Present : Bertram C.J. and De Sampayo J.

1921.

NARAYAN CHETTY *v.* AZEEZ.

48—D. C. Galle, 18,007.

Restitutio in integrum—*Proctor consenting to judgment contrary to instructions—Appeal.*

If a litigant alleges that his proctor by mistake or negligence has consented to a judgment contrary to his instructions, his remedy is not by way of appeal, but by way of application to the Supreme Court for *restitutio in integrum.*

THE facts are stated as follows in the petition of appeal:—

1. This was an action in realization of a mortgage executed by the first defendant-appellant and another in favour of the plaintiff-respondent for the recovery of a sum of Rs. 1,078·47 being balance principal and interest due in respect thereof by the appellant to respondent.

[1] *(1916)18 N. L. R 168.*

1921.

Narayan Chetty v. Azeez

2. The respondent by an averment contained in the 4th paragraph of the plaint filed by him, alleged that the first- and the second-named properties of those mortgaged with him by appellant had been released from the operation of the bond sued on.

3. The appellant to the contrary contended that house No. 58 had also been released, and prayed for its exclusion from the operation of any decree that might be entered in plaintiff's favour in this action, and pleaded deed of release No. 270 of January 12, 1918, in support thereof.

4. The case came on for trial on November 17, on which date, in the absence of the first defendant-appellant (who had duly furnished his proctor with a medical certificate obtained from the Judicial Medical Officer of Galle with instructions to him to move for a postponement), the learned District Judge, upon a statement made by the said proctor, based on a misapprehension that he gave up the contest, entered judgment for the plaintiff-respondent as prayed for . . . .

(*c*) The application for a postponement made by appellant's proctor on the certificate referred to above, filed of record, it is submitted, should have been allowed.

(*d*) Unfortunately for appellant the Court has failed to make a record of either the fact of a certificate having been produced, or of any application made for a postponement to substantiate both, which facts the appellant undertakes to furnish on affidavit at the hearing of the appeal.

(*e*) It is submitted that if the postponement moved for had been allowed, the appellant would have been afforded the opportunity of giving accurate instructions to his proctor and avoiding his acting on the misapprehension he did in giving up the contest.

Abdul Cader, for the appellant.

J. S. Jayawardene, for the respondent.

October 4, 1921. BERTRAM C.J.—

In this case the appellant, assuming he is right on his facts, has misconceived his remedy. It is now settled law (see *Arumugam v. Seeni Mohamado* [1] and *Sinnatamby v. Nallatamby* [2]) that, if a litigant alleges that his proctor by mistake or negligence has consented to a judgment contrary to his instructions, his remedy is not by way of appeal, but by way of application to this Court for *restitutio in integrum*. In my opinion the appeal must be dismissed, with liberty to the appellant to apply to this Court in the manner indicated.

The appeal should be dismissed, with costs.

DE SAMPAYO J.—I agree.

Appeal dismissed.

[1] *2 C. L. R. 15.* [2] *(1904) 7 N. L. R. 139.*