

1944

*Present: Howard C.J. and Soertsz J.*PEIRIS, Appellant, and SENEVIRATNE *et al.* Respondents.

57—D. C. (Inty.) Kalutara 16,934.

Mortgage sale—Execution of mortgage decree—Directions of Court—No material irregularity—No injustice to applicant—Sale upheld.

Where an application is made to set aside a sale of property held in execution of a mortgage decree in accordance with the provisions of the Civil Procedure Code and further directions of Court—

Held, that the sale should not be set aside where there has been no material irregularity or where no injustice has been caused to the applicant.

A PPEAL from an order of the District Judge of Kalutara.

The facts appear from the judgment.

H. V. Perera, K.C. (with him *C. V. Ranawake*), for the petitioner, appellant.

N. E. Weerasooria, K.C. (with him *E. B. Wikremenayake*), for the respondent.

Cur. adv. vult.

March 17, 1944. HOWARD C.J.—

The appellant in this case who was the original plaintiff applied for an order to set aside a sale held on November 29, 1941, at the instance of the second respondent who was substituted plaintiff on the ground that he had seized the decree in this case as against the appellant. The second respondent did not interest himself in the appellant's application which was opposed by the purchaser the 1st respondent. The appellant obtained judgment against the defendant in February, 1932, and a hypothecary decree was entered directing that the mortgaged property should be sold in default of payment of Rs. 2,500. No further directions for the conduct of the sale were given. The Court by its order of May 22, 1933, allowed the substitution of the second respondent only for the purpose of enabling the latter to enforce his decree against the appellant. Conditions were attached that the second respondent should enforce his decree early, that the name of one of the court auctioneers and draft conditions of sale should be submitted with notice to the plaintiff and that the sale should be held under the supervision of the Court. These conditions were attached as the appellant had suggested that the second respondent and the defendant might act in collusion. The appellant appealed from the order of substitution. His appeal was dismissed, but the Supreme

Court approved the conditions formulated by the District Court in its order of May 22, 1933. Later the name of Mr. Abeyesinghe, the auctioneer who conducted the present sale, was submitted. The appellant raised no objection to Mr. Abeyesinghe conducting the sale. The sale, after objections by the appellant, was held on April 21, 1934, by Mr. Abeyesinghe on conditions and an appraisement approved by the Court. On the motion of the appellant the sale was set aside by the Court on December 6, 1934, on the ground that the defendant had published leaflets keeping away would be purchasers. On September 11, 1935, the second respondent applied to have the order to sell re-issued to the same auctioneer free of stamps. This application was refused. On March 11, 1936, an arrangement was made whereby one property was sold privately and the second respondent received Rs. 2,400 towards the settlement of his debt. On November 9, 1939, second respondent moved to have the order to sell re-issued. The defendant was dead and the names of the heirs were mentioned in his application. The original plaintiff, the appellant, was also made a respondent. The second respondent was ordered to issue notice on all parties. The appellant appeared by his Proctor, Mr. Peiris, and on April 25, 1940, asked for time to file objections. On June 14, 1940, Mr. Peiris stated he was not filing objections. On October 30, 1941, the order to sell was issued. On November 20, 1941, Mr. Abeyesinghe, the auctioneer, moved that the Court be pleased to allow him permission to sell the lands on the same conditions, the only alteration being that one-tenth purchase money be paid instead of one-fourth. On November 25, 1941, Mr. Peiris for the appellant moved to withdraw plan No. 8,923 dated May 16, 1922, made by B. M. Caldera, Licensed Surveyor. This application was allowed. On November 27, 1941, Mr. Abeyesinghe, the auctioneer, moved to file a fresh valuation of the properties mortgaged in view of the bad condition of the house and the disappearance of the mill and its machinery. On December 2, 1941, Mr. Abeyesinghe filed his sale report and deposited the sum of Rs. 457.50 being purchase money recovered. On December 17, 1941, the balance of the purchase money amounting to Rs. 3,892.50 was deposited by the purchaser, the first respondent to this appeal. On December 20, 1941, the appellant moved to have the sale set aside. At the hearing in the District Court it was contended on behalf of the appellant that the sale in question, apart from being subject to the provisions of the Civil Procedure Code, was also subject to special directions laid down by the Court. Except for an application made on November 9, 1939, by the second respondent for an order to sell of which the appellant had notice, no notice was served on the appellant as to the subsequent steps especially as regards the auctioneer who was to conduct the sale, the appraisement of the properties sold and the conditions attaching to the sale. It was contended that this was in contravention of the directions of the Court. It was also maintained that the conditions of sale and the appraised value had not been approved by the Court at the time of the issue of the *Gazette* Notice of sale (P 2), that the auctioneer was not a proper person to have conducted the sale, that there was no proper advertisement of the sale, that as a result of these irregularities the sale fetched a price grossly disproportionate to its true value, that there were no bidders at the sale when the property was

