

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

SC(CHC) Appeal No 21/2009
HC(Civil) No 28/2008
SC(CHC) Appeal No 22/2009
HC(Civil) No 30/2008
SC(CHC) Appeal No 23/2009
HC(Civil) No 28/2008

1. R.K. Obeyesekere
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
284, Nawala Road
Nawala

2. Zaki Alif
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
No 6, 27th Lane,
Inner Flower Road
Colombo3

3. Dr. V.P. Vittachchi
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
No 30/3 Colonel T.G. Jayawardene Mawatha
Colombo 3

Petitioners

Vs

1. Milford Exports (Ceylon) Ltd.
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14

2. D.H.S. Jayawardene
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
82, Main Street Ja Ela
3. Mrs. Sonia Weinman
117, Alfred Place
Colombo 3.
4. Secretaries and Registrar Limited
1st floor
No 32A, Sir Mohamed Macan Markar
Mawatha
Colombo3

Respondent

And NOW

D.H.S. Jayawardene
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of 82, Main Street Ja Ela

2nd Respondent-Petitioner

Vs

1. R.K. Obeyesekere
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
284, Nawala Road
Nawala

2. Zaki Alif
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
No 6, 27th Lane,
Inner Flower Road
Colombo3
3. Dr. V.P. Vittachchi
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
And also of
No 30/3 Colonel T.G. Jayawardene Mawatha
Colombo 3
(Now Deceased)

Petitioner-Respondents

1. Milford Exports (Ceylon) Ltd.
No 833, Sirimavo Bandaranaike Mawatha
Colombo 14
2. Mrs. Sonia Weinman
117, Alfred Place
Colombo 3.
3. Secretaries and Registrar Limited
1st floor
No 32A, Sir Mohamed Macan Markar
Mawatha
Colombo3

Respondent-Respondents

Before : J.A.N. de Silva CJ.
G. Amaratunga J.
S. Marsoof J.

Counsel : S.A. Parthalingam PC with Rajindra Jayasinghe and Ranil Angunawela for the 3rd Respondent-Appellant
Romesh de Silva PC with Aritha Wickramanayake, Chanaka de Silva, Aruna Samarajeewa, Sugath Caldera, Shanaka Cooray and Eraj de Silva instructed by G.G. Arulpragasam for the 1st and 2nd Petitioners-Respondents
D.S. Wijesinghe PC with K. Molligoda for the 2nd respondent – Petitioner in SC (CHC) Appeal 23/2009
Nihal Fernando PC with Ranjan Jayasinghe for the 3rd respondent – Petitioner in SC (CHC) Appeal 23/2009
Shanaka Amarasinghe instructed by Julius and Creasy for the 4th Respondent-Respondent
M.A.Sumanthiran for the 1st Respondent Company

Argued on : 31-08-2010

Decided on : 21-03-2011

J.A.N. de Silva CJ.

This is an appeal from an order of the Commercial High Court of Colombo. The 2nd Respondent- Appellant (hereinafter referred to as the Appellant) seeks to set aside the order of the learned High Court Judge dated 11th May 2009. This order was challenged in all three cases, this court decided to amalgamate all three cases together to deliver judgment.

The facts of this case in so far as they are relevant to this application are as follows.

The 1st, 2nd and 3rd Petitioner-Respondents instituted two actions before the Commercial High Court on the same day in terms of section 226 of the Companies Act no 7 of 2007. Perusal of the trial record indicates that court was informed of the death of the 3rd petitioner-Respondent on the 15th of October 2008, which was the date fixed for the filing of objections by the Appellant and the Respondent-Respondents.

It is at this point that controversy arose as to the direction with which the action should proceed thenceforth. The learned Counsel appearing for the 1st, 2nd and 3rd Petitioner-Respondents submitted that the case could proceed without any

substitution in place of the 3rd Petitioner-Respondent, and therefore did not seek to substitute any person. The learned Counsel appearing for the Appellant and the Respondent-Respondents submitted that an application for substitution was mandatory and that the action could not proceed any further without such an application having being made.

