Present: Lyall Grant J. and Maartensz A.J. 1929

PERERA *v.* PERERA.

115—D. C. Negombo, 1,705

Concurrence—Sale in execution—Deposit of ¼ of purchase money—Failure to complete sale—Proceeds of sale—Assets available for distribution—Civil Procedure Code, ss. 262 and 352.

The plaintiff-respondent sued the defendants in this action for the recovery of rent due for certain premises leased to them and obtained a decree for Rs. 6,000. In execution of the decree the lease-hold rights were sold and purchased by the plaintiff, who paid the deposit of Rs. 1,502.50 but did not complete the purchase. At the time of sale the Fiscal had in his hands a writ issued against the first defendant in another action at the instance of the appellant, who had under seizure a half share of the indenture of lease.

Held (in an application for concurrence by the appellant), that the assets available for distribution among the creditors consisted of the sum in deposit only, and that the plaintiff could not be compelled to bring into Court the balance of the purchase money for distribution.

APPEAL from an order of the District Judge of Negombo. This was an application by the appellant for confirmation of the sale held under the circumstances set out, and for determination of the *pro rata* share of the creditors, who claimed concurrence. The learned District Judge refused the application.

M. T. de S. Ameresekere, for judgment-creditor in No. 2,294 D. C., appellant.—The plaintiff has made default in the payment of the balance purchase money. She has done so fraudulently with a view to prejudice the rights of the appellant. In another action she has obtained the cancellation of the lease bond which was sold on this writ. Under sections 282 and 286 the appellant has a sufficient interest to entitle him to ask that the sale be confirmed. If the sale had been perfected, the appellant would have been entitled to one-fourth of the proceeds as representing his *pro rata* share. He should be therefore allowed to draw the full amount in deposit. The respondent cannot be allowed to get any benefit from her default. It is not necessary that he should wait until the full amount is realized by a resale.

Croos da Brera, for plaintiff-creditor, respondent.—The provisions of section 262 of the Code are imperative. Under that section there should be a resale, if the balance is not deposited within 30 days. The deposit is to go in reduction of the claim of the judgment-creditor. The respondent is as much a creditor as the appellant. If the purchaser was an outsider there is no question that the

1929

Perera v. Perera

respondent would be entitled to the amount forfeited or at least to a share of it. He should not be placed in a worse position because he became the purchaser. It is not open to a person in the position of the appellant to apply for confirmatin of the sale. No fraud has been proved.

Ameresekère, in reply.

September 16, 1929. MAARTENSZ A.J.—

The plaintiff in this action sued the defendants for the recovery of rent due for certain premises which she had leased to them and obtained a decree against them for Rs. 6,000.

In execution of the decree the judgment-debtor's leasehold rights were sold on October 27, 1928, and purchased by the plaintiff for Rs. 6,010. She paid the deposit of Rs. 1,502.50, which was deposited in Court less a sum of Rs. 191.80 Fiscal's charges.

At the time of the sale the Fiscal had in his hands a writ for the recovery of Rs. 2,000 issued by the appellant against the present first defendant in case No. 2,294, and a half share of the indenture of lease was under seizure.

On November 7, 1928, the plaintiff moved "that the Deputy Fiscal, Kurunegala, be directed to forward the proceeds of sale of the leasehold rights to this Court, and that he be informed that the claim of the plaintiff is a first charge on the money realized by sale and paid in by her as the same represents rent due to her, and as such she has a tacit hypothec over the proceeds of sale and no concurrence of claim can therefore be recognized."

The application was opposed by the appellant, and the District Judge by an order dated November 29, 1928, dismissed the application with costs.

The plaintiff on November 29 moved to have the sale set aside. On the next day the appellant claimed concurrence in the proceeds of sale and moved for an inquiry.

The plantiff's application of November 29 was disallowed with costs.

The District Judge, with regard to the appellant's application for concurrence dated November 30, 1928, observed as follows: "Matter considered and order delivered on November 29, 1928. File." The District Judge was of opinion that the question of the appellant's right to concurrence had been decided in his favour by the order of November 29, 1928.

The appellant on February 20, 1929, moved "that the sale held in the present case be now confirmed, that the *pro rata* share of the judgment-creditor claiming concurrence in the proceeds of sale be determined, and that the purchaser-judgment-creditor be ordered to

bring to Court such sum as will be sufficient together with the amount already in deposit to make up the *pro rata* share of the judgment creditor in D. C. 2,294. "

The learned District Judge treated the motion as one solely for the confirmation of the sale under section 283 of the Code and dismissed the application.

The appeal is taken from this order.

