*Nov. 2, 1910* *Present :* Hutchinson C.J. and Wood Renton J.

## SULTAN PACKEER, *et al.*

## 248—*D. C. Colombo*, 28,953.

*Action by judgment-debtor to set aside sale on the ground of fraud and material irregularity—Action maintainable—Civil Procedure Code, ss. 282 and 344.*

Certain lands were sold in execution of a decree against the plaintiff, who was a judgment-debtor in another action. He brought this action against the purchaser at the sale, the auctioneer and the judgment-creditor alleging that by reason of fraud and collusion between the purchaser and the auctioneer, and by reason also of certain material irregularities in the publishing and conducting of the sale, the lands were sold under their value, and claimed that the sale and conveyance to the first purchaser be set aside and a fresh sale ordered.

*Held*, that the plaintiff was entitled to have the sale set aside in the present action.

WOOD RENTON J.—The provisions of section 344 would not justify the dismissal of a separate action brought in contravention of its directions.

*Obiter.*—According to Burge, while the purchaser at a judicial sale was bound to ascertain that the sale had been made in conformity with sentence of the Court and the solemnities prescribed by law, the debtor could not, as against the innocent purchaser, set aside the sale without restoring to him the price which he had paid for the property with interest. As against the creditors, he could not set it aside without paying to them the principal and interest of their demands. If a judicial sale was impeached, not by the debtor, but by a creditor, he was not bound to restore the purchase money to the purchaser, but the latter had his remedy against the debtor who by means of the purchase money had obtained a discharge from his debt, or against the person conducting the sale who

by his default had subjected it to rescission ..... It may be necessary some day to decide whether this is a correct statement of the Roman-Dutch Law, and if so, whether there is anything in the sections of the Civil Procedure Code dealing with judicial sale to set it aside.

THE plaintiff was the judgment-debtor in D. C., Colombo, No. 26,729, which was an action on a mortgage, and was ordered to pay C. H. Bury Palliser, the present third defendant, the sum of Rs. 22,500, with interest. In default of payment certain premises described in the schedule annexed to the decree were ordered to be sold, and the proceeds applied in payment of the judgment debt. It was also ordered and decreed that the sale of the mortgaged property be conducted by J. W. H. Ebert, Auctioneer, the second defendant; that notice of the sale be advertised in the *Ceylon Independent*, *Muslim Friend*, and the *Government Gazette*; and that the properties be put up for sale by public auction at the spot, upon certain conditions of sale. The second defendant sold certain of the premises on April 1, 1909, when the first defendant became the purchaser, the premises sold being No. 22 and Nos. 22B and 22C, Maligakanda road.

In this action the plaintiff averred that the properties are worth Rs. 25,000, but were sold for Rs. 12,900, and that the sale was concluded by reason of fraud and collusion between first defendant and second defendant. The plaintiff also complained of various irregularities in the publishing and the conducting of the sale, which he alleged caused him substantial damage. He prayed that the conveyance be cancelled and a fresh sale ordered.

The following issues were framed :—

(1) The plaintiff not having taken steps to set aside the sale under section 282 of the Civil Procedure Code on the ground of material irregularities, can he proceed to do so by action ?

(2) Whether the sale of April 1, 1909, under the mortgage decree, was under chapter XXII ?

(3) Under the decree in D. C., Colombo, 26,729, was the allotment of land first mentioned in the said decree and of the extent of 37¾ perches at all advertised for sale in accordance with the directions contained in the said decree ?

(4) If not, has first defendant any title to the same under the conveyance executed in his favour by the second defendant ?

(5) Was it essential, for the due carrying out of the sale under the decree in D. C., Colombo, 26,729, that the second defendant should publish the notices required under the Civil Procedure Code to be published in the case of sales held by the Fiscal ?

(6) If it was essential, were there the irregularities in publishing and conducting the sale as mentioned in paragraph 5 of the plaint ?

