

1917.*Present:* Shaw and De Sampayo JJ.RAMANATHAN *v.* DON CAROLIS.

10—D. C. (Inty.) Colombo, 46,710.

Warrant of attorney to confess judgment addressed to Proctor A or to any other proctor—Consent to judgment by a proctor other than A—Agreement between debtor and creditor subsequent to execution of bond and warrant to confess judgment—Warrant to confess judgment not properly explained by debtor's proctor—Civil Procedure Codes, ss. 31 and 32.

Where a debtor executed a warrant to confess judgment addressed to Proctor A or to any other proctor, and Proctor S, purporting to act under the said warrant, confessed judgment,—

Held, that Proctor S had authority to confess judgment, though he was not specially named in the warrant.

SHAW J.—“The object of the warrant is to enable the plaintiff to obtain judgment and to put the document in the hands of any proctor for the purpose.”

Effect of debtor's proctor not properly explaining terms of the warrant of attorney to confess judgment and of an agreement between debtor and creditor subsequent to the warrant considered.

THE facts are set out in the judgment.

Bawa, K. C. (with him *A. St. V. Jayewardene*), for appellant.

E. W. Jayewardene (with him *Bartholomeusz and Samarawickreme*), for respondent.

Cur. adv. vult.

March 4, 1917. SHAW J.—

This is an appeal from an order of the District Judge setting aside a decree, entered on December 13, 1913, against the defendant by consent, and giving defendant leave to file a defence in the action. The learned Judge does not say under what provision in the Code he purports to act, and I know of none authorizing him to set aside his own decree, except in the case of a decree *nisi* under chapter XII.

The consent to the decree against the defendant was given on his behalf by a Mr. V. L. S. Swan as his proctor. This gentleman, purported to act under a warrant to confess judgment on a bond, which warrant was executed by the defendant on May 13, 1916, and given by him to the plaintiff.

The warrant follows form No. 12 in the second schedule of the Civil Procedure Code, which is authorized to be used by section 31, and was addressed, as the form provides, to Oliver G. de Alwis, Proctor of the Supreme Court, or “to any other proctor of the said Court or of the District Court of Colombo,” and authorized: “You, the proctor above-named, or any other proctor of the said Court,” to appear, &c. The District Judge appears to have thought that,

notwithstanding the express terms of the warrant, only Mr. de Alwis, and no other proctor, could appear under it and confess judgment. I am unable to agree. The object of the warrant is to enable the plaintiff to obtain judgment and to put the document in the hands of any proctor for the purpose.

It was further contended, for the respondent, that there was a verbal condition, that the bond should only be entered under certain circumstances that have not arisen, and that, therefore, the warrant to confess judgment was given subject to a condition which was not written on it, as it prescribed by section 32 of the Code, and that it was, therefore, void under that section. This contention appears to me quite unsound, for even if there was such a stipulation with regard to the bond, there was none as to the warrant to confess judgment.

The judgment entered by consent appears to me to be authorized by the warrant, and to be regular on the face of it. The respondent may have some other remedy if he can show there has been fraud or mistake, but the District Judge had no power to set aside the judgment.

I would therefore allow the appeal with costs.

DE SAMPAYO J.—

This appeal raises an important point of procedure. The defendant, being largely indebted to plaintiff, executed on May 30, 1916, the bond No. 427, by which he agreed to pay to plaintiff on demand the sum of Rs. 35,000, with interest thereon at 15 per cent., and as security for such payment he mortgaged a number of lands. Contemporaneously with the bond the defendant executed a warrant of attorney to confess judgment addressed to "Mr. O. G. de Alwis, Proctor of the Supreme Court of Ceylon, or to any other proctor of the said Court or of the District Court of Colombo," whereby he authorized Mr. Alwis or other proctor "to appear for me at any time before the District Court of Colombo and to receive summons for me in an action for Rs. 40,000 or any other sum that may become due on the mortgage bond No. 427 made by me in favour of (the plaintiff) and thereupon to confess the said action or else to suffer judgment by default or otherwise to pass against me of record in the said Court for the said sum, interest, and costs of action." On December 13, 1916, the plaintiff sued on the mortgage bond in this action, stating that the defendant had paid Rs. 5,487.66 on account of principal and all interest due up to November 30, 1916, and claiming Rs. 29,512.34 as balance principal, with interest thereon from December 1, 1916, and costs of action. At the same time as the filing of the plaint, a written consent to judgment was submitted to Court from Mr. V. L. S. Swan, a proctor practising in the District Court of Colombo, who, acting under the warrant of attorney executed by the defendant, thereby confessed judgment on behalf of the defendant, and consented to judgment being entered

