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*Present:* Bertram C.J. and Jayewardene A.J.

WALKER *v.* MOHIDEEN.

121—D. C. (Inty.), Colombo, 7,608.

*Mortgage decree—Directions for sale—Authority of Court—Permission granted to mortgagee to bid—Civil Procedure Code, ss. 201, 222.*

In an action to realize a mortgage under section 201 of the Civil Procedure Code, the Court has no authority to give special directions for the execution of the decree, except in the decree itself.

In such a case, the terms under which the mortgagee is allowed to bid for and purchase the property must be embodied in the decree.

Section 272 of the Code, under which permission may be granted to the holder of a simple money decree to purchase at a sale in execution of his decree, has no application to a sale under an order to sell entered under section 201.

**A** PPEAL from an order made by the District Judge of Colombo. The plaintiff obtained judgment by default on a mortgage bond granted by the defendant for Rs. 75,000. On August 16, 1923, a mortgage decree was entered requiring the defendant to pay this sum within one month of the decree, and in default of payment the mortgaged property was ordered to be sold by the Fiscal and the proceeds applied in payment of the amount due. The decree contained no express directions as to the conduct and condition of sale as provided by section 201 of the Civil Procedure Code. On September 15 the plaintiff's proctors filed conditions for sale

for approval, which were the printed conditions under which the Fiscal usually sells property seized in execution of money decrees, and an application for an order to sell was made under section 224 of the Civil Procedure Code. The conditions of sale were approved, and the application for an order to sell allowed. On October 1 the plaintiff's proctors moved, in terms of section 272 of the Civil Procedure Code, that the plaintiff be permitted to bid for and purchase at the sale, and that the Fiscal be directed to give the plaintiff credit to the extent of his claim. The application was allowed, and the property was accordingly sold on January 21, 1924, and purchased by the plaintiff for Rs. 100. On February 19, before the sale could be confirmed, the defendant moved to have the sale set aside, on the ground that the requirements of section 201 of the Civil Procedure Code were not complied with, in that the conditions of sale were not embodied in the decree nor the permission given to the judgment-creditor to purchase. The learned District Judge held that the words of section 201 were not imperative, and that the section did not prevent the Court from giving such directions and permission otherwise than in the decree, and dismissed the defendant's application.

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*E. W. Jayewardene, K.C.* (with him *Canjamanadan*), for defendant, appellant.

*Driberg, K.C.* (with him *Keuneman*), for plaintiff, respondent.

November 17, 1924. JAYEWARDENE A.J.—

This case raises an important point of practice regarding the execution of mortgage decrees under the Civil Procedure Code.

The plaintiff obtained judgment by default on a mortgage bond granted by the defendant for Rs. 75,000. On August 16, 1923, a mortgage decree was entered requiring the defendant to pay this sum within one month of the decree, and declaring the mortgaged property bound and executable, and, in default of payment of the principal, interest, and costs within one month, the mortgaged property was ordered to be sold by the Fiscal, and the proceeds applied in payment of the amount due. The decree contained no express directions as to the conduct and conditions of sale as provided for by section 201 of the Civil Procedure Code. It merely directed that the mortgaged premises be sold by the Fiscal. On September 15 the plaintiff's proctors filed conditions of sale for approval and applied for execution of the decree by the issue of an order to sell the mortgaged property. The conditions submitted for approval were the printed conditions under which the Fiscal usually sells property seized in execution of money decrees, and the application for an order to sell was made in terms of section 224 of the Civil Procedure Code and in the form prescribed under that section. Section 224 indicates the procedure to be followed where a

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party is seeking to execute a decree to pay money. The conditions were approved, and the application for an order to sell allowed. The order to sell issued by the Court, which is at page 135 of the record, directed the Fiscal, Western Province, or his officers, "to sell by public auction after giving ten days' previous notice by affixing the same to the Court-house and after making *due* publication." On October 1 the plaintiff's proctors moved, in terms of section 272 of the Civil Procedure Code, that the plaintiff, the decree holder, be permitted to bid for and purchase at the sale, and that the Fiscal be directed to give to the plaintiff credit to the extent of his claim. In the same motion they asked for a direction to the Fiscal to put up the property for sale; first, at the amount of his valuation, and if there were no bidders, then at the amount of the plaintiff's claim, and if there be no bidders then, immediately thereafter to put up the property for sale to the highest bidder. These applications were also allowed by the Court. The property was accordingly sold on January 21, 1924, and purchased by the plaintiff for Rs. 100. On February 19, before the sale could be confirmed, the defendant moved to have the sale set aside. The application was based on section 344 of the Civil Procedure Code, and the main objection taken was that the requirements of section 201 had not been complied with, in that the conditions of sale under which the property was sold were not referred to in the decree, and the permission to the judgment-creditor to purchase was not embodied in the decree. The learned District Judge held that the words of section 201, providing for the giving of directions as to the conduct and conditions of the sale, were not imperative but permissive, and that the section did not prevent the Court from giving such directions and permission to the plaintiff to bid for or purchase otherwise than in the decree, and dismissed the defendant's application. The defendant appeals, and the same objections have been pressed before us. The question whether that part of section 201 which empowers the Court to give directions in the decree is imperative is not free from difficulty. Section 201 runs as follows:—

