1947 *Present :* **Soertsz S.P.J. and Jayetileke J.**

CHITTAMBARAM CHETTIAR, Appellant, *and* **FERNANDO** *et. al*, Respondents.

S. C. 237—D. C. Colombo, 6,225.

Civil Procedure Code, ss. 402, 404—Abatement of action—Action by administrator—Letters recalled—Fresh appointment of administrator—No steps taken—Right of previous administrator to continue action.

One P, the administrator of the estate of a Chettiar, filed this action for the recovery of a sum of money due on a Note. After the action was fixed for trial letters of administration issued to P were recalled and fresh letters issued to S. This case was taken off the trial roll for substitution of the new administrator. P took no further interest in the action and S took no steps to get himself substituted. The judge made order abating the action. Thereafter the appellant, one of the heirs of the deceased Chettiar, moved in the testamentary case to have letters issued to S recalled and to have himself appointed administrator, and his application was allowed. He then moved to have the order of abatement set aside. His application was disallowed on the ground of delay.

Held, that when a new grant was made to S there was a devolution of interest within the meaning of section 404 of the Civil Procedure Code and S was entitled to ask for leave to continue the action but, since he did not so ask, P was entitled to continue the action.

Held, also, that P was under no legal duty to get S substituted as Plaintiff in his place and that this step which he undertook was not one necessary for him to take in order to prosecute the action as required by section 402 of the Civil Procedure Code.

Held, further, that since P failed to take this step it was the duty of the Court to have fixed the case for trial.

APPEAL from a judgment of the District Judge, Colombo.

H. V. Perera, K.C., with *P. Navaratnarajah*, for plaintiff, appellant.

N. E. Weerasooria, K.C., with *Kingsley Herat*, for the 1st defendant, respondent.

E. S. Amerasinghe, for the 2nd defendant, respondent.

Cur. adv. vult.

December 1, 1947. JAYETILEKE J.—

This is an appeal against an order made by the District Judge of Colombo refusing to set aside an order of abatement entered by him *ex mero motu* on July 13, 1940.

One Parathasarthy, the administrator of the estate of S. K. R. S. S. T. Sinthamarni Chettiar, instituted this action against the defendants, on November 30, 1936, for the recovery of a sum of Rs. 272,062·50 alleged to be due to the estate of the deceased, on a writing " A " given by them to the deceased, undertaking to pay all sums advanced by the deceased to one W. D. Fernando, the 1st defendant's husband, if the latter failed to pay the same. He alleged fruther that W. D. Fernando was adjudged an insolvent in action No. 4,474 of the District Court of Colombo, and was granted a certificate, and that no dividend was paid in that action to the creditors as there were no assets.

The 1st and 3rd defendants filed one answer alleging that they authorised the deceased to advance money to the Ceylon Auto Carriers Co., and not to W. D. Fernando personally, and denying their liability to pay the amount claimed on the ground that the loan does not purport to be a loan to the Ceylon Auto Carriers Co. They further pleaded certain legal defences to the action.

The 2nd defendant filed a separate answer pleading, in addition to the defences set forth in the answer of the 1st and 3rd defendants, that W. D. Fernando transferred to the deceased an estate called Gamikande in full settlement of all the claims the deceased had against him.

The action was fixed for trial on December 9, 1937, but was postponed for March 9, 1938, owing to the illness of the plaintiff.

The medical certificate, which was produced in support of the application for a postponement, shows that the plaintiff was paralysed on the right side, and was unable to speak. The journal entries do not show what took place on March 9, 1938. The next journal entry is dated June 7, 1938. It reads :—

" Mr. Muttusamy, for plaintiff.
Mr. de Silva, for the defendant.
Mr. Mack, for the 1st and 3rd defendants.

Mr. Muttusamy applies for a postponement on the goround that the plaintiff is paralysed and unable to come for the case. He states that he is taking steps to get another administrator appointed and therefore moves for a postponement. Mr. de Silva has no objection. The 1st and 3rd defendants also have no objection of consent, the plaintiff will not be entitled to the costs, of today in any event. Remove case from trial roll and call on August 5, to substitute the new administrator."

Action No. 7,389 (Testamentary) of the District Court was the action in which the estate of the decaesed was administered. The journal entries 1 D 1 show that on July 8, 1938, Mr. Muttusamy took steps to have the letters of administration issued to Parathasarthy recalled, and fresh letters of administration issued to one Arunasalam Servai under section 537 of the Civil Procedure Code (Cap. 86). On March 17, 1939, the Court allowed the application, and letters of administration were issued to Arunasalam Servai. The subsequent journal entries show that, beyond filing an account, Arunasalam Servai took no steps to administer the estate, though he was repeatedly noticed by the Court to do so, and, eventually, on May 15, 1941, the Court was obliged to forfeit his bond and issue writ for the recovery of the money due on it. The writ was returned unexecuted to Court on the ground that he was in India and that he had no property in Ceylon.

