1941 *Present :* **Soertsz and Wijeyewardene JJ.**

HANIFFA *v.* CADER *et al.*

*75—D. C. (Inty.) Kurunegala, 216*

***Administration—Action by widow—Application for letters by widow—Recall of letters and reissue to attorney—Irregularity in proceedings—Evidence Ordinance, s. 44—Application to add attorney—Defendants bound by order in testamentary suit—Amendment of pleadings—Civil Procedure Code, ss. 42, 472, and 547.***

The plaint was instituted by the widow of a deceased person, R, asking for a declaration that she and her children were entitled to a business carried on by the deceased under the name of S. R. M., the profits of which it was alleged were being misappropriated by the defendants, who were employees of the deceased.

On November 25, 1939, the widow obtained letters of administration to the estate of the deceased but on January 20, 1940, the letters were recalled on her application and issued to her attorney H, with the consent of the heirs.

On February 7, 1940, application was made in the action to have H made an added-plaintiff and to make certain amendments in the plaint to enable the widow and children as heirs of the estate of R, represented by the added-plaintiff, the administrator thereof, to claim a decree of Court in respect of the entire business.

*Held,* it was not open to the defendants to question the validity of the appointment of H as administrator on the ground of any irregularity that may have occurred on the administration proceedings.

Held, *further,* that the amendments should be allowed as they do not enlarge the scope of the action or cause any prejudice to the defendants.

APPEAL from an order of the District Judge of Kurunegala.

*N. E. Weerasooria, K.C.* (with him *E. A. P. Wijeyeratne*), for appellants.

*H. V. Perera, K.C.* (with him *N. Nadarajah*), for respondents.

*Cur. adv. vult.*

[1] *21 N. L. R. 62.*

May 5, 1941. WIJEYEWARDENE J.—

The plaint in this case was filed on October 7, 1939, by one Pathumma through her attorney K. M. M. Haniffa. It was stated in the plaint by Pathumma—

(i.) that one Rawther was the sole owner of a business in rice and sundries carried on under the name of S. R. M.

(ii.) that Rawther died in India in September, 1939, leaving her as his widow and five minor children.

(iii.) that the defendants who were employees of Rawther—the first defendant being in addition an attorney of Rawther—were misappropriating the profits of the business, falsifying the accounts and removing the goods with the object of defrauding her and her children.

(iv.) that irreparable loss and damage would be caused to her and her children unless "the immediate intervention of the Court was obtained before letters of administration were granted".

(v.) that she intended applying for letters of administration.

The prayer in the plaint was for a decree declaring her and her children the owners of the entire business and granting them some incidental relief.

On October 9, 1939, Pathumma moved the Court for the appointment of a receiver in terms of section 671 of the Civil Procedure Code. On November 25, 1939, she withdrew that motion on the defendants undertaking to deposit a sum of Rs. 2,000 "as security for any sum that may be found due by Court to be payable". Certain other arrangements were also made at the time without prejudice to the rights of the parties, to enable the plaintiff to take stock of the goods and examine the books of account.

The defendants-respondents filed answers in October and December, 1939, claiming to be partners of the firm with Rawther and pleading that the plaintiff's remedy was to ask for an accounting after taking letters of administration.

Pathumma obtained letters of administration in D. C. (Testy.) Kurunegala, No. 4,370, in respect of the estate of Rawther on November 25, 1939, the Supreme Court having conferred sole testamentary jurisdiction on the District Court of Kurunegala for that purpose. On January 30, 1940, Pathumma moved in the testamentary case that the letters issued to her be recalled as owing to her absence in India the administration of the estate by her had become impracticable. The District Judge allowed this motion which was made with the consent of the heirs. On the same day Haniffa, with the consent of the heirs, moved that letters be issued to him. The District Judge issued letters to Haniffa that day itself on his filing the oath of office.

On February, 1940, Pathumma's Proctor filed a motion in this action to have Haniffa made an "added plaintiff" and to make certain amendments in the plaint calculated to enable Pathumma and her children "as heirs of the estate of Rawther represented by the added-plaintiff the administrator thereof" to claim a decree of Court in respect of the entire business against the defendants-respondents. On an objection

raised by the defendants-respondents, the District Judge held that Haniffa's appointment as administrator was invalid and disallowed the motion. The present appeal is preferred against that order by Pathumma and Haniffa.

