Ran Menika V. Bandi Menika

309/1965

Present: Abeyesundere, J., and G. P. A. Silva, J.

A. M. RAN MENIKA and others, Appellants, and A. M. BANDI MENIKA and others, Respondents

S. C. 5/64 (Inty.)—D. C. Kurunegala, 4227

Civil Procedure Code—Sections 394 (2) and 398—Partition action —Death of a defendant leaving a non-administrable estate— Application for substitution of legal representatives—Procedure.

Where, on the death of a defendant leaving a non-administrable estate, the plaintiff makes application under section 398 of the Civil Procedure Code for the substitution of the surviving heirs in place of the deceased, it is not necessary that he should specifically allege that the proposed substitutes are the legal representatives of the deceased, because it is implicit in the application for substitution that the proposed substitutes are the legal representatives of the deceased.

Further, in such an application, it would be sufficient if the plaintiff, without mentioning whether or not the estate left by the deceased is administrable, describes the estate as a " small estate ".

APPEAL from an order of the District Court, Kurunegala.

T. B. Dissanayake, for the 2nd, 3rd, 5th, 7th, and 18th to 21st defendants-appellants.

H. W. Jayewardene, Q.C., with *S. S. Basnayake* and *Fritz Kodagoda*, for 1A and 11th defendants-respondents.

September 8, 1965. **ABEYESUNDERE, J.**—

The appellants in this case are defendants in a partition action instituted in the District Court of Kurunegala. They made an

application to the District Court seeking execution of the final decree entered in the action and praying that they be placed in possession of the lots respectively allotted to them by that decree. The learned District Judge made order refusing the application of the appellants on the ground that the decree entered in the action was null and void because there was no proper substitution of the persons legally entitled to be substituted in place of the deceased first and fourteenth defendants. The appellants have appealed from the order of the learned District Judge.

The first and fourteenth defendants died before interlocutory decree was entered in the action. After the first defendant died the plaintiff in the action made an application to the District Court for the substitution of the deceased's children in place of the deceased. In that application the plaintiff stated that the deceased first defendant had left a non-administrable estate and that his heirs at law and next of kin were his children who were the respondents named in the application. It was argued by the Counsel appearing for the respondents at the hearing of the appeal that there was no averment in the affidavit annexed to the said application of the plaintiff that the children of the deceased first defendant were his legal representatives within the meaning of that expression as defined in section 394 (2) of the Civil Procedure Code and that therefore there was no evidence upon which the substitution could have been allowed. The proposed substitutes who were named as respondents in the application for substitution did not oppose the application and the learned District Judge allowed the substitution presumably on being satisfied that there were grounds for the substitution. Under section 398 of the Civil Procedure Code it was open to the plaintiff to apply for substitution after the first defendant died and in his application for such substitution he should only have specified the name, description and place of abode of the persons whom he alleged to be the legal representatives of the deceased defendant. The plaintiff had done so when he moved the District Court for such substitution in place of the deceased first defendant. It is unnecessary that he should specifically allege in the application for substitution that the proposed substitutes are the legal representatives of the deceased because it is implicit in the

application for substitution that the proposed substitutes are the legal representatives of the deceased.

After the fourteenth defendant died the plaintiff made an application to the District Court for the substitution of the children of the deceased in place of the deceased. In that application the plaintiff stated that the deceased fourteenth defendant " died intestate leaving a small estate and leaving surviving as heirs his children, the respondents abovenamed ". The proposed substitutes did not oppose the application for substitution. It was argued by the Counsel for the respondents at the hearing of the appeal that the plaintiff did not mention in the said application whether or not the estate left by the fourteenth defendant was administrable and that therefore it was not possible for the District Court to decide who the legal representatives of the deceased were. We think that in view of the fact that the plaintiff has stated in his application that the deceased died intestate leaving a small estate and that his surviving heirs are his children, the respondents named in the application, it may reasonably be inferred that the estate of the deceased fourteenth defendant was non-administrable and that his legal representatives were his children. As already stated, it was unnecessary for the plaintiff specifically to allege in his application that the children of the deceased defendant were the deceased's legal representatives.

For the aforesaid reasons we are of the view that, upon the inferences that may be made from the applications made by the plaintiff in respect of the substitutions in place of the deceased first and fourteenth defendants, the District Court had reason to be satisfied that there were grounds for allowing the substitutions. Accordingly we hold that the decree sought to be executed is not invalidated by the substitutions made. We set aside the order made by the learned District Judge and direct the District Court of Kurunegala to issue a writ in order that the appellants may be given possession of the lots respectively allotted to them by the final decree entered in this action. The appellants are entitled to their costs of the appeal.

G. P. A. SILVA, J. - I agree.

Order set aside.