

1933

*Present : Garvin S.P. and Drieberg J.***SILVA v. CARUPPEN CHETTIAR.**

159—D. C. (Inty.) Kandy, 39,945.

Fiscal's sale—Application to set aside—Hypothecary decree and order of credit—Payment of one-fourth deposit—Obligation of decree-holder—Civil Procedure Code, ss. 260 and 272.

A decree-holder, in whose favour an order for credit is made in terms of section 272 of the Civil Procedure Code, is not bound to deposit twenty-five per centum of the purchase money under section 260 of the Civil Procedure Code, in the event of his becoming the purchaser of the property sold in execution.

THIS was an application to set aside a sale held in execution of a hypothecary decree. The decree-holder, in whose favour an order for credit to the extent of his claim was made, was represented at the sale by an agent, who bid a sum of Rs. 3,950 for the property. The Fiscal's

Officer then inquired from the agent whether he was prepared to deposit one-fourth of the purchase money and poundage, whereupon the latter stated that he had brought no money for the purpose. The Fiscal's Officer then intimated to him that he was not prepared to accept any bid from him and the property was knocked down to another for Rs. 4,000. The decree-holder moved to set aside the sale on the ground that the action of the Fiscal's Officer amounted an irregularity, and that as a result the property did not fetch an adequate price. The learned District Judge set aside the sale.

H. V. Perera for purchaser-appellant.—The point is not covered by authority. The Indian Code makes provision for cases where a deposit may be waived. The conditions of sale are unambiguous. The sale is to be governed by the Civil Procedure Code. A deposit is required of one-fourth in the nature of a security which is forfeited if the sale is not completed. A plaintiff purchaser is not exempt from the liability to make the deposit. A distinction must be drawn between a payment of the purchase price and the liability to pay a sum of money as earnest. If plaintiff's bid is within his claim there is a payment by him at once of the full amount. There is no postponement of the payment of the three-fourth. A purchaser at a Fiscal's sale enters into an agreement to buy. That is why he pays a deposit. If the plaintiff buys within his claim the purchase is at once complete. There is no postponement of the completion of the sale.

[GARVIN S.P.J.—Credit is the credit available against the amount of the bid.]

One is not then applying the provisions of section 262 of the Code. The Mortgage Ordinance makes all these sections applicable. A fund is required for the satisfaction of the Fiscal, if nothing else. In India there is the addition of certain words to the section. Order 21, Rule 84—Sub-section (1) is almost identical with section 260 of our Code. The addition of sub-section (2) exempts a decree-holder from making a deposit. (*Sarkar 6th. ed. 1299; O'Kinealy 330*). Section 260 is an imperative provision and is not taken away by credit being given under section 272.

Hayley, K.C. (with him *Weerasooria*), for plaintiff-respondent.—Credit is required only for the purpose of the deposit. Credit and debit of the purchase price is done by the Court under section 272. The Indian section does not say the Fiscal may give credit but the Court may make an order. That is the same as our Courts giving credit.

Navaratnam, for defendant-respondent.

February 27, 1933. GARVIN S.P.J.—

This was an application to set aside a sale held in execution of a hypothecary decree. The applicant is the plaintiff in the action. In the decree which follows the usual form of a hypothecary decree we find a further order in the following terms:—"It is further ordered that in the event of a sale the plaintiff be allowed to bid for and purchase the property and that he be allowed credit to the extent of his claim". At the sale the plaintiff was represented by his agent who bid a sum of Rs. 3,950 for the property. At that stage the Fiscal's Officer appears to have demanded,

or at least inquired whether the bidder would deposit, a sum equivalent to one-fourth the amount of the purchase price plus the poundage. The reply was that the plaintiff was the holder of an order to bid to the extent of his claim. The Fiscal's Officer however persisted in his demand, whereupon the plaintiff's representative said that he had not with him the required amount of money. The officer appears then to have intimated to him that he was not prepared to accept any bid from him and proceeded with the sale. The premises were eventually knocked down for the sum of Rs. 4,000 to W. Hendrick Silva. The sale was in due course reported to Court. It was urged with success on behalf of the plaintiff that this sale was bad for irregularity in that the Fiscal's Officer was wrong in making the demand he did in view of the fact that the amount which he demanded was much less than the amount for which the plaintiff was entitled to credit, and that, as a result of his action, the plaintiff through his agent was denied the privilege of continuing to bid for and purchase the property. It is specially averred that the amount which was realized by the sale is a wholly inadequate price and that the plaintiff was prepared to pay a higher price for the premises. As to the facts, the learned District Judge has substantially accepted the story as told by the plaintiff's witness, and there is no reason to doubt that his finding is correct that there was only one sale and that it followed the course which the plaintiff's witness says it did.

The purchaser appeals from the order of the learned District Judge whereby he upheld the objection to his sale and set it aside. It is not denied that the plaintiff held an order for credit to the amount of Rs. 2,377 which was the amount of his claim, interest and costs at the date of the sale. But it is urged that notwithstanding the order for credit the Fiscal's Officer was entitled to demand of him a deposit of one-fourth the purchase price and the amount payable by way of poundage.

