
**HARIPALA AND OTHERS
VS
MALLIKA FERNANDO AND OTHERS**

COURT OF APPEAL
AMARATUNGA, J.,
C.A. REV. 1723/2002
D.C. ELPITIYA 553/L
OCTOBER 21, 2003 AND
MARCH 1 AND 24, 2004

*Civil Procedure Code, sections 14A. 32, 321 (2), 325 (4) 326, 327, 328 and 839
- Fiscal resisted by four persons - Application under section 325 filed - One
person died - Is substitution permitted - What is his remedy ?*

HELD:

- (i) If a person who has resisted the fiscal dies before the inquiry, the resistance is at an end. A party who has not resisted cannot be substituted for the person who resisted simply on the ground that he is an heir of the person who offered resistance.

Per Amaratunga, J.

"Absence of any provision for substitution in a 325 inquiry is not a lacuna which is to be remedied by having recourse to sections 839 - section 839 has no application.

- (ii) His remedy is a regular action to establish his right to the property derived through his ancestor.

APPLICATION in revision from an Order of the District Court of Elpitiya.

Case referred to :

1. *Jinasena vs Vithanage* - Bar Association Law Journal Reports - (1994) Vol. V Part II page 56

S. Mandaleswaran with P. Peramunagama and Indika Kalingawansa for petitioners

N. R. M. Daluwatte P. C. with Gaihari de Silve for plaintiff- petitioner - respondent.

Cur. adv. vult.

July 6, 2004

GAMINI AMARATUNGA, J.

When this revision application came up before me for argument, both parties moved to file written submissions and invited me to decide this application on the written submissions filed by them. Thereafter, both parties have filed their written submissions and I proceed to pronounce judgement having considered the written submissions.

The facts relating to this case are as follows. When the fiscal went to execute the writ of possession relating to the plaintiff's action, (where the plaintiff was the successful party in the District Court, the Court of Appeal and in the Supreme Court), the fiscal was resisted by four persons. The plaintiff respondent then made an application under section 325 of the Civil Procedure Code, making those persons, the 2nd, 3rd, 4th and 5th respondents respectively. Thereafter, those four respondents filed their joint written statement of claim in terms of section 325(4). Thereafter, the 2nd respondent, Leelaratna Fernando died. The 3rd, 4th and the 5th respondents, who are the present petitioners, then sought to substitute the deceased 2nd respondent's son in his place. The plaintiff objected to this. Thereafter, the learned District Judge, having considered the submissions made by the parties, made order refusing the application to effect substitution. This application is against that order.

There is no specific provision dealing with substitution in the course of an investigation and inquiry under sections 325 and 326 of the Civil Procedure Code. In the written submissions filed on behalf of the petitioners, it is stated that such substitution is possible under section 14A of the Civil Procedure Code. That section sets out the manner in which an action may be instituted in a situation where a person against whom the right to any relief is alleged to exist is dead and the right to sue for such relief survives. This section provides the manner in which the person who is entitled to claim relief against the deceased person could institute an action to get the relief he could have got from the deceased person, had the latter remained alive. The petitioners' position is that section 14A permits substitution. Is this position correct in law?

The task of the fiscal in executing a writ issued under section 323 of the Code is to deliver possession of the property described in the writ issued to him. When an application is made to Court under section 325(2) for resisting the fiscal, any person, claiming to be in possession of the property relevant to the writ may file his claim setting out his right or interest entitling him to be in possession of the property. Under section 326, what a Court has to decide is the claimant's right to possess the land in question, independently of the judgement debtor. The only question to be decided is the right to possession of the person offering resistance, and whether such right is one derived otherwise than from a right derived from or claimed through the judgement debtor. The concept running through sections 325, 326, 327 and 328 is the right to possession and not the title of the person resisting execution of the writ. In terms of section 326, if the Court finds that resistance was occasioned by a judgment debtor or by some person at his instigation or on his behalf or, that the claim of the person offering resistance is not in good faith or that the claim has not been established, the order to be made is a direction to put the judgment creditor in possession. On the other hand if the claim of the person resisting is accepted, the Court's task is to dismiss the petition of the judgement creditor.

Under sections 326, 327 and 328 the Court's decision does not have the effect of a decree in a regular action. A person dissatisfied with a decision given under those sections has the right to institute a regular action to establish his right or title. Thus, the whole object of sections 325 to 328 is not to make execution proceedings a second regular action to decide the question of title between the judgment creditor and the claimant but to make a summary inquiry necessary to decide the right to possess in so far as it is necessary for the smooth flow of execution proceedings. The absence of provisions for substitution in execution proceedings and the time limit of sixty days set out in section 325 (4) highlight the summary nature of the proceedings commenced under section 325 (1) and (2). The provisions of section 329 which keeps open a dissatisfied party's right to institute an action to establish his right or title to the property in question also indicates that substitution of heirs is not contemplated under those provisions.

If a person who has resisted the fiscal dies before the inquiry, the resistance is at an end. A party who has not resisted cannot be substituted

for the person who resisted simply on the ground that he is an heir of the person who offered resistance. His remedy is a regular action to establish his right to the property derived through his ancestor.

Thus, the son of the deceased 2nd respondent is not without a remedy even though his Substitution is not allowed in an inquiry under section 325. Therefore, the absence of any provision for substitution in 325 inquiries is not a lacuna which is to be remedied by having recourse to section 839. Accordingly, section 839 has no application.

Section 14A which caters to a different situation, namely, the death of a person before an action is instituted to obtain relief which a person is entitled to against the deceased person also cannot be used in the present situation.

To sum up, the position is that the heir of a person who has offered resistance to fiscal on his alleged independent right has no *locus standi* to be substituted in an inquiry under section 325 of the Code. See *Jinasena vs Vithanage*⁽¹⁾ and the case cited therein in relation to an application under section 328 of the Code.

It also appears from the claim filed by the deceased 2nd respondent, that the 3rd, 4th and 5th respondents who are the petitioners in this application were in possession of the property on behalf of the deceased 2nd respondent. Thus, they can, without substituting his heir establish the right the 2nd respondent had to possess the relevant land.

For those reasons I uphold the order of the learned District Judge dated 12.09.2002 and dismiss the application with costs in a sum of Rs. 5,000 payable to the plaintiff-respondent.

Application dismissed.