(7) Did the second defendant, contrary to the terms of the said decree in D.C. Colombo, 26,729, announce and advertise for sale as separate and distinct lots the three component allotments of the premises called Kajugahalanda, described in the said decree, whereas they form one allotment, and should have been advertised for sale in one allotment ?

(8) What is the value of the lands sold ?

(9) If there were irregularities, what damages has plaintiff sustained ?

The learned Acting Additional District Judge (E. W. Jayawardene, Esq.) made the following order on the first issue :—

" The decree in D. C. Colombo, 26,729, was one under section 201 of the Civil Procedure Code. The Court directed that the sale should be conducted by the second defendant (now deceased), and that he should execute the instrument of conveyance. The question is whether the provisions of section 282 apply to a sale under section 201, or do those provisions apply only to Fiscals' sales. There is no case in point, and section 311 of the Indian Code, which corresponds to section 282, and the decisions under that section, do not help us.

" The 1st paragraph of the section 282 lays down that it is the duty of the Fiscal to report every sale of immovable property within ten days, and that no sale is absolute until thirty days of the receipt of such report by the Court, and until such sale is confirmed by the Court. The 2nd paragraph of the same section contains the provisions that are material to the present question : ' any person whose immovable property has been sold under this chapter..... may apply by petition to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it.'

" It is argued that all sales under the orders of the Court are sales under this chapter (chapter XXII.), and that the plaintiff should have proceeded under section 282. I am inclined to think that the 2nd paragraph of section 282 applies only to sales reported to Court under the 1st paragraph of that section. The latter part of the 2nd paragraph seems to put it beyond doubt when it provides that the grounds of the irregularity should be notified to the Court within thirty days of the receipt of the Fiscal's report. In the absence of a Fiscal's report, section 282 cannot apply at all. The present sale was not by the Fiscal, and there is no Fiscal's report.

" A mortgage decree is a decree for the payment of money under section 217 of the Civil Procedure Code (*Don Jacovis v. Perera*[1]),

[1] *(1906) 9 N. L. R. 166 ; 3 Bal. 118.*

but all the sales under chapter XXII. are sales by the Fiscal. The sale in this case was under section 201 (chapter XX.), and not under chapter XXII. Even if it were a sale under chapter XXII., I do not think section 282 applies, as it was not a Fiscal's sale.

"The dictum of Lord Justice James in *Gavin v. Hadden*,[1] that irregularity, error of fact or of law, must be shown in the suit itself, does not apply in a case of this kind, where the irregularity is committed not by the Court, but in process of execution of the decree. In *Gobind Singh v. Ram Doss*,[2] it was open to the debtor to move under section 256 of the Indian Act ; the corresponding section of our Act only applies to sales by the Fiscal.

"Section 344 of the Civil Procedure Code does not apply, as the first defendant was not a party to the previous action. It has been held that a purchaser at a sale in execution of a decree is not a party to the action under section 244, the corresponding section of the Indian Act.[3]

"On the first issue I hold that the action is maintainable."

On the other issues the learned District Judge held as follows :—

"I am of opinion that No. 22, Maligakanda, was sold for nearly half its value. It was not advertised for sale at all. It is reasonable to think that a proper advertisement as required by the Court would have attracted more bidders and helped to realize a better price. I have no hesitation in cancelling the sale of No. 22, Maligakanda. It was argued that Nos. 22, 22B, and 22C really formed one property belonging to the plaintiff, and every one knew that the plaintiff's property at Maligakanda was to be sold. The advertisement was not to be confined, according to the decree, to the small circle of plaintiff's acquaintances. The case of *Silva v. Dias*[4] is distinguishable. The property seized in that case was valued by the Fiscal's officer, who made the seizure in the presence of the plaintiff in that case. No objection was made before the sale that the things were undervalued, neither the plaintiff nor any witness in that case deposed that the property would have been likely to sell better if the sale had been advertised in the *Gazette*, or that other people who were not present at the sale would have been likely to be present. The property sold in that case was of a special kind, for which there was a very limited market. In the present case the property sold was a boutique and some tenements in Maligakanda. Their situation, according to Mr. Daniel, was good. The evidence in this case is that Muhammadans buy tenements largely. The plaintiff has stated in his evidence that if there was a proper advertisement there would have been more bidders, and more people would have come to bid and buy. It is fair to think so. The non-advertisement of the property was a material irregularity, and I think it is sufficiently

