

1931

Present : Drieberg and Akbar JJ.

IBRAHIM v. SEYADU MOHAMADU.

396—D. C. Puttalam, 4,180.

Warrant of attorney to confess judgment—Authority to confess on mortgage bond—Conditions of bond not included in the warrant—Is the warrant valid?

A creditor to whom a warrant of attorney to confess judgment is given by a debtor cannot be prevented from obtaining judgment on the warrant on the ground that certain conditions of the mortgage bond, on which the right of recovery depended, have not been fulfilled, unless those conditions were included in the warrant itself.

BY a mortgage bond, D, the appellant became liable to the respondent in a sum of Rs. 66,854 to be paid by instalments. On the same day the appellant granted to Mr. Strong, a proctor, a warrant of attorney to confess judgment.

The bond provided that, if default was made in payment of an instalment, the appellant was to be given one month's time for payment before bringing an action on the bond. The appellant made default in the first instalment which was payable on June 3, 1930, and the respondent gave notice that if appellant did not pay by July 3, 1930, he would sue on the bond.

On July 2 the appellant brought this action to have the warrant of attorney declared null and void.

The appeal is from the order of the District Judge dismissing the action.

Keuneman, for plaintiff, appellant.—The bond D is subject to a condition, this condition is not incorporated in the warrant of attorney and the warrant is therefore null and void.

The condition set out in the bond must be regarded as a condition subject to which the warrant was given (section 32, Civil Procedure Code). The warrant must be used to confess judgment only for the precise amount shown on the face of it as due and payable. The sum set out in the warrant is not the correct sum due.

H. V. Perera, for respondent.—This warrant is based on the form given in *Volume II., Key and Elphinstone*, p. 196.

The condition referred to in section 32, Civil Procedure Code, is one subject to which the warrant itself is given.

A debtor can assent to judgment though he may have grounds on which to defend the action and by the warrant he can give the attorney the same power.

A debtor has no control over the warrant once it is duly executed and delivered to the creditor (*Ramanathan v. Don Carolis*¹).

October 22, 1931. DRIEBERG J.—

By a mortgage bond, D1, of December 3, 1929, the appellant became liable to the respondent in a sum of Rs. 66,854, which was to be repaid

¹ (1917) 19 N. L. R. 378.

by instalments; on the same day the appellant granted to Mr. Strong, a proctor, a warrant of attorney to confess judgment in any action filed on the bond.

The bond provided that, if default was made in payment of an instalment, the appellant was to be given one month's time for payment before bringing action on the bond. The appellant made default in the first instalment which was payable on June 3, 1930, and the respondent gave the appellant notice that if he did not pay by July 3, he would sue on the bond.

On July 2 the appellant brought this action to have the warrant of attorney declared null and void and for an injunction restraining the respondent, while this action was pending, from using the warrant for the purpose of obtaining judgment on the bond.

During the pendency of these proceedings the respondent on July 11, 1930, filed action on the bond D1, but the matter has not, I understand, been proceeded with beyond the presentation of the plaint.

One ground was that the terms of the warrant had not been fully explained to him in accordance with section 31 of the Civil Procedure Code. The learned District Judge, in dismissing the action, has held against the appellant on this point, and in my opinion rightly.

The other grounds advanced by the appellant were that the warrant was subject to a condition or defeasance, that this was not embodied in the warrant, and that the warrant was for that reason null and void. It was also said that the warrant was fraudulently obtained to secure a confession of judgment for a larger sum than was due and, further, that the sum actually due was not correctly set out in the warrant.

I shall deal with the question of the defeasance later. The objections relating to the amount stated in the bond are connected with the consideration for which the bond was granted.

