1940 *Present :* **Howard C.J. and Soertsz J.**

PERERA *v.* JONES *et al.*

110—D. C. Colombo, 48,598.

Mortgage decree—Sale of property by auction—Application for commission—Notice to judgment-debtor—Execution against other property—Application for writ—Civil Procedure Code, s. 347—Mortgage Ordinance, s. 12 (Cap. 74).

Where a decree is entered in a hypothecary action under section 12 of the Mortgage Ordinance directing that the property mortgaged be sold by auction, and where the judgment-creditor applies for a commission for the sale of the property by an auctioneer, it is not necessary to give notice as required by section 347 of the Civil Procedure Code.

Where, in such a case, it is proposed to levy execution on property other than the mortgaged property the Court would require an application for execution under sections 223 and 224 of the Civil Procedure Code.

Muttu Raman Chetty v. Mohamedu (21 N. L. R. 97) distinguished.

THIS was an action on a secondary mortgage brought by the plaintiff against the first defendant. Under the decree entered in the action the property mortgaged was ordered to be sold by an auctioneer freed from the interests of the second defendant, who had purchased the property from first defendant after the mortgage. When the plaintiff's proctor moved for a commission to be issued to a licensed auctioneer to sell the mortgaged property in terms of the decree, he submitted an application for execution framed in terms of section 224 of the Civil Procedure Code and the District Judge ordered notice on the first defendant. After notice was served the defendant was absent and the commission to sell was issued.

Before execution of the transfer, the second defendant made an application to set aside the sale on the ground that he had no notice of the issue of the commission and the sale, as he claimed he was entitled to have under section 347, Civil Procedure Code.

The District Judge refused the application.

N. Nadarajah (with him *H. A. Wijemanne*), for second defendant, appellant.—The question for consideration is whether section 347 of the Civil Procedure Code is applicable in execution proceedings in a hypothecary action. When section 201 of the Code was in force it was held in *Walker v. Mohideen*[1] that the "General Provisions" of the Code, viz., sections 336 to 354 were applicable to sales in execution of mortgage decrees. See also *Peiris et al. v. Somasunderam Chetty*[2]. The position is the same even after section 201 of the Code has been superseded by section 12 of the Mortgages Ordinance of 1927 (Cap. 74)—*Annamalay Chetty v. Sidambaram Chetty*[3]. It is true that the sale in the present case is not by the Fiscal. But the "General Provisions" of the Civil Procedure Code would be applicable even to an auctioneer's sale.

[1] *(1924) 26 N. L. R. 310 at p. 315.*
[2] *(1924) 2 Times of Ceylon 189.*
[3] *(1931) 33 N. L. R. 277.*

[SOERTSZ J.—Why were sections 255 to 288 and 290 to 297 expressly mentioned in section 12 (2) of Cap. 74 unless it was to exclude the other sections of the Civil Procedure Code ?]

The other sections were not expressly mentioned because according to *Walker v. Mohideen* (*supra*) they were already accepted as applicable. Section 12 (2) of Cap. 74 was intended to provide for the gap caused by the ruling in *Walker v. Mohideen*. Sections 336 to 349, Civil Procedure Code, would be applicable to all execution proceedings whether relating to hypothecary or money decrees. Otherwise, in mortgage actions in the case of assignment, for example, or death, mortgage decrees will be left unprovided for, because no special provisions have been made concerning those matters in the Mortgage Ordinance. Further, it has been decided that a mortgage decree is a decree for the payment of money—*Muttu Raman Chetty et al. v. Mohamadu et al.*[1]; *Don Jacovis v. Perera*[2]. Chapter 22 of the Civil Procedure Code would, therefore, be generally applicable to the execution of a mortgage decree, except the sections mentioned in section 12 (4) of the Mortgage Ordinance.

The appellant should be regarded as a judgement-debtor within the meaning of section 5 of the Civil Procedure Code. He ought, therefore, to have been noticed. A non-observance of the provisions of section 347, Civil Procedure Code, would render the sale which took place null and void—*Keel et al. v. Asirwatham et al.*[3]; *Shyam Mandal v. Satinath Banerjee*[4].

