

1904.

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ROSENBERG v. SILVA.

D. C., Colombo, 19,324.

Hypothecary action—Mortgage decree—Writ of execution against property mortgaged—Fiscal's seizure and sale without advertising in the "Ceylon Government Gazette"—Competency of execution-creditor to waive such publication—Civil Procedure Code, ss. 256 and 282—Meaning of "costs and charges" in s. 256—Material irregularity.

In a hypothecary action where a writ of execution against property had been issued and the Fiscal seized and sold such property without advertising the proposed sale in the *Government Gazette* because he valued the property at Rs. 850,—

Held, that as the property was really worth over Rs. 1,000, it should have been advertised in terms of section 256 of the Civil Procedure Code, and that the non-advertisement was a material irregularity, which being obnoxious to section 282 of the Civil Procedure Code, nullified the sale.

Where, further, it was contended that, though under section 282 of the Civil Procedure Code a petition could be presented to the District Court praying for a nullification of the sale owing to a material irregularity in the conducting or publishing of the sale, this section could not be availed of in the present instance, inasmuch as the execution-creditor had by non-payment of costs of advertisement, and by his proctor's conduct, waived such publication—

Held, that the non-payment of costs by the execution-creditor did not constitute a waiver, since the costs referred to in section 256 are not costs of advertisement in the *Government Gazette*, but in ordinary newspapers; and that it was not even competent for the execution-creditor to make a waiver.

THE petitioner in this case was the mortgagee of a certain house and premises in Wellawatta. He instituted a hypothecary action and obtained a mortgage decree. On a writ of execution against the property being issued, the Fiscal's officer seized the land, and, having valued it at Rs. 850, did not advertise its

sale; nor did he give the petitioner an opportunity of bidding at the sale, having three days before the sale assured the petitioner's manager that there would be no sale till further particulars had been received from the petitioner. 1904.
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At the sale the respondent bought the premises for Rs. 550. The petitioner applied to the District Court that the sale should be declared null and void. The learned District Judge, Mr. Joseph Grenier, granted the petition, suspecting collusion on the part of the Fiscal's officer with the purchaser and his father, Podi Singho.

The purchaser appealed against this order.

Bawa, for first respondent, appellant.

Dörnhorst, K.C., for petitioner, respondent.

Van Langenberg, for Fiscal, second respondent.

Cur. adv. vult.

18th November, 1904. LAYARD, C.J.—

The plaintiff in this case obtained a money decree for over Rs. 2,726 against the defendant, together with a mortgage decree over certain immovable property and a life policy. On the 25th March, 1904, plaintiff applied for execution of the decree by issue of a writ against property; this was allowed, and in due course the immovable property mortgaged was seized. The value of the property so seized has been found by the District Judge to be over Rs. 1,000, and there appears no reason to think the District Judge was wrong in so finding. Subsequent to the seizure the Fiscal purported to sell the property to the appellant for the sum of Rs. 550. During the time the property was under seizure the Fiscal, for some mysterious reason or other, informed the plaintiff's manager that no steps had been taken and no sale fixed, and actually asked him for further particulars regarding the value of a certain life policy that had been mortgaged with the plaintiff as well as the land, and which was covered by the mortgage decree, and told him that no steps could be taken nor the sale fixed until the execution-creditor had furnished the necessary particulars. Notwithstanding this conversation, the Fiscal purported to sell under the writ three days after the conversation above referred to, viz., on the 28th April, the land mortgaged to the appellant for Rs. 550. The execution-creditor never heard of this sale and purchase until some time after it had been held; he thereupon moved the Court to set aside the sale on the ground that there had been a material irregularity in publishing the intended sale, viz., that there had been no advertisement

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 November 18. Civil Procedure Code in respect of immovable property over the
 LAYARD, C. J. value of Rs. 1,000.

It appears to me that it was clearly a material irregularity in publishing the sale of a property exceeding in value Rs. 1,000 to fail to advertise it in the *Government Gazette*, as required by section 256 of the Civil Procedure Code, for that section distinctly and emphatically enacts that no sale of such property shall take place until it shall have been advertised in the *Government Gazette* once at least twenty days prior to the sale, and an execution-creditor cannot authorize the Fiscal to waive such advertisement, which is required, amongst other reasons, for the protection of the execution-debtor.

