SINNATAMBY *v.* NALLATAMBY.

1903.
September 14.

D. C., Colombo, 13,943.

Judgment—Consent decree entered by mistake—Suit for partition of land according to consent decree in previous case—Prayer of defendant in reconvention to cancel such decree—Propriety of such prayer.

Where a defendant prayed in reconvention that a decree which had been duly entered by consent against him by a District Court in a previous suit, and upon which the plaintiff based his present action for partition of a land against the defendant, be cancelled on the ground that his consent had been given by mistake,—

Held, that such prayer was in the nature of a claim of *restitutio in integrum*, and that that remedy could not be sought in a separate action, but must be obtained in the same action by application on due materials to the Supreme Court for an order to the Judge of the lower Court to investigate the matter.

THIS was a suit for the partition of two lands. The plaintiff alleged himself to be the owner of one-half thereof, and the defendant of the other half, by virtue of a judgment pronounced by the District Court of Colombo in case No. 13,430, which he pleaded as *res judicata*.

The defendant answered that the judgment in case No. 13,430 was entered by mistake and should be cancelled. He claimed the whole of the two lands and prayed that the judgment pleaded as *res judicata* be cancelled.

On the day the issues were discussed the learned District Judge (Mr. D. F. Browne) held that the defendant's prayer in the present case for a cancellation of that judgment could not be entertained by him in the present action, and that the proper procedure to be followed by them was to apply to the Supreme Court on proper materials in the same case in which that judgment was delivered to investigate and report on the allegation of mistake.

1903. *September 14.*

The defendant appealed. The case was argued on 24th August, 1903, before the Full Bench, consisting of Wendt, J., Middleton, J., and Grenier, A.J.

Walter Pereira, for appellant.—In *Pereira v. Ekanaike (3 N. L. R. 21)* it was held that a judgment obtained by fraud or passed under a mistake might be set aside either by a regular action or possibly by application by way of summary procedure. No provision occurs in the Procedure Code enabling a party to seek the remedy of *restitutio in integrum*. In Holland, the Supreme Government only granted restitution, and this power has not been vested in the Supreme Court of this Island or any lower Court by any Ordinance. The Supreme Court of the Island has the power of revision, but that is different from the remedy of *restitutio in integrum* which was granted by the Roman-Dutch Law in cases of obligations entered into through fear or duress, or where there was *malâ fides* or minority or the like (*2 Kotze, pp. 342-347 and 428-431*). It has always been the practice in Ceylon to institute regular actions in all such cases. The prayer of the defendant in reconvention to set aside the judgment pleaded as *res judicata* is in the nature of a regular action, and the District Judge should not have disallowed it. The ruling in *Goonaratne v. Dingiri Banda (4 N. L. R. 249)* is not well founded.

Sampayo, for plaintiff, respondent.

Cur. adv. vult.

14th September, 1903. WENDT, J.—

This is a partition action, in which plaintiff claims one-half of the common property and assigns the remaining half to the first and second defendants. The third defendant, a daughter of first defendant, has died pending this appeal. The second defendant is her husband. Plaintiff's allotment of shares is based upon a consent decree passed on 22nd June, 1900, in an action (No. 13,430) brought by him against the same defendants for a declaration of title. The land was in 1856 devised by the joint last will of the original owners to one Francina to be possessed by her for life, subject to the condition that after her death it should revert to and form part of the estate of the testator's nominated heirs, viz., four children of the testator-husband. Francina accordingly possessed the land, and died in 1880. Three of the nominated heirs had predeceased her, intestate, and one only of them (viz., Ramasami) left issue. This issue was a daughter, Neelatchy, who died in 1886, and under whom plaintiff claims. The first defendant

is the sole survivor of the four nominated heirs, and as such he claimed to have become the owner of the entire property on the ground that Neelatchy, by reason of her father predeceasing Francina, took no interest at all. This was the question raised in the action No. 13,430. By the consent judgment, however, plaintiff was declared owner of one half and the first and second defendants of the other half, the second defendant being donee of one-fourth from first defendant.

In their answer to the present action the defendants pray in reconvention that the consent decree be cancelled on the ground that "the defendants did not consent to the said decree being entered, nor did they instruct, authorize, or in any way empower their Proctor to do so, and the defendants say that the entry of the said decree is due to mistake, and the defendants are entitled to have the same cancelled." It appeared at the trial that the defendants, having changed their Proctor, moved the District Court by another Proctor on 21st August, 1900, upon the affidavits of the defendants, for a notice calling upon plaintiff to show cause why the consent decree should not be set aside, but their Proctor withdrew his motion, and the Court recorded that it was as well he had done so as the statements in first defendant's affidavit were utterly untrue, inasmuch as he was present in Court every day the case came up, and everything done was explained to him and discussed with him in open Court.

