

**JABIR
VS.
KARUNAWATHIE**

SUPREME COURT.

S. N. SILVA CJ.

TILAKAWARDANE, J.

AMARATUNGA J.

SC 18/2004.

FEBRUARY 18, 2005.

Civil Procedure Code - Section 396, Section 760 - Rent Act, No. 7 of 1972 - Pending appeal defendant tenant dies - Abatement - Three years later the wife makes application for substitution and set aside order of abatement - Legality - Court of Appeal abating in the absence of an application for substitution, Article 126-Constitution - Court of Appeal Rules - Rule 38.

The 1st defendant tenant lodged an appeal against the judgment of the District court which held in favour of the plaintiff landlord. Whilst the appeal was pending the defendant tenant died on 30.01.2000. On 29.01.2002 the plaintiff filed a motion bringing this matter to the notice of Court and sought an abatement. The Court issued notice on the registered Attorney on record. On being satisfied that the notices were served - the Court of Appeal allowed the motion of the plaintiff-respondent. The appeal was abated, and Writ was executed.

On 13.05.2003, more than 3 years after the death of the defendant - appellatant tenant, his spouse made an application to get the abatement order set aside and for substitution of herself in the room of the deceased defendant-appellant. The Court of Appeal set aside the order of abatement and substitution was allowed and the case relisted.

On special leave being granted,

HELD:

- (1) The consequence of abatement of a case is because the case record has become defective on account of the death of a party

and those parties who are materially interested in the case not taking necessary steps. No cogent or explicit reasons are given for the cause of delay.

Per Shirani Tilakawardane, J.

"The Petitioner could not after more than 3 years and 3 months of the death of the 1st defendant-appellant, and one year after the order of abatement seek to remedy this situation".

- (2) The proxy of the Registered Attorney had been revoked. It was incumbent upon the 1st defendant-appellant even prior to his death to have taken steps to have his registered Attorney-at-Law enter proxy and file the required papers. In failing to give such instructions, the appellant had even prior to his death failed to exercise due diligence in the prosecution of his appeal.

Held further :

- (3) The Court of Appeal must in such applications made on the death a party require such applicant or the petitioner or appellant or as the case may be to place before Court sufficient material to establish who is the proper person to be substituted – Court of appeal Rule 38, Section 760 Civil Procedure Code.

Per Shirani Tilakawardana, J.

"With the death of the 1st defendant-appellant tenant the contract of tenancy came to an end and in the circumstances his surviving spouse admittedly not in occupation of this premises would not be a fit and proper person to be substituted in the room of the 1st defendant-appellant tenant. The only manner in which the surviving spouse of the 1st defendant-appellant could continue would be as a statutory tenant under Section 36(2) but clearly as she is not resident in the premises, she could not plead same".

APPEAL from the judgment of the Court of Appeal reported in 2004 3 Sri LR 123.

Cases referred to :

1. *Simon Silva vs. Sivasupramaniam* - 55 NLR 562
2. *Suppramaniam et al vs. Symons et al* - 18 NLR 229.

LC Seneviratne PC with Riza Muzni for plaintiff-appellant-respondent-petitioner .

Sanjeewa Jayawardane with Priyanthi Gunaratne for petitioner-respondent.

September 7, 2005

SHIRANÉE TILAKAWARDANE, J.

The Plaintiff instituted action in the District Court of Mt. Lavinia for the ejection of his tenant (now Deceased) the 1st Defendant-Appellant for the wrongful subletting of the premises in suit, namely 393, Galle Road, Colombo 4, to the 2nd, 3rd, 4th and 5th Defendant-Respondents, without the prior sanction of the Landlord. It was common ground that the Rent Act No. 7 of 1972 governed the said premises. The District Judge of Mt. Lavinia by Judgment dated 28/08/1997 held in favour of the Plaintiff (A5).

Only the 1st Defendant lodged an appeal, but while it was pending the 1st Defendant-Appellant died on the 30/01/2000, a fact proved by the death certificate marked A7.

On 29.01.2002, almost two years later, the Plaintiff-Respondent filed a motion bringing this matter to the notice of court. The Court issued notice on the registered Attorney-at-Law on record. On 7.5 2003 after ascertaining the fact that notice was not returned and thereby being satisfied that the notices had been served, the Court of Appeal allowing the application of the said Plaintiff-Respondent made an Order for abatement of the Appeal.

