

1920.

Present : De Sampayo J

PERERA v. BRITO.

5—C. R. Colombo, 68,686.

*Civil Procedure Code, s. 282—Sale of property under one writ—Application by another writ-holder to set aside sale—Person interested in the property.*

Defendant's land was sold in execution by the Fiscal on a writ issued by the plaintiff, and was purchased by the appellant. The respondent obtained a judgment in D. C. Colombo, 51,377, and seized the same land in execution, but the Fiscal purported to sell the land under the writ in this case only. The respondent then applied to set aside the sale on the ground of material irregularity. The value of the land was Rs. 2,500, but the sale was not advertised in the *Gazette*, and the price realized was only Rs. 90.

*Held*, that the respondent was a person interested in the property within the meaning of section 282 of the Civil Procedure Code.

THE case No. 68,686 of the Court of Requests, Colombo, was instituted by one G. D. Issan Appuhamy against one Eliza Peiris for the recovery of money due on a promissory note. Decree was entered in favour of G. D. Issan Appuhamy, who thereupon obtained a writ and seized a land called and known as Talgawatta. The said land was sold by the Fiscal under the said writ and bought by the appellant.

Thereupon, the respondent to this appeal, Stephen Brito, presented a petition to the Court of Requests to have the sale set aside. The learned Commissioner set aside the sale.

The following were the reasons of the Commissioner of Requests (T. B. Russell, Esq.):—

No attempt has been made by the respondent seriously to rebut the charge that the whole of the proceedings in this case, from its institution up to the sale by the Fiscal, were intended to defraud the petitioner and prevent his recovering on his decree. The evidence of petitioner and Mr. Thiedeman remains practically uncontradicted. The close relationship of the respondents, the hurry with which the decree in the present case was obtained, the seizure, not of third respondent's own property, which petitioner could not touch, but of the deceased's, over which alone the petitioner had a claim, the events of the sale itself, when bidding was discouraged by the announcement of a fictitious mortgage and lease, all very strongly support fraud and collusion between the respondents. But it is unnecessary for me to go beyond Mr. Thiedeman's evidence as far as the present inquiry is concerned. His statement that the property sold is worth Rs. 1,500 stands uncontradicted. The sale was not advertised in the *Gazette*. The petitioner undoubtedly sustained substantial injury by the way the sale was conducted.

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He is, therefore, on his ground alone entitled to have the sale set aside. I have not dealt with the question whether the petitioner would, on the evidence, be entitled to have the decree also set aside. There is no prayer to this effect in his petition, and I do not think I am entitled to give him a relief he has not asked for therein.

*Zoyza*, for purchaser, appellant.—The property was sold under a writ issued in this case from the Court of Requests, and the respondent's writ having been issued from the District Court, the respondent cannot claim concurrence with the judgment-creditor in this case. See *Mendis v. Peris*<sup>1</sup> and *Meyappa Chetty v. Weerasooriya*.<sup>2</sup> Hence the respondent does not come within the ruling in *Komerappa v. Muttiyah*,<sup>3</sup> and is not a person having an "interest" in the property sold within the meaning of section 282.

*Nagalingam*, for petitioner, respondent.—Though the respondent may not be entitled to claim concurrence with the judgment-creditor, yet he might otherwise have a sufficient "interest" in the property sold to have the sale set aside. In *Caruppen Chetty v. Habibu*,<sup>4</sup> an heir who was only interested in the proceeds of sale was held to be a person "interested" within the meaning of this section. The respondent comes within this principle, as he might have had some balance left out of the proceeds of sale after satisfying the full claim of the judgment-creditor if the sale had been properly carried out. The principle has been extended further. See *Don Brampy v. Peris*,<sup>5</sup> where it was held that one of several co-debtors, whose share in a property was liable to be sold in the event of the shares of the other co-debtors not realizing sufficient assets to pay the entire claim of the judgment-creditor, was a person interested. In the present case the respondent has a direct interest in the property itself that has been sold, so is a person "interested."

July 16, 1920. DE SAMPAYO J.—

This appeal raises a question of procedure of considerable importance. The plaintiff, having obtained a decree for money against the defendant, issued writ of execution, and had a land of the defendant seized and sold by the Fiscal. The appellant became purchaser of the land. The respondent in this appeal obtained a judgment in the action No. 51,377 of the District Court of Colombo against the defendant and seized the same land in execution, but the Fiscal purported to sell the land under the writ in this case only. The respondent then applied to set aside the sale on the ground of material irregularity. The Commissioner made order setting aside the sale, and the purchaser has appealed.

<sup>1</sup> (1915) 18 N. L. R. 310.

<sup>2</sup> (1916) 19 N. L. R. 79.

<sup>3</sup> (1893) 3 C. L. R. 58.

<sup>4</sup> (1907) 11 N. L. R. 230.

<sup>5</sup> (1919) 6 C. W. R. 48.

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There is no doubt about the facts on which the order is based. The value of the land has been found to be Rs. 2,500, but the sale was not advertised in the *Gazette*, and the price realized was only Rs. 90. It is objected, however, that it was not competent for the respondent to apply under section 282 of the Civil Procedure Code, which authorizes a person "establishing to the satisfaction of the Court an interest in the property" to apply to set aside an execution sale on the ground of irregularity. Mr. Zoysa is right in contending that the respondent, not being the holder of a decree of the same Court, was not entitled to claim the proceeds in concurrence under section 352 of the Code, and could not, therefore, rely on the decisions of this Court, to the effect that a judgment-creditor entitled to claim in concurrence is a person interested in the property within the meaning of section 282. But does this exhaust the matter? The respondent had himself seized the property in execution, and, if the sale under the plaintiff's writ were irregular and liable to be set aside, he would be entitled to bring the property to sale under his own writ. Moreover, if the sale under the plaintiff's writ had not been irregular and the property had realized its proper value, a larger balance of proceeds, after payment in full of the plaintiff's decree, would be available for satisfaction of the respondent's claim. I think that the respondent is a person interested in the property, though he may not be able to claim the proceeds in concurrence. The point involved is new, but I think that the construction I have put on section 282 is not only reasonable but in accordance with justice. This case itself shows how injustice might otherwise be the result, for the Commissioner has recorded a strong finding that the sale was brought about by fraud and collusion between the plaintiff and the defendant.

The appeal is dismissed, with costs.

*Appeal dismissed.*