1958 *Present :* **H. N. G. Fernando, J., T. S. Fernando, J., and Sinnetamby, J.**

DEERANANDA THERO, Appellant, *and* RATNASARA THERO, Respondent

S. C. 95—D. C. Anuradhapura, 3,760/L

Abatement of actions—Action to establish personal right to an office—Cause of action purely personal—Death of defendant pending suit—Effect on action—Actio personalis moritur cum persona—*Jurisdiction of Court—Difference between illegality and irregularity—Buddhist ecclesiastical law—Civil Procedure Code, s. 392.*

Section 392 of the Civil Procedure Code, which declares that the death of a plaintiff or defendant shall not cause the cause of action to abate if the right to sue on the cause of action survives, impliedly declares also that, if the right to sue on the cause of action does not survive, the death either of the plaintiff or the defendant causes the action to abate. Accordingly, where a plaintiff's suit against the defendant is primarily to establish his personal right to an office and the cause of action is purely personal, the suit will abate on the death of the defendant during the pendency of the suit.

Want of jurisdiction in a court amounting to an illegality and not merely to a procedural irregularity cannot be cured by consent of parties.

The plaintiff, claiming title to the incumbency of a Buddhist temple, sued the defendant alleging that the latter was (*a*) unlawfully disputing his right to the incumbency and (*b*) was disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent. He prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple. The question of title to or possession of the temporalities of the temple did not arise in the action.

While the trial of the action was partly heard, the defendant died. The plaintiff then made application alleging that any rights which the defendant had to the incumbency devolved on the present appellant and moved that the appellant be substituted in place of the defendant. The appellant consented to the substitution.

Held, that, on the death of the original defendant the action abated by virtue of the provisions of section 392 of the Civil Procedure Code. The action being one of a personal nature against the original defendant, the right to sue ceased on the death of that defendant. Even on the assumption that the appellant was the legal successor of the deceased defendant, it could not be maintained that the appellant was liable to be ejected on the original cause of action. The cause of action did not survive on the death of the original defendant, and the maxim *actio personalis moritur cum persona* was applicable.

Held further, that the fact that the appellant expressly consented to the substitution of himself as defendant did not preclude him subsequently from asserting a want of jurisdiction in the court to continue with the action. The substitution and the subsequent proceedings constituted an illegality and not a mere procedural irregularity which could be waived by the appellant.

APPEAL from a judgment of the District Court, Anuradhapura.

H. W. Jayewardene, Q.C., with *B. S. C. Ratwatte* and *N. R. M. Daluwatte*, for the substituted defendant-appellant.

Sir Lalita Rajapakse, Q.C., with *K. Herat* and *T. B. Dissanayake*, for the plaintiff-respondent.

Cur. adv. vult.

January 17, 1958. T. S. FERNANDO, J.—

The plaintiff-respondent claiming to be entitled as a pupillary successor of one Karambewatte Piyadassi Thero to the incumbency of a temple known as Panikkankulama *alias* Manikkankulama Purana Raja Maha Vihare instituted this action on 15th May 1953 against Konwewa Piyaratana Thero alleging that the latter is (*a*) unlawfully disputing his right to the incumbency and (*b*) is disobedient and disrespectful to him and obstructing him in the lawful exercise of his rights as incumbent. He prayed that he be declared the incumbent and that the defendant and his agents be ejected from the temple. Piyaratana Thero, the defendant, filed answer alleging that Piyadassi Thero had abandoned the temple in 1932, and that the *dayakayas* with the approval of the Chief High Priest of the Province had installed him as the incumbent in the same year 1932. By an amendment of the answer a plea that the plaintiff's right of action, if any, was prescribed was also taken by him.

The trial commenced on 26th November 1953, was continued on the following day, and was then fixed for resumption on the 23rd and 24th February 1954. It would appear that Piyaratana Thero died on 2nd February 1954 before the trial could be resumed, and on 16th February 1954 the plaintiff's proctors moved that the case be taken off the trial roll to enable the plaintiffs to have the defendant's successors substituted. It is recorded in the journal that the defendant's proctors consented to this motion, but it is difficult to appreciate what status they had on 16th February 1954 to signify any such consent. The motion was, however, allowed by the District Judge.

