

1954

Present : Gratiaen J. and Gunasekara J.

E. SIMEON SILVA *et al.*, Appellants, and
A. K. N. SIVASUPRAMANIAM AMBALAM, Respondent

S. C. 19—D. C. (Inty.) Negombo, 5,275

Abatement of action—Death of sole plaintiff—Circumstances when an order of abatement may be made—Civil Procedure Code, ss. 395, 396, 402, 403.

Where, after the death of a sole plaintiff, his legal representatives delayed for nearly eighteen months to have themselves substituted under section 395 of the Civil Procedure Code—

Held, that an order of abatement of the action could be entered under section 396 of the Civil Procedure Code.

APPPEAL from an order of the District Court, Negombo.

H. W. Jayewardene with *P. Ranasinghe*, for the respondents-appellant.

N. K. Choksy, Q.C., with *C. Renganathan*, for the petitioner-respondent.

Cur. adv. vult.

May 28, 1954. GUNASEKARA J.—

This is an appeal from an order of the District Court of Negombo, made upon an application by the respondent Sivasupramaniam Ambalam, setting aside an order made by it nineteen years earlier for the abatement of an hypothecary action.

The action, which was for the recovery of a sum of Rs. 5,000 and interest secured by a bond dated the 17th November, 1927, was instituted on the 6th March, 1931, by the plaintiff's attorney Kowenna Sinniah Pulle, through his proctor Mr. Wijyaratnam, against two defendants, of whom the first was sued as the mortgagor and the second was joined as a subsequent encumbrancer. The record does not have the journal sheet or sheets containing the entries made before the 4th October, 1949, except for a small portion of the first sheet. The parties to the appeal are agreed, however, that the following steps were taken. The court accepted the plaint on the 6th March, 1931, and ordered the issue of summonses on the defendants, returnable on the 17th April. On the 17th April the returnable date was extended to the 7th May. On the 7th May the court ordered that the case be laid by, and on the 30th September, 1932, it ordered the abatement of the action.

What appears on so much of the first journal sheet as is still to be found in the record is as follows :—

“*IN THE DISTRICT COURT OF N*

No. 5275

R. M. K.

Ambalam

Class : V

Amount : Rs. 5,825.

Nature : Bond

Vs.

Procedure : Regular

C. P. Silv

another ”

(overleaf)

“ for Plff.

issued on Defts :

e now for 7/5

o M. H. K.

D. J.

nam for Plff.

ain not Issued

Lay by

M. H. K.

D. J. ”

The plaintiff had died in India on the 8th April, 1931, after the institution of the action and before it was laid by, leaving a last will by which he appointed two persons named Andiappen and Ramanathas Chettiar as executors and the respondent Sivasupramaniam Ambalam, who is his adopted son, his sole heir. The will was proved before the District Court of Colombo on the 7th July, 1932, and probate was granted on the 14th February, 1934, to Andiappen's Attorney Kowenna Sinniah Pulle (who had been the plaintiff's attorney) and Ramanathan Chettiar. The inventory and the final account filed in the testamentary case are verified by affidavits by Sinniah Pulle dated the 12th December, 1934, and the 24th October, 1935, respectively. He died in 1940, and the 1st defendant (the mortgagor) died on the 24th September, 1948.

It does not appear from the record of the mortgage action, or so much of it as is still in existence, that either of the executors took any steps in this action. On the 8th September, 1949, a petition was submitted to the district court by the respondent asking that he should be substituted in the place of the deceased plaintiff, and the appellants and certain other persons in the place of the deceased first defendant, and that the order for abatement be set aside. The appellants and two other parties objected that the respondent had no status to make the application. At an inquiry held on the 7th December, 1950, the respondent was granted time till the 25th January, 1951, to file an amended petition and affidavit. He did so, making the same application and stating among other things that Ramanathan Chettiar had applied to the District Court of Colombo for the recall of the probate that had been issued to him and that he himself had thereafter been appointed executor. It appears that actually he was granted letters of administration on the 18th April, 1951. After an inquiry into the amended petition the learned district judge made order on the 28th November, 1951, setting aside the order for abatement and substituting the respondent in the place of the deceased plaintiff and the 2nd appellant Juwan Silva (to whom letters of administration in respect of the estate of the 1st defendant had been granted on the 4th August, 1950) in the place of the deceased 1st defendant.

