Present : Dalton J. and Akbar A.J. 1925.

RAMAN CHETTY *v.* SIRIWARDENE.

148—D. C. (Inty.) Colombo, 5,046.

Fiscal's sale—Order of court staying the sale—Order not communicated to the officer conducting the sale—Sale held despite the Court's order—Civil Procedure Code, ss. 282, 343, 344.

Where a Fiscal's sale was held after an order of Court had issued staying the sale, because the order was not communicated to the officer conducting the sale,—

Held, that it was competent to the Court to set aside the sale.

The terms of section 343 of the Civil Procedure Code are directory, and an order directing the stay of sale conditional upon the payment of the Fiscal's charges was a sufficient compliance with the provisions of the section.

APPLICATION to set aside a sale held in execution of a decree of the District Court of Colombo.

The property of the judgment-debtor at Induruwa was advertised by the Deputy Fiscal, Galle, for sale on October 4, 1924, at 12 noon. On October 1, 1924, the judgment-creditor applied to the Colombo

[1] *(1872) 10 B. L. R. App. 2.* [2] *(1881) I. L. R. 6 Cal. 530.*
[3] *(1903) 5 Bom. L. R. 312.*

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District Court for a stay of sale and obtained it. This order was in the hands of the Fiscal, Galle, on the 3rd, and the Fiscal's order to stay the sale was handed to the person, bringing the order of Court, to be deliverd to the Fiscal's Arachchi at Induruwa. The order countermanding the sale did not reach the Fiscal's Arachchi, and he sold the property. On October 31, 1924, before the confirmation of sale by Court, the judgment-creditor by a petition, to which the purchaser and the judgment-debtor were made respondents, applied to set aside the sale. The District Judge set aside the sale, and the purchaser of the property appeals from the order.

H. V. Perera, for appellant.—An order staying sale has not the effect of cancelling the sale, and therefore the sale to the purchaser is valid, unless it can be impeached under section 282, Civil Procedure Code (see *Abdin Khan v. Ali Khan*[1]).

Drieberg, K.C. (with *Ranawake*), for respondent.— Order of Court postponing sale has immediate effect, and the sale is therefore bad. The sale was carried out contrary to the orders of Court (*Saint Lal v. Umrao Um Nissa*[2]). Stay of sale takes effect from the moment of pronouncement of order, and not from the moment the order is communicated—sale is void. It need not be further proved that there was material irregularity before the sale is set aside (*Hakum Chand Boid v. Kamalanand Singh*[2]).

[AKBAR A.J.—Under section 343 the fees of the Fiscal have to be paid before the order is obtained.]

The Fiscal's fees vary from day to day. The fees were paid as soon as the order of Court was communicated to Fiscal. This would be a sufficient compliance of the section under the circumstances. Also see section 258, Civil Procedure Code.

H. V. Perera, in reply.—Sections 342, 343, Civil Procedure Code, are the only sections dealing with adjournment of sale. There is no section in the Indian Code corresponding to these, and that is why the Appeal Court in India orders stay of sales under conditions different to ours (*Nayinar v. Aiyangar*[4]). Order of Court is only to take place when communicated. *33 Cal.* not followed.

At most sale in violation of order of Court is an irregularity, and we must succeed under section 282, Civil Procedure Code.

Allahabad case can be distinguished as follows : The purchaser is the execution-creditor ; in the present case the purchaser is an outsider.

Where a stranger purchases *bona fide*, sale cannot be set aside, as there was payment in satisfaction before sale (*Yellappa v. Ramachandra*[5]).

[1] *10 All. 170.*
[2] *(1889) I. L. R. 12 All. 96.*
[3] *(1906) 33 Cal. 927.*
[4] *(1909) I. L. R. 33 Mad. 74.*
[5] *(1909) I. L. R. 21 Bom. 463.*

Sale after returnable date of writ is no irregularity under section 282, Civil Procedure Code. Further, sale was upheld (*Suppramaniam Chetty v. Tissera*[1]). Section 344 is confined to applications by parties to the action.

