Oct. 13, 1911

Present : Lascelles C.J. and Middleton J.

NONOHAMY *et al. v.* BABUN APPU.

135—*D. C. Galle*, 7,668.

Substituted party—Personally liable to pay costs to opposing party—Civil Procedure Code, chapter XXII., ss. 341, 339, and 404.

A substituted party is personally liable to pay the costs of action to a successful opponent.

The new party representing the interest of the former party, who is brought before the Court by order, stands exactly in the same plight and condition as the former party ; is bound by his acts ; and may be subject to all the costs of the proceedings from the beginning of the action.

THE facts appear sufficiently from the judgment.

Bawa, for the first defendant, appellant.—The appellant is entitled to get his costs from the substituted plaintiff. If the substituted plaintiff won, he would have been entitled to get his costs from the defendant ; why should he not be liable to pay the costs of action if he lost the case ? The substituted plaintiff may have refused to become a party to this case when he was cited to show cause ; but having taken upon himself the conduct of the case, he could not now disclaim responsibility for the action. Counsel referred to Civil Procedure Code, sections 341, 404, and 339. *Nugara v. Palaniappa Chetty.*[1]

Elliott (with him *Hayley*), for the substituted plaintiffs, respondents.—In *Nugara v. Palaniappa Chetty*[1] the administrator was responsible for the action ; he was therefore personally liable. Until the decree of the Supreme Court is corrected, writ could not issue against him personally. Counsel cited *Maricar v. Perera.*[2]

Bawa, in reply.

Cur. adv. vult.

October 13, 1911. MIDDLETON J.—

This was an appeal against an order refusing it make the substituted plaintiffs personally liable for the costs incurred by the first defendant in contesting an action and appeal entered by the original plaintiff, but which appeal was subsequently prosecuted by the substituted plaintiffs, when duly made parties to the action, as the legal representatives of the deceased plaintiff.

[1] *(1911) 14 N. L. R. 327.*

[2] *(1891) 1 S. C. R. 17.*

In prosecuting the appeal the substituted plaintiffs, if they had succeeded, would have induced the Supreme Court to contravene the view of the District Judge (Mr. Macleod) in his original judgment that the action was an attempt by the plaintiff in conjunction with the third defendant, his son (now a substituted plaintiff), to deprive the first defendant of a share of the premises he bought in execution against the third defendant, the then owner. This view of the case the Supreme Court upheld by dismissing the appeal and directing the appellant to pay the costs.

Unfortunately the decree was drawn in the singular. This clearly is a clerical error, and can, I think, be amended under section 189 of the Civil Procedure Code. If the decree is amended, it will meet the objection raised by Mr. Elliott on the authority of *Maricar v. Perera*[1].

I have no doubt, however, that the substituted plaintiffs are liable to pay the costs of the action. If they had succeeded, they would have benefited to the extent desired by their predecessor, the original plaintiff, and as representatives of him would no doubt have sought for and obtained execution against the first defendant in their own personal favour for all costs the original plaintiff had incurred in the action.

The general rule is, I take it, that the parties on the record are primarily liable for the costs of the action, and if a substituted party ratifies and adopts the position taken up by the party he is substituted to represent, without any objection at the time, and with the ultimate intention and object of taking personal advantage of success if he obtains it, I cannot see that he has reason to complain if the Court compels him to pay costs if the case is decided against him. If the substituted plaintiffs had desired to protect themselves from liability to costs they need not have supported the appeal, even though made parties when the Court might have exempted them from costs. The substituted plaintiffs might also have shown cause, under section 398 of the Civil Procedure Code, why they should not be held to be the legal representatives of the deceased. Sections 341, 339, and 404 cited by counsel for the appellant do not seem to give us much assistance on the point before us, nor am I able to find in the Civil Procedure Code anything directly bearing on the question.

In *Daniell's Chancery Practice, vol. I., p.* 295, it is said: "The new party, representing the interest of the former party, who is brought before the Court by order, stands exactly in the same plight and condition as the former party; is bound by his acts; and may be subject to all the costs of the proceedings from the beginning of the action." See *Whitcomb v. Minchin*,[2] *Cook v. Hathway*,[3] and *Froward v. Bingham*,[4] in which Sir Lancelot Stadwell

[1] *(1891) 1 S. C. R. 17.*
[2] *5 Mad. 91.*
[3] *L. R. 8 Eq. 612 V. C. M.*
[4] *4 Sim. 483.*

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said : " If the executor does not adopt the original suit he is not liable for the costs, of it," which implies that, if he does, he is liable.

I think, therefore, that under chapter XXII. of the Code it is for this Court to rule on the question and I think also that we ought to be guided by the decision of the House of Lords in *Boynton v. Boynton*,[1] followed in *Pembroke v. Warren*[2] and *Watson v. Halliday*,[3] and in the case of a company *re London Drapery Stores*.[4] In these cases it was held that a party added, as the substituted plaintiffs were, becomes a substituted party, and is personally liable to costs.

In my opinion, therefore, the order of the District Judge must be set aside, and the appeal allowed with costs.

The writ already issued against the respondents here will go for a sum less Rs. 75, which I understand were deposited in Court as security for costs of the appeal by the deceased original appellant. If this appellant left any estate, then the respondents' remedy, if they are the legal representatives of the deceased, is obtainable out of his estate ; otherwise I fear they have none. I direct the amendment of the decree required under section 189.

LASCELLES C.J.—

I agree with the judgment of my brother Middleton, and have nothing to add.

Appeal allowed.