

1926

Present: Dalton S.P.J., Akbar and Poyser JJ.

A. G. A., KEGALLA v. WIJEWARDENE et al.

223—C. R. Kegalla, 7,513.

Mortgage decree—No directions in decree regarding credit to judgment-creditor—Validity of sales—Law before Ordinance No. 21 of 1927 came into operation.

Where property was sold under a mortgage decree before Ordinance No. 21 of 1927 and directions for the sale and the giving of credit to the judgment-creditor were not embodied in the decree itself,—

Held, that the sale was not invalid but merely voidable.

*Walker v. Mohideen*¹ explained.

CASE referred by Maartensz J. to a Bench of three Judges. The facts are stated in the reference as follows:—

This is a proceeding under the Land Acquisition Ordinance, which was referred to Court as no claimant appeared on the date fixed for inquiry into claims and determination of the value of the land.

The compensation awarded was Rs. 53. The first and second defendants each claimed the entire amount. The learned Commissioner held that the first defendant was entitled to the land acquired and second defendant appeals from the order.

The facts are not in dispute. The land acquired is part of a land called Tibbotugollewatta, which belonged to Abraham Silva, who, by bond No. 7,974, dated October 19, 1918, mortgaged it to one Juwanis Fernando to secure payment of a sum of Rs. 2,500; the bond was registered on October 29, and addresses for service of notice furnished to the Registrar as required by sections 643 and 644 of the Civil Procedure Code.

The bond was put in suit in case No. 8,075 of the District Court of Kegalla, and in execution of the decree dated August 12, 1927, the land was sold and purchased by the second defendant, who obtained conveyance No. 680 of July 3, 1929. The second defendant had been substituted plaintiff in the action before the sale in execution as the decree had been assigned to him by the mortgagee by deed No. 221 dated August 7, 1928

The first defendant claims the land acquired under a Fiscal's conveyance No. 6,612 (1 D 2) dated December 18, 1926, issued in pursuance of a sale held on September 6, 1923, in execution of a money decree entered in case No. 48,036 of the District Court of Colombo. The conveyance is expressly subject to a mortgage for Rs. 2,500. This conveyance was registered in the wrong folio and the registration is of no avail to the first defendant.

The validity of the sale to the second defendant was contested in the Court of Requests on the ground stated in issue 1 as follows:—

“Is deed No. 680 of 3-7-29, a valid instrument to convey title of the land to second defendant on the ground that no directions have been given in the decree as to giving of credit to the judgment-creditor, sale of the land by any auctioneer or to auctioneer Krishnapillai, or any authority to Krishnapillai to execute a conveyance in favour of the purchaser?”

The plaint in the mortgage action was filed on August 11, 1927, and the prayer of the plaint contained the necessary requests to enable the Court to enter a decree in accordance with the decision in the case of *Walker v. Mohideen* (*supra*) where it was held that “in an action to realize a mortgage under section 201 of the Civil Procedure Code, the Court has no authority to give special directions for the execution of the decree except in the decree itself and that the terms under which the mortgagee is allowed to bid for and purchase the property must be embodied in the decree.”

The directions given in the present case for the execution of the decree and permitting the plaintiff to bid for and purchase the property sold under the

¹ 26 N. L. R. 310.

commission issued to Mr. Krishnapillai would have been directions given in pursuance of the decree if a decree in terms of the prayer of the plaint had been entered by the Court. The first defendant has been able to raise a contest as to the validity owing to the carelessness of the clerk who drew up the decree for signature by the Judge.

The learned Commissioner has on the authority of *Walker v. Mohideen (supra)* held that the sale to the second defendant was invalid as the terms on which he was allowed to bid for and purchase the property was not embodied in the decree. *Walker v. Mohideen (supra)* is a decision of a Bench of two Judges and, whatever my own view may be I am bound by it. But the contest as to the validity of the sale was raised by the mortgagee in the mortgage action itself and before the sale was confirmed.

The appellant's contention is that the decision in the case of *Walker v. Mohideen (supra)* does not apply to the contest in this case. It was argued that the sale in execution of the mortgage decree is valid until it is set aside, and that the respondent who is bound by the decree, could only have the sale set aside by proceedings in the mortgage action itself by reason of the provisions of section 344 of the Civil Procedure Code.

The replies to this argument were (1) that the respondent was not a party to the mortgage action, (2) that even if he was, the provisions of section 344 were not applicable as there was in fact no decree in pursuance of which the sale could be held, there being no direction for a sale in the decree.

The questions for decision are (1) whether the respondent was a party to the mortgage action by reason of the provisions of section 644 of the Civil Procedure Code which enacts that, [I cite the relevant part] "every such mortgagee, lessee, or other incumbrancer whose deed shall not have been registered, or who shall not have furnished such address as aforesaid, shall be bound by the judgment in the action in all respects as fully as though he had been a party thereto", (2) whether the sale under the decree as entered in the mortgage action was valid.