December 15, 1925. DALTON J.—

This is an appeal from the District Court of Colombo from an order setting aside a Fiscal's sale.

The plaintiff in the action sought to recover a sum of money due on promissory notes from two defendants, and he obtained judgment against the first defendant for the payment of Rs. 9,140 with interest and costs. On December 11, 1923, the Court allowed execution to issue, property belonging to the first defendant was seized, and was advertised for sale on October 4, 1924. Whilst the proceedings took place in the District Court, Colombo, the property seized was situated in Habakkala in Induruwa, which is stated to be about 20 miles from Galle. The sale was therefore to be conducted through the Fiscal at Galle.

On October 1 the District Court, Colombo, was moved by the plaintiff (judgment-creditor), at the instance, it is stated, of the first defendant (judgment-debtor), for an order directing that the Fiscal at Galle be directed to stay the sale. This order was allowed. On October 3 the Fiscal received the instructions from the Court directing him to stay the sale on payment of his charges by the defendant. The charges were paid the same day.

The instructions from the Court to the Fiscal at Galle appeared to have been conveyed by the hand of one Porolis, who was alleged to be in the employment of one Don Charles Mahagalle, a merchant at Induruwa and brother-in-law of the defendants. They were received by the Fiscal about 10.30 A.M. on October 3. The sale was advertised for October 4 at 11 A.M. The place of sale was about 20 miles from the Fiscal's Office. The Fiscal therefore had notice of the order of the Court before the sale, and had ample time to communicate with his officer conducting the sale 20 miles away. The order not to sell, however, never reached the latter officer. It appears that that order was entrusted by the Fiscal's Deputy to the same Porolis, who never delivered it. He says he handed it on to someone else to deliver and he has not seen him since. The sale was therefore conducted by the Fiscal's officer at the advertised time and date, although the Fiscal was in possession of the Court's order staying the sale. It was clearly the duty of that officer to entrust his order to his subordinates or to a reliable person, and to take all proper and reasonable precautions to see that the orders of the Court are carried out. Why Porolis or his messenger did not deliver the order does not appear. No question, however, arises in this case as to any right of action the purchaser may have against the plaintiff or the Fiscal.

[1] *3 A. C. R. 60.*

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At the sale the property was purchased by the second defendant for the sum of Rs. 146, although it was stated to be worth Rs. 3,000. The plaintiff therefore petitioned that the sale be set aside on the ground that it was a nullity, inasmuch as the Court had ordered that it be stayed, there being a material irregularity, the Fiscal's power to sell having been countermanded. Plaintiff also alleged fraud and collusion as between the second defendant and Don Charles Mahagalle in respect of the sale, whereby the second defendant was enabled to purchase the property, causing the plaintiff to suffer material damages.

From the terms of the petition it would appear that plaintiff was moving under section 282 of the Civil Procedure Code. The learned Judge found there was an entire absence of any satisfactory proof of collusion as alleged, and as a fact that the sale was carried out, in spite of the order of the Court staying it, was attributable to the negligence of the plaintiff. He came to the conclusion, however, that the sale was under the circumstances a nullity, and he therefore set it aside. From the order the purchaser, the second defendant, appeals.

For the appellant it is urged that he was a *bona fide* purchaser for value without notice of any irregularity (if any) ; and further, that as the order to stay the sale never reached the officer conducting the sale, the appellant obtained good title to the property ; the communication to the Fiscal was not sufficient, and as the plaintiff himself had failed to communicate the order in time, it was not now open to him to plead any irregularity, as he was to be blamed. In any case, it is urged that there is no proof of any material injury to the plaintiff.

