[FULL BENCH.]

Present : Bertram C.J., De Sampayo J., and Garvin A.J.

ABDULLA *v.* MENIKA *et al.*

295—C. R. Colombo, 23,526.

Execution—Fiscal's sale—Confirmation of sale after decree was set aside in appeal—Is confirmation of sale a step in execution ?—Confirmation after lapse of several years.

Per BERTRAM C.J. and DE SAMPAYO J., *dissentiente* GARVIN A.J.—The confirmation of a sale is part of the execution proceedings, and a sale is not complete until it is confirmed.

A Court cannot confirm a sale held in execution of a decree which has been set aside in appeal after the sale and before its confirmation.

THE facts are set out in the judgment.

H. V. Perera, for purchaser, appellant.—The question is whether the Supreme Court may confirm a sale in execution of a decree after the decree was set aside in appeal. *De Mel v. Dharmaratne,*[1] which decides that the Court has no power to confirm the sale after the decree was set aside, was wrongly decided. That decision, as well as the earlier decision to the same effect in *Idroos Lebbe v. Meera Lebbe,*[2] is based on two Indian cases: *2 Bom. 540* and *10 All. 83.* The latter Indian case is distinguishable, in that the execution purchaser was there the decree-holder himself. The decree-holder purchasing property at the execution sale takes it subject to the ultimate result of the litigation, so that he must give up the property purchased by him in the event of the decree being subsequently set aside. But " *bona fide* purchasers, who were no parties to the decree which was then (. . . . at the time of the sale) valid and in force, had nothing to do further than to look to the decree and to the order for sale." See judgment of the Privy Council in *10 All. 166.* In that case there were several sales in execution of a decree, which was subsequently set aside on the ground that the Court had no territorial jurisdiction to entertain the action. Some of the properties put up for sale were purchased by the decree-holders, and the others were purchased by persons who were not parties to the action. The Privy Council set aside the sales to the decree-holders, but upheld the sales to the others. The principle underlying this decision has been recognized in several Indian cases (*7 W. R. 312, 8 W. R. 300, 10 W. R. 154, 12 W. R. 508,* and *23 Cal. 857*). The judgment of the Supreme Court in *Hamidia v. Kirihamy*[3] is based on the same principle. Two lands were sold in

[1] *(1903) 7 N. L. R. 294.*
[2] *1 Tam. 6.*
[3] *(1917) 19 N. L. R. 215.*

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execution of the decree in the present case. One Kiri Banda purchased one of the properties, and the present appellant purchased the other. The Supreme Court upheld the sale to Kiri Banda. [BERTRAM C.J.—The sale to Kiri Banda was confirmed before the decree was set aside.] That is so, but the decision of the Supreme Court is based not on that fact, but on the fact that there was a valid decree subsisting at the time of the sale.

The decision in *2 Bom. 540* is inconsistent with the judgment of the Privy Council in the case cited, and cannot be regarded as correct. Moreover, the Judges who decided the Bombay case purport to apply the principle laid down by the Privy Council in *7 Bengal L. R. 186*, viz., that an execution sale of property which by its nature is not subject to seizure and sale in execution is void. But that principle has no application.

In *De Mel v. Dharmaratne*,[1] Wendt J. bases his decision on the ground that "the confirmation of the sale is a step in the execution of the decree which the Court has no jurisdiction to take if the decree no longer exists." But under section 283 of our Code the Court can confirm the sale only after the expiration of the thirty days immediately following the receipt of the Fiscal's report of sale. Within these thirty days if a person interested has not had the sale set aside for material irregularity under section 282, the purchaser would have paid the whole of the purchase money (sections 260–261), and the money so paid may have been drawn by the judgment-creditor, as in the present case. Therefore, the confirmation of a sale is not a step in aid of execution, but the first of a series of steps taken by the Court to implement the sale (*31 Cal. 1011*). The power of the Court to take these steps depends not on the existence of a valid decree at the time they are taken, but on the validity of the sale . . . . on the existence of a valid decree at the time of the sale.

