

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

SC Appeal No. 107/2008
SC HC(CA) LA 127/08
WP/HCCA/Col/57/08 (LA)
DC/Mt.Lavinia No.687/02/RE

Ms Deepthi Fernando
No.176, Galle Road,
Colombo 6
Plaintiff

Vs

D. A. Mayadunne
No.166/20
Pangiriwatte Road,
Mirihana
Nugegoda
Defendant (Deceased)
And

Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6
Plaintiff - Petitioner

Vs

Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent

And Between

Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent – Petitioner

Vs

Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6
Plaintiff – Petitioner –
Respondent

And Now Between

Ms Deepthi Fernando No.
No.176, Galle Road,
Colombo 6

**Plaintiff – Petitioner –
Respondent – Petitioner
-Appellant
Vs
Thilak Padmakumara
Arambewela
No.323
Galle Road, Colombo 6
Respondent – Petitioner
– Respondent**

Before: Amaratunga J.
Imam J.
Suresh Chandra J.

Counsel:
Romesh De Silva PC with Rohan Sahabandu and Iraj De Silva for the Plaintiff –
Petitioner – Respondent – Petitioner -Appellant
V. Puvitharan with M.J.B Balachandran for the Respondent – Petitioner – Respondent

Argued on : 25.03.2011
Decided on : 27.03.2012

Suresh Chandra, J

This is an appeal against the judgment of the Civil Appellate High Court of Colombo regarding the dismissal of the Appellant's application to substitute the Respondent in a Rent and ejection case.

The Appellant filed an action in the District Court of Mount Lavinia against the Defendant (Mrs.Mayadunne) to eject her from premises bearing Assessment No.323, Galle Road, Colombo 06, for arrears of rent and for damages. The case went ex-parte against the said Defendant and after entering decree the Appellant took steps to have the decree executed. The Fiscal reported that the said defendant had died and thereupon the Appellant moved to have the respondent substituted in order to serve the exparte decree by making an application in terms of S.839 of the civil Procedure code, on the basis that the defendant had died without children and without leaving an administrable estate, that the defendant's husband had predeceased her, the Respondent was the next of kin of the defendant and was a son of the defendant's sister. The Respondent filed objections against the said application on the ground that he was not the legal representative of the deceased defendant, that he had not inherited the estate of the deceased defendant, that the right to sue did not survive and that he was not doing any business at the premises in suit.

The District Court allowed the application for substitution. The Respondent appealed against the said order of the District Court to the Civil Appellate High Court of Colombo, which appeal was allowed. This court granted leave to appeal against the said judgment on the following questions of law:

28(i) – Did the learned High court Judge err in law when he held that the applicable section was S.341 (1) and the plaintiff could not have moved under S.839?

(vi) Has the plaintiff a right to appoint the respondent as the substituted defendant for the purpose of serving the decree entered in the case?

(vii) Is the plaintiff in the circumstances pleaded, entitled to make the application under S.839 of the civil procedure code?

(viii) In the circumstances pleaded, is the judgment of the High Court according to law?

It would be necessary to examine the nature of the action filed by the Appellant initially and the sequence of events that occurred thereafter. The Appellant filed action in the District Court of Mount Lavinia against the defendant named in the plaint to eject her and those under her occupying the premises in suit on the basis that she had sub-let the premises and that she had failed to pay the rent from September 1999 to 31st October 2001, and for arrears of rent and damages. It was also averred in the plain that the premises in suit was coming under the purview of the Rent Act. The said defendant had filed answer denying the allegations in the plaint and prayed that the action of the Appellant be dismissed. When the case had been taken up for trial on 27.04.2004 the defendant had been absent and unrepresented and the case had been fixed for exparte trial and the exparte trial had been taken up on 30.04.2004 and the plaintiff had given evidence and ex parte judgment had been entered on 17.8.2005. When steps were taken to have the ex parte decree served, the Fiscal had reported that the defendant had died. Thereupon the plaintiff had filed papers to substitute the present Respondent in the room of the deceased defendant by making an application in terms of S.839 of the civil procedure code.

