

DUHILANOMAL AND OTHERS
Vs.
MAHAKANDA HOUSING CO. LTD.

SUPREME COURT

WIMALARATNE, J., VICTOR PERERA, J., & COLIN THOME, J.
S.C. APPEAL No. 90/81 - C.A. APPEAL No. 8/78, D.C. COLOMBO No. 2408/RE
JUNE 4, 1982

Contract of tenancy - Civil Procedure Code, s.393 - Death of one of several defendants - Right to sue surviving defendants - Obligations of partners where partnership is tenant.

The first defendant who was the father of 2nd and 3rd defendants entered into a contract of tenancy with P and carried on business in premises No.76, Chatham Street, Colombo 1. On 1.4.55 he entered into an agreement with 2nd and 3rd defendants whereby the business was carried on partnership. Clause 15 of the Agreement provided that on the death of the partner the partnership should not be dissolved. Clause 17 provided that on death of the 1st defendant his wife should succeed as partner. P sued the defendants for ejection and damages on 10.8.73. On 11.10.74 the 1st defendant died and shortly afterwards his widow also died.

P invoked Section 393 of the C.P.C. to sue the 2nd and 3rd defendants. The District Judge held that the legal representative of the 1st defendant should be substituted for the 1st defendant. P appealed to the Court of Appeal who revised the District Judge's order.

Held –

Per Wimalaratne, J. The tenancy was a partnership asset and in the event of death of one partner the cause of action based on tenancy survives against other partners.

That the word 'alone' in Section 393 of the C.P.C. means that survivors are liable to be sued independently without any others being sued.

Per Victor Perera, J.

1. The Roman Dutch Law of tenancy applied according to which when the three defendants entered into a contract of tenancy as partners of a firm for a purpose of their trade or business there was a joint obligation which created an obligation in solidum so that each partner was severally liable.
2. The word 'alone' in Section 393 of the C.P.C. means exclusively so that where there are more defendants than one and one of them dies and if the cause of action survives against the other defendants alone, the plaintiff can continue the action without bringing in the legal representative.

Cases referred to:

- (1) *Sankru v. Bhoju AIR (1936) Patna, 548.*
- (2) *Gajanand v. Sardamal AIR (1961) Rajasthan, 223.*
- (3) *Nathurmal Gianchand v. Mukaty (1946) 47 NLR 376.*
- (4) *Perera v. Liyanagama (1956) 58 NLR 454.*
- (5) *Panis Appahamy v. Selenchi Appu (1903) 7 NLR 16.*
- (6) *Weeraratne v. Abeywardena (1934) 36 NLR 139, 142.*
- (7) *Gunasekara v. Gunasekara (1941) 43 NLR 73, 75.*

APPEAL from judgment of the Court of Appeal reported in [1981] 2SLR 232

H.L. de Silva, S.A. with *Mano Devasagayam* for 2nd & 3rd defendants - respondents - appellants.

H.W. Jayewardene, Q.C., with *Miss P. Seneviratne* for plaintiff - appellant - respondent.

Cur.adv.vult

June 29, 1982

WIMALARATNE, J.

The question for decision in this appeal is whether on the death of one defendant the right to sue survives against the other defendants alone in a tenancy action where the defendants had been partners of a business which they had carried on in the premises, the subject matter of the suit. The subject of the continuation of actions after the alteration of a party's status is contained in Chapter XXV of the Civil Procedure Code (Cap.101) and the relevant part of section 393 is in these terms "If there be more defendants than one, and

any one of them dies, and the right to sue survives against the surviving defendant or defendants *alone*, the court shall on application by way of summary procedure, make an order to the effect that the action do proceed against the surviving defendant or defendants." I have emphasised the word "alone" because the main argument centred around the interpretation of that word in the context in which it appears.