On the 13.05.2003, more than three years after the death of the 1st Defendant Appellant, his spouse, the Petitioner Respondent, filed an application by way of a petition in the Court of Appeal. The District Court referred to in the caption is the District Court of Moratuwa, though this case was a case instituted in the District Court of Mt. Lavinia. Be

that as it may, it is important to note that the Petitioner-respondent filed the application only after the writ of execution was issued in the District Court of Mt. Lavinia, after the Appeal was abated. This emanates from the facts adverted to in the prayer of the petition filed by the Petitioner respondent in the Court of Appeal.

The Petitioner-respondent by this Petition made an application to set aside the said Order of Abatement made by the Court of Appeal dated 07.05.2003, for substitution of herself in the room of the deceased 1st Defendant-Appellant, and for a re-listing of the Appeal. She claimed therein that she had a daughter who was a co-heir to the estate of the deceased 1st Defendant-Appellant. Her daughter has filed no affidavit consenting to the substitution nor was she noticed of the application for substitution.

This application was allowed by the Court of Appeal by its order of 12.12.2003 in which the objections of the Plaintiff-Respondent-Respondent were overruled, the Order of Abatement was set aside the substitution was allowed and the case was re-listed.

On 24/02/2004 this Court granted special leave to appeal on the following question of law.

- (1) Can the Petitioner-respondent make this application for substitution after more than 3 years of the death of the 1st defendant-Appellant?
- (2) Was the Court of Appeal justified in the circumstances of this case, in particular in the absence of any application for substitution to have abated the said appeal?
- (3) Without prejudice to the aforesaid questions of law is the Petitioner-respondent eligible to seek substitution in place of her deceased husband the 1st Defendant-Appellant in view of the provisions of Section 36 of the Rent Act No. 7 of 1972 as amended.

In the aforesaid Order of 12.12.2003, the Court of Appeal reference was made that the Petitioner-respondent's spouse, who was the 1st Defendant-Appellant in the Appeal, had died on 30/01/2001. This

appears to be a factual error, as according to the death certificate, which has been produced marked A7 and pleaded by the Plaintiff-Respondent-Respondent-Petitioner his death had occurred a year earlier, on 30.01.2000.

Indeed, according to the Court of Appeal it is clear that the only application that was made before the Court was by the Plaintiff-respondent in the Court of Appeal who had informed the Court that the 1st Defendant-Appellant was dead and produced A7. The Court had according to law thereupon noticed the registered Attorney-at-Law. The notice was issued on 08/02/2002 and according to the journal entry dated 05/03/2002 the said notice has not been returned undelivered. Thereupon, on application made on 07/05/2002 appeal was abated.

The consequence of abatement of a case is because the case record has become defective on account of the death of a party and those parties materially interested in the case not taking the necessary steps.

The Petitioners could not after more than almost 3 years and 3 months after the death of the 1st Defendant-Appellant and one year after the order of abatement by the Court of Appeal, seek to remedy the situation.

In the case of *Simeon Silva vs. Sivasupramaniam*⁽¹⁾ where after the death of the plaintiff, his legal representative delayed for nearly 18 months to have themselves substituted, it was held that the order of abatement of the action should be entered under Section 396 of the Civil Procedure Code.

In considering all the facts relating to the case therefore the order of abatement of the action had legitimately been made because the Petitioner who seeks to substitute herself in place of the 1st Defendant-Appellant had failed to take steps rendered necessary by law.

This Court has also considered that in any event the Petitioner had not come within a reasonable time to have the order of abatement set aside. Furthermore no cogent or explicit reasons were given for the cause of the delay except to say that it was "for reasons beyond her

control". In other words she has not proffered any rational explanation, which could legitimately be considered as a valid reason for the delay.

In this respect it is also important to consider whether there has been a defect or error made by the Court of Appeal, in the delivery of notice on the Petitioner. This arises in the circumstances that at the time of the service of this notice, according to the pleadings of the Petitioner, the Registered Attorney's proxy had been revoked and a new registered Attorney-at-Law had been appointed.

The proxy of the registered Attorney-at-Law had been revoked. The Petitioner-Respondent admitted that she knew this fact as far back as 22.09.1998. According to the affidavit of the Petitioner dated 21/05/2003 paragraph 2(b), "the Petitioner was aware that prior to the death of the 1st Respondent", and he had taken steps to revoke the proxy of the registered Attorney-at-Law on 22/09/1998". It is noteworthy that at this time the Appeal was pending, having been lodged in the Court of Appeal on 17/10/1997. So it was incumbent upon the 1st Defendant-Appellant, even prior to his death, to have taken steps to have his new registered Attorney-at-Law enter proxy and file the required papers in the Court of Appeal. In failing to give such instructions the 1st Defendant-Appellant had even prior to his death failed to exercise due diligence in the prosecution of his Appeal.

