Present: Bertram C.J. and Schneider A.J. 1920.

GUNASEKERA *v.* DIAS *et al.*

68—D. C. (Inty.) Galle, 15,796.

Decree of Supreme Court directing that writ of execution be stayed—Sale before decree reaches District Court—Confirmation of sale after decree reaches Court—Power of Court to vacate order of confirmation.

The Supreme Court on appeal directed that the writ of execution should be stayed as against the third defendant. This decree reached the District Court on July 5, and on July 18 the District Court, on an *ex parte* application of the plaintiff, confirmed a sale in execution which had taken place before July 5. The third defendant applied to the District Court for relief, and the District Judge held that he had no power at that stage to grant relief, and that the only means of obtaining relief was by a substantive action.

Held, that the District Judge ought to have refused to confirm the sale, and that he had power to vacate the order confirming the sale.

THE facts appear from the judgment.

Keuneman, for the appellant.

August 5, 1920. BERTRAM C.J.—

This is an appeal against the order of the District Judge of the Galle District Court refusing an application to set aside a confirmation of a sale of property sold in execution. The application was made by the third defendant in the action. Judgment had been recovered against her and the other two defendants, and an appeal was taken to this Court. So far as the third defendant was concerned, the ground of her appeal was that judgment had been recovered upon a promissory note, that she was a married woman, that she had executed this note without the consent of her husband, and that her husband had not been joined as a party in the action. The Supreme Court did not set aside the decree, but directed that execution under the writ in her case should be stayed. A formal order to that effect was duly made out and reached the District Court on July 5, 1919. By the time the judgment of the Supreme Court reached the District Court, a sale in pursuance of the execution had already taken place, but had not yet been confirmed. Notwithstanding the judgment of the Supreme Court, the plaintiff, who was the purchaser under the sale, on July 18, applied to the Court for the confirmation of the sale without bringing to the notice of

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BERTRAM C.J.

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the Court the terms of the judgment of this Court. The District Court, in spite of the fact that there was an entry in the journal of the case showing that the judgment of the Court had been varied by the Supreme Court, allowed the application for the confirmation of the sale. The motion for the confirmation was made *ex parte*, and the present appellant is said to have known nothing of this proceeding. Later, an order for delivery of possession was applied for, also *ex parte*, which is in itself an irregularity (see *Abeydere v. Marikar* [1]), and possession was formally delivered. The appellant then applied to the District Judge for relief, but the District Judge was of opinion that matters had now gone to such a stage that he had no power to grant relief, and that her only means of obtaining relief would be by a substantive action. I think the District Judge has acted under an imperfect appreciation of his powers.

It seems to me that the confirmation of the sale in the circumstances was an irregularity. There is no question, not only that the District Judge could refuse to confirm the sale, but that in the circumstances he ought to have refused to confirm the sale. With regard to his powers in such circumstances, I may refer to the cases of *De Mel v. Dharmaratne* [2] and *Appuhamy v. Appuhamy*,[3] and the case cited to us by Mr. Keuneman (*Gunawardene v. Yosoof* [4]). The order of the Supreme Court directing a stay of execution, so far as it related to the present appellant, was in effect, but not in form, a setting aside of the decree of the District Court, and it was held in *De Mel v. Dharmaratne* [2] above cited, that if a District Court, after its decree has been set aside by the Supreme Court, confirms a sale held in execution of the decree, that order can be vacated.

It would also clearly be a gross injustice that, whether by the default of the Court or by the default of the plaintiff in applying for confirmation of the sale, property which the Supreme Court intended to preserve for the appellant should be taken away from her. In my opinion the case should be remitted to the District Judge in order that he may cite all parties before him and determine on what terms the application of the appellant for relief should be granted. It is necessary, I think, in this case, as the sale has been completed, that notice should be given to the Fiscal, and that the Court should determine who should be responsible for paying the fees which the Fiscal has already received. The order confirming the sale, and the further order for delivery of possession, should be set aside. The appellant is entitled to the costs of this appeal, and in the Court below.

SCHNEIDER A.J.—I agree.

Set aside.

[1] *(1895) 2 N. L. R. 19.*
[2] *(1903) 7 N. L. R. 274.*
[3] *(1910) 14 N. L. R. 8.*
[4] *(1919) 1 C. L. R. 153.*