IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

Rev. Mahanuwara Ratnasara Thero,
Sri Sidhartha Ramaya,
509, Nawala Road,
Rajagiriya.
Plaintiff (Deceased)

Arumugam Rasalingam,
No. 32, St. Anthony's Mawatha,
Colombo 13.
Substituted Plaintiff

SC APPEAL NO: SC/APPEAL/17/2016
SC LA NO: SC/HCCA/LA/349/2014
HCCA COLOMBO NO: WP/HCCA/COL/05/2009(F)
DC COLOMBO NO: 20221/L

Vs.

Sri Lanka Land Reclamation and
Development Corporation,
No. 3, Sri Jayawardenapura Mawatha,
Welikada, Rajagiriya.
Defendant

AND BETWEEN

Arumugam Rasalingam,
No. 32, St. Anthony's Mawatha,
Colombo 13.
Substituted Plaintiff-Appellant

Vs.

Sri Lanka Land Reclamation and
Development Corporation,
No. 3, Sri Jayawardenapura Mawatha,
Welikada,
Rajagiriya.
Defendant-Respondent

AND NOW BETWEEN

Arumugam Rasalingam,
No. 32, St. Anthony's Mawatha,
Colombo 13.
Substituted Plaintiff-Appellant-Appellant

Vs.

Sri Lanka Land Reclamation and
Development Corporation,
No. 3, Sri Jayawardenapura Mawatha,
Welikada,
Rajagiriya.
Defendant-Respondent-Respondent

Before: P. Padman Surasena, J.
Kumuduni Wickremasinghe, J.
Mahinda Samayawardhena, J.

Counsel: Kuvera de Zoysa, P.C., with Piume Kulatilake for the Substituted Plaintiff-Appellant-Appellant.
Kapila Liyanagamage for the Defendant-Respondent-Respondent.

Argued on: 27.07.2022

Written submissions:
by the Plaintiff-Appellant-Appellant on 29.09.2022.
by the Defendant-Respondent-Respondent on 30.08.2022.

Decided on: 16.12.2022

Mahinda Samayawardhena, J.

The plaintiff filed this action against the defendant in the District Court of Colombo on 04.03.2004 seeking a declaration of title to the land described in the second schedule to the plaint, ejectment of the defendant therefrom, and damages. The defendant by answer dated 09.07.2004 sought dismissal of the plaintiff's action.

Before issues were raised, the plaintiff passed away on 12.04.2006 and the registered Attorney of the plaintiff made an application under section 404 of the Civil Procedure Code by way of petition and affidavit dated 27.09.2006 seeking to substitute one Arumugam Rasalingam as the substituted plaintiff, on the basis that the deceased plaintiff during the pendency of the action had transferred his rights in relation to the land in suit by deed No. 4906 dated 16.09.2005. With this application, a copy of

the Death Certificate and deed No. 4906 were tendered marked X1 and X2 respectively.

The defendant filed objections to this application by petition and affidavit dated 28.02.2007 and the matter was fixed for inquiry, which was disposed of by way of written submissions. The defendant resisted this application on two grounds: (a) the signature of the deceased plaintiff appearing on the deed is different from his signature appearing on other documents; (b) if the deed was executed on 16.09.2005, the application could have been made when the deceased plaintiff was alive. It was quite clear that the defendant objected to the application for substitution made under section 404 on the basis that the deed is a forgery and not on any other ground. The District Court having considered the objections and the written submissions tendered by both parties, made order dated 27.06.2007 allowing the application for substitution. The amended caption was accordingly tendered. There was no appeal against the order. Learned counsel for the defendant does not say even now that the order dated 27.06.2007 is erroneous.

On 13.02.2008, admissions and issues were recorded before the District Court. On 07.07.2008, the substituted plaintiff gave evidence-in-chief. Thereafter, on 15.09.2008, during the course of cross-examination of the substituted plaintiff, learned counsel for the defendant raised the following two issues: (a) Did the original plaintiff transfer his rights in the land by deed marked X2 (also marked V3) pending determination of the action? (b) If the answer to that question is in the affirmative, can the plaintiff maintain this action?

The District Court by order dated 09.01.2009 citing *Ponnamma v. Weerasuriya* (1908) 11 NLR 217, *Silva v. Jayawardena* (1942) 43 NLR 551 and *Eugin Fernando v. Charles Perera and Others* [1988] 2 Sri LR 288, answered these two issues against the substituted plaintiff and dismissed

the action on the basis that in a *rei vindicatio* action such as this it is necessary for the title to be present with the plaintiff not only at the beginning of the action but until the conclusion of the case.

Of these judgments relied upon by the learned District Judge, let me say the following: the first judgment does not express such a view; the second judgment does; the third judgment takes the contrary view.

On appeal, the High Court of Civil Appeal affirmed the order of the District Court and dismissed the appeal. Hence this appeal by the substituted plaintiff.

