1923. *Present:* Bertram C.J., Ennis J., and Garvin A.J.

SUBRAMANIAM CHETTY *v.* SOYSA.

167—D. C. Colombo, 5,789.

Fiscal's sale—One of the main gates of estate where sale took place closed —Inability of judgment-creditor to bid at sale—Material irregularity—Sale set aside—Application for leave to appeal to Privy Council by creditor—Property valued by Fiscal at six lakhs—Sale for Rs. 1,991—Was proceedings to set aside sale an "action"—"Final judgment"—Value—Ordinance No. 31 of 1909.

The execution-creditor caused the Fiscal to seize and sell as belonging to the judgment-debtor a property which he had transferred to his son. The public had no access to the place of sale, as one of the gates of the estate was closed, and some of the intending purchasers, including the execution-creditor, were unable to bid at the sale. The estate, though valued by the Fiscal at Rs. 600,000, fetched at the sale Rs. 1,991.

Held (*per* BERTRAM C.J. and ENNIS J.) that the failure on the part of the Fiscal's officer to secure a proper public entrance to the place where the sale was conducted was a material irregularity in the conduct of the sale.

The Supreme Court set aside the sale. The purchaser applied for conditional leave to appeal to the Privy Council.

Held [*per* BERTRAM C.J. and GARVIN A.J. (ENNIS J. *dissentiente*)], that an appeal lay.

The proceeding which resulted in the sale being set aside was an action within the meaning of section 4 of Ordinance No. 31 of 1909, and the order setting aside the sale was a final judgment within the meaning of rule 1 (*a*) in schedule I. of that Ordinance; the subject-matter in dispute was of the value of Rs. 5,000 or over.

THE plaintiff, execution-creditor, moved to set aside a Fiscal's sale on the ground of an alleged irregularity in the conduct of the sale. The District Judge refused the application. The plaintiff appealed, and the appeal was argued before Bertram C.J. and Ennis J. The Supreme Court delivered the judgment reported below allowing the appeal. The purchaser applied for leave to appeal to the Privy Council. The application was reserved for argument before a bench of three Judges, and the hearing came before Bertram C.J., Ennis J., and Garvin A.J.

The following was the argument before three Judges on the application for conditional leave to the Privy Council:—

H. J. C. Pereira, K.C. (with him *Samarawickreme*), for the purchaser, applicant.

The amount involved is over the value specified for appeals to the Privy Council—Rs. 5,000.

The value for the purposes of the appeal is the value of the land—*1 S. C. R. 1.*

[ENNIS J.—You have purchased the debtor's interests for about Rs. 2,000.]

We made a bargain.

The creditor himself having valued the property at Rs. 600,000 he is estopped by it.

The proceeding is an action as defined in sections 5 and 6 of the Civil Procedure Code. The judgment in question is a final judgment. Counsel cited *40 Cal. 635 at 647, 9 N. L. R. 129, 6 C. W. R. 157*.

Hayley (with him *Choksy*), for the creditor, respondent.—The value of the matter involved in this appeal does not amount to Rs. 5,000. It is the *question* or *claim* to the property, or the civil right that has to be of the value of Rs. 5,000. If "amounting to" qualifies only "property," then the words "claim or question to or respecting" might be omitted from rule 1 (*a*).

The value for the purposes of appeal must be judged by the extent to which the appellant suffers by the judgment. He brought the property for Rs. 1,991 at a sale, which, according to him, was regularly conducted.

He cited *13 App. Cas. 780*.

"Amounts to or is" means a specific amount, and not what it might amount to. Leave cannot be given in the latter case (*12 N. L. R. 367*).

This is a proceeding in the course of an "action" and is not an "action." The Code only contemplates two kinds of actions, viz., an action in Regular Procedure and an action in Summary Procedure. Proceedings to set aside a sale are merely "Applications" incidental to and in the course of an action. They cannot be "actions" because there cannot be an action within an action. The purchaser who now seeks to appeal is not a party to the action.

The judgment in question is not a final judgment (*4 Rec. 71* and *5 A. C. 371*). He also cited *4 Q. B. D. 459* and (*1910*) *1 Ch. 489 at 493*.