"When the action is to enforce a right of sale under a mortgage, and the Court finds for the plaintiff, the decree shall specify a date on or before which the money decreed to be due on the mortgage with interest thereon from date of action to date of payment and costs of action shall be paid, and shall direct that in default of such payment within the period so prescribed the mortgaged property shall be sold, and the Court may in such decree for sale give such directions as to the conduct and conditions of the sale (including terms on which the plaintiff shall be allowed to purchase), and the person who shall conduct it, and as to the terms of the instrument of conveyance and the party or parties by whom it shall be executed, it may think fit."

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*Prima facie*, the use of the word "may" would indicate that the provision is not imperative, but merely permissive, but, in many cases, it has been held that "may," when it is used in statutes imposing a duty or conferring power, has a compulsory or obligatory force, and is equivalent to "must." There is no doubt that if a plaintiff asks in his prayer for directions as to the conduct and conditions of sale, the Court is bound to give such directions in the decree. In that sense "may" is equivalent to "must" in the section. *Maxwell on the Interpretation of Statutes*, p. 360, ed. 4. But the question here is whether that is the only stage at which such directions can be given, or whether the Court can give them after decree has been entered.

It would serve no useful purpose to examine all the authorities cited to us, for in my judgment the principle applicable to the determination of the question whether the word "may" is used in an obligatory and exclusive sense in section 201 is to be found in a passage in the judgment of Lord Selbourne in the well-known case of *Julius v. The Bishop of Oxford*,<sup>1</sup> where the noble Lord said:—

"The language (certainly found in authorities entitled to very high respect) which speaks of the words "it shall be lawful," and the like, when used in public statutes as ambiguous, and susceptible (according to certain rules of construction) of a discretionary or an obligatory sense, is in my opinion inaccurate. I agree with my noble and learned friends who have preceded me that the meaning of such words is the same, whether there is or is not a duty or obligation to use the power which they confer. They are potential, and never (in themselves) significant of any obligation. The question whether a Judge, or a public officer, to whom a power is given by such words, is bound to use it upon any particular manner, must be solved *aliunde*, and, in general, it is to be solved from the context, from the particular provisions, or from the scope and objects of the enactment conferring the power."

The words discussed in that judgment were "it shall be lawful," but, as Lord Blackburn remarked in the same case, words conferring a power are equivalent to "may." The question, therefore, whether the word "may" is used in an imperative, or, I should say exclusive sense, must be solved by a consideration of "the context, the particular provisions, and the general scope and objects of the enactment conferring the power."

Now section 201 forms part of a Code. The essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and the law on any point specifically dealt with it must be ascertained by reference to its provisions. If it prescribes a

<sup>1</sup> (1879) L. R. 5 A. C. 214 at p. 235.

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particular course or procedure in a particular case, that course or procedure must be adopted and no other. *Gopal Mandar v. Pudmanund* (Privy Council)<sup>1</sup>; "*Codification in British India*" by Acharyiya, p. 5. This section is one of a group of sections dealing with judgments and decrees, and provides for the contents of a decree passed in an action to realize a mortgage. It requires the decree to specify a day on or before which the money decreed to be due shall be paid, and to direct that in default of payment within the period prescribed the mortgaged property shall be sold, and the Court may in such decree for sale give directions as to the conduct and conditions of the sale, &c. Now, counsel has not been able to point out to us any provision in the Code which enables the Court to give directions as to the conduct and conditions of the sale of mortgaged property at any other stage of the mortgage action. The plaintiff might desire to have specific instructions given for the execution of a decree, or he might prefer to execute his decree in the same way as a simple money decree. If he desires to have the sale carried out under special directions given by the Court, he must see that those directions are given in the decree for sale. I cannot find any section of the Civil Procedure Code or any other Ordinance under which the Court can give these directions once the decree has been entered without reference to them. The use of the word "may" in one part of the section and "shall" in others ceases to have any significance when we find that the Court has no authority to give the directions in question at any other stage of the proceedings. Section 197 affords an apt illustration of the alternative right reserved to the Court. Under that section, in the case of mesne profits which have accrued prior to the institution of an action for the recovery of possession of immovable property, the Court may either determine the amount and embody it in the decree itself, or may pass a decree for the property and reserve the inquiry into the mesne profits to be entered after the execution of the decree.

