1941 *Present :* **Soertsz and de Kretser JJ.**

SIRIWARDENE *v.* KITUGALLA *et al.*

38—D. C. Kurunegala, 16,134.

Execution of decree—Death of defendant—Application for substitution of legal representative—Notice to show cause against execution of decree—Civil Procedure Code, ss. 341 and 347.

Where, on the death of the defendant in an action, the plaintiff made an application for the substitution of the legal representatives of the defendant for the purpose of executing the decree and the legal representatives were not only given notice of the application but were called upon to show cause why writ of execution should not issue,—

***Held,* the provisions of sections 341 and 347 of the Civil Procedure Code were sufficiently complied with and that the application was regular.**

Objection to the taxation of a bill of costs must be made within a reasonable time.

APPEAL from an order of the District Judge of Kurunegala.

L. A. Rajapakse **(with him *C. T. Olegasegaram*), for plaintiff, appellant.**

E. B. Wickremanayake **(with him *N. M. de Silva*), for defendants, respondents.**

Cur. adv. vult.

[1] *16 N. L. R. 369.*

September 3, 1941. DE KRETSER J.—

A decree for partition having been entered, plaintiff's proctor submitted his bill of costs for taxation with notice to defendants' proctor. Defendants' proctor then submitted his bill, also with notice. Thereafter the secretary taxed both bills and on the bills being set off against each other there remained a balance of Rs. 1,907.31 in plaintiff's favour.

The bills were taxed in November, 1939 ; the defendant died in January, 1940, leaving a last will in which he named the substituted defendants (respondents) as executors. After waiting till August, presumably till probate had issued, plaintiff petitioned the Court to have the executors substituted for the purpose of issuing writ. The Court ordered notice on the respondents, whereupon the plaintiffs issued notice calling upon the executors to show cause why they should not be substituted as defendants *and also why writ should not issue.* No cause having been shown, the executors were substituted as defendants. Plaintiff then applied for writ and the Court allowed the application. Then the parties parleyed, not with regard to the bills alone but with regard to them as well as a number of other liabilities of the defendant. The negotiations failed and the property of the defendant was seized and advertised for sale, whereupon the substituted defendants in January, 1941, filed papers alleging that the plaintiff's bill was excessive and praying that writ be stayed pending inquiry. As an earnest of good faith they deposited the amount of the writ in Court. Once the writ was stayed they filed papers alleging that the writ had been issued without the notice contemplated by section 347 of the Code and praying that the writ be withdrawn. The District Judge in a very brief order upheld this contention, ordered return of the deposit, and directed that the secretary should retax the plaintiff's bill. Plaintiff appeals.

Attention seems to have been concentrated on section 347 of the Code and section 341 has been lost sight of. The notice that did issue has also failed to receive attention. When defendant died before the decree had been executed, plaintiff was required by section 341 to apply to the Court to execute it against his legal representatives. The application had to be by petition to which the legal representatives were respondents. It is only section 341 which deals with the execution of decrees after the death of the judgment-debtor. Section 347 does not, in my opinion, apply at all. The object of section 347 was gained by making the legal representatives respondents to the petition under section 341. There exists, perhaps, some confusion of ideas owing to decisions under the Indian Code having been read without a proper realization of the differences between that Code and ours. Section 50 of the present Indian Code corresponds fairly closely with section 341 of our Code but there is a vital difference in that it does not require the legal representative to be made a respondent to the application. Section 50 replaced a somewhat similar provision of the old Code. It was section 248, now replaced by O. XXI. R. 22 (corresponding somewhat with section 347 of our Code) which required the Court to give notice to the legal representative before allowing execution to issue. We have taken away from section 347 the part which related to legal representatives and we have added that part in substance to section

341. Accordingly decisions under the Indian Code must be carefully examined before they are followed. Like the Indian Code, section 341 does not require the substitution of the legal representative but there can be no objection to such substitution. It was held in India that an application for substitution was in substance an application for execution but that the proper application should be one for execution of the decree. *Ameer Ali & Woodroffe's Civil Procedure Code (1908 ed.)* at page 263 refers to a case in which it was so decided but unfortunately the report is not available locally. The application which the plaintiff made was one for substitution for the purpose of execution of the decree, and the executors were given full notice not only of the plaintiff's petition for substitution but they were also called upon to show cause why writ of execution should not issue. The provisions of section 341 were therefore sufficiently complied with.

