

1939

Present : **Hearne S.P.J. and Wijeyewardene J.****SIRIPALA v. U. D. C., KALUTARA.**

314—D. C. Kalutara, 20,097.

*Local Government Ordinance—Sale of property by Urban District Council—Sale set aside by Council—Right of purchaser to refund of charges—Ordinance No. 11 of 1920, s. 230.*

Section 230 of the Local Government Ordinance is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations.

Where property belonging to an Urban District Council is sold by auction and the Council refuses to confirm the sale by virtue of the discretion vested in it under the conditions of sale, the Council is bound to refund all the charges paid by the purchaser at the sale.

**A** PPEAL from a judgment of the District Judge of Kalutara.

*H. V. Perera, K.C. (with him C. E. S. Perera), for plaintiff, appellant.*

*N. E. Weerasooria, K.C. (with him U. A. Jayasundere), for defendant, respondent.*

*Cur. adv. vult.*

August 24, 1939. **WIJEYWARDENE J.—**

This is an action arising out of the refusal of the Urban District Council, Kalutara, to confirm a sale by public auction of a property belonging to it.

The Council authorized a licensed auctioneer to sell by public auction a piece of land called Dombagahawatta of the extent of 30 perches situated at Sea Beach road, Kalutara North. The sale was to be held under the



conditions of sale marked P 1 and subject to an upset price of Rs. 937. The conditions of sale provided *inter alia*, that the sale should be subject to the approval of the Chairman of the Council and could be set aside at his discretion.

The property was sold by public auction on November 23, 1935, when it was purchased for Rs. 875 by the plaintiff's agent, M. P. Fernando, who was the only bidder present at the sale. The Chairman refused to confirm the sale as the price realized was less than the upset price. The auctioneer then put up the property for sale on November 27, 1935, when there were two bidders one K. T. R. de Silva and the plaintiff's agent. K. T. R. de Silva was the highest bidder for Rs. 1,360, the next highest bid being that of the plaintiff's agent for Rs. 1,350. As Silva had no money to pay "immediately after the sale" the auctioneer's charges and one-tenth of the purchase amount, as required by clause 3 of the conditions of sale, the auctioneer rejected his bid and offered the property to the plaintiff's agent for Rs. 1,350. The evidence led in the case shows that the plaintiff's agent refused to buy the property for Rs. 1,350 as he thought that de Silva was a puffer employed by the defendant Council to enhance the price. On the plaintiff's agent refusing to make the purchase at Rs. 1,350 the auctioneer "immediately put up the property for sale afresh" in terms of clause 9 of the conditions of sale. At that sale the plaintiff became the purchaser for Rs. 950. The plaintiff paid into the hands of the auctioneer the full purchase price of Rs. 950 and auctioneer's commission and other incidental charges amounting to Rs. 118.25 and signed the conditions of sale which were duly attested by a notary. As the defendant Council delayed to execute the necessary documents the plaintiff wrote letter P 4 of January 19, 1936, asking for a conveyance in his favour and received in reply P 6 of February 17, 1936, which stated that if he did not agree to buy the property for Rs. 1,350 the sale in his favour for Rs. 950 will be cancelled and the property re-advertised for sale. The plaintiff thereupon wrote P 7 of March 18, 1936, saying that he was unwilling to purchase the property for Rs. 1,350 and requesting the defendant Council to refund the amount paid by him if the Council was not prepared to implement the sale for Rs. 950 in terms of the conditions of sale. By his letter P 9 of May 25, 1936, the Chairman of the Council informed the plaintiff that the Council had decided to cancel the sale and the plaintiff was asked to "call over at the office and withdraw the sum of Rs. 950 deposited by the auctioneer as purchase money". It will be noted that this letter makes no reference to the additional sum of Rs. 118.25 paid by the plaintiff as auctioneer's charges, &c. In view of the attitude taken by the Council the plaintiff presumably thought it advisable at this stage to secure legal advice and his lawyer wrote P 10 of May 29, 1936, asking the Council to refund Rs. 1,068.25 with legal interest in the event of the Council deciding not to sell the property to the plaintiff for Rs. 950. The Council did not delay replying to this letter as on previous occasions but sent P 11 of June 5, 1936, stating that the plaintiff could withdraw the sum of Rs. 950 deposited at the office of the Council.

The property was again put up for sale on June 5, 1936, by public auction and was purchased by Silva for Rs. 940. The plaintiff thereupon



sent P 13 of June 5, 1936, and P 13 of June 16, 1936, pointing to the Council that in the circumstances the Council would stand to gain by confirming the sale in his favour for Rs. 950 instead of approving the sale in favour of Silva for Rs. 940. In reply to this the Chairman sent P 14 of August 1, 1936, intimating that "the sale of the land has been confirmed by the Council on Mr. K. T. R. de Silva" and reiterating the willingness of Council to return Rs. 950 to the plaintiff.

There must, no doubt, have been very strong and cogent reasons for the action of the Council in confirming a sale to de Silva for Rs. 940 when plaintiff was ready to purchase the property for Rs. 950 under the conditions of sale already executed, especially when, as a result of such action the Council was going to refuse to refund to the plaintiff the sum of Rs. 118.25 incurred by plaintiff as incidental expenses. Though the Chairman of the Council has given evidence in the case, the reasons which guided the Council have not been made clear. I do not think it necessary for the purposes of the decision of this Court to make any further comment on this aspect of the case.

