

1959

*Present : Sinnetamby, J.*

T. D. HARAMANIS, Appellant, and U. B. FERNANDO *et. al.*,  
Respondents

*S. C. 185—C. R. Colombo, 58,669*

*Landlord and tenant—Small Tenements Ordinance—Writ of possession obtained thereunder—Death of decree holder before execution—Right of legal representative to apply for execution—Civil Procedure Code, s. 339.*

Where a person who has obtained a writ of possession against his tenant in respect of a small tenement under the Small Tenements Ordinance dies before execution of the writ, it is open to the legal representative to apply for execution of the decree in terms of the provisions of section 339 of the Civil Procedure Code. However, an application for substitution only is not tantamount to an application for execution.

**A**PPPEAL from a judgment of the Court of Requests, Colombo.

*M. L. de Silva*, with *M. T. M. Sivardeen*, for the Tenant-Appellant.

*D. R. P. Goonetilleke*, for the Petitioners-Respondents.

*Cur adv. vult.*

June 8, 1959. SINNETAMBY, J.—

One B. Rosa Fernando having obtained a writ of possession against her tenant in respect of a small tenement under the Small Tenements Ordinance died before she could execute the writ. The petitioners-respondents thereupon applied to the Commissioner of Requests for substitution in place of the deceased landlady in order that they may

execute the decree. The tenant opposed the application on the ground that the right to obtain possession was a personal right and did not pass on the death of the landlady to her heirs. The learned Commissioner of Requests, after hearing argument permitted the substitution. At the inquiry into this application the objection was raised that, in as much as at the date of inquiry the ground on which the order nisi was made absolute and the authorisation of the Rent Restriction Board dispensed with was that the premises were reasonably required for the use of the deceased, it cannot be said that after her death the premises could any longer be reasonably required for that purpose. The learned Commissioner of Requests confined his order to that aspect of the question and in my view was correct in holding that he was only concerned with the rights of the parties as to the date of action: he followed the decision in *S. P. K. Kader Mohideen & Co., Ltd. v. Nagoor Gany*<sup>1</sup>. At the hearing of the appeal the learned Counsel who appeared for the tenant-appellant took the objection that the provisions of the Civil Procedure Code in regard to substitution do not apply to proceedings under the Small Tenements Ordinance and that once a person, who has obtained a writ of possession under the Small Tenements Ordinance dies, no one can execute it. He relied upon certain observations made in *Perera Hamine v. Saibo*<sup>2</sup>. Lawrie, J. in that case held that the provisions of Section 325 *et seq.* of the Civil Procedure Code do not apply to actions under the Small Tenements Ordinance. In doing so, he said that there are express provisions in the Ordinance in regard to the procedure which have to be adopted. These observations were regarded as obiter by Akbar, J. in *Sunderam Pillai v. Ambalam*<sup>3</sup>.

The question that arises in this case is whether in the absence of any express provisions in the Small Tenements Ordinance it is permissible to invoke the provisions of the Civil Procedure Code in order to give effect to an adjudication resulting in a writ of possession being granted to a person. The effect of the decision in *Perera Hamine v. Saibo* (*supra*) seems to be that where there is express provision in the Small Tenements Ordinance it is not permissible to resort to the provision in the Civil Procedure Code. It does not proceed any further. I find it difficult to accede to the proposition that a Court which has entered a decree is powerless to give effect to it merely because there is no express provision in regard to the manner of its execution on the death of the writ holder. If no procedure is laid down it seems to me that a Court has an inherent jurisdiction to devise a procedure which would enable it to enforce its decision. It was conceded at the hearing in appeal that the right of the landlady survives to her legal representatives. It seems to me, therefore, that in the absence of any express provision to the contrary in the Small Tenements Ordinance it is open to the legal representatives to apply for execution of the decree. I use the word "decree" advisedly; an order for possession comes within the definition of the word "decree" as defined in Section 5 of the Civil Procedure Code. In the circumstances

<sup>1</sup> (1953) 60 N. L. R. 16.

<sup>2</sup> (1900) 2 Br. 77.

<sup>3</sup> (1929) 30 N. L. R. 358.

I can see no objection to the legal representatives of a deceased writ-holder seeking to execute the decree in terms of the provisions of Section 339 of the Code. It is to be noted that the Small Tenements Ordinance expressly provides for a person with a derivative title from the landlord applying for a writ of possession. If such a person can apply for a writ of possession, it seems to be illogical to refuse the right to execute the writ to a similar person once it has been obtained. In the present case, however, the application was only for substitution and there was no application for execution made either simultaneously or shortly thereafter. Our Courts have taken the view that an application for substitution without at the same time there being an application for execution of a decree cannot be made under the provisions of Section 339 but in the case of *Sirimalaveda v. Siripala*<sup>1</sup> the Court went so far as to hold that when there was an application for substitution followed by a separate application for execution the provisions of Section 339 were substantially complied with. In the present case, there is no application for execution.

It seems to me, therefore, that the petitioners-respondents cannot succeed for this reason.

I would set aside the order of the learned Commissioner of Requests and allow the appeal with costs.

*Appeal allowed.*

<sup>1</sup> (1954) 55 N. L. R. 544.

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