BALASUBRAMANIAM AND ANOTHER
v.
UPALI DE SILVA AND ANOTHER

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
BANDARANAYAKE, J.
S.C.APPEAL NO. 185/97
C.A. REVISION APPLICATION NO. 768/95
D.C. BATTICALOA CASE NO. 5740/M
28TH APRIL AND 14TH AND 28TH MAY, 1998

Landlord and tenant – Death of judgment creditor before decree is fully executed – Substitution of legal representative – Whether notice to judgment debtor is mandatory – S. 341(3) of the Civil Procedure Code.

The plaintiff filed action against his tenant, the original defendant for arrears of rent and ejectment from the premises in suit. The defendant died during the pendancy of the action. After substitution of the defendant's wife and children, the case was settled but the substituted defendants defaulted in the payment of arrears of rent in terms of the settlement. Consequently the District Judge issued writ. An appeal by the substituted defendants against the order issuing the writ was dismissed by the Court of Appeal. In the meantime the plaintiff had died, having gifted the house to one of her daughters, the 1st appellant. She along with her husband, the 2nd appellant applied to be substituted in the room of the deceased plaintiff. The District Court allowed the application and issued writ. A legal objection was raised by the 1st and 2nd respondents, another son-in-law and a daughter of the deceased plaintiff – husband and wife – that the substitution of the appellants without notice to the respondents was illegal.

Held:

The provision applicable to the substitution in the room of the deceased judgment creditor is section 341(3) of the Civil Procedure Code. Having regard to the wording of that section, the intrinsic nature of execution proceedings, the fact that the 2nd

respondent was not a party to the action and that she had no "apparent" or "recognizable" right to remain in possession of the premises in suit, it was not open to the 2nd respondent to raise the legal objection to the substitution; and the District Court was not required to give notice of the application to any respondent.

Case referred to:

1. *Thyagarajah v. Perera* (1983) 1 Sri LR 380 at 390 and 391.

APPEAL from the judgment of the Court of Appeal.

S. Mahenthiran with *Mrs. F. M. Markar* for the appellants.

Manohara de Silva for the respondents.

Cur. adv. vult.

August 31, 1998

G. P. S. DE SILVA, CJ.

The plaintiff instituted these proceedings on 1.3.73 against his tenant W. Jayasinghe *alias* Jayasuriya for arrears of rent and ejectment from the premises in suit. While the action was pending the defendant died and his wife and his three children were substituted in the room of the deceased defendant. The present 1st respondent to this appeal was appointed guardian *ad litem* of the minor children and was added as the substituted 5th defendant.

On 26.3.74 the case was settled. The substituted defendants, however, defaulted in the payment of arrears of rent in terms of the settlement and, after inquiry, writ was issued on 18.9.80. The substituted defendants preferred an appeal to the Court of Appeal against the order of the District Court issuing writ. The appeal, however, was dismissed by the Court of Appeal on 19.3.86. The record was received from the Court of Appeal in the District Court of Batticaloa on 25.4.86. The District Court directed the issue of notice on the plaintiff and 5th substituted defendant but not on the substituted 1st defendant (the widow). On 8.7.86 the District Court was informed that the plaintiff was dead. The plaintiff had in fact died in 1983. The court thereupon directed the parties "to take steps and move".

It was only on *28.7.94* that the present 1st and 2nd appellants moved to have themselves substituted in the room of the deceased

plaintiff. The District Judge has expressed the view that the delay was due to the fact that the court was not functioning for quite some time by reason of the "unsettled conditions". The 1st appellant is a daughter of the deceased plaintiff and the 2nd appellant is the son-in-law. In the meantime the 1st respondent to this appeal (substituted 5th defendant) got married to another daughter of the deceased plaintiff. This was in 1982. The daughter who married the 5th substituted defendant is the 2nd respondent to this appeal.

The District Court allowed the application made by the 1st and 2nd appellants to have themselves substituted in the room of the deceased plaintiff and also allowed the application for execution of writ. Against this order of the District Court the present respondents moved the Court of Appeal by way of revision to have the orders allowing the substitution of the appellants in the room of the deceased plaintiff and the order issuing writ set aside. The Court of Appeal allowed the application in revision and set aside the order substituting the appellants in place of the original plaintiff and all orders made thereafter including the order issuing writ. The present appeal is against the judgment of the Court of Appeal.

The principal ground on which the Court of Appeal allowed the application in revision was the failure to issue notice of the application made by the present appellants for substitution in the room of the deceased plaintiff on the 1st and 2nd respondents. Mr. Manohara de Silva appearing on behalf of the respondents contended before us that the section in terms of which the District Court could have allowed the appellants' application for substitution is section 341(3) of the Civil Procedure Code and that the issue of notice of the application on the 1st and 2nd respondents was a mandatory requirement. On the other hand, Mr. Mahenthiran for the appellants urged that the substitution was in terms of section 339 (1) of the Civil Procedure Code.

Before I proceed to consider these submissions it is relevant to state that the case for the appellants was that the deceased plaintiff by deed No. 874 dated 10.5.76 gifted the premises in suit by way of dowry to his daughter, the 1st appellant. Although the 1st respondent (the 5th substituted defendant) in his statement of objections filed in the District Court pleaded that the deceased plaintiff had "cancelled the purported deed of dowry" yet no evidence whatsoever was produced to establish the alleged revocation of the deed of gift. In fact

the deed of gift relied on by the 1st appellant is a document filed of record (Folio 199). For the purpose of these proceedings, I hold that the deceased plaintiff had gifted the premises in suit to the 1st appellant by the said deed No. 874 of 10.5.76.