It is argued that, in view of the provisions as to publication in any newspaper in the latter part of that section, it was the duty of the execution-creditor to require the publication in the *Government Gazette*. It appears to me that the provisions as to publication in the *Government Gazette* are imperative, and are not to be exercised at the caprice of the execution-creditor, the object being, I take it, that any landed proprietor holding property over Rs. 1,000, or any execution-creditor holding a mortgage decree over property of which the value is above Rs. 1,000, may have an easy and ready means of discovering that a sale is to take place of property in which they may be interested, and further to enable persons seeking investments to hear of sales which they may desire to attend for the purpose of investing their money. It is said that most people do not read the *Government Gazette*. True, it may not be so good a place to advertise as a newspaper, still no doubt it answers its purpose in giving notice of sales to those who are sufficiently astute to avail themselves of it. In so large a community as are resident at Colombo there are sure to be some who do look into the *Gazette* to watch the advertisement of sales of immovable property. Anyhow, in this case there was no necessity for the execution-creditor to look into the *Gazette* because he had the assurance of the Fiscal that no sale had been fixed. If the sale had been duly advertised by publication in the *Government Gazette*, it might be argued that, although the Fiscal had unintentionally deceived the execution-creditor, he was estopped by his laches in not looking into the *Gazette*. I do not say that such an argument would have been successful, but it might have been raised.

The provisions of section 256 do not cast the duty on the execution-creditor of requiring publication in the *Government Gazette* in a case such as the present. On the contrary, the law

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specially directs that no sale shall take place where the property exceeds the value of Rs. 1,000 until it has been advertised in the *Government Gazette* once at least twenty days prior to the sale. Assuming, however, that it was the duty of the execution-creditor to ask for the advertisement in the *Government Gazette*, as suggested by respondent's counsel, his neglect to do so in this case is accounted for by the action of the Fiscal in saying he wanted further information before he could fix the date of sale, and naturally the execution-creditor would abstain from demanding publication in the *Government Gazette* until he had furnished the Fiscal with all the information he required.

It is argued that he is required to pay under section 256 all costs and charges in respect of advertisement in the *Government Gazette* in advance. The payments in advance of costs and charges there referred to are in respect of newspapers other than the *Government Gazette*. I dare say that the Fiscal may be justified in demanding payment of charges attending advertisement in the *Government Gazette* before he advertises therein. If such is the custom, there is more reason for the execution-creditor thinking in this case that the date of sale had not been fixed.

The appellant's counsel contends that the application of respondent's proctor for permission for respondent to bid for property seized and advertised for sale, which was made on the 15th April, 1904, prior to the sale to appellant, was a recognition by the respondent that the sale, which had been prior to that date fixed, was duly advertised, and amounts to a waiver of the material irregularity now taken advantage of. If that application had stood alone it would point to a knowledge by respondent on the 15th April, 1904, of the coming sale. That there was any such knowledge has been, however, rebutted by the sworn testimony of respondent that he did not know the sale had been fixed, or that the sale had taken place until after the Fiscal had purported to sell the property. The application appears to have been made by the respondent's proctor in the ordinary course of business, thinking everything was in order, but even after he had made it the Fiscal assured the execution-creditor's manager that the date of sale had not been fixed. I cannot find that there has been any waiver by the respondent of the material irregularity which occurred in the publishing of this sale, nor can I find anything in his conduct which estops him from now questioning the validity of the sale. I think the respondent has clearly established that he has sustained substantial injury by reason of such irregularity. The Fiscal's action took away from him the necessity of looking into the *Government Gazette*. If he had looked he would have been

1904. none the wiser. Intending purchasers of property would, as I said November 18. before, naturally refer to the *Government Gazette*. I cannot LAYARD, C.J. presume that they would not do what an ordinarily astute person seeking an investment would do. Had the respondent attended the sale he would have acquired the property, as he was and is willing to pay a larger figure than that paid by appellant. He had deposed he would purchase the property at any time for Rs. 2,500, and is now prepared to pay that sum.

The District Judge must direct that in the sale to be held under the decree the upset price shall be Rs. 2,500, and that the execution-creditor is not at liberty to purchase the property for any sum less than that amount.

Subject to that variation, in my opinion the judgment of the District Judge was right, and the appellant's appeal must be dismissed with costs.

MONCRIEFF, J.—I agree.