It was such failure and lack of diligence on the part of the 1st Defendant-Appellant, which facilitated and/or caused the notice sent by the Court of Appeal on 07/05/2002, to be sent to a registered Attorney-at-Law on record whose proxy by then had been revoked. It is required by law that the Court before making an order of abatement should notice the parties only as far as it conveniently can, to give them an opportunity of showing cause against the order. But even though the Court had followed such procedure it was solely due to the inept failure of the 1st Defendant-Appellant, even prior to his death, to exercise due diligence in his case and failure to give adequate but necessary instructions for the filing of fresh proxy in the Court of Appeal that no papers had been filed by the 1st Defendant-Appellant's spouse. The consequences of such failure must be borne by the party.

It is important when cases are pending before courts to prevent any of the aggrieved parties from being unduly barred from achieving the legitimate result of their litigation by intervening factors. In this context, Wood Renton C.J. and Ennis J. in *Suppramaniam et al Vs. Symons et al* ⁽²⁾ said that "People may do what they like with their disputes so long as they do not invoke the assistance of the courts of law. But whenever that step has been taken they are bound to proceed with all possible and reasonable expedition, and it is the duty of their legal advisers and of the Courts themselves to see that this is done. The work of the Courts must be conducted on ordinary business principles, and no Judge is obliged, or is entitled, to allow the accumulation upon his Court list of a mass of inanimate or semi-animate actions".

The only ground urged by the Petitioner in the Petition for the order of abatement to be set aside, was that no proper notice had been issued on the Petitioner and the bald statement that the said order of abatement had been made "due to reasons beyond the control of the Petitioner". No details or material has been placed before the Court as to what "reasons were beyond the control of the Petitioner". In other words she has failed to explain the delay in taking steps according to law on the death of a party. Furthermore on the facts referred to above it is clear that the Applicant-Petitioner-Respondent had not acted diligently and with the required level of due vigilance to remedy the defect in the record on the death of the 1st Defendant-Respondent. The order of abatement is the reasonable and expected outcome of such failure.

After the 1st Defendant had lodged an appeal in the Court of Appeal, the record of the Court of Appeal became defective by the reason of the death of the 1st Defendant on 30/01/2000. The procedure according to law to rectify the defect and seek substitution has been explicitly described in the Code of Civil Procedure.

In terms of Section 760A of the Civil Procedure Code, " in the manner provided in the rules made by the Supreme Court for that purpose, the Court could determine, who, in the opinion of the Court is a 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 upon such order of the Court the person shall thereupon be deemed to have been substituted or entered of record”.

The relevant Rule 38 of the Court of Appeal Rule reads as follows :

“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 an 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 material to establish who is the proper person to be substituted or entered on the record in place of, or addition to, the party who has died or undergone change of status.....”

The Court of Appeal must therefore in such applications made on the death of a party, “require such applicant or the petitioner or appellant, as the case may be, to place before the Court sufficient material to establish who is the proper person to be substituted.”

It is neither an automatic Order but a considered Order that is envisaged. All the more so if there is more than one heir. In this case the Petitioner has explicitly pleaded that both she and her daughter were lawful heirs in paragraph 15 of her petition dated 13.05.2003.

In this context, it is relevant to note that admittedly on her own affidavit dated 13/05/2003 filed in the District Court of Mt. Lavinia she had not stated as to how the rights of the 1st Defendant-Appellant, even if such were available, would devolve upon her. Especially in view of the fact that this was a rent and ejection matter and it appears that admittedly she was not residing in the premises, which was the subject matter of the action. Furthermore, even though she has claimed to be the legal wife no material has been placed before the Court to determine whether she is the lawful wife of the 1st Defendant-Appellant nor that she is a fit and proper person to be substituted in the room of the 1st Defendant-Appellant.

In any event, with the death of the 1st Defendant-Appellant the contract of tenancy came to an end and in the circumstances that the surviving spouse of the 1st Defendant-Appellant was not, admittedly, in possession of the premises and was not a registered member of the partnership she would not be the fit and proper person to be substituted in the room of the 1st Defendant-Appellant.

The only manner in which the surviving spouse of the 1st Defendant-Appellant could continue would be as a statutory tenant under section 36(2) but clearly as she is not resident on the premises, she could not plead the same.

Accordingly, the order of the Court of Appeal dated 12/12/2003 setting aside the order of abatement and allowing substitution is set aside and the appeal is abated and the order dated 07/05/2003 made by the Court of Appeal abating the appeal is upheld and the application for substitution in the room of the 1st Defendant-Appellant is refused.

S. N. SILVA, C. J. — *I agree.*

AMARATUNGA, J. — *I agree*

*Judgment of the Court of Appeal set aside.
Order of abatement to stand.*