H. V. Perera (with him *B. H. Aluwihare* and *J. L. M. Fernando*), for second defendant, appellant.

F. A. Tissaverasinghe (with him *N. Nadarajah* and *J. E. Alles*), for first defendant, respondent.

Cur. adv. vult.

January 30, 1936. DALTON S.P.J.—

This appeal, which originally came before Maartensz J., was reserved by him for consideration of a Bench of three Judges.

The facts are fully set out in his order. The questions reserved for decision of this Court, as stated by him, are :—

- (1) Whether the respondent was a party to the mortgage action by reason of the provisions of section 644 of the Civil Procedure Code which enacts that, citing the relevant part, "every such mortgagee, lessee, or other incumbrancer whose deed shall not have been registered, or who shall not have furnished such address as aforesaid, shall be bound by the judgment in the action in all respects as fully as though he had been a party thereto".
- (2) Whether the sale under the decree as entered in the mortgage action was valid.

The learned Judge reserved the matter for a Bench of three Judges, for the reason that in his opinion it might be necessary to reconsider the decision in the case of *Walker v. Mohideen*¹.

¹ 26 N. L. R. 310.

The first question reserved for this Court can be disposed of in a few words. The deed of the first defendant (respondent in the appeal), 1 D 2, which, be it noted, was expressly subject to the mortgage, was registered in the wrong folio, whilst no address for service was registered. It is conceded now that it was not necessary to make him a party to the mortgage action, and that he is bound by the decree. Mr. Tissaverasinghe, to use his own words, made a present of that to the appellant, and rested his case mainly upon the second ground, that the sale under the decree as entered in the mortgage action was invalid, and the second defendant's deed, 2 D 5, was void.

To support this argument he relied upon the decision of Bertram C.J. and Jayawardene A.J. in *Walker v. Mohideen (ubi supra)*. The validity of the deed 2 D 5 was contested in the Court of Requests (see issue 1), on the ground that no directions had been given in the decree as to the giving of credit to the judgment-creditor, for the sale of the land by any auctioneer or by auctioneer Krishnapillai, and no authority has been there given to Krishnapillai to execute a conveyance in favour of the purchaser. On the authority of the case relied upon, the terms upon which the mortgagee is allowed to bid for and purchase the property must be embodied in the decree, and the Court had no authority to give special directions for the execution of the decree, except in the decree itself. The law, as it has been construed in that judgment, has been changed by Ordinance No. 21 of 1927, but Mr. Perera for the appellant concedes that having regard to the facts in this case he cannot bring his case under the new Ordinance. He has, however, asked this Court to reconsider the decision in *Walker v. Mohideen (ubi supra)*, if we are against him on the second point reserved.

Mr. Tissaverasinghe for the respondent is, on the facts here, able to rely upon *Walker v. Mohideen (ubi supra)* as to the Court's having no authority to give the directions it did in this case subsequent to the decree. When we come, however, to consider the effect of the Court acting outside this power to give directions in the decree only, the case he relies upon no longer supports him. Bertram C.J. and Jayawardene A.J. held that the procedure followed in the sale dealt with by them was irregular, and that the sale was not invalid or void, but merely voidable. The correctness of this judgment relied upon has not been questioned on this point, in the argument before us. The learned Judges went on to consider whether they should, in the circumstances of that case, then set aside the sale, but did not do so, directing that on the plaintiff certifying satisfaction of the decree and cancelling a bond, the appeal be dismissed and the sale be confirmed.

This decision is then no authority to support Mr. Tissaverasinghe's argument that the sale under the mortgage decree was invalid and the deed void. There has been no attempt or request at any time to set it aside, and in the circumstances, relying on this authority, the answer to the second question reserved for our consideration is that the sale under the decree as entered in the mortgage action is not invalid. The answer to the first issue at the trial should accordingly have been that the deed (2 D 5) is not an invalid instrument to convey title to the land to the second defendant. Mr. Perera's argument on this point must therefore be upheld.

In these circumstances, it is not necessary for the purpose of this appeal to reconsider the decision in *Walker v. Mohideen* (*ubi supra*), that is, whether the learned Judges were correct in holding that at that time the Court had no authority to give directions for the execution of the decree save in the decree itself. It may be pointed out, however, that owing to the provisions of section 12 of the Mortgages Ordinance, 1927, time itself will make it inapplicable.

The appeal of the second defendant is allowed with costs here and below. He is entitled to the order he sought, subject, however, to the plaintiff's costs being paid out of the sum in deposit. The decree of the lower Court is set aside and a fresh decree must be entered as denoted above.

AKBAR J.—I agree.

POYSER J.—I agree.

Appeal allowed.

