

1938

Present : Soertsz and Hearne JJ.

CADER *et al.* v. MOHAMED *et al.*

182—D. C. Galle, 35,208.

Mortgage sale—Application to set aside sale—Discretion of Court—How it should be exercised?

Where a sale in execution of a mortgage decree is carried out by an auctioneer subject to conditions approved by Court and subject to confirmation by Court,—

Held (in an application to set aside the sale) that the Court in exercising the discretion which it has reserved to itself is not limited to the grounds upon which a sale held by a Fiscal is set aside.

A PPEAL from an order made by the District Judge of Galle.

Hayley, K.C. (with him *Tiruchelvam*), for purchaser, appellant.

Perera, K.C. (with him *Haniffa* and *Chitty*), for judgment-debtors, respondents.

Cur. adv. vult.

February 9, 1938. SOERTSZ J.—

This is an appeal preferred by the purchaser of a land and building, against an order of the District Judge of Galle, setting aside the sale. The sale took place in execution of a mortgage decree and was carried out not by the Fiscal, but by an auctioneer appointed by the Court, on certain conditions approved by the Court on May 13, 1937. One of the conditions was that the sale should "be subject to confirmation by Court and the purchaser will have to obtain transfer at his own expense".

The judgment-debtor sought to have the sale set aside on the ground that the auctioneer after he had sold the first three lands "said he would not sell lot 4, with the result that most of the bidders left the place, being made to understand that no further sale would take place", and that thereafter, the auctioneer in breach of his assurance put up this lot for sale, and sold it to the appellant, who was the highest bidder among those present.

The learned Judge has found against the defendants-respondents on the question whether the auctioneer intimated to those present that the sale of lot No. 4 would not take place. He is satisfied that no such announcement was made, and I agree with that finding.

It is admitted, however, that there was a delay in holding the sale of the fourth lot, due to the fact that the defendants-respondents, the judgment-debtors, had asked for time to pay the balance and the Proctor of the judgment-creditor had written to the second plaintiff (judgment-creditor) to inquire whether he would consent to the sale of this lot being stayed.

The learned Judge has taken the view that this adjournment of the sale misled some of those present to bid for this lot, into thinking that the sale would not be held on that day. Two such persons Thaha and Wijeyratna have given evidence. The former says he had come prepared to bid up to Rs. 10,000 for this lot, but that he left the place because the auctioneer announced that the sale had been stayed. The latter says that he was prepared to bid up to Rs. 8,000, and that he left the land in similar circumstances. The Judge holds that the auctioneer made no such announcement, but he appears to accept the statement of Thaha and Wijeyratna that they were ready to bid up to 10,000 and Rs. 8,000 respectively. Counsel for the appellant submitted that the Judge having rejected their evidence on one point, should not have accepted it on the other. But, it is clear that the Judge in not accepting their evidence to the effect that the auctioneer announced that the sale would not be held, took the view that they had misunderstood the auctioneer. That is quite probable. It is in that view of the facts that the Judge has set aside the sale. In his order, however, he says that he is setting aside the sale on the ground that "the absence of a definite announcement as to the cause of the delay in carrying out the sale of the 4th named land"

amounted to a material irregularity in the conducting of the sale. It is, in my opinion, unnecessary to consider whether in sales held by the Fiscal, this delay would have afforded sufficient justification for saying that the sale was vitiated by material irregularity, for it appears to me that when sales are held by an auctioneer acting on orders of the Court, and selling a land on conditions of sale approved by the Court, and subject to the confirmation of the sale by Court, the question that really arises is whether in setting aside the sale, or in refusing to confirm it, the Judge is exercising properly, and in a judicial manner, a discretion which he has expressly reserved to himself. When a Judge is considering how he is to exercise that discretion, I do not think he is limited to the grounds upon which sales held by the Fiscal are set aside. In this instance in the view taken by the Judge of what actually happened on the occasion of this sale, it is impossible for us to say that he has exercised his discretion in a wrong or improper manner and, therefore, we ought not to interfere with his order.

I think, however, that the judgment-debtors are responsible for all the misunderstanding that arose. At the eleventh hour, they asked for time, and sought the intervention of the judgment-creditor's Proctor and caused the delay in the sale. They should, therefore, pay to the purchasers all the expenditure in which they have been involved for no fault of theirs. They must pay him all the expenses incurred by him under conditions of sale No. 5 and 6, of the cost of the transfer if the auctioneer has already executed a transfer, and the costs of the inquiry in the Court below. Each party will bear his costs of appeal subject to these variations, the appeal is dismissed.

HEARNE J.—I agree.

Appeal dismissed.

