

PATRICK LOWE & SONS AND OTHERS

v.

COMMERCIAL BANK OF CEYLON LTD

SUPREME COURT

S.N. SILVA, C. J.

P.R.P. PERERA, J. AND

BANDARANAYAKE, J.

SC (CHC) APPEAL NO. 6/2000

H.C. (CIVIL) 62/98(1)

15TH JANUARY, 2001

Civil Procedure Code - Writ of execution - Stay of sale of immovable property - Charges and fees recoverable by the auctioneer - Sections 256 and 258 of the Civil Procedure Code.

The respondent company ("the plaintiff") instituted action in the High Court of Colombo ("Commercial High Court") against the appellants and obtained judgement for the recovery of money due on a banking facility amounting to Rs. 3 million. The money advanced was secured by a primary mortgage of an agricultural property. The appellants sought leave to appeal against the judgement, decree and proceedings for execution of the decree. During the pendency of that application the dispute was settled and consequently, the execution of the decree was stayed; and leave to appeal was granted only on the question of fees recoverable by the auctioneer. In the circumstances, the auctioneer was noticed and was a party to the hearing of the appeal.

Held :

The expenses, charges and fees that could be recovered by an auctioneer are only those permitted by sections 256 and 258 of the Civil Procedure Code, What is not permitted by those provisions would be struck down by court as being in excess of authority.

Per S.N. Silva, CJ.

"It has to be borne in mind that the seizure of property, sale and connected measures that are taken in execution of proceedings are highly invasive of the rights of the person who is entitled to such property. The rights assured to an owner at Common Law are those specifically limited by the provisions with regard to seizure and sale contained in the overall statutory scheme of the Civil Procedure Code for execution of a decree."

Cases referred to :

1. *Ashbury Railway Carriage and Iron Co. Ltd v. Hector Riche* (1875)
LR 653
2. *Attorney - General v. The Great Eastern Railway* (1880) 5 A.P. 473.
3. *Liyanaage and Others v. Gampaha Urban Council and Others* (1991)
1 Sri LR 1

APPEAL from the judgement of the High Court

Mohan Petris for appellants.

Faisz Musthapha, P.C. with *C. Weerasooriya* and *D.D.T. Dassanayake*
for the party noticed.

A. Coorey with *C. Ladduwahetty* for respondents.

Cur. adv. vult.

April 04, 2001.

S.N. SILVA, C.J.

The Respondent Bank instituted proceedings against the Defendants Appellants in the High Court of the Western Province sitting at Colombo (Commercial High Court) for the recovery of money due on a banking facility that extends to Rs. 3 million. The money advanced on this facility was secured by a primary mortgage of an agricultural property of about 24 acres.

The causes of action are in respect of 3 Bills of Exchange on which money was due from the Appellants. Decree was entered against the Appellants as prayed for, by the High Court. The Appellants sought leave to appeal in respect of the decree of the High Court and proceedings taken in execution of the decree. The execution of the decree was stayed and when the application for leave to appeal was considered, parties submitted that a settlement had been arrived at as to the

amount due and the instalment payments. The only outstanding issue was with regard to the fees claimed by the auctioneer in execution proceedings, which had been paid by the Respondent Bank after the execution was stayed by the High Court. Since the other issues were resolved, leave to appeal was granted only on the question of the fees recoverable by the auctioneer. In the circumstances the auctioneer was noticed and was a party to the hearing of the appeal. Written submissions have been filed by the Appellants and the auctioneer.

The several items contained in the bill submitted by the auctioneer are as follows :

i	fees for the publication in the gazette	Rs. 2445.40
ii.	fees for the publication of notice in the "Lankadeepa"	Rs. 13751.29
iii.	fees for the publication of notice in the "Island"	Rs. 13225.14
iv.	for posters, banners and hand bills	Rs. 18000.00
v	for the preparation of conditions of auction	Rs. 1000.00
vi.	stamp fees	Rs. 200.00
vii.	travelling expenses	Rs. 4000.00
viii.	valuation fees for Rs. 13682812 at 0.5%	Rs. 68414.06
ix.	commission for Rs. 13682812 at 2 1/2%	Rs. 34070.30
	Total	<u>Rs.463,106.19</u>