One of the issues agreed upon in the present action was whether the defendants could have that decree set aside in this case. Defendants' Counsel was unable to say on whose part the alleged mistake was, but stated that his clients had not consented to the judgment.

The learned District Judge held that the prayer in reconvention amounted to a claim of *restitutio in integrum*, and that that remedy could not be sought in a separate action, but must be obtained in the same action by application on due materials to the Supreme Court for an order to the Judge of the lower Court to investigate the matter—as laid down in *Gooneratne v. Dingiri Banda* (*1 Tamb. 29; 4 N. L. R. 249*). The question reserved for the Full Court is whether this ruling is right, or whether it is open to the defendants to attack the alleged consent decree by an ordinary action, and therefore by a claim in reconvention when sued upon that decree.

Appellants' Counsel has questioned the soundness of the decision in *Gooneratne v. Dingiri Banda*, and has sought to re-open the whole question. Conceding that the Sovereign could even now grant *restitutio in integrum*, he has denied that this Court

1903. *September 14.*

WENDT, J.

stands in the place of the "Court of Holland," to which the Sovereign's powers had been specially delegated. He has cited *Van Leeuwen's* description of the Court of Holland, and his definition of the scope of the remedy of restitution (*2 Kotze, pp. 428-431, 342-347*), and has pointed out that in more than one of the cases enumerated as falling within the scope of *restitutio*, the right to claim relief by action is now recognized in Ceylon. But I think that the rule laid down in the case I have already mentioned is a most wholesome one, and ought to be adhered to. This Court there pointed out that some uncertainty had previously existed as to the proper procedure to be followed in cases where a party desired to be relieved of a decree which had been improperly obtained against him, and it proceeded to consider the question with a view to settling the point. It was very fully argued, and having been a Counsel in the case I am able to say that not only were the opinions of Voet and Groenewegen cited, but the several local authorities in *Marshall's Judgments, 2 S. C. C. 108, 6 S. C. C. 102, 3 C. L. R. 13, 3 N. L. R. 21* were discussed, as well as the English cases. The Court consisting of Bonser, C.J., and Withers, J., laid it down that the party complaining of the decree should in the first instance apply *ex parte* on proper materials to the Supreme Court, which if satisfied that a *primâ facie* case was made out would direct the Court which passed the decree to hear the application and review its own decision, confirming it or setting it aside, according to the proof laid before it. If the decree-holder have already taken steps to enforce the decree, doubtless the Court so appointed would in a proper case stay its hand pending the investigation. Considering how often in our Courts litigants who have rushed into Court upon the impulse of some grievance adjust their differences before the trial day or arrive at a friendly compromise, and consent to a decree on terms agreed upon, I think there would be a manifest danger in enabling a party who shortly repents of his agreement to begin an action to have the decree set aside on the ground that he was deceived into consenting, or consented under a mistake, without any guarantee that there is a reasonable ground for the complaint.

I think the appeal should be dismissed with costs.

MIDDLETON, J.—

I have read my brother Wendt's judgment, and I take it from him that in the case of *Gooneratne v. Dingiri Banda* (*4 N. L. R. 249*) the question as to the jurisdiction of this Court to grant *restitutio in integrum* was thoroughly gone into on the authorities, and that

1903.

September 14.

MIDDLETON, J.

Chief Justice Bonser and Mr. Justice Withers were satisfied that the Supreme Court possessed it. It is clear to my mind by reference to *Van Leeuwen, pp. 342, 343, and 431*, that the Supreme Court of Holland had the power, and this Court, succeeding to the jurisdiction exercised by the Supreme Council of Justice in Ceylon, with a mandate under the Proclamation of 23rd September, 1799, to administer justice " according to the laws and institutions that " subsisted under the ancient Government of the United Provinces " subject to certain deviations " which do not apply here, presumably has the same.

I think, therefore, that this Court has jurisdiction on application by petition duly supported by affidavit to grant an order upon the Judge of first instance in certain cases of alleged error upon judgment, to inquire into and to ascertain, and then to correct if necessary and right so to do, by *restitutio in integrum*.

If such error as is alleged here was discovered within the appealable time, I see no reason why the matter should not be raised upon appeal, if the allegation were supported by evidence on affidavit.

