*Present :* Schneider and Dalton JJ. 1925.

FERNANDO *et al. v.* MENDIS *et al.*

*102—D. C. Negombo, 14,231.*

*Decree, assignment of—Before decree* nisi *is made absolute—Application by assignee after final decree to have himself substituted—Civil Procedure Code, s. 339.*

When, after decree *nisi* had been entered in an action, the plaintiff assigned the decree, and the assignee applied to have himself substituted as plaintiff after the decree had been made absolute.

*Held*, that the assignment was good, and that the assignee was entitled to make the application under section 339 of the Civil Procedure Code.

THE plaintiff in this action on June 10, 1920, obtained a decree *nisi* against Singha Fernando and his wife, Welpina Silva, declaring certain interests in land bound and executable. Thereafter on August 5, 1920, he assigned the decree in the action to one Kumarappa Chetty. Decree absolute was, however, entered up only on August 16, 1920. Kumarappa Chetty's interests by various assignments devolved on the first and second respondents who applied under section 339 of the Civil Procedure Code to be substituted in place of the plaintiff.

The application was opposed by the first and second appellants who are wife and husband. The first appellant is a transferee of Welpina's interests in the lands, the subject-matter of the action, and the second appellant is executor of the last will of Singha Fernando.

The application for substitution was allowed by the learned District Judge, and the appeal is from that order.

*H. V. Perera* for first and second defendants, appellants.

*Drieberg, K.C.*, with *Croos Da Brera*, for defendant, respondent.

*Ameresekere*, for petitioner, respondent.

August 28, 1925. SCHNEIDER J.—

On June 10, 1920, the plaintiff in this action obtained a decree *nisi* against Singha Fernando and his wife, Welpina Silva, declaring certain interests in five allotments of land bound and executable. On August 16, 1920, this decree was made absolute.

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On August 5, 1920, the plaintiff assigned the decree in this action and the decrees in several other actions " and all (his) right, title, interest, claim, and demand into and upon the same " to one Kumarappa Chetty.

On November 12, 1921, Kumarappa Chetty, by his attorney Kandasamy, assigned the decree in this action to the first respondent to this appeal (Mendis Silva) and one John Fernando who is said to have assigned his interest to the second respondent to this appeal (Romel Fernando).

In May, 1924, Singha Fernando, the judgment-debtor, died leaving a last will of which he appointed the second appellant (Gomis Dharmasiri), the executor, and by which he devised all his property to his daughter, the first appellant (Salegin Fernando). The appellants are wife and husband.

The other judgment-debtor, Welpina Silva, is said to have transferred her interests in the lands executable under the decree to the first appellant.

In October, 1924, the first respondent petitioned the Court under the provisions of section 339 of the Civil Procedure Code to have himself substituted as plaintiff in order to enable him to levy execution under the decree. To this petition he omitted to make Welpina Silva a party. She should have been made a respondent to it as she is one of the judgment-debtors. He made the appellants party-respondents, alleging that they were in the possession of the lands executable under the decree. He was not justified in making them party-respondents on that ground, but he was entitled to make the second appellant a party on the ground that he was the executor of the deceased judgment-debtor, Singha Fernando. He made his co-assignee a party-respondent, on the ground that he refused to join him in making the application. He was in order in doing that. He also made the third respondent to this appeal (Allis Silva) a party-respondent, on the ground that he was in possession of the lands under the appellants as their lessee. This he was not entitled to do.

To the first respondent's application objections were taken by an argumentative affidavit made by the first appellant. It was objected that there was a non-joinder of necessary parties and a misjoinder as regards the appellants and their lessee. It was also pleaded that the decree had been paid and fully satisfied. Admittedly the satisfaction of the decree which was pleaded had not been certified. Both parties appeared to have realized at the commencement of the trial that there were defects on each side. Each condoned the defects of the other's case. The objection to non-joinder was expressly waived. The other objections were not pressed. It was agreed to accept the affidavit as an application to have satisfaction of the decree entered of record under section 339,

and the trial proceeded to all appearance upon the one question of the satisfaction of the decree. After trial the learned District Judge allowed the first respondent's application with costs to be paid by the appellants, and directed that he be substituted plaintiff as being entitled to half the decree. This appeal is against that order.

On appeal Mr. Perera for the appellants argued—

(1) That the appellants were wrongfully made parties to the application;

(2) That the writings purporting to be assignments of the decree did not in fact effect an assignment of the final decree; and

(3) That the evidence proved that the decree had been satisfied.

Since the argument I have perused the petition of appeal, and it seems to me that he was not justified in taking up the time of this Court in arguing the first point. There is not a word in the petition of appeal urging that point. The proceedings at the trial show that this objection had been abandoned. In the petition of appeal the appellants state in so many words that they had been made parties because they were "the legal representatives of the deceased." That may not be a strictly correct statement of fact, because it was only one of the appellants who was the legal representative, but it confirms the conclusion which is to be drawn from the proceedings as a whole that the appellants regarded themselves as having been rightly made parties as representatives of the deceased judgment-debtor and proceeded to trial upon that footing.

