

FERNANDO v. UDUMAN.

D. C., Puttalam, 1409.

1901.

April 29 and
May 8

Dismissal of plaintiff's action for absence on trial day—Motion to open up judgment—Permission to proceed with case—Motion to be allowed to re-institute case—Fresh action—Res judicata.

Where A's action was dismissed on the ground of his absence on the trial day, and on plaintiff's motion an order *nisi* was allowed on defendant to show cause why the judgment should not be re-opened, but the plaintiff, without availing himself of this order, moved the Court for permission to institute a fresh action—

Held, that the decree of dismissal entered in the old action was a bar to the new action, but that as the District Judge should have opened up the decree, his error should not stand in the way of the issues between the parties being tried.

Therefore, the Supreme Court entered a decree of dismissal in the old case and allowed the new one to go on.

ON 1st November, 1899, the plaintiff sued the defendant in case No. 1,384 of the District Court of Puttalam for the recovery of Rs. 500 alleged to be due on an agreement to supply *coppera*. Defendant filed answer on 27th November, 1899, and the case came on for trial on 19th January, 1900. Plaintiff not being ready applied for a postponement, but the District Judge dismissed the plaintiff's action with costs and entered final decree in due course.

On 5th March plaintiff, for reasons stated in his affidavit, moved for an order *nisi* on defendant to show cause why the judgment entered should not be opened and plaintiff allowed to proceed with the case. The District Judge allowed an order *nisi*, but it was not further pursued, and on 4th April plaintiff moved to be allowed "to re-institute this action" and "to withdraw the documents filed by me." This motion was allowed on payment of all costs up to date.

The plaintiff then raised the present action upon the same cause of action. Defendant pleaded the decree in case No. 1,384 in bar of plaintiff's action.

The District Judge (Mr. W. A. G. Hood) ruled as follows:—

"On referring to the record of D. C., 1,384 I find the action was dismissed on 19th January owing to plaintiff's absence, and that he subsequently filed an affidavit alleging illness on the date in question. I cannot see that there is any bar to plaintiff's instituting a fresh action on the same cause. I accordingly overrule

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defendant's objections and allow the case to be heard on the merits."

Defendant appealed.

Sampayo, for appellant.

Wendt, for respondent.

Cur. adv. vult.

8th May, 1901. LAWRIE, J.—

This case was argued before Mr. Justice Browne and myself some time ago. It was necessary to read the record in D. C., Puttalam, 1,384, which was sent for and which is now before us.

In that case the plaintiff was absent on the day of the trial. His proctor had no instructions. No witnesses had been summoned. His proctor asked for a postponement, which was refused and the action was dismissed.

Some time afterwards, on affidavit being submitted, the District Judge allowed an order *nisi* to issue on the defendant to show cause why the judgment should not be re-opened.

The plaintiff did not take advantage of this permission. No order *nisi* was issued.

Shortly after, on the 4th April, 1900, the plaintiff moved *ex parte* that he be permitted to re-institute the action and be allowed to withdraw the documents filed by him. The motion was allowed on payment of all costs up to date.

I presume these have been paid. On the 14th May, 1900, the present action was commenced. It is by the same plaintiff against the same defendant in the same cause of action.

The defendant pleaded *res judicata*, and the judge repelled that plea and ordered the action to proceed. Hence the appeal.

Assuming that the plaintiff in the former action satisfied the District Court that his absence was due to causes over which he had no control, I think the District Judge on notice to the defendant might have re-opened the judgment.

To the alternative of allowing the plaintiff to institute a new action the object was obvious, that, so long as the decree of dismissal stood, no other action could be brought. A plaintiff may be allowed to withdraw from an action which is still pending. but it is not possible for a plaintiff to withdraw from an action in which judgment against him has been pronounced.

But we must allow either the first or the second action to go on. The mistake made was the mistake of the District Court, and we must not allow that to stand in the way of the issue between the parties being tried.

In the circumstances of this case we affirm the decision now appealed from. There is no doubt that the decree of dismissal

in District Court, 1,384, would have been *res judicata*, had not the plaintiff taken steps to have it re-opened, and had not the District Judge thought the proper course was to allow the new action to be instituted. The new action is now before us, and we think that it ought to go on.

MONCREIFF, J.—

I think the new action should be allowed to go on, provided the decree of dismissal is set aside.

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