1938

Present : **Soertsz and Hearne JJ.**

LATIFF *v.* SENEVIRATNE *et al.*

177—D. C. Kegalla, 7,452.

Execution of decree—Application by executor of plaintiff—No application for Substitution—Civil Procedure Code, ss. 339 and 395.

An application for execution of a decree may be made by the executor of a deceased plaintiff under section 339 of the Civil Procedure Code with notice to the necessary parties.

The section does not contemplate that there should be an application for substitution as distinct from an application for execution.

Section 395 has reference to an application for substitution before decree.

Execution proceedings will not be set aside upon merely technical grounds when the execution has been substantially right.

Fernando v. Fernando (*6 Weerakoon's Reports 70*) followed.

APPEAL from an order of the District Judge of Kegalla.

L. A. Rajapakse (with him *C. R. Guneratne*), for appellant.

N. E. Weerasooria (with him *J. R. Jayewardane* and *Edirisuriya*), for respondents.

February 8, 1938. HEARNE J.—

In this partition action a decree for compensation was passed in favour of the second plaintiff against the first defendant. The first defendant died and the present appellant was substituted in his place. The appeal turns on the question of whether the sale of immovable property ordered by the Court in execution of the money decree at the instance of the executors of the second plaintiff is invalid. The validity of the sale has been impeached for two reasons :

(1) "The application for substitution of the executors of the second plaintiff in place of second plaintiff was not made as provided by law". By this I understand that the application was not made by "petition" in accordance with the provisions of section 339 of the Civil Procedure Code.

(2) "The said application was not allowed by the Judge and no substitution had in fact been made on the record in the case".

In regard to (1) the argument would, I think, have been more correctly formulated if it had been said that the application for execution had not been made as provided by law. Section 339 of the Civil Procedure Code does not, in my opinion, contemplate that there should be an application for substitution as distinct from an application for execution. All that is necessary is that the transferee should file his application for execution, setting out the gounds on which he claims to be the transferee and the

Court orders the application for execution to proceed or rejects it. If the Court allows the application it also orders that the transferee's name be substituted for that of the original decree holder. It was pointed out that a different view was taken by Schneider J. in *Adawiappen v. Aboobucker Lebbe*[1]. If this is so I would respectfully disagree with Schneider J., and would follow *Fernando v. Fernando* reported in *6 Weerakoon's Reports 70.* In the latter case Middleton J. said: "In my opinion the application (by the administrator of plaintiff who died after judgment to be substituted for proceeding with execution) can and should be made under section 339 for execution with notice to the necessary parties when the Court may, if it thinks fit, substitute the administrator's name for that of the deceased plaintiff in the decree and the decree may be ordered to be executed subject to the provisions of the Civil Procedure Code". Let us now put Counsel's argument in this way—does the fact that the application for execution was not made by petition vitiate the sale? The application sets out all the relevant details, a formal declaration was made that the details were true, the appellant who was given due notice did not appear and the application for writ was allowed. Even if the application cannot be described as a petition I would follow the principle enunciated by this Court in *Nanayakara v. Sulaima*[2], that "in execution proceedings the Court will look to the substance of the transaction and will not be disposed to set aside an execution upon merely technical grounds when the execution has been found to be substantially right", and disallow the technical objection that has been taken.

In regard to the second argument that was urged upon us I agree with the Judge who was dealing with an order made by his predecessor that the applications for substitution and for execution were both allowed. It does not, however, appear that although the application for substitution was allowed the names of the executors were in fact recorded on the decree in place of the deceased second plaintiff. Does this inadvertence on the part of the Judge vitiate the sale? It is argued on the authority of *Abeyawardene v. Marikar*[3], that it does. In that case although the question of an application for execution by an executor was before the Court, the effect of section 339 was not considered at all. The Judges of the Court merely considered the effect of section 395. This section which requires a legal representative "to have his name entered of record" seems to apply to applications previous to decree and this is the view which by implication Middleton J. took in *Fernando v. Fernando* (*supra*) which I have quoted. I do not, therefore, regard the case of *Abeyawardene v. Marikar* (*supra*) as binding on us in the present case. It did not purport to be an interpretation of section 339.

The view taken of the corresponding section in the old Indian Code is set out in the judgment of the Court in *Jogendra Chandra Roy v. Shyam Das*[4]. "The Civil Procedure Code does not expressly provide for an application for substitution. There is no provision which renders necessary the actual substitution of the name of the legal representative for the validity of the proceedings in execution. Section 232 merely

[1] *6 Ceylon Law Rec. 17.*
[2] *(1926) 28 N. L. R. 314.*
[3] *1 S. C. R. 192.*
[4] *36 Calcutta 643 at 558.*

requires that the legal representative should apply for execution of the decree and that his name should be brought on the record. This provision was substantially complied with in the case before us".

In my opinion the executors complied with the provisions of section 339 and it would be absurd to regard the sale as a nullity because the Judge failed to perform a ministerial act. I would dismiss the appeal with costs.

SOERTSZ J.—I agree.

Appeal dismissed.