

1931

*Present: Garvin S.P.J. and Maartensz A.J.*

ZAHAN v. FERNANDO.

101—D. C. (Inty.) Colombo, 37,745.

*Mortgage decree—Conditions of sale—Breach of condition by purchaser—  
Technical irregularity—Power of Court to grant relief.*

The directions which a Court gives for the conduct of a sale in execution of a hypothecary decree and the conditions of sale are intended to secure the interests of the parties to the action and also the purchaser at the sale.

The Court is entitled to grant relief in a case in which it would be inequitable to penalize the purchaser for the breach of a condition of sale, which may be regarded as a mere technicality.

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

*N. E. Weerasooria*, for appellant.

*H. V. Perera*, for respondent.

December 17, 1931. GARVIN S.P.J.—

By the hypothecary decree which was entered in this case, certain premises which were mortgaged to the plaintiff were directed by the Court to be sold by Mr. A. C. Koelmeyer, Licensed Auctioneer, and the sale was to be by public auction. Certain other directions were given in the decree, and, thereafter, the Court approved certain conditions upon which the sale was to take place. One of the conditions was that a certain percentage was to be deposited at the time of the sale, and then followed condition 5, which is in these terms:—"The remainder of the purchase money shall be paid within one month from the date of the sale to the District Court of Colombo." This sale took place on October 14, 1930. On November 14 of the same year, the purchaser brought the remainder of the purchase money into Court and moved that a conveyance be issued in his favour. This application was opposed, and the principal ground of opposition would seem to have been that the purchaser was a day late with his deposit. Evidence was, however, led, the tendency of which was to explain and to purge the supposed default as the foundation for the further application to the Court to accept the balance of the purchase money and direct that a conveyance should be issued notwithstanding that there happened to be a few hours' delay in bringing that balance into Court. The learned District Judge, having considered the circumstances of the case, came to the conclusion that it was competent for him to give the relief and he did so. He directed that the sale be confirmed and that a conveyance be issued to the purchaser.

The defendant has appealed from this judgment, and two points have been argued at considerable length upon which our decision is invited. It was contended by the appellant that under no circumstances had the Court jurisdiction to give any relief from the condition which it had itself imposed, notwithstanding that, in that view, the purchaser was involved as a consequence in the forfeiture of the deposit already made by him. On the other hand, it was argued in answer to this objection that the Court was free when it thought the interests of justice demanded it to give such relief and confirm the sale and issue the necessary conveyance. It was further argued that the parties had proceeded upon a misapprehension in that they assumed that the purchaser was out of time, and that in point of fact under the conditions of the sale, he was in time and would have been in time if he brought the balance purchase money into Court at any time on November 14 as he did. It was urged in support of the first of these objections that the directions which a Court gives as to the manner and conditions upon which a sale in execution of a hypothecary decree should be carried out are in effect a part of the decree and that the Court may not vary or give any relief from any of the directions so given by the general rule that a Court may not alter its own decree.

The fact that the directions which the Court gives may be embodied in the decree does not, in my opinion, constitute such directions a decree in the ordinary sense in which that term is rightly understood. A decree is defined to be "the formal expression of an adjudication upon any

right, claim, or defence set up in a civil Court when such adjudication so far as it regards the Court expressing it decides the action or appeal". It is such a decree that the Court may not vary, except in so far as it is permitted to do so by the provisions of section 280 of the Civil Procedure Code, which is in effect limited to the correction of any clerical or arithmetical error. Moreover, section 12 of the Mortgage Ordinance, No. 21 of 1927, while vesting in the Court the power to give directions, empowers it when giving those directions to do so by inserting them in the decree or to give them subsequently after the entering up of the decree. The objection in so far as it is based upon the ground that this is a decree is not, in my judgment, one that can be upheld. In point of fact, in this case, the directions with which we are here concerned were not given in the decree. They were given after the decree.

It was then argued that these conditions must be regarded as part of a contract of sale and that the Court could not give relief from a provision fixing a limit of time within which the purchaser was to complete his purchase by bringing in the balance purchase money, proceeding exactly in the same way as it would proceed if the application had been made to it by one of two parties to such a contract for relief from its provisions. I am unable to take the view that this is merely a contract of such a nature, nor that the defendant is in any sense a party to the contract. This is a sale in execution by the Court of its own decree. The directions which it gives for the conduct and sale are its own unlike other sales in execution to which the provisions of section 255 and those sections which follow are applicable. There are here no statutory directions by which the Court is bound and from which it cannot give relief. The whole conduct of the sale is in its own hands. The directions and conditions which it gives presumably are intended to secure the interests of the parties to the action and also the person who may happen to be the purchaser at the sale in execution. Ordinarily, a Court would not sanction any departure from any direction which it has given or from the conditions which it has imposed. But I am aware of no rule, since there is no legislative enactment by which it is bound in so acting, which prevents it giving relief in a case in which it would be manifestly inequitable to penalize the purchaser for a breach of a condition which in the circumstances of this case may be regarded as a mere technicality. Throughout the proceedings in the Court below, as I have already said, the view appears to have been taken that by "month" was meant a calendar month. It would seem that at the hearing it was assumed that that calendar month expired on November 13. The purchaser stated in his affidavit that he interpreted the month as running from October 14 till the 14th of the following month, and to put his case at the very lowest there can be no doubt that he had reason for thinking that a calendar month would be computed as running from the date at which it commenced to the day bearing the corresponding number in the following month. If that be correct he was in time.

This consideration brings me to the second of the two points which we have been invited to consider, but, in the view I have taken of this case, it seems unnecessary to decide what is a somewhat difficult question.

If I have dealt with it so far, it is for the purpose of emphasizing the very great hardship which would result if the Court refused at this stage of the proceedings to confirm the sale and direct that the conveyance be issued to the purchaser.

For the reasons already given, I think that this is a case in which the Court is entitled in its discretion to accept the balance purchase money and direct the issue of the conveyance, even if in law the purchaser is out of time by a few hours.

The order of the learned District Judge will stand affirmed. The appeal is dismissed with costs.

MAARTENSZ A.J.—I agree.

*Appeal dismissed.*