Parties made extensive oral submissions and also tendered written submissions on the said question. By order dated 11th May 2009 the learned High Court judge held with the Petitioner-Respondents and permitted the Petitioner-Respondents to proceed with the action. This appeal was preferred against the said order.

The Appellant contends that section 393 of the Civil Procedure Code applies to the aforesaid circumstances. The Petitioner-Respondents contend that the procedure to be followed in respect of disputes arising under the Companies Act 7 of 2007 is *sui generis* and therefore submit that the Civil Procedure Code has limited application to the circumstances of this case.

The Petitioner-Respondents advanced several arguments in this connection which deserve full and careful consideration.

The learned President's counsel for the Petitioner-Respondents drew our attention to section 520 of the Companies Act 7 of 2007. The said section reproduced in its entirety is as follows.

(1)Every application or reference to court under the provisions of this Act shall, unless otherwise expressly provided or unless the court otherwise directs, be by way of petition and affidavit, and every person against whom such application or reference is made, shall be named a respondent in the petition and be entitled to be given notice of the same and to object to such application or reference.

(2)Every application or reference made to the court in the course of any proceeding under this Act or incidental thereto, shall be made by motion in writing.

(3)The Registrar shall be entitled to be heard or represented in any application or reference made to the court under this Act at any stage of such application or reference.

(4)In all proceedings before court by way of application or reference under this Act, no order for costs shall be made against the Registrar.

The learned President's counsel for the Petitioner-Respondents also drew our attention to section 6 and 7 of the civil procedure code. Section 6 defines as to what constitutes an action. It reads,

Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action.

Section 7 states that

The procedure of an action may be either "regular" or "summary".

It was then submitted that the procedure found in section 520 of the Companies Act 7 of 2007 did not fall into either category and therefore the procedure laid down in the Civil Procedure Code should not apply in respect of disputes arising out of the Companies Act.

Section 8 which was inserted into the Civil Procedure Code as an amendment in 1980 states that unless specifically provided, proceedings should be by way of "regular" procedure.

The Civil Procedure Code itself, despite the wording in section 7 paves the way for another type of proceedings i.e. found in chapter VIII to be followed in respect of liquid claims. The procedure set out therein is distinctly different to the "regular" procedure as well as the "summary" procedure already referred to.

Therefore I think it would be unwise to contend that a procedure found in a statute alien to the forms found in the Civil Procedure Code would not attract the provisions relating to the regular procedure of the civil procedure code.

The legislature may have in its wisdom adopted various procedures to be followed in relation to the diverse actions which it deems appropriate.

Yet unless the operation and the application of the Civil Procedure Code is expressly prevented, I am of the opinion that the regular procedure of the civil procedure must be applied in terms of section 8.

Section 8 states,

Save and except actions in which it is by this Ordinance or any other law specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure, as hereinafter prescribed.

In other words section 8 of the Civil Procedure Code should be understood as providing for the application of regular procedure where,

- a) The Civil Procedure Code does not provide for summary procedure
- b) Any other law does not provide for summary procedure
- c) Where a law does not provide for any other procedure

I am therefore convinced that the proceedings under scrutiny was found to be an action in which, in addition to the application of the general procedure found in the companies Act, the regular procedure found in the Civil Procedure Code must fill any procedural lacuna.

The learned counsel for the Respondent-Respondent submitted that in any event section 393 applied only to regular procedure adverting to the words found in the section, which are “plaintiff” and “defendant”.

I find this submission by the learned president’s counsel untenable. Section 375 of the Civil Procedure Code is clear, in that an application by way of summary procedure can be made in the course of an ongoing action whether such action be conducted by way of summary or regular procedure.

Chapter LV of the Civil Procedure Code refers to incidental proceedings. The chapter deals with circumstances ranging from the death of a party, the assignment of interest of a party, marriage and bankruptcy. These are circumstances that affect any action irrespective of the procedure followed. Whilst I concede that the words “plaintiff” and “defendant” are suggestive, I do not think that the wording itself should be considered as a compelling reason sufficient to deprive the effect of the statutory provision in respect of actions conducted under “non-regular” procedure.