It has been held that in cases of mere mistake in a decree the Court has power to rectify them of its own motion (*Marshall, p. 244*). This I presume refers to mere verbal or arithmetical errors, and not to error of the character alleged here, which affects the very existence of the judgment. The point particularly emphasized in this case by Counsel for the appellant appeared to me to be that, whether or not he had a remedy by way of *restitutio in integrum* or on appeal, he had an undoubted right of action as against the plaintiff in this case, and so could claim as he has done in reconvention. Now, this is a partition action or proceedings under an Ordinance specifically enabling such proceedings to be taken, and gives the Court power after examining the titles of the claimants to decree partition or sale, and nothing else.

In the case before us the defendant does more than set up a conflicting title: he is obliged to admit plaintiff has the title to the share he asserts, which can only be given him by the decree of a competent Court.

It seems to me that the Court, acting under the Partition Ordinance, would have no power to decree as sought by the defendant. In any case, in my opinion such a claim in reconvention in partition proceedings ought not to be permitted.

Again, has he a cause of action at all in the matter against the plaintiff? It seems to me that he has not.

The defendant must admit that the decree he complains of was entered by the Court with the consent of his own Proctor. The plaintiff was not to blame for it, nor was it a mistake of the Court.

1903. *September 14.* MIDDLETON, J.

The mistake, if any, was the mistake of the defendant's own agent. It is difficult to see that any *injuria* was committed by the plaintiff against the defendant which would render him liable to an action at the suit of the defendant.

In the case of fraud it would be entirely different. If plaintiff had fraudulently induced or misled the Court into a decree damaging to the defendant, it appears to me clear that an *injuria* would have been committed against the defendant giving him clear cause of action against the plaintiff.

This, I think, must be the principle underlying the English cases which enable, if not enjoin (*Davenport v. Stafford, 8 Beav. 503*), an action to set aside judgments obtained by fraud.

For the above reasons I think the defendant is not entitled in this case to bring an action against the plaintiff, and *a fortiori* not to claim in reconvention in partition proceedings. I conceive that in cases where judgments have been pronounced by mistake and decrees entered thereon (except perhaps such mistakes as I have already referred to), or where it is alleged that fresh evidence has cropped up since judgment which was unknown to the parties relying on it before judgment, or in case of fraud discovered within a short time of judgment and before a change has taken place in the position of parties, the remedy may be by way of the proceedings indicated by me for *restitutio in integrum*.

If, however, fraud is discovered after a lapse of time, then the proper remedy would be by action.

I think, therefore, this appeal must be dismissed with costs.

GRENIER, A.J.—

I agree with the rest of the Court that this appeal must be dismissed with costs. I have had the advantage of reading the judgments of my brothers, and there is little that I can add to what they have held in regard to the remedy of restitution as it is understood in the Roman-Dutch Law and as it has been recognized by our Courts. It is a very wholesome rule, and one that has been consistently followed, that the Supreme Court should be first approached upon proper materials and a *primâ facie* case made out before any reference is made to the lower Court which passed the decree complained of. To allow a party to bring a separate action in every case where he considers that he has been aggrieved by a decree being entered against him which, in his opinion, ought not to have been entered against him, would be to open a door to endless litigation and suspend for an indefinite period the operation of valid decrees. In the present case I

understand the defendant's principal grievance to be that the decree against him was entered by mistake. He has asked in reconvention that the decree be cancelled on certain grounds, and in view of the fact that the cancellation was prayed for in the claim in reconvention, there are necessarily no materials supporting the allegations in the answer. In the event, therefore, of the lower Court entertaining a claim in reconvention of this character, without the safeguard of a reference to it by this Court, it will practically have to sit in judgment upon its own proceedings in the previous case, although those proceedings, as in this case, may be *ex facie* quite regular and the decree good and effectual in law. The policy of the Roman Dutch Law, as I have always understood it, never encouraged a procedure of this kind, and that is the reason why the remedy known as *restitutio in integrum* was made available to a litigant in certain circumstances where the ordinary Courts were powerless to relieve. The Supreme Court of this Colony, by virtue of its powers and constitution, is exclusively entitled to exercise, and has exercised, the right of ordering an inquiry in appropriate cases and upon sufficient materials; and it is too late in the day now, especially in view of the distinct pronouncement by this Court composed of Chief Justice Bonser and Justice Withers in *Gooneratne v. Dingiri Banda* (*4 N. L. R. 249*), to raise any doubts as to the soundness of that decision and as to the power of this Court to grant the relief in question.