

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

SC (CHC) Appeal No. 09/2009
HC (Civil) Case No. 17/2008(CO)

In the matter of an application under and in terms of Section 224, 225, 214 and 521 of the Companies Act No. 7 of 2007.

1. Gunamuni Buddhima Sudantha de Silva of No. 2/6, Galpotta Road, Nawala.
2. Gunamuni Sujeewan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England

PETITIONS

Vs.

1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS

AND NOW BETWEEN

1. Gunamuni Buddhima Sudantha de Silva of No. 2/6, Galpotta Road, Nawala.
2. Gunamuni Sujeevan Chandranath de Silva of No. 105, Exeter Road, Raynards Lane, Harrow, England

PETITIONS-APPELLANTS

Vs

1. Macarthy Private Hospital Limited of No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS-RESPONDENTS

AND NOW

In the matter of an application for substitution of the deceased 1st Petitioner-Appellant

1. Gunamuni Praneetha Santhoshini de Silva of No. 2/6, Galpotta Road, Nawala.
2. Gunamuni Manthirini Sunanda Mendis of No. 2/5, Gregory's Road, Colombo 7.
3. Chandra Kumudini de Silva of No. 2/6, Galpotta Road, Nawala.

APPLICANTS-PETITIONERS

AND

Gunamuni Sujeevan Chandranath de Silva of
No. 105, Exeter Road, Raynards Lane,
Harrow, England

2nd PETITION-APPELLANT-PETITIONER

Vs.

1. Macarthy Private Hospital Limited of
No. 22, Wijerama Mawahta, Colombo 7.
2. Gunamuni Chandima Sudhamma de Silva of
No. 22, Wijerama Mawahta, Colombo 7.
3. Gunamuni Subadra Malini de Silva of
No. 22, Wijerama Mawahta, Colombo 7.
4. Gunamuni Thusitha Kanthi de Silva of
No. 22, Wijerama Mawahta, Colombo 7.
5. Gunamuni Udayi Yasoja de Silva of
No. 22, Wijerama Mawahta, Colombo 7.
6. Gunamuni Channa Janaka de Silva of
No. 22, Wijerama Mawahta, Colombo 7.
7. Gunamuni Prajapa de Silva of
No. 22, Wijerama Mawahta, Colombo 7.

RESPONDENTS-RESPONDENTS-
RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Sisira J. de Abrew J.
Anil Gooneratne J.

COUNSEL: Dr. Harsha Cabraal P.C with Revan Weerasinghe
Instructed by Nitti Murugesu for the Petitioner-Appellants

Manjuka Fernandopulle for the Respondents-Respondents-
Respondents
Instructed by Paul Rathnayake Associates

ARGUED ON: 13.11.2015

DECIDED ON: 28.01.2016

GOONERATNE J.

This is an appeal to the Supreme Court from the judgment of the High Court of Colombo in the matter of an application in terms of Sections 224, 225, 214 and 521 of the Companies Act No. 07 of 2007. Action in the High Court as per the said sections were filed mainly to prevent oppression of the minority share-holders and to prevent mismanagement of the 1st Respondent Company. (McCarthy Private Hospitals Limited). Judgment in the said case was entered on 06.11.2008 granting relief to the two Petitioners in the High Court (Petitioners-Appellants) in terms of sub paragraphs 'a', 'b', 'g' and 'i' of the prayer to the Petition filed in the High Court but learned High Court Judge refused to grant relief as per sub paragraphs (c), (d), (e) and (h) of the prayer to the petition. By this appeal Petitioner-Appellants seeks a judgment from the Supreme Court in their favour on the above prayer (c), (d), (e) & (h) which was refused by the High Court, and set aside that part of the final judgment of the High Court.

When this appeal was taken up before this court on 18.02.2014, court was informed that the 1st Petitioner-Appellant expired, (on 11.02.2011) and on that day learned counsel moved court to file necessary pleadings to substitute necessary parties and take steps accordingly, in the room of the deceased 1st Petitioner-Appellant. However on 01.07.2014 the necessary

substitution papers had been filed but an objection was taken on behalf of the Respondents for the proposed substitution, on the following grounds as recorded therein

1. An action filed in terms of Section 224 and 225 of the Companies Act is personal in nature and the cause of action would not survive upon the death of the original 1st Petitioner.
2. In terms of the articles of the relevant company marked X1(c), Article 2 confers a discretion on the Directors of the Company to allot or transfer any shares, and that the said discretion has not yet been exercised.
3. In any event the application has been made in regard to an estate which is subject to testamentary proceedings and probate has yet not been issued, leaving the question of who is entitled to succeed in doubt.

