

**ARIYAWANSA DE SILVA**  
**v**  
**INDUSTRIAL FINANCE LTD.**

COURT OF APPEAL  
UDALAGAMA, J., AND  
NANAYAKKARA, J.  
C.A.L.A. NO.1404/2001  
D.C.COLOMBO 10361/MR  
NOVEMBER 20, 2002

*Civil Procedure Code, sections 221 (1), 221 (2) and 241 – Accident – Original defendant dies – Substitution of son – Ex-parte decree – Personal liability – Validity of decree cannot be impunged at the time of execution.*

The petitioner who was the rider of a motor cycle at the time the accident occurred had on his pillion, his sister who was seriously injured. He instituted

action on behalf of his sister for the recovery of damages. The original defendant died and his son was substituted. The matter went *ex parte*. The application for writ of execution against the 2A defendant was rejected by the trial Court.

### Held

- (i) The 2A defendant has been made personally liable for the damages caused. He has not objected at any stage to his substitution and had stood passively till the *ex parte* decree was entered against him. He cannot now complain of the invalidity of the decree.
- (ii) The question whether 2A defendant is personally liable or not cannot be determined as there is a valid decree.
- (iii) 2A defendant having failed to participate at the trial and failed to lodge any kind of objection to his substitution will have to accept the decree as it is.

*Per* Nanayakkara, J.

"If the decree has made the 2A defendant personally liable, its validity cannot be impugned at the time of execution of the decree"

"Once writ is executed in pursuance of the decree the 2A defendant is still at liberty to prefer an application under section 241."

**APPLICATION** for leave to appeal from the order of the District Court of Colombo.

### Case referred to:

1. *Dias v De Mel* (1984) 1 Sri LR 263

*J.C. Boange* with *J.M. Wanninayake* for plaintiff-respondent.

*P. Epa* for 2nd defendant-respondent.

*Cur. adv. vult.*

December 10, 2002

### NANAYAKKARA, J.

Rejection of an application made for the issuance of writ of execution, consequent to an *ex parte* judgment delivered in an action instituted against 2A defendant and two other defendants, for the recovery of damages and other consequential reliefs in

respect of personal injuries sustained by the plaintiff-petitioner-petitioner (petitioner) in an accident has given rise to this application by way of revision.

The petitioner who was the rider of the motor cycle bearing No.110-2534 at the time the accident occurred had on his pillion, his sister, who was seriously injured in the accident, filed a separate action for the recovery of damages in respect of injuries sustained by her.

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As the original defendant against whom action was initially instituted died during the pendency of the action, her son (as 2A defendant) was substituted in her place.

After a chequered history, in which the 2A defendant had defaulted to take necessary steps and participate in the trial, the court had eventually, on 3.7.99 entered *ex parte* judgment against him. An appeal and application for revision of the *ex parte* judgment against 2A defendant had also been rejected by the Court of appeal. It is in that background that the petitioner had made an application for the execution of the *ex parte* decree which was rejected by the learned District Judge.

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At this stage it would be opportune for this court to focus its attention on the impugned order which is sought to be revised by this application.

It should be observed at the very outset, that the learned District Judge although by his order has correctly analysed section 222(1) and particularly subsection (2) of the Civil Procedure Code as it applies to a decree issued against a party in his capacity as the legal representative of the deceased person. He has failed to do so with reference to the decree as issued in this case. The question whether decree applies to 2A defendant has to be determined by reference to the very decree sought to be executed.

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A careful reading of the decree makes it evident that the 2A defendant has been substituted in place of the original 2nd defendant and that 2A defendant has been made personally liable for the damages caused in the case. At the time of execution of a decree the court has to be guided by the decree sought to be executed, if the decree has made the 2A defendant personally liable, its valid-

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ty, as rightly pointed out by the learned District Judge cannot be impugned at the time of execution of the decree. If the 2A defendant was not satisfied with the decree he should have taken steps to have it set aside at the appropriate time.

It should also be observed, the 2A defendant who had not objected at any stage to his substitution in place of the original deceased defendant and had stood passively till an *ex parte* decree was entered against personally, cannot now complain of the invalidity of the decree.

The learned District Judge has rightly adverted to this aspect of the matter in his judgment. He has also in my view correctly analyzed the legal position in regard to section 222(1) and (2) of the Civil Procedure Code. But in my view what he has failed to realize is that the decree had made 2A defendant personally liable for the damage which the 2A defendant cannot believe. 50

Learned District Judge in his order holding that the petitioner had failed to establish that the 2A defendant had either property of the deceased or had control of the same and had not duly applied at the time of the application of writ and dismissed it. He has also placed reliance on *Dias v. de Me<sup>(1)</sup>* which in my view, applies only when a party has been sued in a representative capacity, and the decree is not binding on him personally. 60

As far as the instant case is concerned the 2nd defendant had been sued not in his representative capacity, but personally against him. Therefore the question whether 2A defendant is personally liable or not cannot be determined at this stage as there is a valid decree. The 2A defendant having failed to participate in the trial and also failed to lodge any kind of objection to his substitution in place of the deceased 2nd defendant will have to accept the decree as it is. The 2A defendant who had been remiss and negligent right throughout the proceedings in the District Court, has thought it fit to object to the issuance of writ when he realized that it was against his interests. 70

Therefore taking into consideration all the circumstances, I am of the view that the writ against 2A defendant is in conformity with the decree, should be issued and direct the learned District Judge to issue writ against 2A defendant in accordance with the decree

entered in the case. Once the writ is executed in pursuance of the decree the 2A defendant is still at liberty to prefer an application under section 241 of the Civil Procedure Code.

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Therefore taking into account all the circumstances, I set aside the order dated 17.06.2001 of the learned District Judge and direct him to issue writ in accordance with the decree. The petitioner is entitled to costs in a sum of Rs. 5000/-.

**UDALAGAMA, J.** - I agree

*Application allowed.*