1954 *Present :* **Rose C.J. and Fernando A.J.**

R. T. SIRIMALA VEDA, Appellant, *and* P. T. SIRIPALA *et al.*, Respondents

S. C. 393—D. C. Kegalle, 6,186

Civil Procedure Code—Procedure when assignee of a decree seeks to obtain execution—Validity of an order for execution preceded by substitution—Assignee in insolvency—" Representative " of insolvent—Sections 339, 347.

(i) Where the assignees of a decree first applied for substitution as plaintiffs and, after that application was granted, made a separate application for execution, without a formal petition—

Held, that the applications, taken together, constituted substantial and sufficient compliance with the requirements of section 339 of the Civil Procedure Code.

(ii) The assignee in insolvency of a judgment-debtor is a "representative" of the judgment-debtor within the meaning of section 339 of the Civil Procedure Code. Therefore, where a mortgagor against whom a hypothecary decree has been entered is subsequently adjudged insolvent and the hypothecary decree is thereafter transferred by assignment from the mortgagee to any other person, such assignee, when he applies for execution of the decree under section 339 of the Civil Procedure Code, must name as respondent the assignee in insolvency of the judgment-debtor and/or a person who has purchased the mortgaged property from the assignee in insolvency. Failure to do so will render null and void the sale in execution of the hypothecary decree.

APPEAL from a judgment of the District Court, Kegalle.

H. V. Perera, Q.C., with *H. W. Jayewardene* and *D. R. P. Goonetilleke*, for the plaintiff appellant.

N. E. Weerasooria, Q.C., with *Sir Lalita Rajapakse, Q.C.*, and *G. D. C. Weerasinghe*, for the 1st defendant respondent.

C. R. Gunaratne, for the 2nd defendant respondent.

Cur. adv. vult.

June 7, 1954. FERNANDO A.J.—

The plaintiff appellant in this case instituted an action against three defendants for declaration of title to a ⅓rd share of a land called Divelgam Walauwa-watte ; the claim against the 3rd defendant was adjusted at the trial and the contest was between the plaintiff on the one hand and the 1st and 2nd defendants on the other.

The share in dispute was originally owned by one Richard Nugawela, who mortgaged the land in 1924 as security for a sum of Rs. 15,550. The mortgagees put their bond in suit in 1924 and hypothecary decree was entered in that action on December 12th, 1929. Although notice was served on the mortgagor in 1931 to show cause why commission for sale of the mortgaged property should not issue, no steps were taken at that stage to have the property sold in execution.

Richard Nugawela, the original owner and mortgagor, was adjudged insolvent in 1936, and on October 7th 1936 the Secretary of the District Court of Kegalle was appointed assignee of the insolvent estate ; the share in dispute in the present case was sold by the assignee on April 11th 1938 with leave of the Court, the sale was confirmed by Court, and on October 10th 1938 a conveyance was executed in favour of the purchaser who is the plaintiff in the present action. The plaintiff's claim to the share in dispute is based on this conveyance.

In March 1939 the mortgagees who had obtained the hypothecary decree in the mortgage action assigned the decree to the 1st and 2nd defendants who on May 5th 1939 filed a petition in the mortgage action for the substitution of themselves in place of the original plaintiffs *for the purpose of proceeding with the action to recover the amount due under the decree in this case.* The mortgagor Richard Nugawela was the only respondent named in the petition and notice was issued on him, but although he was represented at the hearing of the petition of July 5th 1939, no objections were filed on his behalf to the application of May 5th 1939. The Court at first made order that writ (presumably for execution) may be issued but, upon a statement by the proctor for the petitioner that his application was only for substitution, the Court vacated the order for issue of writ and only allowed substitution. Subsequently on July 20th 1939 the substituted plaintiffs applied for notice on the defendants (Richard Nugawela) to show cause against the issue of a commission for the sale of the mortgaged property, and cause not having been shown the commission for sale issued. That commission was returned unexecuted on September 1st 1940 on the ground that the substituted plaintiffs were not desirous that the sale be held for some reason of their own. On application made on October 14th 1940 and after notice to the defendant Nugawela, the commission was reissued on December 19th 1940. The property was sold under that commission and purchased by the substituted plaintiffs in whose favour a conveyance was executed on April 15th 1943. The title of the 1st and 2nd defendants to the present action, who were the substituted plaintiffs and the purchasers in the mortgage action, is based on that conveyance.

