

1969 *Present*: Sirimane, J., and de Kretser, J.

V. T. JOSEPH and another, Appellants, and A. J. THIRUCHELVAM
and another, Respondents

S.C. 57/1967 (Inty.)—D.C. Jaffna, 4885/MB

*Mortgage—Hypothecary sale—Conditions of sale—Whether they can be varied after sale
has taken place—Mortgage Act (Cap. 59), ss. 50 (3), 50 (4) (d), 61—Civil
Procedure Code, ss. 260 to 262.*

Where a hypothecary sale of mortgaged property has already taken place, subject to the conditions of sale prescribed by the Court, the provisions of section 50 (4) (d) of the Mortgage Act debar the Court from varying the conditions of sale at the instance of the purchaser, except with the consent of all the parties who would be affected by such variation.

APPEAL from a judgment of the District Court, Jaffna.

S. Sharvananda, with *M. A. M. Baki* and *M. Waniappa*, for the 7th and the 8th respondents-appellants.

G. Ranganathan, Q.C., with *K. Kanag-Iswaran*, for the 3rd and the 4th defendants-respondents.

Cur. adv. vult.

October 11, 1969. SIRIMANE, J.—

This is an appeal by a purchaser from an order by the District Judge setting aside a mortgage sale.

According to the Conditions of Sale on which the property was put up for sale by public auction, 1/4th of the purchase price had to be deposited immediately after the sale, and the balance paid within one month. If this was not done, the purchaser had to forfeit the deposit, and the property had to be put up for re-sale.

These conditions were made known to the purchaser and all other bidders, and in addition the purchaser had also signed these conditions of sale.

After 30 days had elapsed, the 3rd and the 4th defendants (who are the respondents to this appeal) moved that the deposit be forfeited and the property put up for re-sale in accordance with the conditions referred to above. Though the 3rd and the 4th defendants had conveyed their rights in this property to the 8th defendant, and litigation had followed on this sale yet there was sufficient evidence to show that they (3rd and 4th defendants) were still vitally interested in the property.

Before the lapse of the 30 days, the purchaser had obtained an order enlarging the time for the payment of the balance purchase money, without notice to the 1st, 2nd, 3rd and 4th defendants who were the owners of the property mortgaged.

It was submitted for the purchaser that under section 50 (3) of the Mortgage Act, Chapter 89, the Court had power to alter the earlier directions given to the Fiscal.

Conditions of Sale are prescribed by the Court *before* a sale takes place, and there can be no doubt that by subsequent directions the Court may alter those conditions. But once a sale has taken place subject to the conditions so prescribed the purchaser is bound by those conditions.

Section 50 (4) (d) enacts that

“ Every person making a bid at the sale shall be bound by the Conditions of Sale prescribed by the Code under the preceding provisions of this section whether or not he signs an agreement to be bound thereby ; ”

After the sale has taken place, a condition can be altered by the Court only with the consent of all the parties affected by such alteration.

At the argument, Counsel for the purchaser conceded that if sections 260–262 of the Civil Procedure Code were applicable, the order setting aside the sale was correct. Section 260 provides for the deposit of 1/4th of

the purchase money, and section 261 for the payment of the balance within 30 days. Section 262 provides as follows :—

“ In default of payment within the period mentioned in the last preceding section, the deposit, after defraying the expenses of the sale, shall be forfeited to, and shall go in reduction of, the claim of the judgment-creditor, and the property shall be re-sold, and the defaulting purchaser shall forfeit all claims to the property and to any part of the same for which it may subsequently be sold. ”

(Condition 5 is in practically the same terms as this section).

It was argued that the trial Judge was in error when he referred to these sections of the Civil Procedure because they are not applicable to mortgage sales, as provided by section 61 of the Mortgage Act, Chapter 89.

But section 50 (4) (d) of that Act read with the Conditions of Sale has the same effect as section 262 of the Civil Procedure Code.

The case of *Zahan v. Fernando*¹ was decided under the provisions of the old Mortgage Ordinance 21 of 1927. The purchaser bought the property on the 14th of October, and paid the deposit. He brought in the balance purchase money on the 14th of November. At the highest he was late by a few hours, and the Court held that it would be inequitable to penalise the purchaser for the breach of a Condition of Sale which may be regarded as a mere technicality. Garvin, J. said,

“ I think that this is a case in which the Court is entitled in its discretion to accept the balance purchase money and direct the issue of the conveyance even if in law the purchaser is out of time by a few hours. ”

Under the Mortgage Ordinance of 1927 there was no section corresponding to section 50 (4) (d), and the Court appears to have been influenced by the fact that the objection to the confirmation of sale was very highly technical.

But in the later case of *Suleha Umma v. Nagoor Mohamadu*² it was held (in a partition sale) that the Court had no discretion to allow the money to be deposited after the time fixed had elapsed.

I think that this case sets out the better view. Once the purchaser buys, subject to conditions which are binding on him, the Court is left with no discretion “ to give vent to its own generous and good-natured impulses ” as Soeretsz, J. put it, and vary the conditions, except with the consent of all the parties who would be affected by such variation.

The appeal is dismissed with costs.

DE KRETSER, J.—I agree.

Appeal dismissed.

¹ (1931) 33 N. L. R. 279.

² (1945) 46 N. L. R. 415.