Under section 283 the Court is bound to confirm the sale at the proper time; the words of the section are imperative. The Court can stay its hand only where it appears that the judgment was satisfied at the time that the writ of execution issued. The proviso to section 316 of the Indian Act (XIV. of 1882) to the effect that the Court shall not issue a certificate of sale if there was no valid decree subsisting at the time finds no place in our Code. In India the refusal to confirm a sale under a decree which has been subsequently set aside may be justified under this proviso, as was done in *29 All. 591.*

The purchase money has been paid out to the judgment-creditor. There is no provision in the Code enabling the purchaser to recover that money, and it would, therefore, be inequitable to compel him to give up the property purchased by him.

[1] *(1903) 7 N. L. R. 274.*

N. E. Weerasooriya, for defendants, respondents.—The Court had no jurisdiction at all. The whole proceedings are bad. *Hukam Chand on res judicata, 397–398*. There is no distinction between want of essential and of territorial jurisdiction in the absence of an estoppel or waiver. (*Hukam Chand, 411, 416–420; 4 All. 382; 26 Cal. 727; 20 N. L. R. 372.*) Here, on the plaint, the Court had in law no jurisdiction. The judgment on which the sale took place was *ex parte*. Defendants had proceedings re-opened, and took plea to jurisdiction at first opportunity. The decision in *19 N. L. R. 215* is wrong. It is based on the assumption that *10 All. 166* applies, but that case has no application. In it the Court had jurisdiction with respect to some of the causes of action. The decree was never set aside, but only modified. The existence of jurisdiction is a condition precedent even in the case of a *bona fide* purchaser. (*9 All. 191; 113 Mad. 211; 14 Cal. 18; 27 I. A. 216; 27 Cal. 11; Evidence Ordinance, s. 44.*)

In this case decree was set aside before confirmation of sale. Confirmation is essential. Judgment-debtor is not divested of title until confirmation (section 289). Confirmation is a step in execution of a decree. It is not obligatory on the Court, but discretionary. Section 283 appears in Chapter XXII. of the Code under title "A," sections 218–318, viz., execution of decrees to pay money. No Fiscal's conveyance or possession can be obtained until confirmation. (Sections 286–292; *12 W. R. 201; 7 Cal. 91.*) If the sale is illegal, even an order for delivery of possession may be opposed (*27 Cal. 727*). Execution proceedings do not abate like a suit (*3 Bom. 221*). Under the Indian Code confirmation is not essential. *30 Cal. 1011* does not apply. In *10 All. 166* the question of confirmation was not considered. Probably the sales there referred to were actually confirmed, as a sale deed is mentioned. In *19 N. L. R. 215* also the sale had been confirmed. Confirmation is expressly considered in *1 Tam. 6, 7 N. L. R. 274, C. L. Rec. 115, 2 Bom. 540,* and *10 All. 83,* which should be followed.

The Code contemplates existence of debt and decree; section 283 (proviso), *15 N. L. R. 272,* and *17 N. L. R. 392.* Even a *bona fide* purchaser runs certain risks. He must satisfy himself as to the existence of jurisdiction and of the decree (*25 Cal. 175*). Even in *10 All. 166* there was a decree subsisting, as the original decree was not set aside, but only modified. The purchaser buys subject to order on an application under section 344. He is a party to the action within the meaning of that section. (*15 N. L. R. 414, 1 Cur. L. R. 166, 21 N. L. R. 137.*)

The application for confirmation was stale. The parties should have been noticed (*18 N. L. R. 29*). No equitable considerations should apply. The judgment-creditor should not have drawn proceeds sale before confirmation and without notice (section 350).

H. V. Perera, in reply.—The passage cited from *Hukam Chand*, *397*, has no application. The Court did not " transcend the limits prescribed for it by law." The passage must be taken to refer to the essential jurisdiction of the Court (see *Hukam Chand*, *448–449*). Modification of decree has the same effect as reversal (*31 Cal. 499*).

Cur. adv. vult.