The judgment of the learned Judge is based upon decisions in Indian and local Courts, but he does not state if he acts under the provisions of section 282, section 344, or any other rule of the Code or other enactment. He refers however to *Appuhamy v. Adirian*[1] in which the De Sampayo J. states :—

> " In *Goonetilleka v. Goonetilleka*[2] this Court, while questioning the soundness of a contention that section 344 was an enactment of substantive law, and that in a case which did not fall under section 282 it empowered the Court to set judicial sales aside under any circumstances in which justice to the parties may require that to be done, nevertheless allowed that under section 344 Fiscals' sales might be set aside for reasons which would render them void under the common law, *i.e.*, for fraud. Applying the principle thus recognized, I think that, if a Fiscal's sale can be shown, before it is confirmed, to have been made under an entire mistake, when to the knowledge of the purchaser the exigency of the writ had been fully satisfied, the sale may similarly be set aside under section 344."

[1] *(1914) 17 N. L. R. 392.* [2] *(1912) 15 N. L. R. 272.*

In *Ahamado v. Fernando* [1] the Court interpreted the words "fraud in the conducting of the sale" as used in *Goonetilleka v. Goonetilleka* (*supra*) in a "broad sense," and also points that fraud in the conducting of the sale is only one of the grounds for an application under section 344 of the Code. That case also deals with the question raised as to a purchaser in execution not being a party to the action. (See also *Perera v. Abeyratne.*[2]) As the present purchaser-appellant was a defendant in the action, no question as to his not being a party or being made a party as directed in *Appuhamy v. Appuhamy* [3] can in any case arise here.

In *Gunasekera v. Dias* [4] the question that arose was as to the confirmation of a sale after the execution of the writ had been stayed as regards one of the parties. The order staying the sale as regards one defendant was made by the Supreme Court, and reached the District Court after the sale had already taken place.

Bertram C.J. says :—

> "The order of the Supreme Court directing a stay of execution was in effect, but not in form, a setting aside of the decree of the District Court, and it was held in *De Mel. v. Dharmaratne* [5] that if a District Court, after its decree has been set aside by the Supreme Court, confirms a sale held in execution of the decree, that order can be vacated."

Whether or not in this case the order staying execution was made before the sale does not appear from the report ; it appears probable from the way the matter is dealt with in the judgment that there was an existing order for the sale at the time of the sale, which was stayed after it had taken place. In either case, however, it is authority for the argument put forward on behalf of the plaintiff (respondent) that the sale be set aside. *Appuhamy v. Appuhamy* (*supra*) is another case which it was held the provisions of section 344 applied. There a question arose as to the stamping of a writ, it being held that the writ under which the sale took place had not been duly issued and stamped. The sale was accordingly set aside.

In *Muthu Caruppan v. De Mel* [6] an application was made to set aside the sale under section 282 on account of certain irregularities in the sale. One ground put forward in support of the application was that an order of the Court which allowed the decree holder (appellant) to bid for and purchase the properties and in the event of his becoming purchaser authorizing the Fiscal to give him (appellant) credit up to the amount of the writ, was not delivered

[1] (*1919*) *21 N. L. R. 137.*
[2] (*1912*) *15 N. L. R. 414.*
[3] (*1910*) *14 N. L. R. 8.*
[4] (*1920*) *22 N. L. R. 85.*
[5] *7 N. L. R. 274.*
[6] *6 N. L. R. 239.*

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to the selling officer until after the property had been sold. The application was refused as it was found that the decree holder's agent had undertaken to deliver the order to the selling officer, and it was entirely due to " the gross negligence, carelessness, and fault " of the agent that the property had been sold without the order being communicated to the officer. The Court held that the appellant could not take advantage of the fault of his agent to set aside the transaction " which was otherwise regular." It is in respect of these latter words that this case differs from the one now before us. In both cases it was shown that a decree holder intermeddled with the matter, and in both cases his agent undertook to communicate an order to the selling officer and failed to do so. But the orders were essentially different, in one case only dealing with conditions of sale, but in the other dealing with the authority to hold the sale at all. This case is therefore clearly distinguishable on the facts.

