Present : Bertram C.J. and Schneider J. 1924.

COLOMBO STORES, LTD., *v.* SILVA.

89—D. C. (Inty.), Colombo, 2,034.

Civil Procedure Code, s. 284—May execution-creditor apply to set aside sale on the ground that the debtor had no saleable interest—Construction of Statutes—Proviso.

An execution-creditor who purchases property at the execution sale may apply under section 284 of the Civil Procedure Code that the sale be set aside on the ground that the judgment-debtor had no saleable interest therein.

Words are not to be read into an enactment, which are not to be found there, and which would alter its operative effect, because of provisions found in a proviso.

[1] *(1913) 16 N. L. R. 474.* [2] *(1914) C. P. 857.*
[3] *(1897) 2 N. L. R. 13.*

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THE facts are set out in the judgment.

Choksy, for the appellant.

E. G. P. Jayetilleke, for the respondent.

July 17, 1924. BERTRAM C.J.—

This case raises an important point of procedure, namely, whether section 284 of the Civil Procedure Code, which authorizes a purchaser in execution sale to apply by petition in summary procedure to set aside the sale on the ground that the person whose property purported to be sold had no saleable interest therein, applies to a case in which the purchaser is the execution-creditor. In the present case the purchaser was the execution-creditor, and he appears to have sent a messenger to point out certain land to the Fiscal's Arachchi ; and on the land being so pointed out, the Fiscal seized it. The sale was duly confirmed, and the Fiscal's transfer was executed. But it was not until about eight months after the Fiscal's transfer that the true facts became known to the purchaser, namely, that the property seized did not belong to the judgment-debtor but to his wife.

The terms of section 284 are perfectly general, and apparently there can be no doubt that the words would apply to the case of a purchaser, who is the execution-creditor, but for the terms of a proviso annexed to the section. In the case of *Suppramanian Chetty v. Fernando* [1] De Sampayo J. expressed the opinion that the terms of the proviso, which declares that both the judgment-debtor and the decree holder must be made respondents to the petition, have the effect of limiting the substantive words of the section, and excluding from its application the case in which the purchaser is himself the decree holder. He further said that this exclusion of a decree holder from the section is justified by the fact that it is the decree holder who himself causes the property to be seized and sold, and presumably undertakes the risk when he purchases under the writ. These observations, though obiter, are necessarily of very great weight. But on a careful consideration of the terms of the section, we are of opinion that this cannot be limited in the manner suggested.

The effect of a proviso with reference to the substantive words of the enactment to which it is appended have been considered by the House of Lords in the case of *The West Derby Union v. The Metropolitan Life Assurance Society*.[2] In that case it was sought to import into the substantive section certain words which were not there, but which were thought to be implied from the terms of the proviso attached to the section. Lord Herschell there said, on page 655, " I decline to read into any enactment words which are

[1] *(1917) 4 C. W. R. 33.*

[2] *(1897) A. C. 647.*

not to be found there, and which would alter its operative effect because of provisions to be found in any proviso." Lord Watson said, on page 652, " I am perfectly clear that if the language of the enacting part of the Statute does not contain the provisions which are said to occur in it, you cannot derive these provisions by implication from a proviso. When one regards the natural history and object of provisos, and the manner in which they find their way into Acts of Parliament, I think your Lordships would be adopting a very dangerous and certainly unusual course if you were to import legislation from a proviso wholesale into the body of the Statute, although I perfectly admit that there may be and are many cases in which the terms of an intelligible proviso may throw considerable light upon the ambiguous import of statutory words."

It cannot be said here that the statutory words have any ambiguous import or require any explanation. All that is said is that the reference to the decree holder in the proviso impliedly excludes him from the operation of the section. The authority I have quoted clearly establishes that such a construction cannot be maintained.

In that case the facts were that an attempt was made to import a general positive provision into the substantive part of the enactment, because a partial negative exception was contained in the proviso. But the principle of that case is equally fatal to the attempt made in the present case to limit the general terms of the principal enactment by reference to a particular saving in the proviso.

With regard to the second ground which De Sampayo J. puts forward for the opinion which he expresses, it may be permitted to point out that it is not necessarily the execution-creditor who points out the land for seizure. Section 226 clearly indicates that it is for the judgment-debtor in the first case to point out land to be seized, and that it is only in default of his doing so that the judgment-creditor is called upon to point out property for seizure. With regard to this particular proviso, its object is to protect the decree holder ; to secure that, in a case in which he would not otherwise have notice, he gets notice. It would be acting against this object if we were to construe the proviso as depriving him of the privilege of the section altogether. The proviso applies only in cases in which some person other than the decree holder is the purchaser.

There are one or two incidental difficulties in the application of the section in the wide sense in which it is to be construed. The first is that section 285 declares that when a sale of immovable property is set aside on the ground of want of interest, the purchaser is entitled to receive back his purchase money from any person to whom the purchase money is paid. In cases of this sort it is only the balance of the purchase money which is actually paid, after giving credit to the purchaser for his judgment-debt. With regard to that, it is sufficient to say that section 285 only applies to such cases as naturally come within it, and in so far as any case naturally

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comes within it. If all has been paid by the execution-creditor as a balance of the purchase money, that balance is recoverable under the section.

Further, the question might well arise as to the application of section 272 in such a case. Satisfaction of the decree under that section may have been entered up. What is the effect of setting aside a sale upon this entry of satisfaction? I think it follows of necessity that upon the sale being cancelled, the entry of satisfaction is cancelled also.

Mr. Jayetilleke raises a further point: He cites an Indian case (*Mahabir Prasad v. Dhumandas* [1]) which lays it down that, where an execution-creditor knew at the time of the purchase that his debtor had no saleable interest, he cannot apply under section 284 to set aside the sale. The Court has a discretion in the matter, and would not exercise it in such a case. He suggests that in this case the purchaser had either notice or constructive notice that his execution-debtor had no title. I cannot see that this suggestion of constructive notice is made out. It is true that the Fiscal's Arachchi made a report which mentioned the fact that the execution-debtor's wife had certain property within the boundaries pointed out, and that there was no block of the extent indicated within the property seized. But that report is not very definite in its term, and it was not communicated to the execution-creditor.

It was not made to the Court until after the sale, and though it is true that the confirmation of the sale took place after the report was rendered, I am not clear that the execution-creditor was under an obligation to investigate the record at every stage of the transaction to see that no flaw in his title was disclosed. I do not consider that he had constructive notice of this report, and even if he had constructive notice of it, the report could have done nothing more than put him on inquiry. I do not think, therefore, that by reason of the circumstances of this case we should refuse to exercise our discretion in favour of the execution-creditor. I would, therefore, allow the appeal with costs in both Courts.

SCHNEIDER J.—I agree.

Appeal allowed.

[1] *(1881) I. L. R. 3 Alla. 527.*