At the date of the execution of the bond D1 the appellant owed the respondent a sum of Rs. 35,635.25 on a judgment against him and he owed Mutiah Chetty and another Rs. 31,218.75 on a mortgage bond No. 5,828 of August 26, 1927, of certain leasehold interests; this sum represented the principal and interest up to the date of the bond D1. D1 was for Rs. 66,854, the aggregate of these sums, the respondent agreeing to pay to the creditors on bond No. 5,828 the amount due to them and redeem the mortgage. By D1 the appellant gave the respondent a mortgage, described as a primary one, of the property mortgaged under bond No. 5,828. It is admitted that the respondent has paid the creditors on bond No. 5,828 a sum of Rs. 10,000 only. The warrant, D2, authorized Mr. Strong to receive summons for "me in any action for Rs. 133,692".

There is no substance in the objection that the warrant is made out for the sum of Rs. 133,692. It was clearly intended to enter in the warrant the maximum sum the respondent could recover on the bond, the principal and interest not exceeding the principal. The warrant therefore could have been for Rs. 133,708.

As regards the failure of the respondent to pay the whole of the amount due on bond No. 5,828 and redeem it Mr. Keuneman contends that this

was a condition on which the appellant's liability on the bond depended and was a condition to which the warrant of attorney was subject and as it was not stated in it, the warrant was null and void.

Unless the failure of the respondent to pay the creditors on bond No. 5,828 is a condition to which the warrant is subject, it is a matter with which the Court is not concerned in this action. It would, at the most, if the appellant were sued in the usual way, enable him to plead that he had not received the full consideration on the bond, but the appellant cannot ask that the warrant be declared null and void on the ground that the respondent intends to use it to obtain a larger sum than is due. But there is no substance in this objection. It appears from the affidavit of the respondent that he recognizes his obligation to pay the creditors on bond No. 5,828 and in his own interests he must do so for his mortgage is subject to theirs; nor can the appellant be prejudiced, for if he can pay the amount of the respondent's bond, he can pay it into Court and have what is necessary set apart for the creditors on bond No. 5,828. He can protect himself as well if the properties are sold in execution and the proceeds of sale are in Court, or when the respondent makes application for execution.

It is contended for the appellant that the conditions on which his liability to be sued depended must be regarded as conditions subject to which the warrant was granted.

It is said that the provision in the bond that if the appellant made default in the payment of an instalment he should be allowed a month within which to pay it was a condition on which the respondent's right to sue depended and as such it was a condition of the warrant and should have been entered in it. A similar argument is advanced as regards the undertaking by the respondent to pay the creditors on bond No. 5,828.

The condition or defeasance referred to in section 32 of the Civil Procedure Code is one subject to which the warrant is given; it might be a condition that no action should be taken on the judgment unless certain conditions were satisfied. An example of such a condition is to be found in the form No. 13 in the second schedule of the Civil Procedure Code; the Code itself contains no reference to this form which is based on that given on page 198 of *Volume II., of Key and Elphinstone's Precedents of Conveyancing (6th ed.)*. Or it may be agreed that the warrant should not be used until some condition was satisfied. But the conditions of the bond on which the liability of the debtor depends are not necessarily the conditions to which the warrant is subject unless it is so expressly agreed and the trial Judge has found that it was not given subject to any condition or defeasance.

But it is contended that the warrant must necessarily be regarded as given subject to all the conditions contained in the bond on which the right to sue depends; but this is not so, for it would defeat the whole object and purpose of this procedure. A debtor can consent to judgment though there may be grounds such as these on which he can defend the action, and by the warrant he gives the attorney the same power of

consenting to it. When a debtor has duly executed and delivered to the creditor a warrant of attorney to confess judgment he has no longer any control over its operation (*Ramanathan v. Don Carolis*¹).

If the creditor were to obtain judgment for a sum not due or for a larger sum than is due he renders himself liable to a prosecution under section 207 of the Penal Code; but he cannot be prevented from getting judgment for the amount due to him on the ground that certain conditions of the bond on which the right of recovery depended have not been satisfied unless the warrant of attorney was given subject to those conditions.

The appeal is dismissed with costs.

Appeal dismissed.

AKBAR J.—I agree.