In the course of the argument Counsel also cited several Indian authorities, and they, it seems to me, offer more direct guidance and assistance in the question. Section 282 of the Ceylon Civil Procedure Code is represented, with some changes and additions which makes the latter rule wider in its application, by rule 90 of Order XXI. of the Indian Civil Procedure Code (Act 5 of 1908) which repealed Act 14 of 1882. Section 311 of Act 14 of 1882 is now replaced by rule 90 of Order XXI. Section 344 of the Ceylon Civil Procedure Code is represented with additions by section 47 of the Indian Act 5 of 1908. This section 47 is a restatement, with amendations (for it is wider than section 244) of the provisions of section 244 of Act 14 of 1882. Section 344 is in the following terms :—

> " All questions arising between the parties to the action in which the decree was passed or their legal representatives and relating to the execution of the decree shall be determined by order of the Court executing the decree and not by separate action."

The material parts of section 47 are as follows :—

> " All questions arising between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit."

Amongst the questions which have been held to come within the provisions of section 47 are all questions in connection with the attachment or sale of property. In *Saint Lal v. Umrao Um Nissa* (*supra*) an application was made to the Court by the judgment-debtor to have a sale set aside as being void. The Court executing

the decree had made an order postponing the sale in execution, but that order failed to reach the selling officer, who accordingly carried out the sale. In holding that the sale was more than an irregularity falling within section 311 of the Code, Straight J. says :—

> " I think that the sale was an illegal sale just as much as if the Court tried a cause in respect of a subject matter which before the date of trial had been removed from its jurisdiction by an authority having power to deprive it of such jurisdiction. Under the Code of Civil Procedure the officer conducting the execution sale derives his authority and competence entirely from the Court executing the decree, and it is clear from the powers given by the statute to such Court that if it does postpone a sale its order must have the immediate effect of postponing the sale . . . . I do not think that the question whether the order of the postponement did or did not reach the officer conducting the sale is of any serious importance. When once the sale was postponed, all power to hold it went out of the officer appointed . . . . "

The learned Judge goes on to refer to the power of the Court under the Code to deal with a state of things disclosed and continues :—

> " I cannot suppose that it was intended that a Court executing a decree was to confirm a sale which had never taken place in the sense that it had taken place without authority or that it was to refuse to set aside such a sale when brought to its notice."

He refers to two earlier cases in which a similar view was adopted, in one of which section 290 of the Code was specially referred to. I can find no provision of the Ceylon Code similar to section 290, but it seems to me that the matter is amply provided for by the terms of section 344 of our Code. In *Prosunno Kumar Sanyal v. Kali Das Sanyal*[1] the Privy Council expressed approval of the fact that the Courts had placed no narrow construction on the language of section 244 (the equivalent at that date of section 344). It is true that the claim to have the sale set aside came before the Court on a separate action, but it was admitted that the question at issue was one " relating to the execution, discharge, or satisfaction of the decree."

Hukum Chand Boid v. Kamalanand Singh (*supra*) supports the judgment of Straight J. In the course of that case it was argued that when the Appellate Court had stayed execution, the order of

[1] *(1889) I. L. R. 11 All. 333.*

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the Court only took effect when communicated to the lower Court. It was however held, in the words of Woodroffe J., that—

> "When the Court has said that execution of a decree is not to take place, from that moment the Court to which application has been made for execution has no authority to execute it, and delivery of possession under the authority of an order which was not then in force but had been suspended upon a stay granted by a superior Court is in my opinion invalid."

This decision was not followed in *Muthukumarasami Rowther Nimda Nayinar v. Kuppasami Aiyangar* (*supra*), but in any case the latter decision cannot be of any assistance to the appellant, for it is not questioned that the order of the Court staying the sale was communicated to the Fiscal before the sale. Apart from this, I would follow the earlier authorities I have cited. It may be also pointed out that in *Ramanathan Chetty v. Arunachalam Chetty*[1] the Court did not follow the decision in *33 Madras 74*, one Judge dissenting from that decision, and the other distinguishing it on the facts.

