

Present : Bertram C.J. and Garvin A.J.

1924.

LUCYHAMY v. ALWIS et al.

9—D. C. (Inty.) Colombo, 7,191.

*Judgment obtained by fraud—Application for stay of sale—Power of Court to grant application till defendant applies for restitutio in integrum—Civil Procedure Code, s. 343—Second action while earlier action was pending—Power of Court to enter order of abatement in first action.*

Where a defendant, against whom judgment has been entered, alleges that the judgment has been obtained by fraud, the Court may stay the execution of the decree and give him time to apply for *restitutio in integrum*.

Where a second action is instituted, pending an earlier action on the subject-matter, the Court may enter an order of abatement of the earlier action if it is stale.

**T**HE plaintiff, appellant, sued the defendants, respondents, in this action for the recovery of a sum of Rs. 800 and interest due on a mortgage bond.

Summons was served on the defendants on January 27, 1923, and decree *nisi* on May 19, 1923, but the defendants failed to appear, and decree was made absolute on September 13, 1923, and the sale of the mortgaged premises fixed for November 9, 1923.

On November 8, 1923, the defendant made an application to stay the said sale in the absence of the plaintiff, and on the same day the said application was allowed.

On the same day the plaintiff moved for inquiry into the defendant's application.

On December 3, 1923, the learned District Judge inquired into the allegations in defendants' affidavit, and made order directing that the said sale be stayed and divided costs.

The defendants' affidavit was as follows:—

2. The plaintiff in this action claims a sum of Rs. 800 with interest at 30 per centum per annum on a mortgage bond executed by us on July 3, 1914. This bond was executed by us to accommodate with some money one D. John Silva of Grandpass who was living with the plaintiff.

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3. An action bearing No. 1,900 was instituted in this Court by the plaintiff against my wife and me on this same bond on or about September 15, 1920, but the action was settled, and no further steps were taken in the action since November, 1921.

4. I received the summons in this action about the end of December, 1922, when I appeared before this Court in person, obtained a date to file answer, and saw the plaintiff, who agreed to withdraw this action. I believed she would do so, and took no steps to file answer, but I find she continued the action and obtained judgment without serving decree *nisi* on me and my wife.

5. It was only about the 30th ultimo that my attention was drawn to this development of this action, and that by the sight of a notice of sale posted at the premises mortgaged by the said bond.

6. For the reasons and under the circumstances aforesaid, I am advised and verily believe we have a good and valid defence on the merits of the above case.

8. No decree *nisi* was ever served on me or my wife.

*H. V. Percera*, for the appellant.

*Soertsz*, for the respondents.

March 6, 1924. BERTRAM C.J.—

This is an appeal against an order confirming an order made *ex parte* for the stay of the sale in an action in which a decree absolute had been entered. The ground of the application was fraud, that is to say, it was alleged that the defendants had been fraudulently prevented from defending the action by the representation of the plaintiff. The learned Judge, however, does not appear to have based his order upon that ground. He appears to have been concerned with the fact that an earlier action on the same subject-matter was still pending in his Court. His judgment is mainly occupied with the question of this duplicity of actions, and he says nothing about the alleged fraud. So far as the duplicity of actions is concerned, it happens that the first action is so stale that it is liable to be abated, and this circumstance could be cured by an order of abatement, and I am unable to see that such an order would affect the rights of the parties in the subsequent action. The real question is as to the right of the District Court to make an order for a stay of execution in a case in which it has already entered a decree absolute. The District Court has, of course, no power to set aside its own decree, and it could not order a stay of the sale pending an application for this purpose. The proper

remedy in a case of this sort—assuming the allegations to be true, is elsewhere by proceedings for *restitutio in integrum*, or by a separate action altogether. I think we may treat this case as though the learned Judge had stayed the execution with a view to allow the defendant to seek his proper remedy.

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Mr. H. V. Perera contests the power of the District Court so to act. I think myself that the words of section 343 of the Civil Procedure Code are wide enough to allow a defendant against whom judgment has been entered, and who alleges that the judgment has been obtained by fraud, to apply to the Court for stay of the sale in order to allow him to pursue his proper remedy. I think that such a cause would be a just cause within the meaning of the section. It may be that the defendants' only possible way of securing justice is to take this step. The difficulty is that the learned Judge not having considered this aspect of the case has not fixed a termination to the order of stay.

I would vary his order by limiting the duration of it to a fortnight from this date. In the event of the proper steps being taken, I think that the costs of this appeal should abide the event of such proceedings as may be taken. If no proper proceedings are taken within the fortnight, then I think that this appeal should stand allowed, with costs.

GARVIN A.J.—I agree.

*Varied.*