GOONERATNE *v.* PERERA *et al.*

1896.
September 29.

D. C., Colombo, 6,636.

Civil Procedure Code, s. 404—" Pending the action," meaning of.

The words, " pending the action," as used in section 404 of the Civil Procedure Code, mean " before final decree."

THE facts of the case appear in the judgment of BONSER, C.J.

Van Langenberg, for appellant.

Drieberg and *Wendt*, for respondent.

29th September, 1896. BONSER, C.J.—

This case was originally brought on a promissory note. Both the maker and the payee were dead, and the case was brought by the administratrix of the payee against the administrator of the maker.

When the case came on for hearing it resulted in a compromise, and judgment by consent was given for a smaller sum than the plaintiff claimed, and a larger sum than the defendant admitted to be due. There is no reason to suppose that that compromise was not a *bonâ fide* transaction, and within the powers given to defendant's proctor by his proxy. Execution was then taken out upon that judgment, and certain moneys were brought into Court, the results of sales of the property of the maker of the note. Before the plaintiff obtained an order to have that money paid out to her the defendant left the Island.

His letters of administration were recalled, and letters of administration *de bonis non* were granted to the present appellant.

The plaintiff, for some reason or another, assigned her decree to the present respondent, who then applied under section 339 of the Civil Procedure Code to have himself substituted as plaintiff on the record, and also to have the present appellant substituted for the original defendant on the record. The present appellant opposed that application, but the District Judge allowed it. He appeals against that order, and the chief ground of appeal is that he ought not to have been substituted as defendant. He says that there was no power for the Court to make such substitution. The Court professed to do it under section 404 of the Civil Procedure Code, which provides for the case of an assignment or devolution of any interest pending the action. The Indian Courts in interpreting the Indian Code have held that these words

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"pending the action," which occur in the corresponding section in the Indian Code, apply only to assignments and devolutions before decree. That interpretation is not binding on us, and had this section stood alone, I should have been inclined to interpret the words as signifying at any time before the decree was finally executed; but when these words are considered with the other sections in the chapter in which they occur, it is impossible to come to any other conclusion than that the words mean before final decree. For in every one of these cases it clearly applies to assignment or devolution of title before final judgment. For instance, in sections 393, 394, 395, which deal with cases of assignment of a plaintiff's interest, the words "right to sue survives" are used, which implies that the cause of action is still subsisting. These words would be inapplicable when the proceedings had arrived at a final judgment. The right to sue would then have been merged in the decree.

Again, in section 398, where the case of the assignment or devolution of a defendant's interest is dealt with, it expressly provides for the case of a defendant dying before decree. So, in section 399, which deals with the marriage of a female plaintiff or defendant, and provides that the case may nevertheless be "proceeded with to judgment." Finally, section 404 provides for "other cases of assignment pending the action." Again, it should be observed that in a previous part of the Code the cases of the assignment of a decree (section 339) and of the execution of a decree after the death of a judgment-debtor (section 341) have been dealt with. That is an additional argument for the construction I put on section 404. If that section does not apply, there is no section which applies to a case of this kind.

This is not a case of a judgment-debtor dying after decree, but it is a case of a judgment-debtor against whom a decree was made in his representative capacity ceasing, after decree, to hold that capacity and another person being appointed in his stead. But if there is no provision in the Code for such a case, we are empowered by the Code to make a special order which will meet the justice of the case. Now, is there anything in this order which is contrary to justice, which is unjust to the appellant? If there is, then the order ought not to stand. For my part I do not see how the appellant can in any way be prejudiced by this order. The judgment cannot be executed against him personally. It can only be executed against the property of the deceased which has come into his hands, and has not been duly disposed of by him. It is by no means clear that it is necessary to make him a party, but at any rate it is convenient, and it is to the advantage of the estate

that he should be made a party in order that he may see that nothing more may be exacted from the estate than is justly due.

There is, however, one part of the order of which I think he is entitled to complain. The respondent made this application for his own benefit, but the Court has ordered the appellant to pay personally all costs of the application. That order I do not think should have been made.

We order that the costs in this Court and in the Court below be borne by each party respectively.

WITHERS, J.—

I concur, and have nothing to add.