

Present: Loos A.J.

AMMANULLA *v.* SINNATAMBY *et al.*

1919.

200—C. R. Batticaloa, 18,920.

Assignment of decree—Civil Procedure Code, s. 339—Execution against minors.

A got judgment against B. After B's death, B's son C got an assignment in his favour of A's decree, and issued writ of execution against the widow of B and his other children.

Held, that C cannot execute the decree against them.

"The order of the learned Commissioner appears to me to be bad for several reasons.

"The effect of the order is to enable the substituted plaintiff, who is practically in the position of a co-debtor of the appellants, to execute the decree against his co-debtors, some of whom are minors, and who cannot, therefore, have adiated the inheritance of their father, the third defendant, and further, to authorize the seizure and sale even of the private property of the substituted defendants, which did not belong to the third defendant, and which they had not inherited from him."

THE facts are set out in the judgment.

Bartholomeusz, for first, third, and fourth substituted defendants, appellants.—Respondent is the assignee of the decree, and he is also a co-debtor with the substituted defendants. He cannot, therefore, apply for execution against them. Section 339, proviso 2,

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Civil Procedure Code. Application for writ against second, third, fourth, and fifth substituted defendants cannot succeed as they are minors. Minors cannot adiate the inheritance, and are not liable to be sued for the debts of their father (*Pathman v. Kanapathipillai* ¹ and *Robert v. Abeywardene* ²). As regards the widow, execution can issue, if at all, against her only to the extent of the property of the intestate which she has adiated.

Tisseverasinghe, for substituted plaintiff, respondent.—Section 339, proviso 2, of the Civil Procedure Code does not apply. It applies only to co-defendants on record. The respondent was not a co-debtor at the time the decree was entered. It is too late now to object to the substitution of the defendants. This objection ought to have been taken in the District Court. New points cannot be raised in appeal for the first time (*Gordon Brooke v. Peera Veda*; ³ *Appuhamy v. Nona* ⁴).

Cur. adv. vult.

November 14, 1919. Loos A.J.—

The plaintiff in this case sued the three defendants for the recovery of a sum of Rs. 250 alleged to be due to him upon a promissory note for Rs. 125 made by the first and second defendants in favour of the third defendant, and endorsed by the latter to him. Judgment was entered against the defendants, who did not defend the action.

Thereafter the third defendant died, and his widow and children, with the exception of one of them, were substituted as defendants in his place on the application of the child who was not substituted a defendant, and who at the same time had himself substituted as plaintiff, the original plaintiff having assigned to him the decree obtained by him in this case.

Two of the children substituted as defendants in place of the third defendant were minors, and a guardian *ad litem* was appointed over them.

The substituted plaintiff then applied for execution of the decree, and notice having been served on the substituted defendants, the first, third, fourth, and fifth substituted defendants showed cause against the application, but the learned Commissioner after inquiry allowed the application, holding that there was nothing to show that the money paid by the substituted plaintiff to the plaintiff belonged to his father. The application for execution was by seizure and sale of the substituted defendants' property.

The first, third, and fourth substituted defendants appeal against the order allowing the application, on the ground that the substituted plaintiff is himself one of the heirs of the deceased third defendant, and accordingly one of the judgment-debtors, although he suppressed

¹ (1898) 1 Br. 118.² (1912) 15 N. L. R. 323.³ (1905) 9 N. L. R. 302.⁴ (1912) 15 N. L. R. 311.

that fact in his application to be substituted as plaintiff, and to have the heirs of the third defendant substituted as defendants, and, therefore, not entitled to have the decree executed against the appellants, as assignee of the decree, by virtue of proviso 2 to section 339 of the Civil Procedure Code.

Another ground urged in the petition of appeal is that the order of the Commissioner is bad as against the substituted defendants, who are minors.

On behalf of the substituted plaintiff-respondent it was urged that the appellants could not rely on the grounds urged in the petition of appeal, for those points of law had not been raised in the lower Court, and counsel relied on the cases of *Gordon Brooke v. Peera Veda* ¹ and *Appuhamy v. Nona* ² in support of his contention. In the first place, there is nothing in the record to indicate that those points were not raised in the lower Court; and in the next place, there are sufficient facts before the Court in this case to enable it to consider the points of law raised, even if they have been raised in appeal for the first time. No issues at all were framed.

The order of the learned Commissioner appears to me to be bad for several reasons.

The effect of the order is to enable the substituted plaintiff, who is practically in the position of a co-debtor of the appellants, to execute the decree against his co-debtors, some of whom are minors, and who cannot, therefore, have adiated the inheritance of their father, the third defendant, and further, to authorize the seizure and sale even of the private property of the substituted defendants, which did not belong to the third defendant, and which they had not inherited from him.

Such an order is in the teeth of the authority of the decisions in *Muttiah Chetty v. Maricar* ³ and *Robert v. Abeywardene et al.* ⁴

I am of opinion that the appeal must be allowed, with costs, and that the order must be set aside.

Appeal allowed.

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¹ (1905) 9 N. L. R. 302.

² (1912) 15 N. L. R. 311.

³ (1907) 11 N. L. R. 50.

⁴ (1912) 15 N. L. R. 323.