Section 201 alone gives the Court authority to give directions for the sale of mortgaged property; the plaintiff may apply for such directions or he may not, but if he does apply, he must do so before decree is entered, and the Court has no authority to give such directions except in the decree itself. The procedure adopted by the plaintiff in this case cannot be justified, unless we read some such words as "or at any time prior to the execution of such decree before the words "give such directions, &c.," in the section. Such words are not to be found in the section, and there is nothing in the Code which would justify us in reading them into it. Considering, therefore, "the general scope and objects of the enactment conferring the power," the power being conferred by a Code, the Court was bound to exercise it in the particular manner prescribed by the

<sup>1</sup> (1902) 29 Cal. 707 (715).

Code. There is no practical difficulty in adopting such a course. The conditions of sale may be incorporated in the decree by the reference to conditions drawn up by each proctor and sanctioned by the Court, or drawn up by the Court and made applicable to all sales under mortgage decrees. The procedure followed in this case was, in my opinion, not justified by the Code and therefore irregular.

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The conditions of sale approved by the Court in this case are open to very serious objections. These conditions are the conditions under which the Fiscal sells property in execution of ordinary money decrees. The first condition is that "the sale shall be subject to the provisions of the Civil Procedure Code, 1889." This is too vague and indefinite to be of any practical use. There was evidently safety in this vagueness, for it would have greatly puzzled the Fiscal to say which of the sections of the code applied to mortgage sales. There are 837 sections in the Civil Procedure Code, and out of these about a hundred deal with execution sales, and it has been held that only those sections grouped under the head "General provisions," sections 336 to 384, have any application to sales in execution of mortgage decrees. This condition is a mysterious one, if it has any meaning. Purchasers ought to be informed of all the conditions under which a property is being sold, instead of being referred to a Code which contains a mass of provisions which are inapplicable to the sale at which they have come to bid. In England, in the case of sales by Court the conditions are passed by conveyancing counsel, and in our Courts I think greater care ought to be taken in drafting conditions for Court sales. The order to sell issued to the Fiscal is also open to much criticism. He was commanded to sell the property by public auction after ten days' notice by affixing the same to the Court-house and after making due publication. Now, in ordinary Fiscal's sales, when the property seized exceeds the value of Rs. 1,000, the sale cannot take place until the property has been advertised in the *Government Gazette* once at least twenty days prior to the sale (section 256). Here a property mortgaged for Rs. 75,000 is ordered to be sold after ten days' notice by affixing the notice to the Court-house. The Fiscal was also commanded to make "due publication." I am unable to understand what "due publication" means when a sale is to be carried out under an order to sell. The Fiscal construed it as meaning advertising in the *Government Gazette*, and he accordingly inserted an advertisement in that publication. The Fiscal ought to have been given specific directions as to the mode of publication and advertisement of the sale.

The publication of the sale in this case was not a "due publication" even under the Civil Procedure Code.

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Now we come to the plaintiff's application to bid for and purchase the property. It is contended for the appellant that the permission for this purpose and the terms on which such permission is granted ought to be embodied in the decree under section 201. In the present case the terms on which the plaintiff was allowed to purchase were not embodied in the decree. Permission was obtained under section 272 of the Code.

In my opinion section 272 has no application to sales under an order to sell. It applies to sales of property seized in execution of a simple money decree. It is to be noted that section 201 expressly requires that the directions should contain the terms on which the plaintiff is allowed to purchase the property mortgaged. It appears to have been a matter of complaint in the days before the enactment of the Civil Procedure Code that mortgagees purchased the mortgaged property for a nominal sum and proceeded to realize the balance out of the other property of the mortgagor; and one of the questions (No. 6) on which the Commissioners appointed to inquire and report on the Law of Mortgage in Ceylon invited the opinion of witnesses was based on this complaint. See *Appendix "A" to H. A. Jayewardene's Law of Mortgage in Ceylon, p. v.* As Mr. Berwick states in his answer to this question, persons are deterred from taking the trouble to attend sales by the knowledge that another person, generally the mortgagee, intends to bid up to a price beyond what they are prepared to bid. The same feeling still prevails, as is shown by the evidence of the plaintiff's proctor in this case.

