

1932

*Present : Drieberg and Akbar JJ.*BARTLETT *v.* RENGASAMY.

6—D. C. (Inty.) Kegalla, 9,793.

*Hypothecary decree—Directions regarding execution—Change of auctioneer—  
Power of Court.*

Where a Court has entered a hypothecary decree, it has power to alter the directions given regarding the execution of the decree.

In such a case a sale is not bad for the reason that a different auctioneer was subsequently appointed to carry it out.

**A** PPEAL from an order of the District Judge of Kegalla.

*Ranawake*, for second defendant, appellant.

*Nadarajah* and *Alles*, for respondents.

July 21, 1932. DRIEBERG J.—

This is an action to recover money due to the first respondent on a mortgage of land. Decree was entered on February 6, 1931, against the appellant, who was the second defendant, and two others. The decree was one ordering the defendants to pay the amount due before a certain day, and directing that in default the mortgaged premises should be sold and the proceeds applied in payment of the decree and if they proved insufficient, that the debtor defendants (the first defendant and the appellant, the second defendant) were to pay the deficiency with interest. The only directions regarding its execution which were entered in the decree were that the land was to be sold by Mr. Krishnapillai, an auctioneer, and that the plaintiff, the first respondent, should be allowed to bid for and purchase the land, and have credit for the amount of his claim and costs. On May 16, the plaintiff applied for execution by an order for sale being issued to another auctioneer, Mr. Wickramasinghe, and this was allowed. It does not appear that the defendants were given

notice of the change of auctioneer. Mr. Wickramasinghe submitted conditions of sale which were allowed. The sale took place and the land was bought by the second respondent.

An application was then made by the debtor defendants to have the sale set aside on the ground that it was conducted without proper advertisement and publication, and not at the time stated in the notice of the sale, and that by reason of these irregularities the land which was ordinarily worth Rs. 22,000 was sold for Rs. 2,075. The land consists of 20 acres of rubber. Rs. 22,000 refers to its value at any earlier period and there is no reason for holding that it was worth more than Rs. 2,075 at the time of the sale in August, 1931. The trial Judge has rightly found that there was no irregularity in the publishing or conducting of the sale, and dismissed the application to have the sale set aside. One of the applicants, the second defendant, appeals from this order.

The only point advanced at the argument with which we need deal is Mr. Ranawake's contention that the Court had no power to vary the decree by issuing to Mr. Wickramasinghe the order to sell when the decree directed a sale by Mr. Krishnapillai, and that even if the Court had the power so to appoint another auctioneer, this could not be done without notice to the judgment-debtors. He contended that for either of these reasons the sale was bad and should be set aside, apart from any question of resulting damage from the sale being for an inadequate price.

Section 12 (1) of the Mortgage Ordinance, No. 21 of 1927, provides that—  
“Where in a hypothecary action the Court finds that the mortgage ought to be enforced, the decree shall order that, in default of payment of the mortgage money within the period mentioned in the decree, the mortgaged property shall be sold, and the Court may if it thinks fit, in the decree or subsequently give such directions as to the conduct and conditions of the sale (including the terms on which the mortgagee shall be allowed to purchase), and the person to conduct the sale and the confirmation of the sale, and the form of conveyance and the person by whom it is to be executed, and as to the delivery of possession to the purchaser and as to the removal of any person bound by the decree from the property, as the Court may think fit.” It was contended that if no auctioneer was named in the decree, it would have been within the power of the Court to nominate such an auctioneer subsequently, that the Court has the option of either giving this direction in the decree or subsequently, but not of subsequently giving a direction varying one previously given in the decree.

It is of some assistance to consider the state of the law before the Ordinance No. 21 of 1927. It was held in some cases, of which I need only refer to *Walker v. Mohideen*<sup>1</sup>, that section 201 of the Civil Procedure Code alone gave the Court authority to give directions for the sale of the mortgaged property; the plaintiff may apply for such directions, or he may not, but if he does so apply he must do so before decree is entered and the Court has no authority to give such directions except in the

<sup>1</sup> (1924) 26 N. L. R. 310.

decree itself. Ordinance No. 21 of 1927 was introduced to meet the difficulty created by this decision. While the words of section 12 (1) of the Ordinance to some extent support the appellant's contention, the Court had in my opinion the power to appoint another auctioneer than that named in the decree. This proceeds on the assumption that the directions regarding the conduct of the sale constitute the decree; but this is not so, for though these directions can be embodied in the decree they do not constitute the decree. This was pointed out in *Zahar v. Stephen Fernando*<sup>1</sup>. A decree is "the formal expression of an adjudication upon any right claimed or defence set up in a civil court, when such adjudication, so far as regards the court expressing it, decides the action or appeal". In an action such as this the decree is the declaration that the defendant is ordered to pay the plaintiff a certain sum, that in default of payment the mortgaged property is to be sold and the proceeds applied to payment of this amount, and that if this be insufficient the defendant should pay the amount of the deficiency to the plaintiff. How and when the sale should be carried out, the conditions on which the judgment-creditor can purchase, how the conveyance is to be executed and possession given to the purchaser, are matters concerning the execution of the decree and the directions given for any of these purposes do not constitute the decree, though they may be entered in it. Though a decree can only be amended by the Court which passed it, within the limits prescribed by section 189 of the Civil Procedure Code, there is nothing to prevent a Court from varying or altering its directions regarding the execution of the decree, and the sale is not bad for the reason that another auctioneer was appointed to carry out the sale.

No complaint was made in the application of want of notice that the order to sell was issued to another auctioneer though the appellant knew that the order to sell had been issued, as appears from his petition to Court of July 16, and he was present at the sale. It is not suggested that Mr. Wickramasinghe was a person who should not have been entrusted with such a sale as this, and the mere circumstance that the judgment-debtors had no notice of his appointment is no ground for setting aside the sale.

The appeal is dismissed with costs.

AKBAR J.—I agree.

*Appeal dismissed.*

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