Present : Lascelles C.J. and Ennis J.

1912.

SIVAKAMIPILLAI *v.* MANONMANI *et al.*

155—D. C. Colombo, 32,383.

Order directing plaintiff to perfect letters of administration before a specified date—Action to be dismissed otherwise—May Court grant an extension of time to perfect letters?—Power of Court to vary the order.

Where a Court ordered the plaintiff in a case to have the property claimed by him duly administered before a certain date, and stated in his order that if the letters of administration were not perfected by that date the plaintiff's action would be dismissed—

Held, that the order was in substance an order adjourning the hearing of the case, and that there was no reason to prevent the Judge from afterwards granting a further adjournment if he thought fit to do so.

THE facts are set out in the judgment.

Sampayo, K.C. (with him Gurusamy), for the plaintiff, appellant.—The District Judge had the power to give a further extension of time for perfecting the letters of administration if he was satisfied that there was no fault on the part of the plaintiff. This is not a case of an application for varying or setting aside an order or decree. We asked the District Judge only for an extension of time. That portion of the order where he says that the action will be dismissed if the letters are not properly stamped before May 6 is not a " decree "

1912.

Sivakamipillai v. Manonmani

or " order ". It is only an expression of an intention. Even if the District Judge had no power to give an extension of time, this Court has got the power (*Silva v. Silva*[1]).

Bawa, K.C. (with him *H. A. Jayewardene*), for the defendants, respondents.—The plaintiff should not have appealed. His remedy was to institute a fresh action after getting his letters stamped properly. The dismissal of this action is no bar to a second action after the letters are properly stamped. See *Karunawardana v. Wijesurial.*[2]

Sampayo, K.C., in reply.—To compel the plaintiff to bring a fresh action would be very inequitable. The plaintiff would then have to pay heavy costs and incur further expenses.

Cur. adv. vult.

August 22, 1912. LASCELLES C.J.—

The argument of the case occupied a considerable time, but the point for decision is in reality a simple one. The defendants in their answer pleaded that the action could not be maintained until the plaintiff had obtained administration for the property claimed. The learned District Judge acceded to this contention, and as the parties had acquiesced in the order that he made, no question now arises as to the correctness of the decision of the District Judge on that point.

The order was made by the District Judge on March 4, and he then decided to give the plaintiff an opportunity of amending the inventory of the estate and paying the additional stamp duty. He adjourned the case to May 6, and he stated in his order that if the letters of administration were not perfected by that date the plaintiff's action would be dismissed. May 6 came, and on that date the plaintiff had not amended the inventory nor paid the additional stamp duty. Thereupon, on May 9, the District Judge dismissed the action, refusing an application for further time. He did this, as I understand his order, on two grounds. He, first of all, held that he had no power to vary his previous order of March 4. In that I think he was clearly wrong. The order of March 4 was in substance an order adjourning the hearing of the case, and there was no reason to prevent the District Judge from afterwards granting a further adjournment if he thought fit to do so. The statement contained in the order, that if the security was not perfected by a given date the action would stand dismissed, was merely a declaration of what the Court intended to do in a certain contingency. So far, then, as the power of the Judge is concerned to grant a further adjournment, I think there can be no question at all. Then arises the question whether the plaintiff is entitled to the indulgence which she asks; for it is merely an indulgence. We have been

[1] *(1912) 15 N. L. R. 146.* [2] *(1908) 11 N. L. R. 220.*

referred to the affidavits of the plaintiff and to the record of the proceedings in the testamentary case at Jaffna. What the plaintiff had to do was really the simplest thing in the world. The inventory of the property of her intestate had to be amended, and the additional stamp duty had to be paid. We find that when the plaintiff made her application in Jaffna her petition was minutely criticized by the Secretary of the Court, who appeared to have treated the matter as an application for new letters of administration. The observations of the Secretary were then forwarded to the Acting District Judge, who made some further observations; and the matter was then passed on to the District Judge himself, with the result that the time allowed elapsed without the plaintiff being able to obtain the amendment of the inventory. While I do not think that the plaintiff was entirely free from blame in the matter, I do think that she encountered difficulties in the Court of Jaffna which were hardly reasonable. On that ground I would grant her the indulgence of a further delay of one month from the date when the record is returned to the District Court. The plaintiff, I think, ought to pay the costs of the last hearing in the District Court, namely, the hearing on May 9, and I think the costs of the appeal ought to be costs in the cause. The order then will be that the judgment of the District Court will be set aside, and the plaintiff will be allowed a month from the return of the record to the District Court within which to comply with the order as to the amendment of the inventory and the payment of the additional stamp duty.

ENNIS J.—I concur.

Set aside.