

1936

Present : Dalton A.C.J. and Soertsz A.J.

VENGADASALAM CHETTY v. ANA FERNANDO.

585—D. C. Colombo, 3,985.

Warrant of attorney to confess judgment—Power to confess judgment in favour of A, his attorneys, heirs, executors, administrators, and assigns—No authority to confess judgment in an action by an assignee of the bond from A's administrator—Civil Procedure Code, s. 31.

Where a warrant of attorney is given to a proctor to confess judgment in favour of A, his attorneys, heirs, executors, administrators, and assigns in an action on a mortgage bond,—

Held, that the proctor had no authority to confess judgment in an action on the bond by an assignee from the administrator of the intestate estate of A.

The decision in *Subramanian Chetty v. Naidu*¹ is not exhaustive of the cases in which an application by way of *restitutio in integrum* to set aside a judgment entered in pursuance of a power of attorney to confess judgment would be allowed.

THIS was an application by way of *restitutio in integrum* by the defendant in an action on a mortgage bond No. 4,177 executed in favour of Supramaniam Chetty, or his certain attorney or attorneys, heirs, executors, administrators, or assigns. The defendant on the same day as the bond executed a warrant of attorney No. 4,178 in favour of a proctor authorizing him to confess judgment in the bond at the suit of Supramaniam Chetty, or his attorneys, heirs, executors, administrators, or assigns. Supramaniam Chetty died on May 12, 1929, and letters of administration of his estate were granted to one Ramasamy Chetty. The latter as administrator and sole heir of Supramaniam Chetty by deed No. 221 dated March 17, 1932, assigned the bond in favour of Vengadasalam Chetty, who instituted this action on the bond.

¹ 26 N. L. R. 467.

Rajapakse (with him *Aiyer*), for defendant, petitioner.—The warrant of attorney to confess judgment authorizes the proctor to confess judgment to a claim by the mortgagee, his heirs, executors, administrators, or assigns. The judgment-creditor in this case is merely an assignee of the administrator of the mortgagee. The warrant does not authorize a confession of judgment on his claim. Warrants of attorney to confess judgment must be strictly construed. In England it has been held that where a warrant authorized a judgment to be confessed in an action by A, his executor could not obtain judgment on the warrant. (*Henshall v. Matthew*¹, *Foster v. Clagget*².)

Weerasooria (with him *E. B. Wikramanayake* and *T. S. Fernando*), for respondent.—The only question is whether the proctor had authority to confess judgment. It is immaterial whether the sum was due or not. The effect of such a warrant is to tie the hands of the debtor. If it is wrongly used he has his remedy in a separate action. (*Ibrahim v. Seyadu Mohamadu*³.) The remedy by way of *restitutio in integrum* is not open to him in a case like this. (*Subramaniam Chetty v. Naidu (supra)*.) The action is on the bond and the plaintiff has a valid assignment of the rights of the mortgagee.

Rajapakse, in reply.

Cur. adv. vult.

July 3, 1936. DALTON A.C.J.—

This is an application by Weerawarna Kurukulasuriya Boosabaduge Ana Fernando, the defendant in D. C. Colombo, No. 3,985, for *restitutio in integrum*.

On June 20, 1927, Ana Fernando together with one Joseph Selayar de Cungho executed a mortgage No. 4,177 duly attested in favour of A. V. R. M. S. P. Supramaniam Chetty to secure for the latter "or his certain attorney or attorneys, heirs, executors, administrators or assigns" all sums of money that might become due in respect of any promissory notes, cheques or I. O. U's made or endorsed by the second obligor in favour of the obligee up to the sum of Rs. 3,000. On the same date the two obligors duly executed a warrant of attorney No. 4,178 in favour of John Tambiah Bartlett, a Proctor of this Court, authorizing him to appear for the obligors at any time in the District Court, Colombo, and to receive summons for them in an action for Rs. 3,000 and interest due on bond No. 4,177, whether at the suit of Supramaniam Chetty or his certain attorney or attorneys, heirs, executors, administrators or assigns, and to confess the action.