The plaintiff filed the present action on November 17, 1936. On March 9, 1937, the defendant Council through its proctor moved that the plaintiff should be called upon to give security for the payment of the costs of the defendant Council as the plaintiff was resident outside the jurisdiction of the Court. The District Judge refused this application which seems to have been an extraordinary one to be made in view of the fact that the Council admittedly had with it a sum of Rs. 950 belonging to the plaintiff. The answer of the Council was filed on April 26, 1937. The trial had to be postponed for a few months owing to the difficulties experienced by the Council at this stage in electing a Chairman.

The case came up for trial finally in August, 1937. The District Judge decided against the plaintiff's claim for a conveyance in his favour in respect of the land but held that he was entitled to claim the entire sum of Rs. 1,068.25. The Judge however upheld a plea of prescription raised by the defendant Council and therefore entered judgment only for the sum of Rs. 950 brought by the defendant Council to Court, and ordered the plaintiff to pay the costs of the action to the defendant Council. The plaintiff has preferred the present appeal against that judgment.

At the hearing of the appeal, the appellant's Counsel did not question that part of the judgment of the District Judge refusing to order a conveyance in favour of the appellant or to give him damages. He however contended that the District Judge had erred in holding that the applicant's alternative claim for Rs. 1,068.25 was barred by prescription. The District Judge appears to have thought that the action was governed by section 230 of the Local Government Ordinance, No. 11 of 1920, which enacted that an action against an Urban District Council "for anything done or intended to be done under the powers of the Ordinance" should be instituted within four months next after the accrual of the cause of action. The appellant's Counsel cited a number of decisions of this Court, *Walker & Co. v. The Municipal Council of Kandy*<sup>1</sup>; *Jayasundere v. The Municipal Council of Galle*<sup>2</sup>; and *Sidambaram Chetty v. The Municipal Council of Colombo*<sup>3</sup>, where this Court construed the analogous provisions

<sup>1</sup> (1881) 4 S. C. C. 140.

<sup>2</sup> (1883) 5 S. C. C. 171.

<sup>3</sup> (1888) 8 S. C. C. 133.



of the Municipal Council Ordinance then in operation and held that the corresponding section of the Municipal Council Ordinance, No. 17 of 1865, applied only to obligations arising *ex delicto*. Apart from authority, the language of section 230 of the Local Government Ordinance leaves no doubt in my mind that the section is not applicable to actions against an Urban District Council for the enforcement of contractual or *quasi*-contractual obligations. The learned Counsel for the respondent did not seek to support the District Judge's decision on the question of prescription. He, however, contended:—

- (1) That no cause of action accrued to the plaintiff to claim from the defendant Council the sum of Rs. 118.25 paid by him on account of auctioneer's charges.
- (2) That the order made by the District Judge with regard to the costs of the action was justifiable.

The conditions of sale P 1 under which the various sales were held contain no provision stating what sum or sums paid by a purchaser should be refunded by the Council, if the Council exercised its discretion under clause 15 and set aside the sale. It is difficult to believe that any person would have bid at the sale if he thought that as a result of the Council deciding to set aside the sale for no reason whatever he would forfeit a substantial sum paid by him to the auctioneer—an agent of the Council—on account of commission, &c. If the Council chooses to exercise its right under clause 15, it is fair and equitable that the purchaser whose purchase has been set aside should be refunded all the monies paid by him under the conditions of sale. In the absence of any specific authority compelling me to a contrary view, I do not see any reason in law or equity why the Council should not refund the sum of Rs. 118.25.

With regard to the question of costs it is necessary to examine the pleadings and some documents in detail.

The plaintiff gave notice of the action to the defendant Council in October, 1936. Along with the written notice he sent a copy of the plaint which indicated clearly that the plaintiff was asking for a conveyance in his favour or in the alternative for the refund of the sum of Rs. 1,068.25 and a payment of an additional sum of Rs. 500 as damages. In the plaint filed in Court there was an obvious clerical error when the plaintiff asked in his prayer that the defendant Council should be ordered to confirm the sale or "that the plaintiff be declared entitled to the same". The latter clause has no doubt been inserted by mistake in place of a prayer that the plaintiff be declared entitled to a sum of money. This is made sufficiently clear by paragraph 9 of the plaint. The defendant Council filed answer in April, 1937, and deposited in Court a sum of Rs. 950. The defendant Council by its answer denied any liability, raised the plea of prescription and prayed that the plaintiff's action should be dismissed with costs. When the case came up for trial in August, 1937, the defendant Council resisted the application of the plaintiff to amend the plaint by correcting what is obviously a clerical error and the District Judge allowed the amendment subject to the condition that the defendant Council should be paid the costs of the day. In considering the offers made by the defendant Council in its letters to the plaintiff it should be noted that it is



by no means clear that the sum of Rs. 950 was not offered in full settlement of the plaintiff's claim. An acceptance of Rs. 950 in these circumstances would have barred the plaintiff from making a further claim for the balance of Rs. 118.25. In any event there is no letter from the defendant Council four months after the accrual of the cause of action intimating to the plaintiff that the Council was willing to refund even Rs. 950. The absence of such a letter taken together with the prayer in the answer for the dismissal of the plaintiff's claim seems to support strongly the contention of the appellant's Counsel that the defendant Council was not prepared to refund even the sum of Rs. 950 on the expiry of the period of four months which the Council thought was the period of prescription. I am prepared however to take into consideration the facts urged by the respondent's Counsel that the plaintiff failed in his prayer for a confirmation of the sale and for payment of the damages.

I would set aside the judgment of the lower Court and direct judgment to be entered for the plaintiff for the sum of Rs. 1,068.25 and half the costs of the District Court. The appellant is entitled to the costs of this appeal.

HEARNE S.P.J.—I agree.

*Appeal allowed.*