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for the plaintiff as prayed for in his plaint. The Court then entered judgment for the plaintiff accordingly, and on the same day the plaintiff applied for and issued a writ of execution. On December 20, 1916, the defendant, appearing by a firm of proctors, filed an affidavit, and moved on grounds stated therein that the judgment be opened up and the writ recalled. On this motion certain evidence was heard, and the District Judge, by his order of December 21, 1916, upheld all the objections taken by the defendant and set aside the decree and recalled the writ. The plaintiff has appealed from that order.

I shall deal with the points upon which this appeal turns. Previous to the enactment of the Civil Procedure Code our Courts had tacitly adopted the English practice of entering judgment upon confession of judgment under a warrant of attorney. See *Venathirthan Chetty v. Jayatilleke Appuhamy*,¹ in which the practice was recognized, and it was held that plaintiff, who had a warrant of attorney to confess judgment, might file by the attorney the defendant's admission of his claim and have judgment entered up without notice to the defendant, but that the Court before entering up judgment for plaintiff should require some safeguards, analogous to those required in England, to prevent abuse of this extraordinary procedure. The desired safeguards have since been provided by sections 31 and 32 of the Civil Procedure Code, which are taken from 32 and 33 Vict., chapter 62, section 24 and section 26. All the requirements of section 31 with regard to safeguards were complied with in this case, and the warrant of attorney in question was in accordance with form 12 in the schedule, as required and authorized by that section. Under the English practice a judgment entered up on confession of judgment by the attorney might be set aside on application to Court by the defendant if the warrant of attorney had been obtained by fraud or misrepresentation, or for an illegal debt, and on such like grounds. As our District Courts have generally no power to set aside their own judgments, except in the cases provided for in the Civil Procedure Code itself, it is at least doubtful whether the District Judge was able to open up the judgment in the circumstances of this case, but the appeal may be disposed of upon a consideration of the grounds on which the order appealed from has been supported.

The first objection taken is that only Mr. O. G. de Alwis, who is specifically named in the warrant of attorney, could have acted for the defendant, though the warrant was addressed to and authorized "any other proctor of the Supreme Court or of the District Court of Colombo," and that Mr. Swan's consent was a mere nullity. Counsel for the defendant even went further, and contended that the warrant itself was bad in so far as it purported to give authority to any unnamed proctor, and the District Judge himself, on the evidence given by the defendant at the hearing of the motion, said

¹ (1884) 6 S. C. C. 105.

that the defendant intended to appoint a proctor of Kalutara, as Mr. Alwis was, so that such proctor might communicate with the defendant and act according to his instructions, and that Mr. Swan had no conception of his responsibilities as proctor, and had not communicated with the defendant, as he ought to have done, before he consented to judgment. The misconception appears to me to exist elsewhere. The warrant of attorney in this case is in the form which is authorized by section 31, and is also in the form commonly adopted in England. The objection is based on the mistaken idea that the appointment of an attorney to confess judgment is for the convenience of the defendant, and that the attorney may act or abstain from acting according as the defendant may desire. On the contrary, a warrant of attorney is given as security for the plaintiff, and is delivered to him to use it as he wishes by getting the named proctor or any other proctor of the Court to act under it. The object of it will be effectively defeated if the named proctor refuses to act in the interests of the defendant or for any other reason, unless the warrant is so framed as to enable the plaintiff to get another proctor to act. Mr. Swan might, of course, have refused to act, but if he undertook to do so, he would not have performed his functions properly if he delayed or otherwise prejudiced the plaintiff by any reference to the defendant. When a debtor has once duly executed and delivered to the creditor a warrant of attorney to confess judgment, he has no longer any control over its operation. There is no doubt a certain element of danger in this procedure, but that is why the law provides for the presence of a proctor to advise the debtor at the execution of the warrant. In this connection the defendant stated in his evidence that Mr. Abeyewardene, who was his proctor specially appointed by him for that purpose, did not explain to him the fact of any other proctor but Mr. Alwis was being authorized. But this does not invalidate the warrant in the hands of the plaintiff, unless there was collusion between the plaintiff and Mr. Abeyewardene, of which there is no suggestion (*Haigh v. Fros*;¹ *Cooper v. Grant*²).