We were referred then by Mr. Perera to the Privy Council decision in *Zain-ul-Abdin Khan v. Muhamed Asghar Ali Khan*[2] as an authority in support of his argument that the sale could not be set aside as against a *bona fide* purchaser who is not the decree holder. It is true that there is a distinction to be drawn between decree holders who come in and purchase under their own decree which is afterwards reversed on appeal, and a *bona fide* purchaser who comes in and buys at a sale in execution of a decree to which they were no parties and at a time when that decree was a valid decree and the order for sale was a valid order. But even if the purchaser in the matter before this Court was a *bona fide* purchaser and no party to the decree (he is in fact the second respondent in the action) the order for sale had been stayed and so the authority has no application. Similarly in *Vellappa v. Ramachandra* (*supra*), there was no question that the sale had not been held on a valid order in force at the time of the sale. In *Wickremasinghe v. Jeewathamy*[3] the Supreme Court has held that in applications under section 282 to set sales aside on the ground of irregularity it can make no difference whether the sale is to strangers or to the execution-creditor. With regard to that authority it is not necessary to do more than point out that the sale here was more than an irregularity falling within the terms of section 282.

The last matter to which I would refer is the argument, which was not pressed, that the stay of proceeding was bad and did not conform to the requirements of section 343 of the Code, inasmuch as the order was made before payment of all the Fiscal's fees then due. The practice that obtains, we were informed, is for the order to state that all fees due shall be paid before the order is acted upon.

[1] *(1913) I. L. R. 38 Mad. 766.* [2] *(1887) I. L. R. 10 All. 166.*
[3] *(1906) 2 A. C. R. 160.*

In this case all the fees due to the Fiscal were paid immediately on the order being handed to him by the plaintiff's agent. In practice it appears almost impossible to ascertain what the fees may be before the Fiscal received the order, although no doubt a sum might be deposited to cover the fees. From the words of the section it appears to be framed for the protection of the Fiscal, and I am not prepared now to rule that where the order stays that the fees are to be paid and they are paid the terms of section have not been complied with.

I would accordingly hold for the reasons given that the sale was void and should be set aside.

I would therefore dismiss this appeal, with costs.

AKBAR A.J.—

This is an appeal by the appellant against the order of the District Judge setting aside the sale of a property bought by the appellant at a Fiscal's sale on a writ issued at the instance of the first respondent, who was the judgment-creditor in this case, against the property of the second respondent to this appeal, the judgment-debtor. It appears that the writ of execution was issued to the Deputy Fiscal at Galle, and by virtue of this writ, the property in dispute, which is situated about 20 miles from the town of Galle, was seized and advertised for sale at 12 noon on October 4, 1924.

On October 1 the judgment-creditor, at the instance of his judgment-debtor, the second respondent, obtained an order of the District Judge staying the sale, and it is in evidence that this order was in the hands of the Deputy Fiscal, Galle, at about 10.30 A.M. on October 3.

The Fiscal's charges, the payment of which was a condition precedent to the stay of the sale as expressed in the order, were duly paid to the Deputy Fiscal, and an order from the Deputy Fiscal staying the sale was handed by him to the person bringing the order of the Court, before 11 o'clock on October 3, for delivery to the Fiscal's Arachchi, who had been authorized by the Deputy Fiscal to hold the sale on the spot. The sale, as I have said, was advertised to take place at 12 noon on October 4, and it took place at the appointed time, because the mandate of the Deputy Fiscal countermanding the sale was never received by the Fiscal's Arachchi. Thereupon, by a petition dated October 31, 1924, the first respondent, before the sale could be confirmed by the District Court, applied to the Court to set aside the sale on the following grounds :—

(1) That the sale was a nullity because it was held after the order of Court to stay the sale had been made.

(2) That there was a material irregularity in the sale owing to the reason stated in paragraph (1) above.

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(3) That the appellant had fraudulently purchased this property in collusion with the second respondent.

(4) That the first respondent had suffered substantial damages.

It is necessary to note here that this was an application by the first respondent, the judgment-creditor, and that the purchaser-appellant and the second respondent to this appeal, the judgment-debtor, were both made respondents in the application made to the District Judge. The District Judge, while holding that the issue of fraud and substantial damage to the first respondent to this appeal had not been proved, has set aside the sale, on the ground that the sale was void, as it was held after the Court had stayed the sale.

