1933 *Present* : **Dalton A.C.J. and Drieberg J.**

APPLICATION FOR REVISION OR IN THE ALTERNATIVE FOR *Restitutio in integrum.*

PHIPPS *v.* BRACEGYRDLE.

D. C. Colombo (Special) No. 1,752.

Restitutio in integrum—*Relief from order in judicial proceedings—Mistake committed through lack of knowledge of facts—No proof of damage.*

Relief by way of *restitutio in integrum* from the effect of an order in judicial proceedings will not be granted where the legality of such order is not questioned.

A party to an action is not entitled to relief from any mistake which he has made through lack of knowledge of facts available to him.

Restitution is not allowed unless the applicant can show that he has suffered actual damage.

THIS was an application for revision or in the alternative for *restitutio in integrum.*

Choksy, for petitioner.

Cur. adv. vult.

June 20, 1933. DRIEBERG J.—

The petitioner who is the plaintiff in this action obtained judgment against the defendant in England and having registered it here under Ordinance No. 41 of 1921 obtained writ of execution for Rs. 13,968.11 and costs. The fiscal seized and advertised for sale "all that undivided one-third part or share of and in all that and those the estate plantations and premises called and known as Mayfair comprising the following allotments of land adjoining each other and forming one property, and which from their situation as respects each other can be included in one survey, to wit:—"; there follows in the sale notice a detailed description of six allotments, the extent of each being given, all of which were said to appear in the survey plan No. 521 of September, 1906, made by Daniel E. Jayatileka, Surveyor. These six allotments aggregate 151 acres 26 perches. At the sale this was bought by the petitioner who bid up to the amount of his claim, Rs. 14,000, for which he had an order of credit.

The sale was confirmed on January 18, 1932, and when the fiscal's conveyance was about to be drawn, it appeared that Mayfair estate was 213 acres 3 roods 29 perches in extent. J. L. Booker, deceased, was the owner of this undivided one-third of Mayfair estate, and the administrator of his estate conveyed his interest in it to the defendant by two deeds. By No. 804 of September 9, 1924, he conveyed a third of the six allotments amounting to 151 acres 26 perches, shown in plan No. 521 and by deed No. 184 of July 7, 1926, he conveyed the intestate's interest in another allotment of 62 acres 3 roods 3 perches, shown in plan No. 520 of the same date and by the same surveyor as plan No. 521. The petitioner's proctors wrote on August 4, 1931, before the seizure, which was in September, to Messrs. F. J. & G. de Saram for a detailed description of Mayfair estate. Messrs. de Saram were not, so far as I can see, the proctors for the defendant in this action, but they say that as proctors for the owners of the estate they had the title deeds from time to time in their possession. When this inquiry was made, the title deeds were in the Chartered Bank and from the material before them Messrs. de Saram mentioned only the deed No. 804 which dealt with the six allotments of 151 acres 26 perches. It was only when there was a further examination of the title to prepare the conveyance that the petitioner's proctors were aware of the other allotment of 62 acres 3 roods 3 perches.

The petitioner now asks that this Court should in the exercise of its powers of revision or of granting restitution set aside all the proceedings in execution and allow him to commence them again by applying for execution and seizing and selling the defendant's interests in Mayfair estate of 213 acres 3 roods 29 perches. The reasons for this application are that the petitioner's proctors, the petitioner is in England, believed

that the fiscal had seized and sold a one-third share of Mayfair estate. The superintendent of the estate says that he indicated to the fiscal's officer the boundaries of the whole estate. The deputy fiscal says that in seizing the six allotments he believed he was dealing with the whole of the estate. Mr. Raffel, the proctor who represented the petitioner at the sale, says that he believed that what was being sold was a one-third share of Mayfair estate. There is no doubt that this is so, but with the very important qualification that they thought at the same time that it was a Mayfair estate not of 213 acres but of 151 acres, and it is clear that the petitioner assessed its value and bid for it on that basis. In fact Mr. Raffel concedes this, for he says that " the sale was conducted on the footing that what was being sold was an undivided one-third share of Mayfair estate and I bid up to Rs. 14,000 under the full conviction and the belief that the whole of Mayfair estate was comprised of the six allotments of land described on the sale report ". Mr. Raffel says that he had instructions from the petitioner's proctors to buy the undivided share of the petitioner in Mayfair estate and that he would not have bid at all if he knew that what was being sold was not the defendant's share of the whole of Mayfair estate. The particulars of the bidding at the sale are not before me, but Mr. Raffel's statement that he was ultimately declared the purchaser suggests that there were other bidders.

