

1940

Present: Howard C.J. and Cannon J.

RAJAPAKSE *v.* BASTIAN *et al.*

62—D. C. Negombo, 11,095.

Decree—Assignment of decree—Application for substitution—No application for execution—Civil Procedure Code, s. 339.

Where a decree has been transferred an application for substitution of the transferee's name for that of the transferor in the record cannot be made under section 339 of the Civil Procedure Code apart from an application for execution.

A PPEAL from an order of the District Judge of Negombo.

L. A. Rajapakse for the petitioner, appellant.

Cyril E. S. Perera (with him S. W. Jayasuriya), for the first and second defendants, respondents.

Cur. adv. vult.

December 4, 1940. HOWARD C.J.—

This is an appeal by the petitioner from an order made on April 24, 1940, by the District Judge of Negombo, dismissing the petitioner's application to have himself substituted in place of the plaintiff in case D. C. No. 11,095, Negombo, and as such substituted plaintiff to proceed with the action. In this action decree was entered for the plaintiff who is the seventh respondent to the appeal on September 22, 1939, for the sum of Rs. 1,575 together with further interest and costs jointly and severally against the first to third defendants-respondents to this appeal. Subsequently on October 4, 1939, by consent, the defendants-respondents were given a year's time to pay and settle the plaintiff's claim and costs, if in the meantime, they paid instalments of Rs. 75 a month. By deed No. 131 dated February 10, 1940, attested by a Notary Public, the plaintiff-respondent assigned his right in the said decree to the petitioner-appellant. In dismissing the application the learned District Judge has held that such application was untenable in form inasmuch as it was merely an application for substitution unaccompanied by an application for execution of the decree. He further held that an application for execution would be premature as the defendants had time till October, 1940, to satisfy the decree.

The decision of the learned District Judge was based on an interpretation of section 339 of the Civil Procedure Code for which he purported to find authority in the judgment of Hearne J. in the case of *Latiff v. Seneviratne*¹ and in that of Garvin S.P.J. in the case of *Kailasam Pillai v. Palaniappa Chettiar*². In *Latiff v. Seneviratne* it was contended by the appellant that a sale of immovable property ordered by the Court in execution of a money decree on an application for execution by the executors of the second plaintiff was invalid because there was not a separate and distinct application for substitution. This contention was not accepted by the Court. On the other hand it cannot be regarded as an authority for the proposition that an application for substitution of the transferee's name for that of the transferor in the record of the decree cannot be made under section 339 of the Civil Procedure Code apart from an application for execution. In *Kailasam Pillai v. Palaniappa Chettiar* (*supra*) it was held that where, after a decree had been assigned in writing, it is seized by a creditor of the

¹ 40 N. L. R. 141.

assignor, the creditor is not entitled to priority merely because the assignee has made no application for execution under section 339 of the Civil Procedure Code. This case is an authority for the proposition that a transferee of a decree is only bound to proceed under section 339 if he desires execution of the decree. An assignee, as pointed out by Garvin J., who does not promptly proceed under section 339 imperils his interests in that the decree may be executed by the original plaintiff or by the application of a subsequent assignee. This case, also, cannot be regarded as an authority for the contention put forward by the respondents. In fact scrutiny of the material facts referred to in the judgment of Garvin J., as set out by Akbar J., indicates that the motion made on March 1, 1932, by the appellant in that case was for substitution and not for execution. This motion was apparently allowed. The fact that no comment was made by the Court on the validity of such motion lends some support to the contention that an application for substitution as apart from execution will lie. Our attention has also been invited by Counsel for the appellant to the case of *Fernando v. Mendis*¹ in which after decree *nisi* had been entered in an action the plaintiff assigned the decree and the assignee applied to have himself substituted as plaintiff after the decree had been made absolute. It was held that the assignment was good and that the assignee was entitled to make the application under section 339 of the Civil Procedure Code. The application in this case was for substitution only and was unaccompanied by an application for execution.