The facts shortly are that the three defendants were the tenants of No.76, Chatham Street, Colombo, where they carried on in partnership the business of W. Lalchand & Co. Claiming that the premises were excepted premises within the meaning of the Rent Act No.7 of 1972, the landlord sued the three defendants by name, but designated them as carrying on a business in partnership, and prayed for their ejection, for arrears of rent in a sum of Rs.13,600/- and for damages at Rs.2,600/- per month from 1.8.73. The defendants pleaded, inter alia, the protection given by section 22 of the Rent Act, as well as a promissory estoppel founded upon a promise alleged to have been held out by the plaintiff to permit the defendants to remain in occupation of No.72, on their handing over possession of premises No.82 (in both of which they had carried on their business) as a result of which promise they gave up No.82. After answer was filed the 1st defendant Assudamal Duhilanomal who is the father of the 2nd and 3rd defendants, died on 11.10.74. The plaintiff thereupon invoked the provision of section 393 of the Civil Procedure Code claiming that the right to sue the 2nd and 3rd defendants survived against them.

The learned District Judge held that as the contractual obligations between the defendants and the plaintiff were not of a personal nature, the legal representative of the deceased defendant was liable to be sued in respect of such obligations. Hence the landlord was not entitled to proceed under section 393 but was obliged to take steps under section 398(1) in order to substitute the legal representative of the 1st defendant.

The Court of Appeal reversed the District Judge's order, and held that the causes of action survived against the surviving defendants alone. It followed certain decisions of the Courts in India, which have taken the view that the test as to whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the plaintiffs alone can sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively. See *Sartha Vs. Singh* (1) and *Gajanan Vs. Sardana* (2)

In seeking an answer to the question whether the causes of action survived against the 2nd and 3rd defendants alone, an examination of the partnership agreement is essential. The 1st defendant, who was the sole proprietor of this business which he carried on at the same premises for a long period of time, entered into a written partnership agreement with the 2nd and 3rd defendants as from 1.4.55. Clause 15 provided that in the event of the death of Assudamal Duhilanomal the surviving partner shall not dissolve the partnership between the surviving or remaining partners. Clause 17 provided that in the event of the death of Assudamal Duhilanomal the surviving partners shall admit his wife Parabatibai as a partner in full succession to him in the partnership. It may be stated, however, that no steps were taken by the 2nd and 3rd defendants to admit their mother, Parabatibai as a partner up to the time of her death, sometime during the pendency of these proceedings. The legal representative of the deceased 1st defendant had certainly no right to carry on the business along with the 2nd and 3rd defendants.

Also relevant in seeking an answer to the question we are called upon to decide are the pleadings. The three defendants filed a joint answer and admitted that they were tenants of the premises where they were carrying on the business of Lalchand & Co. in partnership. In their written submissions filed in the District Court the 2nd and 3rd defendants claimed the tenancy of the premises as an asset of the partnership. There could therefore be no doubt that the tenancy of the premises which forms the subject matter of this action is not the personal property of any individual partner or partners but of the partnership itself, and that the tenancy of the premises was taken for the purpose of the partnership business and for no other.

By reason of section 3 of the Civil Law Ordinance (Cap.79) in all questions or issues which have to be decided in Ceylon with respect to the law of partnership the law to be administered is the same as would be administered in England in the like case, in the corresponding period, if such question or issue had to be decided in England, unless in any case other provision is made by any enactment. There is thus no controversy that the English law of Partnership has to be applied when one has to decide upon the liability of partners. The liability of partners for all debts and obligations (contracts) is contained in section 9 of the Partnership Act, 1890 in terms of which every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course

of administration for such debts and obligations, so far as they remain unsatisfied, but subject to prior payment of his separate debts.

The principal contention of learned Counsel for the appellants has been that as, after the death of the 1st defendant, his estate would be severally liable for contractual obligations incurred whilst he was a party, it is necessary to have the legal representative substituted to safeguard the interests of the estate. Therefore, he submits, the 2nd and 3rd defendants cannot be sued *alone* after the death of the 1st defendant. "Alone" in the context of section 393 means "solely" or "to the exclusion of others", according to his interpretation.

