

Present : Bertram C.J. and Garvin J.

PALANIAPPA CHETTY *v.* USUBU LEBBE.

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152—D. C. (Inty.) Colombo, 4,510.

Civil Procedure Code, ss. 282 and 344—Sale under mortgage decree—Trifling and technical irregularities—Application to set aside sale—Decree that Fiscal should sell—May a person holding a deputation from Fiscal sell ?

Section 282 of the Civil Procedure Code does not apply to a sale in execution of a mortgage decree.

Under the common law the only irregularities on which an adjudication at a bidding may be set aside are material irregularities; the omission of what is described as a formal solemnity does no harm.

Semble, a person holding a deputation from a Fiscal may conduct a sale in execution where the mortgage decree directs that the sale should be by the Fiscal—as what was meant was that the sale should be a Fiscal's sale in the ordinary sense of the word, and not that the sale should be by the Fiscal in person.

THE facts are set out in the judgment of the Acting Additional District Judge (K. Balasingham, Esq.):—

This is an application by a mortgage decree holder (plaintiff) to have the sale under the mortgage decree set aside. The land was valued by the defendant himself at Rs. 45,000, but was sold at the Fiscal's sale for Rs. 3,200. This by itself is no ground for setting aside the sale. Besides, the valuation at Rs. 45,000 is a gross exaggeration.

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The defendant with the consent of the plaintiff obtained an order to stay the sale in June last. The order was taken out of Court about July 4. The defendant showed it to the plaintiff, and said that he was going to Kegalle to have the sale stayed. The defendant says that he was unwell, and sent some one else with the order, and that that person reached Kegalle too late to deliver the order in time to stay the sale. The Deputy Fiscal had already left Kegalle for the place where the sale was to take place, which was 24 miles away from Kegalle. The sale was to take place on July 8, but the messenger was not sent with the order till the night of July 7. I am not disposed to believe this story of the defendant.

I hold that plaintiff was deceived by the defendant into the belief that the sale would be stayed. It is not true that the defendant was prevented by a series of accidents from getting the sale stayed in time. But the question for decision is: How far was the purchaser a party to this fraud? There is very little evidence to connect the purchaser with the fraud. The plaintiff's difficulty in establishing the purchaser's participation in the fraud is increased by the fact that the defendant himself asks for a cancellation of the sale. I am inclined to the opinion that this is all a pretence, and that defendant and the purchaser are acting in concert. It is very likely that the purchaser is only the agent of the defendant. But, as I said, there is very little evidence on which I can base these findings. The defendant and purchaser went together to the plaintiff and asked for the stay of sale, and spoke about this debt. They are men of the same village. The purchaser never bought a rubber estate or any estate before this. These are slender materials on which a finding of collusion can be based. But for whose benefit did the defendant fail to stay the sale. It cannot be for the benefit of any casual purchaser. This circumstance renders the collusion between the purchaser and the defendant probable.

In any event the plaintiff is in a position to rely on an irregularity in the order to sell issued to the Deputy Fiscal. The decree directs that the property should be sold by the Fiscal. The order to sell was issued as a matter of fact to the Deputy Fiscal of Kegalle. This is not in accordance with the decree. Mr. Justice De Sampayo in *Fernando v. Fernando*¹ would appear to hold that this irregularity renders the sale null and void. In view of the circumstances of this case, I do not hesitate to give effect to this highly technical objection. I do not think that the fact that the order to the Deputy Fiscal was written in the handwriting of the plaintiff's proctor's clerk, and on a form with the plaintiff's proctor's name printed on it, estops the plaintiff from raising this technical objection. I set aside the sale. Each party will bear his own costs.

Pereira, K.C. (with him *C. W. Perera*), for the purchaser, appellant:

Driberg, K.C. (with him *E. W. Jayawardene* and *Schokman*), for the plaintiff, respondent.

Mervyn Fonseka, for the defendant, respondent.

¹ (1914) 18 N. L. R. 380.

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The original application in this case was to set aside a sale in execution of a mortgage decree, on the ground of fraud or collusion between the defendant and the purchaser. The learned District Judge did not feel justified in basing his order on the ground of fraud or collusion, but, having examined the facts, preferred to set aside the sale of what he described as a highly technical ground, namely, that though the decree directed a sale by the Fiscal, the order of sale was, in fact, issued to one of the Fiscal's deputies. On this ground the learned District Judge has set aside the sale, and it is against that order that the purchaser appeals.