knocked down without much ado to the first respondent by an unfair arrangement with the auctioneer and that the appellant has suffered substantial injury.

The order to sell was re-issued to Mr. Abeyesinghe, the previous auctioneer, without the previous submission of his name to the Court. The order directed him to sell after due publication, but does not prescribe the kind of publication. Mr. Abeyesinghe advertised the sale in the *Gazette* on November 7, 1941, twenty-two days prior to the actual sale on November 29, 1941. He also published the notice in the "Daily News" of November 19, 1941. He also stated in evidence that tom-tom was beaten and handbills distributed. The Court approved the alteration in the deposit and in the valuation of the property to be sold. The learned District Judge held that the Court can adopt the provisions of the Civil Procedure Code as to publication and conduct of sales governed by section 12 of the Mortgage Ordinance, and give directions accordingly. If it does adopt such provisions, it will follow the cases bearing on such provisions. If no such directions are given it will not lightly set aside sales nor will it confirm a sale when it sees that a manifest injustice has been done to some party concerned. In the present case, the learned Judge, for reasons which he has given, came to the conclusion that no manifest injustice has been done to the appellant and dismissed his application with costs.

On behalf of the appellant Mr. Perera has contended that there have been material irregularities in the sale. Those irregularities are as follows:—

- (1) The auctioneer's name was not submitted to the Court in contravention of the Court's order. Nor did the appellant have notice of his appointment.
- (2) The modifications in the deposit and the valuation made by the auctioneer and approved by the Court were so approved without notice to the appellant.
- (3) The auctioneer was not a proper person to conduct the sale, not being licensed to conduct sales at Panadure, but only at Kalutara.
- (4) The sale was not properly advertised and the property was fraudulently knocked down to the first respondent by the auctioneer without proper bidding.

In connection with these irregularities Mr. Perera has maintained that it is not incumbent on the appellant to establish that he has suffered injury by reason thereof and has referred us to the case of *Koelman v. Amarasekera*¹. The headnote of this case is as follows:—

"To set aside a Fiscal's sale on the ground of material irregularity under section 282 of the Civil Procedure Code, it is not necessary that in all cases there should be direct evidence of the connection between the irregularity and the injury. Where the injury appears to be one which may be reasonably and logically inferred to be the natural consequence of the irregularity, the connection need not be further established by 'direct evidence'.

¹ 23 N. L. R. 327.

It is only in cases where there is no such reasonable connection between the irregularity and the injury that the necessity for direct evidence is insisted upon".

The irregularity in this case was a misdescription of the property to be sold, the extent being described as $1\frac{1}{2}$ acres instead of three. The substantial injury was that it sold much below its real value, being valued in the inventory at Rs. 9,000, by the Fiscal at Rs. 5,000 whereas it sold for Rs. 1,100. In *Koelman v. Amarasekera* which was followed in *Ukku Amma v. Punchi Ukku*¹, Bertram C.J. adopted the principle formulated by Pereira J. in *Cassim v. Andris*² that the connection between irregularity and the injury can be established by presumptions as by direct evidence and held that the price realized was so low and the misdescription so considerable that the trial Judge could justifiably have concluded that the inadequacy of price was a consequence of the misdescription.

