partition action, she was not awarded any rights, though she claimed as a co-owner.
3. The said deceased left a last will and a testamentary action to prove the said last will was filed in D/C Kesbewa Case No.T/16.
4. The Petitioner seeking to be substituted had been named as the executor of the last will.
5. A limited probate has been granted to the Petitioner and on 17.12.2013 it has been filed before this Court.
6. A certified copy of the proceedings in relation to the testamentary case has also been filed before this Court.
7. The Plaintiff-Respondent too passed away on 15.01.2015 and this Court was informed of this fact on 24.03.2015.

A perusal of the substitution papers that has been filed to effect substitution in the name of the substituted 4th and 5th Defendant-Appellants appears to demonstrate a hope or a search for a document that would link the Petitioner to the deceased - namely a limited probate that would give some legitimacy to the Petitioner. If that was the legitimate reason for the delay in effecting substitution, it behoved the legal representative to apprise the Court of Appeal of this fact and not expose himself to objections which are well founded.

I must observe though that this partition action had concluded in the District Court of Homagama as far as back as 26.11.2001 and after the appeal was argued before a Judge of this Court on 06.06.2015, the judgment was reserved for 01.09.2005 and again on 26.10.2005, on which date the judgment was not delivered, though the parties were present. Then the Judge who heard the case retired before the judgment could be delivered and though the case was taken up before another judge, but before the argument could be concluded before that particular judge, the benches had been reconstituted.

Subsequently, after several postponements, the appeal was re-fixed for argument on 28.06.2011. A few weeks before 28.06.2011, the Appellant died and it was in those circumstances that this Court directed Counsel on 28.06.2011 to file proper papers for substitution and thereafter, the delay as could be seen owing to the testamentary case has ensued.

In this long whirligig of the trajectory of this case, the Plaintiff-Respondent too has passed away and an application for the substitution of the deceased Plaintiff-Respondent has since been made.

In the surrounding circumstances and backup as above, I bear in mind the discretionary power vested in this Court by virtue of Section 760A of the Civil Procedure Code, which runs as follows:-

“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.”

If the words “Supreme Court” that appear first in Section 760A of the Civil Procedure Code are substituted with the words “Court of Appeal”, the relevant part of Section 760A will read thus:-

“the Court of Appeal may in the manner provided in the rules made by the Supreme Court under Section 136 of the Constitution 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 had died or undergone a change of status, and.....”

Have there been any rules made by the Supreme Court under Section 136 to regulate substitution provided for in Section 760A? The answer would be in the negative and Rule 38 of the Supreme Court Rules 1990 provides:

“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 on 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 in that behalf made by any person interested, or ex mero motu, require such applicant or the petitioner or appellant, as the case may be, to place before the Court sufficient materials 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.”

A scrutiny of Rule 38 would show that it would not apply to the instant application for substitution as what is pending before this Court is an appeal which has become defective by reason of deaths and it would appear that no rule has been made in regard to Section 760A of the Civil Procedure Code.

In the absence of specific rules, the discretion of the Court of Appeal to allow or disallow substitution would depend on a number of factors inherent in the case and that discretion has to be exercised judiciously in order to ensure fair play among parties. Despite the objection raised on behalf of the Petitioner-Respondent one such factor that looms large is the conclusion of the argument of this case long time ago and the case had all but achieved finis with the judgment in the offing, but the judgment became incapable of being delivered owing to the retirement of the judge and the case has since beaten a tortuous path because of the reconstitution of benches and demise of parties -the eternal verities that one oftentimes comes across day in day out in appeals that come up before this Court. As Pereira J. echoed in the full bench decision of *Dodwell & Co v. John et al* 18 N.L.R 133 at p 141, our Courts are Courts of Law and Equity and I hold that equitable consideration must always temper the rigors of Common Law. The exercise of judicial discretion under Section

760A of the Civil Procedure Code is not immune to the intrusion of equity and having regard to all the circumstances of the case, I proceed to allow the application for substitution made by the Petitioner and there shall be an amended caption before substitution takes place.

JUDGE OF THE COURT OF APPEAL