December 18, 1923. BERTRAM C.J.—

This is an appeal against the order of the learned District Judge refusing to set aside a sale under section 282 of the Civil Procedure Code on the ground of an alleged irregularity in the conduct of the sale. The sale took place upon a coconut estate in the Chilaw District. It was advertised as a public sale. On the date of the sale the execution-creditor, accompanied by his proctor and another gentleman, came to the entrance of the estate upon the old Chilaw road, and found the gate at that entrance locked. Persons who appeared to be watchers were on the other side of the estate and refused to admit him. He says that that entrance was the main entrance of the estate. The name of the owner of the estate was

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displayed near the gate. He further says that there was a crowd of some 20 people waiting inside near the gate. One would assume that they were all interested in the sale proceeding. A short time before this, Mr. F. R. Senanayake, accompanied by a relation of the judgment-debtor, also appeared in a car at this same gate, found it locked, and was turned away. Their object in visiting the estate and attending the sale was a purely benevolent one. Mr. Senanayake says that the gate was closed, and that it was a fairly large one. He obviously regarded it as the proper entrance to the estate on which the sale was being carried on. The occupants of both these cars tried to get into the estate by going round it, but both were unsuccessful. Mr. Senanayake arrived at the other gate near to which the sale commenced, apparently after the sale or a substantial part of the sale was over. We have, then, the fact that two independent members of the public approached what they considered to be the main entrance of the estate, and found that entrance barred against them. There can be little doubt that the gate in question was the main entrance. The Fiscal's officer himself says that had he known that one of the main entrances was closed, he would have taken steps to prevent it. I may mention that the legal ownership of the estate was not vested in the judgment-debtor, but, five years ago, had been transferred by him to his son, who had written a letter to the Fiscal claiming the property. A public sale, therefore, could not be held upon the property without his acquiescence.

Objections were duly lodged to the irregularity of the sale, and they may be reduced to two heads. Under the first of these heads the judgment-creditor alleges fraud on the part of the judgment-debtor. He alleges that the gate was fraudulently closed, with a view to keep him and, I suppose, other bidders out. I do not think that this charge is made out. The judgment-creditor had visited the estate on another occasion when the property was seized, and he had on that occasion gone to the other gate. The judgment-debtor had no reason to believe that the creditor would come to any gate, but the one to which he came the first time. Certainly, there was no reason to believe that he desired to exclude from the sale the occupants of the other car who, as I said, attended the sale from purely benevolent motives. There is, however, another ground to the objection, namely, that the sale was not a public sale. We have these undoubted facts : that two intending bidders were not able to get access to the estate in time for the sale because one of the main entrances to the estate, if not the main entrance, was kept closed. How is it possible under these circumstances to say that the sale was publicly conducted ? It was surely the duty of the Fiscal who was conducting a public sale upon a property to see that the main entrances to that property were available to the public. Mr. Pereira suggests that this was not a real effective

entrance, inasmuch as it may regularly have been kept closed. The fact that after the sale various people were seen emerging in motor cars from the estate through this gate seems to contradict that suggestion. He further suggests that the legal owner of the estate may quite possibly, in the exercise of his undoubted rights, have directed that particular entrance to be closed to the persons attending the sale. That may have been so. But that only emphasizes the fact that the sale was not a public sale. It seems to me that this failure on the part of the Fiscal's officer to secure a proper public entrance to the place where the sale was conducted is a material irregularity in the conduct of the sale.

Mr. Pereira further argues that, even if this were so, it caused the judgment-creditor no substantial injury. The estate had been conveyed five years ago by the judgment-debtor to his son. The son had mortgaged it to the extent of five lakhs of rupees. The judgment-creditor if he bought the estate was merely buying an equity of redemption subject to a law suit. Mr. Pereira urges that what he was seeking to buy would probably prove worthless. That may very well be the case. But he attended the sale as a bidder; he desired to bid; he had a right to bid; and, as he was prevented from bidding by the irregularity, he sustained a substantial injury. For these reasons I am of opinion that the judgment-creditor has made out his case, and the appeal must be allowed, with costs.

ENNIS J.—I agree.

The purchaser applied for conditional leave to appeal to the Privy Council.

The application was argued before three Judges, and the following judgments were delivered :—

March 7, 1923. BERTRAM C.J.—

This is an application for conditional leave to appeal to the Privy Council against the judgment of this Court upon an application made in the District Court to set aside a sale in execution of the judgment in the original action. I may briefly refer to the facts of the case. The judgment was given against the judgment-debtor, and the judgment-creditor denounced to the Fiscal a certain estate as being his judgment-debtor's property. Now, the estate, as a matter of fact, had been conveyed by the judgment-debtor to his son some years before the action, and the son had mortgaged it to the extent of over four lakhs of rupees. It is not clear on what precise ground the execution-creditor says that this property was the property of his debtor. It may have been that he intended to bring a Paulian action to set aside the conveyance as having been made in fraud of creditors, in which case I venture to think that the present proceeding is misconceived, or it may be that he

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contended that, although the title was nominally in the son, yet he held property under an arrangement in trust for his father, who was thus the real beneficial owner. The property was advertised for sale. The sale took place, and the purchaser, who is a son-in-law of the judgment-debtor, bought in the property for the comparatively small price of Rs. 1,991. It had been valued by the Fiscal as worth six lakhs of rupees, subject to the mortgages above referred to, and the principal execution-creditor in his evidence has stated that he was prepared himself to bid a lakh for the property if he had been able to attend the sale. He and other members of the public were in fact prevented from attending the sale, because one of the principal entrances to the property where the sale was held was kept closed. The result was that he was not able to reach the place of the sale until the sale was over. It was on this ground that he applied to the District Court to set aside the sale. The District Judge disallowed his application, but we held that the sale was not a public sale, and gave judgment accordingly, allowing his appeal. The purchaser now seeks to appeal from the judgment of this Court to the Privy Council. The execution-creditor opposes his application.

