Present : Bertram C.J. and De Sampayo J.

1921.

KOELMAN *v.* AMARASEKERE *et al.*

123—D. C. Colombo, 51,453.

Fiscal's sale—Material irregularity—Misdescription—Sale for a small price—Substantial injury—Is direct evidence necessary to connect injury with irregularity ?

To set aside a Fiscal's sale on the ground of material irregularity under section 282 of the Civil Procedure Code, it is not necessary that in all cases there should be direct evidence of the connection between the irregularity and the injury. Where the injury appears to be one which may be reasonably and logically inferred to be the natural consequence of the irregularity, the connection need not be further established by "direct evidence."

It is only in cases where there is no such reasonable connection between the irregularity and the injury that the necessity for direct evidence is insisted upon.

THE facts appear from the judgment.

A. St. V. Jayawardene, K.C. (with him *Weerasinghe*), for appellant.

H. J. C. Pereira, K.C. (with him *H. V. Perera*), for respondent.

November 18, 1921. BERTRAM C.J.—

This is an appeal against an order of the Colombo District Court setting aside a Fiscal's sale on the ground of a "material irregularity" in the conduct of the sale which the learned District Judge held to have caused "substantial injury" in terms of section 282 of the Civil Procedure Code.

The alleged material irregularity was a misdescription of the property to be sold. The property was advantageously situated close to a railway station. It comprised an old Walauwa and three acres of land, but the extent was, in fact, described as being only 1½ acre. The "substantial injury" was that it was sold much below its real value. It was valued in the inventory at Rs. 9,000, and by

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the Fiscal at Rs. 5,000, and it actually fetched Rs. 1,100. Evidence was led to prove that properties in the immediate vicinity has recently been sold at a rate altogether in excess of that realized at the sale.

There was no positive evidence connecting the misdescription with the low price realized, but the learned Judge held that the low price fetched might be inferred to be in consequence of this and another alleged irregularity not necessary to discuss, and set aside the sale.

Mr. A. St. V. Jayawardene, for the appellant, contends that it was not competent for the learned Judge to do so upon the evidence; that not only must the irregularity and the injury both be proved, but that there must be further "direct evidence" connecting the one with the other. The evidence he seemed to contemplate was evidence by persons present at the sale testifying to the effect that they would have bid up to a higher price if they had realized the full extent of the property. Mr. Jayawardene relied upon three Privy Council decisions in Indian cases and also upon two decisions in our own Court, in which these Indian cases have to a certain extent been followed.

There is no doubt that in many Indian cases emphasis has been laid upon the necessity of connecting the irregularity with the injury, and in certain cases it has been said that that evidence must be "direct evidence." This proposition is based upon the terms of section 282 of the Civil Procedure Code, 1889, which says: "No sale shall be set aside on the ground of irregularity, unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." The necessity that the evidence adduced must be evidence of a particular character, that is to say, that it must not be inferential or presumptive, but "direct," does not appear to me justified by the terms of the section. The facts of the Indian cases must, therefore, be examined. If this is done it will be found that it is nowhere declared that where the injury appears to be one which may be reasonably and logically inferred to be the natural consequence of the irregularity, the connection must be further established by "direct evidence." It is only in cases where there is no such reasonable connection between the irregularity and the injury that the necessity for "direct evidence" is insisted upon.

In the first of these cases (*Macnaghten v. Pershad Singh* [1]), the judgment demonstrated that in the circumstances of the case the inadequacy of the price could not reasonably be inferred to be the result of the irregularity. In the second of these cases (*Arunachellam v. Arunachellam* [2]), there was no actual evidence of any substantial damage. It was merely assumed that the property sold for less than its value in consequence of a misdescription.

