

PERERA
v.
RAMIAH

COURT OF APPEAL.
GUNASEKERA, J., (P/CA)
ISMAIL, J.
C.A. NO. 112/92
D.C. MT. LAVINIA NO. 381/SPL
JUNE 13, 1996.
OCTOBER 11, 1996.
OCTOBER 18, 1996.

Tenant – Seeking a declaration that owner is not entitled to breakdown – Damage portion of premises – Gift reserving life interest – Death of defendant owner – Substitution – Applicability of S.404 and S.398 of the Civil Procedure Code.

The plaintiff-respondent tenant sought a declaration, that the defendant-appellant owner is not entitled to breakdown a portion of the premises. The defendant by way of a claim in reconvention prayed for a declaration of title to the premises, and ejectment. Before the trial commenced the defendant gifted the premises to the petitioner subject to life interest – The defendant died shortly thereafter.

The petitioner who is the daughter of the original defendant made an application for substitution under S.404.

This application was on the basis that the transfer of the property was made to her pending the action, subject to life interest, and with her death, the petitioner's title became full and complete.

The plaintiff-respondent objected on the ground that substitution should be under S.398. The District Court refused the application of the petitioner, on the ground that reliefs claimed were personal to the deceased.

Held:

The District Court has failed to consider the effect of the Deed of Gift by which the interests of the deceased defendant devolved on the petitioner and that she had title to the premises in suit at the time of her application for substitution.

The petitioner has acquired interest and title to the property which is the subject matter of the action and is entitled to be substituted in place of the deceased defendant in terms of S. 404.

Leave to appeal application, leave been granted.

Cases referred to:

1. *Daniel Silva v. Jayesekera*, 46 NLR 316.
2. *Kino v. Rudkin* LR 1877 6 CLD 160.
3. *Paaris and Another v. Bridget* 1992 - 1 SLR 36.
4. *Elisahamy v. Punchi Banda* - 14 NLR 113 (FB)
5. *Silva v. Jayawardena* - 43 NLR 551 at 552.
6. *Eugin Fernando v. Charles Perera and Another* - 1988 2 CALR 37.
7. *Prokash Chandra Das Gupta v. Sharma Charan Dutt and Others* 1925 AIR(Cal) 467.
8. *Pannananda Thero v. Sumangala Thero* - 68 NLR 367.
9. *Sheriff v. Beebi* 69 NLR 215.
10. *M. Dhammananda Thero v. S. Saddananda Thero* - 79 (1) NLR 289

N. S. A. Goonetillake P.C., with *N. Mahendra* for petitioner.

P. A. D. Samarasekera with *Rohana Jayawardane* for plaintiff-respondent.

Cur. adv. vult.

January 01, 1997.

ISMAIL, J.

The petitioner having obtained leave seeks to have the order of the District Judge Mt. Lavinia dated 4th May 1992 set aside and an order to be permitted to be substituted in the room of the deceased defendant to enable her to defend the action and to proceed with the claim in reconvention set up by the original defendant.

The plaintiff-respondent claiming to be the tenant of premises No. 200, Galle Road, Wellawatte instituted an action against the deceased defendant seeking a declaration that the defendant is not entitled to break down a portion of the premises or damage the same or obstruct him from carrying on his business called "Gandhi Lodge" or obstruct him from using the entirety of the process and from occupying the same.

The deceased defendant who was the owner of the premises pleaded in her amended answer dated 30.10.1989 that the premises bearing No. 200, Galle Road, Wellawatte were destroyed by fire in July 1983 and that accordingly the plaintiff's tenancy came to an end

and that the plaintiff had no manner of right or title to occupy or remain in occupation of the said premises. The defendant by way of a claim in reconvention prayed for declaration of title to the said premises, for ejectment and for accrued damages in an aggregate sum of Rs. 3,250,000/- up to the end of October 1985 and for damages at Rs. 50,000/- per mensem until she was restored to possession. The amended replication dated 19.2.1990 of the plaintiff respondent was filed thereafter.

Before the commencement of the trial the defendant by a deed of gift bearing No. 1446 dated 9.8.1991 attested by N. Manoharan, Notary Public gifted the premises to the petitioner reserving to herself the life interest. The defendant died shortly thereafter on 13.8.1991.

The petitioner who is the daughter then made an application dated 4.10.91 under section 404 of the Civil Procedure Code and prayed that she be substituted in the room of her deceased mother to enable her to defend the said action and also to proceed with the claim in reconvention set up by the deceased defendant. The plaint in this action was dated 12.6.86 and the original defendant died on 13.8.91 before the trial in the action commenced. The petitioner sought to be substituted on the basis that the transfer of the property was made to her pending the action subject to the life interest in favour of the deceased defendant donor and that with her death petitioner's title became full and complete not limited by the said life interest.

