

NILAMDEEN
v.
DAYANANDA AND OTHERS

COURT OF APPEAL
TILAKAWARDANE, J. AND
UDALAGAMA, J.
CA NO. 406/96 (F)
DC MT. LAVANIA NO. 4815/M
DECEMBER 15, 2000
MARCH 8, 30, 2001

Civil Procedure Code, sections and 14A and 394 (2) – Who is a legal representative – Heir – Action instituted against wife representing estate of husband – Liability – Position after Amendment, No. 06 of 1990 compared – Alleged heir – Executor de son tort.

The 1st defendant-appellant was the widow of one N who allegedly was the ostensible owner of the vehicle involved in the accident that has caused injury to the plaintiff-respondents. Prior to the institution of this action N died. The original plaint was filed against the 1st defendant-appellant as representing the estate of the late N. The District Court granted the relief prayed for by the plaintiff-respondents.

It was contended that the liability of the estate of a deceased person attached only upon the “legal representative” of such estate. As the fact of the 1st defendant-appellant being the legal representative of the estate of the deceased had not been proved, liability of the estate of the deceased person, if any, could not attach to the 1st defendant-appellant.

Held:

- (1) In the pleadings set out in the answer of the 1st defendant-appellant, there was no denial of the relationship of husband and wife.
- (2) The basis of her liability as heir to the estate of N was also not denied.
- (3) Heir would include an executor, an administrator or next of kin. The 1st defendant-appellant had not denied the fact that she was indeed the heir and or the legal representative of the deceased N.

- (4) The 1st defendant-appellant had not led evidence that she was not the legal representative of the estate of the late N in terms of section 394 (2) of the Civil Procedure Code.
- (5) Nor was any evidence adduced that the 1st defendant-appellant who was admittedly the widow had not intermeddled with her husband's estate and thereby not constituted herself an executor *de son tort*.
- (6) The 1st defendant-appellant had denied that there was a cause of action against her late husband. By her categorical disclaimer of the liability of her late husband, she has acted at all times as a party interested in safeguarding the rights of the estate of her late husband.
- (7) The plaintiff-respondents had established the nexus as between the purported liability of N and the 1st defendant-appellant representing the estate of the late N.
- (8) Expression "next of kin" in s. 394 (2) of the Civil Procedure Code included a widow who was an intestate heir under the Matrimonial Rights and Inheritance Ordinance.

Held, further –

- (9) The amending law No. 6 of 1990, provided for the substitution of the person who is alleged to be the legal representative. The appointment of a substituted defendant with exact precision was not intended. This is because, sometimes the party instituting action does not know the names of the executor/administrator, the administrator may not be appointed within the prescriptive period of the action.

APPEAL from the judgment of the District Court of Mt. Lavinia.

Cases referred to :

1. *Nesaratnam v. Vaithilingum* – 70 NLR 457.
2. *Prins v. Peiris* – 4 NLR 353.
3. *Arunachalam v. Arunachalam* – 36 NLR at 51.
4. *Perera v. Pathuma* – 21 NLR 76 at 77.
5. *Dahanayake v. Jayasinghe* – 71 CLW 112.
6. *Junaid v. Commissioner of Inland Revenue* – 65 NLR 561.
7. *D. R. Fernando v. K. A. Magilina Hamy* – 75 NLR 60.

Gamini Jayasinghe with *Ms. P. P. de Silva* for 1st defendant-appellant.

Bimal Rajapakse with *G. K. Hirimuthugoda* for plaintiff-respondents.

Cur. adv. vult.

June 01, 2001

TILAKAWARDANE, J.

This Appeal was filed against the judgment of the Additional District Judge of Mount Lavinia dated 10. 07. 1996, wherein he had held in favour of the plaintiff-respondents and granted reliefs prayed for in the plaint.

The 1st defendant-appellant was the widow of Mr. Nilamdeen (*nee* Latha Jayasekera), who allegedly was the ostensible owner of the vehicle bearing No. 32 Sri 2481 involved in the accident that had caused injury to the plaintiff-respondents. Prior to the institution of this action Nilamdeen died on 19. 11. 1987 of ill health that was unconnected to the accident. The accident relating to this case occurred on 12th of November, 1987.

The original plaint was filed on 24. 01. 89 against the present 1st defendant-appellant as representing the estate of the late N. Nilamdeen. In Sinhala the caption reads as follows:

“මියගිය එන්. නිලම්දීන් වෙනුවෙන් ඔහුගේ උරුමකරුය වන ලතා නිලම්දීන්”

The only matter, which was argued before this Court, was whether a cause of action had been made out against the 1st defendant-appellant and if so whether the 1st defendant-appellant was liable in law. In other words has action been properly constituted against the widow of Mr. Nilamdeen?