Supramaniam Chetty died on May 12, 1929, and letters of administration of his estate were granted to one Ramasamy Chetty. The latter as administrator and sole heir of Supramaniam Chetty, by deed No. 221 dated March 17, 1932, assigned for the sum of Rs 12,500 to one Vengadasalam Chetty all the principal and interest due under two mortgage bonds executed in favour of Supramaniam Chetty. The two bonds in question were: (1) a bond No. 228 of January 5, 1925, upon which a sum of Rs. 11,102.52 principal and a further sum as interest were due

¹ 7 Bing 337.

³ 33 N. L. R. 145.

² 6 Dowling 524.

at the date of the assignment, and (2) the aforementioned bond No. 4,177 of June 20, 1927, upon which the sum of Rs. 1,000 was stated to be due as principal at the date of the assignment, and interest at 15 per cent. per annum from March 1, 1932.

On July 15, 1933, some sixteen months after the above-mentioned assignment, it is alleged that Joseph Selayar de Cungho made a promissory note payable on demand for Rs. 1,000 in favour of A. V. R. M. S. P. Ramasamy Chetty, with interest at 15 per cent. Thereafter, on September 24, 1935, Vengadasalam Chetty instituted an action against Ana Fernando on the bond No. 4,177 of June 20, 1927, to recover from her the sum of Rs. 1,000 with interest thereon at the rate of 15 per cent., in all Rs. 1,356.25. There was the usual prayer that the mortgaged property be declared specially bound and executable, and be sold in default of payment.

In support of his claim Vengadasalam Chetty recites the bond No. 4,177 and sets out that in pursuance thereof Supramaniam Chetty from time to time lent money to Ana Fernando on promissory notes, cheques and I. O. U's, which were renewed on occasions in favour of Supramaniam Chetty, and after his death in favour of Ramasamy Chetty. The plaintiff alleges that there is now due under the terms of the bond and on a promissory note, dated July 15, 1933, which is attached to the plaint and marked "B", the sum of Rs. 1,000 with interest at 15 per cent. from July 15, 1933.

The plaintiff then recites the deed of assignment, dated March 17, 1932, No. 221 by Ramasamy Chetty to him, and he files this deed with his plaint. The plaint then continues:—"the said Ramasamy Chetty thereafter duly handed over, delivered and assigned the said promissory note marked 'B' to the plaintiff. The plaintiff thereafter gave due notice of assignment to the defendant and called upon the defendant to pay and retire the note marked 'B'." The note in question, made long after the assignment in 1932, it may be remarked here, is payable on demand to A. V. R. M. S. P. Ramasamy Chetty as such and not to him in any representative capacity, and it bears no endorsement of any kind. There is further no allegation that it is a renewal of any note granted to Supramaniam Chetty.

The plaint then further alleges that de Cungho has been adjudicated insolvent in D. C. Kalutara, No. 290 (no date is given), and that he has disclosed the claim set up in this action as a liability in the balance sheet filed by him in his insolvency. There is nothing to show whether or not any claim has been made in respect of this debt in the insolvency.

When the plaintiff's action was instituted and the plaint filed on September 25, 1935, it is to be noted that no warrant of attorney to confess judgment was filed with the plaint as is usual in such cases, although the bond and the promissory note were filed on that date. The plaint was accepted and the Court ordered that summons be served on the defendant, returnable on October 25. The case was called on October 25, and it was then noted in the journal that summons had not issued on the defendant. The Court then directed that it re-issue, to be returnable on November 25. The next journal entry is dated November 25, when it is recorded that the case was called, that summons had not