In appeal the application for a confirmation of the sale was not very strongly pressed, as such an order would not make any difference to the question whether the amount to be distributed was Rs. 6,010, less Rs. 191.80 or Rs. 1,310.70, which was the main question argued in appeal.

The appellant contended that he was entitled to claim concurrence on the footing that the amount available for distribution was Rs. 5,818.20, of which he was entitled to one-fourth and the plaintiff three-fourth, and that he was therefore entitled to the entire sum deposited in Court, the plaintiff's share being already in effect by her.

For the respondent it was argued that the appellant was not entitled to share at all or at most to a proportionate share of the sum in Court.

It would seem, at first sight, that the respondent could not re-open the question whether the appellant is entitled to share at all, the District Judge having decided it in favour of the appellant by an order which was not appealed from.

The respondent, however, contended that it was open to him to argue that the appellant was not entitled to share at all on the ground that the sum in Court was not an asset realized by the sale.

I am of opinion that this argument cannot be sustained. The amount deposited would, if the plaintiff had paid the balance, be part of the assets realized by the sale, and I cannot see why it should not be regarded as an asset realized by the sale because the plaintiff had not completed the purchase.

Assuming, for the sake of argument, that as the sale was not completed the sum cannot be regarded as an asset realized by the sale, then it could be regarded as an asset realized otherwise than by sale, and section 352 would apply to it just as much as to an asset realized by the sale.

The Indian case relied on (*Hafez Mahomed v. Damoder* [1]), in which it was held that section 295 of the Indian Civil Procedure Code, which corresponds to section 352 of our Code, did not apply to the 25 per cent. deposited by the purchaser under section 306 of the Indian Code is not an authority, as by section 308 of the Indian Code the deposit is forfeited to Government and does not, as provided by section 262 of our Code, go in reduction of the claim of the judgment-creditor.

[1] *I. L. R. 18 Cal. 242*

1929

MAARTENSZ A.J.

Perera v. Perera

This provision in section 262 must, in my opinion, be read with and subject to the provision of section 352.

I accordingly hold that the appellant is entitled to share in the sum brought into Court.

The next question is whether the appellant is entitled to the entire sum in Court as his share of the assets realized by the sale.

Mr. Ameresekere argued on the authority of the case of *Meyappa Chetty v. Weerasooriya*,[1] that the assets realized by the sale was the sum of Rs. 6,010 and that the plaintiff had in effect drawn her share of the proceeds and the appellant was therefore entitled to the balance in the hands of the Court.

In the case cited the point for decision was whether the holder of a writ, delivered to the Fiscal after the sale but before the balance was paid, was entitled to participate in the proceeds of the sale. Shaw A.C.J. and Ennis J. held that " Assets are realized in execution, within the meaning of section 352 of the Civil Procedure Code, at the moment of sale, and not when the money is paid, " and de Sampayo J. that " The words ' prior to realization ' in section 352 means ' before the receipt of the assets.' "

The question debated in the case cited does not arise in this case, and the decision as to the point of time at which the writ should be in the hands of the Fiscal to entitle a writ-holder to participate in the assets is not an authority binding on us in regard to the question before us.

We have in this case to deal with the distribution of assets in the hands of the Court or which are exigible by the Court. Is the balance due from the plaintiff a sum exigible from the plaintiff at this stage of the case? I am of opinion that it is not. By section 262 of the Code, where a purchaser makes default in paying the balance of the purchase money the property must be resold, and by section 266 the purchaser is only liable for so much of the balance as is necessary to make up the difference, if the amount of the purchase money for which the property is resold is less than the amount for which the second sale was concluded.

It is admitted that there has been no resale, and if the purchaser was not the plaintiff the balance of the purchase money or any part of it could not be recovered from her, as the amount she is liable for has not been ascertained. I am unable to differentiate the position of the plaintiff, who has not been given credit, from that of an outside purchaser.

I am of opinion that the appellant's contention that the plaintiff has received her share of the assets realized by the sale must fail, because the plaintiff is at present not liable to pay the balance or any part of it.

[1] *19 N. L. R. 79.*

I accordingly held that the appellant is only entitled to a proportionate amount out of the sum in Court, namely, Rs. 1,310.70. What that proportion is must be determined by the District Court after notice to the other parties, if any, who have claimed concurrence.

I accordingly set aside the order appealed from and remit the case to the District Court to determine the amount the appellant is entitled to out of the sum of Rs. 1,310.70.

The plaintiff and appellant should pay their own costs here and in the Court below. The costs of the further inquiry will be in the discretion of the trial Judge.

LYALL GRANT J.—I agree.

Set aside.