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

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RAMANADEN *v.* FERNANDO *et al.*

94—D. C. Negombo, 7,930.

Civil Procedure Code, s. 339 — Assignment of decree — The assignee becoming heir of one of the judgment-debtors after assignment— Application by assignee to be substituted plaintiff—Discretion of Court—Delay in making application—Prescription.

The second proviso to section 339 of the Civil Procedure Code, which enacts that where a decree against several persons has been transferred to one of them it shall not be executed against the others, does not apply to the case of an assignee who becomes an heir of one of the debtors after the assignment.

The Court has a discretion as to the substitution of a plaintiff; where there was considerable delay the Court referred the assignee to a separate action.

IN this action the original plaintiff sued on a mortgage bond executed by Madalena Fernando and Romel Gabriel Perera. The latter having died, the administratrix of this estate, with Madalena, was sued in the above case. On March 9, 1910, formal mortgage decree was entered against the defendants.

On October 15, 1910, the original plaintiff executed deed of assignment bearing No. 29,584, purporting to assign the said mortgage decree to Maria Perera, the daughter of Madalena. The said Maria Perera executed deed No. 33,873 dated June 15, 1916, formally conveying her interest in the decree to the respondent.

Madalena died intestate on November 7, 1916, leaving as heirs Maria Perera, the husband, and five children of a deceased daughter, Veronica.

The respondent to this appeal, who is one of the children of Veronica (as such being an heir of Madalena), applied under section 339 of the Civil Procedure Code to be substituted in room of the original plaintiff, and also prayed for authority to execute the said decree. To this application all the heirs of Madalena were made respondents, supported by the allegation that heirs were in possession of the lands hypothecated by the mortgage bond.

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The respondent originally applied on May 1, 1919, but the application was dismissed on the ground that the heirs of the original plaintiff, who had died since the decree was entered, were not made parties to the application.

The respondent renewed his application on December 15, 1919, making the heirs of the original plaintiff and the heirs of Madalena (except applicant himself) respondents to the application.

The first appellant, as administratrix of the estate of Gabriel Perera, and all the appellants who are the heirs of Gabriel Perera and Madalena Fernando, contested application.

They contended that the mortgage debt was paid by Madalena, who thereafter fraudulently procured the execution of the deed of assignment in favour of their daughter Maria Perera; that the deed of assignment executed in favour of the applicant-respondent was obtained without consideration; and that the applicant-respondent had no status to maintain the application under section 339, Civil Procedure Code, on the ground that he was an heir of Madalena, one of the co-debtors under the mortgage decree. They maintained that the assignee should be referred to a separate action for contribution.

The learned District Judge disallowed the objection under section 339, and fixed a date for the inquiry into the question of payment and satisfaction of the decree as alleged by the appellants by the following order :—

> The petitioner in this case is the assignee of a decree against the defendants, one of whom is deceased. It is admitted that the petitioner is an heir of the deceased defendant, and the first point for decision is, whether in this case he can execute the decree. Proviso 2 of section 339, Civil Procedure Code, enacts that where a decree against several persons has been transferred to one of them, it shall not be executed against the others. Now, in the present case, the petitioner, who is the assignee, is not one of the co-judgment-debtors. But he is the heir of one of the deceased co-debtors. And it has been held in *Ammanulla v. Sinnatamby* [1] that the heir of a co-debtor in such a case stands in the shoes of the co-debtor, and cannot execute the decree. The only difference in the present case is that here the petitioner became an heir of the co-debtor after he became assignee, whereas in *Ammanulla v. Sinnatamby* [1] the person seeking to execute the decree was already an heir before he became assignee. Does this make any difference? That is the only point for my decision at present. Now, the logical basis of proviso 2 to section 339 seems to be this : that where a debt is due from several co-debtors and one of them pays the creditor the whole debt, the decree has then been satisfied, and therefore writ cannot be issued. The satisfaction of the decree in such a case consists in the fact that the creditor has been paid the debt by the debtor himself or one of the debtors. This is not the case where a complete outsider, who is not himself a debtor, pays the amount of the decree to the creditor, and so takes an assignment of the decree. In such a case, though the creditor has received his money, yet the decree has not