[1] *8 Moore's P. C. (N. S.) p. 90 at p 117.*
[2] *19 W. R. 414.*
[3] *Rampini's Civil Procedure Code, p. 423.*
[4] *(1910) 13 N. L. R. 125.*

proved that a price much below the market value has been realized owing to that irregularity. The loss has been connected with the irregularity as effect and cause in the case by means of direct evidence. The conditions required to vitiate a sale on the Indian cases—*Jagan Nath v. Makund Prasad*,[1] *Arunachalam v. Arunachalam*,[2] *Tasaduk Rasul Khan v. Ahmad Hussain*,[3] *MacNaghton v. Mahabir*[4]—are to my mind present. Next, with regard to the premises Nos. 22B and 22C, Maligakanda, the plaintiff complains that the second defendant announced and advertised for sale as separate and distinct lots the three component allotments of those premises, whereas they form one allotment, and should have been advertised for sale in one allotment. The schedule annexed to the decree describes this property as 'All those three portions of Kadjugahalanda annexed in one, now forming one property, with the buildings standing thereon, presently bearing assessment No. 22B and 22C, and situated at Ketawalamulla, now called Maligakanda road, in Maradana aforesaid,' gives its boundaries and states that the premises comprise three allotments described in sub-heads (*a*), (*b*), and (*c*). The advertisement was clearly not in terms of the decree. I am inclined to think that the terms of a decree must be strictly complied with, and on that ground alone I would be inclined to cancel the sale of this property also. It was argued that the irregularity must be a material one, and must cause substantial loss or damage. The first part of the description seems very material and important, where three portions of the property are described as forming one property with the buildings on it and bearing the Municipal assessment Nos. 22B and 22C. This property only fetched Rs. 5,000. According to Mr. Daniel's assessment, 22B and 22C would be worth Rs. 10,000. The plaintiff says they were worth Rs. 12,000. I think Rs. 10,000 would be a fair valuation.

" The evidence is not, however, sufficient to enable me to hold that there was fraud and collusion between the first defendant and Ebert (the deceased second defendant). It shows, however, that Ebert was busying himself actively for the first defendant, and did not wish Mr. de Saram to stop the sale. The plaintiff was protesting against the sale, complaining of the low prices realized. There was a material irregularity in publishing the sale of the premises 22B and 22C, and substantial injury, in that the sale realized only half the market value of the property. Are they connected as cause and effect ? The plaintiff says that the property being advertised in small lots only a few attended the sale, as people do not think it worth while to buy small blocks. If these premises were advertised as one property, the plaintiff states that there would have been more bidders, and the sale would have realized a larger price. As in the case of No. 22, Maligakanda, the conditions required by the

[1] (*1896*) *I. L. R. 18 All. 37.*
[2] (*1888*) *I. L. R. 12 Mad. 19.*
[3] (*1893*) *I. L. R. 21 Cal. 66.*
[4] (*1882*) *I. L. R. 9 Cal. 656.*

Indian cases for the cancellation of a sale are, I think, present in the case of the sale of the premises Nos. 22B and 22C.

"I answer issues (7), (9), (10) in the affirmative. I enter judgment for the plaintiff as prayed for, that the conveyance No. 2,453 of April 28, 1909, attested by F. A. Prins, Notary Public, be cancelled and declared void; that a fresh sale of the premises described in the decree in D. C., Colombo, No. 26,729, be held after due advertisement as therein required. The first defendant will pay the plaintiff the costs of this action."

