1935

Present : **Koch J. and Soertsz A.J.**

HADJIAR *et al. v.* KUDDOOS *et el.*

37—D. C. Colombo, 47,499.

Fiscal's sale—Failure of Fiscal to demand payment of amount of writ from judgment-debtor—Substantial irregularity—Purchase by holder of money decree—No sanction of Court—Application to set aside sale—Civil Procedure Code, ss. 226, 272, 282, and 344.

The failure of the Fiscal to demand from the judgment-debtor the amount of the writ in terms of section 226 of the Civil Procedure Code is a substantial irregularity, which renders the sale held thereafter null and void.

Such a sale may be set aside under section 344 of the Civil Procedure Code.

The holder of a money decree is bound by the provisions of section 272 of the Civil Procedure Code which forbid the execution-creditor to buy the property sold in execution without the sanction of Court or in contravention of the terms imposed under the section.

De Silva v. Upasaka Appu [1] and *Chellappa v. Selvadurai* [2] followed.

APPEAL from an order of the District Judge of Colombo.

N. E. Weerasooria (with him *Chelvanayagam*), for plaintiffs, appellants.

H. V. Perera, for purchaser, respondent.

H. E. Garvin, for defendant, respondent.

Cur. adv. vult.

[1] *6 C. W. R. 227.*

[2] *15 N. L. R. 139.*

October 25, 1935. KOCH J.—

The plaintiff (appellants) in this case sued the defendant (first respondent) for a declaration of title to a house and grounds, presently bearing assessment No. 14, Hulftsdorp street, Colombo. On March 16, 1934, when the case was taken up for trial, the defendant raised the question of misjoinder which was upheld by the learned District Judge The plaintiff's counsel thereupon elected to confine the claim to the second plaintiff alone. There was an order as to costs also made in favour of the defendant. The defendant lost no time in pressing his advantage, and having issued writ for these costs, seized this very property and sold it. The purchaser at this sale was the second respondent. The price realized was only Rs. 100, although the property was valued by the plaintiffs for the purposes of their plaint at Rs. 4,000. Considering that the premises No. 14 consisted of a house and grounds and that the valuation put upon it was necessary for regulating the stamp duty payable on the pleadings, &c., it is not likely that any but a conservative value would have been imposed on the subject-matter of the action. It follows that there is every reason to regard the case as one of great hardship to the appellants.

The grievance of the appellants, who have made an application to set aside the sale, is that neither the Fiscal nor his deputy who was entrusted with the execution of the writ had repaired to the second plaintiff's dwelling house or place of residence and had required him to pay the amount of the writ, and that, in consequence of this omission, he knew nothing about the sale and only came to hear of it when the purchaser gave notice to the appellant's proctor of an application by him to Court to be substituted in room of the second appellant as the second plaintiff, and, that further, as the result of ignorance on his part, he was unable to apply under section 282 of the Civil Procedure Code within thirty days of the report of the sale to Court, to have the sale set aside on this ground as well as on the ground that the purchaser was a mere nominee and that the actual buyer was the first respondent who, acting in conspiracy with the buyer, procured the purchase in the name of the nominee.

Now, had such an application been made under this section in time, it is conceded that it was possible for both these points to have been raised by the appellants, although it is argued by the respondents' counsel that the contention on the first point must fail as section 226 of the Civil Procedure Code is not imperative in its terms but merely directory, and that the second point also cannot succeed as the sale not having been held in pursuance of a hypothecary decree, there was nothing to prevent the judgment-creditor from purchasing the property himself or through an agent without first obtaining the permission of the Court to do so. I regret I cannot agree with this argument on either of the points. The language in section 226 is, in my opinion, imperative in its nature, at any rate so far as the enjoinment on the Fiscal to proceed to the dwelling house of the debtor and there make demand of him. The section runs thus :—" Upon receiving the writ the Fiscal or his deputy *shall* within forty-eight hours after delivery to him of the same . . . . repair to his (debtor's) dwelling house or place of residence and there

require him, if present, to pay the amount of the writ". It may be that the requirement that the demand should be made within forty-eight hours is merely directory—*The King v. Migel Kangany*[1]. The fact that the demand is made seventy-two or more hours after such a writ is received and not within forty-eight hours, one can understand, should not necessarily invalidate proceedings held thereafter, but the necessity for the demand itself goes to the root of the interests of the judgment-debtor. He surely should be given an opportunity of paying and discharging the writ and this can only happen if he be apprised of the issue of that writ.

De Sampayo J. was of this opinion in *Andris Appu v. Kolande Asari et al.*[2] He there fully appreciated the necessity for such a demand in the first instance, although in his opinion if this was once done, it was not necessary that the demand should be repeated on a re-issue of the writ.

In de Silva v. Upasaka Appu[3] the same Judge was definitely of opinion that a demand should be made of the judgment-debtor and that the failure to do so amounted to an irregularity that was substantial. A sale held thereafter, he said, was liable to be set aside either under section 344 or under section 282 of the Civil Procedure Code. Schneider J. agreed.

These views are strengthened by local decisions under an analogous section of the Code, viz., section 347. That section provides that when there is no respondent named in an application for execution, when a year has elapsed between the date of the decree and such application, the Court shall cause the petition embodying the application to be served on the judgment-debtor. It was sought to be argued that this requirement was purely directory.

Schneider J. in *Perera v. Novishamy*[4] pointed out the necessity under this section for the insistence of even the right formula to be used. He stressed the necessity for a strict compliance with the requirements of that section.

In a later case *Kannangara v. Peries*[5] Drieberg J., basing his remarks on the decisions in *Rajunath Das v. Sundar Das*[6] and *Gopal Chander v. Gunamoni Dasi*[7] said "Notice is required in the interests of parties against whom execution is sought and the absence of notice makes the execution proceedings void as against them and not merely voidable".