On 22nd March 1954, the plaintiff's proctor filed petition and affidavit of the plaintiff which alleged that any rights the defendant had to the incumbency had devolved on one Udiyankulame Deerananda Thero (the appellant on this appeal), and that it had become necessary to substitute the latter in place of the defendant. They moved the Court to issue notice on the appellant to show cause, if any, against the substitution. The defendant appeared in court on 13th May 1954 in response to the notice and consented to the substitution. A proxy signed by the appellant dated 13th May 1954 in favour of a proctor was filed in court on 27th May, and the trial which had been interrupted was resumed on 8th July and concluded on 13th August 1954. By his judgment delivered on 11th November 1954, the learned District Judge declared the plaintiff to be the incumbent and ordered the ejectment of the appellant. The appeal is against this judgment, and counsel for the appellant has contended that the judgment should not be allowed to stand as the action instituted by the plaintiff abated on the death of Piyaratana Thero. He has argued that the action being one of a personal nature against the original defendant, the right to sue ceased on the death of that defendant, and that we should give effect to the maxim *actio personalis moritur cum persona* by making an order abating the action. He has argued, alternatively, that if the right to sue the original defendant survived the only person who could have been substituted was not the appellant but the legal representative of the defendant as defined in section 394 (2) of the Civil Procedure Code.

To consider the soundness of counsel's contention, we must examine the nature of the action filed against Piyaratana Thero. As I have stated already at the outset of this judgment, the allegation with which the plaintiff invoked the assistance of the court was that Piyaratana Thero was unlawfully disputing his rights, was disobedient and disrespectful to him and was obstructing him in the exercise of his rights as incumbent. The action as so framed was therefore undoubtedly of a personal nature and was limited to seeking a declaration of his alleged status of incumbent. It is true that the ejectment of the defendant and his agents was also claimed, but this claim was purely incidental to the claim to be the incumbent and was not a claim to eject the defendant on the ground of *parajika* conduct of the latter. It must be remembered that the defendant as well as the appellant being members of the same *paramparawa* or line of succession would, in the absence of *parajika* or contumacious conduct on their part, both have been persons who would have been entitled to reside in the temple—(see *Dhammajoty Unnanse v. Parenathale*[1]; *Saranankara Unnanse v. Indajoti Unnanse*[2]; *Siriniwase v. Sarananda*[3]; *Gunananda Unnanse v. Dewarakkita Unnanse*[4]). The question of title to or possession of the temporalities of the temple did not arise in the action. Even though the ejectment of the appellant had been sought on the grounds referred to above, it is difficult to see how the right to residence of the appellant can be tainted by grounds purely personal to the defendant.

Section 392 in Chapter XXV of the Civil Procedure Code which regulates the continuation of actions after alteration of a party's status declares that the death of a plaintiff or defendant shall not cause the action to abate *if the right to sue on the cause of action survives.* Appellant's counsel argued that this implies that, if the right to sue or the cause of action does not survive, the death either of the plaintiff or the defendant causes the action to abate. The correctness of this argument was disputed by plaintiff's counsel, but it seems to me that the argument is sound. In *Sham Chand Giri v. Bhayaram Panday*[5], Sale J. interpreting section 361 of the Indian Code of Civil Procedure (same as section 392 of our Code) observed that " the section does not predicate conversely that the death of a party shall cause the suit to abate, if the right to sue does not survive, but that is clearly the practical effect of that section and of the subsequent sections relating to abatement ". In that case the suit was brought to have it declared that the plaintiff was entitled to succeed as *mohant* of a shrine, and on the death of the plaintiff an application to be substituted in his place was made on the grounds which put the applicant into opposition to the original plaintiff and made his claim not dependent on the original plaintiff's case but in conflict with it. It was held that the right to sue could not be said to survive to the applicant within the meaning of the sections of the Code relating to abatement of suit, but that the suit abated by the death of the plaintiff. In the course of his judgment, Sale J. stated that " the suit was of a personal character in as much as its object is to

[1] *(1881) 4 S. C. C. 121.*
[2] *(1918) 20 N. L. R. at 398.*
[3] *(1921) 22 N. L. R. at 320.*
[4] *(1924) 26 N. L. R. at 276.*
[5] *(1894) 22 Cal. 92.*

establish a right to a personal office, and for that reason it appears to me that the right to sue does not survive. The result is that the action abates ". Referring to section 371 of the Indian Code, the learned judge stated that " the language of the Section seems clearly to indicate that the cause of action of the original and revived suit must be the same, and that no fresh cause of action can be imported into the revived suit ".

