

1914.

Present: De Sampayo A.J.

FERNANDO *v.* FERNANDO.

422—*C. B. Negombo, 21,444.*

Mortgage decree—Order to sell under s. 201, Civil Procedure Code—Sale must be carried out by person to whom it is addressed—Duty of Court to give directions as to due publication, &c.—Application to set aside sale—Civil Procedure Code, ss. 344 and 282.

A Fiscal to whom a writ of execution is issued may have it executed by his officers or may endorse it; but an order to sell under section 201 of the Civil Procedure Code is not a writ, and the sale in such a case must be carried out by the officer authorized to sell.

It is the duty of the Court to give directions as to the due publication of the sale, and to see that the sale is carried out under conditions of sale to be previously approved of by the Court.

Section 282 is applicable only to ordinary Fiscals' sales, and not sales of mortgaged property on special orders for sale^o under section 201.

The Supreme Court treated an application to set aside a sale as an application made under section 344, although it did not purport to have been made under that section.

THE facts appear sufficiently from the judgment.

1914.
Fernando v.
Fernando

C. H. Z. Fernando, for appellant.

Batuwantudawa, for respondent.

Cur. adv. vult.

December 10, 1914. DE SAMPAYO A.J.—

The plaintiff in this case obtained a mortgage decree against the defendant, and a special order under section 201 of the Civil Procedure Code was issued for the sale of the mortgaged property. The sale having been carried out, the defendant applied to Court by petition to set aside the sale on the ground that the property was worth Rs. 3,000 and the sale was not advertised in the *Gazette*. The Commissioner regarded the application as having been made under section 282 of the Civil Procedure Code, and as that section was not applicable to the present sale he dismissed the application. The Commissioner is no doubt right in holding that section 282 is applicable only to ordinary Fiscals' sales, and not to sales of mortgaged property on special orders for sale under section 201. But the defendant did not purport to base his application on section 282, though, perhaps, the ground of objection points to that conclusion. The point, however, is too technical, and I do not see any objection to the matter being dealt with under section 344, which has been held to be applicable to sales under a mortgage decree (*Perera v. Abeyrana*¹).

Though the application cannot be supported on the specific ground stated, there is I think a still more serious objection which strikes at the root of the matter. The mortgage decree directed that the property should be sold by the Fiscal, and by the "Fiscal," I take it, was meant the Fiscal of the Province. The actual order for sale issued was, however, addressed to "the Deputy Fiscal, Colombo," and was therefore not in accordance with the decree. Moreover, the official who acted in connection with the sale was not even the Deputy Fiscal, Colombo, but was the Deputy Fiscal, Negombo. Finally, the sale was not carried out even by the Deputy Fiscal, Negombo, but by the Fiscal Arachchi. A Fiscal to whom a writ of execution is issued may, of course, have it executed by his officers or may endorse it, but an order to sell under section 201 of the Civil Procedure Code is not a writ. These progressive irregularities render the sale wholly null and void, as having been effected without any authority and in contravention of the very decree of Court. The sale therefore cannot stand. Before disposing of this appeal, I should like to point out that in the case of a mortgage decree under section 201 it is the duty of the Court to give directions as to the due publication of the sale, and to see that the sale is carried out under conditions of sale to be previously approved of by the Court.

¹ (1912) 15 N. L. R. 414.

1914.

DE SAMPAYO
A.J.
Fernando v.
Fernando

I set aside the order appealed against, and order that the sale be set aside. The defendant-appellant will have the costs of this appeal, but there will be no costs of the proceedings in the Court below.

Set aside.

