

1939

*Present : Keuneman and Wijeyewardene JJ.*VALIAPPA CHETTIAR v. SUPPIAH PILLAI *et al.*

210—D. C. Kandy, 48,531.

Power of attorney to confess judgment—Action on mortgage bond—Warrant attested by creditors' proctor at his request—No proctor attending at request of debtor—Warrant invalid—Civil Procedure Code, s. 31.

Where judgment was obtained on a mortgage bond on a warrant of attorney to confess judgment which was granted by the mortgagor at the request of the mortgagee's proctor and which was also attested by the same proctor,—

Held, that the warrant of attorney to confess judgment was bad as there was no proctor present expressly named by the mortgagor and attending at his request to satisfy the requirements of section 31 of the Civil Procedure Code.

THIS was an application for *restitutio in integrum*.

N. Nadarajah (with him *J. M. Jayamanne*), for defendants, petitioners.

N. E. Weerasooria, K.C. (with him *E. F. N. Gratiaen*), for plaintiff, respondent.

Cur. adv. vult.

March 29, 1939. KEUNEMAN J.—

This is an application by the defendants for *restitutio in integrum*. The plaintiff sued on mortgage bond 739, dated May 7, 1926, and obtained judgment against the defendants by virtue of a warrant of attorney to confess judgment, and decree was entered on May 28, 1937. The defendants allege that the warrant of attorney filed in the case is bad and invalid, in that Proctor Yatawara, who attested the warrant purporting to be the proctor for the defendants, was not nominated by the defendants. It is also alleged that the plaintiff's claim was fraudulent.

The mortgage bond 739 was attested by Proctor Yatawara, who also attested the warrant of attorney to confess judgment, purporting to be the defendant's proctor. It is admitted that as regards the mortgage bond 739 Proctor Yatawara was acting at the instance of, and under the instructions of, the plaintiff, and it is clear that this proctor had received the instructions of the plaintiff to have the warrant of attorney executed. Both documents were executed on the same date and on the same occasion.

Under section 31 of the Civil Procedure Code no warrant of attorney, given by any person to a proctor, to confess judgment is of any force, unless there is present at the execution thereof a proctor "on behalf of such person expressly named by him and attending at his request" to inform him of the nature and effect of such warrant, before the same is executed.

One important requirement in this section is that the proctor must attend "on behalf of the defendant". There are authorities under the similar enactment in 1 & 2 Victoria, c. 110, relating to warrants of attorney and cognovits. In *Mason v. Kiddle* the agents of the plaintiff's attorney sent down the writ to an attorney at Shaftesbury to be served on the defendant. The defendant employed the same attorney to get him time for payment of the debt, and agreed to pay him for his trouble. Thereafter the plaintiff agreed to take a cognovit, and his agents sent it down to the same attorney at Shaftesbury for execution. This attorney then sent for the defendant and asked him to name some attorney to attend on his behalf. The defendant said "I name you", and the cognovit was executed by the defendant in the presence of this attorney and was attested by him, no other attorney being present on behalf of the defendant. It was held by the Court that the cognovit was bad. Alderson B. stated that "there must be an attorney, other than the plaintiff's expressly named by the defendant, and attending on his behalf".

Similarly, in *Sanderson v. Westley & Walters* Parke B. stated, "We are of opinion that Goddard was the attorney of the plaintiff prior to his being employed, and was his attorney in this transaction. If so, the

¹ (1839) 151 *English Reports* 217.

² 151 *English Reports* 337

act is not complied with, since it required that there must be a separate attorney, employed by the defendant to take care of his interests only"; and Alderson B. stated, "Where there is but one attorney present, it ought to be perfectly clear that he is not the plaintiff's attorney".

Further, the proctor must be expressly named by the defendant and attend at his request. This means that there should be some distinct expression of request or appointment by the person who executes, and such request or appointment must be the result of a free choice".—*Chitty's Archbold's Practice of the Court of Queen's Bench (12th ed.,) p. 954.*

In the present proceedings Proctor Yatawara has given evidence with frankness, and there is no reason to think that he has been a party to any fraud, but it is clear that he has misinterpreted the section and misunderstood its requirements. In his evidence he states:—

"Defendants and plaintiff gave me instructions to prepare the bond. Plaintiff said he wanted a power of attorney to confess judgment. I informed defendants about it. They consented to execute that power of attorney I explained the contents of the mortgage bond to the defendants. After the mortgage bond was signed, I explained the power of attorney to confess judgment".

In cross-examination he added:—

"I told the defendants that plaintiff wanted me to execute a warrant of attorney to confess judgment and that for that purpose. I shall have to act as their proctor for the said purpose. Defendants consented to my acting as their proctor. I did not tell the defendants to nominate a proctor to act on their behalf. I was really watching the interests of the plaintiff Chettiar, in getting a warrant of attorney to confess judgment".

It is clear on this evidence that Proctor Yatawara was present on the occasion in question as the plaintiff's proctor. It was therefore his duty to request the defendants to get some other proctor to look after their interests, and not to combine in his own person the duties both of proctor for the plaintiff and of proctor for the defendants. I cannot therefore regard his attestation as having been made "on behalf of the defendants". Further, it seems evident that the defendants were never given the opportunity of making a free choice of their proctor for the purposes of the section, and Mr. Yatawara cannot be regarded as the proctor expressly named by the defendants and attending at their request.

In view of these findings, it is not necessary to consider the allegation of fraud.

I allow the application of the defendants, and set aside the judgment and decree already entered, and order that a date be fixed for the filing of the answer of the defendants, and that the case do proceed to trial in due course.

The defendants are entitled to the costs of this application.

WLJEYWARDENE J.—I agree.

Application allowed.