This Court granted leave to appeal against the judgment of the High Court of Civil Appeal on the following questions of law:

a) *Was the order of the learned District Judge dismissing the District Court action, based on an erroneous construction of the law?*
b) *Did the Hon. High Court Judges and the learned District Judge err in holding that the action of the substituted plaintiff-appellant-petitioner in the District Court cannot be proceeded with since the original plaintiff had parted with his title in the land?*
c) *Did the Hon. High Court Judges and the learned District Judge fail to consider that the title in the land had passed from the original plaintiff not to a person who was not a party in the case, but to the substituted plaintiff-appellant-petitioner?*
d) *Did the Hon. High Court Judges err when they held that the plaintiff has lost his title pending the conclusion of the action, without considering that the title had in fact passed to the substituted plaintiff-appellant-petitioner who had been substituted as the plaintiff in the action by the District Court?*

e) *Did the Hon. High Court Judges and the learned District Judge err when they held that the plaintiff must retain title throughout the course of the action?*

f) *Did the Hon. High Court Judges and the learned District Judge fail to appreciate that the respondent did not challenge the order of the learned District Judge dated 27.06.2007 allowing the substituted plaintiff-appellant-petitioner to be substituted as the substituted plaintiff?*

The preliminary question to be considered is, once an order is made by the Court on a certain matter after giving a hearing to both parties, can the same matter be reagitated by one of the parties, either directly or indirectly, at a subsequent stage of the proceedings before the same Court without preferring an appeal against the previous order? In my judgment, this cannot be done on first principles. As much as a plaintiff cannot present his claim in Court piecemeal (*vide* section 34 of the Civil Procedure Code), a defendant also cannot take up his defence piecemeal. The defendant shall take up at once all matters which existed at the time of pronouncement of the order and which he had an opportunity of bringing before the Court, for otherwise there will be no end to litigation. *Cf. Banda v. Karohamy* (1948) 50 NLR 369. As Sansoni C.J. remarked in *Cassim v. Government Agent, Batticaloa* (1966) 69 NLR 403 at 404 "*there must be finality in litigation, even if incorrect orders have to go unreversed.*" In such circumstances, the defendant cannot later add another string to his bow and say that the plaintiff's vindicatory action must fail because of the execution of the deed (produced with the application under section 404 for substitution) pending the determination of the action. If the defendant wanted to take up that position, it should have been the first objection against substitution (rather than the deed being a forgery), which, if convincing, could have resulted in the dismissal of the action. The defendant did not do so. Hence the defendant could not have reagitated

the matter halfway through the trial. The order of the District Court dated 09.01.2009 is a nullity as it was made *corum non judice*.

The next question is whether the Roman Dutch Law principle articulated by legendary Dutch jurist Voet (1647-1713) as quoted by Keuneman J. in *Silva v. Jayawardena* (1942) 43 NLR 551 (Voet 6:1:4 – *Voet's Title on Vindications and interdicta* by Casie Chitty) and reproduced below should be mechanically followed in view of the provisions of the Civil Procedure Code.

> *But again, if he who brought this action was the dominus at the time of the institution of the suit, but lite pendente has lost the dominium, reason dictates that the defendant should be absolved…both because the suit has then fallen into that case, from which an action could not have a beginning, and in which it could not continue...and because the interest of the plaintiff in the subject of the suit has ceased to exist,…and in short because that (right of dominium) has been removed and become extinct, which was the only foundation of this real action.*

According to this proposition of law, in an action *rei vindicatio*, if the plaintiff loses title to the land *pendente lite*, the action fails. This Roman Dutch Law principle is given recognition to in cases such as *Eliashamy v. Punchi Banda* (1911) 14 NLR 113, *Fernando v. Appuhamy* (1921) 23 NLR 476, *De Silva v. Goonetileke* (1931) 32 NLR 217, *Silva v. Jayawardene* (1942) 43 NLR 551, *Oman Ekanayake and Others v. Ratranhamy* [2012] BLR 19.

At first glance, this proposition of law gives rise to two concerns. Firstly, this ignores another well-settled principle in law, i.e. that the rights of the parties shall be decided at the time of the institution of the action.

Secondly, this ignores the aspect of the continuation of an action after alteration of the status of parties by addition and/or substitution.

Chapter 25 of the Civil Procedure Code containing sections 392-405 provides for the continuation of actions after alteration of a party's status by death, marriage and bankruptcy etc. Section 404 is a residuary section governing cases not specifically provided for in those sections. Section 404 reads as follows:

> *In other cases of assignment, creation, or devolution of any interest pending the action, the action may, with the leave of the court, given either with the consent of all 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.*

Section 404 is a standalone section with little qualification and with considerable latitude being afforded to the Court to decide on the matter of addition or substitution on the unique facts and circumstances of each application. Although section 392 enacts that the death of a plaintiff or defendant shall not cause the action to abate "*if the right to sue on the cause of action survives*", section 404 presents no such qualification. *Vide Dhammananda Thero v. Saddananda Thero* (1977) 79(1) NLR 289 at 302.

