

*Present:* The Hon. Sir Joseph T. Hutchinson, Chief Justice,  
and Mr. Justice Wood Renton.

May 9, 1910

SILVA *v.* DIAS *et al.*

D. C., Colombo, 28,868.

*Application to set aside fiscal's sale—Material irregularity—Inadequacy of price—Civil Procedure Code, ss. 276 and 282.*

A person seeking to set aside a Fiscal's sale on the ground of material irregularity must lead direct evidence to prove that the sale of the property at an undervalue was due to the irregularity; a mere allegation of inadequacy of price without proof that it was the effect of the irregularity, on the ground of which the sale is impeached, is not sufficient evidence of substantial damage caused by such irregularity.

THE facts of this case appear sufficiently from the judgments.

*Van Langenberg, Acting S.-G. (with him Koch), for appellants.* The Privy Council has held in *Tasadduk Rasul Khan v. Ahamad Husain*<sup>1</sup> that the connection between the low price and the irregularity must be proved by "direct evidence." The respondent should have called some person to testify that if he had seen the advertisement in the *Gazette* he would have bought the things for a higher price. In *Muttukumaraswamy v. Nannitamby*<sup>2</sup> our Court has held the same. See also *Jagan Nath v. Makund Prasad*,<sup>3</sup> *Shirin Begum v. Agha Ali Khan*.<sup>4</sup> The respondent (petitioner) is estopped by his conduct from impeaching the validity of the sale, inasmuch as he was present at and bid at the sale; and he does not say that he was unaware of the non-advertisement. See *Arunachellam v. Arunachellam*.<sup>5</sup>

<sup>1</sup> (1893) I. L. R. 21 Cal. 66.

<sup>3</sup> (1895) I. L. R. 18 All. 37.

<sup>2</sup> (1904) 4 Tam. 34.

<sup>4</sup> (1895) I. L. R. 18 All. 141.

<sup>5</sup> (1888) I. L. R. 12 Mad. 12.

May 9, 1910 *De Sampayo, K.C.* (with him *W. H. Perera*), for the respondent.—  
*Silva v. Dias* When a material irregularity is proved to have occurred in the conduct of a sale, and it is shown that the price realized is much below the true value, it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out (*Venkatasubbaraya Chetti v. Zamindar of Karvetinagar*,<sup>1</sup> *Nona Hamine v. De Silva*<sup>2</sup>) Evidence of facts which warrant an inference that the irregularity was the cause of the inadequate price is "direct evidence." within the meaning of the Privy Council judgment (21 Cal. 66). See *Foodroffe and Amir Ali, Indian Code of Civil Procedure 985*. Counsel also cited *Rosenberg v. Silva*.<sup>3</sup>

*Cur. adv. vult.*

May 9, 1910. HUTCHINSON C.J.—

The respondent, the plaintiff in this action, under a writ of execution against the defendant's property, caused the Fiscal to seize and sell certain movables of the defendant. The appellants were the purchasers. The respondent then applied to the District Court to set aside the sale on the ground of a material irregularity in its publication, which irregularity caused substantial injury to him. The irregularity was the non-publication of the sale in the *Gazette*.

Section 256 of the Code requires that, when the property seized under one writ exceeds Rs. 1,000 in value, the Fiscal shall (besides the notices by tom-tom and otherwise thereinbefore required) advertise the sale in the *Gazette*. The property seized under the respondent's writ was valued at Rs. 699 by the Fiscal's officer who made the seizure in the plaintiff's presence. No objection was made before the sale that the things were undervalued, or that the sale ought to be advertised in the *Gazette*. They were actually sold for Rs. 157.85. There was evidence upon which the Court could find that they were really worth more than Rs. 1,000; and the Court did so find. The failure to advertise in the *Gazette* was therefore an irregularity.

The plaintiff then had to prove that he sustained substantial injury by reason of the irregularity. There was no direct evidence on that point; neither the plaintiff nor any witness 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 only circumstance from which the Court could infer that the plaintiff was injured by the irregularity was that the things were sold very much below their value; and the learned Judge drew that inference;

<sup>1</sup> (1896) I. L. R. 20 Mad. 159.

<sup>2</sup> (1908) 2 Leader L. R. 108.