On August 5, 1938, this case was called on the roll, and the District Judge made the following minute :—

" Steps for substitution not taken for 9/9."

On September 9, 1938, the case was called again, and the District Judge made the following minute :—

" Steps not taken—no order."

On July 13, 1940, the District Judge enterd an order of abatement *ex mero motu* under section 402 of the Civil Procedure Code on the ground

that a period exceeding twelve months had elapsed since the date of the last order made in the case without the plaintiff taking steps to prosecute the action.

On November 20, 1944, the present appellant, who is the attorney of the heirs of the deceased, one of whom is a minor, filed a petition and affidavit in action No. 7,389, and moved to have the letters of administration issued to Arunasalam Servai recalled and fresh letters of administration issued to him.

On February 27, 1945, his application was allowed and letters of administration were issued to him. A month later, he filed a petition and affidavit in this action, and moved to have himself substituted as plaintiff, and to have the order of abatement set aside. He stated in the papers filed by him that none of the heirs of the deceased ever came to Ceylon, and that Arunasalam Servai was in Malaya and Burma till 1942 suffering from an incurable disease.

The learned District Judge disallowed the application on the ground that it was not made within a reasonable time, and that the long delay had deprived the defendants of material evidence.

Two points were urged in support of the appeal :—(1) that, at the time the order of abatement was entered, Parathasarthy had lost his status as administrator, and that the District Judge had no power to enter and order of abatement under section 402 before the person to whom the new grant of administration was made was substituted as plaintiff, (2) that, even if Parathasarthy was entitled to continue the action after the letters of administration issued to him were recalled, the District Judge had no power to enter an order of abatement as there was no failure on Parathasarthy's part to take any step which he was required by law to take to prosecute the action.

I do not think that the first point is a good one. Chapter XXV of the Civil Procedure Code contains various provisions for the continuation of actions after alteration of a party's status. Sections 393, 394, 398, 399 and 400 deal with devolutions of interest by death, marriage, and bankruptcy. Section 404 is a residuary section govering cases which are not provided for in those sections. The words " other cases " in section 404 mean cases other than those specially provided for in the preceding sections. Section 404 provides that the person acquiring the interest may continue the action with the leave of Court. It does not provide that, if he does not obtain the leave of Court to continue the action, the action should stand dismissed. Under the corresponding section of the Indian Act (Order 22, Rule 10) it has been held in *Rai Charan Mandal v. Biswanath Mandal* [1] that in the event of devolution of interest *pendente lite*, the successor in interst of the plaintiff may if he chooses, come on the record with the leave of the Court under Order 22, Rule 10, but if he does not, the plaintiff is entitled to continue the suit, and his successor will be bound by the result of the litigation the following passage appears in the judgment :—

" Under R. 10, O. 22, Civil Procedure Code, 1908, where there has been a devolution of interest during the pendency of a suit, the suit

[1] *(1915) A. I. R. Calcutta 103.*

may, by leave of the Court, be continued by or against persons to or upon whom such interest has come or devolved. This entitled the person who has acquired an interest in the subject-matter of the litigation by an assignment or creation or devolution of interest *pendente lite* to apply to the Court for leave to continue the suit. But it does not follow that it is obligatory upon him to do so. If he does not ask for leave, he takes the obvious risk that the suit may not be properly conducted by the plaintiff on record, and yet, as pointed out by their Lordships of the Judicial Committee in *Motilal v. Karab-ud-din*[2] (*A. I. R.—1898—25 Cal. 179*) he will be bound by the result of the litigation, even though he is not represented at the hearing. But the legislature has not further provided that in the event of devolution of interest during the pendency of suit, if the person who has acquired title does not obtain leave of the Court to carry on the suit, the suit should stand dismissed ".

In the present case, the letters that were issued to Parathasarthy were recalled after he instituted the action, and a new grant of letters was made to Arunasalam Servai. When the new grant was made, a devolution of interest took place within the meaning of section 404. It has been held in *Ajaz Hossain Jaffri v. Altaf Hussein* [1] that, when a trustee is removed from office and another is appointed in his place, the estate devolves on the new trustees within the meaning of Order 22, Rule 10.

Under section 404 Arunasalam Servai was entited to ask the Court for leave to continue the action, but he did not do so. Parathasarthy was, therefore, entitled to continue the action.

