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*Present:* Lascelles C.J. and Wood Renton J.

## GOONETILLEKE v. GOONETILLEKA.

24—D. C. Kalutara, 3,517.

*Civil Procedure Code, ss. 282 and 344—Fiscal's sale—Material irregularity—Application to set aside sale.*

Under the general law a sale can be impeached on the ground of fraud. An allegation of fraud in the conducting of the sale is a question arising between the parties to the action in pursuance of the decree in which the sale takes place, and it must, therefore, under section 344 of the Civil Procedure Code, be determined by the Court in the execution proceedings, and not by a separate action.

THE facts appear in the judgment.

*A. St. V. Jayewardene*, for the appellant

*Bawa, K. C.*, for the respondent.

*Cur. adv. vult.*

March 20, 1912. WOOD RENTON J.—

This is an application by the petitioner-appellant to set aside a Fiscal's sale, held in execution of an order of Court, on the ground of material irregularity in advertising and conducting the sale. The order to sell directed the Fiscal of the Western Province to sell the property by public auction after giving twenty-one days' previous notice by affixing the order to the court-house and after due publication at the site of the premises. The property was sold for the sum of Rs. 140. The appellant alleges that it is worth about Rs. 1,500. He alleged a great number of objections to the sale, but the only points argued before us were: (1) That there had been no notification of the impending sale at the court-house as the order of the District Judge directed; (2) that there had been no due publication of the sale at the place where the property was situated; and (3) that the sale had been conducted by an officer who was not qualified to act in the matter, namely, a vidane arachchi, in whose division the land sold was not situated.

The present case is one to which the provisions of section 282 of the Civil Procedure Code cannot apply, inasmuch as there was no seizure of the land in dispute, and the sale in fact took place under a mortgage decree entered up by the Court under section 201.

The learned District Judge does not seem to have attached much credit to the evidence adduced on behalf of the appellant to prove the real value of the property. So far as one can form an opinion

from the written record, I am not myself impressed with the evidence of Moradu Marikkar, who said that he was prepared to pay Rs. 1,500 for it within three weeks. There is nothing to show affirmatively that the order of the Court as to the sale was not affixed to the court-house. The vidane arachchi who conducted the sale said that he did not affix such a notice there, and added "that is not done by the Fiscal." I am not quite sure what these last words mean. But I think that it was the duty of the appellant to prove this objection if he relied upon it. For aught that appears on the face of the record, the notice may have been affixed to the court-house. Moreover, the learned District Judge has stated in his judgment that the petitioner did not rely on this objection at the trial. We must, I think, take that statement to be accurate. I would hold that the first of the three objections above referred to fails. The next objection is an alleged absence of due publication at the spot. We have the vidane arachchi's evidence on the one side, and that of the appellant's witnesses on the other. If the former is speaking the truth, and the learned District Judge has believed him in preference to the appellant's witnesses, there was due publication; and the comparatively low price at which the property was sold must have been due to other causes. The questions involved in this objection are questions of fact and of credibility. I see no reason to differ from the finding of the learned District Judge in regard to it.

The last objection is, I think, plainly untenable. It was clearly incumbent on the appellant's counsel, even assuming that that was sufficient to enable him to succeed on the point, to show that the appointment of a headman of a division other than that in which the lands were situated to carry out the sale was not merely an irregularity, but a material one. There is no such evidence in the present case. The appeal must, therefore, fail on all the points that were argued before us. But I desire to say a word on the argument of the appellant's counsel as to the scope of section 344 of the Civil Procedure Code. He contended in effect that that section is an enactment of substantive law, and that, in cases which do not fall under section 282, it empowers a Court to set judicial sales aside under any circumstances in which justice to the parties may require that to be done. At a later stage in his argument he put his case rather on the ground that under Roman-Dutch law judicial sales can be set aside on the ground of material irregularity, even if there is not the affirmative proof required by section 282, in cases to which it is applicable, that such material irregularity has been the cause of the prejudice of which the party attacking the sale complains (see *Burge*, 1st ed., vol. II., p. 578). It is unnecessary to express an opinion on the latter argument, since the facts of the case, as I interpret them, do not supply even proof of a material irregularity. But I desire to guard myself from being supposed to

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assent to the view of the scope of section 344 which the appellant's counsel invited us to accept. I entertain very serious doubts whether that section does enact substantive law, and whether it does not merely provide that questions that arise legally between the parties, either under the Code or under the common law, are to be dealt with in the proceedings themselves, and are not to form the subject of independent action. This is clearly the principle of the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*.<sup>1</sup> Under the general law a sale can be impeached on the ground of fraud. An allegation of fraud in the conducting of the sale is a question arising between the parties to the action in pursuance of the decree in which the sale takes place, and it must, therefore, under the section in the Indian Code of Civil Procedure (section 244 of the old Code and section 47 of the new), corresponding to section 344 of our Code, be determined by the Court in the execution proceedings, and not by a separate action. I do not see that the decision just referred to goes any further than this. The same observation applies to the other Indian cases to which we were referred: *Jagan Nath Gorai v. Watson and Company*<sup>2</sup> and *Wahid-Un-Nissa v. Girdhari*.<sup>3</sup> The local case of *Carpen Chetty v. Hamidu*<sup>4</sup> relates only to the interpretation of the word "parties" in section 344, and has no bearing on the point now under consideration. No authority has been cited to us showing that section 344 of the Civil Procedure Code itself enables a judicial sale to be impeached on any ground whatever, or does more than regulate the form under which questions as to its validity arising under other heads of the common law or the statute law are to be determined. I would dismiss the appeal with costs.

LASCELLES C.J.—

I concur in the foregoing judgment, and in particular with that portion which deals with the scope of section 344 of the Civil Procedure Code.

*Appeal dismissed.*<sup>1</sup> (1892) I. L. R. 19 Cal. 683.<sup>2</sup> 1892) I. L. R. 19 Cal. 341.<sup>3</sup> (1905) I. L. R. 27 All. 703.<sup>4</sup> (1909) I C. L. R. 166.