

1933

Present : Dalton A.C.J. and Koch A.J.

BROOKE BOND *v.* DE SILVA.

16—D. C. Colombo, 36,549.

Mortgage action—Sanction given to mortgagee in the decree to purchase—No reservation of upset price—Special application not necessary—Civil Procedure Code, s. 272.

Where in a mortgage action plaintiff obtained in the decree the sanction of Court to bid for and purchase the property mortgaged without any reservation of the upset price,—

Held, that the order to bid was valid and that no special application in terms of section 272 of the Civil Procedure Code was necessary for the purpose.

There is no provision of the law that a limit as to price is required to be placed upon the mortgagee if he is to be allowed to bid and purchase.

A PPEAL from a judgment of the District Judge of Colombo.

Hayley, K. C. (with him *Weerasooria*), for plaintiff, appellant.

H. V. Perera, (with him *Rajapakse*), for first defendant, respondent.

July 25, 1933. DALTON A.C.J.—

This appeal arises from an order of the District Court setting aside a sale at execution.

The plaintiff company sued the first defendant to recover the sum of Rs. 22,712.10 and interest due on a mortgage bond executed by the latter in favour of the former on January 9, 1929. The property mortgaged consists of four lots of land, about 45 acres in all, planted with tea in

the Ramboda district. The second and third defendants are puisne incumbances. The first defendant filed no answer to the plaint and did not appear to defend the action.

In the plaint, amongst other things, the plaintiff company prayed that the property mortgaged be put up for sale, first at the amount of the Deputy Fiscal's valuation, then at the aggregate amount of the plaintiff's claim and costs, and in the event of there being no bidders at such sale, then, immediately afterwards to the highest bidder. It also prayed that the plaintiff company or anyone else on its behalf be allowed to bid for and purchase the property at the sale, and in the event of the company becoming the purchaser to allow it credit in any sum not exceeding the aggregate amount of its claim and costs.

On October 31, 1930, none of the defendants being present, after an *ex parte* trial, decree was ordered to be entered, and was entered in terms of the prayer of the plaint. An order for sale thereafter on January 21, 1931, issued from the Court to the Deputy Fiscal directing *inter alia* that the property be sold, after due advertisement, in conformity with the orders and directions set out in the decree and upon the conditions of sale, and in the event of the plaintiff company being the purchaser, to allow credit in accordance with the directions contained in the decree. The sale was held on the premises on July 4, 1931, and the plaintiff company became the purchaser for the sum of Rs. 100.

On August 5, 1931, within the time limited by section 282 of the Civil Procedure Code, the first defendant petitioned that the sale be set aside on the ground of irregularities in advertising and conducting the sale as a result of which, he alleged, he had suffered substantial injury. The inquiry on this petition opened on October 9, 1931, and terminated with the order now appealed from, dated November 9, 1932. On the opening day, counsel for petitioner raised an additional ground in support of his petition which is entered on the record in the following terms:—

“That inasmuch as the plaintiff has obtained directions in the decree entitling him to bid for and purchase the property without any conditions or reservations, which authority he should have obtained by a specific order for this purpose on plaintiff's application in that behalf, the plaintiff should not be entitled to purchase the property without a valid authority to bid.”

The learned trial Judge noted that this point was not raised in the petitioner's statement of objections, and the objection was not taken within thirty days after the receipt by him of the sale report, but stated he would consider it with the other points raised in the case. Objection was taken on the other side, however, that the point was untenable, and in any event raised too late.

After hearing a considerable body of evidence led on both sides, the learned Judge found that there had been due publication of the seizure and sale, and that all the formalities required by law were duly observed prior to the sale. He found against the petitioner on all the matters raised in his petition or statement of objections. He then goes on to consider the objection raised by petitioner's counsel at the opening of the inquiry, and held that plaintiff had not obtained “an order in terms of section 272 of the Civil Procedure Code imposing any terms as to the

purchase by him of the property mortgaged". This he held to be an irregularity affecting the sale to the plaintiff, and "the Court is entitled in the exercise of its equitable jurisdiction and in view of the very low price at which the plaintiff became the purchaser to refuse to confirm the sale". He held the objection, having been taken before the confirmation of the sale, did not come too late and he therefore set aside the sale.