The first defendant appealed.

*Sampayo, K.C.* (with him *Weinman*), for the first defendant, appellant.

*Van Langenberg, Acting S.-G.* (with him *F. M. de Saram*), for respondent.

*Cur. adv. vult.*

November 2, 1910. HUTCHINSON C.J.—

The plaintiff is the judgment-debtor in another action in which a decree was obtained against him, and certain lands were sold in execution of the decree. He brings this action against three persons—the purchaser at the sale, the auctioneer, and the judgment-creditor—alleging that by reason of fraud and collusion between the purchaser and the auctioneer, and by reason also of certain irregularities in the publishing and conducting of the sale, the lands were sold under their value, and he therefore claimed that the sale and conveyance to the first defendant be set aside and a fresh sale ordered.

The first defendant denied that there was any fraud or collusion or irregularity, or that the sale was at an under-value. The second defendant (the auctioneer) filed no answer, and died before the trial. The third defendant filed no answer.

The District Judge found that there was no evidence of any fraud or collusion, and that finding is not disputed. But he found that there had been a material irregularity in the publication of the notice of the sale, that the land was in consequence sold at a price much below its value, and that the plaintiff had sustained substantial injury by reason of the irregularity; and he ordered that the conveyance to the first defendant be cancelled and declared void, and that a fresh sale should take place, and that the first defendant should pay to the plaintiff the costs of the action.

The irregularity in the case of one of the lots sold, No. 22, was that it was not mentioned at all in the advertisement of the sale. In the case of the other lot it was that the advertisement did not follow the description of the property in the order for sale, and did not show that the three allotments of which it was composed were in fact one block. As regards lot 22 the irregularity was manifestly material. As to the other lot, I am not sure that I should myself

*Nov. 2, 1910*

HUTCHINSON C.J.

*Sultan v. Packeer*

have found, without better evidence than was before the Court, that the irregularity caused any injury. But there was some evidence that it did ; the Judge believed that evidence ; and I do not think that we can set aside his finding. Nor do I think that we can reject his finding as to the value of the property.

The appellant complains, lastly, of the order that he should pay all the costs of the action. And I think that if he is, as we must assume him to be, in the absence of any evidence to the contrary, an innocent purchaser, who has done no legal or moral wrong, and who was obliged to come into Court and defend himself against a charge of fraud, and defends himself successfully, he has good cause to complain. The Court ordered the sale and invited buyers ; he knew nothing of any irregularity in the conduct of the sale ; he bought and paid the price and incurred expenses of notary's and other fees and stamps. Then, the man whose land was sold, the man whom one would have expected to see and notice whether the sale was properly advertised and conducted, brings forward certain irregularities, of which he probably knew at the time of the sale, and for which the buyer was in no way responsible ; charges the buyer with fraud ; fails on that issue, but succeeds in getting the sale set aside because of the irregularities ; and obtains an order that the buyer shall pay all his costs of the action. And the costs will probably be no small matter, for I see that the cost of one day, July 30, 1909, which the appellant was ordered to pay were taxed at Rs. 194·53. The appellant has for the present lost the money which he paid for the land; it is in Court, and if he can get it back, it will cost him something to do so ; and he has lost all the other expenses to which he was put, and his time and trouble. It seems to me that it would be reasonable in such cases where there has been an irregularity for which the buyer was not responsible, and of which he was not aware, that the Court should not set the sale aside, except on the terms that the buyer should get back all the money and expenses that he has had to pay. But, however that may be, I think that where the buyer is charged with fraud and defends himself successfully against that charge, it is wrong in principle to make him pay the costs of the action. It is possible that if no charge of fraud had been made, the course of the action might have been quite different. I would amend the decree of the District Court by striking out the order for payment of costs. And I would make no order as to the costs of this appeal.