He contends, in the first place, that the proceeding in which the judgment setting aside the sale was given was not a suit or action within the meaning of section 4 of the Appeals (Privy Council) Ordinance, 1909; and, in the second place, he says that it is not a final judgment within the meaning of rule 1 (*a*) in schedule I. of that Ordinance. He further says that the appeal is not one which involves a claim respecting property amounting to or of the value of Rs. 5,000.

I will deal with these points in order. Was this proceeding a suit or action? In determining that question, we must have regard to the nature of Ordinance No. 31 of 1909. It is intended to supplement our Code of Civil Procedure. It would be highly inconvenient if the word "action" in this Ordinance were given a different meaning from that which is given to it in our Code of Civil Procedure. But there is a further reason. The principal sections of this Ordinance replaced and re-enacted certain repealed sections of our Code of Civil Procedure, and there is a very strong inference that the words used in an enactment so passed should have the same meaning as they bore in the sections which the enactment replaced.

Now, in our Code of Civil Procedure, a very wide meaning is given to the word "action." In section 5 an action is defined as a proceeding for the prevention or redress of a wrong. In section 6 it is said that every application to a Court for relief or remedy obtainable through the exercise of the Court's power or authority, or otherwise to invite its interference, constitutes an action. It seems

clear to me, therefore, that this application to the Court to set aside the sale instituted by a petition to the Court was an action within the meaning of section 4.

Mr. Hayley has addressed to us a very able contrary argument. He says that the Code contemplates three proceedings—a regular action, an action in summary procedure, and an incidental application which may be made either in the course of a regular action or in an action in summary procedure. He relies upon section 373 and certain of the following sections. I do not take this view. In my opinion, with regard to summary procedure, the Code contemplates the possibility of an action within an action. An application made to a Court in the course of, and incidental to, an action in summary procedure is, in my opinion, regarded by the Code as itself being an action. Sections 375 and 390, I think, support this view. I hold, therefore, that the proceeding was an action.

The second question is whether the order of this Court setting aside the order of the District Court was a final judgment. It seems to me very difficult to consider our judgment as an interlocutory judgment. It was a judgment which finally disposed of the case between the parties to the proceedings, that is to say, the purchaser and the execution-creditor. I cannot help being greatly impressed by the remarks of the Privy Council in a case cited to us by Mr. Pereira (*Krishnan Pershand Singh v. Moti Chand*[1]). On page 648 it is observed by Their Lordships that appeals of this nature have frequently been heard by that Board in times past, and they also observed that no reason can be given why orders of so important a character which deal finally with the rights of parties should be excluded from the privilege of an appeal. These words, it seems to me, are very forcible words in the present case. It appears to me, therefore, that the order is a final order.

There is another point which I should mention and to which I have not at present referred. It is contended that the purchaser, who is the respondent to these proceedings, was not a party to the action. It is pointed out that section 4 of Ordinance No. 31 of 1909 only concedes the right of appeal to parties to suits or actions. Mr. Hayley contends that this must mean only parties to the original action. To this point I think there is more than one answer. In the first place, supposing one of the parties to the original action institutes a proceeding against such a person as the purchaser and brings him into the action for the purpose of determining a claim against him, then it seems to me that such a purchaser may well be regarded as being a party to the original action. That has been expressly determined by a judgment of this Court, namely, *Fernando v. Fernando*,[2] where Lascelles A.C.J.

[1] *(1913) 40 Cal. 635.*

[2] *(1906) 9 N. L. R. 129.*

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said: "Any person who is prejudicially affected by a judgment or order of this Court is in my opinion a party to the action for the purpose of appealing to the Privy Council."

Mr. Hayley has pointed out that we had on previous occasions ruled that it is not possible for a person to be made a party after judgment. That principle, I think, applies to cases where it is sought to make a person a party for the purpose of dealing with the original claim. It has no application, I think, to a person who is added as a party for the purpose of determining a question incidentally arising in the execution. But even supposing this view is not upheld, there is another way of regarding the matter, and that is that our Code contemplates, as I have already said, an action within an action, and the parties to proceedings so regarded are parties to an action.

