

GUNARATNE
VS.
TRANSLANKA INVESTMENTS LTD. AND ANOTHER

SUPREME COURT.

FERNANDO J., AMERASINGHE J. AND GOONEWARDENA, J.

S.C. APPEAL NO. 34/91.

C.A. NO. 45/91.

D.C. COLOMBO 14918/MB.

09 OCTOBER, 1991.

Mortgage – Sale in execution of hypothecary decree - Material irregularity - Publication - Civil Procedure Code S. 282 - Refusal to issue notice - Is summary procedure mandatory?

The appellant consented to judgment in a hypothecary suit on a mortgage bond. He was given the facility of paying the decreed sum in instalments but defaulted. The property was sold in execution of the decree. The appellant moved to have the sale set aside on the ground of material irregularity.

Held:

1. Section 282(2) of the Civil Procedure Code requires an applicant to notify to Court the grounds and not the particulars or evidence of such grounds of material irregularity.
2. Summary procedure is not mandatory.
3. Although ordinarily notice should have issued, here one of the prayers was that the mortgaged property be sold after such publication as the auctioneer considered adequate. The defendant had consented to judgment as prayed for. The adequacy of the publication cannot be tested objectively in view of the consent. Publication which the auctioneer considered adequate viewed subjectively, meets the requirements.

Cases referred to:

1. *Muttukumaraswamy v. Nannitamby* (1904) 4 Tamb. Rep. 34
2. *Pitche Bawa v. Meera Lebbe* (1893) 2 Cey. LR 174
3. *Re Abdul Azis* (1895) 1 NLR 196, 199
4. *Silva v. Selohamy* (1923) 25 NLR 113

APPEAL from the judgment of the Court of Appeal.

A.K. Premadasa P.C. with *Ikram Mohamed* and *C.E. de Silva* for defendant - appellant.

Romesh de Silva P.C. with *S.C.B. Walgampaya* for plaintiff - respondent.

F.C. Perera with *S. Gurugaloda* and *Upali Ponnampuruma* for 2nd respondent.

Cur. adv. vult.

23 October, 1991.

FERNANDO, J.

The Plaintiff-Respondent ("the Plaintiff") instituted this mortgage bond action against the Defendant-Appellant ("the Defendant") in 1983. It is not denied that the Defendant resorted to various dilatory tactics; finally he consented to judgement on 26.7.89; thereafter he failed to make payments in terms of the decree, but succeeded in delaying the sale of the property until 19.1.91. On that day the property was sold for Rs. 2,050,000/- to the 2nd Respondent ("the Purchaser"). On 15.2.91 the Appellant made an application under section 282 of the Code to set aside the sale, alleging that the property was worth Rs. 8 million, on the ground of a material irregularity in

publishing the sale: that the sale had not been duly published, in that adequate publicity had not been given, resulting in only two or three bidders attending the sale. Several other grounds were also set out in the petition, (that the auctioneer had not notified the date of sale to the Court, that the perfected conditions of sale were neither stamped nor duly attested, that the Purchaser had not paid the required deposit of 10% etc.) but it is common ground that these were patently untenable, in the light of material already before the Court.

When the Defendant moved that notice of the application be issued on the Respondents, learned President's Counsel for the Plaintiff submitted that notice could be issued only if the Court was satisfied that the facts alleged in the petition established that there was a material irregularity in publishing or conducting the sale; he then referred in some detail to the Defendant's dilatory tactics. The learned trial Judge refused to issue notice; the Defendant filed applications for leave to appeal and for revision in the Court of Appeal; notice was refused. The Defendant then appealed to this Court with special leave.

Learned President's Counsel for the Defendant submitted that upon an application being made under section 282, notice must be issued almost as of right, or as a matter of course. He was forced to concede, however, that there were situations in which the Court could legitimately conclude that there was no merit whatever in the application, and refuse notice; for instance, where the application involved a pure question of law which had been long settled, or a question of fact dependent solely on matters already contained in the record. He submitted that the adequacy of the publicity given was a question of fact which could not be determined by reference to the documents and other material in the record.

