

1932

*Present : Garvin S.P.J. and Jayewardene A.J.*RAMANATHAN CHETTIAR *v.* KURERA *et al.*

118—D. C. (Inty.) Chilaw, 8,706.

Mortgage action—Sale by auctioneer—Confirmation of sale—Notice to judgment-debtor not necessary—Ordinance No. 21 of 1927, s. 12 (1).

Where property is sold by an auctioneer in pursuance of a hypothecary decree entered under the provisions of the Mortgage Ordinance, No. 21 of 1927, the Court is not bound to give notice of confirmation of sale to the judgment-debtor.

A PPEAL from an order of the District Judge of Chilaw. The facts appear from the judgment.

Weerasooria (with him *Rajapakse*, *Samarakoon*, and *J. R. Jayewardene*), for the first and second defendants, appellants.

H. V. Perera (with him *E. F. N. Gratiaen*), for the plaintiff and purchaser, respondents.

July 18, 1932. GARVIN S.P.J.—

In pursuance of a certain hypothecary decree entered in this case various allotments of land which were the subject of the hypothecation were sold on July 7, 8, and 9, 1930. In terms of the decree the sale was held by Mr. Leitan, an auctioneer. Certain of those allotments were purchased by the plaintiff and the purchaser of the remaining allotments was a stranger to this action. The sale was duly reported to the Court on July 22. On August 22, 1930, the present application was made to the Court to set aside the sale. Various very general and very vaguely stated grounds were pleaded as reasons why this sale should be set aside. The only two worth noticing are those in paragraphs 4 (c) and (g), namely, that the sales were not held at the times mentioned in the advertisements, and that certain intending purchasers were dissuaded from bidding by the plaintiff. The application was set down for hearing on February 18, 1931. On that day objection was taken by the petitioners themselves that the third defendant and the heirs of the fourth defendant had not been made parties, and a date was appointed before which, it was quite clear, the District Judge intended that they should rectify their error

by bringing those parties before the Court. The matter was fixed for hearing on April 23. On that day objection was taken to the application upon two grounds, first, that the petitioners had failed to comply with the directions of the Court given on February 18, and secondly, that the sales of these premises had, in point of fact, been confirmed on August 15, 1930, a week prior to the date upon which this application was filed and that the Court had therefore no jurisdiction to entertain this application or grant the petitioners the relief they claimed. The first of these objections was very strenuously pressed and a long argument appears to have taken place as to the correct interpretation of the terms of the order made by the District Judge on February 18. The Judge himself was perfectly clear in his mind that it was his intention not only that steps should be taken for the purpose of bringing the third defendant and the heirs of the fourth defendant in as parties, but that the application was to be dismissed if the petitioners did not actually succeed in bringing them upon the record as parties to this proceeding before the expiry of March 19. He has, also, expressed in terms which leave no doubt that he felt that the petitioners were well aware of the real intention and meaning of the order. It is pressed upon us, however, that, whatever the intention may have been, the terms of the order are capable of the interpretation which the petitioners placed upon it. There is no reason, however, to examine that submission further for the reason that the second of these objections taken to this application is clearly entitled to succeed.

We were invited to treat this as an application to the Court to vacate its order of August 15, confirming the sale. In view of the admission that at the time this application was made the petitioners were not aware that the sale had been confirmed, it is a little difficult to accede to this request. But even if we examine the petition with a view to acceding to counsel's request, if that be possible, we are unable to find in it such averments as we should have expected to find if this were an application to the Court to vacate its order. It was submitted to us, however, that inasmuch as the order for confirmation was made without notice to the petitioners that it was competent for the Court to vacate it and that there was a sufficient reason for the Court doing so in that it had confirmed the sale before the expiry of 30 days from July 22, which was the date on which the sale was reported to the Court by the auctioneer who held it. There is nothing in the provisions of the law applicable to such sales—I refer to the provisions of Ordinance No. 21 of 1927—which require the Court to give notice of an application for confirmation of a sale held in execution of a hypothecary decree. Section 12 (1) enables the Court to embody the directions as to the conditions and conduct of the sale, the person to conduct it, the confirmation of the sale and the form of the conveyances in the decree. There is nothing in the decree in the nature of directions as to the confirmation of the sale and in the conditions of the sale which were subsequently approved by the Court. The only reference to confirmation is in the condition which states that the sale is subject to the confirmation of the Court. Nor is there in the conditions or in the decree or in any subsequent directions given by the Court a direction specifying any period during

which the sale held in execution of this decree was to remain in suspense before it was confirmed. Counsel has endeavoured to invoke the provisions of section 282 and the following sections of the Civil Procedure Code into the matter. But this is not a sale which was held by a Fiscal under the provisions of the Civil Procedure Code but, as I have said, a sale to which the special provisions of the Mortgage Ordinance, No. 21 of 1927, are applicable, and it is a sale which by the very decree entered in this case and in accordance with its directions was held not by the Fiscal, but by a person specified by the Court in its decree. There would seem to be no reason, therefore, why the Court should not have confirmed the sale of these premises as it did. Subsequent to the confirmation the Court further directed that conveyances should issue to the purchasers and specified the person by whom such conveyances should be executed. Conveyances were in accordance with these directions duly executed. The order confirming the sale is one which the Court was entitled to make without notice to the appellants: it was not made *per incuriam* nor has any ground been alleged or established which would entitle the Court to vacate the order.

We were finally invited to treat this as an application made under the provisions of section 344 to the Court to set aside the sale on the ground of fraud. The provisions of section 344 would justify an application to set aside a sale where relief is claimed on the ground of fraud. But fraud should be specifically and clearly set out and pleaded in the application. In this case there is no such plea and it is quite impossible to construe the language of this petition as embodying an allegation of fraud.

The appeal will, therefore, be dismissed with costs.

JAYEWARDENE A.J.—I agree.

Appeal dismissed.