The learned District Judge has dismissed the plaintiff's action holding that the title of the 1st and 2nd defendants on the conveyance of 1943

in the mortgage action confers a better title than that obtained by the plaintiff by virtue of the conveyance in his favour in the insolvency proceedings. This appeal against the judgment of the District Judge is based purely on questions of law concerning regularity of the proceedings in the mortgage action which preceded the sale in execution under the hypothecary decree. Counsel for the plaintiff appellant questioned the regularity of those proceedings on three grounds.

Firstly it was argued that under section 339 of the Civil Procedure Code the only application which may be made by the assignee of a decree is one for *execution* of the decree, that it must be made by *petition* and that on such a petition the order for substitution of the assignee as plaintiff could only be ancillary to the substantial order which the Court may make namely an order for execution of the decree. It was urged that the order of Court made on July 5th 1939 for the substitution of assignees as plaintiffs was a nullity because the Court had no jurisdiction to allow the substitution except upon an application for execution of the decree. Counsel referred to the case of *Rajapakse v. Bastian*[1] where this Court upheld the refusal of the District Court to allow the application by the assignee of a decree to have himself substituted as plaintiff in the action. There too the applicant's counsel had as in the present case stated that *the application was one for substitution and that he was not asking for execution.* Howard C.J. held that an application made merely for an assignee to be brought on the record without any other prayer will not lie. Such application must ask for execution of the decree. The first contention of the appellant in this case was therefore that the petition for substitution was a nullity, that the only application properly before the Court was that made on October 14th, 1940 for execution, and that the latter not having been made in compliance with section 339, i.e., by petition in which the mortgagor-defendant (*inter alia*) should have been made respondent, the Court had no jurisdiction under section 339 to allow execution.

There are seemingly conflicting decisions or dicta of this Court as to what the correct procedure should be when the assignee of a decree seeks to obtain execution, particularly with regard to the question whether it is permissible for the Court to allow an application for execution *which has been preceded by an application for substitution.* In *Abeywardene v. Marikar*[2], Withers J. held (Burnside J. *dubitante*) that an application for the substitution of the legal representative of a deceased plaintiff was an incidental step, and that it should be made by motion and not by petition by way of summary procedure. In *Adawiappen v. Aboobucker Lebbe*[3], Schneider J. held that in a case where the plaintiff had died after decree, " before any step in execution can be taken it was necessary that some person should have been substituted in his place. The procedure for doing so is pointed out in *Abeywardene v. Marikar*[4]. This substitution having taken place, then a motion should have been submitted for execution of the decree ". In *Silva v. Kavanihamy*[5], although the question of the validity of an order for execution preceded

[1] *(1940) 42 N. L. R. 214.*
[2] *(1892) 1 S. C. R. 192.*
[3] *(1924) 6 C. L. Rec. 17.*
[4] *(1892) 1 S. C. R. 192.*
[5] *(1948) 50 N. L. R. 52.*

by substitution did not directly arise, yet the practice of allowing execution in such circumstances was referred to without criticism. Canekeratne J. said at p. 53 " the judgment-creditor having died an application for substitution was made thereafter, and after notice to the debtor, certain persons, one of whom was P. H. W. Edwin Singho, were substituted on January 13th 1937. On November 8th 1937, an application for execution was made to the Court by the substituted plaintiffs. It is in the form specified in the Code, Form 42 in the schedule and is marked 5 D5, the names of the plaintiff and of the defendant are given in the application and the amounts paid are shown. The prayer is that the writ lying in the above case may be executed and be issued for execution to recover Rs. 691·83½ with further interest. It was allowed by the Judge." In *Latif v. Seneviratne* [1] Hearne J. said that s. 339 does not contemplate that there should be an application for substitution as distinct from an application for execution. All that is necessary is that the transferee should file his application for execution setting out the grounds on which he claims to be the transferee and the Court orders the application for execution to proceed or rejects it. If the Court allows the application it also orders that the transferee's name be substituted for that of the original decree holder. He pointed out that in that case the fact that the application for execution was not made by petition did not vitiate the sale. The application set out all the relevant details, a formal declaration was made that the details were true and the appellants given due notice, and he held that even if the application cannot be described as a petition he would follow the principle that the Court would not be disposed to set aside an execution on merely technical grounds when the execution has been found to be substantially right.

