

Present : Garvin and Driberg JJ.

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CATHIRESAN CHETTY v. NATCHIAPPA CHETTY *et al.*

402—D. C. Colombo, 18,643.

Decree—Obtained by fraud—Separate action to set aside—Relief.

A separate action to set aside a decree on the ground that it was obtained by fraud cannot be maintained where relief could have been had in the action in which the decree was entered.

A PPEAL from an order of the District Judge of Colombo.

Hayley, K.C. (with *H. V. Perera*), for first defendant, appellant.

H. H. Bartholomeusz, for plaintiffs, respondent.

May 11, 1928. DRIEBERG J.—

The appellant sued the second respondent in case No. 17,754 of the District Court of Colombo, on mortgage bond No. 229 of May 26, 1923, for the recovery of a sum of Rs. 13,027. The appellant joined the first respondent as a defendant alleging that he held a secondary mortgage of some of the properties hypothecated by the bond sued on. The Court ordered summons for December 2, 1925. On October 12 the appellant's Proctor moved that notice of the action be given to the first respondent by sending him a copy of the plaint and summons by registered post. This was allowed and the notice was posted on October 14.

On October 14 the appellant's Proctor filed a minute of consent to judgment by the Proctor for the second respondent and asked that judgment be entered against him. He also filed the receipt for the registered letter of notice sent that day to the first respondent. The Court allowed this motion on October 16 and on the same day a decree was entered against the present second respondent for the payment of the sum decreed and as against him and the first respondent for the sale of the property mortgaged.

On December 2 a Proctor filed proxy for the first respondent and moved that any application by the appellant to execute the decree be not allowed. The motion stated that there was no money due by the second respondent to the appellant, that the action was a collusive one brought to defeat the claims of just

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creditors, and that a separate action would be filed to set aside the decree, and that a certified copy of the plaint in that action would be filed in this action before the 7th. There is an entry on this motion paper that it was refused on October 4.

On December 9 the appellant's Proctor applied for execution which was allowed. On December 19 the first respondent filed this action praying that the decree in case No. 17,754 be set aside, that the mortgage bond No. 229 be declared discharged and of no force or avail, and that execution of the decree in No. 17,754 be stayed. On December 21 he made an application in case No. 17,754 supported by an affidavit that execution of the decree he stayed pending the decision of either case No. 17,754 or of this case. He also asked that the decree in No. 17,754 be set aside and that he be allowed to appear and defend the action under the provisions of section 644 of the Civil Procedure Code. By this date the property had been advertised for sale. The first respondent's application was finally of consent postponed *sine die*, execution being stayed on security given by him.

In this action the first respondent asks that the decree in case No. 17,754 be set aside on the ground that it was obtained by fraud. In view of the conclusion we have come to it is not necessary to deal with the first respondent's case in detail. It is shortly this : The second respondent wanted from him a loan of Rs. 25,000 on the security of certain properties, two of which were under mortgage to the appellant on the bond No. 229. On June 5 his Proctor, Mr. Watson, inquired from the appellant's Proctor what the amount of the claim on bond No. 229 was, and was told that there was due Rs. 2,602·50 on a promissory note and that the bond would be discharged on payment of this sum. This note was one for Rs. 2,500 due on August 23, 1923, and Rs. 102·50 was due for charges and interest to that day.

He says that Karupiah, the first respondent's agent, agreed to cancel and discharge bond No. 229 on receipt of the Rs. 2,602·50 and not to make any further advances to the second respondent on the bond. On June 7, the second respondent executed a mortgage bond for Rs. 25,000 in favour of the first respondent and was paid Rs. 22,000. The mortgage of the two properties I have referred to was described in the bond as primary. He says that on the same day he paid Karupiah Rs. 102·50 and on August 23 Rs. 2,500, but Karupiah kept putting off cancelling the bond No. 229 on various pretexts, and finally the appellant filed action No. 17,554 on October 2, 1925, for Rs. 13,027, being moneys said to have been lent on bond No. 229 on July 5, 1923, and thereafter. The learned District Judge found in favour of the first respondent and entered judgment declaring that the properties mortgaged

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to the first respondent were free from the mortgage on them created by bond No. 229 in favour of the appellant. The appellant appeals from this judgment.

It is not necessary to express an opinion on the merits of this action, for it is one that cannot possibly be maintained. A separate action to set aside a decree on the ground that it was obtained by fraud cannot be brought where relief could have been had in the action in which the decree was entered.

The first respondent appeared in Court on December 2, within the time allowed by the summons and there was nothing to bar his right to defend the action except the decree which was entered against him by error. The Court did not order, nor did the appellant's Proctor ask for, a decree against him, and the Court had the power to amend the decree by striking out so much of it as affected the first respondent. Further, the decree had been entered before the time allowed for the first respondent to answer.

But even apart from this there are other reasons why this action must fail. If the conditions existed which entitled the first respondent to relief of this nature it could only be obtained by way of *restitutio in integrum* (*Sinnetamby v. Nallatamby*¹). Further, even if the first respondent's statement of the circumstances under which he took his mortgage be true it cannot be said that the decree in 17,754 was obtained by fraud. He had a defence to the claim of the appellant which the latter gave him an opportunity of asserting by making him a party to the action and giving him due notice of it. The mere circumstance that the appellant's claim to be entitled to a primary mortgage was unfounded or in breach of a contract with the first respondent or even if it was supported by false evidence, does not constitute fraud in the obtaining of a judgment so as to justify an action to set it aside on that ground. (*Patch v. Ward*,² *Flower v. Lloyd*,³ *Baker v. Wadsworth*.⁴)

The appeal is allowed and judgment will be entered, dismissing the claim with costs. The first respondent will pay the appellant the costs of the appeal.

GARVIN J.—I agree.

Appeal allowed.

¹ (1903) 7 N. L. R. 139 (Full Bench).

² (1867) 3 Ch. 203.

³ (1877) 10 C. D. 327.

⁴ (1898) 67 L. J., Q. B. D. 301.