The contention of the 1st defendant-appellant was that liability of the estate of a deceased person attached only upon the “legal

representative” of such estate. It was submitted that the fact of the 1st defendant-appellant being the legal representative of the estate of the deceased had not been proved and therefore the liability of the estate of the deceased person if any, could not attach to the 1st defendant-appellant.

Section 14A of the Civil Procedure Code as amended by Act No. 6 of 1990 describes who should be substituted when a person against whom the right to any relief is alleged to exist is dead and the right to sue for such relief survives. It is to be noted that this present action was instituted *before* this said amendment. But, this section in any event deals with the death of a party after action had been instituted. However, what has to be considered in this case is who is the party against whom action has to be instituted when the defendant dies before the institution of the case. Section 14A is, therefore, not strictly relevant. But, it is important to note that the amending law provided for the substitution of the person *who is alleged to be the legal representative*. In other words even after death the appointment of a substituted defendant with exact precision was not intended by law. No doubt this is because sometimes the party instituting action does not know the names of the executor or the administrator. Sometimes the administrator may not have even been appointed within the prescriptive period of the action.

The position prior to the amendment must also be considered. Such person who is so substituted must be one who is within the definition set out in the Civil Procedure Code. Therefore, in considering the term “legal representative”, section 394 (2) of the Civil Procedure Code is relevant. This defines a “legal representative” to be (i) an executor or (ii) administrator (iii) or the next of kin who had adiated the inheritance in an estate below the value of Rs. 50,000 as stated in Act No. 14 of 1993 (earlier Rs. 20,000). Pathirana, J. gave an extended meaning to the “executor” of an estate in the case of *Nesaratnam*

v. *Vaithilingum*⁽¹⁾ at 462-470. Referring to the cases of *Prins v. Peiris*⁽²⁾; *Arunachalam v. Arunachalam*⁽³⁾; *Perera v. Pathuma*⁽⁴⁾; *Dhanayake v. Jayasinghe*⁽⁵⁾ and *Junaid v. Commissioner of Inland Revenue*⁽⁶⁾, he held that an executor of an estate included an executor *de son tort*. An executor *de son tort* as a result of taking upon himself the function of an executor by intrusion renders himself liable to be sued by a creditor of a deceased person and will be liable to the extent of the 60 assets that come into his hands.

The matter to be determined by this Court is whether there were circumstances, which disclosed that, the 1st defendant-appellant who was the widow of Mr. Nilamdeen was not the legal representative of the estate of Nilamdeen. In the pleadings set out in the answer of the 1st defendant-appellant filed on 15. 12. 1989, there was no denial of the relationship of husband and wife between Mr. Nilamdeen and the 1st defendant-appellant. The basis of her liability as heir to the estate of M. Nilamdeen was also *not denied*. In this context the word "heir" must be given a broad interpretation. The English Oxford 70 Dictionary defines an heir to be the one who actually succeeds to the property. The caption of the original plaint dated 24. 01. 89 describes the 1st defendant-appellant as "the heir of Nilamdeen deceased". The amended plaint filed on the 2nd of November, 1991, also carried the same caption. In this sense an heir would include an executor, an administrator or next of kin. Therefore, as "heir to the estate" was not disputed Mrs. Nilamdeen, the 1st defendant could have been any one of them and therefore liable in law.

It is significant that the 1st defendant-appellant had not referred to any error in the caption nor denied the fact that she was indeed 80 the heir and/or the legal representative of the deceased M. Nilamdeen. No issue had been raised as regard to the fact that there was any dispute regarding the basis of liability of the 1st defendant-appellant as an heir to the estate or the basis on which she had been made a party to the action.

The 1st defendant-appellant had not led evidence that she was not the legal representative of the estate of the late Mr. Nilamdeen in terms of section 394 (2) of the Civil Procedure Code. Nor was any evidence adduced that the 1st defendant-appellant who was admittedly the widow had not intermeddled with her late husband's estate and thereby not constituted herself an executor *de son tort*. For such reason she was entitled to be substituted as a legal representative of her late husband. (*Dahanayake v. Jayasinghe (supra)*).

No doubt it is also relevant that the 1st defendant-appellant had been mentioned as a party to the action in her capacity as the legal representative. The plaintiff being *dominus litis* it was incumbent upon him to bring the right person to Court. Having named the 1st defendant-appellant as the legal representative the responsibility then shifted onto the 1st defendant-appellant to disclaim the basis of liability at the first given opportunity. Especially, as the cause of action was against the deceased Mr. Nilamdeen, who had been found by the District Judge to have been in control of the vehicle at the time it was involved in the motor traffic accident upon which the claim was based. This finding has not been challenged or controverted in the arguments placed before this Court.

