MUTTIAH *v.* MUTTUSAMY *et al.*

D. C., Chilaw, 965.

Civil Procedure Code, chapter XLVII.—Power of Court to vacate an order of sequestration made on ex parte *motion.*

A District Judge can, on good cause shown by the party aggrieved, vacate an *ex parte* order of sequestration which has been made at the instance of the plaintiff, under the provisions of chapter XLVII. of the Civil Procedure Code.

THE District Judge having allowed sequestration on the *ex parte* motion of plaintiff, the defendant appeared and moved to vacate the order of sequestration. The Court held it had no power to do so.

The defendant appealed.

Van Langenberg, for appellant.

Bawa, for respondent.

Cur. adv. vult.

12th March, 1895. WITHERS, J.—

We are asked to decide an abstract and a concrete question in this matter.

The abstract question is one of pure law, and is this: Can the District Judge, on good cause shown by the party aggrieved, vacate an *ex parte* order of sequestration which he has made at the instance of the plaintiff under the provisions of chapter XLVII. of the Civil Procedure Code? Before I can declare that a District Judge has no power to vacate an order of the kind under these circumstances, I must be satisfied that the power is

denied him either by express enactment or by clear implication in the Code itself. It being nowhere said that he shall not have the power, is the denial of such power to be clearly implied from the words of the Code ?

It was argued that we ought to imply a disqualification by reason of the following considerations : The provisions of this Code are taken from the repealed Ordinance No. 15 of 1856, with the exception of an important proviso to be found at the end of the 4th section of that Ordinance, viz., "Provided that such sequestration shall "in all cases be dissolved on the defendant giving security to the "satisfaction of the Court equal to the value of the property "sequestered."

Non constat that an *ex parte* order may not be dissolved on good cause shown by the party whose property has been sequestered on the *ex parte* application of the plaintiff ; *non constat* even that a District Judge may not in his judicial discretion in certain cases dissolve such an order on adequate security being furnished by the defendant.

Then we were asked to infer this qualification because in this chapter there is no provision for the dissolution of an order, as there is in the next chapter relating to injunctions. But there is this difference in these two chapters : in chapter XLVII. there is no provision for informing the defendant that the Court will be moved to sequestrate his property. In chapter XLVIII., except in very rare cases, a defendant must have notice given him of plaintiff's intended application for an injunction. If the defendant appears and shows cause against an injunction, the order is *inter partes*, and could not be opened up by the Judge except for the provisions in section 666. In ordinary circumstances he would have to appeal to this Court from an order *inter partes*. But in the present case the defendant would be without a remedy. He could not appeal to this Court because he had not applied to the Court below to set aside its *ex parte* order. This procedure has been repeatedly laid down by this Court as the right procedure.

I therefore do not hesitate to answer the question above stated in the affirmative.

As to the other and concrete question, it is this : Has the defendant shown good cause why the order of sequestration should [not] be dissolved ? He has shown very good cause in my opinion. There was no foundation for the order. There was no evidence that defendant was fraudulently alienating his property with intent to avoid payment of the plaintiff's claim, and, what is more, the plaintiff swore in support of his application for a mandate that defendant was indebted to him in the amount

claimed under his bond. The bond is not for a debt at all, but is for damage, if any ; and plaintiff makes out no case of damage in his affidavit. For these reasons I would set aside the order appealed from, with costs.

BROWNE, J.—

The learned District Judge refused to dissolve a sequestration he had granted, holding he had right to grant it *ex parte*, and even in cases of debts secured by mortgage, when the Court was (as he held he was) satisfied that the plaintiff had no adequate security.

In appeal the respondent has sought to support his ruling on the grounds that a Court has no power to dissolve a sequestration (save by consent) when once granted, even *ex parte*, for the reasons that (1) the Civil Procedure Code, by whose express provisions all procedure is concluded (*2 C. L. R. 63*), does not supplement the provisions of sections 651 and 653 by any provision to dissolve, such as is enacted in regard to dissolving injunctions by section 666, and removing receivers by section 674 ; and (2) the omission of the proviso enabling dissolution in the old procedure under Ordinance No. 15 of 1856, section 4, when adopting the rest thereof. And the absence of any provision of the effect of section 488, Civil Procedure Code (India), or of the provision for release of the debtor in the English Act while security of the defendant against damage is expressly required, indicates that such security was designed as a remedy substituted for discharge of person or release of property, and that these reliefs were no longer to be granted. I had so construed these provisions (when like objection was taken before me in the District Court, Colombo, in actions Nos. C/5,064 and C/5,373), though with reluctance, to hold that the Court had not the power to reconsider its own *ex parte* orders and discharge or release accordingly. In so holding, I would, however (and I believe I did), distinguish between cases where it was clear that the writ should never have issued owing to the absence of necessary material, *e.g.*, the affidavit of the plaintiff himself, or his substitutes authorized by section 655.

Accepting the decision of the rest of the Court that the District Court has no inherent jurisdiction in this respect which is not expressly given to it,—and I did not then feel justified in claiming for it,—I agree that the material on which this writ issued was insufficient, and that the order appealed from herein should be set aside, and defendant's motion allowed, with costs.

LAWRIE, A.C.J.—

In my opinion this sequestration was allowed on insufficient materials, and having been allowed *ex parte*, it ought to have been

recalled on the motion of the defendant. I would therefore set aside the refusal now under appeal, and remit to the District Court to dissolve. I would give the defendants their costs of appeal.

The plaintiff did not make out a *primâ facie* case of fraudulent alienation by the defendants which entitled the plaintiffs to sequestration: something more is necessary than proof of sales; some facts must be sworn to from which the Court can reasonably infer that the sales were not *bonâ fide* for fair value. Alienation is not enough, it must be a fraudulent alienation.

Of fraud I find no proof.

On the ground suggested that a District Court, having once *ex parte* allowed a sequestration to issue, cannot recall it, on good grounds shown by the defendant, all I can say is that I do not assent to so novel and, I think, so dangerous and unjust a rule. There is as a rule no appeal against an *ex parte* order. The proper course is to apply to the Court which made the order to vacate it on notice to the party who holds the order, and on showing good grounds that the order had been made on insufficient materials, or was otherwise wrong.