When the application came up the Court quite properly ordered notice. Once the requisite notices had been served the Court was entitled not only to substitute the executors as defendants but also to allow issue of the writ. It ordered substitution only. Plaintiff then applied for writ and the writ was quite rightly allowed. It would have been raising technicality to the acme of absurdity to have issued notice again on parties who had been clearly called upon to show cause why writ should not be allowed and had had no cause to show.

The Code contemplates a prompt issue of writ after decree and requires explanation of delay for a re-issue of writ. It follows the same line of reasoning when it requires the Court to issue notice when a decree is a year old : it presumes that ordinarily the decree would have been satisfied by that time. It is for that reason it throws upon the Court the duty of protecting the debtor by issuing notice. It follows that when the Court has every reason to believe that the decree is in fact not satisfied it should allow the writ to issue. It is urged, however, that unless a notice under section 347 issues the Court has no jurisdiction to issue a writ, and the judgment of the Privy Council in *Reghunath Das v. Sundar Das Khetri* is relied upon. Unfortunately this judgment is said to be unavailable locally and this Court is asked to rely on the reference to it made in *Shyam Mandal v. Satinath Banarjee*[1]. It is there stated that, "It was pointed out by the Judicial Committee (in that case) that the notice prescribed by section 248 of the Code of 1882 is necessary in order that the Court should obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution". It is necessary to know the facts of the case in order to understand what exactly was decided.

Ameer Ali & Woodroffe in their commentary on O. XXI. R. 22 enumerate a number of cases under section 248 in which it was held that the issuing of a notice was a condition precedent to the valid execution of a decree but they do not include the case of *Raghunath Das. v. Sundar Das Khetri.* They state that where a judgment-debtor appears and contests the decree-holder's right to execute the decree he cannot object that no notice was served on him. The facts of the case now under

[1] *(1916) I. L. R. 44 Cal. 964.*

consideration are even stronger, for there was no question here as to the creditor's right to execute the decree but there was an application to have execution stayed while the bill of costs was being revised.

The case of *Malkharjun v. Narhari* [1], was one that went before the Privy Council and it indicates that the absence of notice would be an irregularity and not a matter affecting the jurisdiction of the Court to execute its decree. The Indian cases seem to have proceeded on the peculiarities of each case and on forms of procedure peculiar to the Indian law. Even, therefore, if section 347 did apply, there is no authority which compels this Court to hold that the absence of notice rendered the application for execution void, and the circumstances I have already set out show that the legal representatives did have notice and that the absence of further notice has not caused them any prejudice.

The second point is whether the bill of costs should be retaxed. The District Judge does not state under what provision he acted when he ordered that the bill be remitted to the secretary. In *Mohamed v. Deen* [2], this Court held that the proper person to refer an objection for decision by the Judge was the taxing officer. There had been no objection to the plaintiff's bill and consequently no reference by the taxing officer to the Judge, and the Judge perhaps was giving that officer an opportunity to refer any matter to him. But why does he give the legal representatives the opportunity of so moving the taxing officer ? I can see no reason for his doing so. It is true that the Code fixes no time limit for objections to the bill but that is only because it presupposes expedition in such a matter. It assumes that a proctor would be business-like in his work. It expects a decree to be executed within a year, and naturally objections to a bill of costs would come much earlier.

In *Separamadu v. Wijeytunga* [3], it was held that objections should be made promptly, and the dictum of Ennis J. in *Meenatchi v. Rengappapulle* [4], that objection should be made within a reasonable time was quoted with approval. The respondents made the very feeble excuse that the failure to object was due to the defendant being ill with cardiac trouble and thereafter to their being delayed by the muddled condition in which he left his estates. But the defendant had his proctor, who had had notice, and who was the one person competent to take objection to the items in the plaintiff's bill. He not only did not object but filed his own bill and had it taxed. The objection to the bill is therefore belated and there should be no revision of the bill. The order of the District Judge is set aside and it is ordered that the plaintiff is entitled to draw the money in deposit. He is also entitled to the costs of the inquiry in the Court below and of this appeal.

SOERTSZ J.—I agree.

Appeal allowed.

[1] *25 Bom. 338.*
[2] *8 C. L. Rec. 174.*
[3] *3 C. W. R. 367.*
[4] *15 N. L. R. 449.*