H. V. Perera, K.C. (with him *E. B. Wikremanayake* and *F. C. de Saram*), for plaintiffs, respondents.—*Shyam Mandal v. Satinath Banerjee* merely lays down that a sale held without jurisdiction is void. One cannot contest that position. Section 347 of our Civil Procedure Code is different from the corresponding Order 21, rule 22 of the Indian Code. In India the Court executing the decree is different from the Court which passes the decree. As long as a Court has jurisdiction to sell property, a non-compliance with any section dealing with procedure, such as section 347, would merely constitute an irregularity, and the sale will not be set aside unless it can be shown that substantial injury has been caused to the owner of the property sold—*Kumed Bewa v. Prasanna Kumar Roy*[5]. No substantial prejudice has been alleged in the present case. Nor can it be said that the Court under whose direction the sale took place had no jurisdiction. The difference in effect between total absence of jurisdiction and an irregularity caused by non-compliance with a merely procedural provision is clearly brought out in the decision of the Privy Council in *Malkarjun v. Narhari et al.*[7]. That case has, however, been misapplied in certain later Indian decisions. See also *Ragunath Das et al. v. Sundar Das Khetri et al.*[7].

The governing section concerning decrees in hypothecary actions is section 12 of the Mortgage Ordinance. Under that section it is within the jurisdiction of Court to order a sale of the mortgaged property without notice to any one. It should be noted that in the decree in the

[1] *(1919) 21 N. L. R. 97.*
[2] *(1906) 9 N. L. R. 166.*
[3] *(1935) 4 C. L. W. 128.*
[4] *(1916) I. L. R. 44 Cal. 954.*
[5] *(1912) I. L. R. 40 Cal. 45.*
[6] *(1900) I. L. R. 25 Bom. 337.*
[7] *A. I. R. 1914 P. C. 129.*

present case it was an auctioneer and not the Fiscal who was appointed to sell. The directions regarding sale of the mortgaged property are not a part of the mortgage decree—*Zahen v. Fernando* [1]; *Bartlett v. Rengasamy* [2]. The directions can be changed from time to time by Court. If they are no part of the decree they do not impose on the parties any of the duties mentioned in the sections dealing with execution by the Fiscal.

N. Nadarajah, in reply.—The absence of notice to the appellant is more than an irregularity and renders the whole proceeding void. All the conflicting decisions of the Indian Courts are considered by a Full Bench in *Rajagopala Ayyar v. Ramanujachariar et al.* [3].

Cur. adv. vult.

February 22, 1940. SOERTSZ J.—

The respondents to this appeal, brought this action on April 28, 1932, to recover from the first defendant a sum of money he owed them, on a loan secured by a secondary mortgage of certain landed property that belonged to the first defendant, at the time of the transaction, that is to say, on July 12, 1929.

They prayed that the first defendant be ordered to pay the sum of Rs. 42,748.49 which was the amount alleged to be due at the date of the institution of the action. They also prayed that the mortgaged property be declared specially bound and executable, and that in default of payment by the first defendant of the amount decreed, the mortgaged property be sold by an auctioneer appointed by the Court, freed from the interests of one W. Siman Perera who had purchased this property from the first defendant after they had obtained their mortgage.

In view of this prayer for a hypothecary decree they made Siman Perera a party, in conformity with section 6 of the Mortgage Ordinance, and in the caption of their plaint, they described him as the second defendant. This was in accordance with what, I believe, has been the invariable practice, but it seems to me that it would have been sufficient, and, perhaps, more logical if they had only named him, and by way of description, added the words "necessary party under section 6 of the Mortgage Ordinance". In their plaint, however, they expressly stated that they sought no relief against this party, not that I see that they could have asked for any relief against him. There was no privity whatever between them and him, and they had no cause of action against him, as that phrase is understood in the Civil Procedure Code. The mortgagor had given a warrant of attorney to confess judgment, and on the production of that warrant duly perfected by the proctor to whom it had been given, judgment was entered against the mortgagor on January 25, 1933. On the same day Siman Perera, the necessary party who is the present appellant, asked that he be given three years' time to pay the amount decreed against the mortgagor, and when this application was refused, he preferred an appeal, and asked the District Judge to stay the sale pending the hearing of his appeal. This request was granted to him on terms. In the end, his appeal was dismissed, and the case went back to the District Court on November 6, 1933. Thereafter, no steps appear to have been taken in the case till July 20, 1938. On that

[1] *(1931) 1 C. L. W. 170.* [2] *(1932) 34 N. L. R. 139.* [3] *I. L. R. (1923) 47 Mad. 288.*

day, the plaintiff's proctor moved that the Commission directed in the decree be issued to a licensed auctioneer to sell the mortgaged property in terms of the decree. With this motion they submitted an application for execution in the form prescribed by section 224 of the Civil Procedure Code. The District Judge made order "notice *1st defendant* for 22. 8. 38." The notice was served on the first defendant. He did not appear and the "notice was made absolute"—whatever that may mean,—and Commission to sell went out.

