GUNARATNA *v.* DINGIRI BANDA.

D. C., Kurunegala, 1,556.

1898. *September 29* and 1899. *September 11*

Consent judgment obtained by fraud—Proper procedure to set it aside—Civil Procedure Code, s. 325—Hindrance to judgment-creditor taking possession—"Tenant or other person" (s. 324).)

Where the consent of a party to a case instituted in the District Court was obtained by fraud and so judgment obtained, the proper remedy is to apply to the Supreme Court for an order on the Court below to review the impugned judgment and to confirm or rescind it.

If upon review the judgment is rescinded, an *actio indebiti* lies to the party who has been compelled to pay money in execution to recover it.

Where, in an action to vindicate certain lands in possession of defendants, plaintiff obtained judgment, and took out a writ of possession, but was unable to get into possession of some of the lands owing to the obstruction of the parties in possession, and where the plaintiff petitioned the Court under section 325 of the Civil Procedure Code, and the District Judge, without finding the facts which constituted the obstruction, directed the petition of complaint to be numbered and registered as a plaint between the decree-holder and the respondents, with the object of investigating the respondents' claims to the different lands,—

Held, that it was the duty of the District Judge to find the facts which constituted the obstruction alleged, and if there was no obstruction, there was no foundation for the order in question.

In section 324, "other persons" is *ejusden generis* with tenant, *i.e.*, a person who has come on to the land under the judgment-debtor by a title which had accrued before the decree.

IN December, 1897, plaintiff commenced this action to recover possession of certain lands which he said had been sold and

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conveyed to him by the defendant in December, 1887. He alleged that he went into possession under his purchase, but that in 1892 he had been ejected therefrom. Five years after the ousting the present action was brought. Defendant answered that the deed of conveyance of 1887 on which the plaintiff relied was a forgery.

The trial was fixed for the 16th March, 1898. On the 10th February the parties and their proctors appeared and stated to the District Judge that, as they had come to a settlement of the case, judgment should be entered in favour of plaintiff for the lands in question and Rs. 1,000 as damages. The terms of this agreement were set forth in a paper subscribed by the parties and their respective proctors, and the Interpreter of the Court certified that the document had been explained by him to the defendant. The District Judge thereupon allowed the motion and signed a decree according to the agreement arrived at.

On the 29th April defendant's proctor moved for a notice on the plaintiff to show cause why the decree should not be re-opened. The application was made on an affidavit of the defendant, in which he stated that his consent to the agreement was obtained by force and fraud of the plaintiff; that plaintiff had made him drunk; and that having been taken in that state before the District Judge he gave his consent. The District Judge allowed the motion and fixed the inquiry for the 30th May. On that day the defendant being absent the Court discharged the motion. On the 15th July the defendant applied for a fresh notice on plaintiff to show cause why the decree should not be re-opened. The District Judge disallowed this motion, being of opinion that defendant was not entitled to any further consideration.

The defendant appealed.

Dornhorst, for appellant.

Wendt, for respondent.

BONSER, C.J.—

There seems to be some doubt as to what should be the proper procedure in cases where a party wishes to get a decree set aside on the ground of fraud. There is no doubt that, if a consent of the parties to a judgment is obtained by fraud, there must be some remedy for the fraud. This application was in substance an application for what is called *restitutio in integrum*, which is a well-known civil law remedy for setting aside a judgment which had been improperly obtained. It seems to have been the practice in Holland to apply for *restitutio in integrum* to the highest Court of Appeal, which had delegated to it the powers of the Sovereign

in this respect. If the applicant satisfied that Court that he had a *primâ facie* case, the case was remitted to the judge who pronounced the decree, who, if he found that the decree had been fraudulently obtained, would restore the parties to their original possession.

In this case the District Judge entertained the application, but unfortunately on the day fixed for the respondent to show cause the appellant was not in attendance, owing, as he says, to an unavoidable accident. The judge therefore dismissed the application. The appellant renewed the application, but the District Judge refused to entertain it, and against that refusal an appeal is now brought to this Court. Now, it seems to me, that we cannot give him any relief on the present appeal. I should have been quite prepared to follow the practice of the Courts of Holland, and to treat this appeal as an application to the Supreme Court for a direction to the District Court to entertain the application for *restitutio in integrum;* but, on reading the affidavit, I am clearly of opinion that the materials before us are insufficient to justify us in making such an order. The affidavit is far too vague. I should like to know more fully what occurred in the Court below on the occasion of the consent decree being made, and in particular what the defendant's proctor has to say about the way in which the consent was given. In my opinion this appeal must be dismissed. At the same time, I think it should be without prejudice to any future application which the appellants may be advised to make to this Court on fuller materials. Any such application will, of course, be an *ex parte* one.