Commenting on this section *Underhill* in his book on the *The Law of Partnership* (8th Ed) says:-

"The net result....is that the plaintiff can bring only one action, and not several actions, against the members of the firm. He is not bound to join all the members of the firm; if he does not choose to do so he loses his rights against those whom he has omitted. The Court may, however, at the instance of any defendant, order the omitted members of the firm to be added as co-defendants.

With regard to torts, on the other hand the plaintiff may issue separate writs against each partner, either contemporaneously or successively; so that if the first one sued becomes bankrupt, the fact of his having sued him alone would be no bar to a second action against another of the partners" p.71.

Explaining what is meant by joint liability, *Underhill* says - "with regard to the extent of a partner's liability, each is individually liable for the whole of the debts and liabilities of the firm, and even though judgment be obtained against all jointly, it may be enforced against one only, leaving all questions of contribution to be settled afterwards between the partners" p.73.

If, then, each partner is liable for the whole of the debts and liabilities of the partnership, and it is open to a creditor to sue only some of the partners, leaving out others, it follows that the cause of action based upon a contractual obligation, in the event of the death of one partner after action has been filed, will survive against the surviving partners who continue as defendants. Contracts of tenancy entered into between partners and their landlords will be no different from other contracts in this respect. "Alone", in the context of section 393 of the Civil Procedure Code, means in my

view that the survivors are liable to be sued independently without any others being joined; "alone" does not mean "none else other than the survivor". On the death of the 1st defendant his legal representative is entitled only to an accounting and to a share of the assets; the beneficial interest in the partnership remains in the members of the partnership for the time being, that is in the 2nd and 3rd defendants. If the legal representative of the deceased defendant wished to have the estate safeguarded there is provision in our Civil Procedure to achieve that purpose. There is also provision for the surviving defendants to ask for substitution. They do not appear to have taken steps in that direction. On the other hand they regret, in their written submissions filed in the District Court, that they did not in the first instance claim substitution on the basis that the tenancy in this case is an asset of the partnership business.

For these reasons I am of the view that the Court of Appeal was right in reversing the order of the District Court. This appeal is dismissed with costs.

COLIN-THOMÉ, J. — I agree.

VICTOR PERERA, J.

I have had the advantage of perusing the judgment of my brother Wimalaratne, J. and I agree with his conclusion that the appeal of the 2nd and 3rd defendants-appellants should be dismissed. However, in my view the interpretation and application of Sections 393 and 398 of the Civil Procedure Code are matters of extreme practical importance when dealing with the continuation of actions after the alteration of a party's status and I have therefore attempted to set down my views independently as I have approached the consideration of this matter somewhat differently.

The plaintiff-Company filed this action on the 10th August 1973 alleging that it had let the premises No.76, Chatham Street, Colombo, to the three defendants who were carrying on business in partnership at the said premises under the name, style and firm of "W. Lalchand & Company". The plaintiff-Company had purported to terminate the monthly tenancy. In paragraph 10 of the plaint the cause of action which had accrued to the plaintiff to sue the three defendants *jointly* and *severally* was

- (a) for ejectment from the premises;
- (b) recovery of all arrears of rent amounting to Rs. 13,008/-; and

- (c) recovery of damages at Rs.2,600/- per mensem from 1st August 1973 until the plaintiff is restored to vacant possession of the said premises.

The reliefs prayed for in the prayer were on the same basis. Intrinsicly, the action was one between a landlord and his three tenants based on a contract of tenancy, in which he was seeking to enforce obligations arising therefrom. The three defendants filed a joint answer admitting that they were the tenants of the premises and were carrying on business in partnership denying that they were in arrears, denying the validity of the notice of termination of the tenancy and praying for a dismissal of the action.

