

CHANDRASOMA PERERA
v.
SULAIMAN PILLAI ADAM

COURT OF APPEAL
WIJETUNGA, J. &
ANANDACOOMARASWAMY, J.
C.A. NO. 458/81(F)
D.C. COLOMBO NO. 743/ED
11 MARCH 1991

Civil Procedure – Substitution in a rent and ejectment suit of partner in business – Civil Procedure Code, Sections 394 and 760A – Rules of the Supreme Court – Executor-de-son-tort.

In a rent and ejectment suit, the defendant tenant died when the appeal in the action was still pending. The plaintiff landlord sought to substitute the late defendant tenant's partner-manager in the business run in the premises in suit who he had averred was the sub-tenant of the deceased tenant. The partner objected.

Held :

(1) There was nothing to support the plea that the person sought to be substituted was the *executor-de-son-tort* of the deceased tenant.

(2) The landlord sued the deceased tenant on the ground that he (the tenant) had sublet the premises in suit to the 2nd defendant. The landlord cannot now have the 2nd defendant substituted in place of the deceased tenant.

Cases referred to:

1. *Iso Nona v. Haturusinghe* 72 CLW 54.
2. *Perera v. Kumarasamy* (1973) 76 NLR 503.
3. *Dahanayake v. Jayasinghe* (1967) 71 CLW 112.
4. *Nesaratnam v. Vaithialingam* (1978) 78 NLR 457.
5. *Duhilanomal and Others v. Mahakanda Housing Co., Ltd.* (1982) 2 Sri LR 504.

APPLICATION for substitution under section 760A of the Civil Procedure Code.

A. K. Premadasa, P.C. with P. A. D. Samarasekera, P.C. and T. B. Dilimuni for petitioner.

S. Mahenthiran for respondent.

Cur adv vult.

3rd April, 1991.

ANANDACOOMARASWAMY, J.

This is an application for substitution of one Sulaiman Pillai Adam as respondent - respondent - respondent in place of the deceased respondent - respondent. Sulaiman Pillai Adam the party sought to be substituted objected to the substitution.

The facts relevant to this application are briefly as follows:—

One Miss W. Chandrasoma Perera the Petitioner sued one M. Soranam the Respondent for ejectment from the premises on the ground that the Respondent sublet the premises in suit to one Sulaiman Pillai Adam, but the Respondent denied that he sublet the premises. The Respondent pleaded that he was carrying on a partnership business with the said Sulaiman Pillai Adam. The Learned District Judge dismissed the Petitioner's action. The Petitioner thereupon appealed from the said judgment to the Court of Appeal, and while the appeal was pending the Respondent - Respondent died and therefore the Petitioner - Appellant sought to substitute the said Sulaiman Pillai Adam (Respondent - Respondent - Respondent) in place of the Deceased - Respondent - Respondent.

It is the case of the petitioner that the respondent - respondent died leaving behind no known heirs and therefore the petitioner sought to substitute the said respondent - respondent - respondent in place of the deceased - respondent - respondent on the ground that the respondent - respondent - respondent is carrying on and managing the business of the said deceased as he is a fit and proper person to be substituted in place of the deceased for the purpose of this case as his *executor-de-son-tort*.

At the outset and before considering any submissions made before us in this application we are of opinion that this application should be dismissed on the pleadings alone filed in this application.

The essence of the petitioner's application for substitution in place of the deceased - respondent - respondent is that :-

The respondent had been registered as a partner of the said business;

He is continuing to occupy the said premises; and is carrying on the said business which was earlier carried on by the said deceased - respondent - respondent.

As the said respondent is managing the business of the said deceased he is a fit and proper person to be substituted in place of the deceased for the purpose of this case as his *executor-de-son-tort*.

From these averments it is clear that the petitioner has no material to substantiate that the party sought to be substituted is the *executor-de-son-tort*. On this ground alone the application fails.

As against this, the averment in the statement of objections of the respondent is that the deceased left behind as his heirs his widow, and child and that the respondent had not interfered with the estate of the deceased and is not an *executor-de-son-tort*.

Therefore on the pleadings alone the petitioner had not made out a case for the substitution of the party sought to be substituted as respondent - respondent - respondent.

However, The learned Counsel for the Petitioner relied on several authorities in support of the petitioner's application. We have therefore decided to deal with his submissions on the law.

Section 398 of the Civil Procedure Code deals with the substitution of legal representative of deceased defendants in the District Court and Section 760A of the Civil Procedure Code read with the Rules made by the Supreme Court for that purpose deals with substitution

in the Court of Appeal. The Rules referred to are the Rules of the Supreme Court published in Government Gazette Extraordinary dated 23 January, 1974. If an appellant dies, any order made after the death of an appellant is invalid and substitution had to be effected before the appeal could be heard, the case of *Iso Nona v. Haturusinghe*⁽¹⁾. Where a defendant tenant dies, his heirs can be substituted and the action can continue against the substituted - defendant *Perera v. Kumarasamy*⁽²⁾. Where a defendant dies pending action the widow can be substituted as *executrix-de-son-tort*, as legal representative of the deceased. The legal representative is either the executor or the administrator, under Section 394(2) of the Civil Procedure Code. The term executor includes an *executor-de-son-tort* *Dahanayake v. Jayasinghe*⁽³⁾. An *executor-de-son-tort* is a legal representative of the deceased within the meaning of Section 341(1) of the Civil Procedure Code *Nesaratnam v. Vaithialingam*⁽⁴⁾.

The learned Counsel for the petitioner relied on the decision in the case of *Duhilanomal and Others v. Mahakanda Housing Co., Ltd.*⁽⁵⁾, where the Supreme Court (Wimalaratne, J. Victor Perera, J. and Colin Thome, J.) held that on the death of the first defendant, the action could proceed against the 2nd and 3rd defendants, all of whom were partners in business and tenants of the premises, without substituting the legal representative of the first defendant deceased. That was a case where the three defendants were partners in business and tenants of the premises and they were sued as such by the plaintiff. In the instant case the respondent tenant was sued on the ground that he sublet the premises to the subtenant whom the petitioner now seeks to substitute in the room of the deceased respondent on the ground that he is the *executor-de-son-tort*. Therefore the case cited has no application to the facts of this case.

For the foregoing reasons we are of opinion that the petitioner cannot maintain this application for the substitution of the party sought to be substituted as respondent - respondent - respondent and we accordingly dismiss the application with costs.

WIJETUNGA, J. - I agree.

Application dismissed.