It has certainly not been established in the present case by direct evidence that the appellant has suffered injury by reason of any of the alleged irregularities. Can it be said that the injury if suffered by the appellant is one that can be reasonably and logically inferred to be the natural consequences of any irregularity? In order to answer this question it is necessary to consider first of all whether any of these irregularities have been proved. The Court approved the conditions of sale setting out that they would be governed by the relevant sections of the Civil Procedure Code. Notice of sale was given in accordance with the provisions of the Civil Procedure Code. There was evidence that tom-tom was beaten in addition to publication in the *Gazette* and the "Daily News". A notice of the sale was affixed in the Court-house. The deposit was altered from twenty-four per cent. to ten per cent. by order of the Court. The lowering of the appraisement or valuation of the property also received the approval of the Court. Having regard to the evidence of the Rev. T. C. J. Peiris, it cannot be said that the auction was a put up job and that the property was knocked down to the first respondent as the result of collusion between him and the auctioneer. I do not consider that there was any material irregularity in the sale by reason of the fact that Mr. Abeyesinghe was not registered to conduct sales at Panadure. The failure of the Court to notify the appellant before approving the modifications in the deposit and valuation, even if irregularities, are not so material as to lead to the reasonable and logical inference that the appellant is injured thereby. There only remains the question of the failure on the part of the Court to approve the name of Mr. Abeyesinghe as auctioneer and his conduct of the sale without formal notice to the appellant. In the absence of any evidence to establish collusion or fraud on the part of Mr. Abeyesinghe and the first respondent, there is no ground for the contention that the plaintiff has suffered injury by reason of Mr. Abeyesinghe's conduct of the sale. It may be said that absolute and strict compliance has not been made with the District Judge's order of May 22, 1933, as approved by the Supreme Court order of January 22, 1934. But it cannot be said that the irregularity was material or that it has lead to any injustice.

¹ 30 N. L. R. 305.

² 17 N. L. R. 144.

There is also a further bar to a successful prosecution of the appellant's claim. In view of Mr. Peiris' application of November 25, 1941, on behalf of the appellant to withdraw plan No. 8,923, it must be inferred that the latter had notice that Mr. Abeyesinghe was to conduct the sale. The appellant had notice of the application for sale and failed to file objections. He was cognizant of the fact that Mr. Abeyesinghe had previously been appointed to conduct the sale and it is in evidence that he was aware of the fact that Mr. Abeyesinghe was making arrangements for the sale. He could have applied to the Court for the appointment of another auctioneer. In these circumstances I do not consider that he can now be heard to object to the sale on the ground that he had no opportunity to object to Mr. Abeyesinghe's appointment. In this connection I would invite attention to *Samarasinghe v. Amaradewakare*¹ and *Arunachellam v. Arunachellam*².

Further considerations affecting the appellant's right to take advantage of any irregularity in the sale has been brought to our notice by Mr. Weerasooria. The property was bought by the first respondent and no fraudulent conduct by way of collusion with the auctioneer or second respondent has been established. In these circumstances he cannot be deprived of his property. *Perera v. Lebbe*³ was cited in support of this proposition. The headnote of this case is as follows:—

“ A property, the sale of which the owner had prohibited by his last will, and which was subject to a trust, was sold under the authority of the Court, and was purchased by defendant from one of the executors.

The plaintiff, who is the sole surviving executor and trustee under the last will, brought this action for declaration of title.

Held, defendant could not be deprived of the property on the ground of any irregularities in the order for sale, or in the procedure by which that order was obtained, if he purchased the property *bona fide* for value and without notice of the trust.”

The same principle was also formulated in the Privy Council case of *Rewa Mahton v. Ram Kishen Singh*⁴.

For the reasons I have given, I have come to the conclusion that the District Judge came to a right conclusion and the appeal must be dismissed with costs.

SOERTSZ J.—I agree.

Appeal dismissed.

¹ 11 C. L. R. 13.

² I. L. R. 12 Mad. 20.

³ 19 N. L. R. 308.

⁴ I. L. R. 14 Calc. 19.