

1907.
June 12.

Present: Mr. Justice Middleton and Mr. Justice Grenier.

IDROOS LEBBE *v.* TAMBY MARICAR.

D. C., Puttalam, 1,513.

Several judgment-debtors—Assignment of judgment to one by judgment-creditor—Execution—Satisfaction of decree by payment—Contribution—Civil Procedure Code, s. 339.

Judgment on a money bond having been entered against two defendants, one of them took an assignment of the decree from the judgment-creditor, and, with notice to the other defendant, obtained an order of Court substituting himself as plaintiff, issued writ, and seized and sold the property of the other defendant. On an application made by the other defendant to have the sale set aside:

Held, also, that where the Court has no jurisdiction at all, consent under section 339 of the Code to execute the decree.

Held, also, that where the Court has no jurisdiction at all, consent of parties cannot confer such jurisdiction.

MIDDLETON J.—The object of the original decree was fulfilled by payment of one of the persons ordered to pay to the plaintiff, and the decree in one sense came to an end. The bond merged in the decree and the decree was satisfied by payment by one of the co-obligors liable on the decree. The only remedy is an action for contribution on the assignment—an entirely new right of action.

A PPEAL from an order of the District Judge (R. N. Thaine, Esq.) setting aside a sale. The material facts and arguments appear in the judgment.

W. Pereira, K. C. S.-G. (Elliott with him), for the substituted plaintiff, appellant.

H. J. C. Pereira (G. E. Chitty with him), for the defendant, respondent.

Cur adv. vult.

12th June, 1907. MIDDLETON J.—

The original plaintiff in this action obtained a judgment on a money bond against two defendants jointly and severally, the second defendant being a surety on the bond for the first defendant. The second defendant paid the plaintiff the whole amount due and obtained on assignment of the decree in his favour from the plaintiff. The second defendant then, with notice to the first defendant, obtained an order of the Court substituting himself as plaintiff, issued a writ, and seized certain property of the first defendant, which was sold and the proceeds paid into Court, but the sale was not confirmed by the Court. The first defendant then moved to set aside the sale on the ground of material irregularity under section 282 of the Civil Procedure Code, and on the further ground

that the sale was void under the second proviso to section 339 of the Civil Procedure Code, which says that where a decree against several persons has been transferred to one of them, it shall not be executed against the others.

1907.
June 12.
MIDDLETON
J.

The learned District Judge, who has delivered a judgment commendable both in reasoning and lucidity, held—and his finding is not disputed on this point—that there was no material irregularity under section 282, but set aside the sale on the ground that, the writ being illegally issued, the sale was void, basing his judgment on *Palaniappa Chetty v. Samsadeen*¹ and a case reported at page 230 of *Sutherland's Weekly Reporter*.

The second defendant appeals against this order, first on the ground that the proviso to section 339 lays down the procedure to be followed and does not enact substantive law, and that the order substituting second defendant as plaintiff having been made *inter partes* without appeal by the first defendant shows that he waived his rights under the proviso to section 339, and was therefore now estopped from disputing the legality of the writ.

Sections 53 and 756 were quoted as showing certain matters of procedure which might be waived, and the case reported in 3 *Bala-singham*, p. 47, was relied on by the learned Solicitor-General as supporting his argument.

The observations of Lascelles A.C.J. in 9 *N. L. R.* 344 on the judgment of the Privy Council in *Rewa Mahton v. Ram Kishen Singh*,² to the effect that a purchaser who buys at a Fiscal's sale under a decree of a competent Court is not bound to assure himself that the proceedings on which the judgment is based are free from error in law or in fact, was also relied on. With that I perfectly agree, and I doubt if this side had been confirmed by the Court under section 283 to the purchaser whether it would not have been too late to raise the objection. The purchaser is, I understand, a party to these proceedings, but has not appealed, a fact which may be attributable as much to the desire to avoid further costs and trouble in the matter as to acquiescence in the order appealed against.

The question seems to be whether the proviso to section 339 is substantive law or procedure. If it is a matter of procedure, it is contended that the first defendant might and did waive the proviso as to execution by one against other co-obligors in section 339 by assenting to the second defendant's being substituted as plaintiff.

Sir Frederick Pollock in his introduction to the *Encyclopædia of the Laws of England*, vol. I., p. 4, says: "The law of duties, rights, and remedies, together with the needful auxiliary rules, is often called Substantive Law by modern writers.....The rules which fix the manner and form of administering justice are called Rules of Procedure or Adjective Law." This appears to me to be an apt description and distinction between the two classes, and I feel bound

¹ (1905) 8 *N. L. R.* 325.

² (1886) *I. L. R.* 14 *Cal.* 18.

1907.
 June 12.
 MIDDLETON
 J.

to hold that a proviso, even though it may be included in what was intended as a Code of Procedure, which imperatively directs that, where a decree against several persons has been transferred to one of them, it shall not be executed against the others, is a substantive enactment defining the rights of the so-obligors under the judgment, and not a rule which fixes the manner and form of administering the law.

The learned Solicitor-General has suggested that the reason for the proviso is to prevent confusion, but in my opinion the reason is to be found in the judgments of Peacock C.J. and Phear J. in the case reported in *Sutherland's Weekly Reporter*.

The object of the original decree was fulfilled by payment of one of the persons ordered to pay to the plaintiff, and the decree in one sense came to an end.

The bond merged in the decree, and the decree was satisfied by payment by one of the co-obligors liable on the decree.

His only remedy is an action for contribution on his assignment—an entirely new right of action.

The case is different from that of an outsider who does not satisfy the judgment by obtaining an assignment of the plaintiff's rights under it, because he was not liable under it; the outsider, therefore, can be substituted for the plaintiff and proceed to execute the process, as Phear J. puts it, provided for the purpose of securing obedience to the order.

In my judgment therefore the proviso to section 339 is an enactment of substantive law.

It has been held in the case of *Hewitson v. Fabre*¹ that the service of a writ out of the jurisdiction instead of notice of the writ, as required by Order ii., rule 6, is a nullity, and the order of service and all subsequent proceedings in the action were set aside after judgment had been signed in default of appearance and after proceedings had been taken on the judgment in the Foreign Court. No consent or waiver by the parties either can give jurisdiction in any case where the Court has no jurisdiction at all (per Jervis C.J. in *Wellesley v. Withers*,²

It is, however, here admitted that if this be an enactment of substantive law, it could not have been waived by the first defendant.

Moreover, the debt in the decree having been satisfied before execution, the sale ought not to be confirmed under section 283.

I think, therefore, that the order of the District Judge must stand, and the appeal be dismissed with costs.

GRENIER J.—I entirely agree. The proviso to section 339 is a matter of substantive law, and it was admitted by appellant's counsel that, if it were so, it cannot be waived.

Appeal dismissed.

¹ (1889) 21 Q. B. D. 6.

² (1885) 4 E. & B. 754.