WITHERS, J.—

I agree. There has been no settled procedure regarding the rescission of judgments obtained by fraud of one of the parties. There must be some remedy, as the Chief Justice observes, for restoring parties as far as can be done to the *status in quo*. Of course it may not be possible to do this completely. But, the judgment once rescinded, it would be open to the party who had been compelled to pay money in execution of the rescinded judgment to recover that money by an *actio indebiti*.

I see no better form of procedure than an application to this Court for an order to the judge of the Court below to review the decision said to have been obtained by fraud. There is nothing in the Procedure Code or in The Courts Ordinance to prevent this course being followed.

We have the fullest powers of revision, and if a *primâ facie* case is made out to us that judgment is fraudulent and ought to be

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rescinded, we can direct the judge of the Court below to review his judgment, and to confirm it or rescind it as he may be advised after a further re-hearing.

In this case there is not sufficient material evidence to support an order of this kind.

On the case going back to the Court below, the plaintiff took out a writ of possession. On the 31st January, 1899, the Fiscal reported that he put the petitioner in possession of certain lands, but that he was unable to put him in possession of the rest, as they were claimed by different parties. No action was taken on the report, but the writ was re-issued on the 1st March, 1899, for the Fiscal to follow the procedure laid down in section 324 of the Civil Procedure Code. Thereupon the Fiscal reported that he put the plaintiff in possession of the lands which he was unable to put him in possession of on the previous occasion, by serving notices on the occupants. The plaintiff then commenced proceedings under section 325 against such occupants. The District Judge ruled as follows:—

"This is an action under section 325 of the Civil Procedure Code to deal with respondents who have hindered petitioner from obtaining complete and effectual possession of certain lands under a writ of possession.

"I think, after reading the proceedings, that the petitioner is perfectly in order and has adopted the correct remedy. The Fiscal has put him in legal possession of the lands by serving notices containing the substance of the decree on respondents who are in occupation and who are not bound by the decree. All requirements of section 324 of the Code have been complied with. Petitioner has within thirty days of the obstruction come to Court.

"It appears to me that the obstruction has been caused by respondents claiming in good faith to be in possession of the properties on their own account. Therefore, under section 327, I direct the petition of complaint to be numbered and registered as a plaint in an action between the decree-holder as plaintiff, and the respondent claimants as defendants.

"Mr. Advocate Jayawardena urged that, as the various respondents claim the various lands on varying titles, the Court should refer the decree-holder to regular actions against the respondents.

"But I fail to find any authority in these sections for any such decision of this Court. I think I am bound to deal with the matter under section 327, though the lands and respondents are

certainly so numerous as to make such a course a little complicated. It will be convenient to deal with each respondent separately.

"Fix the 10th instant for issues to be framed as between petitioner, decree-holder, and each claimant respondent."

Against this order the claimants appealed.

Dornhorst and *Jayawardena*, for appellant.

Wendt, *Pieris*, and *H. J. C. Perera*, for plaintiff, respondent.

Cur. adv. vult.

11th September, 1899. WITHERS, J.—

This is a novel case, arising out of the application of the provisions of sections 324, 325, and 327 of the Civil Procedure Code.

The facts of the case appear to be these:—

The plaintiff, in an action to vindicate certain lands in the possession of the party defendant, obtained judgment for them.

This entitled him to a writ for the delivery of the possession of the lands in the form No. 63 to be found at page 534 in the second schedule to the Civil Procedure Code.

The plaintiff accordingly took out a writ. The writ was sent back to the Court with a return dated the 31st January, 1899. The return in effect showed that the plaintiff's men had been put in possession of some of the lands, but that as to the other numerous lands the plaintiff could not be put in possession, as they were claimed by different parties. The affidavit of the officer entrusted with the execution of the writ was annexed to the return. The officer reported how he had put the plaintiff in possession of some of the lands mentioned in the writ of delivery, but as to the other lots he stated that he could not put the plaintiff in possession, as "they were claimed and being possessed" by certain individuals under deeds of gift, mortgage, and otherwise. The writ, according to an endorsement on it dated the 1st March, 1899, was "extended and re-issued, returnable the 15th April, 1899."

This was returned on the 13th April with the affidavit of the Fiscal's officer of the same date, according to which the officer had put the plaintiff into actual possession of a few more lands, and into constructive possession of the rest by serving on the occupants, as per list annexed to the return, notices in writing containing the substance of the decree in the above case, as the

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occupants declined to give up possession. The Fiscal excused himself for not having delivered the remaining lots to the plaintiff in terms of the mandate by stating that the occupants were not bound by the decree to relinquish their occupancy, and that they declined to give up possession. On the 20th April the plaintiff petitioned the Court for an interlocutory order on the persons named in the Fiscal's return to the writ appointing a day for inquiry into the matter of his petition, which was that he, the petitioner, was hindered by those persons in taking complete and effectual possession of the remaining lots of land.

