

1926.

Present: Garvin A.C.J. and Dalton J.KULASEKERE APPUHAMY *v.* MALLUWA.

72—D. C. Negombo, 328.

Assignment of mortgage debt—Hypothecary action—Pending the decree—Assignee's right to substitution—Civil Procedure Code, s. 404.

Where, after the decree had been entered in a hypothecary action, the mortgage bond, upon which the action was raised, was assigned by the Fiscal in pursuance of a sale in execution against the plaintiff.

Held, that the assignee was not entitled to have himself substituted as plaintiff in the action.

THE plaintiff as mortgagee of certain lands under bond No. 259 dated September 25, 1922, instituted a hypothecary action against the mortgagor on June 16, 1925. Decree was entered in his favour on September 15, 1925. Meanwhile in pursuance of a writ issued in another case against the plaintiff the Fiscal seized and sold, and by a writing dated September 22, 1925, assigned to one Jagalis Fernando, the purchaser, "the following movable property—mortgage bond No. 259, dated September 25, 1922." Jagalis Fernando applied to have himself substituted in place of the plaintiff. The learned District Judge allowed the application.

Keuneman, for plaintiff, appellant.

H. V. Perera, for respondent.

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The plaintiff as mortgagee of certain lands under a bond No. 259, dated September 25, 1922, instituted on June 16, 1925, a hypothecary action against the mortgagor in the District Court of Negombo. Decree was entered in his favour on September 15, 1925. In the meantime in pursuance of a writ issued in case No. 7,502, of the Court of Requests of Colombo against the plaintiff the Fiscal seized and sold, and by a writing dated September 22, 1925, assigned to one Jagalis Fernando, the purchaser, "the following movable property—mortgage bond No. 259, dated September 25, 1922." Jagalis Fernando on February 9, 1926, applied to the District Judge of Negombo to be substituted in place of the plaintiff, whose interest in the mortgage bond in suit he claimed to have acquired under and by virtue of the sale and assignment in pursuance of the writ issued in Court of Requests, Colombo, No. 7,502.

The District Judge granted the application and directed that he be substituted. From this order the plaintiff appeals.

There is nothing on record to indicate the procedure followed in the seizure and sale of this bond which was, at all material dates, filed of record in the hypothecary action then pending in the District Court of Negombo. It appears to have been assumed that the sale was regular and that the subject of the sale was the bond and the plaintiff's interests therein. It was contended, however, that the petitioner acquired no title to the subject of sale until the assignment in his favour was executed by the Fiscal, and that inasmuch as that assignment took place after decree this is not a case of the assignment of any interest " pending the action " within the meaning of section 404. The procedure to be observed in the sale of movable property is contained in section 274 of the Civil Procedure Code and the following sections.

It is provided by section 275 which applies to the sale of movable property other than negotiable instruments and shares in public companies or corporations that " on payment of the purchase money, the officer holding the sale shall grant a receipt for the same, and the sale shall become absolute. " Section 277 which relates to negotiable instruments and other movable property of which actual seizure has been made requires that the property shall be delivered to the purchaser. Section 278 enacts, with reference to the property of the judgment-debtor in the lawful possession of another, that delivery shall be made by notice to the person in possession prohibiting him from delivering the property to any person except the purchaser. And section 279 which applies to a debt not secured by a negotiable instrument requires that the assignment thereof shall be in writing signed by the Fiscal who is required forthwith by written notice to prohibit the creditor from receiving the debt and the debtor from making payment to any person except the purchaser.

Whether such notices were issued in this case we do not know, but it is assumed that this case is governed by section 275 and section 279 and that all the requirements of the law relating to the sale of a debt have been observed.

We have to determine at what date the plaintiff's interest in this bond passed to the purchaser. Was it when the purchase money was paid or did he remain vested with his rights till he was divested by the formal assignment by the Fiscal ?

The series of sections commencing with section 274 and ending with section 281 require that there shall be a sale, and thereafter delivery, and in the case of property not capable of actual delivery the execution of a formal document of title. The general scheme is that there shall be a sale followed and implemented by delivery actual or constructive for the purpose of vesting the purchaser with the title to the property sold. Section 281 states in express

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terms that in respect of any movable property not provided for the Court may make order and "execute such documents as may be necessary vesting such property in the purchaser, or as he may direct, and such property shall vest accordingly."

That section is based on the assumption that title does not vest on the sale and payment of the purchase price, but that a further step is necessary for that purpose.

The group of sections makes a distinction between the completion of the sale and its consummation the passing of the property in the things sold by delivery or its equivalent. In this view the petitioner can only claim to be assignee of the plaintiff's interests in the mortgage bond from the date of the formal assignment which was made on September 25, 1925. At that time those interests had been converted into a decree. Now section 404 enables a person to whom the interests of a party plaintiff have come by assignment pending the action to have himself substituted for the plaintiff and continue the action for his benefit.

The interests (if any) which came to the petitioner under this assignment came to him after decree. If the words "pending the action" mean "before final decree" the petitioner is clearly not entitled to the benefits of section 404. It is contended that the words "pending the action" do not necessarily mean before final decree, that they must be construed with reference to the nature of the action and that a hypothecary action is pending till at least the sale of the property hypothecated has taken place. The cases of *Silva v. Lokumahatmaya*¹ and *Sarawanamuttu v. Solamuttu*² were referred to. But these cases merely decided that in the case of hypothecary actions the doctrine of *lis pendens* operates even after judgment and up to the conclusion of execution. We are not here concerned with the rule of *lis pendens* but with the correct construction of certain words which appear in section 404 of the Code of Civil Procedure.

In the case of *Gooneratne v. Perera*³ the point was fully considered by Bonser C.J. After a careful examination of the chapter of which section 404 is a section and the provisions of section 339 and 341 of the Code, His Lordship came to the conclusion that the words "pending the action" in section 404 mean "before final decree." With this decision Withers J., the other member of the Bench, agreed.

Section 404 deals with the case of assignments before final decree and enables the assignee after substitution to continue the action. Assignments of the decree are referred to and dealt with in section 339.

¹ (1920) 22 N. L. R. 184.

² (1924) 26 N. L. R. 385.

³ (1896) 2 N. L. R. 185.

The rights (if any) which passed to the petitioner upon the documents he relies on were assigned to him after the final decree had been entered.

Counsel for the respondent referred to the case of *Chunni Lal v. Abdul Ali Khan*.¹ This case does not carry his argument any further. It is an authority for the proposition that a decree made under the Transfer of the Property Act, 1882, being only a decree *nisi* and not a final decree an assignee of such a property may be made a party under section 372 of the Indian Code of Civil Procedure which is substantially the same as our section 404. The hypothecary decree in Ceylon is a final decree and not a decree *nisi*.

The case of *Goodall v. Mussoorie Bank, Ltd.*² is clearly against Counsel's contention and is in accordance with the view taken by Bonser C.J. of the true meaning of section 404. The ruling in this case was that the words "pending the suit" in section 372 of the Indian Act meant "during the progress of the suit and before the passing of the decree."

The corresponding words of section 404 are "pending the action" and, in my judgment, mean during the progress of the action and before final decree.

The judgment of the District Judge is set aside, and the appeal allowed with costs in both Courts.

DALTON J.—I agree.

Appeal allowed.

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¹ (1901) I. L. R. 23, All. 361.

² (1887) I. L. R. 10 All. 97.