The learned President’s Counsel then attempted to advance the argument that the proceedings in question did not fall within the definition of an action, thereby attempting to take away the specific application of section 393 as well as the pervasive application of the Civil Procedure Code referred to previously.

The learned President's Counsel noted that the term "cause of action" is one which is foreign to the companies Act, and that its inclusion in section 393 prevents the application of the said section in this instance.

The learned President's Counsel defined the term "cause of action" broadly as a wrong which may result in an action without referring to the definition given to the same in section 5 of the Civil Procedure Code. Thereafter he sought to limit the ambit of that definition with the use of section 7. It was his submission that since the procedure set out in the companies Act did not fall into either regular or summary procedure, that this "application" would not constitute an action.

I find little merit in this submission. Section 5 defines a cause of actions as

"cause of action" is the wrong for the prevention or redress of which an action may be brought, and includes the denial of a right, the refusal to fulfill an obligation, the neglect to perform a duty and the infliction of an affirmative injury"

The same section defines an action as

"action" is a proceeding for the prevention or redress of a wrong

Section 6 of the Civil Procedure Code states as to what constitutes an action

Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action

Therefore simply put a cause of action is a wrong, for which a relief or redress is obtainable through the exercise of the courts power or authority. The words used in section 5 are inclusive so as to capture varied circumstances in to the fold of a cause of action.

I am firmly of the view that the broad and inclusive definition given to the term cause of action in section 5 as well as in innumerable cases should not be limited as suggested by the learned President's Counsel. The wording in section 7 cannot restrict section 6 and the meaning attached to the term cause of action. Clearly, the tail cannot be seen to wag the dog.

Therefore in conclusion, I am of the opinion that the circumstances of this case attract the provisions of the Civil Procedure Code, and specifically section 393.

I now turn to the application of section 393 of the Civil Procedure Code to the circumstances of this case.

Section 393 in its entirety is as follows.

If there be more plaintiffs or defendants than one and any of them dies, and if the right to sue on the cause of action survives to the surviving plaintiff or plaintiffs alone, or against the surviving defendant or defendants alone, the court shall, on application in the way of summary procedure, make an order to the effect that the action do proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants

It appears that section 393 introduces two requirements to be fulfilled before court can issue an order for the action to proceed. Namely,

- a) the right to sue on the cause of action must survive to the surviving plaintiff or plaintiffs alone
- b) an application must be made by way of summary procedure

The Appellant contends that in the instant case neither of the requirements have been fulfilled. The learned President's Counsel for the Appellant drew our attention to section 373 which requires every application by summary procedure to be made upon a duly stamped petition.

It is common ground that no such written application was made. The language of section 373 makes it clear that the requirement is one which is imperative.

I shall first consider as to whether the right to sue on the cause of action survives to the plaintiffs.

The learned President's Counsel for the Appellant took great pains to demonstrate that section 393 had no application to the instant case and that the right to sue survived the death of the 3rd Respondent, to his heirs and therefore the Respondents should have substituted such heirs in place of the 3rd Respondent.

The Action of the 1st to 3rd Respondents have been instituted in terms of section 224 read with section 226 of the Companies Act No 7 of 2007. The petition filed by the

respondents before the Commercial High Court states that they are jointly entitled to make the said application. The Appellants refer to certain other paragraphs which also lend credence to the assertion that the application was joint in nature.

The Appellant also draws our attention to the reliefs sought, specifically to prayers (D) and (E) which seek an order seeking the purchase of the collective shares of the petitioners etc.

I am inclined, in considering the said observations made by the learned President's Counsel for the Appellant, to agree with him that the Respondents instituted this action as a joint action.

The learned President's Counsel for the Appellant also sought to demonstrate that the action found in section 224 of the Companies Act No 7 of 2007 is inherently joint in nature and that it was not a personal action in nature.

Section 224 is as follows.

