

Present : De Sampayo J. and Garvin A.J.

1924.

FERNANDO *et al.* v. RODRIGO.

35—D. C. (Inty.) Colombo, 2,752.

Partition Ordinance—Sale—Minute irregularities do not invalidate sale.

Minute irregularities were held not to invalidate the sale under the Partition Ordinance.

A sale under the Partition Ordinance was advertised in the papers for six weeks, but posters were posted only three weeks before the sale. Handbills were not distributed contrary to the directions of the Court.

Held, that the irregularities did not invalidate the sale.

THIS action was one under the Partition Ordinance. The Court ordered the property in question to be sold, and a commission was issued to Mr. Wickremesinghe, licensed auctioneer. Mr. Wickremesinghe filed his report on April 23, 1923, and stated that as there was no bid among the co-owners, the property was immediately afterwards put up for sale among the public, and realized a sum of Rs. 2,000.

The petitioner objected that the sale was irregular, because it was held after the time for the return of the commission had expired. The commission was issued on March 1, 1923, and required the commissioner to bring the proceeds of sale into Court on or before April 18, 1923. On April 19, 1923, the commissioner moved that the date of the commission be extended to April 30, 1923. It was contended that the commission having expired on the 18th could not be extended by the order made on the 19th, and that any application for extension should have been made before April 18. The other ground of objection was that the sale had not been advertised as ordered by the Court.

On this point the contention was that the Court had approved of the advertisement of the sale by the fixing of posters and the distribution of handbills, that section 8 of Ordinance No. 10 of 1863 required the commissioner to give not less than six weeks' notice of the sale in such manner as the Court shall direct, and that as a result the sale should have been advertised by posters and handbills for a period of six weeks.

The District Judge held that the posters were posted within three weeks of the sale, but that handbills were not distributed. He further held that in view of this irregularity it was not necessary to consider the question whether the extension of time was irregular. He set aside the sale. The purchaser appealed.

1924.
 Fernando
 v. Rodrigo

H. J. C. Pereira, K.C. (with him *A. L. Jayasuriya*), for fourteenth respondent, appellant.

H. V. Perera, for petitioners, respondents.

Cur adv. vult.

May 26, 1924. DE SAMPAYO J.—

In this case we have to consider the regularity of a sale under the Partition Ordinance. Commission was issued to effect the sale to one L. A. Wickremesinghe. The sale was carried out, and the matter of confirming the sale or setting it aside came before the District Judge. Of all the parties to the action only the second defendant, Abraham Fernando, objected to the sale, and applied that it be cancelled. All the other parties, of whom there were seven or eight, either tacitly acquiesced in the sale or did not actively take steps to have the sale set aside. The chief ground on which the objection was upheld by the District Judge was that handbills containing notice of the sale had not been distributed by the commissioner. There were certain other points which he thought not necessary to decide, which, however, have been pressed before us and which will be considered in due course. On the question of handbills the point is whether the Court had given directions that the sale should be advertised by means of handbills among other forms of advertisement. The Ordinance by section 8 enacts that the commissioner shall give notice of the sale in such manner as the Court shall direct. In the present case the commissioner, after he received the commission, submitted to the Court a document which, for convenience sake, I will call the motion paper, in which he stated the valuation that he made of the property, the total figure stated being Rs. 7,500. Then comes the following passage :—

“ I file conditions of sale marked A and B and draft notice of sale marked C, and move that the same may be approved.”

Against this portion of the motion we find the word “ approved ” written in the margin by the District Judge and initialled by him. The paper I referred to continues “ the sale will be advertised in the *Daily News*, *Daily Mail*, and *Morning Leader*, and by affixing posters and distribution of handbills.”

The argument is that the effect of this document, as regards the form of advertisement, is that the Court directed that not only the sale shall be advertised in the newspapers mentioned and by means of posters, but it shall be advertised by the distribution of handbills. The District Judge, as a matter of fact, on the evidence has held that no handbills were distributed by the commissioner, but that itself is not a sufficient ground for setting aside the sale, but it must be shown that the Court gave the direction that the advertisement shall take the form of distribution of handbills. As I have already stated the Court's approval was asked and given

