

DODWELL *et al.* v. ROWTER *et al.*

1899.

August 25.

D. C., Colombo, Nos. 11,295 and 11,406.

*Civil Procedure Code, s. 781—Certificate of requirements fulfilled under s. 42 of Courts Ordinance—Judgment against one person upon answer filed by another person without authority—Motion for vacating such judgment—Petition for restitutio in integrum—Appeal to Her Majesty in Council.*

Where, in an action against three persons said to be partners, summons was served only on the second defendant, and he filed answer on behalf of himself and the first defendant without exhibiting any authority from the first defendant, and decree was signed by the Supreme Court against the first defendant only ; and where that defendant applied for a reversal of such decree with liberty to him to appear and defend himself—

*Held*, that the first defendant's application was in the nature of a petition for *restitutio in integrum*, and that so long as another remedy was available, namely, to bring the judgment in question in review within the time prescribed by the Code, the petition for restitution could not be allowed.

*Held* further, *per* WITHERS, J., that in the circumstances of the case the first defendant was entitled to a certificate under section 781 of the Civil Procedure Code, so as to permit him to appeal to Her Majesty in Council against the order disallowing the petition for restitution.

IN case No. 11,295, the plaintiff sued the defendants for the recovery of Rs. 1,594 as damages arising from a breach of contract, and Rs. 2,593 as debt due to the plaintiffs in respect of certain advances made to the defendants from time to time. Plaintiff prayed judgment for Rs. 4,187 with interest at 14 per cent. on Rs. 2,593.

In another case, No. 11,406, plaintiffs sued the defendants for a sum of Rs. 7,000 due on a promissory note made by the second defendant as a partner of the first and third defendants, who were all said to be carrying on business under the name and style of Mana Thavanna.

No summons was served on the first and third defendants, but the second defendant filed answer on behalf of himself and the first defendant without exhibiting any authority from the first defendant to do so.

The case came on for trial before the Acting District Judge of Colombo, who on the 12th December, 1898, entered judgment against the second defendant only, being of opinion that partnership had not been proved between the defendants.

On appeal by the plaintiff, the case came on for hearing before BONSER, C.J., and WITHERS, J., who were agreed that second defendant acted as the agent of the first defendant, and that judgment should be entered against the first defendant. A decree to that effect was entered on the 6th February, 1899.

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The first defendant thereupon applied to the Supreme Court that, as no summons was served on the first defendant and for other reasons stated in the affidavit filed with his petition of 10th March, 1899, the decree of the Supreme Court should be set aside and permission given to him to appear and defend himself.

The Supreme Court disallowed this application on the 9th May, 1899.

And now the first defendant, desirous of appealing to Her Majesty in Council against the order of the Supreme Court refusing to vacate its decree dated 5th February, 1899, petitioned the Supreme Court (1) for a certificate under section 781 of the Civil Procedure Code that, as regards the amount, value, and nature, the two cases against him fulfilled the requirements of section 42 of The Courts Ordinance, 1889, and that it was otherwise a fit one to appeal to Her Majesty in Council; (2) that the Court do determine the amount and nature of the security to be given by the petitioner for costs; and (3) that the case be heard in review and the decree of the Court dated 6th February, 1899, be set aside, and that petitioner be allowed to defend the action. This application was made before WITHERS, J.

*Layard A.-G. (H. Jayawardana with him), for petitioner.*

*Dornhorst (Van Langenberg with him), for plaintiffs, respondent.*

*Cur. adv. vult.*

25th August, 1899. WITHERS, J.—

This is an application under section 781 of the Civil Procedure Code for our certificate, that the case—in which by our judgment we dismissed the first defendant's petition to this Court to set aside our judgment in the appeal taken from the judgment of the Court below on the ground that it was founded on evidence amounting to perjury and fraud—as regards amount, value, or nature, fulfils the requirements of section 42 of The Courts Ordinance, 1889.

The case is a consolidated action, in which the would-be petitioner in review was adjudged to pay the plaintiff a principal sum in all of Rs. 6,781·76 with interest.

The petition to set aside our judgment in appeal we regarded as a petition for *restitutio in integrum*. We were asked in effect to hear evidence to satisfy us that the evidence on which we based our judgment in appeal was perjured evidence, and given with intent to deceive the Court which received it. Had we heard fresh evidence on the point and had been satisfied that a proper case had been made out for a new trial, we might have sent back the case to the District Court for a new trial. That petition was dismissed for the reason that the would-be petitioner in review did not, within the time limited by the provisions of the Code, bring up the judgment in review.

The Roman-Dutch Law does not allow the extraordinary remedy of a petition for a *restitutio in integrum*, if there is any other remedy available. Such a case as this has never occurred before that I am aware of.

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The procedure for obtaining the relief sought for by the Attorney-General has been rightly or wrongly taken over by us from the Roman-Dutch procedure, as it appeared to us that the remedy was not inconsistent with the provisions of the Courts Ordinance of 1889. I should certainly be glad if we could be directed to hear further evidence in the interest of the first defendant, the present petitioner, as he had no opportunity of meeting the case put forward by the plaintiff in the Court below.

The matter is by no means free from difficulty, but I am prepared in the circumstances to grant the certificate asked for.