The question of poundage which is a wholly subsidiary question might be disposed of at once. An argument was addressed to the learned District Judge to the effect that there is no provision which requires poundage to be paid at the time of the sale. This argument found acceptance with the learned District Judge, but it seems to me unnecessary to express any opinion upon the point ourselves. There is no suggestion that any separate demand was made for the poundage. The incident so far as it is disclosed in the evident indicates that the demand was for the lump sum consisting of one-fourth of the purchase price plus the poundage which could only have amounted to something under Rs. 50, and that what the Fiscal's Officer insisted upon being paid was the deposit without which he was not prepared to accept any bid made by the plaintiff's agent.

We are therefore free to address ourselves to the only question which properly arises for consideration, namely, whether a person who is entitled to credit by reason of an order to that effect in his favour is a person who is compelled by reason of the provisions of section 260 of the Civil Procedure Code to make a deposit of 25 per cent. of the amount of the purchase money in the event of his becoming the purchaser of property sold in execution. Now section 260, if it be read by itself, clearly places every purchaser under an obligation to make such a deposit, but that section and the sections which follow, sections 261 and 262, must clearly be read

in conjunction with section 272 which is in the following terms:—"A holder of a decree in execution of which property is sold may, with the previous sanction of and subject to such terms as to credit being given him by the Fiscal and otherwise as may be imposed by the Court, bid for or purchase the property. When a decree-holder purchases, the purchase money and the amount due on the decree may, if the Court thinks fit, be set off against one another, and the Court in execution of whose decree the sale is made may enter up satisfaction of the decree in whole or in part accordingly." It will be noticed that the holder of a decree must obtain the sanction of the Court to bid at all. It is clear from that provision and the language of sections 260 and 261 that the earlier sections in the first instance contemplated a purchase by a person who is a stranger to the action. That at least is the normal case, whereas a purchase by a decree-holder is the exception. But the words which are of the greatest importance in deciding the matter immediately before us are those which relate to the terms which a Court may direct should be given to an execution-creditor by the Fiscal. Inasmuch, therefore, as such an order for credit has been made in this case, the plaintiff was entitled to demand of the Fiscal that he should, in respect of any monies due and payable by him in consequence of his becoming the purchaser at this sale, be given credit to the amount of his decree, interest and costs, which in this case amounted to Rs. 2,377. The amount which at the date of the sale the plaintiff would have become liable to pay by reason of the provisions of section 260 was one-fourth of the sum of Rs. 3,950 or Rs. 987.50. That sum was considerably less than the amount for which the execution-creditor was entitled to receive credit. If the provisions of section 272 and an order for credit made thereunder are to have any effect at all, it must be at the stage of the sale, for it is at that stage alone that any question of being allowed credit by the Fiscal arises. In respect of the balance which under the law becomes payable within a month from that date no difficulty arises for the latter part of the section expressly provides that the Court may deal with the matter if it thinks fit by directing that the purchase amount should be set off against the decree and enter up satisfaction of the decree in whole or in part accordingly. The only stage at which any question of credit being allowed by the Fiscal arises therefore is at the time the bidding closes.

In support of the argument that the terms of section 260 are imperative and apply as much to a decree-holder in whose favour an order for credit has been made as to any other purchaser, we were referred in the first instance to the judgment in the case of *Gopal Singh v. Roy Bunwaree*¹, of which a brief note is to be found in *O'Kinealy's Commentaries on the Code of Civil Procedure*, s. 294.—"The purchaser under this section must make deposit in cash required." But the provisions of the corresponding Indian sections are different from those of our section. There is no such provision as is contained in the first clause of section 272, nor in there anything corresponding to a direction to the Fiscal to give credit to a holder of a decree when he becomes the purchaser. The provisions of that section are akin to the second clause of section 272 where the Court is empowered to set off the purchase money as against the amount of the

decree. The whole system in India would appear to be entirely different to ours. In India the whole matter is left in the hands of the Court and adjustments are made by the Court. Here the Court empowers the Fiscal to give credit. The policy of the Indian Courts is continued even in the new rules and orders where, to give relief in such cases, a special provision has been added which enables the Court to make a special order in appropriate cases dispensing with the requirements of the rules which correspond to our section 260 in a case where the decree-holder is the purchaser and is entitled to set off the purchase money against the amount of the decree.

It has further been urged that unless the provisions of section 260 are regarded as imperative and binding upon any and every purchaser including a decree-holder in whose favour an order under section 272 has been made that it will not be possible to give effect to the provisions of section 262. That section assumes that a deposit will be made and directs how when that deposit is made it should be applied and makes further provision as to what is to happen in the event of the purchaser failing to implement his purchase by paying in the balance. That provision appears to me in the first instance to have been enacted for the protection of the judgment-creditor and as in the case of section 260 to contemplate a purchase by a stranger to the action. But whether that view be correct or not, it is quite impossible to say that because the legislature has not provided for the special case of a purchase by a decree-holder in whose favour an order for credit under section 272 has been made, that, therefore the credit and the whole purpose for which it was made should be rendered nugatory by giving to the provisions of section 260 an interpretation which takes no note of the intentions and objects of the legislature as manifested in the language used when it enacted section 272.

For these reasons I think that the learned District Judge has come to a right conclusion in this case and that the provisions of section 260 do not place a purchaser, as the purchaser in this case, under an obligation to make a deposit of 25 per cent. of the purchase money.

The appeal must therefore be dismissed with costs.

DRIEBERG J.—I agree.

Appeal dismissed.

