

1903.

September 23.

DE MEL v. DHARMARATNE.

D. C., Colombo, 13,718.

Judgment—Issue of writ of execution—Appeal against decree—Sale by Fiscal—Confirmation of sale—Conveyance by Fiscal to purchaser—Reversal of judgment by Supreme Court—Application to District Court to vacate order of confirmation of sale—Civil Procedure Code, ss. 282, 283.

Where a writ of execution was allowed upon a judgment against the defendant, and the defendant appealed against the decree and the Supreme Court set it aside a week after the Fiscal had sold his property, and where, such sale being confirmed by order of the District Court, the defendant moved it to vacate its order of confirmation,—

Held, that the Court had power to vacate its order.

THE plaintiff obtained judgment against the defendant on the 15th August, 1902, and issued a writ of execution on the 18th

of the same month. The defendant filed his petition of appeal against the decree on the 27th.

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On 14th November, 1902, the Fiscal sold to a third party the defendant's land which had been seized under the writ. The sale was confirmed by order of Court dated 20th January, 1903, and the Fiscal's conveyance to the purchaser was duly passed.

The Supreme Court sitting in appeal having set aside the decree (under which the sale had taken place) on the 25th November, 1902, the defendant moved the District Court for an order to vacate its order of the 20th January, 1903, whereby it had confirmed the sale, on the ground that such order was made *per incuriam*, in ignorance of the fact that the decree had been set aside in appeal.

The Additional District Judge (Mr. Felix Dias) allowed the motion on the authority of *Idroos Lebbe v. Meera Lebbe* (1 *Tambyah's Reports*, p. 6). He held that a Court could refuse to confirm a sale only for the reasons stated in sections 282 and 283 of the Civil Procedure Code; that a defendant who did not, within the thirty days allowed him under section 283, apply to the Court to stay the confirmation of a sale was not entitled afterwards to question its validity; that if no such application had been made, it could refuse to confirm a sale if it appeared that the judgment debt had been satisfied at the time the writ of execution issued; that the defendant neglected to take steps within the thirty days to have the sale set aside, and an innocent purchaser ought not to be allowed to suffer by his negligence. Nevertheless the Court felt bound by the Supreme Court decision above referred to.

" This decision, " the A.D.J. observed, " appears to have been wrongly decided. Lawrie, J., has followed two Indian decisions based on sections 312 and 316 of the Indian Procedure Code, but it seems to me that they have no application under our Code. In section 312 of the Indian Code, which partly corresponds to our section 283, there is no proviso showing the grounds upon which the Court shall stay its hand in confirming a sale. Under section 316 of the Indian Code, which does not appear in our Code, after a sale of immovable property has become absolute the Court is bound to issue a certificate of title to the purchaser but only provided that the decree under which the sale took place was still subsisting at the date of the certificate. "

" In other words, under the Indian Code, a sale is incomplete until the issue of the certificate by the Court, so that if in the interval the original decree is reversed for any reason, the Court ceases to have jurisdiction to take further steps to execute that decree, and necessarily it has been rightly held that it had no

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 September 28. been set aside.

“ The Indian cases relied upon cannot govern us, and the only grounds upon which a Court can refuse to confirm a sale are those contained in sections 282 and 283 of our Code.

“ Following the judgment of the Supreme Court above cited, I direct that the order of the 20th January, 1903, confirming the sale of property in this case be vacated. ”

The purchaser in execution appealed.

The case was argued on 23rd September, 1903, before Layard, C.J.
Van Langenberg (with *Samarawickrama*), for the purchaser, appellants.

H. J. C. Pereira, for respondent.

Cur. adv. vult.

28th September, 1903. LAYARD, C.J.—

In this case the District Judge has very properly followed Mr. Justice Lawrie's judgment in the case of *Idroos Lebbe v. Mira Lebbe* reported in *1 Tambyak's Reports*, p. 6. It is, however, argued by appellants' counsel that Mr. Justice Lawrie's judgment is incorrect, and being the judgment of a single Judge is not binding on this Court.

It is suggested that Mr. Justice Lawrie, in following the two Indian decisions cited by him, overlooked the difference between our Code and the Indian Code, and that these two decisions are based on the proviso attached to section 316 of the Indian Procedure Code, which has no place in our Code.

