

1953

Present : Gunasekara J. and Pulle J.

K. KADIRGAMADAS *et al.*, Appellants, and K. SUPPIAH *et al.*,
Respondents

S. C. (Inty.) 2—D. C. Jaffna, 3,468

Civil Procedure Code—Proctor—Appointment—Requirement of writing signed by the client—Section 27—Death of plaintiff—Assignee's claim to be substituted as plaintiff—"Legal representative"—Section 394 (2).

When the petition of appeal was filed on behalf of the defendants, the Proctor who presented it had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for some of the appellants. He was so appointed after the appealable time had expired. He had, however, without objection from any of the parties, represented all the defendants at various stages of the proceedings earlier.

Held, that the irregularity in the appointment of the Proctor was cured by the subsequent filing of a written proxy.

Held further, that where the plaintiff in a pending action dies it is only his legal representative who can be substituted as a party in his place. A person, therefore, who claims the plaintiff's interests in the action by virtue of an assignment which had been made by the plaintiff is not entitled to be substituted, as he is not a legal representative within the meaning of section 394 (2) of the Civil Procedure Code.

APPPEAL from a judgment of the District Court, Jaffna.

S. J. V. Chelvanayakam, Q.C., with *H. W. Tambiah* and *Felix Dias*, for the substituted defendants.

C. Renganathan, for the 1st substituted plaintiff respondent.

Cur. adv. vult.

September 22, 1953. GUNASEKARA J.—

This appeal arises out of an action instituted in the District Court of Jaffna by Sithamparapillai Arumugam against two defendants, Kumaravetpillai and his son Kadirgamadas. The plaintiff Arumugam and the first defendant Kumaravetpillai have both died, and the present defendants, including the second defendant Kadirgamadas, have been substituted in the place of the first defendant, being his legal representatives. The appeal is against an order made by the learned District Judge on the 4th April, 1952, by which he purported to set aside an order that had been made by his predecessor on the 4th June, 1951, substituting the second to sixth respondents in place of the deceased plaintiff Arumugam, and to substitute instead the first respondent Suppiah. The appeal has been filed in the name of all the present defendants by Mr. Nalliah, who has signed the petition as proctor for the appellants.

A preliminary objection to the hearing of the appeal was taken by the learned counsel for the first respondent on the ground that Mr. Nalliah had authority to sign the petition of appeal only on behalf of the second defendant Kadirgamadas and not on behalf of the other defendants. When the petition of appeal was filed, on the 25th April, 1952, Mr. Nalliah had not been appointed in writing, as required by section 27 of the Civil Procedure Code, to act for these defendants. He was so appointed later, on the 8th May, 1952, after the appealable time had expired. In the meantime, however, he had, without objection from any of the parties, appeared for these defendants and acted as their proctor in the proceedings that were held upon the first respondent Suppiah's application to be substituted in place of the deceased plaintiff. On the 16th November, 1951, he applied for time to file on behalf of these defendants a statement of objections to Suppiah's application, and was granted time to do so. On the 17th December, 1951, he filed a statement of objections on their behalf. On the 23rd January, 1952, and the 21st March, 1952, he appeared for them at the inquiry into the application, and he also represented them when the order that is appealed from was delivered on the 4th April, 1952. We are satisfied that Mr. Nalliah had been authorised by the substituted defendants to file an appeal on their behalf, although they had omitted to appoint him in writing as required by section 27 of the Code. That requirement, however, is merely directory, as was held in *Tillekeratne v. Wijesingha*¹, and in our opinion the irregularity in the appointment was cured by the subsequent filing of a written proxy.

¹ (1908) 11 N. L. R. 270.

“ No doubt ”, said Hutchinson C.J. in the case cited, “ the enactment means, though it does not in terms say so, that the appointment is to be signed and filed before the proctor does anything in the action. But if the omission to sign is not because the proctor has not in fact any authority, and if the client afterwards ratifies what has been done in his name by signing the authority, in my opinion that satisfies the requirements of the enactment ”. *Reginahamy v. Jayasundara*¹ and *Silva v. Cumaratunga*², which were relied upon by Mr. Renganathan, are distinguishable: in each of those cases the proctor who had signed the petition of appeal was a proctor who could not be authorised to sign it, for the reason that a proxy granted to another proctor was already in the record. In *Silva v. Cumaratunga*² the *ratio decidendi* is stated to be that “ this Court cannot recognize two proctors appearing for the same party in the same case ”. In the present case there was no bar to the appointment of Mr. Nalliah to act for the defendants. For these reasons we over-ruled the preliminary objection and heard the appeal.

