

**1978 Present : Samerawickrame, J., Wimalaratne, J. and
Vythialingam, J.**

**KRISHNASAMY VANGADASALAM *alias* VENGADAN and
ANOTHER, Substituted Plaintiff-Appellants.**

and

**ADIKA PUNDAYAN KARUPPAN *alias* KARUPPIAH
and Others, Defendants-Respondents.**

S.C. 130/75 (F) — D.C. Avissawella, 13088/M

Delict—Action for damages by plaintiff, an employee of defendant firm—Death of plaintiff—Whether stage of “*litis contestatio*” reached—*Aquilian action*—Does such action die with the plaintiff.
Conciliation Boards Act—Certificate issued in respect of dispute between plaintiff and K. & Co.—Partners of firm substituted—Would such certificate be sufficient compliance with provisions of Act.

Where in an action filed by a plaintiff against a firm of which he was an employee, for damages resulting from injuries caused by the falling of negligently stacked rice bags, the plaintiff died before answer was filed—

Held: (1) That a personal action dies with the plaintiff unless the stage of *litis contestatio* has been reached. This takes place with the joinder of issue or the close of pleadings.

(2) That, however, the above rule does not apply to the *Aquilian action* where the heirs of the original plaintiff can maintain an action against the wrongdoer to recover patrimonial loss suffered. Thus a claim in respect of expenses incurred or other patrimonial loss would survive to the heirs of the original plaintiff but not a claim in respect of pain and suffering.

Held further: That even after the present 1st, 2nd and 3rd defendants who were partners of the firm of Karunasena & Co. had been substituted as defendants, a certificate from the Conciliation Board in respect of a dispute between the original plaintiff and Karunasena & Co. was sufficient compliance with the provisions of the Conciliation Boards Act. The plaintiff's cause of action was against the three substituted defendants not personally but as partners of Karunasena & Co.

Case referred to:

Muheeth v. Nadarajapillai, 19 N.L.R. 461.

APPEAL from a judgment of the District Court, Avissawella.

F. W. Obeysekera, with S. Parameswaran and C. P. Illangakoon, for the plaintiff-appellant.

D. C. Amerasinghe, with C. Suntheralingam, for the defendants-respondents.

Cur. adv. vult.

March 21, 1978. SAMERAWICKRAME, J.

The original plaintiff filed this action against Messrs. Karunasena & Co. claiming damages in a sum of Rs. 15,000. He averred that he was an employee of the defendant firm and worked in the defendant's shop; that the defendant had so negligently stacked rice bags that they slipped down and dumped upon the plaintiff and caused him grievous injuries. Before any answer was filed, the original plaintiff died and the present plaintiffs have been substituted in his place. Karunasena & Co. appears to have filed answer and thereafter the present defendants, who are partners of the firm of Karunasena & Co. have been substituted as defendants.

At the trial, certain issues were taken up *in limine* which set out grounds urged by the defendant why the plaintiffs could not maintain the action. The learned District Judge has held that there is no material to show that the dispute between the plaintiffs and the present defendants has been the subject of an inquiry by the Conciliation Board. He appears to have gone on the basis that the certificate from the Chairman of the Conciliation Board refers to a dispute between the plaintiffs and Karunasena & Co. and not between the plaintiff and the present 1st, 2nd and 3rd defendants. The 1st, 2nd and 3rd defendants, however, were the partners of the firm of Karunasena & Co. The cause of action set out in the plaint was not in respect of some private obligation of the defendants but in respect of the claim against them as members of the firm of Karunasena & Co. I am, therefore, of the view that the certificate from the Chairman of the Conciliation Board filed in the plaint is sufficient evidence of a dispute between the plaintiff and the 1st, 2nd and 3rd defendants being the subject of an inquiry before that Board.

Learned counsel for the defendants-respondents sought to support the order upon a ground upon which the learned District Judge had held against the defendants. He submitted that the cause of action did not survive after the death of the original plaintiff. A personal action dies with the plaintiff unless the stage of *litis contestatio* has been reached. It would appear that *litis contestatio* takes place with the joinder of issue or the close of pleadings (see *Voet* 47.10.22). In *Muheeth v. Nadarajapillai*, 19 N.L.R. 461 at 462, Wood Renton, C.J. said—

“An action became litigious, if it were in rem, as soon as the summons containing the cause of action was served on the defendants; if it was in personam on *litis contestatio*, which appears to synchronize with the joinder of issue or the close of the pleadings.”

In this case, that stage had not been reached when the original plaintiff died. The above rule, however, does not appear to apply to actions in respect of delicts which fall under the *Lex Aquilia*, where the heirs of an original plaintiff maintain an action against a wrongdoer to recover what is known as patrimonial loss.

Paragraphs 5 and 6 of the plaint state as follows:—

“5. The aforesaid injuries are direly grievous and have left the plaintiff amongst other things

(a) paralysed below the waist

(b) with tubes to urinate

- (c) unable to move
- (d) with loss of the use of legs
- (e) bedsores
- (f) and the need of an attendant.

6. The substituted plaintiffs claim for the injuries aforesaid as damages a sum of Rs. 15,000 which sum or any part thereof the defendants have failed and neglected to pay though often demanded."

From the above it is not clear whether plaintiff claims in respect of pain and suffering caused to him or in respect of expenses incurred because of the injuries. Paragraph 5 (f) at least suggests that the damages may also be in respect of expenses. In my opinion, any claim in respect of pain and suffering does not survive to the heirs of the original plaintiff but a claim in respect of expense or other patrimonial loss would survive. The substituted plaintiffs may therefore maintain the claims in so far as they relate to patrimonial loss.

I would, therefore, set aside the order dismissing the action and send the case back for determination in respect of such claims as the substituted plaintiffs may maintain for patrimonial loss. The substituted plaintiffs-appellants will be entitled to half costs of appeal.

WIMALARATNE, J.—I agree.

VYTHIALINGAM, J.—I agree.

Set aside.
