1960 *Present :* **Basnayake, C.J., and Pulle, J.**

SARLIN and others, Appellants, *and* JAMES FERNANDO and another, Respondents

S. C. 148—D. C. Colombo, 28948/M

Civil Procedure Code—Sections 226 (1) and (2), 392, 394 (2), 398 et seq., 531, 534, 540 —Death of defendant pending action—Substitution of legal representative—Proper person for substitution—Legal effect of improper substitution—Conditions precedent for substitution of widow as administratrix—Requirement of payment of estate duty—Estate Duty Ordinance, s. 52—Execution of decree to pay money —Duties of Fiscal on receiving writ—Failure of Fiscal to demand payment from debtor—Right of debtor to challenge validity of execution sale.

Under section 398 (1) read with section 394 (2) of the Civil Procedure Code, if, during the pendency of an action either in the District Court or the Court of

[1] *(1871) L. R. 3 P. C. 465.*

Appeal, a sole defendant dies leaving an estate not below the value of Rs. 2,500, it is only his executor or administrator that the plaintiff can in law specify as the person whom he desires to be substituted as the defendant. The substitution of the deceased defendant's widow has no legal effect until the power of administration has been conferred on her by Court by the issue of a grant of administration. The circumstances that the widow has applied for letters of administration in respect of the estate of the deceased and that the order *nisi* made under section 531 has been made absolute under section 534 does not make her the administratrix, inasmuch as under section 52 of the Estate Duty Ordinance, the Court is forbidden to grant letters of administration until the Commissioner has issued a certificate that the estate duty for the payment of which the administrator is liable under the Ordinance has been paid or secured or that the administrator is not liable to pay estate duty under the Ordinance, and that certificate has been filed in Court.

The legal effect of the improper substitution of a legal representative in place of a deceased judgment-debtor is to nullify an execution sale held after the death of the debtor.

When the Fiscal receives a writ for the seizure and sale of property in execution of a decree to pay money, the requirement of section 226 (1) of the Civil Procedure Code is imperative that the Fiscal should repair to the dwelling-house or place of residence of the judgment-debtor and there demand from him, if present, the amount of the writ. Failure to comply with this requirement entitles the judgment-debtor, or a person whom the Court has substituted (even though wrongly) in place of a deceased judgment-debtor, to challenge, in the very action in which execution has been levied, the validity of the seizure and sale; it is not open to him to do so in a separate and independent action.

APPEAL from an order of the District Court, Colombo.

Judgment was entered in favour of the plaintiff in an action on a promissory note. The defendant died while his appeal to the Supreme Court was pending. The plaintiff thereupon moved the District Court to substitute the deceased defendant's heirs, viz. widow and minor children, in place of the deceased, and his application was allowed. Subsequently the appeal of the deceased defendant was dismissed on 13th February 1956. On 18th May the plaintiff applied for execution of the decree, making the deceased as defendant and his widow as substituted defendant. On 21st May the widow applied for stay of execution stating (*a*) that she had applied for letters of Administration in respect of the intestate estate of her late husband, (*b*) that the certificate of the Estate Duty Commissioner was awaited. The application for stay of execution was refused. By precept dated 5th June 1956 the Fiscal was directed to levy execution against the lands of the deceased. The Fiscal seized and sold on 18th March 1957 certain immovable property. On 4th April the widow filed a petition that the sale be set aside, but the application was refused by the learned District Judge. Thereupon the

present appeal was filed against the refusal of the District Judge to set aside the sale. It was submitted on behalf of the appellant that—

(*a*) the appeal which had been preferred by the judgment-debtor, prior to his death, was decided without the deceased defendant being represented by a person legally entitled to take his place,

(*b*) that the order to execute the decree was obtained against a person not entitled in law to take the place of the deceased,

(*c*) that the execution sale was bad as the condition precedent of demand of payment from the judgment debtor had not been observed.

H. V. Perera, Q.C., with *Nimal Senanayake* and *Desmond Fernando*, for Petitioners-Appellants.

H. W. Jayewardene, Q.C., with *G. T. Samarawickreme* and *L. C. Seneviratne*, for 2nd Respondent-Respondent.

Cur. adv. vult.