January 16, 1922. GARVIN A.J.—

This appeal, which was reserved by my Lord for decision by a bench of three Judges, raises two questions of law of special importance to purchasers at sales in execution of decrees of Court. Of these, the first is whether a purchase made by a third party at a sale held in execution of a decree is void and a nullity, for the reason that at a later stage following upon an appeal it was held that the Court had no jurisdiction to entertain the action. The second is whether the confirmation of such a sale is a step which a Court has no jurisdiction to take as and from the moment at which its decree is set aside in appeal. The material facts are as follows. Plaintiff sued on a promissory note and obtained judgment by default. Decree was entered on August 17, 1911, writ issued, and in due course certain lands belonging to the defendant were seized and sold on November 9, 1911. At the sale one Kirihamy became the purchaser of one of the properties, and the others were purchased by the present appellant. The full amount of the decree was levied, and the amount drawn out of Court by the plaintiff. Kiri Banda applied for confirmation of the sale to him, and on January 16, 1912, his application was allowed. In 1914 the defendant moved to re-open the proceedings on the ground that he received no notice of the action. His application was refused, but on appeal the decree was on September 4, 1914, set aside, and he was admitted to appear and defend.

On December 1, 1914, the Commissioner of Requests made order dismissing the action, upholding the defendant's objection to the jurisdiction of the Court, on the ground that the cause of action arose outside the local limits of its jurisdiction. On May 27, 1921, the sale to the appellant was confirmed, and on June 15, 1921, he obtained a Fiscal's transfer for the lands purchased by him. Four days later, *i.e.*, on June 19, 1921, the defendant moved the Court to set aside its order confirming the sale, on the ground that the decree had been set aside. The Court allowed the motion, holding that the order confirming the sale had been made *per incuriam*. The appeal is from this order. These sales, it is said, are a nullity, because the Court of Requests at the trial which followed on the appeal held that it had no jurisdiction to try the case, because the cause of action did not arise within its local limits. This contention was based mainly on the following passage from *Hukam Chand's Law of Res Adjudicata at page 397*: " When a Court transcends

the limits prescribed for it by law, and assumes to act where it has no jurisdiction, its adjudication will be utterly void and of no effect either as an estoppel or otherwise." This is too general a proposition to be regarded as a sufficient authority for the contention that a sale in execution ordered by a Court of law, which, so far as its proceedings showed, had jurisdiction to entertain the action, passed no title even to a purchaser who was a stranger to that action.

A prudent person who examined the record of this case with a view to purchase the property advertised for sale on November 9, 1911, would have seen that this was an action on a promissory note for the recovery of an amount under Rs. 300. The nature of the cause of action and of the relief claimed was such as came within the jurisdiction of the Court of Requests. There was nothing on record whether in the plaint or elsewhere to show that this was not an action which the Court of Requests of Kurunegala had jurisdiction to entertain; and there was filed of record the usual returns in proof of service of process on the defendant.

In such a case as this the contention under consideration can only prevail if in law every step taken by a Court must in all cases be held to be void and a nullity *ab initio* upon collateral proof that an averment as to the local jurisdiction of the Court was, in fact, incorrect, or that the defendant had not been served with process. For this proposition no direct authority was cited, but in the course of argument reference was made to the cases of *Ikbal Begam v. Sham Sundar*[1] and of *Durga Charan Mandal v. Kali Prasanna Sarkar.*[2] These cases merely state that a sale in execution of property which is by law declared to be unsaleable is bad, and that the Court which orders the sale of such property acts without jurisdiction. When a Court does an act which manifestly transcends the limits prescribed for it by law, that act is a nullity, and no rights can be acquired in consequence thereof. But that is not the case here.

The nature of the action and of the relief claimed was such as came well within the essential jurisdiction of the Court; the record contained *primâ facie* evidence of all other necessary jurisdictional facts. It would, indeed, be a serious matter if, under these circumstances, a sale in execution should be held to be a nullity which conveyed no rights to a *bona fide* third party purchaser, merely because in a subsequent proceeding, to which in this instance he was not even a party, it was established that the defendant was not, in fact, served with process, or that some jurisdictional fact relating to locality did not in fact exist.

It is not on the existence of facts, but on the allegation that those facts exist upon which the jurisdiction of a Court primarily depends (*Hukam Chand, 241–243*). From the application of

[1] *I. L. R. 5 All. 382.*

[2] *I. L. R. 26 Cal. 727.*

this principle to the facts of this case it follows that the Court had at all times material to this appeal jurisdiction over the subject-matter of this action. There was nothing on record at the date of the sale which discloses a want of essential, local, or personal jurisdiction in the Court.