In view of these cases it appears that our Courts have not laid it down as a *sine qua non* for the validity of an order for execution under section 339 that there must be strict compliance with the exact procedure specified in the section. The argument for the appellant in this case is that the provisions of the section are mandatory and that the Court would only have jurisdiction to allow an order for execution where there has been strict compliance : in the absence therefore of the contemplated application *by petition* the Court if it allows execution would not be committing an error of jurisdiction, but would be acting without jurisdiction, a circumstance which would totally vitiate the order for execution. Counsel for the respondent urged that there had been substantial compliance with the provisions of s. 339 and relied on decisions relating to s. 347 where substantial compliance was held to have been sufficient. A Full Bench of the Bombay High Court in the case of *Lakhamshi v. Dahyabhai* [2] dealing with Order 21 Rule 16 of the Indian Civil Procedure Code which provides for execution upon application of the assignee of a decree, held that the assignee cannot get a decree executed unless he had established his title to be assignee after giving notice to the judgment-debtor and after his objections if any had been heard by the Court. It was pointed out that while the Privy Council regarded the notice to the judgment-debtor as mandatory and the very foundation of the jurisdiction to allow execution, the view of the Privy Council was that

[1] *(1938) 40 N. L. R. 141.*

[2] *A. I. R. (1949) Bombay 63.*

what is prohibited is the execution of the decree *without hearing the objections of the judgment-debtor*. The facts of the case were that though no notice was given to the judgment-debtor in terms of the section, nevertheless the debtor did appear and raised objections challenging the title of the assignee to maintain the execution proceedings. The Court held that the irregularity of not issuing the necessary notice had been cured by the judgment-debtor putting in a written statement and filing his objections which were considered before execution was allowed.

Applying the *ratio decidendi* of that case to the one before us it will be seen that the object which the Legislature had in view in providing for a procedure by way of petition for an application for execution has been substantially satisfied. Although in fact the application of October 14th 1940 for execution was not made by petition and did not specify the title of the assignee to ask for execution, yet there had been previously made to the Court a petition for substitution upon which the judgment-debtor could if he so wished have challenged the title of the petitioner. He was aware, and the Court was aware, when the subsequent application for execution was made, that substitution had previously been allowed by the Court on the application by the assignee. The principal object of the section being not so much to permit objections to the issue of execution but to permit challenge of the validity of the assignment, that object was in my opinion substantially satisfied by what took place in the proceedings in the mortgage action. Howard C.J., in *Rajapakse v. Bastian* [1], said that the question for decision in that case is whether the petition in that case could be regarded as an application for execution. Undoubtedly it could not. But if in fact it had been followed by an application for execution I do not think the Court would have had much hesitation in deciding that the applications taken together constituted substantial and sufficient compliance with the requirements of s. 339.

For the reasons set out above, I am of opinion that the conveyance in favour of the respondents cannot be impeached on the first ground contended for by the appellant.

Secondly, Counsel for the appellant argued that the order for execution of the decree in favour of the substituted plaintiffs in the mortgage action was invalid on the ground that the original plaintiffs (who had assigned their rights under the decree to the defendants in the present case) had not been named respondents to the application for execution. Here too the principle sought to be relied on is that the provisions of s. 339 are mandatory and that the naming of the assignors as respondents was essential in order to confer jurisdiction on the Court. The object of the section in requiring that they be so named was to give them an opportunity of denying the validity of the assignment or of alleging that the assignment was subject to some reservation or qualification.

On the facts of the present case there appear to have been no circumstances whatever which would permit one to take the view that this object had been even substantially secured. The effect of the order for execution and the substitution allowed by the Court would have been

[1] *(1940) 42 N. L. R. 214.*

to sweep away the right of the alleged assignors, and undoubtedly the latter would be entitled successfully to challenge the validity of such an order on the ground that it was made without notice to themselves. It is not equally clear that a third party like the present appellant would have a similar right. There is much to be said for the view that the failure to comply with a procedural provision framed to secure so important an object would vitiate the order for execution, but in view of my decision on the third point raised by the appellant it is unnecessary for the purposes of this case to decide the question involved on this second ground of appeal.

The third ground taken at the argument in appeal is that the order for execution and the sale and conveyance in pursuance of it are void by reason of the failure to name, as respondents to the petition for execution, the assignee in insolvency of the original mortgagor and/or the present plaintiff who had purchased the property in the insolvency proceedings. Counsel for the appellant conceded that the title of the plaintiff to the property which he purchased was subject to the hypothecary decree previously entered in the mortgage action, but argued that never-the-less the rights under the hypothecary decree could not be enforced in such manner as to affect the title of the appellant unless the assignee in insolvency or the appellant or both had been named respondents in the execution proceedings.

