

1923.

*Present* : Schneider J.

PATHINAYAKE *v.* WICKREMESINGHE *et al.*

36—C. R. Galle, 2,967.

*Hypothecary decree—Sale of land other than that mortgaged—Estoppel.*

Writ of execution was issued under a hypothecary decree, which directed the sale of the property mortgaged. Several attempts to sell the property mortgaged were unsuccessful for want of bidders, and an application was made that an extension of time might be granted to the Fiscal to seize and sell such property as might be pointed out. The Court granted an extension of time, but without expressly stating that the Fiscal was authorized to sell other property than that mortgaged. A property other than that mortgaged was sold and purchased by the plaintiff.

*Held*, that the sale was not invalid.

IN this case the plaintiff sued the defendants for declaration of title to five-sixths of the land called Kamuketiyewatta ; he also prayed for an order of ejectment and damages against the defendants. The plaintiff based his title to the said shares on a Fiscal's

transfer in his favour. The said shares were sold in execution of a writ issued in case No. 1,581, C. R. Galle, against the second, third, and fourth defendants, and were purchased by the plaintiff, who thereafter obtained the Fiscal's transfer in his favour. Regarding the contest between the plaintiff and the first defendant, the matters in issue between them were settled at the trial. The second, third, and fourth defendants contended that the proceedings in case No. 1,581 were irregular, and that the Fiscal's transfer issued to the plaintiff after his purchase at the sale held in execution of the writ issued in 1,581 conferred no title on plaintiff.

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The Commissioner of Requests held as follows :—

It is conceded that plaintiff purchased the land in dispute in execution of a decree in an action on a mortgage bond, that the land purchased by him is not the land mortgaged, and that the mortgaged property has not yet been discussed. The irregularity of this procedure is pointed out in *Wijesekera v. Rawal*.<sup>1</sup> It is there laid down that the creditor should first realize the mortgage, and can resort to the other property only for any deficiency, unless the debtor consents otherwise.

I do not think it can be maintained that the defendants "consented." It may be they were present at the sale, and did not object, but "consent" in this connection surely means something stronger than "not object." There was no duty cast upon them of correcting plaintiff's errors in law, even if they had the knowledge to do so.

*Soertsz*, for appellant.

*H. V. Perera*, for respondents.

June 22, 1923. SCHNEIDER J.—

The plaintiff alleged that the second and third defendants were entitled to an undivided five-sixths of the land in dispute, and that at a sale under a writ of execution issued against them and the fourth defendant, who is the husband of the third defendant, he purchased the said shares and became entitled to them on Fiscal's transfer dated November 10, 1921. He alleged that the defendants, of whom the first was entitled to the remaining one-sixth share, were in possession of the whole land disputing his right thereto. The first defendant confined his claim to the one-sixth share mentioned in the plaint. The second and third defendants claimed an undivided half share by paternal inheritance in their amended answer. In their original answer they simply denied that they were in possession of any share. In neither answer did they meet the plaintiff's claim as derived in execution against them. The second issue raised their defence, but in a vague form. From the proceedings it would appear that what they really contended was this. The writ of execution against them was issued under a hypothecary decree which directed

<sup>1</sup> (1917) 20 N. L. R. 126.

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the sale of the property mortgaged. The Fiscal without discussing that property seized and sold the property in dispute which had not been mortgaged. The sale was therefore invalid, and the plaintiff derived no title by his purchase. The learned Commissioner upheld this contention and dismissed the plaintiff's action. He relied upon the case of *Wijesekera v. Rawal*.<sup>1</sup> I do not think that decision is applicable to this case. It decided simply that the opposition of a judgment-debtor to the application of a judgment-creditor in an action upon a mortgage bond for authority to sell in the first instance property other than that mortgaged should be upheld in the absence of any reason for granting such a departure from the terms of the decree. The learned Commissioner has failed to notice a reservation in the judgment of De Sampayo J., who decided that case, which is applicable to this case, and which modify the general principle he gave effect to. The reservation was that there might be good reason for a Court not enforcing the general principle that the mortgaged property should be first discussed. In this case several attempts to sell the property mortgaged were unsuccessful for want of bidders and upon a report to that effect repeated by the Fiscal on February 28, and a request made that an extension of time might be granted to him to seize and sell such property as might be pointed out. The Court granted an extension of time, but without expressly stating that the Fiscal was authorized to sell other property than that mortgaged. The sale of the land in dispute was held in these circumstances. It appears to me that the Court intended by its order to authorize the Fiscal in terms of his application to sell such property as would be pointed out. It was within the competence of the Court to so authorize and to do so was not to act inconsistently with the decree. The decree was to the effect that if the sum decreed to be paid to the plaintiff was not recovered by the sale of the mortgaged property, the balance was to be recovered by the sale of other property. It was, therefore, not inconsistent with such a decree when the property mortgaged could not be sold, for the Court to order execution upon other property. But even if the Court had no authority to so order, the defendants are bound by the sale at which the plaintiff purchased. The evidence is that the defendants were present at that sale and took no objection to the sale of the land. They are now estopped by their conduct from denying the validity of that sale upon the ground upon which they are seeking to impeach it.

I, therefore, set aside the order appealed against, and give judgment for the plaintiff for five-sixths shares as claimed, and damages at Rs. 15 a year as agreed upon. The plaintiff will have his costs in the lower and in this Court.

*Set aside.*