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

C.A. Case No. 1164/2000 (F)
D.C. Polonnaruwa Case No. 1676/L

Walpola Liyanage Belin Perera
of Hingurakgoda.
Substituted PLAINTIFF-APPELLANT

-Vs-

N.K. Kiribanda
of Balakotuwa, Kaudulla.
DEFENDANT-RESPONDENT

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

COUNSEL : S.N. Vijithsingh with Chitrananda G. Liyanage for the Substituted Plaintiff-Appellant

Chathura A. Galhena with Manoja Gunawardana for the Defendant-Respondent

Decided on : 19.11.2018

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

The issue in this case concerns a declaration of title that a permit holder under the Land Development Ordinance (LDO) sought and the quintessential question before this Court is whether the Appellant who was substituted in the court *a quo* after the demise of the original permit holder could prosecute and maintain this action notwithstanding the fact that the Appellant was not a nominee of the original Plaintiff or his consanguine relative. The permit holder-one Peter de Mel instituted this action

against the three defendants for a declaration of title to two lands depicted in the schedule to the plaint, eviction of the defendants therefrom, and for damages. It is axiomatic that a permit holder under the Land Development Ordinance enjoys sufficient title to enable him to maintain a vindicatory action against a trespasser-*vide* ***D.P. Palisena v. K.K.D. Perera*** 56 N.L.R 407; ***Bandaranayake v. Karunawathie*** (2003) 3 Sri.LR 295; ***Jayaalath v. Karunatilaka*** 2013 (1) Sri L.R. 337.

Be that as it may, the permit had long been issued to the original Plaintiff in 1962 and he instituted this action against a three defendants alleging unlawful possession as far back as from 1978 and the plaint had since been amended several times until the trial was taken up on the amended plaint dated 31.05.1989. It has to be remembered that the declaration that was sought by the amended plaint in 1989 was to the effect that the permit held by the original Plaintiff Peter de Mel was yet valid and effectual. It would appear that the original Plaintiff Peter de Mel passed away on 14.03.1990 and the Appellant before this Court Belin Perera who was not a consanguine son of Peter de Mel was substituted in the room of the original Plaintiff.

The substituted Plaintiff-Appellant Belin Perera was neither the nominee of the original permit holder (the original plaintiff) nor was he one who fell within the Third Schedule of the Land Development Ordinance No. 19 of 1935 as amended. When the trial began, it was the substituted Plaintiff-Appellant Belin Perera who gave evidence and admitted that he was not the son of the original Plaintiff (permit holder) Peter de Mel. Admittedly the original Plaintiff had been married to the mother of the substituted Plaintiff-Appellant. In other words, the substituted Plaintiff-Appellant was not a lineal descendant of the original Plaintiff. Because the deceased Plaintiff was married to his mother, the Appellant made an application to be substituted in the room of the deceased Peter de Mel and upon that application being allowed, he was permitted to prosecute the action. In my view the propriety of this substitution comes into question in this appeal and I will presently go into it.

The learned Additional District Judge of *Polonnaruwa* by his judgment dated 03.10.2000 has dismissed the plaint holding that the substituted Plaintiff-Appellant was not entitled to inherit the rights of the deceased Plaintiff Peter de Mel. One of the reasons given for the dismissal of the plaint was that the substituted Plaintiff was neither the nominee of Peter de Mel nor was a consanguine relative coming within Third Schedule of the LDO. The learned Additional District Judge of *Polonnaruwa* makes two findings that are relevant to the consideration of this appeal-namely, the substituted Plaintiff-Appellant, though not a consanguine relative of the original Plaintiff, was properly substituted according to law and that the original Plaintiff had a valid and effectual permit at the time of institution of the case.

The learned Additional District Judge further held that since the substituted Plaintiff-Appellant did not satisfy the requirements of the LDO, there was no way that the Court would grant him the remedies sought in the plaint.

Mr. Vijithsingh who appeared for the Appellant strenuously impugned the findings and conclusions of the learned Additional District Judge. The thrust of his argument was that having held that the substituted Plaintiff-Appellant was properly substituted and permitted to prosecute the action, it was contradictory for the learned Additional District Judge to have improperly disallowed the relief prayed for in the plaint. The original Plaintiff had sought a declaration that his permit under the LDO was yet valid.

