

1974 Present : Walgampaya, J., Vythialingam, J., and Walpita, J.

V. KANAPATHIPILLAI, Appellant, and P. KANAPATHIPILLAI, Respondent

S. C. 558/68 (F)—D. C. Point Pedro, 9716

*Mortgage Act—Section 26—Co-mortgagors—Death of one of them prior to date of institution of hypothecary action—Appointment of representative of the deceased mortgagor—Question whether the action is prescribed—It cannot be decided at a stage where only a question of substitution of heirs arises.*

Hypothecary action was filed against two mortgagors, one of whom had already died long before the action was filed. The action was filed a few days before the action was prescribed. An application filed about six months later for the appointment of a legal representative to represent the estate of the deceased mortgagor was refused by the Court on the ground that, as the mortgage bond was not a joint and several bond and the hypothecated property belonged to the deceased mortgagor, the heirs of the deceased mortgagor should have been substituted in her place before the Bond got prescribed.

*Held*, that, under section 26 of the Mortgage Act, the deceased mortgagor's heirs should have been substituted. The question of joint and several liability or joint liability and other questions that arose on the pleadings could only be considered at the trial and not at the stage when only a question of substitution of heirs arose.

**A**PPEAL from a judgment of the District Court, Point Pedro.

*A. Mahendrarajah*, with *S. Mahenthiran*, for the plaintiff-appellant.

*M. Tiruchelvam*, with *N. Tiruchelvam* and *S. Ratnasingham*, for the 1st defendant-respondent.

*Cur. adv. vult.*

March 15, 1974. WALPITA, J.—

This was a hypothecary action filed by the plaintiff-appellant against the 1st defendant-respondent and his wife one Sivakami-pillai who was named as the 2nd defendant on a mortgage Bond No. 14574 dated 22.8.57. This action was filed on 7.8.67 a few days before such action would have become prescribed.

Summons was served on the 1st defendant-respondent on 23.11.67 but could not be served on the 2nd defendant-respondent as she had died long before the action was filed. The proctor for the plaintiff-appellant then moved Court on 2.2.68 for the appointment of a legal representative to represent the estate of the 2nd defendant and for the issue of notice on the heirs of the 2nd defendant deceased. This was objected to. An inquiry was held on 9.9.68 on this objection and the learned District Judge

by his order of 30.9.68 refused the application of the plaintiff-appellant for notice on the heirs of the 2nd defendant as this Bond was already prescribed after 22.8.67.

This appeal is from that order of the learned District Judge. The learned District Judge has upheld the submissions of the defendant-respondent that according to the terms of the bond both mortgagors have not bound themselves to pay back this money jointly and severally, that as such after the death of the 2nd defendant, her heirs should have been substituted in her place before the Bond got prescribed and that no hypothecary decree can be entered against the 1st defendant-respondent as it was the second defendant who hypothecated her land.

It has been submitted before us that at an inquiry into the application for substitution of heirs of the 2nd defendant it was premature to decide any issues arising out of the plaint and answer and that to decide whether the first defendant-respondent and his wife the 2nd defendant were jointly liable or jointly and severally liable and whether the property mortgaged belonged only to the 2nd defendant or was Thediathetum property, 3/4th of which on her death devolved on the 1st defendant-respondent can only be done at the trial. There is much substance in this contention of the appellant's Counsel.

The inquiry of 9.9.68 concerned only the question of substitution of heirs of the 2nd defendant. Though she had died before the action was filed, under Section 26 of the Mortgage Act No. 6 of 1949 which reads as follows :—

“ (1) Where any mortgagor dies before the institution of a hypothecary action in respect of the mortgaged land, or any mortgagor or any person who is or becomes a party to a hypothecary action dies after the institution of the action, and grant of probate of the will or issue of letters of administration to the estate of the deceased has not been made, the Court in which the action is to be or has been instituted may in its discretion, after the service of notice on such persons, if any, and after such inquiry as the Court may consider necessary, make order appointing a person to represent the estate of the deceased for the purpose of the hypothecary action, and such person may be made or added as a party to the action :

Provided, however, that such order may be made only if—

- (a) the value of the mortgaged property does not exceed two thousand five hundred rupees ; or
- (b) a period of six months has elapsed after the date of the death of the deceased ; or

(c) the Court is satisfied that delay in the institution of the action would render the action not maintainable by reason of the provisions of the Prescription Ordinance.

(2) In making any appointment under sub-section (1) the Court shall appoint as representative a person who after summary inquiry appears to the Court to be the person to whom probate of the will or letters of administration to the estate of the deceased would ordinarily be issued ;

Provided, however, that in the event of a dispute between persons claiming to be entitled to be so appointed, the Court shall make such an appointment (whether of one of those persons or of any other person) as would in the opinion of the Court be in the interests of the estate of the deceased.”

her heirs could be substituted. In 66 N. L. R. 251, *Muthu Ramaie v. Athimulam* the Court held that under this Section, substitution of heirs can be made in respect of a deceased co-mortgagor even where such co-mortgagor had died before the action was filed provided the action was not a nullity. Sansoni J. said in that case, that a distinction has to be drawn between the case of a decree against a sole defendant who was dead when the decree was entered in which case it is a nullity and a decree against more than one defendant where only some of the defendants had died before decree. The question whether the whole decree in the latter case is a nullity can only be *answered after considering the nature of the action.*

In the present case, therefore, where there was more than one defendant, the question of joint and several liability or joint liability and other questions that arise on the pleadings can only be considered at the trial and not at the stage where only a question of substitution of heirs arises. We are of view therefore that the order of the learned District Judge refusing the application of the plaintiff to issue notice on the heirs of the 2nd defendant was wrong and must be set aside. That order is accordingly set aside. Notice will now issue on the heirs of the 2nd defendant and a legal representative appointed to represent the estate of the 2nd defendant at the trial of this action. The 1st defendant-respondent and the heirs of the 2nd defendant will be entitled to take up thereafter any question of prescription or liability on the bond or any other matter which may arise on their pleadings.

The appellant is entitled to costs of this appeal.

WALGAMPAYA, J.—I agree.

VYTHIALINGAM, J.—I agree.

*Order set aside.*