A careful perusal of these two decisions discloses that they both deal with the jurisdiction of a Court to confirm a sale where a sale in execution of a decree has taken place pending an appeal and the decree has been reversed before the sale has been confirmed by the Court. Now, the section of the Indian Code which deals with confirmation of sales in execution by the Court is section 312, and that section corresponds to section 283 of our Code, and contains no provision directing the Court to refrain from confirming a sale in execution where the decree on which the writ of execution has issued has been set aside before the application for confirmation was made; still the Indian Courts held that the power of the Court to confirm the sale under a decree ceased when such decree was reversed in appeal before the confirmation took place, and that the Court had no jurisdiction to confirm such sale. The judgments of the Indian Court, which make no reference to section 316 of the Indian Procedure Code or of the proviso to it,

appear to me to be sound. A sale under a decree is incomplete until confirmation by the Court, and the Court's power to confirm a Fiscal's sale is dependent on the sale being held in pursuance of a decree. It is the existence of a valid decree which gives the Court jurisdiction to act. Such being the case, when the decree has been swept away by a judgment in appeal, the Court has no power to confirm the sale, there being at the time no subsisting decree which would justify the Court in acting. The power of confirmation is to be executed when there is a decree and a sale thereunder, and consequently if the decree has ceased to exist before the Court is called upon to exercise its power of confirmation the Court's jurisdiction to confirm ceases. Again, under section 283 of our Code a sale can only be confirmed if no such application is made as is mentioned in the preceding section. One of the parties who is entitled to make such application and support it under section 282 is the decree-holder; no such person, however, exists as a decree-holder when there is no subsisting decree.

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Sections 282 and 283 contemplate that there is a decree-holder at the time of confirmation of the sale; when however the decree ceases to exist, there is no decree-holder who can make an application or support it when made.

A reference to section 316 of the Indian Procedure Code shows that that section deals with what transpires after the order of confirmation of a sale under section 312 has been made, and in no way limits the power of the Court to confirm a sale under section 312; its provisions were not alluded to by the Indian Judges in their judgments in the cases above referred to, and could not in any way have affected their judgments, because, as I said above, that section deals with what transpires after the order of confirmation has been made by the Court.

Section 316 runs as follows: "When a sale of immovable property has become absolute in manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate, and not before: Provided that the decree under which the sale took place was still subsisting at that date."

It enacts only what is to happen after a sale has been confirmed under section 312, viz., that the Court must issue a certificate and then proceed to declare what the effect of such a certificate is, viz., that it vests the title of the property mentioned in it in the

1903. purchaser, provided that the decree under which the sale took *September 23.* place was still subsisting at the date of the certificate, *i.e.*, at the date of the confirmation of the sale, because the certificate bears that date also.

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The object of the proviso is to limit the effect to be given to a certificate after it has been issued, for, the section having imperatively enacted that a certificate once issued was to vest title, it was necessary to provide that it did not do so if the decree was not subsisting at the date of the certificate. Otherwise it was open to argument that when a certificate was produced the enactment prevented the person, whose property was mentioned in, it, as having been sold, from impeaching the title of the purchaser under any circumstances. The object of the proviso was to emphasize the fact that the Court could only act under section 312 when there was a subsisting decree, and not in any way to define the jurisdiction of the Court to confirm a sale under section 312.

The order of the District Judge must be affirmed, and in addition thereto it must be declared that the purchaser at the Fiscal's sale is entitled to a refund of the amount paid by him. If the amount of the levy is in Court, the purchaser must be allowed to draw it, and the execution-creditor, the plaintiff, must be decreed to pay the purchaser the difference between the amount in Court and the actual purchase money. If the plaintiff has drawn the amount of the levy, then he must be decreed to pay the whole of it to the purchaser. The appellant must pay the costs of the appeal.

WENDT, J.—

I entirely agree. The true principle appears to me to be that the confirmation of the sale is a step in the execution of the decree, which the Court has no jurisdiction to take if the decree no longer exists. I think, therefore, that the decision of Lawrie, J., in *Idroos Lebbe v. Meera Lebbe* (1 *Tamb.* 6) was perfectly correct.