This case is not one in which we can exercise our powers of revision, for no question arises regarding the legality or propriety of any order or proceedings of the District Court.

The form of relief known as *restitutio in integrum* was primarily one intended for relief from contracts on the ground of minority, error, fraud, and duress. The object of the action was to recover any property lost through the contract, or compensation in damages, or damages generally, but actual damage had to be proved (Maasodorp's *Institutes of Cape Law 1907 ed.), Vol. III, pp. 58 and 67.* Relief is also granted from the effect of an order in judicial proceedings. Relief was granted from orders in judicial proceedings on the ground of absence from the country (*Maasdorp (supra) pp. 58 and 70*), and has been granted in South Africa in other cases of default (Nathan's *Common Law of South Africa (2nd ed.), Vol. II., pp. 766—769*).

But apart from such cases it is granted for reasons similar to those in cases of contract. It can be granted where a decree has been obtained by fraud (Wood-Renton C. J. in *Buyer v. Eckert* [1] and *Jayasuriya v. Kotelawala* [2]), also where a proctor has consented to judgment against the instructions of his client (*Silva v. Fonseka* [3] and *Narayan Chetty v. Azeez* [4]), for in such cases it could be said that there was in reality no consent. On the same principle I can understand, though there is no reported case on the point, relief being granted on the ground that both parties have agreed to a settlement under a mistake of fact, for as in the case of contract the element of consensus would be absent. It would be a dangerous extension of the law to hold that a party to an action can

[1] *(1910) 13 N. L. R. 371 on 375.*
[2] *(1922) 23 N. L. R. 511 on 512.*
[3] *(1922) 23 N. L. R. 447.*
[4] *(1921) 23 N. L. R. 477.*

obtained rlief from any and every mistake which he may make through lack of knowledge of facts available to him and that he is entitled to have all steps taken under that mistaken belief set aside and begin again from the point where he erred.

The mistake here was not induced by any misrepresentation of the defendant nor is it a question of mutual error ; it is merely a case of the petitioner through his not knowing the extent of the estate dealing in execution with what he later came to know was not the entire interest in it owned by the defendant. He was under no mistake as to what he bought for he thought he was buying one-third of 151 acres, and I must assume he paid for his purchase on that basis and he has got what he bought, but he now finds that if he had seized one-third of the extent of 213 acres and bought that, it would be more to his advantage and he would be free from the inconvenience incidental to ownership of an interest in a part of an estate. If he had, for example, bought from the owner Mayfair estate consisting of six specific portion amounting to 151 acres, could he seek relief from the contract solely on the ground that he later came to know that there was another block of 62 acres, saying, as he no doubt might quite truthfully, that if he had known this he would not have bought the six blocks ? It appears to me that he would not be entitled to relief in such a case, and I see no ground for distinguishing the present case in which the mistake is of the same nature.

But even if the relief is available in such a case as this, the petitioner cannot succeed for this reason. As I have pointed out, restitution is not allowed unless the applicant can show that he has suffered actual damage. The petitioner has suffered no damage whatever in the sense of pecuniary loss. The seizure report is not in evidence, but the additional deputy fiscal of Kegalla in his affidavit says he valued the undivided one-third share of Mayfair estate at Rs. 44,235 and this also appears on the sale report. He goes on to say that he did so in the belief that he was dealing with the whole estate; no doubt he did, but I cannot understand the valuation of a large rubber estate being made on any other than an acreage basis and I must take it that what he valued at that figure was a one-third share of 151 acres 26 perches. By paying Rs. 14,000 for this, the petitioner has suffered no pecuniary loss but has bought at considerably less than the fiscal's valuation. As I have said, the ownership of an undivided share of a part of the estate may be inconvenient and embarrassing, but this is not without a remedy.

A supplementary affidavit of May 17, 1933, by Mr. Craib, the superintendent, was submitted. He says the block of 62 acres 3 roods 3 perches is fully planted with rubber and of the same quality as the rest of the land. He does not say that it has any buildings on it which give it any greater value than the other blocks. Mr. Craib appears to assume that the fiscal's valuation was of the whole of the estate, but this is not so, the fiscal was dealing with a third share. The application is refused.

DALTON A.C.J.—I agree.

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Application refused.