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Present: De Sampayo A.J.

APPUHAMY *et al.* *v.* ADIRIAN *et al.*

218—C. R. Matara, 6,333.

Fiscal's sale—Application to set aside sale by judgment-debtor—Purchaser aware that debt was paid at the time of sale—Civil Procedure Code, ss. 282 and 344—Fiscal's fees not paid—May Fiscal sell the land seized?—Civil Procedure Code, ss. 258, 270 and 343.

If a Fiscal's sale can be shown, before it is confirmed, to have been made under an entire mistake, when to the knowledge of the purchaser the exigency of the writ had been fully satisfied, the sale may be set aside under section 344 of the Civil Procedure Code.

In this case the Supreme Court treated an application made under section 282 as one made under section 344 of the Civil Procedure Code.

When a writ is satisfied by the payment of the amount which the Fiscal is thereby authorized to levy, the Fiscal cannot further execute the writ merely for the recovery of his own fees.

The Fiscal's only course is to proceed in the manner laid down by sections 258 and 270 of the Civil Procedure Code.

THE petitioners (defendants) applied to have the Fiscal's sale under writ issued in this case set aside. They filed the following petition:—

Your Honour's applicants are the judgment-debtors in the above-styled case.

That with the consent and knowledge of the judgment-debtors' proctors, the first applicant sold two of the lands, specially mortgaged to Don Davith Wickremesinghe of Kirinda and Hewa Lokugey Samel Hamy, and raised money and paid the amount of the debt in the said case and costs in full, as would appear on reference to the two receipts respectively dated December 22, 1913, and January 9, 1914 (which will be produced at the inquiry into this petition).

That long after the payments and settlement of the above debt, *i.e.*, on the 14th instant, at an unusual hour of the day, namely, 5 o'clock in the evening, the said Fiscal's Arachchi, who is a close relation of the second respondent and a thick friend of the first and third respondents, and who knew about the payments of the said debt, as he happened to be at the notary's office on the day the first respondent sold the two lands for the payment of the debt, sold the following lands to the first, second and third respondents at the extremely low prices, without making any publication of the sale as required by law, that is to say:—

(1) 3/16 of Gulugahawatta at Kirinda, worth Rs. 100, for Rs. 3 to first respondent.

(2) 3/16 of Gulugahadeniya, worth Rs. 50, for Rs. 2 to first respondent.

(3) One pela extent of Uda Kirindakumbura, worth Rs. 200, for Rs. 4 to second respondent.

(4) 1/7 of Weralugahamadiththa and the planter's half share of the second plantation thereof and tiled house of seven cubits in Weralugahamadiththa, all worth Rs. 300, for Rs. 14 to third respondent.

That the applicants have sustained substantial injury by reason of the said irregularity of not publishing the sale, and by the said sale of valuable properties for low prices.

That the applicants are not indebted now to judgment-debtor in any sum of money.

Wherefore the applicants pray that, in terms of clause 282 of the Ordinance No. 2 of 1889, the said sale may be set aside with costs.

The following issues were proposed and accepted:—

(1) Was the writ under which the lands in question were sold a valid writ?

(2) Were the respondents already aware that the writ had been paid and settled?

(3) Was there due publication of the sale?

(4) If not, did the petitioners suffer any material damage by reason of the said irregularities?

The learned Commissioner delivered the following judgment:—

In this case writ issued on December 1, 1913. Seizure of property took place on December 13, 1913 (P 4). On January 7, 1914, part payment of the greater portion of the debt, viz., Rs. 230, was certified. On January 9, 1914, the balance (Rs. 19) was paid, but payment was not certified by plaintiffs' proctor. The property seized was sold on February 14, 1914, as the seizure was not withdrawn. The result is this petition to set aside the sale.