Learned Counsel for the Appellant contended that the expenses, charges and fees that could be recovered by an auctioneer are only those permitted by sections 256 and 258 of the Civil Procedure Code. It was submitted that since the sale itself was stayed, the amount recoverable as fees would be specifically governed by the provisions of section 258. Learned President's Counsel for the party noticed, the auctioneer, submitted that the process of effecting a sale is based on a commission issued to the auctioneer by Court. Pursuant to which the auctioneer tenders to court a valuation report and

an estimate of his charges. This includes his commission. It was submitted that subsequent action, is taken in relation to the sale on the approval granted by Court of the charges and commission, included in the estimate. On this basis it was submitted that section 258 of the Civil Procedure Code has no application and that the auctioneer is entitled to recover the full amount of his charges and commission, in respect of which prior approval was granted by Court. It was also submitted that the sale was stayed on an agreement arrived at between the parties and the High Court in its order dated 10.4.2000 made on the agreement of parties specifically stated that the expenses already incurred by the auctioneer and the commission fees would be payable as a pre-condition for such stay. On 27.4.2000, the auctioneer submitted his claim for expenses and fees and the Court made order directing that the bill be taxed and the amount so taxed should be paid by the Plaintiff. On this basis it was contended that the payment that was made is on an order of Court which in turn derived its authority from the settlement entered into by the parties pursuant to which the sale was stayed.

The submissions of learned Counsel involve an important question of law relating to the application of the relevant provisions of the Civil Procedure Code with regard to the sale of immovable property and the expenditure and/or fees that may be lawfully recovered by an officer carrying out such sale.

It has to be borne in mind that the seizure of property, sale and connected measures that are taken in execution proceedings are highly invasive of the rights of the person who is entitled to such property. The rights assured to an owner at common law are thus specifically limited by the provisions with regard to seizure and sale contained in the overall statutory scheme of the Civil Procedure Code for execution of a decree. In this statutory scheme the execution of the decree is at all times done under the authority of Court. The property that is liable to

be seized, the manner of effecting seizure and the sale for the recovery of the sum decreed, are all laid down in the Civil Procedure Code. The authority of the Court is here exercised by the Fiscal or other person duly authorized by writing under his hand. At present there is no Fiscal, but the Registrar of the particular Court is designated Deputy Fiscal for the purpose of carrying out the functions that lie on the Fiscal in terms of the law. Section 5 of the Civil Procedure Code provides that the Fiscal includes a Deputy Fiscal. Thus the order for sale made by the Court is given effect to by the Registrar in his capacity as Deputy Fiscal, by authorizing an auctioneer to carry out the necessary functions. The auctioneer would himself thereupon be vested with the authority that flows from the respective provisions of the Civil Procedure Code.

It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage & Iron Co. Ltd., vs. Hector Riche*⁽¹⁾ and the *Attorney General vs. The Great Eastern Railway*.⁽²⁾ It follows that what is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by Court as being in excess of authority.

In earlier times the enabling statutory provisions were strictly interpreted in delineating the limits of the power or authority that was vested. The later judgments have adopted a less rigorous approach in applying the doctrine and any action which could be reasonably considered as being incidental to or consequential upon that which is permitted, is not to be considered as *ultra vires*, provided such action is taken to promote the general legislative purpose in the conferment of power on that particular person or authority (vide *Ltynage and others vs. Gampaha Urban Council and others*⁽³⁾)

When the foregoing principles are applied to the instant case it would be seen that the auctioneer has to act in terms of the power or authority vested in him by the provisions of the Civil Procedure Code that relate to the sale of the property seized and the recovery of charges and fees for the work done by him. The submission of learned President's Counsel that the relevant provisions of the Civil Procedure Code with regard to charges and fees that are recoverable are not applicable, is therefore wholly untenable. The auctioneer cannot exercise the highly invasive power with regard to property of the judgment debtor in terms of the Civil Procedure Code and at the same time claim that he is not bound by the limits imposed by that provision itself on the matter of recovering his charges and fees. Similarly, it cannot be contended that the Court could vest authority in the auctioneer by accepting his estimate of charges and fees to recover amounts in excess of what is permitted. Even the court is bound by the relevant provisions of the Civil Procedure Code in this matter. Further, even assuming that there was an implied consent by the parties, that too would not permit the auctioneer to recover any amount in excess of what is permitted. For, such a process of permitting a party to pay a higher amount would negate the very purpose of the amount recoverable being fixed in the law itself.

The relevant provisions of the Civil Procedure Code with regard to the sale of immovable property are contained in Sections 256, 258 and 259 of the Civil Procedure Code. Section 256 provides that where the value of the property seized exceeds Rs. 5000/- in addition to other notice that is required to be given by section 255, the sale itself should be advertised in a local newspaper or in such other manner as "the court may direct having regard to the valuation of the property and other relevant circumstances." The provisions contain the time period within which such advertisement and publication of the sale should take place. The costs and charges with regard to such advertisements are payable in advance, as provided.