Learned President's Counsel for the Plaintiff submitted that the Court had a discretion under section 282 in regard to the

issue of notice, and that notice should not be issued unless the Court is convinced that there had been a material irregularity and that substantial injury had been caused. When it was pointed out that section 282(2) prohibited the **setting aside** of a sale on the ground of irregularity unless the applicant proved to the satisfaction of the Court that he has sustained substantial injury, and that therefore there was no similar burden at the time notice was sought, he submitted that the Court must be satisfied *prima facie* at that stage. His attention was drawn to section 377 which required the Court to be so satisfied in applications by way of summary procedure, whereupon he submitted that summary procedure applied to section 282 as well. The only authority he cited was *Muttukumaraswamy v. Nannitamby (1)*. There the District Judge had proceeded under Chapter XXIV, and although Middleton, J., inclined to the view that summary procedure applied, that was *obiter*, because he expressly stated that the form of the proceedings did not affect the point for decision, namely that substantial injury had not been proved. Section 8 of the Code makes summary procedure applicable where the Code or other statute "specially provides". Learned President's Counsel was unable to draw our attention to any other decision either as to the applicability of summary procedure to applications under section 282 or as to the need for the trial Judge to be *prima facie* satisfied that there had been a material irregularity. He further submitted that the Defendant had filed papers in the District Court on 9.1.91 in an abortive attempt to stay the sale fixed for 19.1.91 on various grounds, but had not made this complaint of inadequate publication: this, he said, indicated that the complaint lacked merit. There was no other material in the Court record indicating the extent of publication. The learned trial Judge was strongly influenced by this omission and the undoubtedly dilatory tactics adopted by the Defendant, in refusing to issue notice.

Section 282(2) requires an applicant to notify to the Court the grounds, and not the particulars or evidence of such

grounds; it was therefore sufficient to state that adequate publicity had not been given. If the Court was of the view that sufficient particulars had not been given, a direction may well have been given to furnish such particulars; the time limit of 30 days applies only to the notification of the grounds, and not to furnishing particulars thereof. As to whether summary procedure applies, in *Pitche Bawa v Meera Lebbe* (2), the purchaser applied by way of motion to confirm the sale (under section 283); this was allowed. On appeal it was contended that the application should have been by petition by summary procedure. Lawrie, J., held that application by motion was permissible, but thought it would have been better by summary procedure. Withers, J., however, considered the procedure to be correct and that summary procedure was appropriate only in cases expressly provided for by the Code (a view which he re-iterated in *Re Abdul Azis* (3)). Thus in regard to section 283 summary procedure is not mandatory. Further, section 284 expressly provides for "a petition on summary procedure", and it must be presumed that the omission of this requirement in section 282 was deliberate. I therefore cannot accede to the proposition that this is mandatory for section 282. There is, in my view, sufficient compliance where the petition states the particular ground constituting a "material irregularity". A statement of the facts and circumstances (unlike section 374(d), is not required, nor does the Court have to be satisfied that the material facts are *prima facie* established (unlike section 377), though it may call for further particulars. The Court is not required to make an order *nisi* or an interlocutory order, but only to issue notice. Even in applications of summary procedure, the Court has a discretion under section 376 to direct or permit the Petitioner to adduce oral evidence. I must mention also *Silva v Selohamy*, (4), where it was held that summary procedure was applicable under section 276 - which merely provided that "no irregularity in publishing or conducting the sale of movable property shall vitiate the sale unless substantial damage has been caused to the person impeaching the sale thereby". Schneider, J., observed that it

was not the policy of the Code to throw out applications for relief on account of defects in pleadings, and if the trial Judge thought that particulars should have been furnished, it was his duty to direct that particulars be submitted.

The reasons given by the learned trial Judge thus do not justify a summary rejection of the Defendant's application, and I would have been inclined to direct him to issue notice and to hear and determine the application on its merits. However, learned Counsel for the Purchaser has drawn our attention to the following, which were matters of record; one prayer in the plaint was that the mortgaged property be sold after such publication as the auctioneer considered adequate; the Defendant consented to judgement as prayed for; the decree included the identical provision as to publication. Accordingly, the only grounds of complaint legitimately available to the Defendant were either that there was no publication or that the publication was less than that which the auctioneer (subjectively) considered adequate. Admittedly, some publicity was given, and the Defendant's only complaint was that, objectively, it was not adequate. That is a different ground altogether on which, by reason of the consent decree, the Defendant was not entitled to rely. The issue of notice would therefore have been futile, for even if the Defendant proved that there had been inadequate publicity, the sale could not have been set aside in view of the express provision in the consent decree; and as he had not duly notified the ground that there had not been such publicity as the auctioneer considered adequate, he could not have been allowed to prove that ground.

I therefore dismiss the appeal. The 2nd Respondent (Purchaser) will be entitled to costs in this Court in a sum of Rs. 5,000/- payable by the Defendant-Appellant.

AMERASINGHE, J — I agree.

GOONEWARDENE, J — I agree.

Appeal dismissed.