Court granted time for the Respondents to file objections. I had the advantage of perusing the written submissions of both parties. My attention is drawn to the provisions contained in the Civil Procedure Code, Companies Ordinance and the articles of Association of the 1st Respondent. In terms of Section 760A of the Civil Procedure Code the Supreme Court may determine in the opinion of the court the proper person to be substituted or entered on the record in the room of the deceased party.

Section 760A reads thus:

Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Supreme Court may in the manner provided in the rules made

by the Supreme Court under Article 136 of the Constitution determine, who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who had died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered on record as aforesaid.

When such a person is substituted under Section 760A, and as per Rule 38 of the Supreme Court Rules he or she becomes the legal representative, and therefore entitled to prosecute the appeal. As regards the case in hand, the person substituted would be entitled to all benefits as arising from the appeal and similarly has to accept all liabilities arising from the Judgement in appeal.

The Applicant-Petitioners have filed the required petition and affidavit and moved court to have themselves substituted. The 1st and 3rd Applicants-Petitioners are the daughter and wife of the deceased party respectively. The 1st Petitioner-Appellant is a joint executrix of the last will No. 542 and testament of the deceased party and Attorney for the 2nd Applicant-Petitioner (sister of deceased) by a special Power of Attorney No. 796 dated 02.04.2014. It is also pleaded that steps are being taken to file testamentary proceedings and seek probate upon the last will No. 542 (L2). By last will (L2) the 3rd Applicant-Petitioner is the beneficiary of shares owned by the deceased party, in the 1st Respondent Company. At the hearing before this court on 13.11.2005 this court was informed that the testamentary case had been filed.

I wish to observe that the above material placed before court is more than sufficient to effect a proper substitution.

It is trite law that on death of a person his estate comprising of both movable and immovable vests immediately on the heirs, unless the deceased has taken other steps to make disbursements by a last will or other valid instrument during his or her life time. This is by operation of law and the estate passes at once to the heirs and dominium vests in them 10 NLR 242. My attention has been drawn inter alia to the case of *Re Greene* (1949) Ch 333 which state that "on the death of a sole shareholder the shares vest in his personal representatives; Charlesworth's Company Law 18 Ed pg. 156. As such title to the share would pass to the executor and or legal representative of the deceased party. The term legal representative is defined in Section 529 of the Companies Act to mean "an executor or administrator". As such the objection raised by the Respondent party that the rights accrued to the 1st Petitioner-Appellant who is now deceased and the deceased right to shares ceases and does not survive his death and does not pass to the legal representative cannot be accepted as a valid objection and need to be rejected.

The position taken up by the Respondents and the objections raised in that regard could be met and answers could be provided to same by the provisions contained in the Companies Ordinance and Civil Procedure Code. In

terms of Section 232 of the Companies Ordinance an extended meaning to “shareholder” is contemplated. Section 232 reads thus:

A reference in sections 224 to 228 to a “shareholder”, shall also include a reference to-

- (a) a persons on whom shares have devolved through the death of a shareholder;
- (b) the executor or administrator of a deceased shareholder; or
- (c) a person who was a shareholder at any time within six months prior to the making of an application under section 224 or section 225

As stated above the rights of a ‘shareholder’ will not cease upon his death. The said extended meaning given to ‘shareholder’ in the above section would provide an answer to the other objection as well. i.e, no document or proof before court to demonstrate that Applicants-Petitioners are in fact ‘shareholders’ of the 1st Respondent Company or that its Board of Directors of the company have sanctioned the transfer of shares. To effect a proper substitution the above section does not require the Applicant-Petitioner to be registered shareholder of the company or that the board had sanctioned the transfer of shares. Therefore as submitted by learned President’s Counsel for Applicant-Petitioners, is that the only requirement for substitution under Section 232 of the Companies Act, is for the deceased party to name and appoint an Executor to the last will, which the deceased had done or the shares have devolved through the death of the shareholder on the beneficiary, as referred

to in last will No. 542 (L2), more particularly paragraph 6 of last will (L2). It states that the testator give device and bequeath all the rest and residue of any property estate and effects whether real or immovable or personal or movable etc.