The three main questions that have to be considered on this appeal are—

(i.) Is Haniffa a duly appointed administrator ?

(ii.) Is it open to the defendants-respondents to question in this case the validity of Haniffa's appointment as administrator ?

(iii.) Are the suggested amendments of the various paragraphs in the plaint liable to be rejected on the ground that they tend to enlarge the scope of the action ?

The District Judge allowed Haniffa's application in the testamentary case to be appointed administrator and issued letters of administration to him without any such advertisement as is referred to in section 532 of the Civil Procedure Code. It was contended on behalf of the appellants that, as there had been due advertisement of the earlier application of Pathumma for letters of administration, it was not necessary to give any notice of the application of Haniffa and the learned Counsel for the appellants sought to support his argument by reference to sections 534 and 549 of the Code. It was argued that section 532 of the Code required only the first application for letters of administration to be advertised and that there was no provision in the Code requiring such advertisement in respect of a subsequent application except in the special cases falling under section 549. The Counsel's argument, if I understood him right, was that an application required advertisement in order to give notice to the world that the estate of a person was being administered as that of a deceased person, and that once the world had been given notice of that fact by the advertisement of the first application, there was no reason for giving notice of the same fact by advertising a subsequent application.

The appointment of Haniffa was not, however, made under section 534. Letters were issued to him after the revocation of the grant to Pathumma. The answer to the question whether there should have been an advertisement in respect of Haniffa's application depends on a consideration of sections 532 and 549 of the Code. I think that such an advertisement was necessary, as section 532 is operative " in all cases of application for the grant of the administration of a deceased's property ". No doubt section 549 specifically enacts that such advertisement is necessary in the case of a fresh grant of administration on the death of an administrator leaving a part of the deceased's property administered. I do not think that can be regarded as an indication of the intention of the Legislature that in all other cases where a fresh grant of administration is made, such advertisement is not necessary. It has, however, to be conceded that the need for such an advertisement in the circumstances under which Haniffa's application was made depends on the interpretation of the various sections in the Code and that there has not been a uniform practice in matters such as these in our Courts. Therefore the most that can be said against the order made in the testamentary case is, that the District Judge has on a wrong interpretation of the law issued the letters

to Haniffa without a due advertisement of his application. I do not think however that the defendants are entitled to question the validity of Haniffa's appointment in these circumstances. Under section 41 of the Evidence Ordinance the order made in the testamentary case would be conclusive proof of the fact that the legal character which it conferred accrued to Haniffa at the time when the order came into operation. The respondents seek to impugn the conclusive nature of that order on the ground that the order was made by "a Court not competent to deliver it" (*vide* section 44 of the Evidence Ordinance). It cannot be denied that the District Court of Kurunegala was duly empowered to entertain an application for the administration of the estate of Rawther. The fact that the Judge made an incorrect interpretation of the law regarding the need for notice—if it be correct to say that the Judge's interpretation was wrong—did not deprive him of the jurisdiction which was vested in him when he entertained the application. There might have been a wrong exercise of the jurisdiction which the District Judge had but not a usurpation of a jurisdiction which the Judge did not have. In *Malkarjun Bin Shidramppa Pasare* and *Narhari Bin Shivappa*[1] the Privy Council said, "The real complaint here is that the execution Court construed the Code erroneously. Acting in its duty to make the estate of Nagappa available for payment of his debt it served with notice a person who did not legally represent the estate, and on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great confusion into the administration of the law". In his commentary on the Law of Evidence, Ameer Ali says, "It cannot be said that whenever a decision is wrong in law or violates a rule of procedure, the Court must be held incompetent to deliver it." That statement of the law is founded on the Judgment of the Full Bench in *Caston v. Caston*[2] which has been followed in *Nathu Ram v. Kaluan Das*[3]. In *Caston v. Caston* (*supra*) it was argued that in view of section 17 of the Indian Divorce Act No. IV. of 1869 a decree absolute of nullity of marriage pronounced by the High Court should be regarded as a nullity because it was pronounced before six months had elapsed from the date of the decree of the District Judge which it confirmed. Strachey C.J. rejected the argument and said in the course of his judgment :—