Though he sought this relief by his original plaint dated 05.05.1978, it is a component element of a vindicatory action, the title, though sufficient to institute such an action, must continue throughout the course of action. Not only must the Plaintiff have title at the time the *rei vindicatio* is instituted, but he must retain title throughout the action-*see* ***Silva v. Jayawardene*** (1942) 43 N.L.R 551; ***Heen Menika and Others v. Pitchamuttu Murugiah*** CA 1086/2000 (C.A. Minutes of 01.06.2018). So the question certainly arises in this case whether the title of the original Plaintiff which the District Court found to be valid was transmitted to anyone after his demise on 14.03.1990. In fact the death of the permit holder occurred during the pendency of the action. The learned Additional

District Judge has held that the substituted Plaintiff-Appellant was not capable of deriving title from the deceased Plaintiff because he was neither the nominee of the permit holder nor was he one of those enumerated in the Third Schedule to the LDO. I have no reason to differ from this reasoning but what is disconcerting as a contradictory reasoning of the learned Additional District Judge is his finding that the Appellant was properly substituted in the room of the original permit holder. Was the substituted Plaintiff-Appellant entitled to be substituted in the room of the original Plaintiff? In my view the answer to this question will suffice to dispose of the question-whether the plaint must be allowed or dismissed?

It has to be remembered that the subject-matter of the action was not the private property of the original Plaintiff which was capable of transmission through an *inter vivos* disposition by a deed or by testate succession or otherwise.

As to how the permit would devolve on the successors of the original permit holder is dealt with in the LDO and though the learned Additional District Judge holds that the title of the original Plaintiff remained effectual right throughout, there is no legal basis that he adduces for this conclusion. But the finding of the Additional District Judge that the Appellant was not entitled to succeed to the permit is referable to LDO and that finding is certainly unassailable-for succession by a spouse of a permit holder under the LDO-*see* Sections 48, 48B, 49 and 51 and for inheritance in the absence of nomination-*see* Section 72 and Third Schedule to the LDO.

Let me now turn to the question I have posed above. Was the Appellant entitled to be substituted in the room of the original permit holder? I have said that the answer to this question is dispositive of this case. The Additional District Judge has stated in his judgment that the substitution of the Appellant in the room of the original Plaintiff was properly effected. But I must observe that there is also no reasoning as to why it was a permissible substitution.

Was the substituted Plaintiff-Appellant properly substituted in place of the original Plaintiff?

This question looms large in this case. When a sole plaintiff in a civil action passes away, Section 392 of the Civil Procedure Code (CPC) the very first provision in Chapter XXV addresses this question. In terms of this section,

> *"The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives."*

Order 22, Rule 1 of the Indian Code of Civil Procedure, 1908 is identical to our provision- section 392 of the CPC.

If the cause of action does not survive the demise of the sole plaintiff in this case, Section 392 makes it patently clear that this action would abate upon the death of the original Plaintiff in 1990. So the question before the learned District Judge was-"Did the cause of action survive the original plaintiff who was the permit holder in the case?". Even before substitution could be made, this was the question that loomed large before the Additional District Judge. It is thereafter that Section 395 of the CPC comes into play.

> *"In case of the death of a sole plaintiff or sole surviving plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name."*

In order for an action to continue after the demise of a Plaintiff during the course of the trial as has happened in this case, the followings ingredients must be satisfied.

1. Did the cause of action survive the demise of the plaintiff?
2. Is the person seeking to be substituted a legal representative?

- Section 392, 394 and 395 of the CPC.

Did the cause of action survive to the legal representative?

If I may combine the above two questions, the composite issue to answer is whether the cause of action with which the original Plaintiff came to court would survive to his legal representative. As I said before, the original Plaintiff sought a declaration that his title as

a permit holder was still valid. He sought ejectment of the defendants from the subject-matter of the action on that score. A cause of action is defined in Section 5 of the CPC thus:-

> *"Cause of action is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty and the infliction of an affirmative injury."*

Sarkar's Commentary on the Code of Civil Procedure 8th edition vol-I page 125, 54 vol-II at page 1136 has the following on cause of action.

> *"Right to sue means the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death. The cause of action in the original and revived suits must be the same and no fresh cause of action can be imported into the revived suit."*

It is manifest from the above that every action is founded on a cause of action and thus 'a cause of action' is the right to sue and forms the foundation of the suit. The cause of action that the plaintiff had must survive to the legal representative as enunciated in Section 395 of the CPC. The expression 'legal representative' is defined in Section 394 (2) to mean an executor or administrator, or in the case of an estate below the administrable value, the next of kin who have adiated the inheritance.

Upon the death of the original Plaintiff it is the next of kin, *i.e.*, all the heirs who should be substituted.

In terms of Section 394(2) of the Civil Procedure Code all the 'legal representatives' have to be substituted. The expression or the term 'legal representative' that occurs in Section 394(2) is a term of art, a word or phrase having a specific and precise meaning apart from its general meaning in ordinary contexts. To reproduce the very wording of Section 394(2) which is as follows:-

> *"Legal representative means an executor or the administrator or in the case of an estate below the value of Rs.4000,000/- the next of kin who have adiated the inheritance."*

It is to be observed that the wording in Section 394(2) is next of kin who "have" adiated the inheritance. Whether the expression "next of kin" includes or means one person or more than one person depends on the circumstances or the facts peculiar to a particular case. For instance, if the deceased plaintiff had one child, the expression "next of kin", in such a context would necessarily mean one person. If there is one solitary heir who has adiated the inheritance, he enjoys the status or the right to continue the action after the death of original Plaintiff.

