

1933

Present : Dalton A.C.J. and Koch A.J.

PERERA *v.* WICKREMARATNE *et al.*

40—D. C. Badulla, 5,407.

Fiscal's sale—Satisfaction of claim before sale—Tender of fiscal's charges and request to stay sale—Refusal of fiscal to exercise his discretion—Material irregularity—Civil Procedure Code, ss. 282 and 342.

Where, at a fiscal's sale, evidence is produced, before the sale takes place, that the plaintiff's claim has been satisfied and money is tendered for fiscal's charges, the failure of the fiscal or his deputy to exercise his discretion and adjourn the sale, is a material irregularity within the meaning of section 282 of the Civil Procedure Code.

A PPEAL from an order of the District Judge of Badulla.

H. V. Perera, for defendant, appellant.

Rajapakse (with him *Stanislaus Alles*), for purchaser, respondent.

July 20, 1933. DALTON A.C.J.—

The appellant is the defendant in the action, the respondent appearing on the appeal being the purchaser of the appellant's property bought at a fiscal's sale. The plaintiff (respondent), who did not appear on the

¹ (1925) 27 N. L. R. 33.

² (1918) 21 N. L. R. 12.

appeal, obtained judgment against the defendant for the sum of Rs. 600, and Rs. 102.80 costs. She took out a writ on December 21, 1931, for the sum of Rs. 702.80 and on March 3, 1932, seized the land in question, valued by the fiscal at Rs. 3,000. The sale was advertised for April 16. The plaintiff also seized salary due to the defendant, a sum of Rs. 72.95 representing salary due, being paid by the defendant's employer into Court on March 5. On March 31, defendant's employer sent a further cheque for Rs. 629.85 to the Court, being the balance of the amount due to plaintiff. Receipts for both these sums were issued to him on the instructions of the District Judge, and the amounts were paid over to the plaintiff on March 19 and April 9, respectively. Plaintiff's claim was thus satisfied. On April 14 appellant heard by telegram from his proctor that further sums were due for proctors' and fiscal's charges, amounting to Rs. 115. Accordingly he sent a messenger with Rs. 115 in cash on April 16 to the fiscal's deputy to the scene of the sale, together with a letter stating it was the balance due, to which was also attached the District Judge's acknowledgment for the previous amount paid. This amount was tendered to the fiscal's officer before the sale, but he refused the amount, stating he could not stay the sale except on an order of the Court. He therefore proceeded with the sale and the property, valued by him at Rs. 3,000 and by appellant at a higher figure, was sold to the purchaser respondent for Rs. 560.

The learned District Judge has held that although the appellant has suffered substantial injury, there was no irregularity in the conducting or publication of the sale within the meaning of section 282 of the Code, and no proof of any fraud or error that would entitle the appellant to have the sale set aside under the provisions of section 344.

There is no doubt that the plaintiff's claim was satisfied some considerable time before the sale. The deputy fiscal says he was not aware of these payments, but since they were payments into Court, it is difficult to believe he did not know of them. There was nothing due thereafter to the judgment-creditor. On the day of the sale the balance due for charges was tendered to the deputy fiscal in cash, and evidence, in the form of the District Judge's acknowledgment, was tendered to him of the earlier payment. He refused the cash and apparently declined to look at the receipt, if he is to be believed. The reason he gives for acting as he did is that his instructions from the fiscal are not to stay a sale once advertised except on an order of the Court. An extract of those instructions was produced at the inquiry, but it is clear they refer to the stay of execution proceedings and adjournments of sale under section 343 of the Code. The extract is in fact so headed, and there is no doubt that it refers to stay of execution proceedings under that section which can only be by order of the Court.

Both the learned trial Judge and the fiscal's deputy appear however to have overlooked the provisions of section 342 of the Code, which gives the fiscal a discretion to adjourn a sale, on good ground being shown for such adjournment of course, and directs him to report to the Court the cause for which the adjournment was made. Where clear and undisputed evidence is produced to the fiscal or fiscal's deputy before the

sale, that the plaintiff's claim has been satisfied and cash for his fees is tendered, what stronger and better case could be put forward for the exercise of his discretion to adjourn the sale and report the cause of the adjournment to Court? How can he justify in such a case, the selling of the property seized in execution? Counsel urged, on behalf of the respondent, that even if double the amount of the judgment-debt and all sale expenses were tendered in cash before the sale, the fiscal might still proceed with the sale which would then become effective. The Court will deal with that case when, if ever, it arises. He suggested further that the receipt produced might have been forged. If the fiscal's deputy had looked at the document and had given that as his reason for declining to accept it, there might be some explanation for his conduct. Under the circumstances here, the evidence is clear that he exercised no discretion at all such as the law gives him and requires him to use when called upon to do so, as to whether the sale should be adjourned, he misread his instructions and he proceeded with the sale as if he had no authority at all to adjourn it although asked to do so, and for very good reason. That, in my opinion is, under the circumstances, an irregularity in the conducting of the sale within the meaning of section 282.

The decision in *Silva v. Ibrahim Rawter*¹ relates to claims under section 241 where it was urged that the fiscal should have stayed the sale when a claim was made. With regard to the postponement of a sale under the provisions of section 242 *Wendt and Middleton JJ.* appear to have been of opinion that it only applied to the postponement of a sale after it had been commenced. If that construction is correct in that case, Mr. Rajapakse conceded it could not be applied to an adjournment under section 342, since such a narrow construction is not consistent with the words of that section. In *Uparis v. Subasinghe*² the power of the fiscal to adjourn a sale under section 342 is referred to, and the safe course that he should adopt in certain cases is pointed out. That he has a discretion in the matter is of course clear, but he cannot throw off his responsibility by saying he has no discretion at all. He must be on his guard against being deceived by false stories, but in practice a sensible officer should have no difficulty in deciding whether or not he should adjourn a sale under the powers given him by section 342 when asked to do so. If he is in doubt, he should adjourn it and report the cause for doing so at once to the Court.

There is one unreported case which has been brought to our notice, in which it was held that the refusal of a fiscal's officer to accept the tender of the amount due was not an irregularity in conducting the sale which entitled the judgment-debtor as against the purchaser to have it set aside under section 282. (*Supreme Court Minutes, November 2, 1914 S. C. 321—C. R. Matara 7,386.*) The facts of the case are not set out and so one does not know what tender was made, in what form it was made, or what reasons were put forward by the fiscal's officer for refusing the tender and for proceeding with the sale. In his judgment *Wood Renton C.J.* pointed out that there was very little authority on the point, but he came to the conclusion that there was no positive requirement of the law which compelled the officer to accept the tender. I

¹ 10 N. L. R. 56.

² 19 N. L. R. 468.

think one may therefore safely assume the fiscal's officer had exercised the discretion given to him by section 342, although the material upon which that was done does not appear, and did so properly, in which circumstances there would be no irregularity in conducting the sale and in his refusal to accept the tender. If that is so, I think it can be distinguished from the case before us.

Argument was addressed to us also, and cases cited, as to the powers of the Court to set aside the sale under the provisions of section 344 of the Code, but it is not necessary in view of my conclusion to consider them. I am satisfied a material irregularity in conducting the sale within the meaning of section 282 of the Code has been committed and that the appellant thereby suffered material loss and injury. He is entitled to have his application granted; the appeal is allowed and the sale set aside. In the circumstances, although the respondent is not responsible for what happened, I do not see that the appellant can be denied his costs in both Courts. I would so order.

Koch A.J.—I agree.

Appeal allowed.