Pending the trial of the action the 1st defendant, who was the father of the 2nd and 3rd defendants-appellants died on the 11th October 1974. Thereupon the plaintiff-respondent alleging that the right to sue on the cause of action pleaded in the plaint survived against the 2nd and 3rd defendants applied to Court for an order that the action do proceed against them. Curiously he had omitted to use the word "alone" in his petition and affidavit. The 2nd and 3rd defendants-appellants objected to the said application. The District Judge held that the cause of action did not survive against the 2nd and 3rd defendants *alone*, that the provisions of Section 393 were not applicable to this case and directed that the plaintiff should proceed under Section 398(1) by substituting the legal representative of the deceased 1st defendant.

The plaintiff-respondent appealed to the Court of Appeal from that order and the Court of Appeal by its order dated 18th September 1981 set aside the order of the District Judge and made order that the action do proceed in terms of Section 393 against the 2nd and 3rd defendants-appellants. The 2nd and 3rd defendants-appellants have appealed against this order of the Court of Appeal.

In the District Court submissions were made on behalf of the plaintiff and of the 2nd and 3rd defendants almost entirely on the question of tenancy and the consequences that affected the tenancy on the death of one of the co-tenants. It was contended on behalf of the 2nd and 3rd defendants that on the death of the 1st defendant his rights as a tenant devolved on his legal representative and that she was therefore entitled to be substituted. It was contended on behalf of the plaintiff that on the death of one of the co-tenants the tenancy accrued to the surviving tenant. The District Judge took the view that the legal representative of the deceased tenant succeeded to the tenancy rights along with the surviving tenants.

The plaintiff in his petition of appeal to the Court of Appeal took up the position that the three defendants were jointly and severally bound by the contract of tenancy and that on the death of the first defendant the plaintiff was entitled to proceed against the surviving defendants alone. It is not clear what other submissions were made at the hearing of the appeal before the Court of Appeal. But the Court of Appeal, in its judgment had started on the premise that "the case before us concerns a partnership" and proceeded to examine the Law of Partnership by reference to several reported cases dealing with the partnership law in England as the Law of Partnership in Sri Lanka was the English Law. The argument before us also proceeded on the basis of the judgment of the Court of Appeal. In my view it was not necessary to venture into the realm of Partnership Law as the plaintiff-respondent had based his entire appeal on the question whether the co-tenants were bound jointly and severally or not.

It will therefore be necessary to consider the pleadings filed in the District Court in order to find a solution to the problem that had arisen in this case. The case had not proceeded beyond the pleadings at the stage when the 1st defendant died. The plaintiff's cause of action was based purely and simply on a contract of tenancy between him and the three defendants. A contract of tenancy is governed by the Roman Dutch Law, subject to the statutory limitations which had been introduced into the Common Law by the Rent Restriction Acts. Therefore the answer to the contentions raised have to be found in the Roman Dutch Law. The plaintiff-respondent had quite correctly pleaded that the tenancy was with the several defendants and not with the Firm or Partnership. A Partnership or Firm cannot enter into a contract of tenancy as it is not a legal persona. This position has been clearly decided by the Supreme Court in the cases of *Nathurmal Glanchand vs. Makaty* (3) and *Perera vs. Liyanagama* (4). A contract of tenancy being governed by the Roman Dutch Law, it is necessary to refer to that law to determine the questions of procedure that arises in this case. In my view it was not necessary to invoke the provisions of the English Law in regard to this tenancy action.

The Roman Dutch Law authorities appear to lay down clearly that an obligation contracted generally by several persons is not an obligation binding on each of them *in solidum* unless there is something in the nature of the subject to induce a different construction and render it several in respect of the separate interests of the contracting parties. This principle was accepted in the case of *Panis Appuhamy*

vs. Selenchi Appu (5) where two joint lessees were sued for the recovery of rent in respect of premises taken by them without any indication that each lessee bound himself *in solidum* and the Court held that each lessee was not severally liable for the whole debt. But the Roman Dutch Law made an exception *in the case of partners of a Firm* when they enter into a contract of tenancy on account of their trade or business. According to the Roman Dutch Law authorities, where tenants were partners they were liable *in solidum* (Wille – Landlord and Tenant, 4th Edn. p.177). However, even in cases where co-lessees were not partners, the liability in regard to cancellation of a lessee for failure to pay rent was regarded as an indivisible obligation which could be enforced against a co-lessee alone – *Weeraratne vs. Abeywardena* (6).