WOOD RENTON J.—

His Lordship stated the facts, and continued :—

There is direct evidence connecting, and the District Judge connects, the irregularities in the publication of the sale with the low prices obtained as cause and effect. There were few bidders,

although the locality is populous and land in it is valuable. The respondent says in his evidence that the non-advertisement of No. 22 and the omission to advertise Nos. 22B and 22C as one property were responsible for this. On the other side we have merely such arguments as these, that a distinct property—described in the case as the Maradana property—and sold the day after Nos. 22, 22B, and 22C, although valued at Rs. 12,000, sold for only Rs. 5,300 ; that forced sales frequently yield results unsatisfactory from the seller's standpoint ; that Mr. de Saram said in cross-examination that the Maradana property fetched what it was worth—an answer, by the way, withdrawn in re-examination ; that the lots in question were well known in the neighbourhood as forming one property, and that there was a sufficient local publication of the sale. These considerations do not seem to me to outweigh the evidence of the respondent. As regards lot No. 22, I have had no difficulty in coming to the conclusion that the District Judge is right, and even as regards lots 22B and 22C, I do not see the answer to Mr. van Langenberg's argument in commenting upon the evidence of the respondent on the point that the irregularity in the advertisement would prevent the attendance of the class of bidders who would buy large blocks of property, while the fact that it was blocks of that character that were being sold would put them beyond the reach of the small bidders whom the local publication might have attracted. On these grounds, I think that the decision of the District Judge that the sale must be set aside should be upheld.

In the view that I take of the question of costs, it is unnecessary to deal at length with Mr. de Sampayo's argument, that, under the section 344 of the Civil Procedure Code, the respondent's present claim should not have been made the subject of a separate action. I do not think that the use of the word " parties " in that section (see *Carpen Chetty v. Hamidu* [1]) precludes a person in the position of the appellant from raising this objection. But the objection, if successful, is one to which effect could only be given by an order as to costs. The provisions of section 344 would not justify the dismissal of a separate action brought in contravention of its directions. In the present case the failure of the respondent to establish the charge of fraud against the appellant which he distinctly made in his plaint, although it did not form part of the issues originally framed, entitles the appellant to be relieved entirely from the costs both of the action and of the appeal. I concur in the formal order proposed by His Lordship the Chief Justice.

If the point had been taken and made the subject of an issue at the trial, there might have been a good deal to be said on the question as to whether the appellant in these proceedings, an innocent purchaser, was not entitled to further relief. According to Burge (*vol. II., pp.* 578 *and* 579), while the purchaser at a judicial sale

[1] *(1909) 1 Cur. L. R. 166.*

*Nov. 2, 1910*

WOOD RENTON J.

*Sultan v. Packeer*

was bound to ascertain that the sale had been made in conformity with the sentence of the Court and the solemnities prescribed by law, the debtor could not, as against an innocent purchaser, set aside the sale without restoring to him the price which he had paid for the property, with interest. As against the creditors, he could not set it aside without paying to them the principal and interest of their demands. If a judicial sale was impeached, not by the debtor, but by a creditor, he was not bound to restore the purchase money to the purchaser, but the latter had his remedy against the debtor who by means of the purchase money had obtained a discharge from his debt, or against the person conducting the sale who by his default had subjected it to rescission. In support of these statements Burge relies on *Matthaeus de Auctionibus* (*book* 1, *C.* 12, *N.* 12 *and C.* 16, *N.* 16). I have looked at the passages in Matthæus to which Burge refers, and they seem to bear out the propositions that he deduces from them. It may be necessary some day to decide whether this is a correct statement of the Roman-Dutch law, and if so, whether there is anything in the sections of the Civil Procedure Code dealing with judicial sale to set it aside. There can be no doubt, however, but that, as Matthæus says, in such a case as the present, *ipsa aequitas dictat pretium emtori restituendum esse.* Here, however, as I have already said, the point was not taken in the District Court or in the petition of appeal. It is a point the answer to which might well have depended on evidence that has not been recorded, and I do not think that we can entertain it now.

*Appeal dismissed.*