Section 259(1) empowers the Court, on the application of the judgment debtor to postpone the sale and make such order as to the payment of fees and charges due to the Fiscal. Section 258 specifies the fees recoverable by the Fiscal or the auctioneer authorized by him.

It reads thus :

“258. Every sale shall be held by an officer of the Fiscal, or some other person duly authorized by the Fiscal by writing under his hand.

When the proceeds do not exceed the sum of seven thousand five hundred rupees, the Fiscal shall recover a fee of three per centum on the proceeds actually recovered on return thereof made to the court in respect of every sale and resale of movable property, and two per centum on the proceeds of sale of immovable property belonging to the debtor.

When the proceeds, whether of movable or immovable property, exceed that sum, the Fiscal shall recover a fee of one hundred and fifty rupees and of five rupees for every thousand rupees of the proceeds over and above the said sum of seven thousand five hundred rupees.

And in every case after the seizure of property and publication of sale thereof, in which the sale shall be postponed or stayed at the request or with the concurrence of the party suing out the writ, the Fiscal shall recover half of the above fees on the estimated value of such property from the party at whose instance the writ shall be stayed, and in default of immediate payment thereof the Fiscal shall certify the amount of such fees to the court whence the execution issued:

Provided, however, that such fee shall never exceed fifty rupees or the actual expenditure already incurred by the

Fiscal towards carrying out the sale, whichever sum shall be the larger. The fees recovered under this section shall be brought to account and appropriated in such manner as the Secretary to the Treasury shall from time to time direct.”

It is seen that the fee that is recoverable is limited in relation to three distinct situations.

The first situation is where the proceeds of the sale do not exceed a sum of Rs. 7500/-; the fee is fixed at 3% of the sum actually recoverable in relation to the movable property and 2% in relation to immovable property. This would be in addition to the costs of advertisements payable under Section 256.

The second situation is where the proceeds exceed the sum of Rs. 7500/-; the fee recoverable would be Rs. 150/- for every Rs. 1000/- of the proceeds over and above Rs. 7500/-. This would be in addition to the costs of advertisement as stated above.

The third situation is where the sale is postponed or stayed. The amount recoverable as fees would be half the amount that may be due in relation to the first and second situations on the basis of the estimated value of the property. However in this instance the fee recoverable is specifically limited by the proviso at the end of section 258 which states “that such fee shall never exceed fifty rupees or the actual expenditure already incurred by the Fiscal towards carrying out the sale whichever sum shall be the larger.”

The present case comes within the third situation and would be governed by the proviso with the specific limitation referred to above. In the result the amount that is recoverable would be the actual expenditure incurred towards carrying out the sale since that amount is obviously more than the sum of Rs. 50/-.

If the bill submitted by the auctioneer is examined in the light of the foregoing it would be noted that items i to vii, would

come within the description of the actual expenditure already incurred towards carrying out the sale.

Item viii relates to valuation fees, in respect of which the auctioneer is seeking to recover a sum of Rs. 68, 414.06 being an amount computed at 0.5% of the value. It appears that such valuation is done prior to the stage of the sale. Section 256 referred to above empowers the Court to direct that the sale be advertised "having regard to the value of the property..... ." It is a concomitant of this provision that the Court could require a valuation to be done of the property to be sold. Such a valuation should be paid for and its cost would be an expenditure incurred towards carrying out the sale. Therefore I hold that item viii being the valuation fee is also recoverable by the auctioneer.

Item ix being the largest component of the bill is a "commission" claimed by the auctioneer of 2 1/2% of the value of the property. The amount claimed is Rs. 342,070.30. The auctioneer is not empowered to claim a commission based on the value of the property in terms of section 258 or any other provision. The right to make such a claim cannot even be remotely implied from any of the provisions. What is recoverable is a fee on the proceeds of the sale to be computed in the manner set out in the first and second situations referred above and where the sale is stayed half of that amount subject to the limitations in the proviso to section 258. As noted above in the instant case the amount recoverable as a fee would be the actual expenditure that was incurred. Since that is incorporated in items i to vii, I hold that no additional amount is recoverable as a fee or commission by the auctioneer. In the circumstances the claim of the auctioneer for the payment of a commission of Rs. 342,070.30 is disallowed. The auctioneer is directed to refund the said amount if it has been paid. Since the parties have arrived at a settlement as to the amount payable and the instalments, the decree could be accordingly amended by the High Court.

Subject to the foregoing the appeal is *pro forma* dismissed. No costs.

PERERA, J. - I agree.

BANDARANAYAKE, J. - I agree.

Appeal dismissed pro forma subject to amendment of auctioneer's charges.