1922.

Present : Porter and Schneider JJ.

BANDA *v.* DHARMARATNE.

97—D. C. Kegalla, 5,367.

Action on a mortgage bond against mortgagor and purchaser—Application after trial to add the purchaser, pendente lite, *as party to action—Civil Procedure Code, s. 18—Power of Court to delay entering up of decree—Civil Procedure Code, ss. 187 and 188—Policy of the Code to avoid multiplicity of actions.*

Plaintiff instituted an action on a mortgage bond against the mortgagor (first defendant) and the purchaser from the mortgagor (second defendant). The *lis pendens* was not registered nor were the provisions of chapter XLVI of the Civil Procedure Code complied with. After trial judgment was reserved, and before judgment was delivered plaintiff moved that judgment be deferred till an application to add a party to whom the second defendant had sold the property pending the action was considered.

Held, that the Court had power under Section 18 of the Civil Procedure Code to add a party at that stage, and that plaintiff's application should have been allowed under the circumstances.

SCHNEIDER J.—"The policy of the Civil Procedure Code is to avoid a multiplicity of actions, and therefore, where the facts brought to the notice of the Court before it has finally disposed of the action are such that the addition of a person would tend effectually to deal with all the questions involved, the Court should not put difficulties in the way of parties to the action who seek to add such persons, but should stay its hand and afford the party seeking to do so an opportunity to add such persons as may be necessary to finally determine all questions arising in the action."

A District Judge has no power to delay the entering of the decree once judgment has been pronounced.

THE facts appear from the judgment.

R. L. Pereira, for the plaintiff, appellant.

Keuneman, for the second defendant, respondent.

November 1, 1922. SCHNEIDER J.— 1922.

Banda v. Dharmaratne

On January 12, 1920, the plaintiff instituted this action for the realization of a mortgage created in his favour by the first defendant. He alleged that the second defendant was in possession claiming to be a purchaser of the land mortgaged subsequent to the date of the mortgage. The first defendant offered no defence. The second defendant pleaded several defences and disclosed that the land mortgaged was seized and sold on January 8, 1920, and was purchased by her, and that she obtained a transfer from the Fiscal on August 9, 1920. A trial followed, but upon an appeal to this Court a fresh trial was directed by the judgment of this Court dated October 21, 1921.

This trial took place on June 27, 1922, and was concluded on that date. The judgment was deferred for July 18, 1922. As to what happened on that day, there is the affidavit of Mr. Advocate Molamure, which I accept without hesitation.

In this affidavit he states that the plaintiff's proctor handed to him a motion early that morning. This motion is on the record. It is dated July 17, 1922, is signed by the proctor for the plaintiff, and is to the effect that the second defendant had transferred her interest in the property mortgaged on January 25, 1922, to one Dingiri Bandara Mahatmaya—a fact which had been concealed up to that date, and that "decree be not entered till the summons are issued to the said purchaser, and that he also moved for a summons on the said purchaser."

This motion is characteristic of the motions which some proctors occasionally make without considering the procedure which they should follow. The motion was clearly intended to ask that the Court should stay its hand until the party named was added, and that the plaintiff be allowed the opportunity to take steps to add that party.

It was not correct to ask for a summons to issue in the first instance upon the party sought to be added. The correct procedure that should have been followed for that purpose was pointed out, and laid down in *Loos v. Scharenguivel* [1] so far back as 1891. It was there pointed out that the procedure for adding a party under section 18 of the Civil Procedure Code should be that the party seeking to bring in a third person should obtain *ex parte*, an order giving leave to serve a notice on the person whom he desires to bring in, and the question whether such person ought to be joined should be considered and dealt with in his presence and in that of the parties already on the record.

It is evident, therefore, that the latter part of the motion of the plaintiff's proctor that summons should issue is not in order. It is unfortunate for his client that the plaintiff's proctor should have

[1] *3 C. L. R. 47.*

1922.

SCHNEIDER J.

Banda v. Dharmaratne

blundered in the manner he has done in respect of procedure which had been laid down over thirty-one years ago. But that blunder has no bearing upon the situation which has developed.

On July 18, 1922, Mr. Molamure states that before judgment was delivered, he moved that it be deferred till the application was considered for the addition of the party to whom the property was alleged to have been transferred during the pendency of the action. The learned District Judge appears to have regarded the motion of Mr. Molamure strictly according to the wording of the motion in writing, and to have told Mr. Molamure that he must deliver his judgment then and take notice of the motion to defer, the entering of the decree should be given to the second defendant and its consideration be taken up later. He accordingly pronounced his judgment, which is in favour of the plaintiff against both defendants as prayed for, that is, for the sum claimed in the plaint upon the footing of a hypothecary decree.