[1] *(1882) 9 Cal. 656.*

[2] *(1888) 12 Mad. 19.*

In the third of these cases (*Razul Khan v. Hussain* [1]), the judgment of the Privy Council, while observing that the section clearly contemplates " direct evidence " on the subject, and that there was no such evidence, expressed the opinion that " it would be extremely improbable that injury could have happened from the non-compliance with the strict letter of section 290." None of these cases, therefore, can be relied upon as an authority for Mr. Jayawardene's proposition. The phrase " direct evidence " only occurs in one of them (*Razul Khan v. Hussain* [1]), and there it was used *obiter*. On the other hand, there is another Privy Council decision of a later date (*Saadatmand Khan v. Phul Kuar* [2]), in which it is true these previous cases are not discussed, but in which the Judicial Committee appear to have considered itself justified, without anything in the nature of " direct evidence," in connecting the irregularity with the injury simply by a process of logical reasoning. Lord Hobhouse in delivering the judgment observed: " It is, indeed, something more than the kind of irregularity which is commonly alleged, for it is a misstatement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however, it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices or from bidding at all." It is quite true that in India an impression does seem to have prevailed that the Privy Council has declared that in all cases " direct evidence " of the connection between the irregularity and the injury must be adduced (see *Jagan Nath v. Prasad* [3]). But even in that case there was no necessarily logical connection between the irregularity and the damage, and moreover this interpretation of the Privy Council decisions has by no means been universally accepted. It is observed in *Woodroffe & Amir Ali's* " *Civil Procedure in British India (1908)*," *at p. 985* : " Proof, of course, will be required, and this proof may, it is submitted, on a true construction of the Privy Council decisions, consist of ' direct ' evidence in the narrow sense stated, or of evidence of facts which warrant an inference that the irregularity was the cause of the inadequate price." There is, indeed, one Indian case which goes beyond this (*Venkatasubbaraya Chetti v. Zemindar of Karvetinagar* [4]), where it was said that " where a material irregularity is proved, and it is also proved that the price realized is much below the true value, then it may ordinarily be inferred that the low price was a consequence of the irregularity, even though the manner in which the irregularity produced the low price be not definitely made out." Our own Court has, however, treated this decision as not being authoritative (see *Chellappa v. Selvadurai* (*infra*)), and it appears to have been delivered without full consideration of the previous authorities. The learned District Judge in the present case thought

[1] (*1893*) *21 Cal. 66.*
[2] (*1898*) *20 All. 412.*
[3] (*1895*) *18 All. 37.*
[4] (*1896*) *20 Mad. 159.*

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himself justified in following this case, but in my opinion it is a judgment which it is safer to treat as going beyond established principles, and as not to be followed in our Courts.

So much for the Indian cases. With regard to our own authorities, they are three in number: *Silva v. Dias*,[1] *Chellappa v. Selvadurai*,[2] and *Cassim v. Andris*.[3] The earlier cases may be disregarded. In the first of these cases (*Silva v. Dias* (*supra*)), Hutchinson C.J. did not adopt Mr. Jayawardene's proposition. He held that in the circumstances of the case the lowness of the price realized could not be reasonably connected with the irregularity. "It may be a reasonable inference in some cases, but not in others; we must look at the nature of the property and the nature of the irregularity and all the circumstances." He said nothing about "direct evidence." Wood Renton J., on the other hand, adopted what was apparently supposed to be the effect of the Indian decisions as to "direct evidence," and with unflinching logic carried that principle to its full conclusion. "The causal relation between the irregularity and the sale of the property at an undervalue may, no doubt, be a reasonable inference from the facts of the case, but the question we have to decide is whether it is open to the District Judge to draw that inference in the absence of any direct evidence connecting the two." This must be taken as the personal opinion of the learned Judge, and not part of the judgment of the Court. In *Chellappa v. Selvadurai* (*supra*), which purported to follow that case, the irregularity alleged was that there was no publication of the sale in a certain village, but there was obviously no necessary connection between the inadequate price and the failure to publish the sale in this village, in the absence of evidence that there were probable bidders in this village. The case, therefore, in spite of the grounds on which it proceeded, cannot be considered an authority as to the necessity of "direct evidence" in all cases. *Cassim v. Andris* (*supra*) is a definite decision in the other direction. It is the decision of a single Judge, but of a Judge to whose authority in such matters weight is to be attached. Pereira J. observes: "No doubt it has been held that such a connection should be affirmatively established, but there is no reason why it may not be established by means of presumptions permissible under section 114 of the Evidence Ordinance as effectually as it may be by direct evidence." It does not appear to me, therefore, that our own Court has anywhere definitely decided that "direct evidence" connecting the irregularity with the injury must in all cases be adduced. I prefer to adopt the principle enunciated by Pereira J. With regard to the application of that principle to the present case, the price realized was so low and the misdescription was so considerable that, in view of the situation of the property, it seems to me that the learned Judge may justifiably have concluded that inadequacy of price was a

[1] (*1910*) *13 N. L. R. 125.* [2] (*1912*) *15 N. L. R. 139.*
[3] (*1913*) *17 N. L. R. 144.*

consequence of the misdescription. It is true that his mind appears also to have been influenced by another alleged irregularity which does not seem to me to have been fully made out, and also by the supposition that there was collusion between the purchaser and the judgment-debtor, who is in this case the administrator of an estate. This collusion can hardly be considered to have been established, and even if it were established, it would not be relevant to the present question. I think, however, that the connection between the inadequacy of the price and the irregularity may be considered as reasonably established by the circumstances of the case.

One further point is taken which need not be fully discussed, and, that is, that as the decree in the present case was against the administrator, the applicant who intervenes as next friend of one of the minor heirs had no *locus standi* for the purpose. This objection is sufficiently met by the case of *Caruppen Chetty v. Habibu*[1] cited by Mr. H. J. C. Pereira. For the reasons given I would dismiss the appeal, with costs.

DE SAMPAYO J.—I am of the same opinion.

Appeal dismissed.