In Ceylon there appears to be an absence of authority on the question as to whether an application merely for recognition by the Court of the transferee as such will lie. This absence of authority is, however, compensated by the fact that the Indian Courts provide numerous decisions on the interpretation to be given to the corresponding provision in the Indian Civil Procedure Code. The wording of Order 21, R. 16 of the Indian Civil Procedure Code is very similar to that of section 339 of the Ceylon Code. It is true that in the Indian rule the words "the transferee's name may be substituted for that of the transferor on the record of the decree" are missing. I do not, however, consider that such omission affects the question as to whether an application under section 339 merely for substitution will lie. Numerous decisions of the Indian Courts have answered this question in the negative. Thus, in *Devraj Multani Sahai v. Fatehchand Ramchand*² it was held that an application by a transferee to be brought on the record without asking for execution of the decree is not an application in accordance with law, as it is not an application for execution of the decree; that is to say an application setting the Court in motion that the decree be executed in any manner set out in the last column of the prescribed form. In coming to this decision the Court followed *Ramachandra Aiyer v. Subramania*³. In that case Sir Bhashyam Aiyangar held that the transferee of a decree cannot make an application merely for recognizing him as a transferee, that there is no provision of law requiring the Court to recognize the validity of a transfer before the transferee has actually applied for execution and that the only application which the transferee can make is an

¹ 27 N. L. R. 143.

² (1903) 14 M. L. J. 393.

³ (1933) A. I. R. Sind 341.

application for execution. The case of *Devraj Multani Sahai v. Fatehchand Ramchand* (*supra*) was followed in *Mt. Memoo Muhammad Ismail v. Muhammad Sidik Pir Muhammad*¹. In this case it was held that an application made in the form of an execution application asking for the assignee to be brought on the record and not making any other prayer is not an application for execution made in accordance with law: and there is nothing in Order 21, R. 16 or any other rule of the Civil Procedure Code to require a transferee of a decree to apply for his name being brought on the record. The only possible application he can make is one for the execution of the decree. In *Baij Nath and another v. Ram Bharos*² the application was by the representatives of a deceased decree-holder to be brought on the record in the latter's place and that execution might be proceeded with. The Court held that inasmuch as this was not a fresh application for execution it was in order and execution might proceed. In *Akhoy Kumar Talukdar v. Surendra Lal Pal*³ it was held that on the death of the applicant for execution it is open to legal representatives to apply immediately for carrying on the proceedings in execution of the decree or to apply for fresh execution under O. 21, R. 16. It is not necessary for them nor is it competent to make an application for substitution and therefore an order for substitution if made cannot have the effect of continuing the application made by the predecessor. In *Mira Rowther v. Muhammad Ismail and others*⁴ it was held that an application by the assignee to recognize him as an assignee of the decree-holder and for transmission of the decree from the small cause side to the original side for execution is a petition for execution.

Summarizing the principle formulated in the various Indian decisions cited in this judgment it would appear that an application made merely for the assignee to be brought on the record without any other prayer will not lie. Such application must ask for execution of the decree, that is to say an application setting the Court in motion for execution in one of the modes prescribed by law.

In this case the appellant in his petition prayed that he might be substituted in place of the plaintiff and as such substituted plaintiff be allowed to proceed on with this action. At the hearing, the appellant's Counsel stated that the application was for substitution and that he was not asking for execution. Inasmuch as the decree-holder had not applied for execution there was no question of carrying on with proceedings started by him. The question for decision, therefore, is whether the petition in this case can be regarded as an application for execution. Such an application must specify the mode in which the assistance of the Court is required. It must ask for some relief. Can it be said that the words in the petition "and as such substituted plaintiff be allowed to proceed on with the action" ask for assistance or relief? In view of the fact that there had been no previous application for execution in this case I do not think that such a meaning can be given to these words. In these circumstances the decision of the District Judge was right. The appeal fails and is dismissed with costs.

CANNON J.—I agree.

Appeal dismissed.

¹ (1935) A. I. R. Sind 26.

² (1927) A. I. R. Allahabad 165.

³ (1926) A. I. R. Calcutta 957.

⁴ (1933) A. I. R. Madras 797