Subject to the provisions of section 226, any shareholder or shareholders of a company who has a complaint against the company that the affairs of such company are being conducted in a manner oppressive to any shareholder or shareholders (including the shareholder or shareholders with such complaint) may make an application to court, for an order under the provisions of this section

The language of the section clearly suggests that the right to institute this action is attached to the shareholding. Where a shareholder is of the view that the affairs of the company are conducted in a manner oppressive to him or other shareholders, he may make a complaint.

When such a single complainant dies, a question arises as to whether the right to sue survives and devolves on his/her heirs. Clearly the shares will devolve on the heirs. Any prospective rights attached to the shares must devolve on the heirs as well.

In such circumstances I am of the opinion that the right to sue does not survive to the heirs on the basis that the action requires a shareholder to form an opinion that the affairs are conducted in a manner oppressive to shareholders. With the demise of the

complainant, his complaint loses sanctity. Clearly it is available to the heir or any other shareholder to make a fresh complaint. But as far as the original complaint is concerned, it ceases to be of effect with the death of the complainant.

What then is the application of the above principle to a joint complaint? Does it necessarily follow that the surviving complainants may continue with their action so long as they continue to hold the threshold shareholding requirement?

The learned President's Counsel for the Appellant submitted that section 393 has no application in the instant case on the basis that the cause of action does not survive to the 1st and 2nd Respondents alone.

The word "alone" in section 393 has been judicially interpreted in the case of

Duhilanomal and Others v. Mahakanda Housing Co. Ltd. 1982 (2) SLR 504 at 509

"Alone", in the context of section 393 of the Civil Procedure Code, means in my view that the survivors are liable to be sued independently without any others being joined; "alone" does not mean "none else other than the survivor".

A similar view has been taken in India in **Gajanand vs Sardarmal** AIR 1961 Raj 223, where the Indian Civil Procedure rules have the identical provisions to our section 393. It was held in that case that,

"The test whether a right to sue survives in the surviving plaintiffs or against the surviving defendants is whether the surviving plaintiffs can alone sue or the surviving defendants could alone be sued in the absence of the deceased plaintiff or defendant respectively."

On the strength of the aforesaid authorities prima facie it appears that the surviving complainants could continue the action if each of them satisfy the shareholding threshold.

But the learned President's Counsel for the Appellant contends further that in any event it is section 394 that the instant circumstances attract and not section 393.

Section 394 is as follows.

If there are more plaintiffs than one, and any of them dies, and if the right to sue does not survive to the surviving plaintiff or plaintiffs alone, but survives to him or them and the legal representative of the deceased plaintiff jointly, the court may cause the legal representative, if any, of the deceased plaintiff to be made a party, and shall thereupon cause an entry to that effect to be made on the record and proceed with the action

If the right to sue survives to the heirs as submitted by the Appellant, this application would hinge on a single issue. I.e. whether the right to sue survives to the remaining complainants and the legal representatives of the deceased complainant ***jointly***?

The word “jointly” needs careful interpretation. Clearly it is used in section 394 in a sense directly opposite to the word “alone” found earlier in the same section and in section 393.

It is also relevant to note that section 393 precedes section 394, and that the circumstances envisaged in the said sections are necessarily mutually exclusive. This assertion is given added credence by the use of the words “does not” found in section 394.

Therefore I am of the view that section 394 attracts circumstances where the right to sue survives to the heirs, and where the surviving plaintiffs fail the test

laid down in ***Gajanand vs Sardarmal***, making future prosecution to be made jointly a necessity.

For reasons already stated, in the instant case, I am not of the view that a joint prosecution of the case by the remaining complainants and the heirs is necessary.

Therefore I hold that the facts of the case attract section 393 of the Civil Procedure Code and that a cause of action survived to the plaintiffs “alone”. But the plaintiffs failed to satisfy the second requirement of making an application by way of summary procedure and therefore the plaintiffs are prevented fatally from proceeding any further.

In the circumstances, we direct the learned High Court Judge of the Commercial High Court to terminate the proceedings in these two cases pending before him with an order for appropriate costs.

Chief Justice

G. Amaratunga J.

I agree.

Judge of the Supreme Court

S. Marsoof J.

I agree.

Judge of the Supreme Court