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Mr. Jayawardene, who appears for the respondent in the case, urges that, notwithstanding the ground on which the District Judge has based his action, he might be taken as finding that fraud or collusion in fact existed. The learned Judge does, indeed, express what can be regarded as little more than a suspicion that the defendant did in fact deceive the plaintiff in this way. The plaintiff at the request of the defendant had applied for an order staying the sale. That order was made. The defendant by arrangement took possession of this order, and was to deliver it to the Deputy Fiscal, and so to effect the stay of the sale. He did not in fact do this. He gives a number of excuses for his failure. The learned Judge suspects those excuses, but he does not feel himself justified in implicating the purchaser in the fraud. Now, the only possible fraud suggested in this case is one to which the defendant and the purchaser must have been parties. The suggestion is that the defendant really bought in the property himself at a ridiculously low figure through a dummy in the shape of the purchaser. The learned Judge cannot bring himself to find in fact that the purchaser was a party to this fraud, and, as he thus in effect acquits one of the necessary parties, his finding is, in effect, that there was no fraud. It is impossible for us to say that he ought to have found otherwise. The material is far too slender for such a course.

I come to the highly technical irregularity on which the learned Judge has based his order. With regard to that, I would observe, in the first place, that this was not the ground on which relief was originally asked for, and I question whether relief can be granted in such a manner unless the application is amended and the respondent has an opportunity of considering the facts and the law with a view to meeting it. In the second place, I would point out that, if there was any irregularity, the plaintiff himself was responsible for the irregularity, because his proctor drafted the order on a paper, stamped with his own name, and, in fact, procured the Court to issue an order for sale to the Deputy Fiscal. But with regard to the alleged irregularity itself, I confess that I

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question whether there was an irregularity at all. It is quite true that the decree directed that the sale should be conducted by the Fiscal. But what did that order mean? Had the learned Judge of the Court below in mind the gentleman actually discharging the functions of Fiscal in the Province of Sabaragamuwa? I do not think so. I am disposed to think that all that he meant was that the sale should be a Fiscal's sale in the ordinary sense of the word. That is to say, a sale conducted either by the Fiscal or any person who holds a deputation from him, and under the provisions of section 5 of the Fiscal's Ordinance was authorized to discharge his functions.

My brother has pointed out that this interpretation is confirmed by the conditions of sale which the Court authorized, and which refer in express terms to the Fiscal or Deputy Fiscal as the person conducting the sale. I observe, however, that in a judgment of my brother De Sampayo (*Fernando v. Fernando (supra)*), the opinion is expressed that a sale by a Deputy Fiscal, when the decree directs the sale by a Fiscal, is a departure from the order of the Court. I do not think it is necessary that we should decide this case on this ground. The matter will no doubt receive further consideration. I have indicated the view which as at present advised I am disposed to adopt.

But let us assume that there was an irregularity, a highly technical irregularity. What is the effect of that irregularity? It is conceded that section 344 applies to a question of this sort. See *Perera v. Abeyratna*¹ and also *Goonetilleka v. Goonetillaka*.² It is further conceded that section 282 does not apply to a sale in execution of a mortgage decree. See the case of *Fernando v. Fernando (supra)* to which I have referred. What then are the principles governing the question? They are the principles of the common law, and they apply whether the sale is an ordinary sale or a sale in execution of a mortgage decree. Section 282 in effect limits the principles of the common law in one particular, namely, by requiring that it must appear that there is some connection between an irregularity and the loss sustained. Our Code does not expressly declare that a sale may be set aside on the ground of irregularity. It leaves the principles of the common law as determining that question, subject to the limitation I have just mentioned.

Now, what is the effect of the judgment of my brother De Sampayo in *Fernando v. Fernando (Supra)*? Is it that any departure from the decree is necessarily fatal, however trifling and technical that departure may be? I cannot think so. I think the judgment in that case proceeded upon the facts, and the facts disclosed a progressive series of irregularities terminating in a sale by the Fiscal's Arachchi, a person who in no circumstances is entrusted with the powers of the Fiscal himself. The principles of the common

¹ (1912) 15 N. L. R. 414.² (1912) 15 N. L. R. 272.

law are stated in *Burge, 3rd ed., vol. II., 578.* It is there very clear that the only irregularities on which an adjudication at a bidding may be set aside are material irregularities, and that the omission of what is described as a formal solemnity does no harm. I think it is quite clear that on these principles, in order to entitle a Court to set aside a sale on the ground of an irregularity, it must appear that the irregularity was material. In this case, both from the expression used by the learned District Judge, namely, "a highly technical irregularity," and from the very facts of the case, it is clear that the irregularity was immaterial. I am of opinion that it was not one which justified the setting aside of the sale. In that view of the case, the appeal must be allowed, with costs, both here and in the Court below. There will be no order as to the defendant's costs.

GARVIN J.—I agree.

Set aside.

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