The second point argued by him also appears nor to have been pressed in the lower Court. It is also not set out in the petition of appeal. It is purely a question of law, and will be discussed fully by my brother Dalton. I will therefore only say shortly how the argument strikes me. Mr. Perera argued that a party to an action can lawfully assign his interest in the action or in the decree in his favour, but the decree must be final. He could not assign a decree *nisi*. I am unable to accept this contention. The assignment by the plaintiff in this action to Kumarappa Chetty appears to me to be good and effectual, whether regarded as an assignment of the decree *nisi* which was the only decree in existence at the time, or as an assignment of the plaintiff's interest in the action. The words of the assignment permits either view being taken. I regard the assignment as that of the plaintiff's interest in the action which at the time was crystallized in the decree *nisi*, that is, all the plaintiff's right to a decree for the sum mentioned in the decree *nisi*, unless the decree *nisi* were set aside. Our Civil Procedure contemplates in section 404 the possibility of the assignee of the rights in a pending action being substituted as a party on the record, but leaves the matter entirely within the discretion of the Court. If, therefore, after such an assignment the action goes forward without the substitution of the assignee even to the stage of a final decree, the

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assignee's rights under the assignment will not be prejudiced. There is no reason why they should. He will step into the place occupied by his assignor on the record at the point when the Court grants him leave to be substituted. In this action final decree had been entered in favour of the plaintiff at the time the first respondent to this appeal sought substitution. The first respondent's application was, therefore, rightly made under section 339 of the Code. The original assignment of the decree *nisi* had by that date ripened into an assignment of the decree absolute. He was entitled to step into the place occupied by the plaintiff on the record at that date. I would, therefore, hold against Mr. Perera's contention on this point also.

There remains the third point urged by Mr. Perera that the decree had been satisfied by payment. It is the only one of his three points which finds a place in the petition of appeal. On this point, too, I would hold against him. The appellants were not in a position to give any direct evidence on this point. Mr. Perera had to rely mainly on a solitary sentence in the evidence of Kandasamy, the attorney of Kumarappa Chetty, who as attorney assigned the decree to the first respondent and John Fernando. The sentence was " Singha (*i.e.*, the judgment-debtor) paid the sum due to me." But it would be unreasonable to interpret his evidence by this one sentence alone. In the very next sentence he modified it altogether. He said " Singha, John, his son (one of the assignees of the decree) and the petitioner (*i.e.*, the first respondent to this appeal—the other assignee of the decree) all came to pay me the money. All three paid money to the notary who paid it to me." What is obscure in this evidence, as the witness does not say why the money was paid, is cleared by the first respondent's evidence that he paid Kandasamy " Rs. 2,500 through the notary for the assignment of half share of the decree," and that " the assignment was made directly after (he) paid the money."

I have no hesitation, therefore, upon the evidence in coming to the conclusion that the decree was not paid and satisfied.

The appeal is dismissed with costs.

DALTON J.—

This is a somewhat involved matter which is not assisted by the way in which the order of the Court below has been drawn up.

The facts appear to be as follows :—The plaintiff in the action (No. 14,231 Negombo) Ramasamy Chetty on August 16, 1920, obtained a decree absolute on a mortgage claim for the sum of Rs. 4,062·50 against Singha Fernando and Welpina Silva, the two defendants in the action. A decree *nisi* had been obtained on June 10, 1920.

On August 5, 1920, plaintiff by deed No. 1,097 purported to assign to one Kumarappa Chetty the decrees obtained in the various cases enumerated, including this case No. 14,231, " and all the right, title, interest, claim, and demand of him, the said Ramasamy Chetty, into and upon the same."

On November 12, 1921, the attorney of Kumarappa Chetty by deed, after reciting the claim of the plaintiff in the action and the assignment of August 5, purported to assign for the sum of Rs. 5,000 to one Mendis Silva and John Fernando—

> " The said decree No. 14,231 by virtue of the said deed of assignment No. 1,097 and the right to recover upon the said decree the amount appearing therein from the therein named debtors or their heirs, and all the other right, title, claim and interest of me, the said Kumarappa Chetty, in and to the said decree."

The notary who attested the deed of assignment certifies that the Rs. 5,000 was paid in his presence.

John Fernando thereafter assigned his rights to Romal Fernando.

Singha Fernando, the first defendant, already mentioned, died in 1924, and left his property to one Gomis Dharmasiri.

Welpina Silva, the second above-mentioned defendant, in 1920 transferred her property to one Salegin Fernando.

Gomis Dharmasiri and Salegin Fernando granted a lease of the property or part of the property in question to Allis Silva.

Mendis Silva now petitioned the Court to substitute him in place of the original plaintiff, in terms of section 339 of the Civil Procedure Code, to enable him to realize the amount of the decree assigned over to him ; Romal Fernando, Salegin Fernando, Gomis Dharmasiri, and Allis Silva were respectively made first, second, third, and fourth respondents to the petition.

