

1971 Present : H. N. G. Fernando, C.J., and Thamotheram, J.

P. SELLAPPAH, Appellant, and A. VAITHILINGAM, Respondent

S. C. 253/68 (Inty.)—D. C. Jaffna, 2043/L

Civil Procedure Code—Section 272—Purchase of judgment-debtor's property by execution-creditor—Invalidity thereof if permission of Court had not been obtained to buy the property.

When a judgment-creditor purchases at a Fiscal's sale in execution of the decree entered in his favour any property belonging to the judgment-debtor, the sale is invalid and is liable to be set aside at the instance of the judgment-debtor if the permission of the Court had not been obtained, in terms of section 272 of the Civil Procedure Code, for the purchase of the property by the judgment-creditor.

APPEAL from an order of the District Court, Jaffna.

C. Ranganathan, Q.C., with R. Manikkavasagar, for the defendant-appellant.

H. W. Jayewardene, Q.C., with K. Kanag-Iswaran, for the plaintiff-respondent.

Cur. adv. vult.

January 30, 1971. H. N. G. FERNANDO, C. J.—

The defendant in this action had under deed No. 1710 of 5th February 1964 a right to a reconveyance of a certain land upon the conditions set out in that deed.

In the present action a decree was entered on 18th March 1966 for the payment by the defendant to the plaintiff of a sum of Rs. 14,500. In execution of that decree, writ issued in May 1966 for the seizure of the defendant's right of redemption under the deed No. 1710, and the seizure of that right was effected by a prohibitory notice which was served on the defendant sometime prior to 23rd December 1966. Thereafter the right of redemption was sold by the Fiscal on 6th March 1967, and according to the sale report dated 11th March 1967 the right was purchased by the plaintiff for a sum of Rs. 8,600 at the sale. On 6th April 1967 the Fiscal reported to Court that the plaintiff had paid in full the purchase price for the right sold to him at the sale and that the money had been deposited in the Kachcheri to the credit of the action. No objection having been taken to the sale, it was confirmed by the Court on the 22nd April 1967 and a Fiscal's conveyance was executed in favour of the plaintiff on 26th April 1967.

On 29th March 1967, i.e. before the order confirming the sale, the defendant's Proctor deposited in Court a sum of Rs. 14,500 due from the defendant under the decree. At this stage, the officers of the Court discovered that the record of the action was missing, and the only journal entries now available relate to matters which took place on and after 29th March 1967. The fact that the defendant, after depositing the full amount due from him, nevertheless did not immediately take some steps to challenge the sale of the right of redemption, is in my opinion satisfactorily explained by the circumstance that, because the record was missing at the stage when that deposit was made, the defendant did not become aware that the sale report had been filed in Court.

On 27th April 1967, the plaintiff's Proctor filed a motion for the issue of an order of payment in favour of the plaintiff of the proceeds realised by the Fiscal at the sale in execution, and notice of this motion was served on the defendant in June 1967. After that notice was served, the defendant filed a petition seeking to set aside this sale, and for present purposes it suffices to refer only to one ground on which the defendant relied, namely, that the plaintiff had not as required by s. 272 of the Code obtained the permission of the Court to purchase the right of redemption at the sale in execution.

In considering this ground, the learned District Judge has in his order stated that "there is also sufficient evidence in this case, as is apparent from the documents, that s. 272 has also been complied with". I must note with regret that there is literally no evidence and no indication whatever in the documents that s. 272 was in fact complied with. The sale report does not mention that the plaintiff had obtained permission to bid at the sale, nor does the Fiscal's Conveyance refer to any such permission having been obtained. The best evidence of compliance with s. 272 was of course not available because the record was missing. But permission under that section must have been obtained if at all sometime in January or February 1967 on a motion by the plaintiff's Proctor, and it would have been a simple matter for the Proctor to give evidence of that fact. But neither he nor the plaintiff gave any evidence, and the Fiscal's officer who conducted the sale and who was called as the plaintiff's witness at the inquiry was not asked whether he was aware of such permission having been obtained.

In view of the failure of the plaintiff to adduce any evidence of this permission, even by a bare assertion of his own, the only reasonable conclusion is that the permission has not been obtained. The probability that there was no compliance with

s. 272 is enhanced by another circumstance. It is clear that the plaintiff actually paid to the Fiscal the initial deposit and the balance of the purchase price which he bid at the sale, but if indeed permission had been obtained under s. 272 the order under that section would ordinarily have allowed to the plaintiff credit up to the amount of his decree, and payments to the Fiscal would not have been necessary.

I would accordingly reverse the finding of the trial Judge, and hold instead that there had been no compliance with s. 272.

In Hadjiar v. Kuddoos,¹ 37 N. L. R. 376, Koch J. (Soertsz A. J. agreeing) held that the provisions of s. 272 must be complied with not only in the case of a hypothecary decree but also in the case of a sale under a simple money decree. In so holding this Court followed the decision of Lascelles C.J. and Wood Renton J. in *Chellappa v. Selvadurai*² 15 N. L. R. 139. In the latter case reference was made to a contrary opinion expressed by Lawrie J. in *Silva v. Uparis*³ (1894) 3 C. L. R. 75.

Mr. Jayewardene for the plaintiff in the present action suggested that the correctness of the decision in *Hadjiar v. Kuddoos* should be reconsidered in view of the opinion expressed in 1894 by Lawrie J. I am in entire agreement with the judgment of Koch J., and I see no reason why its correctness should be reconsidered. I would only add that the report in *Silva v. Uparis* contains also the report of a judgment pronounced by Lawrie J. in 1893, in which he expressed emphatically the view that a purchase by an execution-creditor is invalid if permission had not been obtained under s. 272.

For these reasons I hold that the defendant's application to set aside the sale in execution must be allowed. The plaintiff will of course be permitted to withdraw the moneys which he deposited as instalments of the purchase price. The sum of Rs. 14,500 deposited by the defendant to the credit of the action will be paid out to the plaintiff in satisfaction of the decree, after deduction of the costs of the proceedings in the District Court taken on and after 26th June 1967 and of the costs of this appeal.

THAMOTHERAM, J.—I agree.

Order set aside

¹ (1935) 37 N. L. R. 376.

² (1912) 15 N. L. R. 139.

³ (1894) 3 C. L. Reports 75.