

1931

*Present: Garvin S.J.P. and Maartensz A.J.*ANNAMALY CHETTY *v.* SIDAMBARAM CHETTY.

120—D. C. (Inty.) Colombo, 25,761.

Sale in execution of mortgage decree—Decree-holder allowed to purchase above appraised value—Purchaser, a nominee of decree-holder—Fraud—Civil Procedure Code, s. 344.

Where after a mortgage decree had been entered, the Court directed the sale to be held by the Fiscal and gave permission to the decree-holder to purchase the property at or above the appraised value and where the property was purchased by a nominee of the decree-holder below the appraised value,—

Held, that an application may be made to set aside the sale under section 344 of the Civil Procedure Code.

Notwithstanding that certain of the facts which constitute the fraud alleged may of themselves amount to a material irregularity, an application for relief based on fraud, as apart from a mere irregularity, may be made under the provisions of the section.

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

H. V. Perera, for purchaser, appellant.

E. G. P. Jayatileke (with him *Wikramanayake*), for plaintiff, respondent.

Nadarajah, for first defendant, respondent.

December 21, 1931. GARVIN S.P.J.—

This is an application to set aside a sale held in execution of a hypothecary decree. Acting under the provisions of section 12 of Ordinance No. 21 of 1927, the District Judge directed that the sale should be held by the Fiscal upon certain terms specified by him, one of them being that the plaintiff or any one else on his behalf may be permitted to bid for and purchase such properties at the sale, and that in the event of the plaintiff becoming the purchaser thereof the plaintiff should be allowed credit for his claim and costs. Upon an application made by the plaintiff's proctor who had not apparently familiarized himself with the terms of the decree the District Judge made order that the property may be purchased by the plaintiff at or above the appraised value. At the sale held by the Fiscal, the appellant became the purchaser. After

the lapse of thirty days in the absence of any application to set it aside the sale was duly confirmed under the provisions of section 282 of the Civil Procedure Code. The present application was made on July 12, 1929. It was alleged that in order to defeat and circumvent the order of the Court, permitting the plaintiff to bid for and purchase the premises at or above the appraised value; he arranged with the appellant to purchase the premises on his behalf. Various other grounds were set out with which we need not concern ourselves since they are matters which should have been brought before the Court in a proceeding to set aside the sale under the provisions of section 282 of the Code.

In the Court below the objection was taken that the provisions of section 344 of the Code which the defendant invoked in support of his application did not apply to a case in which the hypothecary decree was carried into execution by the Fiscal. The learned District Judge has considered the arguments addressed to him and has come to the conclusion that the effect of section 12 of the new Mortgage Ordinance, No. 21 of 1927, where the Court acting under its provisions directs the sale in execution of a hypothecary decree should be carried out by the Fiscal, is to bring into operation all the provisions of sections 255 to 288 and sections 290 to 297 of the Civil Procedure Code, and that it was competent therefore for any person having the right to do so to proceed, if so advised, under the provisions of section 282. He has further held that there is nothing in the provisions of Ordinance No. 21 of 1927 to prevent a person proceeding under the provisions of section 344 to have a sale set aside in any case in which it would otherwise be competent for him to do so. It seems to me that the learned District Judge is right on both points. Section 344 is a procedural provision, the purpose and effect of which is to require persons in all matters relating to the execution of a decree to take steps in the action in which the decree was passed and not to resort to a separate action to obtain the relief claimed. The provisions of section 282 are applicable when it is sought to set aside a sale in execution "on the ground of a material irregularity in publishing or conducting it". But there are cases in which a person is entitled to be relieved from the consequences of a sale in execution notwithstanding that in the publishing or conducting of the sale there has been no material irregularity, and one of these is a case in which a person is able to establish the existence of a fraud which would entitle him under the Common law to maintain an action to have the sale set aside. Fraud is not one of the grounds specified in section 282 for setting aside a sale. Notwithstanding that certain of the facts which constitute the fraud alleged may of themselves amount to a material irregularity, an application for relief based on fraud as apart from a mere irregularity, if the fraud is such as would entitle a plaintiff to relief in an action, may be made under the provisions of section 344. A purchase by the decreeholder in the name of a nominee has been treated as an irregularity within the contemplation of section 282.

A purchase made in such circumstances may conceivably amount to an irregularity and no more. It may on the other hand in conjunction with other circumstances amount to a fraud which vitiates the whole

proceeding from which a Court will give relief, notwithstanding that the sale was confirmed under section 282 by the Court in ignorance of the fraud.

The main ground upon which this appeal was pressed upon us was that the averments in the affidavit filed by the petitioner did not disclose such fraud as would entitle him to have the sale set aside. It was urged that the specific averments in the affidavit did not amount to more than that the property has been purchased by the decree-holder in the name of his nominee, and that the District Judge was, therefore, wrong in fixing the matter for inquiry.

Fraud should be specifically and clearly set out in an application of this nature and no general allegation of fraud will suffice. But, after careful consideration, I have come to the conclusion that this case must go back for the inquiry ordered by the learned District Judge. In the first place, the objection pressed in appeal was not taken in the Court below. In the next place, although the petition and affidavit are not a good example of how such a ground of relief should be pleaded it may nevertheless be gathered from the averments that relief is claimed on the ground that the decree-holder who was only permitted by Court to bid for and buy the property at or about the appraised price entered into a conspiracy with the purchaser to buy the same for him, though in the name of the purchaser and did in fact so purchase the property very considerably below its true value and to the loss of the judgment-debtor.

The appeal will therefore be dismissed with costs, and the case will be remitted to the Court below to be proceeded with in due course.

MAARTENSZ A.J.—I agree.

Appeal dismissed.