Except in the dissenting judgment of Grenier J. in *Eliashamy's* case (*supra*) where there is a passing reference to section 404 of the Civil Procedure Code, the Court has not made even a passing reference to section 404 in any of the other cases referred to above but has solely depended upon the aforesaid passage of Voet. Grenier J. at page 121 merely states "*I do not think that either section 18 or section 404 is helpful to the plaintiff in the position in which he has placed himself by conveying*

the property in question to third parties, for no declaration of title can be made in this action in favour of the purchasers so long as the plaintiff is on the record." It may be relevant to note that in the instant action the original plaintiff is not on record; he passed away and, after inquiry, the substituted plaintiff was appointed in his place.

In *Eugin Fernando v. Charles Perera and Others* [1988] 2 Sri LR 228, Goonewardene J. did not agree with the above observation of Grenier J. Whilst stating that it is *obiter*, Goonewardene J. held that section 404 of the Civil Procedure Code makes express provision for such a course of action and further stated that the same view has been taken in cases such as *Murugesu v. Gunaratne* (CA/LA/29/79, CA Minutes of 18.07.1979) and *Kandasamy v. Meenambikai* (CA/LA/17/79, CA Minutes of 22.08.1979).

Pless Pol v. De Soysa (1907) 10 NLR 252 was not a *rei vindicatio* action. Nevertheless, the pronouncement of Hutchinson C.J. in that case is instructive. The plaintiff had filed action against the defendant seeking damages on an agreement. After the answer was filed, the plaintiff, by way of a deed sold and assigned all his interest in the agreement and in the action to another; the latter then sold and assigned the same to the appellant. The application by the appellant to be added as a party to the action was refused by the District Court relying on a statement of the Roman Dutch Law to that effect contained in *Nathan's Common Law of South Africa*, Vol. II, page 735. On appeal, the respondents citing eminent Roman Dutch Law jurists contended that under the Roman Dutch Law a right of action cannot be assigned after *litis contestatio* (which, in Ceylon, according to Hutchinson C.J., means the settlement of issues in the action), and therefore there was no assignment to which section 404 could apply. Rejecting this contention, Hutchinson C.J. stated at pages 253-254:

> *On these authorities it does not seem to me quite clear that the Roman Dutch Law forbids such an assignment. But if it did, I think it cannot*

> *have been intended to make the transaction altogether illegal and void as between the parties to it, but that the rule was only a rule of procedure, and that section 404 over-rides it. That section gives the Court power to allow the assignee to be added as a party when the assignment was made at any time pending the action; and the Court ought to do so in a proper case when it appears convenient and possible without prejudice to the other party.*

This finding of the Supreme Court was affirmed by the Privy Council in *Pless Pol v. Lady De Soysa* (1911) 15 NLR 57.

There is no rationale for the proposition of law that in a vindicatory suit, the action must fail the moment the plaintiff transfers title pending action (except to say that it is a principle of the Roman Dutch Law as articulated by Voet) when section 404 of the Civil Procedure Code expressly enacts that in the case of assignment, creation or devolution of any interest in the subject matter of a pending action, the Court has the discretion to admit parties as plaintiffs or defendants after affording a hearing to all parties to the action. It is up to the Court to exercise that discretion judicially taking into consideration the facts and circumstances of each individual case. *Vide Daniel Silva v. Jayasekere* (1945) 46 NLR 316, *Paaris and Another v. Bridget Fernando* [1992] 1 Sri LR 36, *Perera v. Ramaiah* [1997] 1 Sri LR 225, *Cinemas Ltd v. Soundarajan* [1998] 2 Sri LR 16, *Seneviratne v. Fernando* [2001] 3 Sri LR 72.

I am not inclined to accept the argument of learned counsel for the defendant that section 404 deals with the procedural law, which has not changed the substantive law. Insofar as the instant matter is concerned, the procedural law and the substantive law cannot be separated; they are interwoven. What is the point in making the appellant the substituted plaintiff under section 404 to continue with the action, if the Court is to inform him at the end of a protracted trial that the action is dismissed

without going into the merits on the Roman Dutch Law principle enunciated by Voet quoted above? The express provision in section 404 of the Civil Procedure Code can appropriately be made use of in making applications for addition or substitution of parties in a vindicatory action as well, when assignment, creation or devolution of any interest in the subject matter is effected pending determination of the action. If the substitution/addition is allowed, the Court is entitled to look into the merits of the claim of the added or substituted party, as appropriate.

Cases must be decided on the merits, not on technicalities (unless the technicality goes to the root of the case). The law is not static but, rather, dynamic and should cater to the needs and challenges of contemporary society.

Issue No. 17 raised in the District Court shall be answered in the affirmative and issue No. 18 as "*Action can be maintained*." I answer the questions of law accepted by this Court in the affirmative.

The order of the District Court dated 09.01.2009 and the judgment of the High Court of Civil Appeal dated 17.06.2014 are set aside and appeal is allowed but without costs.

The trial will continue from the place it was abruptly stopped. In view of this decision, the parties are permitted to raise additional issues, if necessary. The substituted plaintiff *inter alia* shall prove due execution of the deed V3.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Kumuduni Wickremasinghe, J.

I agree.

Judge of the Supreme Court