I have quoted the learned Judge's words to some extent, as there seems to be some ambiguity as to the reasons why he set aside the sale. At one point he holds that where a plaintiff on a mortgage decree desires to be allowed to purchase the property mortgaged and required terms as to credit, it is not sufficient to ask for this in his plaint, but he must make a special application for this purpose. The purpose of this special application is stated to be that the mind of the Court may be specially directed to this matter. Later, however, he refers to the power of the Court to control its own sales and so direct that no injustice may be done to any party.

In my opinion the learned Judge is wrong in holding that here the plaintiff company was required to make any further application to the Court for leave to bid and purchase, having already obtained that leave, and the approval of the Court of the conditions on which it was to be exercised as set out in the decree. Until the passing of the Mortgage Ordinance (No. 12 of 1927) the Court had no power to give special directions governing the sale except in the decree, and the plaintiff was required to apply for any directions he might require before the decree was entered. (*Walker v. Mohideen*¹) Now by section 12 of the Mortgage Ordinance, such directions may be given in the decree, or subsequently. Here the plaintiff obtained in the decree the sanction of the Court to bid and purchase the property, terms as to credit being given are set out, and the conditions on which the Deputy Fiscal is to put up the property, first at the amount of his valuation, then, if there is no bid, at the aggregate amount of the plaintiff's claim and costs, and lastly if there be no bidders at that figure, without restriction to the highest bidder, are fully set out. The terms of plaintiff's plaint were fully known to first defendant, and he neither appeared to defend the action or to object to that portion of the plaint relating to the conditions on which the property should be sold. The plaintiff company had the sanction of the Court to purchase, and no further application by it was necessary under the Code. There has therefore been no irregularity in conducting the sale as the learned trial Judge has held. The plaintiff in fact had a right to have his bid entertained, and a refusal on the part of the Fiscal to accept it would have furnished the plaintiff with cause for complaint that there was a material irregularity in the conduct of the sale. The learned trial Judge in a later decision of June 5, 1933, which has been referred to in the course of the argument before us, appears to have come to the same conclusion to which I have now come on this point.

The plaintiff company having obtained the sanction of the Court under section 272 and directions governing the sale, the additional objection raised by petitioner's counsel on October 9, 1930, had no substance. I might point out, however, that could it have been sustained, it would

¹ 26 N. L. R. 310.

appear to have been, on the authority of *Chellappa v. Selvadurai*¹, an irregularity in the conducting of the sale within the provisions of section 282 of the Code, which must be notified to the Court within the time there limited. Inasmuch as the objection was out of time, the Court therefore could not set aside the sale on that ground.

There remains the further argument that the Court has a duty to see that no injustice is done to debtors, and has a judicial discretion in deciding the terms upon which sales in execution should be held. In deciding these terms it was urged that the Court should in every case fix the figure below which a judgment-creditor should not be allowed to buy. I agree that the Court has a discretion within limits in settling the terms, but there is nothing before us to show in this case the Court has not exercised that discretion. There was no suggestion in the lower Court to that effect. The learned trial Judge does state that it is likely more often than not the clerk in charge of decrees will pass the decrees tendered without scrutiny, but there is nothing to show that the decree in this case is otherwise than in order.

There is no requirement of the Code that the Court should in every case fix the figure below which a judgment-creditor should not be allowed to purchase, nor have I been able to find any provision of the Code that would empower the Court to do so. During the last two or three years I understand, owing to the depression and the general fall in prices, it has been the practice on occasion for such a condition to be approved of by the Court, but no such term was present in this case, nor did first defendant ask for it. One would assume that where such a condition has been made without objection, the special circumstances of the case are such as to justify it. The Courts also have not been backward in assisting the debtor in proper cases by granting a stay of execution. Up to two or three years ago I have no reason to doubt that, as has been stated in the argument before us, when request was made to the Court for the judgment-creditor to be allowed to bid and purchase the property, and for the terms and conditions to be fixed upon which this might be done, the order of the Court was as a general rule in the form of the decree now before us.

