

Present : De Sampayo and Schneider JJ.

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GUNAWARDENE v. DIAS.

145—D. C. Galle, 472.

Insolvency—Sale of property belonging to estate of insolvent—Purchase under the belief that property was sold free of encumbrances—Belief induced by conduct of assignee's proctor—Sale set aside—Fraud—Misrepresentation.

The Court on the motion of the assignee's proctor issued a Commission to A to sell a property belonging to the estate of an insolvent. The steps taken by the assignee's proctor were such as to create the belief in would-be purchasers that the property was to be sold free of encumbrances. At the sale B bought the property in the belief it was sold free of encumbrances. Subsequently, the property was sold under mortgage decree. B applied to Court that the sale to him be not confirmed, and that the deposit be refunded to him. The District Judge refused the application on the ground that (1) B should have made the necessary inquiries before buying; and (2) that the assignee not being "an officer of the Court, the Court could not deal with the matter of the petition."

Held, that both grounds were wrong.

It does not lie in the mouth of the party, who by his conduct or representations misleads another, to say that the latter ought not to have acted on the belief induced by himself, and should have satisfied himself as to the truth by independent inquiries. The power of the Court to interfere with the sale and prevent injustice does not turn on the question whether or not the assignee is an officer of the Court.

"It would be disastrous, it would be shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this."

THE facts appear from the judgment.

H. J. C. Pereira, K.C. (with him *J. S. Jayawardene*), for purchaser, appellant.

A. St. V. Jayawardene, K.C. (with him *Keuneman*), for respondents.

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March 6, 1922. DE SAMPAYO J.—

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In this insolvency case a number of extraordinary steps taken by the assignee's proctor have created a curious situation from which the appellant requires to be rescued. In addition to the simple contract debts provable in insolvency, the insolvent appears to have incurred debts secured by mortgages of his immovable property. One of these mortgage creditors had put his bond in suit in D. C. Colombo, No. 53,153, and having obtained a decree had issued a writ to be executed by the Fiscal of Galle. Referring to this and other mortgage actions the assignee's proctor on May 13, 1921, submitted a long argumentative motion, and asked that the District Judge of Colombo be informed of these insolvency proceedings and be requested to stay sale under the writ, as the claim of the Colombo writ-holder would be paid by the assignee. The motion was allowed, and the District Judge of Colombo was communicated with accordingly. This involves the comfortable assumption that the execution proceedings in one Court could thus be controlled by another Court. It was, on May 30, 1921, followed by an order, on the application of the assignee's proctor, allowing the assignee to sell the lands belonging to the insolvent, it being stated by the proctor that "he had no objection to the secured creditors being given credit for the amounts due to them in the event of their purchasing at the sale." In view of what has since happened this minute is of importance. Notices to this effect would appear to have been issued to all the mortgagees. Then, on the application of the proctor, the Court on June 4, 1921, issued a commission to one Henry de Silva to carry out the sale. The Commissioner carried out the sale on conditions approved of by the Court, and at the sale the appellant became purchaser of two of the lands; and in terms of the conditions of sale he duly paid the one-tenth deposit which the Commissioner brought into Court. These two lands were properties that had been mortgaged to the decree-holder in the Colombo case, No. 53,153, and has been advertised for sale by him and were, in fact, subsequently, sold under the writ. The appellant finding himself in a most embarrassing position petitioned the Court, praying that the sale at the instance of the assignee be not confirmed, and that the same be cancelled and the amount of deposit be refunded to him. It is surprising that this petition was not consented to by the assignee or allowed by the Court. It is quite clear that the steps taken by the assignee's proctor, more specially the motions of May 13 and May 30, 1921, were such as to create the belief in would-be purchasers that the Commissioner appointed by the Court was to sell the property free of encumbrances. In the affidavit submitted in support of the petition, the appellant swore to his being under that belief, and in addition to that he swore that at the sale, before the bidding commenced, he was informed by the assignee and his

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proctor that the sale was being held to pay off the secured debts as well as the unsecured debts of the insolvent, and that the bid for the land in the full belief that he would be given a valid title free from encumbrances. These statements were never effectively denied, but, on the contrary, were practically admitted by the proctor who, as the District Judge says, gave his evidence very guardedly at the inquiry. The District Judge, however, refused the prayer of the petition on two grounds: (1) that the appellant should have made necessary inquiries before buying and satisfied himself further on the effect of the sale; and (2) the assignee not being "an officer of the Court," the Court could not deal with the matter of the petition and interfere with the sale. I do not think that either of these reasons is sound. It does not lie in the mouth of the party, who by his conduct or representations misleads another, to say that the latter ought not to have acted on the belief induced by himself, and should have satisfied himself as to the truth by independent inquiries. The power of the Court to interfere with the sale and prevent injustice does not turn on the question whether or not the assignee is an officer of the Court. As I have endeavoured to show, the Court had allowed itself to be moved by the assignee in matters in which neither the Court nor the assignee had any concern. Apart from the real position of the assignee, it is sufficient for the present purpose to note that not only did the Court make an order for the sale of the lands on the application of the assignee, but the auctioneer who carried out the sale acted on a commission issued to him by the Court. The sale was, therefore, a sale under the direction of the Court, and was reported to the Court by the Commissioner for confirmation, for which the conditions of sale approved of by the Court had provided. I do not say that the Court ought to have undertaken the sale instead of leaving the assignee to act under section 80 of the Insolvency Ordinance, or have acceded to the motion of the assignee's proctor that a commission be issued. I need only note that it did. In my opinion the Court had full control over the sale. In *Kala Mea v. Harperink*¹ where also the Court had refused to interfere, on the ground that the purchaser, though he bid under a misapprehension that the sale was to wipe off a mortgage, might, with ordinary diligence, have discovered the true state of affairs, the Privy Council said: "It has been laid down again and again that in sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud, or deceit, or misrepresentation is found in the conduct of its ministers. The Court, it is said, must, at any rate, not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and

¹ (1908) I. L. R. 36 Cal. 323.

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impair its usefulness. It would be disastrous, it would be shocking, if the Court were to enforce against a purchaser misled by its duly accredited agents a bargain so illusory and so unconscientious as this." These observations apply with great force to the circumstances of this case.

In my opinion the appeal should be allowed, with costs in both Courts to be paid by the assignee, and the sales in question should be cancelled, and the money paid by the appellant refunded to him.

SCHNEIDER J.—I agree.

Appeal allowed.