The ruling in *Sham Chand Giri's* case was referred to with approval in the Indian decision in *Ramsarup Das v. Rameshwar Das* [1], Sinha J. making the following observations (see page 189) :—

> " If a plaintiff is suing to establish his right to a certain property in his own rights and not by virtue of his office, certainly the cause of action for the suit will survive, and his legal representative can continue the suit on the death of the original plaintiff, either during the pendency of the suit or of the appeal. But, where the plaintiff's suit is primarily to establish his personal right to an office which would entitle him to possession of the property in question, on his death, either during the pendency of the suit or during the pendency of the appeal, the right to sue would not survive, and the suit will therefore abate ".

and again,

> " The principle is well established that the substituted party can only prosecute the cause of action as originally framed in the suit, and, if it becomes necessary to alter the pleadings it becomes manifest that the original cause of action is being substituted by another cause of action which could very well form the subject-matter of a separate suit. In such a case, therefore, it is a new suit which has to be tried. The following observations of Their Lordships of the Madras High Court in the case of *Subbaraya Mudali v. Manika Mudali* (19 Mad. 345) are relevant to the question before us :— ' The general rule is that, as the representative of a deceased plaintiff can only prosecute the cause of action as originally framed, so the defendant can raise no other defence against him than he could have raised against the deceased '."

Although both cases cited above dealt with instances of substitution in place of a deceased plaintiff, the principle enunciated will, even as the language of section 392 expressly indicates, apply also in the case of a substitution in place of a deceased defendant. The converse of the principle so enunciated in section 392 is in my opinion embodied in the maxim " *actio personalis moritur cum persona* ". The history of this maxim has been examined by Bowen L.J. in the course of delivering the judgment of the majority of the Court of Appeal in the English case of *Phillips v. Homfray* [2] who states—(see page 456)

> " Whatever its wisdom or policy, the rule with certain limitations and explanations is as old as the English law. By the Civil law, penal actions arising from wrong were not generally available against the heir, and certain actions *ex contractu* fell under the same disability.

[1] *(1950) A. I. R. (Patna) 184.* [2] *(1883) L. R. 24 Ch. D. 439.*

By the English law, the executor represents the debts and property, but not the person of the testator. It seems to have been thought that there would be an injustice in making the executor stand in the place of the dead man when the causes of action were purely personal. 'The taking up of an executorship', says Bacon, 'is an engagement to answer all debts of the deceased and all undertakings that create a debt, as far as there are assets, but does not embark the executor in the personal trusts of the deceased, nor is he obliged to answer for his several injuries, for none can tell how they might have been discharged or answered by the testator himself'. And even in some actions of contract, such as debt where the testator could have waged his law, the executor was not held liable, for this would have been to deprive his executor of the benefits of the wages of law. *As regards all actions essentially based on tort, the principle was inflexibly applied*".

In dealing with the question of the extent to which the right of action survives upon death of a party, the same learned judge stated (at page 454) :—

"The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act appear to us to be those in which property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, *though arising out of a wrongful act*, does not die with the person."

Upon an examination of the character of the action instituted by the plaintiff against Piyaratana Thero, the original defendant, it appears to me beyond dispute that the cause of action alleged was the wrongful acts of Piyaratana Thero in denying the plaintiff's claim to the incumbency, and, even on an assumption that the appellant is the legal successor of Piyaratana Thero, it cannot be maintained that the appellant is liable to be ejected on that original cause of action. If, on the other hand, the appellant's own unlawful denial of the plaintiff's claim is alleged to be the basis of the action as continued after the substitution, the cause of action then is surely different to that which is said to have survived. In these circumstances it is plain that the cause of action did not survive on the death of the original defendant and that the maxim '*actio personalis moritur cum persona*' applies to the case before us. The result I am compelled therefore to reach is that the plaintiff's action abated on the death of Piyaratana Thero on 2nd February, 1954.