This brings to me to what is the real question at issue in the appeal, namely, what is the manner in which the subject-matter of the appeal should be valued. What was being sold in the case was the land itself. The Civil Procedure Code contains in form No. 56 a form which states precisely what it is that the Fiscal conveys. It purports to convey the land seized. It is quite true that in effect he conveys nothing more than the interests of the execution-debtor. But what is sold is, in fact, the land. Now that purchaser has bought that land. The execution-creditor declared that that land was the property of his execution-debtor and the purchaser bought it on that footing. The execution-creditor now seeks to take away from the purchaser the land which he claims to have bought. What is the extent of his prejudice if this claim is allowed as it was allowed by this Court. In my opinion the only possible measure of the value for the purpose of this appeal is the actual value of the land sold.

It appears to be contended that in determining this question we must not consider that actual value, but the value of the land in the circumstances in which it was sold and with regard to the person who bought it. I am quite unable to take this view. It would be quite impossible for a Court in our position in determining a question of this kind to attempt to value such a speculative matter as the actual title of the judgment-debtor to the land. Where the judgment-creditors cause land to be seized and sold as property of their debtors, I think any subsequent proceeding in relation to the execution must proceed upon that footing. Mr. Hayley suggests this point of view. He says that in his hands the property might be worth a lakh of rupees, because he would be able to bring a Paulian action to get the conveyance to the execution-debtor's son set aside, whereas the purchaser is not in this position. I doubt this. A Paulian action surely implies that the property has passed from the debtor. In any case, I think, it is impossible to go into considerations of that sort. The only practical way of dealing with the

question of value is to regard the appeal as involving a question respecting the actual concrete land itself. As I read paragraph (*a*) of section 1, what it declares is that an appeal lies as of right, where it involves some question respecting property of the value of Rs. 5,000 or upwards. It seems agreed that the value of the actual property is about Rs. 100,000. It seems to me, therefore, that the purchaser is entitled to conditional leave to appeal, and that the application must be allowed, with costs.

ENNIS J.—

In my opinion this application should be refused. The value of the property is not such, in my opinion, as to give a right of appeal under rule 1 in the schedule to the Ordinance No. 31 of 1919. The applicant in this case is the purchaser at an execution sale and he bought all that the creditor could seize under section 218 of the Civil Procedure Code and under the Fiscal's sale, namely, the right, title, and interest of the judgment-debtor in the land. The question then arises whether the second part of rule 1 is such as to make the total value of the property the basis of the valuation for the purpose of the appeal, or whether one should take the actual value of the right, title, and interest of the judgment-debtor which should be taken into account. It will be seen that rule 1 makes a distinction between a matter in dispute and questions affecting property. The second part of rule (*a*) seems to apply to abstract rights, *i.e.*, individual rights (*proprius*) which are peculiar to the individual. That these rights may bear a value very much less than the real value of the land is shown by the fact that the property in this case is heavily mortgaged. It is next shown by the fact that, at what purported to be a sale of the judgment-debtor's right, title, and interest in the land, a sum of Rs. 1,991 only was realized. It seems to me that the best criterion of the value of any given property is the sum it will fetch when it is sold in the market. Both the parties in this case seem to be in accord that there is some value in the particular rights sold, although it is difficult to see what rights were sold ; the land in question does not belong to the judgment-debtor, but to his son, and there is no admission by the son that he holds it in trust for or on behalf of the judgment-debtor, and it is only such that can be seized under section 218 of the Civil Procedure Code. The value to be ascertained for the purpose of the appeal is the value of the property to the party seeking to appeal. In this case there was a sale by auction, and it was set aside on the ground that it was not a public sale. The appellant contends that it should not have been set aside, and if, as he would contend, the sale was a public one, then the price obtained must be regarded as the value of the property, from his point of view, for the purpose of this appeal. For these reasons I am of opinion that the application should be refused.

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GARVIN A.J.—

I agree with my Lord the Chief Justice on all points. The parties to this proceeding are the execution-creditor and the purchaser at the execution sale. The dispute between them relates to the sale in execution. The execution-creditor is seeking to set aside the sale on the ground of material irregularity. In the lower Court the learned Judge held that the sale had been validly conducted. On appeal, however, the judgment was set aside. Now, what the Fiscal purported to sell, and what the purchaser claims to have purchased, was a certain land. It seems to me, therefore, that the dispute between the parties is one with respect to property, and I think both parties are agreed that the land in this case is worth substantially more than Rs. 5,000. It is true that any transfer by the Fiscal could only pass such rights as the judgment-debtor possessed, and it may be that in some future proceeding it may be established that the judgment-debtor had an interest which is less than Rs. 5,000 in value, and possibly that he had no saleable interest in the property. But it is impossible for us at this stage to determine whether or no the judgment-debtor has any interest, or to estimate the value of such interest as he may be entitled to.

Application allowed.