

1946

Present : Soertsz A.C.J. and Rose J.

ABOOSALIHU, Appellant, and MARIKAR *et al.*,  
Respondents.

75—D. C. (Inty.) Batticaloa, 323.

*Civil Procedure Code, s. 344—Scope of—Limited to questions arising between parties to the action or their legal representatives.*

Where the appellant who was the judgment-creditor in a case sought, under section 344 of the Civil Procedure Code, to reap the benefit of a decree entered in favour of the judgment-debtor in another case on the ground that the latter decree had been assigned by the judgment-debtor to the respondent collusively and fraudulently in order to defeat the rights of creditors—

*Held*, that section 344 of the Civil Procedure Code had no application, that section being confined to questions arising between the parties to an action or their legal representatives. The appellant's proper remedy was by way of a Paulian action.

**A** PPEAL from a judgment of the District Judge of Batticaloa.

*L. A. Rajapakse, K.C.* (with him *C. T. Olegasegurem*), for the petitioner, appellant.

*G. Thomas*, for the substituted plaintiff, respondent.

*Cur. adv. vult.*

January 15, 1946. SOERTSZ A.C.J.—

This case is full of confusion resulting from a lamentable lack of appreciation by all the parties concerned in the Court below of clear rules of procedure. The typed copies of the proceedings in the relevant cases, prepared for the purpose of this appeal, make confusion worse confounded, and it is only by consuming hours in a laborious examination of the original record in the case that I have been able to ascertain—at least I hope so—some of the material facts from which the questions submitted for our consideration have arisen. Those facts are as follows:—The plaintiff in case 323 D. C. Batticaloa obtained judgment against one Mohamad Bawa on March 25, 1941, for a sum of Rs. 432 and interest and costs. The appellant now before us, on August 16, 1941, obtained judgment in case No. 119, D. C. Batticaloa against the plaintiff in case

No. 323 for a sum of Rs. 449, and on August 18, 1941, he purported to seize the decree the plaintiff in D. C. Batticaloa 323 had obtained. But by a writing, valid on the face of it, the plaintiff in case 323 D. C. Batticaloa had assigned his decree to the first respondent to this appeal who, by an order of Court, has been substituted as plaintiff to enable him to proceed to the execution of the decree in 323 D. C. Batticaloa by virtue of his assignment.

The question thus arose whether the appellant or the first respondent who is the substituted plaintiff is entitled to reap the benefit of the decree in D. C. Batticaloa 323. It is established, beyond question now, by the ruling of the Divisional Bench that heard the appeal in *Kailasan Pillai v. Palaniappa Chettiar*<sup>1</sup> that in circumstances such as exist in the present case, the assignment being prior to the seizure prevails over it. But it was submitted to us that in view of the fact that the appellant had opposed the respondent's application also on the ground that it was collusive and fraudulent and with a view to defeating the appellant's claim that question should have been tried by the Judge when he was considering the question under section 344 of the Civil Procedure Code which the appellant contended was the section that applied. The point for decision, then, is whether that section applies, and if it does, whether such an issue can be tried and determined under it. The section is in these terms—

“ All questions arising between the parties to the action or their legal representatives and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by separate action ”.

The decree, that the appellant is seeking to execute is the decree he obtained in case No. 119 D. C. Batticaloa against the plaintiff in case No. 323 D. C. Batticaloa and in regard to case No. 119 the first respondent to this appeal is no party. He, by virtue of his substitution, is now a party to case No. 323 D. C. Batticaloa. For that reason alone, it seems to me that section 344 has no application, that section being confined to questions arising between the parties to the action or their legal representatives. The parties to the action in which the decree sought to be executed are the appellant and Mohamadu Bawa. The first respondent is a complete stranger to that action. But, even if section 344 applied, I greatly doubt that such an issue as was raised by the appellant, could be tried under it. It seems to me that the appellant has been acting in misconception of his rights and of the rules of procedure. So far as the facts disclose, it seems to me that the appellant's remedy was by way of a Paulian action. If disregarding section 344 under which appellant's Counsel placed his case, the matter be examined in the light of section 234 of the Civil Procedure Code which provides the mode of seizure in a case like this, again the appellant is involved in difficulty for the minute in the journal relied on by the appellant can hardly be said to be “ an order of the Court directing the proceeds of the former decree to be applied in satisfaction of the latter ”

<sup>1</sup> 35 N. L. R. 342,

I would dismiss the appeal, but in view of the very confused manner in which both parties presented their case in the Court below and caused the copies required for this appeal to be prepared, I would fix the respondent's costs in both Courts at Rs. 105.

ROSE J.—I agree.

*Appeal dismissed.*