I cannot help feeling that the intention of the legislature was to regard a demand by the Fiscal of payment of the sum stated in the decree an essential, and that it gave this intention its full effect by using the words "*shall require* him to pay the amount of the writ". If therefore the Fiscal has failed in this duty and this has been established to the satisfaction of the Court, I am of opinion that the sale held under the writ is null and void.

The learned District Judge in his order refusing the second appellant's application says that "it does not appear . . . . that the

[1] *4 C. W. R. 127.*
[2] *19 N. L. R. 225 at p. 233.*
[3] *6 C. W. R. 227.*
[4] *29 N. L. R. 242.*
[5] *30 N. L. R. 78 at p. 80.*
[6] *(1914) 42 Cal. 72.*
[7] *(1892) 20 Cal. 370.*

judgment-debtor was not to be found and therefore no demand could have been made from him". The learned Judge in saying so is no doubt purporting to act under the words "and there require him, if present" in the section.

There can be no doubt that the Court has to satisfy itself as to the presence of the debtor in the house at the time before it can be held that the Fiscal's failure to demand is an irregularity ; but the complaint of the second appellant is that although he brought out this point expressly in paragraph 5 (*b*) of his petition and affidavit, the learned District Judge has refused to allow him the opportunity of establishing his allegations and proceeded to decide the point as well as the other points raised on his behalf without recording any evidence whatsoever.

In connection with this matter it was further urged by the respondents that even if there was substance in the contention of the appellants, the point must fail as the default of the Fiscal amounted to a mere irregularity that could only be relieved by means of an application to set aside the sale under section 282. This has to be done, he argued, within thirty days of the report of the sale to Court and before confirmation, and the present application is therefore too late. I have already stated that the default of the Fiscal amounted to more than a mere irregularity for it rendered the sale null and void, and I also agree with de Sampayo J. in *de Silva v. Upasaka Appu* (*supra*) that relief can be claimed under section 344 and not necessarily under section 282.

In a recent case of importance *Anamally Chetty v. Sidambaram Chetty* [1], Garvin J. looked upon section 344 as a procedural provision which could be availed of by a party who seeks to set aside a sale, not on the ground of a material irregularity in the publishing and conducting of it, but on other grounds which refer to matters relating to the execution of a decree. He instances cases of fraud and also explains that, although a purchase by a decree holder in the name of a nominee may often be treated as an irregularity within the contemplation of section 282, there may be cases where such purchases may be made in circumstances which may amount to a fraud which vitiates the whole proceeding, from which the Court will give relief notwithstanding the sale was confirmed under section 282 in ignorance of the fraud. It becomes clear therefore that such fraud will depend on circumstances that have to be established by evidence. There is a sufficient disclosure of that fraud set out in paragraph 5 (*d*) of the petition and affidavit. But, as I have said before, the learned District Judge has not permitted the second plaintiff to establish it by evidence.

In view of the decision I have arrived at on the first point, it is hardly necessary to decide the second point, but as some argument was addressed to us regarding it, I may as well decide that point too.

I do not agree that it is only in respect of hypothecary decrees that permission to bid and buy under certain conditions must be obtained by the judgment-creditor. I think it is necessary to obtain this permission even in the case of a sale under a simple money decree. Section 272 of our Code sets out the requirements thus :—" A holder of a

[1] *33 N. L. R. 277.*

decree in execution of which property is sold may, with the previous sanction of and subject to such terms as to credit being given him by the Fiscal and otherwise as may be imposed by the Court, bid for or purchase the property". Does this section only refer to the necessity for such an application, if credit to be given him is desired by the judgment-creditor ?

The implications of this section came up for consideration in the case of *Chellappa v. Selvadurai*[1], and Lascelles C.J. there stated "I am clearly of opinion that section 272 of the Civil Procedure Code must be construed to mean what it says, namely, that the decree holder may only bid for and purchase the property with the previous sanction of the Court and subject to such terms as the Court may impose".

Wood Renton J. in his judgment in the same case said that the meaning of section 272 did not present to his mind any difficulty. He was unable to agree with Lawrie J. in *Silva v. Uparis*[2] that this section did not expressly forbid an execution-creditor from purchasing without the sanction of the Court. He could not see how the Roman-Dutch law or the practice prior to the enactment of the Civil Procedure Code could help. He emphasized that his concern was only with the language adopted in the section and that it was, in his opinion, entirely unambiguous. He decided that the meaning of the enactment was that the holder of a decree in execution although merely for money can only bid for or purchase property sold under that decree with the previous sanction of the Court, and that the Court in granting such sanction could subject the decree holder to conditions as to credit or otherwise as it deemed fit.

This judgment has met with approval in the case of *Weeraman v. de Silva*[3]. De Sampayo J. there stated that it would be an evasion of section 272 for an execution-creditor to purchase at an execution sale *either* without the sanction of the Court *or* in contravention of the terms imposed by the Court, whether he does so himself or through an agent. It is true that he felt in this case that if the application was made under section 282 and the Court was considering it under that section, such an application would be out of order if made after the confirmation of the sale. But in view of this learned Judge's previous opinion and the decision in *Anamally Chetty v. Sidambaram Chetty* (*supra*), I have little doubt that the application may rightly be made in these circumstances and considered under section 344.

The case will have to go back for the reception of evidence on the points raised by the appellant's counsel in the District Court. The order of the learned District Judge will be set aside and the case remitted for that purpose. The appellants will be entitled to the costs of appeal. The costs already incurred in the District Court and the further costs will abide the result of the inquiry.

SOERTSZ A.J.—I agree.

Set aside.

[1] *15 N. L. R. 139.*

[2] *(1894) 3 C. L. R. 75.*

[3] *22 N. L. R. 107.*