

Present : Schneider J. and Jayewardene A.J.

1923.

SILVA v. SELOHAMY *et al.*

1—D. C. Kalutara, 8,016.

*Civil Procedure Code, ss. 229, 275, 276, 282, 344—Irregularity in conducting sale of movable property—Application to set aside sale—Summary procedure—Defect in pleadings no ground for refusing relief—Power of Court to grant relief against damage resulting from irregularity in execution proceedings.*

An irregularity in publishing and conducting the sale of movable property vitiates the sale, provided substantial damage has been thereby caused to the person impeaching the sale. The party seeking to get the sale set aside can apply by way of summary procedure.

“ It is not the policy of the Civil Procedure Code to throw out applications for relief for defect of pleadings. On the contrary, its policy could appear to be otherwise.”

As a general principle it should be within the competence of a Court, whose decree is being executed to take cognizance of and grant relief where an irregularity resulting in damages is brought to its notice as having taken place in the course of the execution proceedings.”

The policy of the Code is, where possible, to grant relief in the same action instead of referring parties to a separate action.

THE facts are set out in the judgment.

*Soertsz*, for appellant.

*Francis de Zoysa*, for respondents.

July 18, 1923. SCHNEIDER J.—

Under a writ of execution issued in this case against the plaintiff, a mortgage bond in his favour for the sum of Rs. 300, carrying interest at 25 per centum per annum, was seized and sold on July 23, 1921, when the third defendant, respondent, became the purchaser of the same for the sum of Rs. 9. On August 11, 1921, the plaintiff presented a petition and affidavit praying that the sale may be set aside on the ground that there had been irregularity in the publishing and conducting of the sale, which had resulted in his suffering substantial loss and damage. He also stated that he had no notice of the sale. Notice of this application was served on the third defendant, respondent, who appeared and objected to the application. It does not appear what his objection was, but the matter was fixed for inquiry on May 19. There was no inquiry on that day, but the learned District Judge records that he had read through the “ petition and application,” and that it appeared to him that no grounds of irregularity were set out in the pleadings, and that he,

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therefore, dismissed the application with costs. From this order the plaintiff has appealed.

It seems to me that the order of dismissal should not have been made. If the learned Judge thought that particulars should have been furnished, it was his duty to direct that the particulars be submitted. It is not the policy of the Civil Procedure Code to throw out applications for relief for defect in pleadings. On the contrary, its policy would appear to be otherwise. For instance, it contains express provisions for curing defects in pleadings and for rectifying errors of misjoinder. The plaintiff has also stated in his petition that he had no notice of this sale. If he means by this that he had not received the notice required by section 229 to be given by the Fiscal, it would appear that the sale cannot stand as pointed out by this Court in the case of *Bastianpillai v. Anapillai*.<sup>1</sup> It would appear, therefore, that a *primâ facie* case for investigation was disclosed by the pleadings, and that an investigation should have been held, the pleadings being amended, if the Court so directed.

I would, accordingly, set aside the order of dismissal, and remit the case for proceedings in due course.

But, on appeal, the question was raised whether the plaintiff, appellant, could maintain this application. If he cannot, it would be useless to interfere with the order made by the learned District Judge. I would, therefore, proceed to consider whether the application is in order. The question is one of importance in practice. The argument was that there was no provision in the Code for setting aside the sale of movable property, although there was express provision for that purpose in section 282 in respect of the sale of immovable property. This argument is opposed to the language of section 276, which clearly indicates that an irregularity in publishing and conducting the sale of movable property will vitiate the sale, provided substantial damage has been caused to the person impeaching the sale thereby. It was argued that the words "the sale shall become absolute" in section 275 indicated that on payment of the purchase money, and the officer holding the sale granting a receipt for the same the sale became absolute and could not be impeached. I do not think that is a sound argument. The section immediately following section 275, as I have already pointed out, clearly indicates that the sale can be impeached. It seems to me that the words in section 275 relied upon in support of the argument, mean no more than that the sale is concluded so far as the Fiscal and the purchaser are concerned. As a general principle, it should be within the competence of a Court, whose decree is being executed to take cognizance of and grant relief where an irregularity resulting in damages is brought to its notice as having taken place in the course of the execution proceedings.

<sup>1</sup> (1901) 5 N. L. R. 165.

Section 344 expressly provides that "all questions arising between the parties to the action in which the decree was passed and relating to the execution of the decree shall be determined by order of the Court executing the decree, and not by separate action." This is another clear indication that the policy of the Code is, where possible, to grant relief in the same action instead of referring parties to a separate action.

Section 276 of our Code was adopted from section 298 of the Indian Code of 1882, which was as follows :—

"No irregularity in publishing or conducting the sale of movable property shall vitiate the sale ; but any person sustaining any injury by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person is the purchaser) for the recovery of the specific property and for compensation in default of such recovery."