At page 2105 Chitaley and Rao 2nd edition-vol-2, the same view as that expressed by Sarkar has been articulated. To quote:

> *"The expression legal representative must where there are more representatives than one be read in the plural.....As a general rule all the legal representatives should be brought on record and if any of them refuses to join as plaintiffs they must be made defendants or respondents....."*

Section 394(2) of the Civil Procedure Code defines "Legal Representative" as the next of kin who have adiated the inheritance.

To deal with adiation which finds expression in Section 394 (2) of the CPC, it is the process of inheriting or inheritance, the word being referable to Roman Dutch Law. For adiation to come into play, the deceased parent (original plaintiff) should have had a proprietary interest in the property, be it noted, at the time of his death.

Proprietary interest should devolve on the person or persons (next of kin) who are substituted in consequence of death or by reason or by virtue of death of the original Plaintiff.

As explained at page 2104 (Civil Procedure-Chitaley and Rao 2nd edition vol-2) "legal representative must be a person on whom the estate devolves on the death of the party suing or sued".

In the case before this Court nothing devolved on Belin Perera who had been substituted as the substituted Plaintiff. No proprietary interest passed to him on the death of the original Plaintiff because Belin Perera was admittedly not an heir of the original Plaintiff.

As such, no adiation of inheritance could possibly have taken place in consequence of the death of the original Plaintiff, because no rights of ownership or interests could have possibly devolved upon his death on Belin Perera. That being so, he could not have been substituted as the next of kin because Belin Perera had not "adiated the inheritance".

At page 2104 Sarkar refers to a case in which it was held that upon the death of a trustee- a new trustee, who is elected or appointed, cannot be substituted as the estate of the former trustee had not devolved on the new trustee in consequence of the death of the former trustee.

The above case illustrates the principle that the next of kin of a deceased party can be substituted only, but only, if there is a "devolution" of interests on the next of kin as a result of the death of the original party.

Devolution of interests may not take place or occur due to various reasons. Since this was a permit given at the instance of the state, it is through the provisions of the LDO that the proprietary interest that resided in the original Plaintiff is transmissible upon his death. Under the LDO one has to be a nominee or should belong to the category of relatives who are specified under the Third Schedule. To inherit is to receive or derive property from parents or ancestor upon or in consequence of the death of parent or ancestor. To inherit or adiate is to receive property from an ancestor, be it noted, under the laws of intestate succession or under a statutory devolution as is found in the LDO.

So Belin Perera did not satisfy this requirement of an entitlement to a statutory devolution but notwithstanding the disentitlement of Belin Perera to have adiated the inheritance of the original permit holder, he was substituted improperly.

Needless to say, the District Court purported to substitute Belin Perera as the Plaintiff when he had not adiated the inheritance of the original Plaintiff. Belin Perera did not and could not possibly inherit or adiate any inheritance from the original Plaintiff. But in terms of Section 394(2) of the Civil Procedure Code only the next of kin who "have" adiated the inheritance can be substituted as the plaintiff or the plaintiffs as the case may be.

In the circumstances this action has to be dismissed because the substituted Plaintiff Belin Perera had no legal right to prosecute or continue the action upon the demise of the original Plaintiff. When the substituted Plaintiff-Appellant has no right to maintain the action the inevitable result ought to follow *i.e.* the action will have to be dismissed.

The effect of an improper substitution was considered in ***Sarlin v. James Fernando*** 63 N.L.R. 34. In that case the Court considered the combined effect of the operation of both Section 394(2) and 398(1) of the Civil Procedure Code. On the facts and circumstances of that case, Basnayake C.J. held that, *"the effect of the improper substitution of a legal representative in place of a judgment debtor is to nullify an execution sale".*

One has to recall section 392 of the CPC as well-*"The death of a plaintiff or defendant shall not cause the action to abate if the right to sue on the cause of action survives."* For the reasons adduced above the right to sue on the cause of action did not survive to the purported legal representative namely Belin Perera the improperly substituted Plaintiff-Appellant and therefore the death of the plaintiff caused the action to abate and the District Court was quite oblivious to this consequence of nullity that had supervened. The initial question whether the application made by the Appellant for substitution could be allowed should have been answered having regard to the law surrounding Chapter XXV containing provisions relating to continuation of actions after alteration of a party's status and the proceedings should have abated at an anterior point of time without the substitution of the Appellant being allowed.

Instead the proceedings were conducted leading to a judgment which dismissed the plaint holding that the Plaintiff could not succeed to the permit of the original Plaintiff. This was the very decision that should have been made at the stage of substitution and the dismissal of the plaint came far too late. In any event since the right decision was made, albeit at a posterior point of time, I proceed to affirm the judgment dated 03.10.2000 and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL