

1930

*Present : Maartensz A.J.*MUTTUWA v. SILVA *et. al.*143—*C. R. Matale*, 19,864.

*Fiscal's sale—Application by judgment-debtor to set aside sale—Decree holder is not essential—Civil Procedure Code, s. 282.*

The decree holder is not a necessary party to an application by the judgment-debtor to set aside a sale under section 282 of the Civil Procedure Code.

**A** PPEAL from an order of the Commissioner of Requests, Matale.

*R. C. Fonseka*, for appellant.

*Navaratnam*, for respondent.

October 2, 1930. MAARTENSZ A.J.—

The petitioners, appellants, are the defendants in this action. They appeal from an order of the Commissioner of Requests refusing to set aside the sale of a land that was sold in execution of the decree entered in the action.

The sale took place on February 5, 1930, and the application to set aside the sale was made on February 7. But the Court took no steps till the Fiscal's report was sent in on February 27.

The only respondent to the application was the execution-purchaser. At the hearing on July 1 objection was taken to the application on the ground that the judgment-creditor was not made a respondent. The learned Commissioner upheld the objection on the authority of certain Indian decisions which were cited

to him. The authority in which the principle is laid down that the decree holder is a necessary party to an application under section 311 of the Indian Civil Procedure Code, which corresponds to section 282 of our Code, is the case of *Ali Gauhar Khan (applicant) v. Bansidhar* (opposite party).<sup>1</sup>

I entirely agree with the learned Judge in that case that a judgment-creditor has the greatest interest in an application to set aside a sale in execution and would be greatly affected by the result of the inquiry.

I would therefore find no difficulty in following that decision if our section was in entire agreement with the section of the Indian Code. But that is not the case. Paragraph 2 of section 282 reproduces section 311 of the Indian Code up to the word "irregularity". The rest of the paragraph of 282 fixing the time within which an application should be made is not in the Indian Code.

The Indian section does not say who should be made respondent and it is open to the Court to decide that question.

Section 282 of our Code, however, enacts that in every such application the purchaser shall be made respondent to the petition. It was contended that the words I have just quoted, which do not appear in the Indian section, displace the authority of the Indian decisions, and that in view of that passage the only person who need be made respondent is the purchaser.

In support of this argument I was referred to section 284 of the Civil Procedure Code which provides that on an application by an execution purchaser to set aside a sale both the judgment-debtor and the decree holder should be made parties. It was urged that if the legislature wanted any other person than the execution purchaser to have notice of the application made under section 282 nothing would have been easier than to make the necessary provision in the section.

The Indian section as I have observed leaves the party to be noticed an open question, and it has accordingly been held in India that an execution-purchaser and the judgment-creditor being persons interested in the result of the inquiry are necessary parties. But if every person interested must be noticed the person applying to have a sale set aside would have to notice not only the execution-purchaser and the judgment-creditor but also writ holders having a right of concurrence, for they equally with the decree holder would be interested parties in the inquiry.

The applicant may not be aware of the existence of these writ holders, but if the principle that all persons interested must be noticed is strictly enforced, his application would have to be rejected if it was discovered at the inquiry that these decree holders had not been given notice of the application.

Throughout our Code the person or persons to be noticed is or are specified in the sections which provide for interlocutory applications or applications by way of summary procedure. Thus, in section 338 where one of several decree holders apply for execution of the decree on behalf of the others the co-decree holders as well as the judgment-debtors should be made respondents to the application.

In section 350 payment of money out of Court which has not been received to a separate account can only be paid out after notice to all the parties to the action or such of them as are interested in the money, and if any claims have been notified to the Court, after notice to the claimants.

I am of opinion therefore that the legislature by the additional paragraph in section 282 directing notice on the purchaser intended that he should be the only person who need be noticed. I do not for a moment say that this paragraph denies to the judgment-creditor or any other person interested a status in the inquiry, for I have no doubt that any of them could intervene

<sup>1</sup> (1893) 15 *All.* 409.

and take part in the inquiry. But I do think that it is not necessary for the applicant to serve them with notices of the application.

I also think that the objection should not have been entertained as it was not made at the first opportunity. Thirty days had not elapsed from the date of the receipt of the Fiscal's report by the Court on the returnable date of the notice. On that day respondent was absent and the Proctor appearing on his behalf undertook to file proxy. If the respondent had on March 18 taken the objection as he should have done, that the judgment-creditor was a necessary party, the appellant would have had time to add him as a party and perfect his application before thirty days had elapsed.

For the reasons given by me I allow the appeal and send the case back for the inquiry to be held. The appellant will have the costs of appeal. The costs in the Court below will follow the event.

*Appeal allowed.*

---