On the basis of the gift of the premises in suit to the 1st appellant, Mr. Mahenthiran argued that the 1st appellant was the "transferee" of the decree within the meaning of section 339 (1) of the Civil Procedure Code and was accordingly entitled to move for "substitution" and for execution of the decree. With this submission, I do not agree. By reason of the gift there was no "transfer" of the decree by "assignment in writing or by operation of law" within the meaning of section 339 (1) of the Civil Procedure Code. I accordingly hold that section 339 (1) of the Civil Procedure Code has no relevance to these proceedings.

It seems to me that the relevant provision in so far as these proceedings are concerned is section 341 (3) of the Civil Procedure Code, as rightly submitted by Mr. Manohara de Silva. Mr. de Silva, however, strongly urged before us that the substitution purported to have been made in terms of section 341 (3) was bad in law inasmuch as it was made **without notice to the 1st and 2nd respondents.** Mr. de Silva further contended that the 2nd respondent being a daughter of the deceased plaintiff was an "heir" and if she had notice of the application made by the appellants she would have been in a position to challenge the validity of the gift of the premises in suit to the 1st appellant. In short the principal contention of Mr. de Silva was that in the absence of notice to the 1st and 2nd respondents, the substitution of the 1st and 2nd appellants in the room of the deceased plaintiff was made without jurisdiction, and the order for issue of writ was also tainted with the same illegality. This, in substance, was the view taken by the Court of Appeal. It therefore seems to me that the true question that arises for consideration before us is whether the provisions of section 341 (3) of the Civil Procedure Code required the District Court to issue notice on the 1st and 2nd respondents. The finding of the Court of Appeal was that no notice was issued on the respondents. I think that finding of fact must remain undisturbed, though Mr. Mahenthiran submitted that notice was served on the 1st respondent.

Section 341 (3) of the Civil Procedure Code reads thus:- "If the judgment creditor dies before the decree has been fully executed, the legal representative may apply to the court to have his name entered on the record in place of the deceased and the court shall thereupon enter his name on the record."

The matter upon which the court has to be satisfied is as to whether the person making the application is the "legal representative" of the deceased plaintiff. If the court is so satisfied "the court *shall* thereupon enter his name on the record". Having regard to the wording of the section it seems to me that the court is not required to give notice of the application to any "respondent". I am fortified in taking this view by reason of the significant difference in the language used in section 341 (1). Section 341 (1) applies to a case where the judgment debtor dies before the decree had been fully executed. Section 341 (1) reads thus:- "If the judgment debtor dies before the decree has been fully executed, the holder of the decree may apply to the court which passed it, *by petition, to which the legal representative of the deceased shall be made respondent,* to execute the same against the legal representative of the deceased". In my opinion the absence of the words underlined above in section 341 (3) is of the utmost significance. Section 341 (3) does not contemplate an application by petition to which a party "shall be made respondent".

The next question is whether the 1st appellant (that is, the daughter of the deceased plaintiff to whom the premises had been gifted) was the "legal representative" within the meaning of section 341 (3). Now section 338 (3) (**b**) of the Civil Procedure Code defines the expression "legal representative" to mean "an executor or administrator **or** in the case of an estate below the value of five hundred thousand rupees, *the next of kin who have adiated the inheritance*: Provided however, that in the event of any dispute arising as to who is the legal representative the provisions of section 397 shall, *mutatis mutandis,* apply".

Having regard to the fact that the premises were gifted by the deceased plaintiff to the 1st appellant, it seems to me she is one who has "adiated the inheritance" and is therefore the "legal representative" within the meaning of the definition.

Mr. Manohara de Silva contended that the 2nd respondent (the daughter of the deceased who married the 1st respondent) disputed the validity of the gift and relied on a last will executed prior to the gift. Counsel argued that in view of the dispute in regard to title, there arose a "dispute" as to who the legal representative of the deceased plaintiff was and that the court should have tried this question as a "preliminary issue" before making an order for "substitution".

With this submission, I am afraid, I cannot agree. In the first place, the 2nd respondent was at no time a party to the action. Whatever rights she claims she has cannot be agitated in these execution proceedings. Secondly, she has no "apparent" or "recognizable right" to remain in possession of the premises in suit. Moreover, as observed by Soza, J. in *Tyagarajah v. Perera and others* (1983) 1 Sri LR 380 at 391: "At the outset it is well to remember that in execution proceedings the statutory procedures are so designed as to assist the judgment creditor to recover the fruits of his judgment and not to afford facilities to the judgment debtor to defeat or delay the execution of the decree of court". Again, at page 390 of the same judgment Soza, J. states: "The substitution of the legal representative is merely a step in aid of execution". Having regard to the intrinsic nature of execution proceedings and the fact that the 2nd respondent was not a party to the action. I hold that it was not open to the 2nd respondent to raise a "preliminary issue" as contended for by Mr. Manohara de Silva.

For these reasons, the appeal is allowed, the judgment of the Court of Appeal is set aside, and the order of the District Court dated 31.10.95 allowing the issue of writ is affirmed. In all the circumstances, I make no order for costs.

PERERA, J. – I agree.

BANDARANAYAKE, J. – I agree.

Appeal allowed.