1920.

Present: Bertram C.J. and De Sampayo J.

ISMAIL *v.* ISMAIL.

139—D. C. Tangalla, 1,841.

Contempt of Court—Decree to effect repairs—Failure to effect repairs—Action for damages for not complying with decree—Civil Procedure Code, ss. 334 and 344—Courts Ordinance, ss. 51 and 59.

In a previous case defendant was ordered to execute certain repairs to a boiler within two months. This order was not complied with, and the District Court punished defendant for contempt, and subsequently plaintiff brought this action against defendant claiming damages.

Held, that the District Court had no authority to punish for contempt under the circumstances.

Non-compliance with the judgment of a Court is not in ordinary circumstances a contempt of Court, nor has the District Court power to punish summarily contempts of its authority, unless they are committed in the face of the Court. Other contempts must be brought to the notice of the Supreme Court.

Held, further, that the action for damages was not maintainable. The provisions of the Civil Procedure Code providing for the execution of decrees and orders were intended to be exhaustive, and it is not competent to a party who has obtained a decree to enforce that decree by a separate action. Where an action is brought in a case where the appropriate procedure is an application, the Court has power to deal with the action as though it were an application, provided the Court before which the action is brought has jurisdiction to deal with the application if it had been made in due course.

THE facts appear from the judgment.

J. S. Jayawardene, for the appellant.

Drieberg, for the respondent.

November 24, 1920. BERTRAM C.J.—

This is an appeal against an order of the District Judge of Tangalla, made with reference to a point of law, which it was thought desirable to determine, in the first instance, before the action was heard. The question was, whether the action was maintainable, and the learned Judge held that it was maintainable. It was brought with reference to a previous action, in which, on an appeal being taken to this Court, the defendant was ordered to execute

certain repairs to a boiler within two months of the payment by the plaintiff of a certain sum into Court. This order was not complied with, and the plaintiff then made an application to the Court, drawing the attention of the Court to the non-compliance, and this application was dealt with by the Court on the footing that it was well-founded; non-compliance with the Court's judgment was in the nature of contempt, and should be summarily punished for contempt of Court. It now appears that these proceedings were wholly misconceived. Non-compliance with the judgment of a Court is not, in ordinary circumstances, a contempt of Court. Nor has a District Court power to punish summarily contempts of its authority, unless they are committed in the face of the Court (see section 59 of the Courts Ordinance). Other contempts must be brought to the notice of the Supreme Court under section 51. The parties, therefore, and the Court overlooked the fact that the proceedings were inappropriate, and that the law had expressly provided for the case in question by section 334 of the Civil Procedure Code. Oblivious of this fact, the Court made an order against the defendant, punishing him for contempt, and, subsequently, the plaintiff brought this action against the defendant, claiming damages.

It has been pointed out in a previous decision of this Court, *Ramen Chetty v. Frederick Appuhamy*,[1] that the various provisions of the Civil Procedure Code providing for the execution of decrees and orders were intended to be exhaustive, and that it was not competent to a party who has obtained a decree to enforce that decree by a separate action. That decision applies wholly to the present case. It has also been suggested that section 344 of the Civil Procedure Code, which declares that all questions arising between the parties to an action and relating to the execution of a decree shall be determined by order of the Court executing the decree, and not by separate action, covers this case. It is not necessary in this case to determine whether that is a correct interpretation of section 344. But it appears that under the corresponding section in the Indian Code of Civil Procedure, before the recent changes that have been made in that Code, it was held that, where an action had been brought in a case where the appropriate procedure was an application, the Court had power to deal with the action as though it were an application, provided that the Court before which the action was brought would have had jurisdiction to deal with the applicaton if it had been made in due course. In the case of *Biru Mahata v. Shyama Churn Khawas*[2] the Court said: "We have been asked to refer the plaint in this suit as an application made to the Court executing the decree, the suit having been instituted in the same Court has had jurisdiction to execute the decree. We think that this view may be accepted, as

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

[2] *(1895) 22 Cal. 483.*

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the suit does not fail for want of jurisdiction, and the fact that the plaintiff has made his application in the form of a suit may be regarded as a merely formal defect which has done nobody any harm, except himself, as he had paid a higher Court fee than he need have paid."

Whether or not this case comes within section 344, the principle laid down in the Indian cases, one of which I have just cited, is a salutary one, and may well be applied to the present circumstances. The question which the Court had to decide was whether the action was maintainable. The judgment of the Court that it was maintainable would appear to be erroneous. But it is open to us, nevertheless, to grant the relief which was granted in the Indian case, and the only question for us is, on what terms the relief should be granted. I think that the order of the District Judge should formally be set aside, and that the case should be remitted to him, to be dealt with as though it had been an application under section 334. I think that the appellant is entitled to the costs of these proceedings both in the Court below and in this Court, and that all costs in the matter, apart from those I have just mentioned, should be taxed on the basis of the proceedings being an application under section 334, and not a separate action.

DE SAMPAYO J.—I agree.

Sent back.