

DE SILVA v. BABASINNO.

C. R., Balapitiya, 2,548.

1900.
September
17.

Hypothecary action—Procedure to be adopted on death of defendant—Impropriety of appointment of legal representative in such event—Civil Procedure Code, chapter XXV. and s. 642.

In a hypothecary action, on the death of the defendant after action brought, the proper procedure to be adopted by the plaintiff is not to obtain the appointment of a legal representative under section 642 of the Civil Procedure Code, but to obtain the appointment of an administrator under chapter XXV. of that Code, who should be made defendant in the stead of the original defendant.

PLAINTIFF sued his father-in-law, the original defendant in this case, for the recovery of a sum of Rs. 300 due to the plaintiff on a mortgage bond, and prayed that the land specially mortgaged to the plaintiff by his father-in-law “ be declared bound “ and executable under the judgment of this action on the footing “ of the said mortgage.”

The original defendant filed answer denying his liability to the plaintiff, but before the case came on for trial died intestate. His estate being under the value of Rs. 1,000, the Court below, on the application of the plaintiff, and on the motion of some of the heirs who were made respondents to the plaintiff's application, appointed a legal representative under section 642 of the Civil Procedure Code to represent the estate of the deceased defendant, and thereafter dismissed the plaintiff's case with costs, holding that in accordance with the judgment reported in 2 *S. C. C.* 141 an administrator should be appointed for the deceased's estate.

The plaintiff appealed.

H. Jayawardena, for appellant.

Bawa, for respondent.

17th September, 1900. *BONSER, C.J.*—

It seems to me that this appeal was ill-advised. The plaintiff has been wrong in the course he has taken. He sued upon a mortgage bond, which had been given to him by his father-in-law to secure a loan of Rs. 250.

Before the action came up for trial the defendant died, and thereupon the plaintiff applied to the Court under section 642 of the Civil Procedure Code to appoint a person to represent the deceased mortgagor, and a person was appointed.

But that section has no reference to a case like this, where the mortgagor dies while the action is pending; it refers to a case

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where the mortgagor dies before action brought. The plaintiff ought to have proceeded under the provisions of chapter XXV., which deals with the case of a party dying while the action is pending.

The proper course in this case will be to get an administrator appointed and make him defendant in the stead of the deceased defendant. The action will go back for that purpose. The plaintiff must pay the costs of this appeal.

