Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Wood Renton.

1908. June 29.

MOHAMADO HANIFA *v.* LAVENA MARIKAR *et al.*

Ex parte OMER LEBBE, Petitioner, Appellant.

D. C., Colombo, 11,140.

Assignee of decree—Right of substitution—Right to bring fresh action on decree—Discretion of Judge—Civil Procedure Code, s. 339.

The assignee of a decree is entitled to maintain an action on the decree against the judgment-debtor.

Ramen Chetty v. Frederick Appuhami [1] distinguished.

APPEAL from an order of the District Judge of Colombo (J. Grenier, Esq.) disallowing an application made by the appellant under section 339, Civil Procedure Code, to be substituted on the record in the place of the judgment-creditor.

The application was made on December 9, 1907, and the facts on which it was based are set out in the following petition of the applicant:—

"1. On April 7, 1898, the plaintiff obtained judgment in the above case against the first, second, and fourth defendants for the recovery of the sum of Rs. 2,000, with interest thereon at the rate of 9 per cent. per annum, to be computed from March 23, 1898, until payment in full, and also the costs.

"2. On May 20, 1898, writ of execution was issued against the property of the said first, second, and fourth defendants for the recovery of the said amount, and by sale of the property a sum of Rs. 300 was realized.

"3. By deed No. 7,925 dated May 7, 1900, attested by Don Joseph Kulatunga of Colombo, Notary Public, the said M. I. Mohamado Hanifa, the plaintiff in the said case, sold and assigned over to the petitioner, his heirs, &c., all his right, interest, and claim

[1] *(1906) 9 N. L. R. 133.*

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upon the aforesaid judgment, and the free benefit and advantage thereof, for the sum of Rs. 1,500, with authority to recover and receive the balance sum of Rs. 1,700, with interest thereon at the rate of 9 per cent. per annum from March 23, 1898, and costs of suit, which are taxed at Rs. 191.27.

" 4. The first, second, and fourth defendants have not paid me the said sum of Rs. 1,700, interest, and costs, or any part thereof, and the whole of the said sum of Rs. 1,700, interest, and costs still remains due to me and unpaid.

" 5. The petitioner did not take any steps on this to have himself substituted plaintiff in the said case as transferee of the said decree to recover the said amount, as the said defendants were not then possessed of any property, but the petitioner is now informed and verily believes that they are possessed of property, and that they have the means of paying the said amount and costs.

" Therefore, the petitioner prays that his name may be substituted for that of the plaintiff in the record of the said decree, for costs incurred in this behalf, and for such other relief, &c. "

The District Judge disallowed the application, and referred the applicant to a separate action.

He appealed.

F. M. de Saram (with him *H. Jayewardene*), for the appellant.

Van Langenberg, for the respondents.

Cur. adv. vult.

June 29, 1908. HUTCHINSON C.J.—

This is an appeal by the assignee of the decree in the action from an order dismissing his application to be submitted as plaintiff. The decree was made on April 7, 1898, for Rs. 2,000, and interest, to be paid by three of the defendants to the plaintiff. The appellant, in his application to the District Court made on December 7, 1907, and in his affidavit in support of it, says that in May, 1898, a writ of execution was issued on which Rs. 300 was recovered; and that by deed dated May 7, 1900, the plaintiff sold and assigned to him his interest in the decree, on which Rs. 1,700 and interest and costs are still due; and that the reason why he did not take steps sooner to have himself substituted plaintiff was that the defendants were not then possessed of any property, but that he is now informed and believes that they are possessed of property. He does not say when he was so informed. The fourth defendant filed an affidavit in opposition, alleging that; under the circumstances therein stated, the debt had been fully satisfied, and that the applicant was fully cognizant of the circumstances.

The District Judge in the order appealed against that the reason given by the applicant for his delay of more than seven years appeared very unsatisfactory; that in view of the statements made in the fourth defendant's affidavit he did not feel justified in permitting the applicant to be substituted as plaintiff; that it was open to him to bring an action on his assignment, and that that is what he should do; that the fourth defendant's affidavit raised several questions of fact, which could be more conveniently decided, upon proper issues, in a regularly constituted action than in these incidental proceedings.

The appellant contends that the assignee of a decree cannot bring an action on his assignment; that in accordance with the ruling in *Ramen Chetty v. Frederick Appuhamy*,[1] a judgment-creditor cannot bring an action on his judgment, but must execute it in the manner prescribed by the Civil Procedure Code; and that the assignee can have no other right than his assignor.

Section 339 of the Code enacts that the assignee of a decree may apply for its execution, and, if the Court thinks fit, his name may be substituted for that of the assignor in the record, and the decree may be executed in the same manner as if the application were made by the decree-holder. But how if the Court does not think fit? In this case the Court did not think fit, and gave a good reason for refusing the application. When the Court refuses a writ of execution to a decree-holder, it does so because it holds that he is not entitled to execution, and he cannot try the question whether he is so entitled a second time by bringing an action on his judgment; but when it refuses an application under section 339, on the ground that the most convenient way of trying the questions that are raised on the assignment is by separate action, I can see nothing in the Code to prevent the assignee from bringing such an action.