The plaintiff-respondent objected to the application of the petitioner on the basis that substitution of a legal representative has to be effected in terms of section 398 of the Civil Procedure Code and that the petitioner cannot seek to continue the action as provided for in section 404 of the Code. The parties tendered written submissions and the District Judge by his order dated 4.5.92 rejected the application of the petitioner. He expressed the view that the declaratory relief and ejectment from the premises prayed for were personal to the deceased defendant and that her rights in the action did not survive. He postponed the consideration of the question as to whether the accrued damages would go to the estate

of the deceased until after substitution of the legal representative in accordance with the provisions of section 398 was determined.

The plaintiff-respondent did not himself make an application to substitute the legal representatives of the deceased defendant in terms of section 398 of the Code. It was the application of the petitioner that stood rejected on the ground that the provisions applicable to effect substitution were not section 404 of the Code. However, learned counsel in the written submissions tendered has sought to justify the order of the Judge on the basis that section 404 vests a discretion in the court as to the parties to be admitted as plaintiff or defendant relying partly on the observations of Keuneman SPJ in *Daniel Silva v. Jayesekera*⁽¹⁾. The decision in this case is not relevant for the present purposes and does not support the contention of counsel. However, I propose to refer to it as it explains the scope of section 404 of the Code. There the 2nd defendant transferred and assigned all his rights in the subject matter of the action for valuable consideration to the petitioner who sought to intervene in the action as a party defendant. The District Judge took the view that section 404 only permitted the plaintiff or the person to whom his interest has come to continue the action against the defendant or the person to whom his interest has come and that the court had no right to force the plaintiff to proceed with his action against the petitioner when the plaintiff was satisfied with obtaining decree against the two defendants alone. It was contended at the hearing of the appeal that the District Judge had wrongly decided the question of law and that it was open to him even at that stage to admit the petitioner as a party to the case. Keuneman SPJ considered the provisions of section 404 which are as follows:

"In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of court, given either with the consent of all the parties or after service of notice in writing upon them, and hearing their objections, if any, be continued by or against the person to whom such interest has come, either in addition to or in substitution for, the person from whom it has passed, as the case may require."

Keuneman SPJ observed that "there is nothing in this section which prevents a party claiming to be added as a defendant in the

case of an assignment, creation or devolution of any interest in the subject matter of the action. The important and controlling words in my opinion are that "leave of court" must be obtained.

Keuneman SPJ further observed;

"In England, where the rule is not materially different, it has been held that a purchaser *pendente lite* can be admitted as a party defendant." See *Kino v. Rudkin LR*⁽²⁾.

He also referred to Order 22 Rule 10 of the Indian Code of Civil Procedure which is similar to section 404 of our Code. Woodroffe and Amir Ali in their commentaries on the Code of Civil Procedure, {1990} ed. at page 2246 explain the principle and scope of the rule thus;

"1. Principle – This rule is based on the principle that trial of a suit cannot be brought to an end merely because the interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit but that suit may be continued against the person acquiring the interest with the leave of Court.

2. Scope – It is a mere enabling section and it is not obligatory. An assignee is not a necessary party under this rule. It may be that if a transferee does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard."

Dealing with the words "other cases of assignment, creation or devolution of interest" the following passages at page 2266 state the effect of the authorities.

"The words "other cases" in this rule mean cases other than those specifically provided for in the preceding rules in this order. It is intelligible that the Legislature whilst providing for incidents of "death, marriage and insolvency of the parties" should, at the end of the order, make provision also for "other cases" of assignment, creation and devolution of any interest pending the suit".

The interest contemplated in this rule is any interest which will be vitally affected by the suit.

These words in the first part of the section do not mean only devolution by death. They also apply to a case wherein, pending a suit instituted by the manager of an encumbered estate the estate is released and restored to the owner, by reason of his attaining majority. This rule applies as well to the devolution of interest by operation of law or in *invitum*. Transfer of property [subject matter of the appeal] by way of a gift to the wife is a case of devolution of interest and the case falls within this rule."

In *Paaris and Another v. Bridget* ⁽³⁾; this court affirmed the position that the donee of the premises in suit from the deceased plaintiff can be substituted in his place under section 404 of the Civil Procedure Code.

Learned counsel for the plaintiff respondent has also relied on the full bench judgment in *Elisahamy v. Punchi Banda* ⁽⁴⁾; and submitted that a party seeking declaration of title should retain title till the end, that is, until his death. I take it that counsel seeks to submit that this action came to an end when the deceased defendant donated the property to her daughter. This submission is presumably based on a passage from Voet 6:4:4 [Ganes translation volume 2 p. 214] and referred to in this judgment, to the effect that "if in a vindicatory action plaintiff loses ownership *pendente lite*, the defendant is discharged." This too does not appear to me to be relevant having regard to the facts of this case. However, this passage has also come up for consideration later in *Silva v. Jayawardane* ⁽⁵⁾; where Keuneman J. said;

"It is clear that the action contemplated by Voet was the action *rei vindicatio* and I think that it follows that all rights *in rem* against the property are lost when the *dominium* has been transferred pending the action to another person."