The matter of the plaintiff's motion was considered by the District Judge on July 28, 1922, when he held that he had no power to defer the entering of the decree in terms of his judgment. He directed that decree should be entered in terms of his judgment. From this order the plaintiff appeals.

His appeal is dated August 8. It is evident that if the appeal be regarded as from any order made on July 18, it is out of time. From the petition of appeal it is clear that the plaintiff's proctor regarded the appeal as from the order refusing to defer the entering of the decree on July 28. To my mind the learned District Judge was quite right in so refusing. The reason given by him is good, viz., that he had no power to delay the entering of the decree once judgment had been pronounced.

Judgment and decree are defined in the Civil Procedure Code, and the provisions in sections 187 and 188 of the Code make it plain that the decree must follow as, of course, when the judgment has been pronounced. It seems to me that the written motion should have been that the Court should not decide the action or pronounce judgment till the plaintiff had taken steps to add the person whose name was disclosed as a party to the action. It would accordingly appear that the motion was not rightly conceived in either of the two matters to which it referred. The plaintiff is also to blame in that he omitted to register his "*lis pendens*." Had the provisions of the law been followed in that respect, he would not have found himself in the present predicament.

Two questions arise for decision:—

(1) Could a fresh party be added to the action at the stage of it at which the application was made.

(2) Should the plaintiff's application have been allowed.

In my opinion, the answer to both these questions is in the affirmative.

The language of section 18 of the Civil Procedure Code that the Court " may at any time order that the name of any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action " is wide enough to cover this case and to allow the addition of a fresh party at any time before the decision of the action, that is, before the judgment is pronounced. As I read that section I have no doubt, but that it is the intention and meaning of that section.

But was the presence of Bandara Mahatmaya, the person disclosed in the action, necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action ? I think it was. For a mortgage decree to be effective against a person in possession, that person should be made a party to the action, unless the same result could be attained by virtue of the provisions of chapter XLVI of the Civil Procedure Code. Here, the plaintiff does not, and so far as the facts show cannot, rely upon them. He might have relied upon the doctrine of " *lis pendens* " so far as Bandara Mahatmaya was concerned. This, too, he cannot effectually rely upon, upon the actual facts, as he had not registered his " *lis pendens* " (*vide* the Land Registration Ordinance, 1891, as amended by section 3 of Ordinances Nos. 29 of 1917 and 21 of 1918).

The only remedy, therefore, open to the plaintiff is the addition of Bandara Mahatmaya as a party to the action. His blunderings should not deprive him of this right, because the refusal to allow him to add Bandara Mahatmaya as a party would be tantamount to a denial of justice, inasmuch as the judgment in his favour would be barren and ineffective, unless it bound the land in whosesoever possession it might be.

The second defendant, who alone opposed the motion of the plaintiff, had really no concern in the matter. The addition of Bandara would not have made any difference to her in the action, at least, so far as I am able to see upon the facts now on record. But her counsel, Mr. Bartholomeusz, addressed an ingenious argument. He argued that this action was instituted in January, 1920, that Bandara Mahatmaya had purchased the land in January, 1922, that an action has to be decided upon the facts as they existed at its institution, and that, therefore, the plaintiff had no cause of action against Bandara Mahatmaya at the date of the institution of this action.

I was taken at first with this argument, but upon consideration I am not disposed to uphold it. The policy of the Civil Procedure Code is to avoid a multiplicity of actions, and, therefore, where the facts brought to the notice of the Court before it has finally disposed of the action are such that the addition of a person would tend effectually to deal with all the questions involved, the Court should

1922.

SCHNEIDER J.

Banda v. Dharmaratne

not put difficulties in the way of parties to the action who seek to add such persons, but should stay its hand and afford the party seeking to do so an opportunity to add such persons as may be necessary to finally determine all questions arising in the action.

For these reasons acting in revision I would set aside all the proceedings on and after July 18, and direct that the plaintiff should take the necessary steps within a time to be fixed by the District Judge for adding Bandara Mahatmaya and for the continuance of the action thereafter.

In the circumstances each party will bear his costs in this Court.

PORTER J.—I agree.

Set aside.