

1970 Present : H. N. G. Fernando, C.J., and Tennekoon, J.

N. VAJIRAGNANA THERO, Appellant, and GINTOTA ANOMADASSI THERO, Respondent

S.C. 118/67(F)—D.C. Balapitiya, 1448/L

Action for declaration of right to an office—Death of plaintiff pending action—Abatement of action—Effect—Civil Procedure Code, ss. 395, 403.

Where, pending an action for a declaration that the plaintiff was the Controlling Viharadhipathi of a temple and its temporalities, the plaintiff died and the action was abated on the ground that the cause of action did not survive the death of the plaintiffs—

Held, that it was competent for the person who claimed to be the deceased plaintiff's successor in office to institute a fresh action against the same defendant for similar relief.

APPEAL from a judgment of the District Court, Balapitiya.

E. B. Wikramanayake, Q.C., with *H. Samaranayake*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *Walter Wimalachandra*, for the defendant-respondent.

June 2, 1970. H. N. G. FERNANDO, C.J.—

In this action the plaintiff sued the defendant for a declaration that he is the Controlling Viharadhipathi of a temple and its temporalities, and also for the ejection of the defendant from the temple. It would appear that a Monk who is claimed by the plaintiff to have been his predecessor had instituted an earlier action against the same defendant for similar relief to that which is now claimed by the plaintiff. That action was abated upon the death of the plaintiff in that action on the ground that the cause of action did not survive the death of the plaintiff.

The learned District Judge has in the present case upheld an objection that because of the abatement of the former action Section 403 of the Civil Procedure Code is applicable, and he dismissed the present action.

It seems to us that under Section 395 of the Civil Procedure Code it was impossible for the former action to be continued because the legal representative of the deceased plaintiff in that action could not have sued

for a declaration that he was the Viharadhipathi of the temple or for any ancillary relief. It seems to us that the former action fell within the principle applied in the case decided in 60 N. L. R. 7.

The order dismissing the plaintiff's action is set aside and the case is returned to the District Court for trial on the issues other than issue No. 26. The plaintiff will be entitled to the costs of this appeal and of the past proceedings in the District Court.

TENNEROON, J.—I agree.

Order set aside.
