1917.

Present: Wood Renton C.J. and Shaw J.

UPARIS *v.* SUBASINGHE *et al.*

29—D. C. (Inty.) Galle, 11,573.

Fiscal's sale—Payment of money due under writ to judgment-creditor's proctor before sale—Payment communicated to Fiscal—Fiscal's letter authorizing stay of sale not received by officer who conducted the sale till after sale—Power of Fiscal to stay sale without order of Court—Civil Procedure Code, ss. 226, 342, 343.

A Fiscal has no legal power to stay a sale otherwise than upon an order of Court. He may adjourn the sale.

It is no doubt customary for Fiscals or their officers to stay sales upon the application of parties to proceedings, but they do so at their own risk. The safe course for a Fiscal to whom any such application is made is to adjourn the sale and report the matter to the Court itself.

A judgment-debtor moved to have a Fiscal's sale set aside, on the ground that he had satisfied the decree by full payment to the judgment-creditor's proctor two days before the sale took place, and that the fact of that payment had been duly communicated to the Fiscal with a request to stay the sale. It was only after the sale that the Fiscal's letter authorizing a stay of the sale was received by the Fiscal's officer who conducted the sale.

Held, that in the absence of fraud on the part of the purchaser the sale cannot be set aside.

THE facts are set out in the judgment.

E. W. Jayewardene, for purchaser, appellant.

Bawa, K.C., for plaintiff, respondent.

May 29, 1917. Wood Renton C.J.—

On July 8, 1916, three lots of land called Madangahawatta were sold by the Fiscal's officer in execution of a decree for *pro ratâ* costs due by the plaintiff and the fourteenth to the eighteenth defendants. On August 3, 1916, these parties filed petitions praying for an order to set aside the sale, on the grounds that they had satisfied the decree by full payment to the judgment-creditor's proctor two days before the sale took place, and that the fact of that payment had been duly communicated to the Fiscal, with a request to stay the sale. The purchaser of two of the lots in question consented to the sale being cancelled. The purchaser of the third lot showed cause against the application, and the learned District Judge, after hearing evidence, set the sale aside. He appeals against that order.

The ground of the District Judge's decision is that the appellant was fully aware that payment had been made, and, in view of the decisions of this Court *in Goonetilleke v. Goonetilleke* [1] and *Appuhamy v. Adrian*,[2] and *cp. Hamidu v. Kirihamy*,[3] there can be no doubt but that that ruling would be correct if the evidence showed conduct on the part of the appellant that could be regarded as equivalent to fraud. I do not think, however, that the facts of the present case are capable of supporting a finding to that effect. On July 6 the whole amount of the judgment-debt was paid to the execution-creditor's proctor. The appellant is the father of the execution-creditor, whose name, by an inexplicable error on the part of the Fiscal's Arachchi, was at first put down as that of the purchaser at the execution sale. This mistake was subsequently rectified by the substitution of the name of the real purchaser, the appellant himself. The appellant was a party to the partition proceedings in which the judgment-debt for *pro ratâ* costs was incurred. The proctor was not examined as a witness at the trial. These circumstances would no doubt point to the conclusion that the execution-creditor must have been aware of the fact of payment, and they might have constituted valuable corroboration of other evidence showing that the appellant also was aware that the judgment-debt had been satisfied. But the only other facts that can be relied upon for that purpose are the under-value at which the property was sold, namely Rs. 59, as compared with the alleged value of Rs. 2,000, and the circumstance that before the sale the judgment-debtors who were at the spot informed the Fiscal's Arachchi, in the appellant's presence, that the money had been paid, and that a letter staying the sale had been sent from the Fiscal's office. This evidence does not affirmatively prove that the appellant heard what the judgment-debtors said, although it is no doubt highly probable that he did so. It was only after the sale had been

[1] *(1912) 15 N. L. R. 272.*

[2] *(1914) 17 N. L. R. 392.*

[3] *(1916) 19 N. L. R. 215.*

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concluded that the judgment-debtor, by whom actually payment had been made, arrived with the Fiscal's letter authorizing a stay of the sale. Even if we assume that the appellant did hear the statement of the judgment-debtors to the Fiscal's Arachchi prior to the sale, it does not, in my opinion, necessarily result from that fact that he was aware that payment had been made. I do not think that the evidence, which I have just summarized, is sufficient to bring home fraud to the appellant within the meaning of the cases above mentioned.

The question then arises whether, in the absence of fraud, the sale can be set aside. To that question the answer must, in my opinion, be in the negative. The trend of judicial decisions in this Colony distinctly establishes the proposition which is supported by the language of sections 342 and 343 of the Civil Procedure Code, that a Fiscal has no legal power to stay a sale otherwise than upon an order of Court. He may adjourn the sale. It is no doubt customary (see *Saparamadu Appuhamy v. Appuhamy*[1]) for Fiscals or their officers to stay sales upon the application of parties to the proceedings, but they do so at their own risk. The safe course for a Fiscal to whom any such application is made is to adjourn the sale and report the matter to the Court itself. The case of *Silva v. Rawter*,[2] although it turned directly on the claim sections in the Civil Procedure Code, is, I think, an authority for the proposition that the Fiscal has no power to stay execution without an order of the Court, and it has been subsequently interpreted in that sense. See 436 C. R. Negombo, 19,074,[3] and 321 C. R. Matara, 7,386.[4] It appears to me that this is a reasonable construction of the law. It would be highly inconvenient if the right of Fiscals or their officers to stay a sale of their own authority were recognized. Section 226 of the Civil Procedure Code shows that, if payment is not made to the Fiscal or his officer by the judgment-debtor on the original demand before execution of the writ is proceeded with, the seizure and sale must follow so far as the Fiscal or his officer is concerned. The expression " by seizure, and, if necessary, by sale " in Form No. 43 in the schedule to the Civil Procedure Code cannot be taken as modifying the clear language of section 226. The direction in that section that the Fiscal shall " forthwith proceed to seize and sell " is peremptory, subject to the power of adjournment conferred by section 342.

On these grounds I would set aside the order under appeal, and direct judgment to be entered up confirming the sale. The appellant is entitled to his costs in the District Court and also of this appeal.

Shaw J.—I agree.

Set aside.

[1] *(1909) 2 S. C. D. 76.*
[2] *(1906) 10 N. L. R. 56.*
[3] *S. C. Min. Jan. 21, 1913.*
[4] *S. C. Min. Nov. 3, 1914.*