There is no doubt as to the Court's power to set aside a sale for reasons other than those specified in section 282. It is urged also, and two cases have been specially relied upon in support of this contention, that the Court has a general discretion to refuse to confirm a sale in the exercise of what the learned Judge has termed its equitable jurisdiction. The first case is *Ramaswamy Chetty v. Silva*². An examination of that case shows that this Court was in doubt whether the mortgagee had any right to bid since there was no such permission incorporated in the decree. That afforded ample ground for setting aside the sale. Ennis J. however goes on to express his opinion *obiter* that even if the plaintiff's agent was properly authorized to purchase, there would seem to be equitable grounds for interfering as no limit was put as to the price at which the mortgagee might be allowed to purchase, and the property fetched a sum much below the valuation given by the auctioneer. As I have stated, no provision of the law, that a limit as to price is required to be placed

¹ 15 N. L. R. 139.

² 7 C. W. R. 163.

upon the mortgagee if he is to be allowed to bid and purchase, has been brought to our notice. On the further point as to inadequacy of price, there is ample authority that sales in execution cannot be set aside on that ground alone.

The second case to which I refer is *Pakir Tamby v. The Proprietor of Dartry Group*¹. In that case there is no doubt that the sale was not previously advertised in the *Government Gazette*. The land had been valued at Rs. 935, but it was subsequently discovered that the valuation was improper and that it was in fact worth Rs. 1,955. The Deputy Fiscal accordingly reported to the Court that the sale was irregular as it had not been published, and he asked the Court to annul the sale and to be allowed to hold a resale after due advertisement in the *Gazette*. The Commissioner of Requests allowed this application. Fresh execution proceedings were then taken and a claim to the property was made which was upheld. The original purchaser then asked that the first sale be confirmed and that the order on the Deputy Fiscal's application be set aside. The Commissioner of Requests thereupon set aside his order and confirmed the first sale. De Sampayo J., in holding that the Court should have refused to confirm the sale, points out that the judgment debtor, who would have been able to apply under section 282 to set aside the sale for want of due publication, was deprived of the opportunity of doing so by reason of the order made by the Commissioner on the Deputy Fiscal's application. The Deputy Fiscal was not a person who was authorized to make any application under section 282. The learned Judge expresses the opinion that the spirit of the Code indicates that the Court generally has power to prevent injustice in the case of sales under its own order. In addition however to the inadequacy in price obtained, there was also the irregularity in respect of publication, and under the circumstances he allowed the appeal and the sale was set aside.

On the facts, both these cases are clearly to be distinguished from the one before us. There was evidence in both of an irregularity in conducting or publishing the sale. Mr. Perera, however, relies upon them for this purpose, as going to show that the Court should not confirm a sale if it works an injustice. Injustice, as he uses the term, means, I take it, the doing of a wrong or the violation or withholding of another's rights or dues, and must not be confused with hardship. In the case of irregularities in respect of publishing or conducting a sale, if no application is made under section 282 and allowed, this Court has held that the confirmation of a sale can only be refused for the reason set out in section 283. *Chelappa v. Selvadurai* (*supra*.) Wood Renton J. pointed out that this may involve hardship in particular cases, but that this interpretation of the law was sound in principle. The only ground upon which the learned trial Judge set aside the sale that has been substantiated is the very low price that has been obtained. Can the Court for that reason alone refuse to confirm the sale? In my opinion it cannot do so. What is a plaintiff purchaser to do if no one will bid more than the first bid made by him? Counsel answers that the law steps in and says it must not be accepted, that he must be limited by terms as to the amount at which he may buy.

There is however no law to that effect. No doubt a considerable hardship is suffered here by the judgment-debtor, for which to some extent as I have denoted he must take the blame, whilst I think the value he put upon the property at the time of the sale was probably much too high. The fact that the secondary mortgagees were present at the sale and made no attempt to bid or to protect their claim would go to confirm this. The judgment-debtor also seems to have made no effort to prevent the property being knocked down at the first bid when it was put up without restriction. In the result his property has been sold, and after the sale the judgment debt remained unsatisfied except for the sum of Rs. 100. The purchasers however have now agreed to give the judgment-debtor credit for the sum of Rs. 8,000 in addition to the small sum fetched at the sale, towards the amount due on the decree. That is the figure at which their witness valued the property at the time of the sale. The hardship suffered is thereby very considerably diminished.

For the above reasons the petition of the judgment-debtor to set aside the sale should have been dismissed. The appeal is allowed, and the appellants are entitled to costs in both Courts.

Koch A.J.—I agree.

Appeal allowed.