In the case of *Elisahamy v. Punchi Banda* (*Supra*) in which during the pendency of an action for declaration of title, ejectment and

damages, consequent on trespass and the wrongful removal of plumbago from the land in dispute, the plaintiff sold the land in dispute to a third party; it was held 1] that the vendees need not be added as plaintiffs; and 2] that the plaintiff was not precluded from maintaining his claim for damages though he could not get a decree for declaration of title and ejectment.

This decision was followed in *Silva v. Jayawardene (Supra)* referred to above, where after the institution of an action for declaration of title to five blocks of land the plaintiff transferred three blocks, it was held that no decree for title can be entered in respect of the blocks sold. The right to claim damages up to the date of the transfer was not affected by the sale.

The judgments in the two cases referred to above were considered in some detail in *Eugin Fernando v. Charles Perera and Another*⁽⁶⁾; Goonewardene J. finally held that "on a true reading of section 404 of the Civil Procedure Code there was no impediment to bringing in a purchaser of the plaintiff's interest, in addition to the plaintiff and the action continuing to enable the purchaser to get relief that the plaintiff would have got but for the transfer."

In the present case the defendant gifted the premises in suit to the petitioner by Deed No. 1446 dated 9.8.91 subject to the life interest in her favour. She died a few days later on 13.8.91. Learned counsel for the petitioner submitted that she got full and complete ownership of the property on the death of the donor defendant and that the premises in suit could in no way form part of the estate of the deceased. It was submitted that the learned District Judge erred in the circumstances in holding that no interest devolved on the petitioner and rejecting her application for substitution in terms of section 404 of the Code. However, the District Judge has observed that in any event the petitioner would not be entitled to the accrued damages claimed by the deceased and has postponed deciding the question as to whether it would accrue to the estate. Yet the position appears to be that the petitioner to whom the interest of the deceased has devolved pending the action does not forfeit her right to be substituted for the purposes of continuing with the action.

In the Indian case of *Prokash Chandra Das Gupta v. Sharma Charan Dutt and Others*⁽⁷⁾ the Court pointed out that in a case such as this the simple question of law that arises –

“... is whether when there are two devolutions – the death of a party and the transfer by him of his interest in the suit – the transferee has the right to be brought on the record in place of the deceased transferor. It seems to us on going through the several sections of the Code dealing with this matter, that the two devolutions are which have occurred in this case are distinct and governed by different considerations. The death of the plaintiff after the assignment of his interest should not take away the assignee's rights to be substituted in the suit. If effect is given to the contrary contention the result will be that if a plaintiff after selling his interest in the subject matter of the suit dies, before the assignee could make an application for substitution under Order 22, Rule 10, the assignee will have no right to be brought on the record and the legal representative of the deceased plaintiff having no interest in the subject matter there will be no representation in the suit, and the assignee will be deprived of his purchase through no fault of his.”

I accept the submission on behalf of the petitioner that the learned District Judge has erred in finding that the relief for declaration of title to the premises in suit and ejection therefrom were personal to the deceased defendant. The District Judge has failed to consider effect of the deed of gift by which the interest of the deceased defendant devolved on the petitioner and that she had title to the premises in suit at the time of her application for substitution.

The applicability of section 404 of the Civil Procedure Code in such a situation was considered by the Supreme Court in *Pannananda Thero v. Sumangala Thero*⁽⁸⁾. There it was held that, where a plaintiff who sues for a declaration that he is the lawful Viharadhipathi of the Vihara, and entitled to possess the temporalities thereof, dies during the pendency of the action, a person who can establish that under the Buddhist Ecclesiastical Law, he would be the successor-in-title to the incumbency upon the assumption that the plaintiff himself had been the incumbent is entitled to substitution

under section 404 of the Civil Procedure Code. See also in *Sheriff v. Beebi*⁽⁹⁾ where, pending an action filed by the trustee of a mosque, the trustee died, the person who was subsequently appointed trustee under the Muslim Mosques and Charitable Wakfs Act, No. 51 of 1956, was held entitled to be substituted in place of the deceased plaintiff under section 404 of the Civil Procedure Code. The Court took into consideration that the trust property would vest in the newly appointed trustee and that it can be regarded as devolution of interest pending the action. Again in *M. Dhammananda Thero v. D. Saddananda Thero*⁽¹⁰⁾; the Supreme Court held that in an action for declaration of title to the office of Viharadhipathi of a temple on the death of a plaintiff or defendant (if he too claimed to be the Viharadhipathi) the action can be continued by or against the successor in title under section 404 of the Civil Procedure Code. It was considered that the action though in form an action for a status or an office is in substance an action for a temple and the temporalities which by operation of law belong to the Viharadhipathi of the temple.

For the reasons set out above I am of the view that the petitioner who has acquired interest and title to the property which is the subject matter of the action during its pendency is entitled to be granted leave to be substituted in place of the deceased defendant for the action to be continued in terms of section 404 of the Civil Procedure Code. The order of the District Judge dated 4.5.92 is set aside and the petitioner is permitted to be substituted in place of the deceased defendant in the action pending before the District Court.

GUNASEKERA, J. (P/CA) – I agree.

Appeal allowed.