Present: Ennis A.C.J. and De Sampayo J.

1919.

AHAMADO *v.* FERNANDO *et al.*

3—D. C. Chilaw, 5,744.

Civil Procedure Code, ss. 282, 284, and 344—Mortgage of two lands as one land—Sale of two lands as one land—Debtor has no saleable interest to one land—Application to set aside sale.

Plaintiff obtained a mortgage decree against defendant, by which a land within defined boundaries was ordered to be sold in satisfaction of the debt. The appellant became purchaser at the Fiscal's sale, but before completing the purchase by payment, the appellant made an application to Court that the sale be set aside, on the ground that subsequently to the sale he discovered that the defendant had no title to the southern portion of the land, in extent 2 acres, in consequence of a decree which a third party had obtained against the defendant. It was urged that as the land had become split into two lands by reason of the decision, the defendant had no saleable interest as to one land.

Held, that the defendant had a saleable interest.

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" Under section 284 it is the property purported to be sold that has to be considered. In this case the Fiscal did not purport to sell two lands . . . . . I do not see any general objection to two portions of land being consolidated and sold as one land. "

Held, further, that in the circumstances of this case the appellant was not entitled to any relief under section 344 of the Civil Procedure-Code.

THE facts appear from the judgment.

Bawa, K.C., for purchaser, appellant.

Chitty, for plaintiff, respondent.

Balasingham, for defendant, respondent.

Cur. adv. vult.

May 16, 1919. DE SAMPAYO J.—

This appeal involves one or two points of civil procedure. The defendant by bond dated October 20, 1912, mortgaged to the plaintiff, *inter alia*, a land called Kadurugahagoda Binwasia, with the plantation and buildings standing thereon. The land is of the extent of 7 acres, and is contained within definite boundaries. The defendant acquired the land upon a deed of 1904, but it appears that his title was ultimately traceable to a Crown grant, which showed the land to be a lot marked A 481 on a Crown survey plan. The plaintiff brought this action against the defendant on the bond and obtained a mortgage decree, by which the land as above described was specifically ordered to be sold in satisfaction of the debt. A writ having been issued to the Fiscal in pursuance of the decree, a sale was held on July 13, 1918, when the appellant became the purchaser for a sum of Rs. 1,750. But before completing the purchase by payment, the appellant made an application to Court that the sale be set aside, on the ground that subsequently to the sale he discovered that the defendant had no title to the southern portion of the land, in extent 2 acres, in consequence of a decree which a third party had obtained against the defendant in the action No. 4,334 of the District Court of Chilaw. This appeal is taken from an order of the District Judge refusing the application.

The appellant bases his application on section 284 of the Civil Procedure Code, and alternatively on section 344. The former of these sections provides for the setting aside of a sale of immovable property at the instance of the purchaser, " on the ground that the person whose property purported to be sold had no saleable interest therein. " Had the defendant no saleable interest in the land Kadurugahagoda Binwasia? Because the defendant had lost title in favour of a third party to a portion of the land, it does not follow that he had no saleable interest in the land in any sense of the term. Any interest, however small or limited, existing in the

execution-debtor will be sufficient to support a sale. But the argument on behalf of the appellant is that as a result of the decree in action 4,334, the land got split up into two lands, and that consequently, if the defendant had no title to one land, the whole sale is liable to be set aside. If this argument is to be sustained, the appellant should consistently ask for the cancellation of the sale, not of the " two lands, " but of the one " land, " for which the defendant had no title, and the Court should be in a position to allocate the purchase money in respect of each land, and set aside the sale of one land and confirm that of the other. I may state that the appellant did ask for this relief in the alternative. The fact appears to me to be, however, that the whole argument rests on a fallacy. Under section 284 it is the property which purported to be sold that has to be considered. In this case the Fiscal did not purport to sell two lands. Kadurugahagoda Binwasia may consist of two distinct portions, but the Fiscal, under the exigency of the writ, sold the land in its entirety as one property. Even if the Fiscal could go beyond the directions given in the writ, I do not see any general objection to two portions of land being consolidated and sold as one land. That may under certain circumstances constitute an irregularity for the purposes of section 282, but, in my opinion, the execution-debtor cannot be said to have " no saleable interest " in the consolidated land within the meaning of section 284, simply because he happens to have no title to one of such portions. It should be remembered in this connection that an execution sale does not carry with it a warranty of title, and if the purchaser is mistaken or ignorant as to the extent of the execution-debtor's interest in the land which purports to be sold as a whole, section 284 is inapplicable to the case.