The appeal is from this order, and it is contended that the sale is valid in spite of the order staying sale.

We have had the benefit of a full and able argument by Counsel on both sides, and I will proceed to state the reasons which induce me to think that the order of the Court was right.

The Deputy Fiscal is an officer of the Court and acts on the authority of Court, and he is authorized to delegate his powers of selling property on writs issued to him to any of his officers under section 258 of the Civil Procedure Code and the Fiscal's Ordinance of 1867. The order to stay the sale was in the hands of the Deputy Fiscal at 10.30 A.M. on October 3, and he had ample time to communicate with his Arachchi and to stay the sale, which was fixed for 12 noon the next day. No evidence has been led that it was impossible to do this for any particular reason. On the contrary, the evidence discloses the fact that the Deputy Fiscal chose to entrust his directions to the messenger who brought the Court order to him. If so, this messenger must necessarily be regarded as the agent of the Deputy Fiscal chosen by him for this purpose. That being so, the authority quoted by Mr. Drieberg, *Saint Lal v. Umrao Um Nissa* (*supra*), applies with double force. In that case Straight J. went even to the length of holding that immediately the Court stayed the sale " all power to hold it went out of the officer appointed, and he, though no doubt in this particular case without being aware of it, was *functus officio*," and that it was immaterial to the question whether the order of the postponement did or did not reach the officer conducting the sale. In this case, in my opinon, the order to stay the sale immediately superseded the writ, and the Fiscal had no power to act on the writ without further directions from the Court. If further authority be needed for this proposition, it will be found in *Ramanathan Chetty v. Arunachalam Chetty* (*supra*) and *H. C. Boid v. Singh*[1] and impliedly in *Gunasekera v. Dias* (*supra*).

Mr. Perera, for the appellant, sought to distinguish these cases by arguing that the position here was different to that in *12 Allahabad* quoted above, and that the law must be interpreted in a different sense when the purchaser is a *bona fide* purchaser, and not the decree

[1] *(1905) I. L. R. 33 Cal. 927.*

holder; and he cited the Privy Council decision in *Zain-ul-Abdin Khan v. M. A. Ali Khan* (*supra*). But I agree with Mr. Drieberg that this case has no application to the facts of this case. Sir B. Peacock when delivering the judgment of the Privy Council, stated expressly in his judgment that "Before the judgment of the Privy Council and before the decree of the High Court which reversed a part of the original judgment of the subordinate Judge, the plaintiffs in that suit who are now some of the defendants, executed their decree, and several sales took place under that execution . . . . there is a great distinction between the decree holders who came in and purchased under their own decree which was afterwards reversed in appeal, and the *bona fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties and *at a time when that decree was a valid decree and when the order for the sale was a valid order.*"

I have put the relevant words in italics, which distinguish at once the facts in that case from those here. When the sales referred to in Privy Council case were held, the decree was still in force and had not been modified or set aside. Here at the time of the sale the order to stay sale had already been made, and that order was in the hands of the officer responsible to the Court, and with whom alone the Court had any dealings in law, namely, the Deputy Fiscal, in ample time for him to communicate with his Arachchi.

The case of *Velappa v. Ramachandra* (*supra*) can be distinguished from this case, because here there was an order from the Court taking away the authority of the Fiscal to sell. Nor do I think that the case of *Nayinar v. Aiyangar* (*supra*) is sufficient authority for the proposition put forward by Mr. Perera. It is a short judgment, and has been expressly dissented from in the later case reported in *38 Madras* quoted above.

Mr. Perera then sought to draw a fine distinction between the words of sections 344 and 282 of the Civil Procedure Code. He is right when he says that this cannot be regarded as an application under section 282 of the Civil Procedure Code, because that section requires proof by the judgment creditor that he has suffered substantial injury, and this has been negatived by the finding of the District Judge.