Unfortunately, in circumstances such as this the plaintiffs are in a situation of double jeopardy. They not only have to face the loss of a member of the family, often the breadwinner, but when action is instituted they face an added disadvantage. In general, the victim's party would not be placed in a position to ascertain with any certainty ascertain the heirs or the legal representative of the party to be sued. In such circumstances the action can be instituted according to the present law, against the person whom the party suing reasonably knows or has ground to believe is the legal representative and/or heir. In other words the *alleged* heirs/legal representative. This shows that the law does not require the heirs/legal representatives to be named

with exactitude. The reason that the law does not so require such party to be named with precision is because this information is often not easily available to the victim's party, who has to additionally contend with the prescriptive period within which the action must necessarily be filed. Therefore, before the action is prescribed, the action needs to be instituted against the party, who the party suing to the best of their knowledge alleges to be the heir/legal representative. Then, it is incumbent upon that party sued to disclaim and show that they are not the legal representative and where possible if they so desire and if it is within their knowledge to provide the identity of the true legal representative. 120

It is also relevant that no objection had been taken at the inception of the case that the 1st defendant-appellant was not the heir or legal representative of the deceased Nilamdeen. Had such objections been taken, the party suing could have obtained within the prescriptive period the information needed. 130

Furthermore, the trial Judge had come to two salient findings. He had stated "it appears that the first defendant had been made a party as the heir of late N. Nilamdeen"(page 205 of the brief). No evidence has been placed by the 1st defendant or any other party to dispute the fact that the 1st defendant was the legal heir of Nilamdeen. Hence, this finding is logical. Accordingly, he has come also to the finding that there was "no dispute that the first defendant was the heir of Mr. Nilamdeen" (page 206 of the brief). His conclusions appear valid on the evidence led at the trial and on the fact that the 1st defendant-respondent did nothing to dispute the assertion that the 1st defendant was the legal representative and heir of the deceased Nilamdeen. Even at the trial this claim of the plaintiff-respondent that the 1st defendant-appellant was liable on the basis that she was the legal representative of the estate of her deceased husband Mr. Nilamdeen had not been disclaimed either through oral testimony or through documentary evidence. 140

In fact, she appears to have known about the estate as she speaks to the ownership of the vehicles that were purported to be under his control. (paragraph 3 of the answer at page 84 of the brief). She had knowledge that his cars had been sold (page 156). She admits that having received the summons she made inquiries and took all steps on behalf of her deceased husband to file an answer (page 158). She has also taken up the position that her husband's estate was not liable to pay any damages. She has denied that there was a cause of action against her late husband. By her categorical disclaimer of the liability of her late husband she has acted at all times as a party interested in safeguarding the rights of the estate of her late husband. But, she failed to state whether the estate was above the administratable value or not. If, therefore, we presume the estate to be below the administratable value then she is clearly a next of kin who had adiated the inheritance of her late husband.

In the circumstances the plaintiff-respondents had established the nexus between the purported liability of Mr. Nilamdeen and the 1st defendant-appellant as representing the estate of the late Nilamdeen. In these circumstances the plaintiff-respondent's action must succeed.

In the case of *D. R. Fernando v. K. A. Magilina Hamy*⁽⁷⁾ it had been held that the expression next of kin in section 394 (2) of the Civil Procedure Code included a widow who was an intestate heir under the Matrimonial Rights and Inheritance Ordinance, No. 15 of 1876.

In English law the phrase "legal representative" would be held to be next of kin and would include a wife upon the death of her husband. (Strouds Judicial Dictionary 5th edition, page 1444).

This appears to have been clarified in cases where substitution had to be made when a party died whilst the case was pending, under

Amendment Act No. 6 of 1990, where section 14A states: "... the person in whom such right is *alleged to exist* ...". It is, of course, within the special knowledge of the party being sued to either accept or reject the said status or name the correct party to be substituted. ¹⁸⁰

The plaintiff-respondents objected to the raising of this question of law regarding whether Ms. Nilamdeen was a legal representative in appeal. It was submitted that it should have been taken in the Court of first instance. It was also contended that it must necessarily have been raised at the earliest given opportunity. Failure to do so would mean that the 1st defendant-appellants would have to take the consequences. By submitting to the jurisdiction of the District Court of Mt. Lavinia by filing answer as well as in participating at the trial, and that in the circumstances estoppel by conduct would operate ¹⁹⁰ against her. I find that there is merit in this submission. I also find that the 1st defendant-appellant is liable to pay the damages awarded by the District Judge.

Accordingly, the appeal is dismissed and the judgment of the District Judge of District Court, Mt. Lavinia, dated 10. 07. 1996 is affirmed. Parties shall bear their own costs.

UDALAGAMA, J. – I agree.

Appeal dismissed.