A comparison of section 276 of our Code with the above clearly indicates that the framers of our Code advisedly refrained from following the provisions of the Indian Code that an aggrieved party should seek his remedy by a separate action. It seems, therefore, clear to my mind, that it was intended by the provisions of section 276 that the sale of movable property in execution should be impeached for any irregularity in publishing and conducting the sale by proceedings in "the Court executing the decree and not by separate action" in the language of section 344. The question then arises what is the procedure ? There is no express procedure provided, but there is no reason for not carrying out the intention of the Code. It seems to me that the framers of our Code appeared to have lost sight of the fact that they should have prescribed the procedure to be followed under section 276, when they forebore from adopting the procedure under the Indian Code that the sale should be impeached in a separate action. Section 8 of our Code enacts that in cases where it is not specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by a course of regular procedure. But looking to the language and scope of chapter XXIV., and also taking into consideration that in the absence of any express provision as to the procedure under section 344, in practice, summary procedure is followed in applications under that section, it seems to me that the appropriate procedure for proceedings under section 276 is summary procedure. Proceedings under section 276 impeaching a sale might well be regarded as covered by the provisions of section 344, and section 375 would seem to indicate that the appropriate procedure is the summary procedure.

I think the appellant is entitled to the costs of the appeal payable to him by the first and third defendants, respondents. All other costs will be costs in the cause.

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I agree. Section 275 which declares a sale of movable property absolute on the payment of the purchase money, and the granting of a receipt for the same by the officer conducting the sale is clearly inconsistent with section 276 which enables such a sale to be impeached, if by reason of any irregularity in publishing or conducting the sale, substantial damage has been caused. If a sale is declared absolute for the purpose of execution proceedings, the proper procedure would have been to allow a separate action to be brought to have the sale set aside, as provided for by section 298 of the Indian Civil Procedure Code of 1882 and by Order 21, Rule 78, of the Code of 1908—a provision which has not been taken into our Code. This is, however, only one of the many inconsistencies to be found in our Code. But the point is directly covered by authority. In a case (*Muttiah v. Fernando*<sup>1</sup>) decided in 1893, shortly after the Code came into operation, although only reported in 1907 in the second volume of the Appeal Court Reports, the point was raised and decided in accordance with the opinion expressed by my brother Schneider. There Lawrie A.C.J. said :—

“ We must deal with the sale as of movable property, viz., of a debt due to the defendant.

“ The sale has not yet been perfected by delivery or assignment ; it has not yet become absolute.

“ I am of opinion that the 276th section of the Code recognizes the right of our Courts to set aside sales of movables when there has been material irregularity in the publication and conduct of the sale, and when the party impeaching the sale has suffered substantial injury. See also on this point a decision of Clarence J. in 20,307, D. C. Chilaw, reported in *Ram. Rep. 1872—76, p. 284* : ”

and Withers J. said :—

“ . . . it was argued on the other side that the appeal must fail on the ground that the Court had no power to set aside the sale of movable property on account of material irregularity in publishing or in conducting the sale.

“ But in view of the case cited to us by appellant’s counsel, and the provision of section 276 of the Civil Procedure Code, I am not prepared to decide that our Courts are incompetent to grant relief in the case of substantial damage caused to a person impeaching the sale of movable property for irregularity in the publication or conduct of the sale.”

This judgment appears to have been considered authoritative, for in *Silva v. Dias*<sup>2</sup> the right to have a sale of movable property set aside under section 276 was not seriously, if at all, questioned.

<sup>1</sup> (1893) 2 A. C. R. 86.

<sup>2</sup> (1910) 13 N. L. R. 125.

Hutchinson C.J. made no reference to the matter in his judgment, but Wood Renton, J. remarked :—

“ The serious issue, however, is whether such a case for setting aside the sale as will satisfy the provisions of sections 276 and 282 of the Civil Procedure Code has been made out. In view of the fact that the former of these sections expressly recognizes the setting aside of a sale of movable property on the ground of any irregularity which has caused substantial damage to the person impeaching it, I am disposed to hold, following the authority of the case of *Muttiah v. Fernando*,<sup>1</sup> that the present proceedings are competent.”

These are two-judge decisions and binding on this Court, the earlier case being thirty years old. The application should be, as my brother has laid down, by summary procedure, as being the most convenient and appropriate, and, as I believe, all proceedings under section 344 generally are.

With regard to the ground stated in the plaintiff's petition that he received no notice of the sale, it no doubt provides a *prima facie* case calling for investigation, but the plaintiff should be prepared to meet the decision in the Indian case of *Rosnash Chunder v. Jadob Chunder*<sup>2</sup> that the non-service of the notification of sale on the judgment-debtor is not an irregularity.

*Sent back.*

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DENE A.J.

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