

1955

Present: Keuneman and Jayatileke JJ.

SOCKALINGAM CHETTIAR and others, Appellants, and SEEMAN APPUHAMY and another, Respondents.

11—D. C. Inty. Kalutara, 17,666.

Civil Procedure—Several defendants—Death of one—Substitution of legal representative of deceased defendant—Failure of court to enter his name in his representative capacity—Rectification nunc pro tunc—Civil Procedure Code, s. 398.

Where there are several defendants and any of them dies before trial the failure of the court to enter in the record the name, in his representative capacity, of the person who has been appointed, and has acted, as legal representative of the deceased defendant under section 398 of the Civil Procedure Code is merely a failure to perform a ministerial act, which may be performed *nunc pro tunc*. Nothing in the nature of an order absolute is needed under section 398 of the Civil Procedure Code.

A PPEAL from a judgment of the District Judge of Kalutara.

H. V. Perera, K.C. (with him G. P. J. Kurukulasuriya), for the plaintiffs, appellants.

N. E. Weerasooria, K.C. (with him M. D. H. Jayawardene), for the 2nd defendant, respondent.

Cur. adv. vult.

July 4, 1945. KEUNEMAN J.—

This mortgage action was brought by the plaintiff against the original five defendants. Pending the action and before trial the first and the third defendants died. On April 17, 1934, plaintiffs' proctor moved that the second defendant be appointed legal representative of the estates of the first and the third defendants (deceased) for all the purposes of the action. The motion was supported by petition and affidavit.

It appeared that the first defendant was the mother, and the third defendant the brother, of the second defendant. The proctors for the defendants received notice, but further order was made that the respondents to the petition be noticed. The petition dealt with another matter also, with which we are not concerned.

On April 25, 1934, the proctor for plaintiffs moved that *Order Nisi* be entered and a date given to enable him to issue the same. This was allowed on April 26, 1934, and *Order Nisi* was entered and issued. In this *Order Nisi* it was ordered that the second defendant be appointed the legal representative of the estates of the first and the third defendants who were dead, "unless sufficient cause be shown to the contrary". On August 3, 1934, a motion that the *Order Nisi* be affixed to the mortgaged house and land called Madangahawatta was allowed, and this was done later, but the respondents to the petition did not appear or show cause against the *Order Nisi*. No definite order was made that the *Order Nisi* be made absolute, nor was the second defendant's name entered in the caption as legal representatives. But the case was fixed for trial.

The trial took place on March 14, 1935, and it is clear that the present defendants were all represented at the trial. The case was settled or that date and decree was entered for the plaintiffs in terms of that settlement. Thereafter substantial payments have been made to the plaintiffs in terms of the decree.

On February 29, 1944, the proctor for plaintiff moved that the caption to the decree be amended by entering the name of the second defendant as legal representative of the estates of the first and the third defendants. The second defendant objected to the application and the District Judge refused the application on the ground that the *Order Nisi* had not been made absolute and that the appointment of the legal representative had not been made. The District Judge refused to make the *Order Nisi* absolute *nunc pro tunc* or to act as though the *Order Nisi* had been made absolute.

For the purposes of this appeal it is necessary to consider whether section 398 of the Civil Procedure Code has been satisfied by the plaintiff. This section deals with the procedure which arises when one defendant dies and the right of action does not survive against the surviving

defendants. In such a case the plaintiff may make an application to the court specifying the name, description and place of abode of the person whom he alleges to be the legal representative of the deceased defendant and whom he desires to be made defendant in his stead. In the present case the application of April 17, 1934, conforms in all particulars to the application required by section 398.

The section continues that the court shall, on being satisfied that there are grounds therefor, enter the name of such representative on the record in place of such defendant and shall issue a summons to such representative to appear and defend the action, and the case will then proceed as if the representative had originally been made a defendant, provided that the person so made defendant may object that he is not the legal representative of the deceased defendant, or may make any defence appropriate to his character as such representative.

In the present case there can be no doubt that the court was satisfied that there were grounds for the appointment of the second defendant as legal representative of the estates of the first and third defendants deceased. It is true that the court did not actually enter the name of the second defendant on the record in his representative capacity. But it is clear from the *Order Nisi* that the court made the appointment of the legal representative, subject to cause being shown. In fact the form of the *Order Nisi* is not inappropriate to the terms of section 398. In my opinion the failure to enter the name of the legal representative in the record was merely a failure to perform a ministerial act, which may be performed *nunc pro tunc*. There can be no question that the second defendant had full notice of the appointment and subsequently appeared but raised no objection to the appointment, and advanced none of the grounds set out in the proviso.

The District Judge has erred in holding that anything in the nature of an Order Absolute is needed under section 398. The section contemplates the making of the appointment and the entering of the name on the record on the *ex parte* application of the plaintiff, but the right to object is reserved to the person appointed. In the absence of any objection the appointment stands. In the present proceedings it has not been objected that the second defendant was not qualified to be appointed legal representative of the estates of the first and third defendants deceased.

It is urged that in this case no summons has been issued to the second defendant as legal representative to appear and defend the action. This would no doubt be a matter of importance in a case where a person not already a party to the action is appointed legal representative. But in the present case the second defendant was already a party, and it is clear that he had received notice of the action and of the date of trial, and in fact was represented on the date of trial.

In my opinion the order of the District Judge cannot be supported. I allow the appeal. The appellant will be entitled to the costs of the appeal and of the inquiry in the court below.

JAYATILEKE J.—I agree.

Appeal allowed.