I think it was very negligent on the part of plaintiffs' proctor not to have withdrawn the seizure, or at any rate not to have certified the second payment. Petitioners are by no means free from blame in the matter. As, however, the seizure was not withdrawn, and full payment not certified, I can see no reason to hold that the writ was invalid. No authority in point has been shown to me, though I have waited five days for it, and Mr. Grebe promised to furnish authorities on the 12th. Nor has any irregularity in the conduct of the sale been proved. The only question is whether respondents were innocent purchasers.

It is in evidence that third respondent purchased one of the lands, Uda Kirindakumbura, from the original first petitioner, father of Siddi Appu, now deceased. The late Adirian sold the land in order to raise money to pay off this debt. That evidence has not been contradicted. *It therefore follows that third respondent knew the debt had been paid; first is his brother, and had equal knowledge. It is not, however, shown* that second respondent knew of a previous sale. It does not appear that Adirian was at the sale to inform intending purchasers. However, the lands fetched next to nothing, because it was probably known that the writ had been satisfied. I therefore set aside the sale of the first, second, and fourth lands on the ground that the first and third respondents were in a position to know, and knew, that the writ had been satisfied,

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and were therefore not innocent purchasers for value, but uphold the sale of third land, as second respondent was not in such a position.

As to the Fiscal's Arachchi, I do not think he should have beeen sued. He had only to obey orders and carry out the sale.

The petitioners will pay costs of second respondent and of fourth respondent; first and third respondents will pay the petitioners' cost.

J. C. W. ROCK.

In forwarding the above case, I have the honour to state that, in writing my judgment, by an oversight I omitted to state my opinion that the plaintiffs had suffered material damage by the sale.

J. C. W. ROCK.

Balasingham, for the appellants.—The writ was not paid in full. The petitioner himself admits in his cross-examination that "the Fiscal's charges had not been paid." In any case there was no order to the Fiscal to stop sale. It was held by the Full Court in *Silva v. Rawter* [1] that the Fiscal has no power to stay execution of a writ without an order of Court to that effect. See also *16 N. L. R. 451*, *2 Leader 151*. It would be inconsistent to hold that the Fiscal had to sell, but that no one should purchase if he knows that the debt was paid. The money was not paid to the Fiscal, but to the creditor.

Nothing has been proved to show that there was any irregularity in publishing or conducting of the sale. A sale regularly conducted under a subsisting decree does not become null and void, even if the decree is afterwards set aside. See *Idroos Lebbe v. Meera Lebbe*.[2] The petitioners have applied for setting aside the sales on the ground of material irregularity under section 282 of the Civil Procedure Code. The fact that the purchasers knew that the debt was paid is not an irregularity in publishing or conducting of the sale. (See *14 N. L. R. 314*, *2 A. C. R. 123*.) In any case that is not a ground set out in their petition as a ground for setting aside the sale. Sections 282 and 283 require that the grounds of each irregularity on which a person desiring to set aside a sale relies should be expressly notified to the Court within thirty days of the sale, and the Court has no power to set aside (whatever hardship the particular circumstances of the case may disclose) any sale on the ground of an irregularity which has not been so notified (see *Chellappa v. Selvadurai* [3]). The objection in this case was not raised within thirty days, and the second issue should not have been framed.

Where a person, a stranger to the proceedings, purchases property *bona fide* at an auction sale held in execution of a decree, the sale to him cannot be set aside, on the ground that the decree had already been satisfied out of Court at the time the sale was held. See *Yellappa v. Ramachandra*.[4]

[1] *(1906) 10 N. L. R. 56.*
[2] *(1899) 1 Tam. 6.*
[3] *(1912) 15 N. L. R. 139.*
[4] *(1896) 21 Bom. 463.*

Even if an application was made to the Court, it would not have recalled the writ unless the Fiscal's fees were paid. See section 343. There is no evidence to show that the appellants knew of the payment of the debt.

V. Grenier (with him *Canekeratne*), for the respondents.—The Judge holds that the appellants were aware of the payment. The properties were sold for ridiculously small amounts. There is nothing on the face of the record to show that objection was taken to the framing of the second issue.