On November 8, 1938, the Commissioner appointed for the sale, submitted his report stating that the respondents, had purchased the mortgaged property on October 31, 1938. All that remained to be done was for the Secretary of the Court to satisfy himself that the sale was in conformity with the conditions of sale approved by the Court, and to execute a conveyance in favour of the purchasers.

But before this could be done, the appellant made application praying that the sale be set aside on the ground that he "had no notice whatever of the issue of the Commission and of the sale", and contending that "the said sale held under a Commission issued without notice to him is bad in law".

The District Judge refused this application with costs, and the present appeal is the appellant's protest against that refusal.

On this appeal, the questions arising for determination are (*a*) Does section 347 of the Civil Procedure Code apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer shall carry out the sale, when the judgment-creditors are moving for a commission for the sale of the mortgaged property by an auctioneer ?; (*b*) If it does apply, is the appellant a judgment-debtor within the meaning of that section, and as such, entitled to be served with the notice indicated therein ?; (c) In the absence of such notice, is the sale that took place on October 31, 1938, *void* or only *voidable* ? The second and third questions will, of course, have to be answered only in the event of the answer to the first being in the affirmative.

A close examination of the matters involved in these questions has led me to the conclusion that section 347 of the Civil Procedure Code does not apply.

The difficulties in this case appear to take their origin in the fact that the respondent's proctors, when they asked for a commission to sell to issue, tendered along with their motion, an application for execution in accordance with section 224 of the Civil Procedure Code. This was unnecessary, and indeed inappropriate in the case of such a decree as had been entered in this case, for in that decree, there were directions cut and dried in regard to what was to follow on the default of the mortgagor, that is to say, on his failure to pay the amount decreed. In the case of an ordinary money decree, however, an application for execution is the *sine qua non* for bringing into operation the functions of the Fiscal by way of enabling a creditor to recover or, at least, to attempt to recover his judgment debt by the seizure and sale of property.

Section 226 of the Civil Procedure Code, for instance, requires a demand for payment to be made of the judgment-debtor before he can be put

in the wrong in such way as to make his property liable. That demand, of course, is possible, only if the Fiscal's Officer meets the judgment-debtor. If the debtor is absent, the absence itself constitutes the default which entitles the judgment-creditor to point out property for seizure and sale. Section 223 of the Civil Procedure makes this quite clear. It enacts that "*for the purpose of effecting* the required *seizure* and *sale* . . . . the Fiscal *must be put in motion* by application for execution of decree to the Court which made the decree sought to be enforced". Section 224 then goes on to provide the form of that application.

Now, the decree entered in this case is such that the intervention of the Fiscal is not required, for this decree not only orders the mortgagor to pay the amount decreed, but also declares the mortgaged property "specially bound and executable freed from the interests and rights" of the present appellant and goes on to direct that "in default of payment *forthwith*", the specially bound and executable property "freed from the rights and interests of the appellant, be sold by public auction, by *a licensed auctioneer*, on conditions of sale approved by the Court." It directs further that "in the event of there being a deficiency" the mortgagor do pay to the plaintiffs the amount of the deficiency, and finally, it provides that the plaintiffs shall be "at liberty at any time, in the course of the proceedings, and until payment of their claim and costs, to apply to this Court for any directions either in regard to the sale or otherwise".

In the case of such a decree as this, there is really no place for the Fiscal. No demand need be made for there is already direction in the decree itself that the sale shall take place "*in default of payment forthwith*", nor is the Fiscal required in order to effect seizure and sale, for an auctioneer has been appointed to carry out the sale.

It might have been different, if in default of directions such as those given in this case under section 12 of the Mortgage Ordinance, or directions given expressly to that effect, the sale came to be held by the Fiscal. That was just what happened in the case of *Muttu Raman Chetty v. Mohamadu*[1]. The decree in that case was entered on December 15, 1902, and it directed that the defendants do pay a sum of money, and that in default of payment, the mortgaged property be sold by the Fiscal, and that if the proceeds of sale were insufficient, the balance be recovered *by execution levied upon any other property* of the defendants. No steps were taken till January, 1911, and the writ that issued on that occasion proved fruitless. In February, 1913, the plaintiffs applied for a re-issue of the writ, and the question then arose whether section 337 of the Civil Procedure Code applied and operated to debar them. It was held that it did. That case is clearly distinguishable from this. In the first place it arose long before our Mortgage Ordinance "amending and consolidating certain laws relating to mortgages", was enacted. Secondly in that case the decree provided for the sale of the property *by the Fiscal* and it gave no special directions to him in regard to the conduct and to the conditions of sale, and in the absence of such directions, as the law then stood, the Fiscal could be put in motion only in the manner indicated in section 223 and 224 of the Code, and in the train of those sections come the other

