

PAARIS AND ANOTHER
v.
BRIDGET FERNANDO

COURT OF APPEAL
WEERASEKERA, J. AND
ISMAIL, J.,
C.A. APPLICATION NO. CA/LA/50/91,
D.C. NEGOMBO NO. 3320/L,
13 DECEMBER 1991.

Civil Procedure – Plaintiff's death pending action – Civil Procedure Code, sections 404 and 392.

Held:

A person claiming to the donee of the premises in suit from the deceased plaintiff can be substituted in his place.

Case referred to:

(1) *Dhammananda Thero v. Saddananda Thero* (1977) 79(1) NLR 289, 302.

APPLICATION for leave to appeal from order of substitution made by the District Judge of Negombo.

S. F. A. Cooray with *Sarath Morawaka* for defendant-respondent-appellants

J. W. Subasinghe, P.C. with *D. J. C. Nilanduwa* for petitioner-respondents.

Cur adv vult.

19th December, 1991.

ISMAIL, J.

This is an application for leave to appeal against the order of the learned District Judge dated 8.3.91 allowing the petitioner-respondent to be substituted in the room of the deceased plaintiff and to continue the action under Section 404 of the Civil Procedure Code.

The plaintiff Botalage Julius Fernando, (since deceased) averred in his plaint dated 13 August 1984, that the defendants-respondents-appellants, who were in occupation of the house situated in the premises described in the schedule thereto, with his leave and license, had failed to comply with a notice dated 9 April 1984, sent by registered post, to vacate the said premises by the end of May, 1984. He prayed for an order for their ejection and for the restoration of possession of the premises in suit to him and claimed damages at Rs. 40/- per mensem from 1 June 1984 with costs of action. The trial commenced in August 1988 and after the plaintiff and his witnesses had given evidence, the case for the plaintiff was closed. The appellants had then commenced their case and after the evidence of a surveyor was recorded, the case was adjourned for further trial. In the meanwhile the plaintiff died on 19.4.1990.

Upon the death of the plaintiff, his daughter, the petitioner-respondent, made an application dated 30.5.1990, supported by an affidavit, to be substituted in place of the original plaintiff to continue the action, on the basis that the premises in suit had been gifted to her by deed of gift No. 21032 dated 8.12.1957. The appellants filed a statement of objections dated 8.7.1990 denying that the said premises had been gifted to her and that she was not its owner at the time of the application for substitution. The appellants had further pleaded that the original plaintiff died, leaving an estate requiring administration, with five children including the respondent as intestate heirs, and that no cause of action accrued to her on the death of the original plaintiff. The parties had filed written submissions and the learned District Judge, for the reasons set out in his order, allowed the substitution of the respondent in place of the original plaintiff in terms of section 404 of the Civil Procedure Code.

I have considered the submissions of the learned counsel and the grounds set out in the application upon which leave to appeal is sought. Considering the relief sought by the plaintiff in this action and that the appellants themselves claimed prescriptive title to the premises in suit, I am unable to accept the submission that this was a personal action which abated upon the death of the plaintiff. A personal action is an action in which the cause of action or complaint or injury is one affecting solely a person. As regards the contention of the learned counsel for the appellants relating to the identity of causes of action, the answer to this is contained in a passage in the judgment of Pathirana, J. in *Dhammananda Thero v. Saddananda Thero*⁽¹⁾; "Section 392 deals with the right to sue on the cause of action surviving. Section 404 does not say 'In other cases of assignment creation or devolution of the right to sue on the cause of action.' Section 404 makes no reference to 'the right to sue on the cause of action.'" It has to be considered independently of Section 392. It only speaks of "devolution of interests" pending the action in which event the action may be continued by or against the person to whom such interests had come either in addition or substitution for the person from whom it has passed."

Learned Counsel for the respondent submitted that the respondent was not seeking to be substituted as the legal representative but in

terms of section 404 of the Civil Procedure Code on the basis that an 'interest' devolved on her pending this action, in terms of the deed of gift No. 21032 dated 8.12.1957, free of the life interest which was retained by her father, the deceased plaintiff. The words "pending the action" have been interpreted as meaning "before final decree" – (1896) 2 N.L.R. 185, and as meaning, "during the progress of action and before final decree" – (1926) 28 N.L.R. 246 at 248.

Besides, section 404 speaks of continuation of the action with the "leave of Court". The Court has therefore a wide discretion in the matter which must be judicially exercised. I am of the view that the respondent seeking to be substituted has satisfied the requirements of section 404 of the Civil Procedure Code and has been rightly substituted in place of the deceased plaintiff. In the circumstances the application for leave to appeal is refused and is dismissed with costs.

WEERASEKERA, J. – *I agree.*

Application for leave to appeal refused.