It is next objected that, as the warrant of attorney authorized the proctor to appear for the defendant and to receive summons for him, and "thereupon" to confess judgment, and as no summons was served on Mr. Swan, he had no authority to confess judgment. There is no doubt that the terms of a warrant must be complied with. But a summons is intended to inform a party of the institution of an action and of the nature of the claim. The written consent of Mr. Swan shows that he had seen the actual plaint, which is even better for that purpose than the summons, and I think there is no substance in this objection.

The most important ground of objection has reference to another agreement between the plaintiff and the defendant entered into on

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the same day as the mortgage bond and the warrant of attorney but subsequent thereto. By that agreement the defendant agreed to deliver to the plaintiff all the produce of the mortgaged lands for sale, and for appropriation of a certain proportion of the proceeds in respect of his indebtedness to the plaintiff. It was by the agreement expressly declared that nothing therein contained should in any manner prejudice or affect the right of the plaintiff to sue for and recover at any time the moneys due on the mortgage bond, " provided, however that (the plaintiff) shall not put the said bond No. 427 in suit so long as (the defendant) shall well and truly observe and perform all the obligations contained in this agreement. " In October or November, 1916, certain differences arose between the plaintiff and the defendant, the plaintiff alleging that the defendant had failed to consign all the produce to him and to fulfil certain other stipulations, and the defendant maintaining the contrary, and further alleging that the plaintiff had failed to render the monthly accounts as agreed. The plaintiff, as stated above, gave credit to the defendant for Rs. 5,487.86, but the defendant says that he should have been given credit to a larger extent. The objection founded on this question of fact is that as the defendant, according to himself, had fulfilled all the obligations on the agreement, the plaintiff's action was premature, and the confession of judgment is inoperative. In my opinion the objection cannot be sustained. Any agreement qualifying the terms of the mortgage bond can, if at all, only be regarded as a defeasance or condition, which should have been written on the warrant of attorney, but was not. It is contended for the defendant that it was for the plaintiff to see that the defeasance was so written. The law, however, is not so. The omission should be attributed to the person who prepared the document, but constitutes no ground of avoiding the warrant of attorney or the judgment entered thereupon (*Partridge v. Fraser*¹). Moreover, what section 32 of the Civil Procedure Code provides is that if the warrant was given subject to any defeasance or condition, the same shall be written on the same paper, and that otherwise the warrant shall be void. The condition introduced by the subsequent agreement has reference to the mortgage bond, and was not a condition subject to which the warrant was given. I may add that the agreement is of itself a complete and independent contract, and contained a secondary mortgage of the very lands primarily mortgaged to plaintiff by the bond, and that, as a matter of fact, it was sued upon by the defendant before the institution of the present action by the plaintiff. It would be strange if the plaintiff were not able to sue on the mortgage bond, seeing that the defendant would get in his own action all the credit to which he claims to be entitled in connection with the delivery of produce. Where a warrant of attorney was given to confess judgment for a

certain sum, but it was understood that it was given to indemnify plaintiff against his suretyship for a smaller sum, it was held that that was not such a defeasance as needed to be endorsed on the warrant of attorney (*Barber v. Barber*¹). So far from the warrant of attorney in this case being subject to a condition postponing the exercise of it pending the currency of the subsequent agreement, the proctor was authorized to confess judgment at any time. Moreover, the currency of the agreement came to an end when the defendant himself absolutely refused to consign any more produce to the plaintiff and brought an action thereon. In these circumstances, I am unable to hold that the plaintiff's action was premature.

In my opinion the order appealed from is erroneous. I would allow the appeal with costs in both Courts, and would restore the original decree in favour of the plaintiff.

Appeal allowed.

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