There is no express provision in the Code laying down the procedure to be followed by the holder of a decree in a case where the judgment-debtor is subsequently declared insolvent and an assignee in insolvency appointed. In *Carson v. William Cameron* [1] a mortgagee had obtained a hypothecary decree, but before the mortgaged property was seized in execution the mortgagor was adjudicated insolvent and an assignee of his estate appointed. Subsequently, the plaintiff applied *ex parte* to have the assignee made a party defendant and for execution to be levied on the mortgaged property. The District Judge refused the application on two grounds :—*Firstly*, that the assignee could not be made a defendant at a stage after judgment, and *secondly*, that the plaintiff was not entitled to interfere with the assignee's duties and rights of administration which included the right to sell the insolvent's interests in the mortgaged property. Immediately thereafter a proxy was filed on behalf of the assignee authorising the proctor to consent to the issue of execution against the mortgaged property. Clarence J. held in appeal that the mortgagee is entitled to proceed to execution under his decree and the insolvency threw no obstacle in his way. The learned Judge was " not at present prepared to say that the mortgagee was bound even to give the assignee notice before proceeding to execution ", but he did not consider the point because in fact the assignee had intimated to Court that he did not oppose the plaintiff's application for execution. Counsel for the respondent in the present appeal relied on that judgment as authority for the argument that there was no necessity to name the assignee or his successor in title as respondent in the proceedings under s. 339. It must be noted however that the remark of Clarence J. regarding the need for notice to the assignee was clearly an *obiter dictum*. In *Suppiah*

[1] *(1883) 5 S. C. C. 149.*

Pillai v. Ramanathan [1] it was held that where the property of a judgment-debtor had been seized in execution of a decree, the insolvency of the judgment-debtor after seizure does not abate the seizure and that therefore, the seized property being already in the hands of the law it was not necessary to substitute the assignee in insolvency in place of the insolvent debtor. That decision is inapplicable to the case of a hypothecary decree where the title to the mortgaged property still remains in the judgment-debtor, being only liable to be sold under a subsequent order if the principal debt is not paid. The property would not come "into the hands of the law" until the order to sell is actually issued. In *Santiago v. Segu Mohamado* [2] the judgment in which was only a brief one, the District Judge had apparently refused to permit the judgment-creditor to enforce his hypothecary decree, presumably because the Judge thought that the subsequent insolvency of the debtor barred the right of execution. Apparently also in that case no assignee in insolvency had even been appointed, and that being so the title to the mortgaged property undoubtedly remained with the judgment-debtor. Obviously therefore the plaintiff was fully entitled to have the land sold in execution of his decree, the right which this Court recognised in appeal. Macdonell C.J. however said that after the sale or auction "the money or the proceeds thereof would have to be lodged in Court and there will then be ample opportunity for the assignee of the insolvent, if such be then appointed, to show cause against the money being paid out to the plaintiff and to impeach the plaintiff's mortgage". It might be that this was said *obiter*, but the learned C.J. must have intended it either as guidance or as a directive to the lower Court in regard to the matter of the disposal of the proceeds of sale. If it is open to an assignee to impeach a mortgage, a sale in execution of which had taken place even prior to his appointment as such, it would seem to follow *a fortiori* that after he is appointed an order for sale cannot issue except after notice to him.

We were not referred to any decision expressly declaring that a decree which has been entered against a defendant who subsequently becomes insolvent cannot be executed without notice to the assignee. But recognition of the status of the assignee is implied in the judgment of Drieberg J. in *Hong Kong and Shanghai Bank v. Krishnapillai* [3] where in his judgment at p. 255 (citing from *Mathiah v. Markar Tamby* [4]) he refers to three courses open to a mortgage creditor when the mortgagor is adjudicated insolvent—"he should make a formal demand of the assignee in order to allow him the opportunity of redeeming the mortgage under s. 76 of the Ordinance and disposing of the property for the benefit of the creditors; if the assignee does not elect to redeem the property the mortgage creditor can prove his claim under the mortgage bond and when the property is sold he can draw the whole proceeds or so much as is sufficient to satisfy his claim, or he might bring an action on the bond against the mortgagor as debtor and against the assignee as the party in whom the property has vested under s. 71 of the Ordinance, obtain a hypothecary decree and have the property sold".