Mr. Berwick suggested that a reserved price should be placed on the property, or that it should be sold at an "upset" or "assessed" price, the price being determined by an equitable consideration in each particular case of *all* interests concerned and by a practical consideration of the present and future and (near future) state of the market. The Commissioners, however, made the following suggestion for securing a fair market value for mortgaged property sold by public auction:—

- (39) That on a primary mortgagee becoming purchaser in execution on his own writ of a single security, the execution-debtor shall be entitled to have credit for the full amount of the decree, unless the execution-creditor shall, within thirty days from the date of the Fiscal's sale, satisfy the Court that the security was of a less value than the amount of the decree, and that, if so satisfied, and to the extent determined by the Court after due inquiry, the execution-debtor shall have credit only for the less amount accordingly.

(40) That in the event of there being more than one property mortgaged, the mortgagee seeking to enforce his mortgage shall apportion his debt between the several mortgaged properties, and such apportionment shall be credited to the mortgagor, if the primary mortgagee buys the security to which the apportioned amount relates, unless such apportionment does not represent the fair market value which the mortgagor must prove as above; and it was proposed that any such provision be not retrospective.—  
*Pages iv and v.*

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When persons are deterred as above described, the bidding becomes confined to a few persons, if the mortgagee does not become the sole bidder. He would thus be enabled to buy the property at a price which is much below its real value, and to recover the balance from the other property of the debtor, who thereby suffers great loss.

It is to meet this difficulty that when the Civil Procedure Code was enacted, the duty was imposed on the Court of prescribing the terms on which a mortgagee should be allowed to buy the property.

In my opinion our Courts do not sufficiently regulate and control sales under mortgage decrees. Conditions of sale are approved as a matter of course, and the mortgagee is permitted to bid unconditionally for the mere asking. This should not be so. The Court should, particularly in the case of decrees under which valuable properties are to be offered for sale, exercise its discretion judicially, and the mortgagee should not be allowed to bid, except under such conditions as would prevent the sale of the property below its real value, and thus avoid the possibility of loss and damage, not only to the mortgagor, but also to his unsecured creditors, which section 201 was intended to obviate. I might here repeat what Sir Comer Petheram C.J. and Bannerjee J. said in a similar connection in *Sheonath Doss v. Janki Prosal Singh*<sup>1</sup>:—

“ Whilst we attach much importance to the leave of the Court to the decree holder to bid, and consider that it removes all disability in him to bid, we deem it our duty to observe that such leave should be very cautiously given. It should, in our opinion, be given only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given only after some inquiry that the sale proclamation has been duly published. ”

The question remains whether the sale now under consideration should be set aside owing to these irregularities. The defendant was fully aware of the fact that the property was to be sold, and

<sup>1</sup> (1888) 16 Cal. 132.



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it may fairly be presumed that he informed himself of the terms and conditions under which the sale was to take place. He raised no objection then, but had the sale stayed when it was first advertised and obtained time to settle his debt. This he failed to do, and the property was then put for sale and purchased by the plaintiff. The plaintiff is prepared to give the defendant credit for full amount due on the decree and to have satisfaction of the decree entered up, he is also prepared to cancel another bond for a sum of Rs. 3,000 advanced by the plaintiff on the security of certain property belonging to the defendant's sister for the purpose of paying the rates due to the Municipality on the property sold. The total amount due to the plaintiff would now amount to about Rs. 95,000. The defendant would thus be obtaining about Rs. 95,000 for his property. This I think is a fair price in the present state of the market. In these circumstances the defendant will not suffer any loss, and his substantial rights will in no way be prejudiced by the confirmation of this sale. On the plaintiff certifying satisfaction of the decree in this case and cancelling the bond for Rs. 3,000 referred to above within fourteen days of the receipt of the record of the case in the lower Court, this appeal will stand dismissed and the sale will be confirmed. There will be no costs of this appeal. If the plaintiff fails to certify satisfaction of the decree and cancel the bond as directed above, the appeal will be allowed, with costs, in both Courts.

BERTRAM C.J.—I agree.

*Judgment varied.*