After hearing evidence led for and against the petition, the learned trial Judge came to the conclusion that petitioner was entitled to be substituted as " substituted plaintiff " as prayed for, and to recover half of the amount of the decree, Romal Fernando, the first respondent (as assignee of John Fernando, one of the assignees of Kumarappa Chetty) he held should also be substituted as a " substituted plaintiff " entitled to half the amount of the decree.

The second and third respondents were directed to pay the costs of the petitioner, the first respondent to pay his own costs. The fourth respondent did not appear on the petition.

From this decision the second and third respondents, Salegin Fernando and Gomis Dharmasiri, now appeal, the two grounds argued being—

(*a*) That at the time of the assignment, August 5, 1920, by the plaintiff in the action, there was no decree in existence.

(*b*) The decree was satisfied, and the assignment conveys no right to so much of the decree so satisfied.

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With respect to the first ground, the principal one relied on for the appellant, the decree *nisi* was obtained on June 10, 1920, the assignment is dated August 5, and the decree was made absolute on August 16. The argument addressed to this Court is to the effect that the decree not being made absolute until a date subsequent to the assignment, no decree in fact existed at the date of the assignment, and therefore the petition of the applicant should have been dismissed.

The provisions of the Code dealing with decrees in summary proceedings are sections 377 and 383. Under the first-named section, the Court is authorized to make an order *nisi*, conditioned to take effect on the event of the respondent not showing cause against it on the appointed day. On that day, under the provisions of section 383 the petitioner appears, and the Court may make the order absolute, or dismiss the petition as may appear right.

The record shows that on the date the decree was made absolute, it was the plaintiff who appeared and not the assignee. The first defendant was also present. As no cause was shown in the terms of the section quoted, the decree was made absolute as against both defendants.

The assignment of the rights of a party in a pending action after *litis contestatio* is not illegal in Ceylon. It is in fact specially provided for in section 404 of the Code (*Pless Pol v. de Soysa* [1]). Mr. Perera does not deny the plaintiff's legal power to assign his rights in the action prior to decree *nisi*; he does not deny his right to assign a decree in the action, which must however he argues be a final decree. What however one may ask are the plaintiff's rights in the period between the granting of the decree *nisi* and the making of it absolute. Has he no power to assign those rights, whatever they may be? Has not the decree *nisi* taken the place of his right of action? It is true that it is a conditional order, but no authority has been cited to this Court to show that the rights under an order of that nature cannot be assigned, although it is true they may turn out to be worthless. The case of *Podia Veda v. Fernando* [2] does not deal with this point, nor with one analogous to it. The case of *Subramaniam v. Ponnampalam* [3] deals with the assignment of a decree which had been specifically set aside, whilst there is nothing that I can see in the judgment in *Fry v. Vandespaar* [4] which assists the argument for the appellant on this ground.

The provisions of section 404 of the Code would in any case appear to be directly opposed to the argument addressed to us. That section deals with procedure in the case of assignment pending the action before a final order has been made. The equivalent provision under the Indian Civil Code is contained in section 372. In a case arising

[1] *(1907) 10 N. L. R. 252; (1911) 15 N. L. R. 57.*

[2] *6 C. W. R. 245.*

[3] *5 C. W. R. 85.*

[4] *9 S. C. C. 207.*

under that section (*Chunni Lal v. Abdul Ali Khan and others* [1]) a question arose as to the rights under a decree *nisi* made under section 88 of the Transfer of Property Act, 1882, and whether a suit terminated until an order absolute was made. It was held that where such a decree is assigned before an order absolute is made, the assignee takes subject to all the liabilities resulting from the application of the doctrine of *lis pendens*.

In the case before us, the decree having been made absolute, although after assignment, whatever might have been urged at the time application was made by plaintiff to make the order absolute, at this stage (*i.e.*, when the petition was presented to the Court) the assignee was in my opinion correct in proceeding under the provisions of section 339.

The second ground of appeal was not argued at any length. In considering it, it is necessary to look at the course the matter took in the Court below, the attitude of the parties there, and the questions the trial Judge had to decide as the matter was placed before him. As the trial Judge points out the position of the plaintiff was not seriously contested, and there is ample evidence that he paid Kandasamy Pulle, the attorney of Kumarappa Chetty, the sum of Rs. 2,500 for the assignment of a half share of the decree. The assignment was made to the petitioner and John Fernando, because the second and third respondents refused to join in the transfer of the property to the petitioner. As I have already stated the facts have certainly become involved, and some order had to be come to out of the confused state of affairs brought about by the second and third respondents on the evidence before the trial Judge. I am of opinion he was justified in coming to the conclusion that petitioner was entitled to be substituted as plaintiff in respect of half the amount of the decree. For the reasons he gives which are adequately supported by the evidence, it also follows that the first respondent is entitled to be substituted for the plaintiff in respect of half the amount of the decree.

The appeal of the second and third respondents to the petition should therefore in my opinion be dismissed, with costs.

*Appeal dismissed.*

[1] *23 Alla. 331.*