[1] *21 N. L. R. 97.*

provisions of Chapter XXII of the Code. Under the law as it obtained before 1928, the Court had no authority to give directions for the execution of the decree except in the decree itself—*Walker v. Mohideen* [1]. To-day the position is quite different, for section 12 of the Mortgage Ordinance specially authorizes the Court to give directions in the decree *or subsequently in regard to the enforcement of the decree.* The result is that what section 337 of the Civil Procedure Code has in view can now be secured by the Court using the power vested in it by section 12 of the Mortgage Ordinance to give or not to give directions as it thinks fit when they are asked for in regard to the sale of the mortgaged property. Thirdly, that case is distinguishable on the ground that there was provision in that decree for the sale of property other than the mortgaged property in the event of a dificiency and failure to pay it. That probably is the position even in the law as it is to-day. If occasion should arise for directions to be asked for and to be given for the sale of other property after the mortgaged property had been discussed, the provisions of Chapter XXII of the Civil Procedure would apply, and the Court would require an application for execution to be made under sections 223 and 224 of the Civil Procedure Code, for the decree entered in a case like this authorizes the auctioneer to sell *only the mortgaged property.* In fact, section 12 of the Mortgage Ordinance empowers a Court to give directions in the decree or subsequently only in regard to the sale of the *mortgaged property.* If after that property has been discussed, resort to other property is found necessary, it would appear, that the provisions of the Civil Procedure Code relating to the execution of decree is the only way in which to put into operation the functions of the Fiscal whose intervention is then necessary.

In the course of the argument before us, appellant's counsel relying upon the judgment in the case of *Muttu Raman Chetty v. Mohamadu* [2], and in the case of *Don Jacovis v. Perera* [3] submitted that a mortgage decree is a decree for the payment of money, and from that submission he sought to deduce the proposition that all the provisions of Chapter XXII of the Code, except those specially excluded by section 12 (4) of the Mortgage Ordinance, applied to every mortgage action. I am quite unable to accede to that proposition, because as I have already observed, although in the decree that was entered in the present case, there is an order for the mortgagor to pay the amount, there is also a direction as to what shall be done on default of payment of the sum found due, and a demand under section 226 of the Code is, therefore, not necessary. From this fact it follows that the Fiscal need not be put in motion under section 223 of the Code for the sale of the mortgaged property. The inevitable result is that section 347 has no application whatever in the circumstances of this case because that section applies only when there must be application made for execution and when that application is made after more than a year has elapsed from the date of the decree.

But it is contended that in this case there was in point of fact, an application for execution made, evidently in compliance with section 224 of the Code. The question then, is whether because the plaintiffs when

[1] *26 N. L. R. 310.* [2] *21 N. L. R. 97.* [3] *9 N. L. R. 166.*

they moved for a Commission to sell, went further and resorted to a form prescribed for certain cases, they are bound by all the other provisions in Chapter XXII of the Code which are connected with section 224 in cases in which section 224 applies. In my opinion, the answer to that question must be that they are *not* so bound. The principle of law is "*quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est*". All the plaintiffs need have done was to move that a Commission do issue. They did that, but while doing it, they did more. They supported their motion with an application provided for cases different from theirs. What is the legal consequence of that? In my opinion, it would be fallacious to say that a party who has done all that he was required to do to achieve the end he had in view, and who had gone beyond, and done what he need not have done, is thereafter bound by all the consequences of the superfluous wrong procedure. In my view, this is surplusage that may be ignored.

In regard to the cases of *Don Jacovis v. Perera* (*supra*) and *Silva v. Singha*[1] it must not be overlooked that the application was for the execution to recover the balance due on the decree *after the mortgaged property had been* discussed, and in those cases the questions arose between the "mortgagor-creditor" and the "mortgagee-debtor". There was no party in those cases occupying the position of the present appellant.

In that view of the matter, the other questions (*b*) and (c) above do not arise.

I dismiss the appeal with costs.

HOWARD C.J.—I agree.

Appeal dismissed.