

1922.

Present: Ennis J.

NATCHIYA *v.* ABDUL CADER.

256—*C. R. Galle, 12,189.*

Assignment of two mortgage bonds to defendant for Rs. 500—Payment of Rs. 225 by defendant—Action for balance—Seizure of bonds under section 229, Civil Procedure Code—Sale of "deed of assignment No. 57" by Fiscal—No reference to bonds—Prejudice—Material irregularity.

Plaintiff assigned to the defendant two mortgage bonds for Rs. 250 each. The defendant paid him Rs. 275, and the plaintiff sued him for the balance, obtained writ, and seized the two bonds by issue of a prohibitory notice under section 229 of the Civil Procedure Code. The Fiscal advertised for sale "the deed of assignment No. 57 in favour of the defendant." Rs. 125 were realized by the sale. The defendant moved to set aside the sale.

Held, that the defendant was prejudiced by the way the sale was carried out. "The failure to specify the property in the advertisement of the sale other than by reference to the number of a deed must have affected the price realized at the sale, and had caused a substantial damage to the defendant."

THE plaintiff by deed No. 57 dated February 19, 1921, assigned to the defendant for Rs. 500 mortgage bonds No. 6,711 dated October 9, 1913, and No. 9,670 dated January 18, 1916. The defendant did not pay a sum of Rs. 225 out of the Rs. 500, and plaintiff sued him for the balance due and recovered judgment.

On January 10, 1922, the plaintiff had a writ issued against the defendant, and caused the two mortgage bonds of the value of nearly Rs. 1,000, with interest, which had been assigned to the appellant by the first respondent, to be seized on February 1, 1922.

On April 3, 1922, the Fiscal caused the deed of assignment to be advertised for sale, and the same was put up for sale on April 10, 1922, when the second respondent purchased the same for Rs. 125.

The defendant-appellant on May 6, 1922, made an application to set aside the sale on the grounds (1) that the Fiscal sold the assignment without any reference to the two mortgage bonds, whereas the two mortgage bonds were seized; (2) that there was not sufficient notice given of the sale, in that no tom-toming took place at Weligama, where the applicant resided and where the two mortgage bonds were seized; (3) that the property sold was not described accurately and fairly.

On July 28, 1922, the Commissioner of Requests made an order dismissing the appellant's application.

The defendant appealed.

Soertsz, for the defendant, appellant.

Aelian Pereira, for the plaintiff, respondent.

M. B. A. Cader, for the purchaser, respondent.

November 29, 1922. ENNIS J.—

This is an appeal from an order refusing to set aside a sale. It appears that the plaintiff assigned to the defendant two mortgage bonds, each for Rs. 250. The defendant paid Rs. 275, and the plaintiff sued him for the balance Rs. 225, obtained judgment, took out writ, and seized the two bonds by the issue of a prohibitory notice under section 229 (a) of the Civil Procedure Code. Steps were taken by the Fiscal to sell the bonds. The Fiscal did not sell the bonds, but sold the assignment of the bonds, and advertised for sale the following property: "The deed of assignment No. 57 in favour of the above-mentioned defendant." This advertisement clearly did not conform with the requirements of section 255, as it cannot be said that the property was fairly and correctly specified to the extent which the circumstances rendered it reasonable and practicable to do. The word "assignment" did not describe the property in any way, and the deed might have applied to any kind of property under the sun other than the

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conveyance, which has to be made in set form. The property realized Rs. 125, and the defendant applied to have the sale set aside on the ground that there was a material irregularity in the conduct of the sale. Not only did the Fiscal not sell the property actually seized, but he did not give notice of the sale by beat of tom-tom as required by section 255 ; and, further, did not advertise the sale as required by the Code. But a further objection has been urged, an objection which does not appear to have been noticed by the learned Judge in making his order on the application. It has been objected on appeal that the plaintiff did not choose to adopt the procedure laid down in section 230 of the Code, namely, of issuing summons on the mortgagor to see whether he was willing and able to pay the amount of the mortgage debt. Taking all these circumstances together, I am of opinion that the defendant has been gravely prejudiced by the way the sale has been carried out, and that the failure to specify the property in the advertisement of the sale, other than by reference to the number of a deed, must have affected the price realized at the sale, and had caused a substantial damage to the defendant. In the circumstances I set aside the sale. The appellant will have costs against the plaintiff respondent.

Set aside.