The provision of section 344 of the Code, upon which also the appellant relies, is more useful for his purpose. It is true that that section enacts no substantive law, but provides, as a matter of procedure, that all questions relating to the execution of the decree shall be determined in the same proceedings and not by separate action, and for the grounds of an application thereunder we must look elsewhere. It has been held by Wood Renton J. in *Goonetilleke, v. Goonetilleke* [1] that a fraud in the conducting of a sale is one of such grounds. I am willing to take the expression " fraud in the conducting of the sale " in a broad sense, and to regard it as including any act of positive misrepresentation or illegal omission, whereby a purchaser is induced to bid for and purchase the property to his prejudice. The question then is, whether there was such fraud in this case. The District Judge refused to entertain the application as based on section 344, because he thought a purchaser in execution was not a " party to the action " within the meaning of that section. Here the District Judge is in error, and I need only refer to *Carpen*

[1] *(1912) 15 N. L. R. 272.*

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Chetty v. Hamidu [1] *and Perera v. Abeyratna* [2] and the authorities therein cited. The matter, therefore, really turns on the question of fact, which I have indicated.

In my opinion the materials in the case do not amount to proof of fraud. The only allegation in the appellant's petition on this point is that the plaintiff was well aware that the defendant " had no saleable interest in the southern portion at the time of the execution of the mortgage. " Nor is this insufficient allegation supplemented by evidence at the inquiry, except by the admission by the plaintiff's proctor that " his client was aware, when the land was put up for sale, that the southern block did not belong to his judgment-debtor. ". No act of actual misrepresentation by which the appellant was misled is even alleged against the plaintiff, but it is contended that he ought to have warned the bidders at the sale, or otherwise prevented the inclusion of the southern portion in the sale, and that his silence or inaction amounts to fraud. I am unable to agree with this contention. The defendant mortgaged to him the entire land in 1912, and there is nothing to show that at that time, or at the time of the action, which was brought in 1917, or at the date of the decree he knew of any defect in the defendant's title. In the plaint he described the mortgaged property, as he should do, according to the particulars given in the bond, and the decree of Court and the writ necessarily contained the same descriptions. The plaintiff had no further obligation in that regard, and could not control the execution proceedings. He might, of course, have withdrawn the writ, or announced to the bidders that his execution-debtor's title was defective, but I am unable to characterize as fraudulent his failure to act up to that counsel of perfection. Any idea of fraud is further negatived by the fact that he himself bid within Rs. 5 of the bid for which the property was knocked down to the appellant. He took the same risk as the appellant, and no less, and I do not think that the appellant, to whom the principle of *caveat emptor* applied, has any reason to complain against the conduct of the plaintiff. Faced with this result of the proceedings as they stand, Mr. Bawa wished to have a further opportunity to prove other facts. What these other facts may be we do not know. But it is clear that the appellant's case must stand or fall on the materials which he himself put before the Court in support of the application. When fraud is alleged, it must be proved by cogent evidence; and in the absence of such evidence, I am not disposed to allow the plaintiff to be troubled a second time on a question of fraud.

In my opinion the appeal should be dismissed, with costs.

ENNIS A.C.J.—I agree.

Appeal dismissed.

[1] *(1909) 1 Cur. L. R. 166*

[2] *(1912) 15 N. L. R. 414*