

SIVANADIAN v. SAMARAWIKKRAMA.

1878
April 2.

D. C., Galle, 38,848.

Misfeasance of notary public—Careless attestation of mortgage bond—Action for damages against notary by mortgagee—Decree for damages—Difference between what plaintiff could have recovered on mortgage bond and what plaintiff actually recovered—Recovery of a further sum from other debtors—Right of defendant notary to set off such amount against amount of decree.

Where plaintiff got judgment against defendant, for misfeasance in his duty as a notary public, for a certain amount as damages computed as the difference between what the plaintiff could have recovered on his mortgage bond, had it been properly drawn by the defendant, and what plaintiff actually recovered; and where plaintiff subsequently recovered by some unforeseen means a further sum from another debtor—

Held, that in equity the defendant notary was entitled to set off such further sum against the amount of the decree.

THIS was a suit for the recovery of damages consequent on the defendant, who was a notary public, having drawn and attested a certain mortgage bond executed by W. H. A. Jansz and H. F. Jansz in favour of plaintiff, and having (it was alleged) falsely attested and represented to the plaintiff that the said bond was duly drawn and attested, whereby the plaintiff was induced to accept the said bond as valid, whereas the defendant knew it was not duly drawn and attested, in that he neglected to take the signature of H. F. Jansz in the presence of the defendant as notary and of the

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subscribing witnesses to the deed. The plaintiff alleged that owing to such neglect one of his debtors, H. F. Jansz, was held by a judgment of the District Court of Galle, in case No. 36,936 instituted by plaintiff against the said H. F. Jansz, not to be bound by the said bond, and was accordingly absolved.

The defendant admitted that he omitted to secure the attendance of the subscribing witnesses at the time the said H. F. Jansz signed the bond, but he denied that such omission was made with a view to defraud and prejudice any one. He further pleaded that, though the bond was not valid as a mortgage, yet it was valid as a personal obligation, and it was the duty of the plaintiff to have appealed against the judgment of the District Court in 36,936; and that, if the defendant was liable for the neglect complained of, it was only in the amount which the plaintiff would have actually lost had he taken all the steps available to him and discussed all the property of the defendant within his reach.

The District Judge entered judgment for plaintiff for Rs. 750, "as the plaintiff is only entitled to recover the value of the property "H. F. Jansz purported specially to mortgage."

After judgment obtained, plaintiff moved for a rule on plaintiff to show cause why further proceedings in the case should not be stayed, as the land Kandalwela, which H. F. Jansz purported to mortgage, had been sold and proceeds brought to the credit of the plaintiff.

The District Judge disallowed the motion in these terms:—
"The land sold was not as against Mr. H. Jansz, who was
"absolved. But he chose to allow it to be sold for his son's debt,
"which can in no way interfere with plaintiff's right against
"defendant."

Defendant appealed.

2nd April, 1878. CLARENCE, J.—

In this case the defendant, a notary, was sued by plaintiff for a misfeasance in his notarial capacity. Defendant was employed by plaintiff to attest a mortgage securing Rs. 4,500 and interest at 18 per cent. on the security of certain property of the mortgagors, Messrs. Henry Andree Jansz and Henry Frederick Jansz, another person Mr. Albert William Jansz joining as a surety. This was admitted by defendant, who also admitted that he allowed Henry Frederick Jansz to sign the mortgage in the absence of the witnesses, whereby, that person not scrupling to take objection when the mortgage bond was put in suit by the mortgagee in Galle District Court case No. 36,936, plaintiff lost the benefit of the mortgage which Henry Frederick Jansz had purported to

give. At the trial of the present case Henry Frederick Jansz was called and admitted that he did sign the mortgage bond, though not in the presence of the witnesses.

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It is unnecessary now to consider whether under such circumstances this man should have been allowed to take advantage of his own conduct at the expense of the mortgagee, under cover of the Ordinance against frauds and perjuries, since not only has the case 36,936 been decided on that point in his favour without appeal, but the result of that decision has been accepted by the defendant to the present case. The result of the case 36,936 was that J. A. Jansz and A. W. Jansz were decreed to pay plaintiff the Rs. 4,500 mentioned in the bond with costs of suit, while H. F. Jansz was absolved from the instance, paying his own costs. It does not appear why he should have been absolved from the money liability as a mere debt unsecured by the mortgage, but he was so absolved, and the present defendant contended in his answer that plaintiff ought to have appealed against that part of the judgment.

It was by no means made clear at the trial of this case that plaintiff had exhausted such remedies as he still possessed under the bond in spite of H. F. Jansz's escape from the mortgage liability, but the District Judge proceeded to give plaintiff, on conjectural grounds, a judgment for Rs. 750, and this decree has not been appealed against.

Upon plaintiff moving for writs under this judgment, defendant raised the contention that a sum of Rs. 500, which plaintiff had recovered under writ in case No. 36,936, should be deducted from the amount of judgment in this case, and the District Judge having decided that point against defendant, defendant now appeals.

I am of opinion that in equity, supposing plaintiff to have got judgment against defendant for a certain amount as damages in this case, computed as the difference between what plaintiff could have recovered on his mortgage bond if defendant had not made the mistake and what plaintiff using all lawful means was actually able to recover; and supposing that plaintiff afterwards by some unforeseen means recovered a further sum from the Janszes, such further sum ought in equity to be set off against the amount of the judgment.

There is in the record of case 36,936 an entry showing that Rs. 500 had got into Court,—how, it does not appear,—and that after deducting the claims of two claimants, plaintiff was allowed to draw a balance of Rs. 430·06. The District Judge, in assessing damages, held that plaintiff was entitled to recover the value of the property which H. F. Jansz purported to mortgage.

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That property was an allotment of land called Kandalawela, and the District Judge valuing it at Rs. 750 gave plaintiff damages for that amount. Consequently, if this net sum of Rs. 430·06 was recovered since judgment from H. F. Jansz, defendant ought to have the benefit of it. I cannot gather from the record in either case what this sum is, or whence it came. Defendant might very simply have cleared up the question what sum plaintiff has raised and from what source by examining plaintiff and, if necessary, the Fiscal or the Janszes. Plaintiff having got a judgment for Rs. 750, it is for defendant to show that there has been a satisfaction in equity; and under the above circumstances I can only say that defendant has not satisfied me that there has been any such satisfaction in equity, and I consequently cannot interfere with the District Judge's order which has been appealed against.

Appeal dismissed.

