

1945

Present: **Keuneman S.P.J., and Rose J.****DANIEL SILVA**, Appellant, and **JAYASEKERE et al.**, Respondents.

47—D. C. (Inty.) Tangalle, 5,000.

*Civil Procedure—Sale of party's interest pending action—Right of purchaser to intervene—Discretion of Court—Civil Procedure Code, s. 404.*

Where a purchaser *pendente lite* of an interest sought to intervene and to be made a party defendant in the action relating to that interest.—

*Held*, that section 404 of the Civil Procedure Code vests in the court a discretion as to the persons to be admitted as parties plaintiff or defendant; the important and controlling words in the section are that "the leave of the court" must be obtained.

**A**PPPEAL from a judgment of the District Judge of Tangalle.

*H. V. Perera, K.C.* (with him *U. A. Jayasundera* and *S. E. J. Fernando*), for the petitioner, appellant.

*N. E. Weerasooria, K.C.* (with him *G. P. J. Kurukulasuriya*), for the plaintiff, respondent.

*G. P. J. Kurukulasuriya*, for the 2nd defendant, respondent.

*Cur. adv. vult.*

August 3, 1945. KEUNEMAN S.P.J.—

This action has followed a curious and unusual course. The plaintiff on August 30, 1943, brought this action against the 1st and the 2nd defendants alleging that the premises in question were purchased by the 1st defendant (his mother-in-law) at his request and with his money and in trust for him, and that the 1st defendant conveyed the said premises fraudulently and collusively and without consideration to the 2nd defendant who had been a servant in her household for about ten years and had full knowledge and notice of the trust. The 1st defendant admitted the allegations in the plaint, and added that the 2nd defendant had compelled her to execute the transfer by threats to kill her if she did not do so.

This answer was filed on February 3, 1944. The 2nd defendant had previously on November 4, 1943, filed answer, which was amended on September 9, 1944, in order to meet an amendment in the plaint. In his answer the 2nd defendant denied the allegations in the plaint and prayed for a dismissal of the plaintiff's action. But on September 27, 1944, a motion sent by registered post by the 2nd defendant was received by the Court asking that judgment should be entered in favour of the plaintiff as prayed for, and that his proctor's proxy be cancelled. Notice of this motion was not served on the plaintiff or the 1st defendant.

On November 8, 1944, the present petitioner, appellant, sought to intervene and to be made a party defendant. In his affidavit he alleged that the plaintiff filed action on August 30, 1943, and that pending the action the 2nd defendant by deed 427 dated September 25, 1943, transferred and assigned all his rights and interests in the subject-matter of

the action for valuable consideration. In his affidavit the petitioner added that he had reason to believe that the 2nd defendant may, acting in fraud and collusion with the other parties to the action, defeat his rights and cause him serious loss and damage.

It has been established (see P1) that the plaintiff had duly registered his action before the date of deed 427, and accordingly the doctrine of *lis pendens* attaches to this transaction.

On January 4, 1945, the date of the inquiry into the petition, both the 1st and the 2nd defendant consented to judgment in the plaintiff's favour but decree was not entered for the plaintiff on that date.

In substance, the District Judge held that section 404 of the Civil Procedure Code only permitted the plaintiff or the person to whom his interest has come to continue the action against the defendant or the person to whom his interest has come, and that the Court had no right to force the plaintiff to proceed with his action against the petitioner when the plaintiff was satisfied with obtaining decree against the two defendants alone.

Thereafter on January 31, 1945, the 1st and the 2nd defendants consented to judgment, and judgment was accordingly entered in favour of the plaintiff.

On appeal the petitioner contended that the District Judge had wrongly decided the question of law, and that it was open to the District Judge even at that stage to admit the petitioner as a party to the case.

In England, where the rule is not materially different, it has been held that a purchaser *pendente lite* can be admitted as a party defendant—see *Kino v. Rudkin*<sup>1</sup>. There Fry J. said—“I do not think there is any necessity for Mr. Worley's presence. As the assignment was made to him *pendente lite*, I think he will be bound by the proceedings. But it is very reasonable that he should be made a party, and I will make an order that he be added as a defendant, he submitting to be bound”. In this case, however, the plaintiff did not object to the addition of this party.

In India also Order 22 Rule 10 is on the same lines as our section 404. In *Kristo Kumar Das v. Girish Chandra Poddar*<sup>2</sup> an argument similar to that addressed to the District Judge was advanced, but the Judge held—“As to the first contention we are not prepared to say that Order 22 Rule 10 can only apply to plaintiffs and their representatives. Nor has any authority been put before us to show that it does . . . . In the case in *Rajaranees Dassie v. Debendra Nath Shau*<sup>3</sup> the application was made under section 372 Civil Procedure Code corresponding to Order 22 Rule 10, and no doubt was expressed by the Court or urged by the Bar that such an application would lie on behalf of a person seeking to continue the suit as a party defendant”.

I have myself considered the language of section 404 and have come to the conclusion that there is nothing in the section which prevents a party claiming to be added as a defendant in the case of an assignment, creation or devaluation of any interest in the subject-matter of the action. The important and controlling words in my opinion are that “the leave

<sup>1</sup> L. R. (1877) 6 Ch. D. 160.

<sup>2</sup> (1915) A. I. R. Calcutta 771.

<sup>3</sup> (1899) 3 C. W. N. 754.

of the court " must be obtained. I think that puts the court in complete control of the case, and vests in the court a discretion as to the persons to be admitted as parties plaintiff or defendant.

There can be, in my opinion, no doubt that the action was still pending, in view of the fact that judgment and decree had not been entered at the time of the intervention.

The District Judge has not addressed himself to the question as to whether he will exercise his discretion in favour of the petitioner or not. He has, indeed, made a point of the fact that the deed 427 was not produced before him, but the fact of the execution of that deed has been established by the petitioner's affidavit, and also by the document P1, the schedule of encumbrances produced by the plaintiff.

There are, however, certain matters which are prominent in this case. Not only the plaintiff but also the 1st and the 2nd defendants object to the admission of the petitioner as a party defendant. Next, though the action was not entirely dead at the time of the intervention, it was at its last gasp. Again, the petitioner has apparently all along been aware of the action filed and registered; in any event he has not denied that he had actual knowledge of this fact and no excuse has been offered for his delay in seeking to intervene. Further, he has given no solid or material facts to help to establish his suggestion that there has been fraud and collusion on the part of the plaintiff and the two defendants. Lastly, in the words of Fry J., there was no necessity for his presence for the determination of the original matter.

In all the circumstances I do not think that his application to intervene in this action should be allowed. The appeal is dismissed with costs.

ROSE J.—I agree.

*Appeal dismissed.*