Though the petition is not intituled in the matter of the 325th section of the Civil Procedure Code, it clearly refers to that section, and has been so regarded. The inquiry was held on the 29th June following, and in the result the District Judge found that the petitioner had been obstructed by the parties made respondents to his petition, but as they claimed in good faith to be in possession of the lots of land on their own account he directed the petition of complaint to be numbered and registered as a plaint between the decree-holder and the respondents with the object of investigating the respondent's claim to the lands. This order was made under the provisions of section 327. But the District Judge did not find the facts which constituted the " obstruction," and if there was no obstruction there was no foundation for the order appealed from.

This was the chief point taken by the appealing respondents.

Section 325 of the Civil Procedure Code contemplates (1) resistance or obstruction to the officer charged with the execution of the writ of delivery; and (2) hindrance after delivery to the judgment-creditor for taking complete and effectual possession. As to No. 1, neither the Fiscal nor the execution-creditor complained of such resistance or obstruction. The petitioner complains of hindrance, but does not explain how he was hindered by any of the respondents.

The respondents were treated by the Fiscal as persons on whom service of a notice in writing containing the substance of a decree for the recovery of possession was tantamount to giving delivery of the lands they occupied, and as coming within the terms of section 324 of the Civil Procedure Code. Whether the respondents do in fact answer to the description of persons indicated in that section may be open to doubt.

That section 324 affects persons in occupation of immovable property, such as a tenant or other person entitled to occupy the same as against the judgment-debtor and not bound by the decree to relinquish such occupancy.

I cannot help thinking that " other persons " in this section is *ejusdem generis* with tenant, and by that I mean a person who has come on to the land under the judgment-debtor by a title which has been said to go before the decree. Such occupancy may carry with it full rights of possession and enjoyment or only qualified rights of possession and enjoyment. It may be limited to a short time or may extend to a long time.

Now, what constitutes hindrance in each case must depend on the particular circumstances of the case. It was argued that " other persons " in section 324 included any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account of some other person than the judgment-debtor was to be found in section 327. That, as I said before, is a doubtful question, but I need not decide the point, as in my opinion there is no evidence of the nature of the hindrance alleged to have been offered by any of the respondents to the execution-creditor. In the absence of such evidence the order cannot stand.

I have less regret in discharging the order, because I think the claims of the respondents should be decided by action and not by the summary procedure provided by section 327.

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I quite agree with my brother in his construction of section 324. If the words " other person," &c., were not to be read as *ejusdem generis* with " tenant," but entirely free from that which is attached to them—in certain relation towards the judgment-debtor—we might have expected that the proviso would have been worded, simply " as to so much of the property as is in the occupancy of any person not bound by the decree."

I do not know whether this Court has yet decided whether hindrance to a creditor in taking complete and effectual possession, after the officer had delivered formal possession to him, would be punishable under section 326 or as a contempt of Court. It has only been ruled that the primary resistance or obstruction to the officer is not punishable as contempt (*2 S. C. R. 145*).

This clause as to subsequent hindrance of effectual possession is not in the Indian Code, and our own Code has not in sections 326-7 dealt with such " hindrance " *nominatim*. It may be possible therefore that, when formal possession is given by the officer without such resistance or obstruction as would necessitate immediate complaint—*i.e.*, when the writ of possession has been at the first formally submitted to—any subsequent hindrance might be punishable as contempt when committed so soon after

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formal delivery as to be truly a disobedience after a semblance of obedience, or might, especially when manifested only some time thereafter, be matter for a fresh cause of action.

In the present case the interval between formal delivery and possession was thirteen days, and therefore facts should have been clearly detailed and shown whether it was a case of contempt or not. However that may be, I agree in holding here that the averment in the petition that the petitioner is hindered (by the parties on whom the Fiscal served the notice under scetion 324) in taking complete and effectual possession thereof was too bald. It was not supplemented by any evidence at the inquiry into the matter of the petition, and I fail to see, therefore, how the Court "found" there was any resistance or obstruction for which it should proceed under section 327.

It was irregular to file one petition with one such averment against the persons who were, according to the Fiscal's return, in occupancy of the lands in seven parties—one of fifteen lots, one of three, one of two, and four of one lot each respectively—and presumably in any hindrance of petitioner made the same independent of the others, necessitating separate inquiry thereto, and thus avoiding the complication which the learned District Judge said would arise.

The Fiscal's return to the writ was also defective, in that he did not show that the occupants on whom he served the notices were or at least claimed to him to be, tenants of the judgment-debtor or entitled, and how, to occupy the same as against him.

I agree, therefore, that the order under section 327 be set aside with all costs.