May 16, 1960. BASNAYAKE, C.J.—

The facts of this case are briefly as follows :—On 21st May 1953 James Fernando, the plaintiff, as holder in due course of a promissory note for Rs. 4,000/- dated 28th October 1949 executed by his younger brother Stephen Fernando, in favour of Dr. P. Kulasinghe, sued him for the recovery of the capital sum together with the interest thereon, and obtained judgment on 30th June 1954. On the same day the successful plaintiff made application for writ of execution " against the property of the defendant " and it was allowed. The defendant lodged an appeal and on 7th July 1954 took objection to the issue of writ while the appeal was pending. When the matter came up for inquiry counsel for the plaintiff stated that he had no objection to execution being stayed provided sufficient security was given in cash or property. The District Judge then made order staying execution if the defendant furnished security either in cash or by way of immovable property in a sum of Rs. 6,000/- for the due performance of such decree as may ultimately be passed.

On 31st August a bond was tendered by the defendant and the Court made order " Stay Execution ".

While the appeal was pending the defendant died on 5th June 1955, and the following minute appears in the Journal of 28th June 1955 :

" Registrar, S. C. returns record as the appellant is reported dead, so that steps may be taken for substitution of heirs of the deceased and the record thereafter be sent to the S. C. for determination of the appeal ".

On 25th July 1955 the proctor for the plaintiff filed a petition supported by an affidavit and moved that the widow and the four children of the deceased be substituted in his place. On this petition the District Judge made an order nisi, the material portion of which reads—

> " It is ordered that the 1st respondent be and she is hereby appointed guardian-ad-litem of the 2nd to 5th respondents (*b*) the respondents be substituted in place of the deceased defendant unless sufficient cause be shown to the contrary on the 12th day of September 1955 ".

On 5th December 1955 the District Judge made order substituting the appellant and her children as defendants in place of the deceased defendant. The record was thereafter returned to this Court and on 13th February 1956 the appeal of the deceased defendant was dismissed with costs and the record was returned to the District Court. On 18th May 1956 the plaintiff made an application for execution of the decree naming the deceased as defendant and his widow the appellant as substituted defendant. The mode in which the Court's assistance was required was stated thus " by issue of writ for seizure and sale of property ". On 21st May 1956 the appellant's proctor filed a petition supported by affidavit and prayed that the application for writ be stayed in the above case till the issue of Letters of Administration in her favour. The petition disclosed—

(*a*) that the appellant had applied for Letters of Administration in respect of the intestate estate of her late husband and order absolute had been entered in her favour,

(*b*) that the certificate of the Estate Duty Commissioner was awaited, and

(*c*) that the appellant was not possessed of any means wherewith to pay the plaintiff's claim and costs.

On 21st June 1956 the appellant made an application for stay of execution till the issue of Letters of Administration in her favour. This was refused.

The plaintiff then sought to recover his debt by the seizure of money due on a policy of insurance No. 727316 on the life of the deceased.

The insurance company took objection on the ground—

(*a*) that the money due under the Policy was only payable to the executor, administrator or assigns of the deceased.

(*b*) that there was no debt due to the substituted defendants.

(*c*) that the plaintiff was not entitled to compel the company to bring any monies due under the Policy until Letters of Administration were issued in respect of the estate of the deceased.

At the inquiry on 4th December 1956 the parties agreed on a course of action which is recorded as follows :—

" Mr. W. undertakes to issue a notice on the company after the letters are obtained, and the company undertakes to deposit the money in the testamentary case ".

Meanwhile by precept dated 5th June 1956 the Fiscal had been directed to levy execution against the lands of the deceased defendant in these terms :—

" *Writ of Execution against Property*

In the District Court of Colombo

Welikandage James Fernando of No. 19 Vihare Road, Mt. Lavinia

Against

Welikandage Stephen Fernando of No. 193 Grandpass, Colombo. deceased ..... Defendant.

(1) Parawahera Nipunachcharige Sarlin Fernando of No. 253 Duwapansala Road, Heenatiyangala, Kalutara.

Substituted Defendant and guardian-ad-litem of 2nd to 5th substituted defendants-minors.

To the Fiscal for the Western Province,

Levy and make of the Houses, Lands, Goods, Debts and Credits of the abovenamed defendant by seizure, and if necessary, by sale thereof the sum of Rs. 4,000 four thousand rupees and interest thereon at 12 per cent. per annum from 28th October 1949 till date of decree and thereafter legal interest on the aggregate amount of the decree at 5 per cent. per annum till payment in full and costs of suit taxed at Rs. 1,662·65.

