1954 *Present :* **Rose C.J. and Sansoni J.**

D. S. JAYALATH *et al.*, Appellants, *and* ABDUL RAZAK *et al.*, Respondents

S. C. 65—D. C. (Inty.) Kandy, 2,259

Jurisdiction—Execution of proprietary decree—Right to challenge validity of decree—Civil Procedure Code, ss. 325, 394.

Execution proceedings to enforce a judgment are collateral to the judgment, and no inquiry into the regularity or validity of the judgment can be permitted in such proceedings.

In a suit between A and B, B died pending the action and B's devisees under his last will were substituted in his place. Subsequently decree was entered ordering A to be placed in possession of the premises which were the subject matter of the action. No appeal was filed against the judgment. When the Fiscal tried to execute the decree he was obstructed by C who had become a tenant of the premises under B during the pendency of the action and, later, under B's widow and the other substituted parties. In proceedings taken by the judgment-creditor under section 325 of the Civil Procedure Code it was contended on behalf of C that the Court had no jurisdiction to enter the decree it did because, under section 394 of the Civil Procedure Code, only the executor or administrator of the deceased B, and not his devisees, could have been substituted in the place of B.

Held, that even assuming that the judgment was based upon a misconception of the true legal position, it was not open to C to impeach the judgment for errors of law or irregularity in procedure.

Muheyadin v. Thambiappah (1945) 46 N. L. R. 370, distinguished.

APPEAL from an order of the District Court, Kandy.

N. E. Weerasooria, Q.C., with *C. Thiagalingam, Q.C.*, *H. W. Tambiah*, *E. D. Cosme* and *T. Parathalingam*, for the 1st to 4th respondents appellants.

H. V. Perera, Q.C., with *S. Sharvananda*, for the defendant petitioner respondent.

Cur. adv. vult.

October 11, 1954. ROSE C.J.—

This matter originated in an action against the present respondent by his father for a declaration that the respondent was holding certain properties in trust for the plaintiff and that the deed relating to the properties be declared null and void for the reason that they were revocable deeds of gift and had indeed been revoked by the plaintiff by deed P2 in 1947. Subsequently, before the determination of the action, the father of the respondent died and the proceedings were continued by the substituted plaintiffs who were substituted on an application made by the respondent and who claimed to be the original plaintiff's legal heirs. All the parties to the proceedings are Muslims.

2——J. N. B 41521-1,500 (12/54)

On the 4th December, 1953, judgment was given in the District Court dismissing the action of the substituted plaintiffs and entering a decree in favour of the defendant-respondent in terms of paragraphs (*b*) and (*c*) of the prayer in his amended answer, that is to say, declaring that the respondent was entitled to the premises in question and ordering the ejectment of the substituted plaintiffs from the said premises.

The relevant part of the decree, which bears the date 4th December, 1953, states :—

> " It is further ordered and decreed that the defendant be and he is hereby declared entitled to the said premises.
>
> It is further ordered and decreed that the substituted plaintiffs be ejected from premises No. 132, Colombo Street, and 28, Peradeniya Road, Kandy, fully described and set out in the said schedule and the defendant placed in peaceful and quiet possession thereof ".

There was no appeal against that decree.

On 10th December, 1953, the respondent applied to the Court for execution of the decree, and his application was allowed. Writ of possession was issued on the following day against the substituted plaintiffs. When the Fiscal's Officer went to the premises in question the 1st, 2nd, and 3rd appellants stopped execution of the decree by signing the document R1 dated December 14, 1953, which was in the following terms :—

> " We the undersigned do hereby agree to quit and vacate and give peaceful possession on or before the 21st December, 1953, and without causing any damage to premises No. 132, Colombo Street, Kandy, failing which we agree to be ejected forthwith. We shall not raise any objection to the writ or take any further time but undertake to give over possession. Writ is not to be executed till then ".

The very next day the 3rd respondent filed papers in Court claiming to be allowed to remain in possession on the ground that he was not bound by the decree. His application was dismissed as he had not been ejected, but it indicates his state of mind when he signed the undertaking R1.

When the 21st December, 1953, arrived the 1st, 2nd and 3rd appellants broke their undertaking, which they probably never intended to honour, and continued in possession. When the Fiscal tried to execute the writ on 23rd December, he was obstructed by all four appellants whereupon the respondent made an application under Section 325 of the Civil Procedure Code. The appellants pleaded in their statement of objections that they were formerly the tenants of the original plaintiff and later became the tenants of his widow and the other substituted plaintiffs in November, 1953. They attacked the decree as invalid and therefore incapable of execution. This application resulted in an order of the District Court dated 10th February, 1954, ordering the respondent, as judgment creditor, to be placed in possession of the premises in question. It is of this order that the appellants now complain.

So far as the facts are concerned, it is to be noted that the original action by the deceased plaintiff was instituted in December, 1947. The present appellants concede in an affidavit that their occupation of the premises began on the 1st January, 1950.

The appellants contend that the decree dated 4th December, 1953, is bad in law, because section 394 of the Civil Procedure Code has not been complied with by the Court in bringing the substituted plaintiffs on the record. It was submitted that only the executor or administrator of the deceased plaintiff could have been substituted in his place, whereas the persons substituted are devisees under his last will. From this it was sought to argue that the Court had no jurisdiction to enter the decree it did, and such decree must therefore be treated as a nullity. Be that as it may the decree has not been set aside by a superior Court and it seems to me to be idle to argue that, whether or not the decree is mistaken, the District Court had no jurisdiction to enter it. Assuming, but not conceding, that the judgment of the District Judge is based upon a misconception of the true legal position, it still seems to me that the matter is covered by the principle laid down in *Malkarjun v. Narhari & another*,[1] where Lord Hobhouse says at page 348 :

> " In so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right ; and if that course is not taken the decision, however wrong, cannot be disturbed."