The original plaintiff Arumugam had sued Kumaravetpillai on a promissory note in case No. 1339 of the District Court of Jaffna and had obtained a decree against him on the 28th November, 1931, for the recovery of Rs. 2,638 with legal interest and costs. In execution of this decree the property that is the subject of the present action was seized on the 17th September, 1946. The second defendant Kadiryamadas claimed the property, and his claim was upheld on the 2nd April, 1947. Arumugam then instituted the present action, under section 247 of the Civil Procedure Code, to have the property declared liable to be sold in execution of the decree that had been entered in case No. 1339. The action was dismissed on the 27th September, 1948, and Arumugam appealed. While the appeal was pending before this court Kumaravetpillai died, and the record of the proceedings was remitted to the District Court for the substitution of his legal representatives in his place. The record was received in the District Court on the 12th December, 1949, and the plaintiff was given time till the 13th February, 1950, to make the necessary application, but before that day the plaintiff himself died. On the 12th October, 1950, the second defendant applied for the substitution of himself and the other children of the first defendant in place of the latter, as his legal representatives, and also for the substitution of the deceased plaintiff's children in the plaintiff's place as his legal representatives. These applications were allowed on the 4th June, 1951, and the second defendant and the other appellants were substituted in the place of the first defendant, and the 2nd to 6th respondents in the place of the original plaintiff. On the 12th October, 1951, the first respondent Suppiah submitted to the District Court a petition praying for an order substituting him “ in place of the above-named plaintiff (Arumugam) who is dead ”.

It appears that on the 15th September, 1946 (before the institution of the present action and before the seizure of the property), Arumugam had assigned to one Selvadurai his interests in the decree in case No. 1339

¹ (1917) 4 C. W. R. 390.

² (1938) 40 N. L. R. 139.

“ and the full benefit profit sum and sums of money and advantage whatsoever that now can or shall or may hereafter be obtained by reason or means of the same or of any execution thereupon now had or to be had, sued out executed or obtained ”. By a deed executed on the 17th September, 1951, which recites, *inter alia*, the institution of the present action, Selvadurai assigned to the first respondent Suppiah these interests “ and all chose or choses in action founded on the said 247 action bearing 3468 of the D. C. Jaffna ”. Suppiah claimed that by virtue of this assignment he was “ entitled to have himself substituted in place of the said plaintiff who is dead and to the exclusion of the plaintiff’s heirs ”. The learned District Judge accepted this contention and said in his order :

“ If the application of the petitioner Suppiah for substitution is not granted, his interests would obviously suffer as the legal representatives of the deceased plaintiff have already agreed to settle this case and withdraw the appeal.

I hold that Suppiah is entitled to be substituted in the room of the deceased plaintiff and substitute him accordingly. The substitution of the 1st to 4th substituted plaintiffs made on June 4th, 1951, is set aside. ”

The only provisions for the substitution of a party in the place of a plaintiff in a pending action who has died appear to be those contained in Chapter XXV of the Civil Procedure Code. Under those provisions it is only the legal representative of the deceased plaintiff who can be substituted, and section 394 (2) provides that for the purposes of this Chapter legal representative shall mean 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. Suppiah was not the legal representative of the deceased plaintiff and was therefore not a person who could be substituted as a party in the place of the plaintiff. Mr. Renganathan sought to meet this difficulty by arguing that Suppiah’s application must be regarded as an application that he should be substituted in the place of the deceased’s legal representatives, the second to sixth respondents to the present appeal, who had already been made parties plaintiff. The application was not understood in that sense in the lower court, and it seems to me that its language cannot bear the meaning that Mr. Renganathan now seeks to put upon it. It is therefore unnecessary to consider whether the assignments upon which the first respondent relies entitle him to be substituted in the place of the second to sixth respondents, and if they do, what rights he would acquire by stepping into their shoes after they have agreed to withdraw the appeal that was filed by the deceased plaintiff.

The learned District Judge’s order of the 4th April, 1952, which is the subject of the present appeal, must be set aside and the first respondent must pay the appellants their costs in this court and the court below.

PULLE J.—I agree.

Order set aside.