Which the said plaintiff has recovered against the said defendant by a Judgment of this Court bearing date the 30th day of June 1954 and have that money before this Court on or before the 6th day of June 1957 to render to the said plaintiff and inform this Court for what sum or sums, and to what person or persons, you have sold the said property respectively and pay all monies levied under this writ to the separate account of the plaintiff ; and have you there this mandate.

By order of the Court

Signature illegible

5th June 1956. Clerk of Court "

On 29th June 1956 the Deputy Fiscal, Kalutara, to whom it was endorsed by the Fiscal Western Province, made the following endorsement to the Fiscal :

" The Fical, W. P.
Colombo.

My officer reports that he searched for the substituted defendant at the given address but he was not to be found there and he further reports that there is no premises bearing 253 at Duwapansala Road, Heenatiyangala.

The Writ and Proctor's letter dated 15.6.56 are returned herewith unexecuted ".

Thereafter the Fiscal appears to have seized on 25th January 1957 and sold on 18th March 1957 premises Nos. 191 and 193 Grandpass Road valued at Rs. 25,000 for a sum of Rs. 13,600 to Salanchi Mukadange Piyadasa of Ranungala in Kalutara District. It would appear from its description that this is the very property that the deceased mortgaged to the Secretary of the District Court as security for the stay of Execution. On 4th April 1957 the appellant filed a petition that the sale be set aside. After setting out the history of the litigation she stated that the purchaser is a nephew of the plaintiff to whom she had let the premises on her husband's death and whom she was seeking to eject at the time of the sale. She also stated that the plaintiff is living in the same premises. Several grounds were urged in support of the petitioner's prayer. But the only grounds relevant to the points argued by learned counsel are :—

(*a*) that no demand had been made from her personally or as Guardian-ad-litem of 2nd, 3rd, 4th and 5th substituted defendants at her place of residence or dwelling place No. 235, Duwa Pansala Road, and

(*b*) that the 1st petitioner does not reside at 253 Duwa Pansala Road.

The District Judge refused her application. In doing so he said :

" In this case the Petitioner knew of the application for writ, and she knew that the property had been seized. She must have known that, if she did not pay the amount due on the decree, the property would be sold. No substantial injustice has been done to her by the fact that no demand had been made for payment by the Fiscal, and on that ground the Petitioner must fail ".

This appeal is from the refusal of the learned District Judge to set aside the sale.

It is submitted on behalf of the appellant that—

(*a*) the appeal was decided without the deceased defendant being represented by a person legally entitled to take his place,

(*b*) that the order to execute the decree was obtained against a person not entitled in law to take the place of the deceased,

(*c*) that the sale is bad as the condition precedent of demand of payment from the judgment-debtor had not been observed.

I shall now proceed to examine the above submissions. It is settled law that on the death of an appellant an appeal abates. When the right to sue on the cause of action survives the abatement is temporary, in the sense that the right to proceed is merely suspended, and may be revived. When the right to sue on the cause of action does not survive the appeal comes to an end and cannot be revived. Our Civil Procedure Code does not prescribe a procedure for reviving an appeal. But it has been the practice for quite a long time to remit the record to the original court on this court being notified by counsel, as amicus curiae, in open court of the death of an appellant, in order that, where action may properly be taken under Chapter XXV of the Civil Procedure Code, such action may be taken. Although in proceedings under that chapter it does not appear that strict proof of death is always insisted on I am of opinion that such proof is necessary.

Section 392 of that code provides—" 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 ". In the instant case on the fact of the death of the appellant being notified to this court it appears to have made the order that the record be remitted to the original court so that steps may be taken for the substitution of the heirs of the deceased in his place, and this was done and the record was returned to this court thereafter. The Registrar's communication quoted above on which the plaintiff respondent seems to have acted does not contain an order of this court that the heirs of the deceased be substituted. It is for the party on whom the duty of taking the necessary steps is imposed by the Civil Procedure Code to advise himself as to what in law is the correct step to be taken and to take that step. Now section 398 provides that when the sole defendant dies the plaintiff may make an application to the court, specifying the name, description, and place of abode of any person whom he alleges to be the legal representative of the deceased defendant, and whom he desires to be made the defendant in his stead. In section 398 and the other sections of Chapter XXV the expression " legal representative " means an executor or administrator or in the case of an estate below the value of two thousand five hundred rupees the next of kin who have adiated the inheritance. (s. 394 (2)). In the instant case the estate is not below the value of two thousand five hundred rupees and it is only the executor or administrator that the plaintiff