Learned counsel for the plaintiff was constrained to admit that the action did not survive if it was for a declaration of status simpliciter, but he argued that the plaintiff's action was for a declaration of personal status together with the emoluments that go with it, and that therefore no abatement resulted and that the substitution was valid. I have already adverted to the form of the action and the relief sought to be

obtained from the court, and it is therefore unnecessary here to repeat that the appellant could not have been ejected on the basis of acts committed or conduct for which the original defendant was alone responsible, and that the appellant could in any event be proceeded against only on a separate cause of action in a separate suit. In these circumstances it does not become necessary to consider the situation that would have arisen in respect of substitution if the right of action survived on the death of the original defendant. Appellant's counsel contended that in the event of the right of action surviving, the only person who could have been substituted in terms of the Civil Procedure Code was the original defendant's legal representative as indicated in section 398 (1), and that it has not been shown that the appellant is such representative. Plaintiff's counsel, on the other hand, argued that section 398 applied only in the case of the death of a defendant who has left an administrable estate, and is wholly inapplicable to the case of the death of a Buddhist monk who, he alleged, can leave no estate. Alternatively, he sought to find justification for the substitution effected on 13th May 1954 in section 404 of the Civil Procedure Code. In view, however, of the conclusion already reached by me that the cause of action in this case did not survive on the death of the original defendant, I do not consider it necessary to embark upon an examination of these arguments.

Counsel for the plaintiff sought to maintain the judgment appealed from on the ground that the appellant having expressly consented in the trial court to the substitution of himself as defendant is now estopped or precluded from asserting a want of jurisdiction in the court to continue with the action. The point whether the appellant is estopped from questioning the maintainability of the action appears to me to depend on the further question whether the substitution and the proceedings subsequent thereto amounted to an illegality or only a mere irregularity or whether there was only a defect of contingent jurisdiction which was cured by the consent given by the appellant. Mr. Jayewardene has argued that the substitution and the continuation of the proceedings thereafter constituted an illegality, while Sir Lalita Rajapakse has contended that there has been only a procedural irregularity or at most a defect of contingent jurisdiction (*defectus triationis*), and that the consent given by the appellant has had the effect of curing such defect. Mr. Jayewardene has referred us to the statement of the law (reproduced below) set out in Spencer Bower's treatise on Estoppel by Representation at page 182 (1923 ed.):

> "Just as it is a good affirmative defence to an action on a contract that it cannot be performed without directly contravening the provisions of a statute, and that, by enforcing it or otherwise judicially treating it as valid, any court would be sanctioning and condoning such contravention, so also, and *a fortiori*, it is a good affirmative answer to a case of estoppel by representation that any closure of the representor's mouth would result in a like judicial recognition of, and connivance at, a statutory illegality".

Sir Lalita Rajapakse has relied on other passages appearing in the same treatise in support of his argument that the appellant cannot be permitted

now to agitate the question of a proper substitution of parties or the further proceedings taken, particularly on the following statement of the law (at page 187) :—

> " On the other hand, where it is merely a question of regularity of procedure, or of a defect in ' contingent ' jurisdiction or non-compliance with statutory conditions precedent to the validity of a step in the litigation, of such a character that, if one of the parties be allowed to waive, or by conduct or inaction to estop himself from setting up, such irregularity or want of ' contingent ' jurisdiction or non-compliance, no new existing jurisdiction is thereby impliedly extended beyond its existing boundaries, the estoppel will be maintained and the affirmative answer of illegality will fail ".

