

1933

Present : Macdonell C.J. and Driberg J.

SEKAPPA CHETTY *et al.* v. MURUGAPPA CHETTY *et al.*

74—D. C. (Inty.) Colombo, 32,566.

Fiscal's conveyance—Sale under mortgage decree—Right of purchaser to ask for plan—Power of surveyor to enter land—Order of Court—Ordinance No. 21 of 1927, s. 12 (5).

Where property is sold by the Fiscal in execution of a hypothecary decree, a plan is not an essential part of the conveyance issued to the purchaser, unless the Court otherwise orders.

THE plaintiffs obtained judgment against the defendant on a mortgage bond on April 30, 1929. An order for sale was issued to the Deputy Fiscal under section 12 of the Mortgage Ordinance, No. 21 of 1927. One of the hypothecated properties which were sold was an undivided portion of land of 16 acres from and out of a larger land containing in extent 400 acres.

When the Fiscal's surveyor went to the land to survey it for the purpose of a conveyance, the respondent, who claimed title to the larger land, objected. When this was reported to Court, the appellants moved on September 12, 1930, for a notice on the respondent to show cause why he should not allow the Fiscal's surveyor to enter the land. On the respondent showing cause, the learned District Judge held that a survey was not necessary and that the Fiscal should convey to the appellants the land as described in the order of sale.

N. E. Weerasooria, for appellant.—The sale was by the Fiscal. Under section 12 of Ordinance No. 21 of 1927, sections 282 to 286 of the Civil Procedure Code apply. Under section 286 no Fiscal's conveyance is issued without a plan. The proviso says "to all conveyances . . . there shall be annexed a sufficient map". There is no earlier plan. A survey is necessary. No prejudice will be caused. The rights, if any, of the respondent, will remain unaffected.

H. V. Perera, for respondent.—The execution sections of the Code are so framed as to protect the rights of the party in possession, *e.g.*, right to claim on seizure, sections 241 to 247, also where possession is sought to be given, sections 325 to 330. Under section 12 (3) (b) of Ordinance No. 21 of 1927 the Fiscal cannot enter without an order of Court. If he cannot enter, he cannot survey. Section 286 must be read as modified by section 12 (3) (b). Where the Court refuses to make an order to enter, the purchaser must be content with a conveyance giving the description without a plan. Provision is made by section 12 (5). See also schedule for form of conveyance. A plan is unnecessary. The purchaser should file an action.

Weerasooria, in reply.—An action only binds the parties to it. A party in possession is under no obligation to claim. Parties are agreed on the corpus sold. Section 12 (3) does not apply where it is in conflict with section 286. If so, express words would have been used. Counsel cited *Ukku Menika v. Ratwatte*¹.

February 27, 1933. MACDONELL C.J.—

In this case the plaintiff-appellants had obtained a mortgage decree and a commission had been issued to the Fiscal to sell the mortgaged property. The sale was held and the plaintiffs became purchasers, doing everything and paying all moneys necessary for them to be entitled to a conveyance after the sale. No special conditions seem to have been attached by the Court to the order for sale. The plaintiff-appellants then requested that the Fiscal should send his surveyor on to the property so as to make a plan for annexure to the conveyance as required by section 286 of the Civil Procedure Code. The land to be surveyed was described as follows:—“All that undivided portion of land in extent sixteen acres from and out of all that land called Higgala *alias* Rankiripetiyehenyaya, situated at Ambamalla in Lower Bulatgama aforesaid; and bounded on the north by the village boundary of Punahela, on the east by Ratmalehena Heenna, on the south by Katuhena Galenda, and on the west by Katukitulehinna, containing in extent four hundred acres (A 400).” The plaintiffs-appellants then were asking for a survey of the whole of these 400 acres so that a plan of the same might be annexed to their conveyance, but that plan would obviously not show any divided portion of the 400 acres as having been sold to them. The owner of the 400 acres, the respondent to the present appeal, objected through his agents to the Fiscal’s surveyor going upon his 400 acres so as to make the survey requested, in fact he refused entrance to the Fiscal’s surveyor for the purpose of the survey. The plaintiffs-appellants thereupon applied to the District Court for an order upon the respondent to permit the Fiscal’s surveyor to enter these 400 acres to make the survey desired. The learned District Judge refused this order and it is from his refusal that the present appeal is brought.