respondent could in law have specified as the person whom he desired to be made the defendant instead of the deceased and the court had no power to enter on the record in the place of the deceased defendant the name of any person other than his executor or administrator. The substitution of the deceased defendant's widow and children appearing by their guardian-ad-litem not being authorised by law has no legal effect and does not carry with it the consequences of a proper substitution under section 398. The proceedings subsequent to the death of the defendant appellant have therefore been against persons who in law cannot be substituted in place of the deceased in the suit. A person who is not entitled to take the place of the deceased defendant appellant in the suit and whom the court has no power to appoint to take his place has *no locus standi in judicio*. The deceased defendant was therefore not in law represented at the hearing of his appeal which was dismissed without such representation.

The execution proceedings in the original court after the dismissal of the appeal are of no effect as they have been taken against the widow of the deceased who cannot in law take the place of the deceased defendant and execution levied against the property left by the deceased defendant in proceedings in which the name of the legal representative of the deceased has not been entered on the record is both of no effect and does not bind the legal representative.

The circumstances that the widow had applied for letters of administration in respect of the estate of the deceased and that the order *nisi* made under section 531 had been made absolute under section 534 did not make her the administrator, as under section 52 of the Estate Duty Ordinance, the Court is forbidden to grant letters of administration until the Commissioner has issued a certificate that the estate duty for the payment of which the administrator is liable under the Ordinance has been paid or secured or that the administrator is not liable to pay estate duty under the Ordinance, and that certificate has been filed in court. It would appear by implication from section 540 that the power of administration is not conferred on the administrator and cannot be exercised by him until it is conveyed by the issue of a grant of administration. In the instant case no such power had been conferred on the widow at the material time.

I also uphold the submission of learned counsel that the step prescribed in section 226 (1) is a condition precedent to the seizure and sale of the judgment-debtor's property. The words of the section are imperative. This is not a context in which it is permissible to read the word " shall " as if it has the force of " may ". The Fiscal is in law bound to take the step prescribed in sub-section (1). It is only after taking that step

that he is empowered to proceed to sell. This is forcefully brought out by the words " If by reason of the debtor's absence no demand for the payment is made or, in the event if any such demand, when made not being complied with, the Fiscal shall forthwith proceed to seize and sell ". The proviso to sub-section (2) reinforces the view I have expressed above, for, it declares that when the debtor is out of the Island it shall not be necessary to require him to pay the amount of the writ before the execution is carried into effect. The words of the proviso clearly indicate that the legislature intended that the observance of the requirement of sub-section (1) should be a condition precedent to the sale. In the instant case the demand was not made from any person whatsoever ; but even if it had been made from the appellant it would not have amounted to a compliance with section 226 (1) as she was not the person whose name the court had power in law to enter on the record in place of the deceased.

Learned counsel for the respondent relied on the case of *Wijeyewardene et al. v. Podisingho et al.*[1], which is a decision of a Bench of five Judges. But that case is only an authority for the proposition that it is not open to any person to seek to attack in a separate action a seizure and sale of property by the Fiscal on the ground that no demand was made by him under section 226 (1). In the instant case the seizure and sale is attacked in the very action in which execution has been levied and by a person who has been expressly made a party to the proceedings for execution. Section 226 (1) is a provision meant for the protection of the judgment-debtor. It is legitimate for him to complain when the Fiscal ignores section 226 (1) that he has been denied the benefit of a provision of the Code designed for the protection of judgment-debtors and challenge the legality of the course adopted by the Fiscal. But if the judgment-debtor does not choose to challenge the legality of the Fiscal's action in the case in which execution is levied, *Wijeyewardene's* case is a bar to its being questioned in separate proceedings. In the instant case the sale is challenged by the person whom the Court substituted in place of the deceased judgment-debtor. Even though the action of the Court in substituting her is not warranted by the Code she having been placed in the room of the judgment-debtor is entitled to take any objection open to him.

For the above reasons the appeal is allowed and all proceedings after the death of the defendant are quashed and the sale is set aside. The appellant is entitled to the costs of this appeal.

PULLE, J.—I agree.

Appeal allowed.

[1] *(1939) 40 N. L. R. 217.*