> "Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would of course include any question of procedure, such as the question of the construction of sections 17 and 20 of the Indian Divorce Act. To illustrate this let us suppose that at the hearing either the petitioner or the respondent had formally taken the objection that an adjournment was necessary, as under the proviso in section 17 the decree could not be confirmed until the six months had expired. Suppose further that, after full argument on the point, the High Court had taken a view of section 17 different from that expressed in the Bombay case, and had confirmed the decree of the Judicial Commissioner accordingly. In such a case surely the

[1] *27 Indian Appeals 216.* [2] *I. L. R. 22 Allahabad 271.*
[3] *I. L. R. 26 Allahabad 523.*

Court would not only be competent but bound to decide the question thus raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was 'competent' to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless 'competent to deliver it' . . . . The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued by a party or Counsel. An express decision upon the construction of sections 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in section 17 could only be supported on the principle where every decision is wrong in law, or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place it is opposed to the language of sections 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decree which they referred to conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used, and it would be inaccurate to describe such decrees as constituting 'conclusive proof'."

I shall now discuss the third question more specifically. The action was instituted in order to obtain a decree in respect of the entire business and not merely the widow's share of the business. This is made clear by the prayer in the plaint that "she and her minor children be declared the owners and proprietors of the business".

Apart from any question of administration, the action could have been properly instituted and maintained if the widow and the minor children appearing by a next friend were named as the plaintiffs. There is no reason to suppose that the omission to have the minor children also as plaintiffs was due to any cause other than a bona fide mistake. There could have been no substantial objection to her getting the children added and a next friend appointed when the defendants pleaded in their answers that she could not claim in this action the shares of her children. Such an addition would not have resulted in enlarging the claim originally made and could not have caused any prejudice to the defendants. Where a new party is added, the action will, so far as the new party is concerned, be regarded as having been instituted when he was made a party. Even if it be contended that the addition of the minor children involved addition of new causes of action, such a contention could be met by pointing out that the causes of action accruing to those children have not been barred by prescription. Does the fact then, that the letters of administration were applied for and obtained after the commencement of the action alter the position? The need for administration in respect of civil actions arises in view of certain provisions of the Civil Procedure Code (*vide* sections 42, 472, and 547). Clearly section 42 has no application in the present case as Pathumma did not purport to sue the defendants in the representative character of an administrator. Section 547 has not the effect of preventing the institution of a suit in respect of an estate for which no administration has been taken. It provides only

that, "no action shall be maintainable . . . . unless letters of administration duly stamped shall first have been issued to some person or persons . . . . " (vide *Alagakawandi v. Muttumal* [1]). Hence the present action could have been maintained and continued when Pathumma obtained her letters on November 25, 1939. The subsequent recall of these letters did not and should not have the effect of abating the action. Nor do I think that section 472 presents an effective obstacle to any necessary relief being granted in this case. In fact the somewhat strict interpretation put on that section in the earlier cases has now been considerably modified (vide *Nagahawatte v. Wettesinghe* [2]).

Moreover the proposed amendments will prevent a multiplicity of suits and enable the Court to decide effectually and completely all the questions arising between the parties in respect of the business forming the subject-matter of the action. I think that this is essentially an appropriate action for the Court to exercise its powers and allow the pleadings to be amended especially as there is not the remotest possibility of the proposed amendments working any injustice to the defendants. (Vide *Seneviratne v. Candappa* [3] and *Cassim Lebbe v. Natchiya* [4].)

I set aside the order of the District Judge and direct that the motion of February 7, 1940, be allowed.

The appellants are entitled to the costs of the appeal and of the inquiry in the Court below.

SOERTSZ J.—I agree.

*Appeal allowed.*

[1] *22 N. L. R. 3.*
[2] *23 N. L. R. 70.*
[3] *20 N. L. R. 60.*
[4] *21 N. L. R. 205.*