With regard to the second point, the journal entries show that, after filing the plaint, Parathasarthy took out summonses on the defendant and brought them before the Court. There was no other step which he had to take under the Civil Procedure Code. After the defendants filed their answers the Court fixed the case for trial, and, on the trial date, the Court, as an indulgence, gave Parathasarthy time to surrender his lettrs of administration and get someone else appointed to take his place as administrator. Arunasalam Servai as appointed administrator in place of Parathasarthy, but he failed to get himself substituted as plaintiff in this case. There is no provision in the Civil Procedure Code that a person, who files an action in a representative capacity, is bound to take steps to have someone else substituted in his place if he is unable to prosecute the action owing to illness or for any other cause. The step which Parathasarthy undertook to take on June 7, 1938, was not a step that it was " necessary for him to take in order to prosecute the action as reguired by section 402 of the Civil Procedure code,

In *Lorensz Appuhamy v. Paaris* [2], it was held that the word "necessary " means " rendered necessary by some positive requirement of the law ". In the course of his judgment, Wood Renton J. said :—

> " We ought not to interpret it as if the section ran ' without taking any steps to prosecute the action which a prudent man ought to take under the circumstances ' ."

[1] *(1928) A. I. R. Calcutta 651.*

[2] *1908) 11 N. L. R. 202.*

This judgment was followed in *Kuda Banda v. Hendrick* [1], *Seyado Ibrahim v. Naina Marikar* [2], and *Associated Newspapers of Ceylon v. Kadirgamar* [3], Parathasarthy could have proceeded with the action in spite of his illness, and when he failed to get someone substituted in his place, it was the duty of the Court to have fixed the case for trial. Under section 80 of the Civil Procedure Code the duty of fixing the date of trial rests on the Court (See *Fernando v. Kurera* [4], *Ponnambalam v. Canagasabey* [4]).

In *Kuda Banda v. Hendrick* (*supra*), before the case came up for hearing the plaintiff's Proctor stated that his client was in jail, and moved that the case might be postponed to the bottom of the roll, but the District Judge ordered that it be struck off the roll. Subsequently, the District Judge ordered the action to abate *ex mero motu* on the ground that no steps had been taken for more than a year. It was held that the order that was made was *ultra vires*, and that it should be vacated inasmuch as there was no step which was necessary for the plaintiff to take which he had not taken. It was held further that the duty of fixing the case for trial rested on the Court. The order which the Court made on September 9, 1938, to wit—

"Steps not taken, no order".

was not an order which is contemplated by the Ciivl Procedure Code which specially requires that, when statments are made, the Court shall fix a day for the further hearing (See *Kumarihamy v. Keerthiratne* [6]).

Mr. Weerasooria argued that, on the order made by the District Judge on June 7, 1938, the moment the Court recalled the letters that were issued to Parathasarthy and issued letters to Arunasalam Servai, the latter automatically became the plaintiff in the case. I am unable to read that order in the way in which Mr. Weerasooria invited me to read it. The order was that the case should be called on August 5, to substitute the new administrator. Section 405 of the Civil Procedure Code has laid down the procedure to be followed for the substitution of a party. An application has to be made to the Court, by petition, to which the parties who may be affected by the order sought must be made respondents. Such an application was not made by Arunasalam Servai, and the Court had no power under section 404 to compel him to get himself substituted as a plaintiff.

Even if Mr. Weerssooria's contention is correct. I do not think that the order of abatement made by the District Judge can be supported.

For the reasons I have given, I am of opinion that the order of abatement that was entered by the District Judge is void and of no effect. In *Eastern Garage and Colombo Taxi Cab Co. v. de Silva* [7], de Sampayo J. held that an order of abatement which is improperly entered is void. A similar view was taken by Wood Renton J in *Kuda Banda v. Hendrick* (*supra*) and by Garvin J. in *Kumarihamy v. Keerthiratne* (*supra*).

[1] *(1911) 6 S. C. D. 42.*
[2] *(1912) 6 S. C. D. 79.*
[3] *(1934) 36 N. L. R. 103.*
[4] *(1896) 2 N. L. R. 29.*
[5] *(1896) 2 N. L. R. 23.*
[6] *(1935) 12 Times 89.*
[7] *(1924) 2 Times 166.*

In view of my decision that the order made by the District Judge is void, it is unnecessary for me to consider whether the application to have the order set aside was made within a reasonable time. However, I think that the delay in making the application has been sufficiently explained in the appellant's affidavit. It states that Arunasalam Servai was in Malaya and in Burma up to 1942 and was unable to leave owing to illness. I do not think that the delay in making the applications has caused any prejudice to the defendants, because W. D. Fernando is alive and the books of the Ceylon Auto Carriers Co. must be available to the defendants.

In all the circumstances of the case, I think the order made by the District Judge on July 13, 1940, must be vacated and the case remitted to the Court below for trial The appellant will be entitled to the costs of appeal and of the inquiry.

SOERTSZ, S. P. J.—I agree.

Appeal allowed.