Several authorities were cited before us and it would be useful to consider some of them in dealing with the point. *Smurthwaite v. Hannay* [1] was a case in which several persons joined in one action against a shipowner claiming damages for non-delivery of the number of bales specified in their respective bills of lading in the following circumstances. Bales of cotton were shipped by several shippers upon a general ship for carriage to a certain port, the bills of lading being similar. Upon arrival at the port, it was found that the number of bales fell short of those shipped, and that some of the landed bales could not be identified, their marks having been obliterated. Sixteen holders of bills of lading, nine being shippers and seven consignees, joined in one action claiming damages for non-delivery. It was held that the causes of action of the several plaintiffs were separate and distinct and could not be joined in one action. Lord Herschell, L.C., in his speech, stated (at page 501) :—" I cannot accede to the argument that, even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX, could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity ". In the same case, Lord Russell stated—(at page 506)—

> " A further point was taken at the Bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorised by Order XVI was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well-founded. In my judgment, such joinder of plaintiffs is more than an irregularity ; it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure ; and apart altogether from any express power given by the rules, it is fully within the competence of the Court to restrain and to prevent an abuse of its process ".

In *Craig v. Kanseen* [2] it was held that, where proceedings which must be taken *inter partes* were taken *ex parte*, this was not a mere irregularity, but had the effect of making the order a nullity, and that the appellant was entitled *ex debito justitiae* to have the proceedings set aside.

[1] *(1894) A. C. 494.* [2] *(1943) 1 A. E. R. 108.*

Where it is shown that the proceedings are illegal in the sense that the Court had no jurisdiction to proceed to make an order, there is, in my opinion, no room for the argument that it is too late at the stage of appeal to object to the proceedings taken and the order of court consequent upon these proceedings. The Privy Council decision in *Raja of Ramnad v. Pandiyasawmi* [1] cited by counsel for the plaintiff is clearly distinguishable as the observations of Lord Phillimore therein to the effect that an objection as to proper representation of a party not taken in the courts below will not be entertained by the Privy Council had reference to a case where the point depended upon a question of fact which, if disputed, should have been determined on evidence. In the case before us the facts necessary for the decision of the question of abatement of the action all appear in evidence and are not in dispute at all. In point is the decision in the case of *Norwich Corporation v. Norwich Electric Tramways Co., Ltd.* [2] where the question of a lack of jurisdiction in the court below was raised for the first time on appeal. In dealing with a point raised that the Court had no jurisdiction to hear the case as it had by statute to be referred to arbitration, Vaughan Williams L.J. stated—see page 125—

> "I can only say with regard to that point that I have always supposed it to be well-established law that the objection that the tribunal has no jurisdiction to entertain the case is one which, at all events in reference to proceedings in the High Courts may be taken at any time. If the Court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself. The plaintiff's counsel failed, as it appeared to me, to produce any authority for the proposition that such an objection to the jurisdiction could only be taken at the trial, for the case of *Mayor of London v. Cox* (1867) L. R. 2 H. L. 239 has, I think, no application to a case of this kind. In the absence of authority, I asked upon what legal principle they based that proposition. The answer was that there was either a waiver or something in the nature of an estoppel. As regards waiver, what is said to have been waived ? It is the provision for arbitration in section 33 of the Tramways Act, 1870, which is a public general Act applying to all the tramways in the Kingdom. It is not open to a party to a litigation to waive such a provision, which is not an agreement, even a parliamentary agreement, between parties. The provisions of section 33 must be taken to have been introduced into the Act for the benefit of the public and therefore nobody can waive them . . . The same considerations appear to me to apply to the argument that there was something in the nature of an estoppel".

I would respectfully adopt the observations quoted above and, in view of the conclusion reached by me as already stated that the action filed by the plaintiff abated on the death of Piyaratana Thero, the inference is clear that the substitution and the subsequent proceedings constituted an illegality and not a mere curable procedural irregularity. The judgment of the District Court and the decree already entered must

[1] *(1918) A. I. R. (P. C.) 156.* [2] *(1906) 2 K. B. 119.*

therefore be set aside, and I make order accordingly. This does not, of course, preclude the plaintiff from filing a fresh suit, if so advised, against the appellant. The merits of the rival claims to the incumbency have not been canvassed before us, and I refrain from saying anything thereon which may possibly have the effect of prejudging any issue in any such future suit.

In regard to costs, as the appellant consented in the District Court to the application for substitution, the appropriate order to be made is that each party shall bear his costs in the Court of trial. The appellant will, however, be entitled to the costs of this appeal.

H. N. G. FERNANDO, J.—I agree.

SINNETAMBY, J.—I agree.

Appeal allowed.