The ground of the learned judge's order was that the order for the abatement of the action was void for the reason that in the circumstances of this case the court had no power to make such an order under section 402 of the Civil Procedure Code. That section provides that "if a period exceeding twelve months . . . elapses subsequently to the date of the last entry of an order or proceeding in the record without the plaintiff taking any step to prosecute the action where any such step is necessary, the court may pass an order that the action shall abate". There can be no doubt that this section can have no application in a case where the reason for the plaintiff's not prosecuting the action is that he is dead (*Sellamma v. Palavasam*¹), but I can find no justification for the view that it was under this section that the court had purported to make the order for the abatement of the action. It

¹ (1939) 41 N. L. R. 186.

is provided by section 395 that "in case of the death of a sole plaintiff the legal representative of the deceased may, where the right to sue survives, apply to the court to have his name entered on the record in place of the deceased plaintiff, and the court shall thereupon enter his name and proceed with the action"; and by section 396 that "if no such application be made to the court by any person claiming to be the legal representative of the deceased plaintiff, the court may pass an order that the action shall abate". In the present case, at the time of the order for abatement no application under section 395 had been made to the court by the plaintiff's legal representatives, although nearly eighteen months had elapsed since the death of the plaintiff. It was therefore open to the court, under section 396, to make an order for the abatement of the action. The actual terms of the order are not before us, but that circumstance cannot raise a presumption that the order which the court had power to make under one provision of law purported to be made under another which gave it no such power. Quite apart from the presumption in favour of regularity, it seems to be likely that the object of the order made on the 7th May, 1931, that the case should be laid by, was to give the plaintiff's executors an opportunity of making an application under section 395 to be substituted in his place. In my opinion the order for abatement was a valid order, and the learned district judge's view that it was void is erroneous.

In terms of section 403 of the Code the order could be set aside upon an application made by a person claiming to be the plaintiff's legal representative if the application was made within a reasonable time and it was proved that he was prevented by sufficient cause from continuing the action. The facts relied upon by the respondent to show that these conditions were satisfied are stated as follows in his petition of the 25th January, 1951 :

"Owing to the deaths of Kowenna Sinniah Pulle and the 1st defendant and also due to the Petitioner's absence beyond the seas and the fact that the other executor took no interest in the administration proceedings, the Petitioner was prevented from continuing the action and recovering the moneys due."

It appears from the evidence given by the respondent at the inquiry that the absence beyond the seas to which he refers is an absence from 1935 to 1949, when he was in South India. He suggests that what prevented him from coming to Ceylon between 1940 (when Sinniah Pulle died) and 1949 was the war. He admitted that he took charge of the plaintiff's business in Ceylon in 1933 and that Sinniah Pulle managed it for him as his agent until 1940. On the 18th November, 1935, he signed a minute, which is filed in the testamentary case, accepting the correctness of the final account filed by the executors and consenting to the "estate being closed", and stating further that he had "been in charge of the business from 4th December, 1933, and assisted the executors in filing the accounts in this case". Nevertheless, according to him it was only in 1949, fourteen years after the filing of the final account in the testamentary case, that he learnt of this mortgage

action ; although it is mentioned in the inventory filed in the testamentary case in December, 1934. The explanation, such as it is, that has been tendered by the respondent of the delay to make the application in question is in effect a plea that he and those whom he succeeded as the plaintiff's legal representative had been negligent. It cannot be said that the conditions upon which an order for abatement can be set aside have been satisfied.

The order appealed from must be set aside and the respondent's application must be dismissed. The respondent must pay the appellants their costs in this court and the court below.

GRATIAEN J.—I agree.

Appeal allowed.