I think the appeal should be dismissed with costs.

WOOD RENTON J.—

This case raises a question of considerable interest and importance. The material facts are these. On April 7, 1898, Mohamado Hanifa obtained judgment for Rs. 2,000 against the first, second, and fourth respondents. He had waived his claim against the third. On May 20, 1898, writ of execution was issued against the property of the first, second, and fourth respondents, and a sum of Rs. 300 was realized. By deed dated May 7, 1900, Mohamado Hanifa assigned all his interest under the decree to the appellant, who on December 9 last applied, under section 339 of the Civil Procedure Code, in the District Court of Colombo, to be substituted for his assignor as plaintiff in the case. He explained his long delay in moving under his assignment on the ground that the respondents were not in the interval " possessed of any property," adding that he

[1] *(1906) 9 N. L. R. 133.*

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was informed and believed that they had property now. Although, as my Lord the Chief Justice pointed out at the argument, the prayer of the appellant's petition was not strictly in conformity with the terms of section 339, inasmuch as it did not specifically ask for execution of the decree, there could have been no intention on the part of the appellant to avoid asking for execution; and I think that his petition should be treated as if he had formally done so. The first, second, and fourth defendants in the action were made respondents in the petition. But counsel stated to us that the two former are now dead; and, in any event, the fourth respondent alone was represented at the hearing of the appeal. He had answered the appellant's petition in an affidavit, which the learned District Judge had before him when he made the order appealed against, and which in substance alleged that the balance of the amount appearing due upon the judgment had by agreement between the parties been satisfied by the conveyance of certain property to Mohamado Hanifa.

The learned District Judge, in view (*a*) of the appellant's laches in making the application and failure to give any particulars of the property which he alleged had subsequently come into the respondent's possession, (*b*) of his right to bring an independent action on his assignment, and (*c*) of the statements in the fourth respondent's affidavit which could be more conveniently decided in such an action, dismissed the petition with costs. Against that order this appeal is taken. Mr. Morgan de Saram and Mr. Hector Jayewardene, on behalf of the appellant, strenuously contested the learned Judge's proposition that his client had right to bring an independent action on his assignment; and contended that the only remedy open to him was that prescribed by section 339 of the Civil Procedure Code. Mr. Van Langenberg, for the respondent, argued that there is nothing to prevent the assignee of a decree from suing on it, and that on the materials before him, viz., the appellant's delay in making his application, and the uncontradicted statements in the respondent's affidavit, the District Judge was justified in giving effect to the objection of want of due diligence, an objection equally good against the assignee of a decree and the original decree-holder, and in refusing to accede to what was practically an application for re-issue of the writ. I may add to this argument that if this be the light in which the appellant's petition should be regarded, it was the third application of that character, for it appears from the record that the writ was re-issued on September 16, 1898, and again on February 6, 1899. I agree with the decision of the learned District Judge. It is quite clear that in the absence of any enactments to the contrary, an *actio judicati* lies for the recovery of a judgment debt (*see Meruwanji Nowroji v. Ashabai* [1]). The Legislature

[1] (*1883*) *I. L. R. 8, Bom.*

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may, however, in providing a special remedy for the recovery of such debts, exclude the *actio judicati* either by express words or by necessary implication. Whether it has done so in any particular case is a question that has to be determined by an interpretation of the terms and the scope of the provisions creating the statutory remedy. It has been held by this Court (*Ramen Chetty v. Appuhamy* [1]), following various decisions under the corresponding section of the Indian Code of Civil Procedure (*cf. Ram Bakhsh v. Panna Lal;* [2] *Abidunnissa Khatoon v. Amerunnissa Khatoon;* [3] *Ali Khan Bahadoor v. Balmalkund* [4]), that section 337 of our own Civil Procedure Code is exhaustive of the remedies open to a decree-holder, and that he cannot bring a separate action on his decree. I think that we ought not to extend this ruling to the case of the assignee of a decree. The decree-holder is a party to the record. The assignee is not, till he has secured his substitution for the decree-holder under section 339. The decree-holder has a right to the issue of the original writ of execution, if his application is in conformity with the requirements of the Code (section 225). The Court has a discretion as regards the application of the assignee. Those circumstances seem to me to differentiate the case of the assignee from that of the decree-holder. Such local authority as there is supports the view that the assignee can bring a separate action on his assignment (see *Weerawagoe v. Fernando,* [5] distinguished by Wendt J. in *Ramen Chetty v. Appuhamy, ubi sup.*, on the ground that it was an action by an assignee, and *Sulyman v. Somanaden* [6]). I think that the District Judge was right on the law; and I see no reason to interfere with the exercise of his discretion on the materials before him.

I would dismiss this appeal with costs.

Appeal dismissed.

[1] *(1906) 9 N. L. R. 133.*
[2] *(1885) I. L. R. 7, All. 457.*
[3] *(1876) I. L. R. 2, Cal. 327.*
[4] *(1876) 26 W. R. 82.*
[5] *(1893) 2 C. L. R. 207.*
[6] *(1897) 3 N. L. R. 20.*