[1] *(1920) 22 N. L. R. 225.*
[2] *(1931) 32 N. L. R. 222.*
[3] *(1932) 33 N. L. R. 249.*
[4] *(1854) 6 S. C. C. 83.*

The dictum of Drieberg J. referred only to the position of a creditor upon a mortgage and not to one of a creditor who had obtained a mortgage decree prior to the insolvency of the debtor; but I find it of assistance in construing the provisions of s. 339 of the Civil Procedure Code which requires the assignee of the decree to name as respondent to his petition for execution "the parties to the action or their representatives". The person who must first and obviously be named respondent is the judgment-debtor, but where an assignee of the judgment-debtor has been appointed already, his title to the mortgaged property as well as his interest in the proceedings in the mortgage action would have ceased and undoubtedly the object of the section is not secured by serving a notice on him of the petition for execution.

Counsel for the 1st respondent relied on decisions that in considering the validity of execution proceedings, the Court would not insist on compliance with technical requirements as to procedure. That principle is well recognised, but when there is non-compliance with any particular procedural requirement, it is the duty of the Court to consider the object which the Legislature had in mind when imposing the requirement and the importance of that object: if in fact the consequence of the procedural defect is that some important object has not been secured or that a means of protection intended to be afforded to some party or other interested person has not in fact been afforded to him, then the execution cannot be said to be substantially right and a Court which declares it invalid will not be doing so on "merely technical grounds". Counsel also cited the case of *Malkarjun v. Narhari and another*[1] where upon the death of the judgment-debtor notice was served on a person stated by the plaintiff and found by the Court to be his legal representative. The Privy Council held that once notice was served the Court had jurisdiction to order the sale despite its erroneous finding that the party served was the legal representative. This case was distinguished by the Privy Council in *Ragunath Das v. Sundar Das Khetri*[2] on the ground that in the latter case where the debtor had been adjudicated insolvent no notice of the application for execution had been served on the assignee of the insolvent estate. The two cases illustrate the difference between an error of the Court in the exercise of jurisdiction, which would make the execution only voidable, and a failure to take a step necessary to found jurisdiction, which renders anything done in purported exercise of the jurisdiction a nullity. The defect in the case now before us is clearly one of the latter description. The case of *Ragunath Das v. Sundar Das Khetri* is of importance because in fact the assignee had notice of an application for substitution but no notice of the application for execution.

Another argument which we were invited to consider in favour of the respondents to this appeal was that s. 339 of the Civil Procedure Code does not apply to a mortgage action. For the 1st respondent it was urged that S. 12 of the Mortgage Ordinance (Cap. 74) includes the power to give directions for the substitution of parties at the stage of execution: Counsel for the 2nd respondent made the more extreme suggestion that

[1] *(1900) 27 Ind. App. 216, 25 Bombay 337.* [2] *I. L. R. (1914) 42 Cal. 72.*

the whole set of provisions in the Civil Procedure Code dealing with execution is excluded from application to a mortgage action. Even assuming for a moment the correctness of either or both of these contentions, the most favourable conclusion one could draw would be that the matter of the execution of a hypothecary decree in circumstances such as those obtaining in this case is left to the discretion of the Judge. But that discretion, if such there be, must be exercised judicially and reasonably ; and requirements such as those set out in s. 339 are no more than what a Court should insist upon as conditions precedent to the exercise of its discretion. I would therefore hold that the assignee in insolvency of the judgment-debtor and/or a person who has purchased the mortgaged property from the assignee in the insolvency proceedings is a " *representative* " of the judgment-debtor within the meaning of s. 339, that accordingly each or one of those persons should have been named as respondents to the proceedings under s. 339 and that the sale in execution of the hypothecary decree obtained against Richard Nugawela, the original defendant in the mortgage action, was void on the ground that neither the assignee nor the present appellant was named a respondent to, or in any manner participated in, the proceedings under s. 339.

The appeal is therefore allowed and decree will be entered in favour of the plaintiff-appellant as against the 1st and 2nd defendants declaring him entitled to the property claimed. The 1st and 2nd defendants must pay the costs of this appeal and of the contest in the lower Court to the plaintiff. That part of the decree of the District Court which requires the plaintiff to give up possession to the 3rd defendant of a share of certain contiguous lands (a matter which was settled by agreement on 30th October 1950) and the payment of the costs of the 3rd defendant will not be affected by the judgment in this appeal.

ROSE C.J.—I agree.

Appeal allowed.