<sup>3</sup> (1904) 3 N. L. R. 110; 31 Cal. 815.

he thought that it was plain that the things would have sold better if the sale had been advertised in the *Gazette*. May 9, 1910

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When the Court is satisfied that the things sold have been sold for much less than their market value, it does not necessarily follow that the low price was in consequence of the irregularity; for we all know that absurdly low prices are common at Fiscals' sales which are conducted quite regularly. It may be a reasonable inference in some cases, but not in others; we must look at the nature of the property and the nature of the irregularity and all the circumstances. The property in this case was of a very special kind: theatrical scenes and dresses and other paraphernalia, and the copyright in certain plays. It was property for which there can only be a very limited market in Ceylon, if there is any; it is costly to produce, but when you want to sell it you may find that there is no one in Ceylon who wants to buy it. The plaintiff himself was at the sale and bid for the things, but was over-bid by the appellants. I think that it was not reasonable, considering the nature of the property, to infer that the undervalue was the result of the irregularity, without any evidence to support the inference, evidence which, if it was the fact, could very easily have been produced. There should at least have been evidence that there were other possible buyers of property of this kind in Ceylon who were not at the sale, and who might possibly have heard of it if it had been advertised in the *Gazette*. In these cases the purchaser also should not be left out of consideration; if he has taken the trouble to attend the sale, and has bought in good faith and without notice of any irregularity, it is hard on him to set aside the sale, and (as was done in this case) order him to pay the costs of the application to set it aside. Silva v. Dias

I think that the order under appeal should be set aside, and that the respondent should pay the appellants' costs in both Courts.

WOOD RENTON J.—

I see no reason to differ from the finding of the learned District Judge that there is nothing in the evidence to estop the petitioner-respondent from now challenging the validity of the sale in question. The serious issue, however, is whether such a case for setting aside the sale as will satisfy the provisions of sections 276 and 282 of the Civil Procedure Code has been made out. In view of the fact that the former of these sections expressly recognizes the setting aside of a sale of movable property on the ground of an irregularity which has caused substantial damage to the person impeaching it, I am disposed to hold, following the authority of the case of *Muttiah v. Fernando*,<sup>1</sup> that the present proceedings are competent. I think, also, that there is evidence justifying the learned District Judge in holding that the value of the property here in question exceeds

<sup>1</sup> (1893) 2 A. C. R. 86.

May 9, 1910 Rs. 1,000, and that, consequently (see the case of *Rosenberg v. Silva*<sup>1</sup>), the omission on the part of the Fiscal to advertise the property in the *Ceylon Government Gazette* is a material irregularity. The only question that remains is whether the petitioner-respondent has complied with the provisions, contained alike in sections 276 and 282, and requiring proof on his part that substantial damage has been caused to him by the irregularity of which he complains. There is no evidence here of "substantial damage." Property exceeding Rs. 1,000 in value, and found by the learned District Judge to be worth Rs. 6,000, has been sold for Rs. 152.85. There is nothing in the evidence, however, to show directly that the undervalue realized at the sale was "caused" by the Fiscal's omission to advertise the property in the *Ceylon Government Gazette*. The causal relation between this irregularity and the sale of the property at an undervalue may no doubt be a reasonable inference from the facts of the case, but the question that we have to decide is whether it was open to the District Judge to draw that inference in the absence of any direct evidence connecting the two. This is a question in regard to which there has been a good deal of difference of judicial opinion both in Ceylon and in India in the construction of section 311 of the old Indian Code of Civil Procedure, which closely corresponds to the provisions of section 282 of our own Code. There are cases (see *Venkatasubbaraya Chetti v. Zamindar of Karvetinagar*,<sup>2</sup> and see a decision of my own in *Nona Hamine v. De Silva*<sup>3</sup>) in which it has been held that it may be ordinarily inferred from the fact that the price realized at a sale is much below the true value, that the low price was the consequence of the irregularity, even although the manner in which the irregularity produced the low price has not been definitely made out. On the other hand, the Privy Council has held in *Machnaghten v. Pershad Singh*<sup>4</sup> (and compare *Tasadduk Rasul Khan v. Ahmad Husain*<sup>5</sup>) that a mere allegation of inadequacy of price without proof that it was the effect of the irregularity, on the ground of which the sale was impeached, is not sufficient evidence of substantial damage caused by such irregularity. These decisions, and see also *Jagan Nath v. Makund Prasad*,<sup>6</sup> *Shirin Begum v. Agha Ali Khan*,<sup>7</sup> *Arunachellam v. Arunachellam*,<sup>8</sup> *Amerasekera v. Kirimenika*,<sup>9</sup> and *Muttukumaraswamy v. Nannitamby*,<sup>10</sup> are of course binding upon us, and I am constrained to hold that the appeal must be allowed. The order of the District Judge will be set aside, and the application of the petitioner-respondent will be dismissed with all costs here and below.

*Appeal allowed.*

<sup>1</sup> (1904) 8 N. L. R. 110.

<sup>2</sup> (1896) I. L. R. 20 Mad. 159.

<sup>3</sup> (1908) 2 Leader L. R. 108.

<sup>4</sup> (1882) I. L. R. 9 Cal. 656, 660.

<sup>5</sup> (1893) I. L. R. 21 Cal. 66.

<sup>6</sup> (1895) I. L. R. 18 All. 37.

<sup>7</sup> (1895) I. L. R. 18 All. 141.

<sup>8</sup> (1888) I. L. R. 12 Mad. 19.

<sup>9</sup> (1893) 3 C. L. R. 30.

<sup>10</sup> (1904) 4 Tam. 34.