Present: Dalton J. and Jayewardene A.J. 1926.

DE SILVA *v.* VADUGANATHAN CHETTY *et al.*

D. C. Colombo, 18,061.

Restitutio in integrum—*Warrant of attorney to confess judgment on mortgage bond—Money decree—Sum in excess of amount in warrant—Irregularity.*

A warrant of attorney to confess judgment on a mortgage bond includes authority to consent to a money decree being entered on the bond.

Consenting to judgment on a warrant of attorney for a larger sum than is mentioned in the warrant does not render the judgment a nullity. It is only an irregularity that is capable of amendment.

Where judgment was entered for a sum in excess of the amount given in the warrant and it appeared that that sum was justly due, the Supreme Court refused to entertain an application for *restitutio in integrum* to amend the decree.

APPLICATION by way of *restitutio in integrum* to set aside the decree entered in the case.

The facts appear from the judgment.

De Zoysa, in support.

H. V. Perera, *contra*.

March 29, 1926. DALTON J.—

This is an application by way of *restitutio in integrum* to set aside a decree entered in this case, recalling the writ issued, and declaring that the petitioner be allowed to defend the action.

The facts are as follows: the petitioner (defendant in the action) mortgaged on October 19, 1925, certain property to Vaduganathan Chetty and Letchiman Chetty, binding himself to pay to them all sums of money advanced not exceeding Rs. 3,500. On the same day he executed a warrant to confess judgment for that sum in favour of a proctor named therein.

On October 31, 1925, the mortgagees filed a claim against the petitioner, alleging that the sum of Rs. 3,519.38 together with interest was due to them on the bond. The reason they give for bringing the action so soon after the execution of the bond is that they had received information that petitioner was not the lawful owner of the property he had mortgaged to them.

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On the same date the proctor for the plaintiffs, mortgagees, filed a minute of consent purporting to be signed by the defendant's proctor, filing warrant of attorney to confess judgment, and consenting to judgment as prayed for in the plaint. Judgment was entered accordingly on the same day, plaintiffs obtaining a money decree and not a hypothecary decree.

In support of the application Mr. de Zoysa has urged three grounds, the first being that an hypothecary decree only should have been granted. There is nothing in the warrant of attorney which would limit the powers of the attorney in this way. It is admitted that in the ordinary course in an action on a mortgage bond the successful plaintiff is entitled to both decrees if he asks for them, and I can see nothing in this case to take it out of the general rule. It is well to recall here the words of Bertram C. J. in *Subramaniam Chetty v. Naidu*[1]:—

> " Warrants of attorney are intended to tie the hands of debtors, and if the debtors take the risk of giving these documents they must consent to their hands being tied."

He also points out that the Code expressly empowers the person who obtains judgment in this manner to obtain from the attorney a release in respect of defects and imperfections which shall be binding upon the judgment debtor.

The second point refers to the terms of the power, which authorize the attorney " to appear for me . . . . and to receive summons for me in an action for Rs. 3,500." No summons was received here, and hence it is argued the act of the Attorney was bad. This same point was taken in *Ramanathan v. Don Carolis*,[2] and as there, so here, there is no substance in the objection. In that case de Sampayo J. says:—

> " It is next objected that, as the warrant of attorney authorized the proctor to appear for the defendant and to receive summons for him and therefore to confess judgment, and as no summons was served on Mr. Swan (defendant's proctor) he had no authority of confess judgment. There is no doubt that the terms of a warrant must be complied with. But a summons is intended to inform a party of the institution of an action and of the nature of the claim. The written consent of Mr. Swan shows that he had seen the actual plaint, which is even better for that purpose that the summons, and I think there is no substance in this objection."

Lastly, it was urged that as the warrant authorized the attorney to confess judgment in the sum of Rs. 3,500 only, he has in confessing judgment for Rs. 3,519.38 acted beyond his authority, and

[1] *26 N. L. R. 467.* [2] *19 N. L. R. 378.*

his act is wholly bad, and this Court has no power to alter the decree, the judgment being void. There is authority governing this point also in the case of *Stopford v. Fritzgerald*,[1] where it was held that signing judgment on a warrant of attorney for a sum larger than that mentioned in the warrant is only an irregularity, and the judgment is not a nullity but can be amended.

Under the circumstances here, as there is no suggestion that the whole sum of Rs. 3,519.38 is not due by the defendant, but it is admitted, although not on the bond, having regard to the fact that there is also a small sum in interest due on the Rs. 3,500, and lastly, having regard to the nature of the remedy sought, based upon natural equity and the injustice of respondent's case (*Voet IV. tit. 1 s. 1*), I am of opinion this Court should leave the judgment as it stands and dismiss the application, with costs.

JAYEWARDENE A.J.—I agree.

Application refused.