In the case of *Gunasekera vs. Gunasekera* (7) it was held that in the case of a contract or obligation governed by Roman Dutch Law, the liability of several defendants, *who were partners*, was an obligation *in solidum* and each was liable in respect of the entire obligation. On a consideration of all these authorities it is clear that the three defendants had entered into the contract of tenancy as partners of a Firm for the purpose of their trade or business and that therefore this contractual relationship of tenancy, though with them as individuals, took the case out of the ordinary rule creating a joint obligation and created an obligation *in solidum*. Therefore each of the defendants became jointly and severally liable in respect of the entire obligation under the contract of tenancy entered between the plaintiff-respondent and the three defendants.

In this context it will be necessary to examine the Sections 393 and 398 of the Civil Procedure Code to examine the consequences of the death of a co-defendant who was a partner. Similar provisions are to be found in the Indian Civil Procedure Code. Chittaley and Rao in their Commentaries (7th Edn.) have clearly set out how the Indian Courts had interpreted the identical words used in our Code. The term “*right to sue*” has been interpreted to mean the “*right to seek relief*” and therefore in actions where a personal relief is sought or a right to a personal office or where damage is sought in respect of a tort, the right to sue has been held not to survive. The term “*survive*” has not been used in a technical sense, but has been used in its ordinary sense of “*outlive*”. The term “*alone*” in these sections have been held to mean “*exclusively*”, that is, to the exclusion of others and not as the Court of Appeal has held to give greater emphasis. Therefore when there are more defendants than one in

an action already instituted and any one of them dies, if the right to sue on a stated cause of action survives against the other defendants alone, then only will a plaintiff be permitted to continue the action against them without bringing the legal representative of the deceased defendant into the suit. In the instant case in view of the applicability of the Roman Dutch Law to this contract of tenancy there could be no doubt that the right to seek relief against the surviving defendants alone has survived for the reason that the defendants were partners and that the tenancy was entered into for the purpose of their trade or business each of the defendants being liable *in solidum* to perform their obligations towards the plaintiff.

At the argument before the Court of Appeal the 2nd and 3rd defendants-appellants had produced a Deed of Partnership No.112 dated 14.11.1955 marked "X" which they had not produced in the District Court. According to this Deed the 1st defendant had been the sole proprietor of the business he had carried on at these premises under the business name of "W. Lalchand & Company". In 1955 he had admitted his two sons the 2nd and 3rd defendants as partners with him. Thereafter all three defendants had been accepted as the tenants of the premises. Clause 15 of the Deed provided that the death of any partner shall not dissolve the partnership between the surviving partners. Clause 17 provided that on the death of the 1st defendant, the 2nd and 3rd defendants shall admit the 1st defendant's widow as a partner in his place. All these provisions have the effect of rendering the 2nd and 3rd defendants-appellants the sole surviving partners till they admit the 1st defendant's widow into the partnership. It was conceded that the widow of the 1st defendant had not been brought in as a partner at any stage and that she has since died. This document therefore fortifies the position that in regard to the tenancy which alone is the subject matter of this action, the right to seek relief has survived against the 2nd and 3rd defendants-appellants alone because they were partners. Therefore the plaintiff-respondent was entitled to invoke the provisions of Section 393 of the Civil Procedure Code. In adverting to the provisions in the Deed of Partnership, one does not have to examine the Law of Partnership. The provisions in this Deed help to determine the question of procedure in regard to the pending action relating to a contract of tenancy where the defendants happen to be partners and nothing more.

The appeal of the 2nd and 3rd defendants-appellants from the order of the Court of Appeal is therefore dismissed with costs for the above reasons.

Appeal dismissed.