

**A** PPEAL from an order of the District Judge of Avissawella.

*N. E. Weerasooria*, for first defendant, appellant.

*N. Gratiaen*, for plaintiff, respondent.

October 22, 1930. DALTON S.P.J.—

The appellant (first defendant) was sued by the respondents (plaintiffs) for the recovery of a sum of Rs. 45,810 due on a mortgage bond dated March 26, 1926. At the time of the execution of the bond the appellant granted a warrant of attorney to his proctor in the usual form to confess judgment. Summons was duly served upon the proctor as provided in the warrant of attorney and on August 31, 1928, the appellant through his proctor consented to judgment. This was followed by decree on November 19, 1928. One of the plaintiffs thereafter died and some time seems to have been taken in taking steps for representation of the deceased plaintiff. Then, on April 1, 1930, the plaintiffs applied for execution of the decree and sale of the mortgaged premises. Notice thereof was served on the appellant and he objected to the application on the ground that the decree was wrongly entered, as the warrant of attorney was bad.

The District Judge held that until the decree was set aside he was bound by it and that the objections must be overruled. He thereupon allowed plaintiff's application for execution. From that order the defendant appeals.

The point raised on the appeal is whether, assuming the District Judge was satisfied that the objections raised by defendant (appellant) were good, he had jurisdiction to set aside the decree entered.

It is conceded that this is not a case in which the lower Court has power to set aside the decree entered under the provisions of Chapter XII of the Civil Procedure Code and Counsel for appellant can

1930

*Present* : Dalton S.P.J. and Akbar J.

VAN TWEST v. GOONEWARDENE.

147—*D. C. (Inty.) Avissawella*, 530.

*Warrant of attorney to confess judgment—Decree entered of consent—Right of Court to set aside decree—Civil Procedure Code, s. 189.*

A Court has no jurisdiction to set aside its own decree, entered of consent, in pursuance of a warrant of attorney to confess judgment.

<sup>1</sup> 12 *N. L. R.* 16.

refer to no other provision of the Code and to no local decision supporting his contention.

Counsel relied upon English authorities and cited *Anlaby v. Praetorius*<sup>1</sup>, where it was held that where a judgment is obtained irregularly the defendant is entitled *ex debito justitiae* to have it set aside. That was a case of a writ specially endorsed under O. III. r. 6. and the defendant took out summons to set aside the judgment, which was dismissed by the master. It has been held however that a judgment by consent, even where it is urged that the consent has been obtained by a concealment of material facts, which is fraudulent, cannot be set aside upon motion after it is passed and entered (*Kinch v. Walcott and Others*<sup>2</sup>). It is binding until a fresh action is constituted for the purpose of setting it aside. We were also referred to *Muir v. Jenks*<sup>3</sup> which does not carry the matter further.

It has been held in Ceylon that, apart of course from the special provisions of Chapter XII of the Code, a Court has no jurisdiction, except as provided by section 189 of the Code dealing with amendments of the decree, to vacate or alter an order after it has been passed (*Ramasamy Pulle v. De Silva*<sup>4</sup>). That decision, so far as I am aware, has settled the question since it was given. Application has on several occasions been made to this Court and not to the Court making the order, for relief. That would appear to be the correct procedure unless of course the procedure appropriate to the case be by a separate action (*Lucyhamy v. Alwis*<sup>5</sup>).

The order of the lower Court dismissing the objection was correct and the appeal must therefore be dismissed with costs.

AKBAR J.—I agree.

*Appeal dismissed.*

<sup>1</sup> 20 *Q. B. D.* 764.      <sup>3</sup> (1913) 2 *K. B.* 412.

<sup>2</sup> (1929) *A. C.* 482.      <sup>4</sup> (12 *N. L. R.* 298.

<sup>5</sup> (1926) 26 *N. L. R.* 123.