This is not a case on all fours with the case of *Muheyadin v. Thambiappa*[2] on which the appellant's counsel strongly relied. In that case Cannon J. decided that when in a preliminary proceeding before action is filed a Court appoints the heirs of a deceased mortgagor to represent his estate, although there is no proof that the mortgaged property did not exceed Rs. 2,500 as required by section 7 (2) of the Mortgage Ordinance, Cap. 74, the Court is acting without jurisdiction. But it is important to note (1) that the validity of the order of the Court was not challenged in execution proceedings in the same action but in a separate action, (2) that the separate action was filed by a third party who, as Cannon J. points out, was a stranger to the earlier action and was not bound by it, (3) that the action was brought after the Court had made an order appointing a legal representative to represent the estate of the deceased mortgagor. In all three respects that case differs from the present one.

On the first point the present appellants are seeking in execution proceedings to attack the validity of a decree which still stands, and this they cannot do because, as the Judicial Committee observed in *Girish Chunder Lahiri v. Shoshi Shikheveswar Roy* [3] " in execution proceedings we are only construing the decree and not considering its merits ". The principle is also well settled that " a proceeding to enforce a judgment is collateral to the judgment, and therefore no enquiry into its regularity

[1] *25 I. L. R. (Bombay) 338.* [2] *(1945) 46 N. L. R. 370.*
[3] *27 Cal. 951.*

or validity can be permitted in such a proceeding ". Windham J. no doubt had this principle in mind when he decided *Chinnathamby v. Somasundera Aiyar* [1]. In that case too the Fiscal was obstructed by certain persons when he went to execute a decree ; they were not parties to the action, and when the decree holder made an application under section 325 of the Code and the matter came up for inquiry the obstructors raised objections to the regularity of the original action. The District Judge upheld the objections and dismissed the action. In appeal Windham J. said " Now section 327 of the Civil Procedure Code requires the petitioner's (plaintiff's) petition of complaint to be ' numbered and registered as a plaint in an action between the decree-holder as plaintiff and the claimant as respondent ', and it further requires the Court to ' proceed to investigate the claim in the same manner and with the like power as if an action for the property had been instituted by the decree-holder against the claimant '. But these words, though no doubt they require the investigation to be treated as if it were a ' fresh action ' (and on that point I concur with what was said in *Fernando v. Fernando* [2]) cannot in my view reasonably be construed as placing the plaintiff—the decree-holder—in the position of having to comply with all the technical requirements of the Civil Procedure Code, non-compliance with which might prove fatal to an actual fresh action brought by him. Nor is there any question of his having to show a ' cause of action '. It is sufficient that he is the holder of a decree for the possession of the immovable property. Section 327 merely says that the claim shall be investigated as if it were an action by the decree-holder against the claimant. But it is the claim (i.e., the case of the person offering resistance to the decree) which is required to be investigated, and not the decree-holder's own right. For he holds the decree, and the onus is on the claimant to support his claim as against that decree. Accordingly I think the learned Judge of the District Court erred in dismissing the plaint on issues 9 and 10, i.e., on the ground that the plaintiffs had no cause of action or had no right to maintain their action. The very decree which they held gave them that right ".

The second point on which I would distinguish this case from that decided by Cannon J. is also important. In that case it was the administrator of the deceased mortgagor who filed a separate action asking for declaration of title to the lands of the deceased which had been bought by the mortgagee in execution of the decree. That is a very different position from the one we are faced with in this appeal. It is not open to the substituted plaintiffs to attack the decree from which they filed no appeal and it is not open to those claiming rights through them, viz., the appellants, who became their tenants pending the action, to attack it either.

The third point of difference is that in this case, unlike the case decided by Cannon J., the Court had already validly assumed jurisdiction while Cannon J. thought that in the case decided by him " in the absence of evidence of the value of the mortgaged property the Court had no jurisdiction to appoint a person to represent the deceased mortgagor and

[1] *(1947) 48 N. L. R. 515.* [2] *(1923) 24 N. L. R. at p. 505.*

therefore his estate was in law not represented in the action on the bond ". He cited in support of his decision the dictum of Lord Esher M. R. in *The Queen v. The Commissioner of Income Tax* [1] :—" It (the legislature) may in effect say that if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. Then it is not for them conclusively to decide whether that state of facts exists, and if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction ".

But the case we are dealing with is different. The passage quoted by Nagalingam J. in *Marjan v. Burah* [2] is more to the point : " After a Court has acquired jurisdiction as well as a right to decide every question arising in the case, and however erroneous its decision may be, it is binding on the parties until reversed or annulled. Here we have a competent Court with admitted jurisdiction of the subject matter and the parties, with full power and authority to decide all questions arising in the case, and it is sought to impeach the validity of its decree because forsooth it was mistaken either as to the law applicable to the facts before it or to the facts themselves ". Nagalingam J. went on to say " The principle is so well settled that it is said to be an axiom of law that when a Court has jurisdiction of the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularity in practice ".

The appeal, in my opinion, is misconceived and must be dismissed with costs.

SANSONI J.—I agree.

Appeal dismissed.