

1922.*Present : De Sampayo and Porter JJ.*NAGALINGAM *et al* v. CHITTAMPALAM *et al*.

58—D. C. (Inty.) Jaffna, 10,298.

*Assignment of decree—Order of statement—Application by assignee to be substituted plaintiffs and to have order of abatement set aside—Civil Procedure Code, s. 404.*

The decree in this case was assigned to the appellants after an order of abatement was made. They moved to be substituted plaintiffs and to have the order of abatement set aside.

*Held*, that they had no status to make the application.

**T**HE facts appear from the judgment.

*E. W. Jayawardene*, for the appellants.

*Hayley*, for the respondents.

July 21, 1922. DE SAMPAYO J.—

This is a somewhat peculiar case. In the action No. 9,104 of the District Court of Jaffna, the plaintiff sued the second defendant on a promissory note and obtained judgment. In execution of the decree, he seized a number of lands which were claimed by the first defendant upon a transfer made in his favour by the second defendant. The claim was upheld. Consequently the plaintiff brought this action, which was instituted so long ago as February, 1915, to have it declared that the deed executed by the second defendant in favour of the first defendant was in fraud of creditors, and to have it set aside. Sometime afterwards the plaintiff assigned the decree in the previous action to the present appellants, and they came into the present case and asked to be substituted as plaintiffs in place of the original plaintiff, and also to have an order of abatement entered by the Court set aside. The order of abatement was made in these circumstances. On April 23, 1915, the Court ordered this case to be put by in order to enable the plaintiff to seize and realize, if possible, some other property of the second defendant as judgment-debtor in the previous case. But later the Court ordered the action to abate, as no steps had been taken for over a year. The only question, so far as I am concerned, on this appeal, is whether the appellants can bring themselves under any provisions of the Code entitling them to be substituted as plaintiffs in this case, and to have the order of abatement set aside. Mr. Jayawardene, for the appellants, refers us to section 404 of the

Civil Procedure Code. But there are one or two difficulties in the way of the appellants in seeking to come under that section. In the first place there was no assignment, creation, or devolution of any interest in this action by the plaintiff to the appellants. Secondly at the time of the assignment this action was not pending, as the order of abatement had already been made. I do not think that section 404 helps the appellants. I think really they have mistaken their remedy in seeking to intervene in this action. The District Judge, I think, was right in refusing the application, and I would dismiss the appeal with costs.

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I agree. I will only add, that had there been any merit in this application, the way in which it was framed made it impossible for the Judge to have granted the application. The appellants asked, in the first place, to have the order of abatement rescinded; and secondly, that they be made parties to the action. They had no status, not being parties to the action, and, therefore, on the application to set aside the order of abatement, they could not be heard, the Judge was right in refusing to grant the application.

*Appeal dismissed.*