The above position is further fortified by Section 472 of the Civil Procedure Code. It reads thus:

"In all actions concerning property vested in a trustee, executor, or administrator, when the contention is between the persons beneficially interested in such property and a third person, the trustee, executor, or administrator shall represent persons so interested; and it shall not ordinarily be necessary to make them parties to the action. But the court may, if it thinks fit, order them, or any of them, to be made such parties".

Share or shares as defined by the Oxford Dictionary of Law 6th Ed...' shares as immovable property', and as in the case of any form of property the right to represent the interests of those that would benefit from such property by operation of Section 472 would accrue to the executor. As such it includes the right of substitution in as much as the right to invite a fresh action on behalf of beneficiaries of estate.

All persons die testate or intestate. The property left by such deceased person may include cash, shares in companies or partnership. Land and building, clothing, jewellery furniture etc. or even intangibly rights eg. Right to claim a debt. A will is a document by which a person express his or her

intention and gives directions as to disposal of his or her property (on death) owned during life time. In the will the testator appoints a person or persons called an executor/executrix. Often two or more executors are appointed to act together who are joint executors. Duty of the executor is to administer the estate of the testator e.g collect assets, pay debts, and distribute property as directed by the testator in the last will. Executor is appointed by the testator by last will and not by court. Executor derives title from the will and not from grant of probate (Williams on Executors, 59-61 X111 th Edn. Vol I) executor is entitled to commence certain acts to a point. Probate is merely operative as the authenticated evidence of the executors, title (Williams on Executors 57 X111 the Edn. Vol 1) Executor can commence action before probate and continue as far as probate becomes necessary.

It is not incorrect to observe that it is in order and it will be sufficient if the executor obtains probate in time for that exigency (Williams on Executor 61, X111 th Edn. Vol. 1)

However the following supporting material and provisions in the Companies Act, also cannot be ignored, although a different view on same had been expressed by the Respondents.

Article 22 of the table 'A' in the first schedule to the Companies Act reads thus:

A person becoming entitled to a share by reason of the death, insolvency or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share..."

Article 20 (Table 'A' schedule 01) reads thus:

"The legal representative of a deceased sole holder of a share shall be the only person recognized by the company as having title to the share".

Section 80 of the Companies Act reads thus:

The production to a company of any document which by law is sufficient evidence of probate of a will or of letters of administration of the estate or confirmation as executor of a deceased person having been granted to some person, shall be accepted by the company notwithstanding anything in its articles, as sufficient evidence of the grant.

I have to emphasise that even the above provisions support the right to be substituted. I have referred earlier in this order, the interpretation to legal representative in Section 529 of the said Act. I am unable to make order refusing the application to substitute. I am satisfied that sufficient material had been placed by the party concerned to permit court to arrive at a conclusion that proper persons are to be substituted and their names should be entered on

the record in the room of the deceased party. It is by operation of law and a right in law that substitution need to be permitted in a case of this nature. I proceed to reject all objections of the Respondent party.

It is common knowledge that death of any person or party in a suit cannot be anticipated so easily except where a person is feeble and very old or subject to a terminal illness. Testamentary proceedings in a District Court can prolong even in the absence of objecting parties, as procedural steps contemplated by the code cannot be accelerated. The grant of probate is a matter for the District Court and appointing an executor in a last will is an act solely with the rights and powers of the testator of the last will. In a pending action or appeal, when a party dies the relevant court need to decide on applications made in that regard for substitution. Supreme Court, like the case in hand need to decide and determine in the opinion of court the proper person or persons to be substituted. This decision has to be taken in the best interest of justice, keeping in mind that a party need to prosecute its appeal to ensure the ends of justice and finality in litigation. In the context of the case in hand and in the circumstances there is no necessity to withhold or refuse an application for substitution, on the basis that probate has not been granted hitherto or await the granting of probate by the original court. Subject to the views

expressed by this court the Applicant-Petitioners are the next of kin, entitled as of right to step into shoes of the deceased party.

The application for substitution by the Applicants-Petitioners and the 2nd Petitioner-Applicant is allowed, with costs.

Application allowed with costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Sisira J. de Abrew

I agree

JUDGE OF THE SUPREME COURT