The Respondent had filed objections to the application of the Appellant and the matter had been fixed for inquiry at which the Appellant as well as the Respondent had given evidence. At the conclusion of the inquiry the learned District Judge had made order allowing the Respondent to be substituted whereupon he appealed to the Civil Appellate High Court. The Civil Appellate High Court set aside the order of the learned District Judge and the present appeal is against the said judgment.

One of the first questions that could be asked would be as regards the survival of the action. It is necessary to consider the nature of the action for this purpose. The present case was filed by the Appellant to eject the defendant from the premises where she had been a tenant and the prayer was to eject the defendant and to claim arrears of rent and damages. The Plaintiff also asserted that the Rent Act No7 of 1972 applied to the premises. It transpires from the facts made available to Court that the defendant had died intestate, and issueless and there was no evidence to show that she had left an administrable estate. The question that would arise then is as to whether the action which was basically a tenancy action would survive the death of the tenant specially when no claims had been made for the succession of the tenancy. In such a situation it would be prudent to state that since the tenancy action is based on a contract of tenancy that the death of the tenant would terminate the tenancy and therefore the action would not survive as in a contract of tenancy, death of either party would

terminate the contract. S.36 f the Rent Act provides for succession to tenancy in a situation where the tenant dies. The landlord or any person specified in the said section could take steps as set out therein to name a person to succeed to tenancy. In the present case no such steps have been taken by the landlord or by anyone on behalf of the deceased tenant. The landlord who is the Plaintiff on the other hand had taken steps to effect substitution of a nephew of the deceased tenant to proceed with the action. It is in that respect that the learned district judge had made an order to substitute the respondent in the room of the deceased tenant. As stated above since there was no claim to succeed to the tenancy in respect of the premises in suit the death of the tenant terminated the tenancy and therefore the action could not be proceeded with thereafter. The resultant position would be that the decree entered would be a nullity and of no effect in law. If the premises in suit had been occupied by some third party the Plaintiff should have had to advise herself regarding the obtaining of vacant possession of premises.

Although the Appellant and the Respondent have made submissions regarding matters relating to succession and which matters were considered by both the District Court and the High Court, a consideration of the survival of the action as discussed above would have concluded this matter.

In the generality of civil cases proceeded with under the provisions of the Civil Procedure Code where succession to a defendant who dies during the pendency of an action a consideration, of the provisions of s.341(1) of the Civil Procedure Code would be relevant. In that light as the Respondent is the defendant's sister's son, and hence a nephew of the defendant it certainly would make him a next of kin. If he made any claim to the estate of the defendant he may be entitled to such estate if there were no other claims from any other relative of the defendant. There is no evidence of such a claim having been made by the Respondent. If the Respondent had made such a claim and had acted in respect of the estate of the deceased he could be said to have adiated the inheritance or acted as an executor de son tort. But there is no such evidence. Therefore it is my view that the mere fact that the Respondent was the nephew of the defendant does not give the right to the plaintiff to substitute him in the room of the defendant and forced to inherit the obligations of the defendant.

In view of the above conclusions the questions on which leave to appeal was granted are answered as follows:

- (i) The Learned High Court Judge had not erred in deciding that S.341(1) of the Civil Procedure Code was the applicable section.
- (vi) The Plaintiff has no right to appoint the Respondent as a substituted defendant to serve the decree entered in the case which became a nullity due to the death of the defendant.
- (vii) The Plaintiff was not entitled to make an application under S.839 of the Civil Procedure Code.
- (viii) The judgment of the High Court is a valid judgment.

The appeal of the Appellant is dismissed with costs fixed at Rs. 21,000.

JUDGE OF THE SUPREME COURT

AMARATUNGA J.

I agree.

JUDGE OF THE SUPREME COURT

IMAM J.

I agree.

JUDGE OF THE SUPREME COURT