issued on the defendant, that the plaintiff's proctor was absent, and that he should have notice to appear on December 12. The next entry on the journal is dated November 4, a date earlier than the preceding entry, it will be noted. No explanation as to how this happened is forthcoming. If the date is correct, the entry could hardly have been made on the date on which the proceeding took place. On that date the plaintiff's proctor is stated to have filed the warrant of attorney to confess judgment, No. 4,178 above mentioned, and also a minute of consent from the proctor appointed under the warrant. His minute, dated October 30, 1935, states that "having perused the plaint and other connected papers" in the case, he consented to judgment in favour of the plaintiff as prayed for in the plaint. The Court thereupon on that date (November 4) is stated to have entered decree as prayed for, the sum to be payable in a month. The plaintiff was given leave to purchase the property on conditions to be fixed by the Court. The defendant, apparently having heard of the order, moved the Court on November 29, with affidavit in support, to set aside the decree and to allow her to file answer and defend the action, but the Judge apparently held he had no power to set aside the order. He informed the defendant she should apply to this Court for *restitutio in integrum*, which she did on December 12. The plaintiff obtained on December 12 leave to issue writ of execution, but execution proceedings were stayed on the order of this Court, pending decision of this present application by the defendant.

I do not wish to comment upon or say more about the facts of the case I have set out above than is necessary, as the petition must be allowed and the defendant must be given leave to defend as asked for. It is sufficient to say that the proctor had no power under the warrant of attorney, in my opinion, to confess judgment in any action at the suit of the plaintiff Vengadasalam Chetty. As has been frequently laid down, these warrants of attorney must be strictly construed. Power to confess judgment is confined to an action by Supramaniam Chetty or his heirs, executors, administrators or assigns. If the object of the warrant had been to secure payment to Supramaniam Chetty alone, judgment cannot be confessed or entered under the warrant after his death at the instance of his executor (*Henshall v. Mathew*¹). In *Foster v. Clagget*², Williams J. pointed out that it might happen that the executors of a person are entitled to the benefit of a contract into which that person has entered, even although they are not expressly named. But the question he had to decide was whether a warrant of attorney, given to the testator only, could be treated as such a contract. He pointed out that it had been decided that "an authority of this nature must be strictly pursued, and we cannot supply any supposed omission of the parties". Reference may also be had to the decision in *Short v. Coglin*³, which is to the same effect. In the warrant before us the word "assigns" has been added to the words used in form No. 12 mentioned in section 31 of the Civil Procedure Code, but the assigns there mentioned are the assigns of Supramaniam Chetty and of no one else. If it had been intended to include the assigns of his heirs, executors, or administrators, it would have been a simple matter in place of the word "assigns" to insert the words "or of his or their assigns".

¹ 7 Bingham 357.

² 6 Dowling 524.

³ 1 Anst 225.

Mr. Weerasooria for the respondent (plaintiff) has urged that the question to be answered here is whether the proctor had authority to confess judgment in this action. If he had, even supposing for the moment that he consented to judgment for a sum of money that was not due, the petitioner is not entitled to the remedy she is seeking in these proceedings, as the judgment would bind her as her own act. He argues that the action is on the bond, which is to Supramaniam Chetty, his heirs, executors, administrators, and assigns, that Ramasamy Chetty was administrator with power to assign, and that the plaintiff was an assignee of Supramaniam Chetty, since he had a valid assignment of Supramaniam Chetty's rights to recover money on the bond. This argument, however, it seems to me, does not help him, for what we have to construe is the warrant of attorney. He has not satisfied me that under the warrant the proctor was empowered or had any authority to confess judgment in an action at the instance of Vengadasalam Chetty.

It was then urged that the decision in *Subramaniam Chetty v. Naidu*¹, was exhaustive of the cases in which an application by way of *restitutio in integrum* to set aside a judgment entered in pursuance of a power of attorney to confess judgment could succeed. This, however, is clearly not so, although I agree that all such applications must be very carefully scrutinized.

For the reasons I have stated, the petitioner here is entitled to the remedy she seeks, and the appeal and application must be allowed with costs here and below.

SOERTSZ A.J.—I agree.

Application allowed.

