

1939

*Present : Hearne and de Kretser JJ.*THE FISCAL (C.P.) *v.* NALLIAPPA CHETTIAR.

173—D. C. (Inty.) Kandy, 43,957.

Fiscal's fees and poundage—Sale of mortgaged property—Mortgagee given permission to purchase—Subject to condition of full satisfaction of his claim—Levy of fees and poundage.

Where a mortgagee was given permission to bid for and purchase the mortgaged property subject to the condition that "in the event of his becoming the purchaser thereof which shall be for not less than his claim and interest or in full satisfaction of his claim and interest he shall be given credit to the extent of his claim and costs",—

Held, that the value of the property sold for the purpose of levying fees and poundage should be the amount of the claim and interest.

Held, further, that the plaintiff's remedy was by way of separate action and not by application under section 344 of the Civil Procedure Code.

A PPEAL from an order of the District Judge of Kandy.

E. F. N. Gratiaen, for the plaintiff (Fiscal, Central Province).

N. Nadarajah, for the plaintiff, respondent.

S. J. C. Schokman, C.C., on behalf of the Attorney-General as *amicus curiae*.

November 23, 1939. HEARNE J.—

The mortgagee (judgment-creditor) had been given permission to bid for and purchase the mortgaged property subject to the condition that "in the event of his becoming the purchaser thereof which shall be for not less than his claim and interest or in full satisfaction of his claim and interest he shall be given credit to the extent of his claim and costs".

The highest bid at the auction sale was that of the mortgagee, viz., Rs. 49,500. The amount due to him in the suit was Rs. 99,827. The point in the appeal is whether the value of the property sold, for the purpose of levying fees and poundage, is Rs. 49,500 or Rs. 99,827.

The value of a property is the price which a purchaser pays for it when sold. What was the price paid by the mortgagee? It shall not, according to the condition imposed, be less than Rs. 99,827 or it shall be for a sum which satisfies the full claim and interest of the mortgagee. In other words it may be more than Rs. 99,827 if it was necessary for him to bid so high, or if it was not necessary to go up to Rs. 99,827, it must be that sum. Less it cannot be. The wording of the condition is unhappy but this is the sense I make of it.

In my opinion fees and poundage should be levied on Rs. 99,827.

I also think the plaintiff-respondent's remedy, if any, was not by motion in the lower Court but by separate action.

I would allow the appeal with costs.

DE KRETZER J.—

I agree that the appeal should be allowed with costs. I prefer to rest my decision on the second ground taken by my brother. In my opinion section 344 of the Civil Procedure has no application to the circumstances disclosed in this case. This does not mean that I disagree on the first point.

Appeal allowed.