as regards the conditions of sale and form of notice, but the Court was not asked to give, nor did the Court profess to give, directions as regards the rest of the matters, namely, advertisement, &c. This is made clearer by reference to the journal which has a record to this effect: "Mr. Wickremesinghe" (i.e., the commissioner) "files conditions of sale marked A and B and draft notice of sale marked C for approval," and the District Judge gave his approval. Consequently, so far as the order of Court on the commissioner's motion is concerned, there was no direction given that the sale shall be advertised by means of handbills. Mr. H. V. Perera, for the respondents, argues that in another way the Court's direction to that effect may be gathered. For instance, in the conditions of sale already referred to, there is a paragraph to the effect that the property will be put up by auction for sale at the spot at 5 P.M. on April 20, 1923, "after previous advertisement." Mr. Perera argues that the expression "after previous advertisement" referred to the last portion of the commissioner's motion paper containing his intention to advertise the sale in a certain way and by distribution of handbills. It is obvious that that expression does not refer to that portion of the motion, and does not constitute a direction of the Court as contemplated by the Partition Ordinance. I may note that the conditions of sale are on a printed form, evidently one out of a stock kept by the commissioner for general purposes of sales of lands and not for sales under the Partition Ordinance, much less to this particular sale, and it is also not unreasonable to say that "previous advertisement" referred to is such advertisement as the auctioneer or commissioner will actually publish according to his discretion. It has been found, as a fact, that the commissioner did advertise the sale in the three newspapers and also by means of posters. The only omission was as regards the handbills. Here I may usefully cite a passage from the judgment of the Chief Justice in *Tilakasekera v. Misi Nona*.¹ The Chief Justice there observed that in sales under the Partition Ordinance it is always possible to point to some minute irregularity. If such minute irregularities were held to be fatal, few of such sales would survive criticism. It is clear to me that this omission to distribute handbills, even if a direction was given by the Court, was of the kind of irregularity contemplated in the passage I have quoted. I think we ought to hold, in the first place, that the Court gave no directions as contemplated by the Partition Ordinance, and, therefore, none was violated by the commissioner. The only ground on which the sale was set aside by the Court has no real foundation. Mr. H. V. Perera, however, appearing for the respondents, not only argued contrary, but sought to support the order of the District Judge on two other points, one of which is that while the Ordinance requires that notice of sale shall be given six weeks before the date of sale, in the present

1924.

DE SAMPAYO
J.Fernando
v. Rodrigo¹ C. W. R. 65.

1924.

DE SAMPAYO
J.*Fernando
v. Rodrigo*

case such period of notice had not been given. The fact is that the advertisements in the newspapers were for a period of six weeks, but the commissioner admitted as regards the posters that he issued them only just three weeks before the date of the sale. The Ordinance does not say that all the forms of notice of sale shall be for six weeks. As I have already remarked, even if posters were a part of the directions of the Court and were not issued six weeks before the date of the sale, the irregularity, if any, is so slight that the Court will not make that a ground on which to set aside the sale.

The next point urged on behalf of the respondents is that the original authority given to the commissioner was irregularly extended to a further date. Commission was issued on March 1, and did not limit the period as to the time of sale, but only directed the commissioner to bring the proceeds of sale within a certain time. It has been assumed on behalf of the respondents that the time referred to there is the limit of the time of the commission itself, and on that footing it is argued that the extension which was made after that date was of no avail, and that the commissioner had no authority to carry out the sale at all. Now, looking at the commission itself, the idea to fix a limit of time to carry out the sale is not borne out. This document may not be perfect in form, but what it does say is that the commissioner shall bring the proceeds of sale within a week of the sale, "or on or about April 18, 1923." The extension, in fact, was made on April 19 to April 30. Now the document does not show that the Court limited the commissioner's authority as regards the time of sale to April 18. It only directed him to bring the money into Court within that time if the sale had taken place before that date. After all, April 18, is not the decisive date. That part of the commission authorized the commissioner to bring the money into Court within a week after the date of sale, whatever date it might have been, or on or before April 18, so that there was an alternative. It does not make the extension on the 19th invalid by reason of a limit of time being placed beforehand. So, I think, even if the District Judge had considered these two points, he would very rightly have refused to act on them and decide the question of validity of sale for the reasons so given.

I think the appeal is entitled to succeed, and I would set aside the order under appeal, and direct that the District Judge should confirm the sale as reported by the commissioner.

The respondents should pay the costs of the appeal.

GARVIN A.J.—I agree.

Set aside.