Mr. Perera then argued that this application could not be regarded as one coming within section 344 of the Civil Procedure Code, because that section only referred to an application by parties to the action; he further argued that the only extent to which the Supreme Court had applied that section was to set aside sales to the decree holder, and even then only when the sale was vitiated by the common law, for example, by fraud.

But there are cases in which section 344 has been applied and in which outside purchasers (who were not parties to the original action) were affected. (See *Appuhamy v. Appuhamy* (*supra*), *Palaniappa Chetty v. Usubu Lebbe*,[1] *and Perera v. Abeyratne* (*supra*).)

[1] (*1923*) *24 N. L. R. 361.*

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I should like particularly to call attention to the extract from the Privy Council case quoted by Pereira J. in the *15 N. L. R.* case. The application here is by the judgment creditor, and he is complaining on a point which relates to the execution of the decree. So he is well within the provisions of section 344 of the Civil Procedure Code. He has made his judgment debtor a party to the application, and if his application affects the position of the purchaser, that is no reason why the judgment creditor's application should be rejected as not coming within section 344. In the words of the judgment of the Privy Council: "Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of section 244," corresponding to our section 344, "and that when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the suit." (*Sanyal v. Kali Das Sanyal* (*supra*).)

Even if sections 344 and 282 do not apply to this case, it will be noticed that a Fiscal's sale has to be confirmed by the Court under section 283. The Supreme Court, in the case reported in *24 N. L. R. 85*, expressed the view that the Court had the power to refuse to confirm the sale for a similar irregularity.

Sir Douglas Straight in *12 Allahabad 96* quoted above came to a similar conclusion. To quote his words: "I cannot suppose that it was intended that a Court executing a decree was to confirm a sale which had never taken place in the sense that it had taken place without authority or that it was to refuse to set aside such a sale when brought to its notice."

As Edge C.J. stated in *Prasad v. Rai*,[1] one must assume such powers are inherent in a Court by implication.

The above authorities also dispose of the point taken by appellant's Counsel that section 344 only applies to applications in which the decree holder is the purchaser, and only where the sale is attacked on the ground of fraud. It is true that in the case of *Appuhamy v. Adirian* (*supra*), De Sampayo J. referred to section 344 as only authorizing the setting aside of Fiscal's sales for reasons which would render them void under the common law, *i.e.*, for fraud. But in the very next sentence, although he qualified it by reference to the facts of the particular case, he seems to imply that a sale may be set aside under section 344 if it can be shown before the sale is confirmed that it was held under a mistake. I fail to see why section 344 cannot be resorted to set aside an obviously illegal sale when it is admitted that it can be so utilized to set aside a sale for reasons which would render it void under the common law.

[1] *I. L. R. 19 Cal. 683.*

It is on this footing that one can explain the *ratio decidendi* in the cases where sales were set aside on the ground that they were based on writs which had not been properly stamped. (See *Palaniappa Chetty v. Samsudeen* [1] and *Wickremasinghe v. Jeewathamy* (*supra*).)

In the latter case Lascelles A.C.J. stated "it is true that the the original application to set aside the sale did not proceed upon the ground that the writ was unstamped. But I think it was competent for the Judge when an irregularity going to the root of the authority to the Fiscal was brought to his notice to set the sale aside. This was the course taken by this Court in *Palaniappa Chetty v. Samsudeen* (*supra*), where the fact that the writ was unstamped appears to have been brought to the notice of the Court for the first time during the hearing of the appeal."

Mr. Perera also argued that the order to stay the sale was void because it did not comply with the terms of section 343, which forbids the making of such an order before payment of all Fiscal's fees then due. But the order directed the stay of the sale on payment of the charges to the Fiscal, and it is admitted that the charges were so paid as soon as the order reached the hands of the Deputy Fiscal on October 3. The terms of section 343 relating to the payment of these charges are merely directory, and I think the conditional order followed by the payment was a sufficient compliance of the provisions of the section.

For the reasons stated by me I think the order of the District Judge was right, and I would dismiss the appeal, with costs.

Appeal dismissed.

[1] *8 N. L. R. 325.*