[1] *(1921) 21 N. L. R. 245.*

been satisfied, because the debt has not been paid by the judgment-debtors. And it seems to me that that is what has happened here. The petitioner took an assignment of the decree. At that time he was not an heir of one of the debtors, but was a complete outsider to the case. He stood then in the position of a genuine assignee who has a right to execute the decree. The fact that he afterwards happened to become an heir of one of the co-debtors cannot alter his status as assignee, which was once and for all determined at the time he took the assignment. Therefore, I hold that he has status to execute the decree, and is not debarred from doing so by proviso 2 of section 339. The present point will, therefore, be decided by this Court in favour of the petitioner.

There is, however, a further point. The contesting respondent asserts that payment has already been made, and asks that satisfaction of decree be entered. That question has yet to be determined. And I fix inquiry into that matter for July 18.

H. J. C. Pereira, K.C. (with him *Canakeratne*), for applicant.

Samarawickrema, for respondents.

October 20, 1921. BERTRAM C.J.—

This is a matter which has given us some trouble to decide. The appeal is against an order of the District Judge of Negombo granting an application to be substituted as plaintiff made under section 338 of the Civil Procedure Code by the assignee of a decree in a mortgage action, which was recovered in the year 1910, against a principal debtor and the administratrix of his surety. Although the two defendants themselves bore to each other the relation of principal and surety, the liability on the mortgage bond was in fact joint and several. The peculiar feature of the case is that the assignee of the decree has by virtue of the death of the first defendant himself become an heir to the first defendant, and if he is now substituted as plaintiff, he will be in the position of enforcing the decree against the heirs of the first defendant, of whom he is one. It has been argued that the case comes within the second proviso to section 339, which says that where a decree against several persons has been transferred to one of them, it shall not be executed against the others. The learned Judge has given a decision on that point of law. He has referred to the various authorities cited, and he has come to the conclusion that the proviso does not apply. With that conclusion I feel bound to agree. I do not think the proviso applies to a case where a person becomes a party to a suit by operation of law after the transfer. But there is another point to be considered.

The power of the Court to substitute a plaintiff in the action is entirely discretionary. The question arises whether in the circumstances of this case we should exercise our discretion in favour of the assignees. Allegations of fraud have been made. On these I express no opinion. That is a question of fact which shall

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have to be tried out in the Court below. But it is admitted that if the assignee is substituted as plaintiff and pursues his remedy, there is nothing to prevent him proceeding in the first instance against the property which the surety has mortgaged in the mortgage bond. Mr. Pereira pressed us very strongly with this consideration that as things stand he is bound to the terms of the bond which makes him a joint and several debtor, and that he will not be able to insist on any rights he might otherwise have as surety against his principal.

There has been a very considerable delay in making this application, and he claims he is prejudiced by that delay. He is certainly prejudiced to this extent that the original debtor and creditor are both dead, and that those from whom he appears may thus have a difficulty in proving their case. If the present applicant is compelled to enforce his remedy by a separate action, Mr. Pereira insists that in reconvention he will be able to set up pleas which will place him in a more equitable position. I think there is some force in his contention. Delay in making the application has been referred to as a ground for viewing it unfavcurably in one of the authorities, and in all the circumstances of the case I think it would be better that the assignee should assert his rights by a separate action. There may, however, be one difficulty that if we put the assignee to this course his claim will apparently be prescribed. There certainly has been very long delay. There may be more reasons than one for that delay. We should be reluctant, therefore, to take a course which would deprive him of his remedy altogether, Mr. Pereira in open Court on behalf of his client has formally waived any plea of prescription that he may put forward in any subsequent proceedings, and as it appears that action taken by a Court on such a waiver would be sufficient to estop his client if any attempt were made to set up the plea of prescription in any action, it seems to me that that waiver disposes of the difficulty which I mentioned.

For these reasons I would allow the appeal, and refuse the application of the assignee of the decree to be substituted as defendant. I would allow the appeal on the usual terms as to costs.

DE SAMPAYO J.—I agree.

Appeal allowed.