1931

Present: **Lyall Grant J. and Maartensz A.J.**

SAMARAKOON *v.* PONNIAH.

11—*D. C. Kandy*, 40,381.

Sequestration before judgment—Proof of facts —Grounds of belief—Civil Procedure Code, ss. 181 and 653.

In an application for sequestration, before judgment, a mere statement in the affidavit that the applicant verily believes that the defendant is not possessed of any other property and that he is about to alienate the subject matter of the action is insufficient. The grounds of belief must be set forth in the affidavit.

APPEAL from an order of the District Judge of Kandy.

Navaratnam, for defendant, appellant.

N. E. Weerasooria, for plaintiff, respondent.

March 9, 1931. LYALL GRANT J.—

This is an appeal from an order made by the Acting District Judge of Kandy on an application, by the defendant in an action, to recall a mandate of sequestration, which had been issued by the District Judge *ex parte* on an affidavit made by the plaintiff in the case.

The suit was in respect of the balance of the price of a motor car, part of which had been paid. The mandate of sequestration

[1] 20 *N. L. R.* 424.
[2] 26 *N. L. R.* 479.
[3] 31 *N. L. R.* 233.
[4] 1 *Browne's Reports* 6.

was asked for on the grounds that the car was daily deteriorating and losing its value, that to the best of the plaintiff's knowledge the defendant was possessed of no other property, and that the plaintiff verily believed that the defendant intended fraudulently to alienate the said car. On that affidavit an *ex parte* order was made under section 659, sequestrating the car. Thereafter summons was served, certain proctors filed their appointment for the defendant and on an affidavit moved that the order of sequestration be removed. In that affidavit it was said that the plaintiff, in order to obtain the sequestration, had falsely alleged that the car was deteriorating and losing its value and that the defendant intended fraqulently to alienate the car. In addition to certain other averments the defendant said he was possessed of immovable property and that he had no intention of alienating the car ; in fact that he had no power to do so as the registration was in the name of the plaintiff.

On the matter coming before the learned Judge who was acting at the time the principal point which seems to have been discussed was whether the original order ought to have been made, inasmuch as the plaintiff's affidavit disclosed no intention fraudulently to alienate ; reference was made to two cases. No evidence was led at the inquiry. The learned District Judge after stating that the requirements of section 653 must be satisfied, commented on the affidavit filed that the plaintiff only believed that the defendant had an intention to alienate but added that as the goods to be sequestered were only one article he did not see how it was possible to allege anything more. He declined to go into the correctness or otherwise of the allegations made as those were matters which would have to be dealt with at the final trial. He ended his judgment by saying that the District Judge had considered the material and held it to be sufficient, and by doubting whether the Acting District Judge had authority to review the opinion of the permanent District Judge in the matter. The learned Acting District Judge has mistaken his position here ; sitting on the District Court Bench he was vested with the same powers as the permanent Judge and it was open to him to decide, when the matter came up *inter partes*, whether the original *ex parte* order was improperly made and ought to be rescinded, or whether a further inquiry should be held in the matter in view of the defendant's affidavit. It is of course open to this Court to order an inquiry into the defendant's affidavit, but if the original order was improperly made the sequestration ought not to have been allowed. The facts of this case are very similar to those in a case reported in 7 *Ceylon Times Reports, p.* 39, where the point was considered by Sir Stanley Fisher C.J. In that case the affidavit said that the plaintiff had good reason to believe certain information, and that was held to be insufficient to satisfy the requirements of this section. The section requires the plaintiff to establish to the satisfaction of the Judge by affidavit, or, in certain cases by *vivâ voce* testimony, that he has a sufficient cause of action against the defendant, either in respect of a money claim of or exceeding two hundred rupees, or because he has sustained damage to that amount. The Chief Justice in the course of his judgment sets forth the requirements of the section as follows :—" There is no statement of any facts in the affidavit as required by section 653 of the Civil Procedure Code and moreover being an affidavit based on belief section 181 is also applicable and must be complied with.

" That section requires reasonable grounds for the belief to be set forth. The affidavit in this case did not comply with section 181 in this respect and there was therefore no proper affidavit before the Judge. It is impossible to give effect to the contention that the insufficiency of the material on which this mandate was granted can be made

good if it is shown that the state of things in fact existing at the time the application was made, had it been brought to the notice of the Judge, would have justified him in acting as he did. In my opinion there is no proper material upon which a mandate could be issued and it must therefore be dissolved".

The reference to section 181 refers to the statement in the affidavit that the plaintiff had good reason to believe. That is practically the same as the statement in paragraph 8 of the affidavit in the present case " that I verily believe ". Section 181 contains an exception to the rule that affidavits shall be confined to statements of such facts as the declarant is able of his own knowledge and observation to testify to, except on interlocutory applications, in which statements of his belief may be admitted provided that reasonable grounds for such belief are set forth in the affidavit. The requirement of section 181 and section 653 are similar. I think we ought to follow the procedure adopted by this Court in the case cited and to order that the mandate should be dissolved and the appeal allowed with costs in both Courts.

MAARTENSZ A.J.—I agree.

Appeal allowed.