It is conceded by the appellants that there was no plan attached to the mortgage which they had originally taken over the property which they have now purchased; the mortgage itself contained the description of the land set out above, and no further description. It was argued to this Court that the words of section 286 are peremptory; that a plan was an essential part of the conveyance and that without such plan a conveyance could not be obtained nor could the order of the Court confirming the sale be properly carried into effect. It was further argued that there must be certainty about the Court’s order; the Court by confirming the sale had in effect ordered a conveyance to be made to the purchaser and such a conveyance must be expressed in definite terms, otherwise there would be no certainty about the Court’s order.

The decree in this case is dated April 20, 1929, consequently the case will be governed by the Mortgage Ordinance, No. 21 of 1927. Section 12 of that Ordinance seems to decide the point raised in this appeal.

Sub-section (1) gives to a Court issuing a mortgage decree certain powers with regard to giving directions as to the conduct and conditions of the sale. Sub-section (2) says as follows:—

“Subject to or in default of any such directions, the mortgaged property shall, on an order for sale being given by the Court to the Fiscal, be sold in like manner as if it had been seized by the Fiscal under a writ of execution for the amount of the mortgage money, and sections 255 to 288 (inclusive) and 290 to 297 (inclusive) of the Civil Procedure Code, 1889, shall apply accordingly.”

In the present case the only conditions contained in the decree were that the sale was to be conducted by the Deputy Fiscal and that the plaintiffs were allowed to bid and purchase; also that the Deputy Fiscal was to execute the necessary conveyance in favour of the purchaser. Then there was nothing in the facts of the case excluding the effect of section 286 of the Civil Procedure Code. If then section 12 ended with sub-section (2), presumably the plaintiff-appellants would have been entitled to demand that the conveyance given them should contain a plan, but the section goes on to say in sub-section (3)—

“On a sale under this section the Fiscal shall not, except by order of the Court—

(a) seize the property; or

(b) if any occupier, other than the judgment-debtor, objects, enter on the property, whether before or after the sale.”

This sub-section (3), as I read it, limits the effect of sub-section (2) quoted above. For instance, section 290 of the Code, which by sub-section (2) is made applicable to sales after mortgage decrees, gives the Fiscal the power to enter upon the land, but sub-section (3) limits that power by saying that, unless the Court shall otherwise order, he is not to enter on the property to be sold if any occupier other than the judgment-debtor objects, whether before or after the sale. If then a survey cannot be made without entering upon the land to be surveyed, as was admitted to be the fact here, then there was a statutory difficulty about making that survey since the occupier, the respondent, objected to the Fiscal's surveyor entering on the land, consequently entry upon it for the purpose of survey could not lawfully be made. It was argued that as section 286 directs in peremptory terms that a plan be made, then sub-section (3) of this section 12 of Ordinance No. 21 of 1927, would not apply. With submission, I do not so read the sub-section. I think it places a clear limit on the applicability of the various sections of the Civil Procedure Code declared by sub-section (2) generally to be applicable. They are to be applicable, doubtless, but subject to the limit imposed upon their applicability by sub-section (3).

But further, sub-section (5) of this section 12 must be considered:—

“On a sale by the Fiscal under this section, the form of conveyance contained in the schedule to this chapter shall be used unless the Court otherwise orders.”

Now the conveyance established by this Ordinance is clearly the one to be used in the present case. The Court has not “otherwise ordered”

and therefore the statutory form is the one that must be used. Now that statutory form says nothing about a plan. It says that the Fiscal sells and assigns unto the purchaser "the property described in the schedule hereto", and below there is a statement that the schedule is to 'contain a description of the property conveyed', but the statutory form is wholly silent on the question of plan. It was argued to us that the words "description" and "described" themselves imply a plan. I am afraid I do not so read them. The words "description", "described" referred to something written, not to something depicted. If the statutory form had used the word "delineated" or some such term, then it might well have been argued that the statutory form contemplated a plan. But in the absence of any such words I must hold that this statutory form does not require a plan to be annexed, in that respect differing from the conveyance contemplated by section 286, which does so require.

The effect then of the Ordinance No. 21 of 1927 seems to be that, in the absence of a special order by the Court, the conveyance which the purchaser on a mortgage sale is entitled to ask for is the statutory form given at the end of the Ordinance, and as that statutory form is silent as to the necessity of a plan, then the purchaser must be contented with a conveyance which does not contain a plan. If this be the correct interpretation of this Ordinance No. 21 of 1927, then the order appealed from was right. To enable the plaintiff-appellants to obtain the conveyance which they are entitled to demand, no plan is necessary and therefore no entry upon the land of the respondent is necessary either. If the above considerations hold good then this appeal must be dismissed with costs.