July 17, 1914. DE SAMPAYO A.J.—

The appellants are the first and third respondents to a petition submitted by the defendants, who are the judgment-debtors in this case, for the purpose of having certain sales in execution set aside. The appellants were the purchasers at those sales. The petition purports to be an application under section 282 of the Civil Procedure Code, but that section does not apply because there is no irregularity shown in the publication or conducting of the sales. There is, however, no objection to the application being regarded as one made under section 344 of the Civil Procedure Code.

The judgment against the defendants was for Rs. 222, but writ issued for the recovery of Rs. 254.11, the difference being due to the addition of costs and poundage. After the issue of writ the defendants paid to the plaintiffs' proctor a sum of Rs. 230, which was certified on the record, and a further sum of Rs. 19, for which a receipt was granted. From the terms of the receipt it is clear that the plaintiffs received the money in full satisfaction of their claim, and I agree with the Commissioner's finding that thereafter there was nothing to be recovered by the plaintiffs on their judgment. By some mistake, however, the writ was not recalled, and the Fiscal proceeded to sell certain lands, some of which were purchased by the appellants for ridiculously small sums. There is evidence in the case to show, and the Commissioner finds, that the appellants well knew prior to the sales that the amount of the writ had been satisfied. Counsel for the appellants, however, urged that the evidence fell short of proof that the appellants were aware of the payments made. It is generally difficult to prove a fact of the description by direct evidence, but it is sufficient for practical purposes if circumstances are proved from which it can be inferred. In my opinion there is ample proof of circumstances in this case pointing to the conclusion that the appellants had knowledge of satisfaction of the judgment. As a matter of fact, the large sum of Rs. 230 was paid out of the proceeds sale of another land, which was purchased from the defendants on a notarial conveyance by one of the appellants, who are brothers. The arachchi who conducted the Fiscal's sales appears to have himself been present at the notary's

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office when the deed was executed, and there is some ground for the defendants' suggestion that there was collusion between him and the purchasers in connection with the Fiscal's sales.

The question in these circumstances is whether it is within the power of the Court to set aside the sales on the ground that the amount of the writ had been fully paid. In *Goonetilleka v. Goonetilleka* [1] this Court, while questioning the soundness of a contention that section 344 was an enactment of substantive law, and that in a case which did not fall under section 282 it empowered the Court to set judicial rules aside under any circumstances in which justice to the parties may require that to be done, nevertheless allowed that under section 344 Fiscals' sales might be set aside for reasons which would render them void under the common law, *i.e.*, for fraud. Applying the principle thus recognized, I think that, if a Fiscal's sale can be shown, before it is confirmed, to have been made under an entire mistake, when to the knowledge of the purchaser the exigency of the writ had been fully satisfied, the sale may similarly be set aside under section 344. I therefore consider that the application in this case is well founded, so far as the execution sought to enforce a satisfied judgment. But it is argued that the Fiscal's sales were still good, because it was shown that the Fiscal's fees had not been paid. As regards this, I am unable to agree that when a writ is satisfied by the payment of the amount which the Fiscal is thereby authorized to levy, the Fiscal can further execute the writ merely for the recovery of his own fees. Section 258 provides a scale of fees due to the Fiscal when a sale takes place, and enacts that where a sale is not proceeded with after seizure and publication of sale the Fiscal shall recover half the fees so sanctioned, and that in default of payment the Fiscal shall certify the amount to Court, and section 270 provides for the procedure to be followed in order to enforce payment. Of course, if the sale in fact takes place, the Fiscal may deduct from the proceeds what is due to him and account to the Court for the balance; but if the sale does not take place, it seems to me that the Fiscal's only course is to proceed in the manner laid down by sections 258 and 270.

For these reasons I think the order appealed against is right, and I dismiss the appeal with costs.

Appeal dismissed.

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