

1936

*Present : Abrahams C.J. and Koch J.*KUMARIHAMY *v.* PUNCHI MENIKA.165—*D. C. Ratnapura, 5,727.*

Decree entered of consent against attorney—Power of attorney not valid—Application to set aside—Decree—Irregularity not fatal—Civil Procedure Code, s. 25 (b).

Where judgment was entered of consent against a defendant, who appeared by an attorney whose power of attorney was found to be invalid,—

Held, that the irregularity did not vitiate the proceedings unless the irregularity affected the merits of the case or the jurisdiction of the Court.

A PPEAL from a judgment of the District Judge of Ratnapura.

N. E. Weerasooria (with him *Pandita Gunawardene*), for appellant, defendant.

H. V. Perera, for respondent.

July 23, 1936. ABRAHAMS C.J.—

The appellant was the defendant in the Court below and the summons in the action was served upon her. She had given a general power of

attorney to her husband which, had she complied with the provisions of section 25 (b) of the Civil Procedure Code, would have constituted him her recognized agent for the purposes of the action. In the circumstances it failed to have that effect. The husband gave a proxy to a proctor who, when the case was called, consented to judgment. After the consequential decree, the appellant's property was ordered to be sold and was sold, but before confirmation the appellant unsuccessfully applied to have the decree and sale set aside.

It is argued for the appellant that as the power of attorney did not in law constitute the appellant's husband her recognized agent, the proxy was invalid, the consent to judgment was invalid and the consequential decrees were void. It is an astonishing submission that the appellant makes. She does not complain that the learned District Judge has done anything to her prejudice on the motion of the opposite party or *suo proprio motu*, she complains apparently that he had acted in the belief that she had succeeded in doing in law what she had endeavoured to do, or in other words she complains that he ought not to have accepted the representations made to him at the appellant's own instance.

Fortunately for the better administration of justice the appellant's contention is defeated by the exposure of the fallacy upon which it rests. In my opinion the decree is not void. The learned District Judge whether he was misled in some way into believing that the appellant's husband was her recognized agent, or whether in the circumstances he took it for granted, had jurisdiction in respect of the defendant and the subject-matter of the action, and had therefore power to make the decree. It has not been argued that the decree apart from the technical defect in question, was an improper one to make, its invalidity alone is relied upon. I am of the opinion that the appellant's submission fails and that the appeal should be dismissed with costs.

KOCH J.—

The appeal is from an order of the District Judge dismissing the application of the appellant to have a decree entered against her vacated and proceedings held thereunder declared null and void. This decree was recorded on November 9, 1932, in favour of the plaintiff. In the journal the entry of that day reads thus, "Defendant present. Defendant consents to judgment". If this is an accurate entry of fact, the defendant will have no grievance but the defendant in her affidavit, which she presented in support of her application made 2½ years later, has rather disguisedly sought to take up the position that she was not present in Court on the day this decree was entered. The particular paragraph that refers to this is paragraph 2. It runs thus:—"On the 9th day of November, 1932, judgment has been entered against the petitioner in her absence consequent upon consent given by the attorney". It will be seen that the defendant does not definitely state that she was not personally present that day in Court, and that the entry made by the District Judge was, in point of fact, inaccurate. She would rather appear to suggest that absence on her part should be inferred, because on September 19, 1932, the day fixed for the *ex parte* trial, Mr. Proctor Delgoda

filed a proxy from her husband and attorney, and moved to file answer, and on the day fixed for the filing of answer moved for an extension. To make matters worse for her she did not dare at this inquiry to enter the witness box and affirmatively deny her presence in Court on the day decree was entered against her. Her husband was the only witness called. He did not impress the District Judge and on this evidence the learned Judge was not prepared, and, rightly so, to hold that the defendant was not personally present in Court. We therefore have a solemn entry in the record made 2½ years earlier that the defendant was present, consented to a decree being entered against her on the one hand, and no later finding on the other hand that this was an inaccurate entry. The defendant cannot complain of the way the inquiring Judge expressed himself, as she was solely to blame for not being present at the inquiry and helping the Court to arrive at a definite finding as to her presence or absence on the date in question. This being the position, the entry on September 9 must stand as its accuracy has not been successfully challenged. It follows that the decree entered is in order and the proceedings taken thereunder good and valid.

I would wish however to state in addition that the evidence of the defendant's husband forfeits defendant's claim to sympathetic consideration. The bond sued upon in the case was executed by her husband who acted on a power of attorney granted to him. She was admittedly served with summons but did not appear. She permitted and authorized her husband to appear for her and obtain leave to file answer. She authorized her husband to apply for and obtain time to discharge the decree. She authorized her husband to apply for and obtain stay of sale in execution on several occasions. She allowed her husband to make part payments on the decree which, she was aware, was entered against her. After obtaining concessions right through this period of 2½ years she now seeks to upset all steps that followed on the decree, on the ground that the power of attorney granted to her husband was a general one, and that he was not therefore her recognized agent in law to appear for her under section 25 (2) of the Civil Procedure Code. It would be monstrous in my opinion to permit her in these circumstances to take advantage of this irregularity to the prejudice of the plaintiff and the purchasers of property sold under the decree, the validity of which is questioned at this late date.

I see no reason why the opinion expressed in *Segu Mohamadu v. Govinden Kangany*¹ should not apply. There Wood Renton C.J. approved of the finding in *Bisandas Valad Majuvian v. Lakmichand Kisamchand*², which was to the effect that an irregularity of this nature should not be permitted to vitiate the proceedings unless such irregularity affected the merits of the case or the jurisdiction of the Court. In the case before us, the Court clearly had jurisdiction and the defendant having received summons was made amenable to that jurisdiction. She failed to answer her summons and thereby placed herself in default. The point raised in this appeal is devoid of merit and the appeal must be dismissed with costs.

Appeal dismissed.

¹ 2 *Leader* 61.

² 6 *Bombay High Court Reports*. 159.