DRIEBERG J.—

The appellants obtained judgment against the defendant on a mortgage bond on April 30, 1929; execution of the decree was therefore subject to the provisions of section 12 of the Mortgage Ordinance, No. 21 of 1927. An order for sale was issued to the Deputy Fiscal; in the order it was stated that the sale was to be conducted "upon the conditions annexed"; no conditions of sale were annexed and the only condition in the order is a direction that the decree holders were entitled to purchase and to credit to the extent of their claim and costs. One of the hypothecated properties which were to be sold was an undivided portion of land in extent 16 acres from and out of all that land called Higgala *alias* Rankiripetiyehenyaya, situated at Ambamalla in Lower Bulatgama, in the District of Kegalla; and bounded on the north by the village boundary of Punahela, on the east by Ratmalehena Heenna, on the south by Katuhena Galenda, and on the west by Katukituleminna, containing in extent 400 acres. This land and another were sold by the Fiscal and were bought by the appellants and the sale was confirmed. When the Fiscal's surveyor went to the land to make a survey of it for the purpose of the conveyance by the Fiscal, the superintendent of the estate employed by the respondent would not allow him to enter the land, which he said was the property of the respondent. No order of Court had been obtained authorizing the Fiscal to survey the land. The respondent claims the land within which the property

mortgaged lies wholly or in part. This was reported to the Court and the appellants then moved on September 12, 1930, for a notice on the respondent to show cause why he should not allow the Fiscal's surveyor to enter the land and survey the subject of the decree. The respondent showed cause against this and the learned District Judge held that there was no necessity for a survey and that the Fiscal should convey to the appellants the land as described in the order of sale. The appeal is from this order.

Mr. Weerasooria contended that no order of Court was necessary for the purpose and that if one was, his application to the Court of September 12, 1930, was in effect an application for such leave and that it should have been granted.

His first contention is based on the assumption that the decree had to be executed as if it were a simple money decree falling under the head A of section 217 of the Code, in which case a survey of the land would be a necessary step in the preparation and execution of the conveyance by the Fiscal. But it was held in many cases, of which I need only refer to *Walker v. Mohideen*¹, that mortgage decrees do not fall within this class. This led to the passing of the Mortgage Ordinance, No. 21 of 1927. Under section 12 (2) of that Ordinance, the order for sale having been given to the Fiscal the property would have to be sold in the same manner as if it had been seized by the Fiscal under a writ of execution for the amount of the mortgage money, that is to say, as if it was in execution of a decree falling under head A of section 217; in such a case, sections 255 to 288 and 290 to 297 of the Code will apply, and under section 286, there being no plan available, the Fiscal would be obliged to have a survey made for the conveyance. But under section 12 (3) (b) the Fiscal cannot enter on the property before or after the sale, where the occupier, other than the judgment-debtor, objects except by order of Court. It might be contended that this implies that the Fiscal could in the ordinary course enter on the land for the survey if it is in the occupation of the judgment-debtor and that it is only when it is in the possession of another who objects to the entry that an order of Court is needed. But any doubt there may be on this point is removed by section 12 (5) which provides that unless the Court otherwise orders the form of conveyance where the sale is by the Fiscal, is to be that provided in the Ordinance. This form has no reference to a plan made by the Fiscal, whereas the form in the Code, which is for sales in execution of simple money decrees, requires the land to be described in reference to a diagram or map. The Court did not order that the conveyance should be with reference to a plan; no survey therefore was needed, and there was no necessity for the Fiscal to enter the land to make one. The first point raised, that the Fiscal had the right to enter the land without a special order, must therefore fail.

Regarding the second contention that the appellants' application of September 12, 1930, should be treated as an application under section 12 (3) (b) for an order of Court authorizing the Fiscal to enter the land, it appears to me that such an application can only be made where the

¹ (1924) 26 N. L. R. 310.

Court has directed under sub-section (5) that a plan should be made for the conveyance. In such a case, the Fiscal can enter the land without a special order for the purpose, but one will be needed if he is resisted by a person in occupation other than the judgment-debtor. The learned District Judge was of opinion that it was not necessary to make a plan for the purpose of the conveyance and I think he is right. In the case of simple money decrees, the conveyance is the final stage of the duties of the Fiscal which begin with seizure, and where there is no plan available, one prepared by the Fiscal is needed to show what property was seized and sold. In the case of a mortgage, the decree directs the sale of that which the parties to the bond have agreed should be sold in default of payment of the debt and which it must be assumed the parties have sufficiently described in the bond. Cases may occur where a plan may be necessary but no good reason has been advanced why one is needed in this case.

I agree that this appeal must be dismissed with costs.

Appeal dismissed.