Is a purchaser at an execution sale bound to pursue his inquiries any further? Is such a *bona fide* third party to be deprived of his rights by the disclosure of some hidden defect in the matter of local or personal jurisdiction? The answer to these questions must, I think, be in the negative. At page 448 of his work Hukam Chand, dealing with the case of a "party who has been wronged by being judged without any opportunity to make his defence," cites the following from a judgment of one of the American Courts: "He cannot generally affect the rights of innocent third parties growing out of a judgment regular on its face. But as to those parties, it would be as great a violation of the principles of natural justice to deprive them of property acquired for a valuable consideration, by establishing some hidden infirmity preceding the judgment, as it is to deprive the defendant of his rights by maintaining the integrity of the record. And as the law cannot minister abstract justice to all the parties, it is at liberty to pursue such a course as will best subserve public policy. This course requires that there should be confidence in judicial tribunals, and that titles resting upon the proceedings of these tribunals should be respected and protected . . . ."

Had the judgment entered in this case remained unreversed, as a result of the subsequent proceedings and the appeal to the Supreme Court, could the defendant have impeached it by collateral proof of want of jurisdiction with a view to defeat the appellant's title? The passage above cited is an authority for the proposition that no such opportunity would have been accorded him.

I do not think it makes any difference to the appellant that in a subsequent proceeding to which he was not a party the judgment of the Court of Requests was reversed in appeal.

"The hardship arising from an erroneous or inadvertent decision upon jurisdictional questions is no greater than that issuing from an erroneous or inadvertent decision upon other matters. That the reversal of a judgment in an Appellate Court shall not affect rights acquired under it by third parties is a rule universally and uncomplainingly acknowledged." (*Hukam Chand, 448–449.*)

For these reasons I hold that the rights acquired by the appellant at the sale in execution are unaffected by the subsequent proceedings to which I have referred.

It is worthy of note that in an action by the defendant to vindicate his title to the land purchased by Kirihamy, it was contended unsuccessfully that the sale to him in execution was a nullity.

This case ultimately came up for hearing in appeal before Ennis and Schneider JJ., *vide 19 N. L. R. 215,* who rejected the contention that the sale was a nullity.

It remains for me to consider the second of the two questions which arise on this appeal. The contention that a Court has no power to confirm a sale held in execution of its decree after that decree has been set aside in appeal is founded on two Indian judgments which were approved and followed in two judgments of this Court. The first of these rulings was made in the case of *Basappa bin Malappa Aki v. Dundaya bin Shivlingava,*[1] and is to the effect that a Court has no jurisdiction to confirm a sale regularly held in execution of a decree after that decree has been set aside in appeal. The reason for this ruling would seem to be that from the moment a decree of Court is reversed in appeal it ceases to have jurisdiction to take any further steps to execute it. It cannot be disputed that a Court cannot proceed to execute a decree which has ceased to exist. But is the confirmation of a sale in execution of a decree valid and subsisting at the date of the sale a step in the execution of the decree ?

No light whatever is shed upon this question by the judgment in *Mul Chand v. Mukta Prasad,*[2] which follows the ruling in the earlier case. Mr. Justice Lawrie, in the case of *Idroos Lebbe v. Mira Lebbe,*[3] founds his judgment upon the authority of the two Indian cases to which I have referred, and adds no observations of his own.

Before dealing with the last of the cases cited, I wish to remark that section 312 of the Indian Civil Procedure Code, which relates to the issue of a certificate of title after confirmation of sale, is subject to the proviso " that the decree under which the sale took place was still subsisting at the date of the certificate," *i.e.*, at the date of the confirmation of the sale because the certificate has to bear that date. This may possibly justify the rulings of the Indian Courts, but there is no such limitation imposed by our Code of Civil Procedure.

This brings me to the case of *De Mel v. Dharmaratne.*[4] The judgment of Sir Charles Layard is in effect that the Civil Procedure Code contemplates the existence of a valid and subsisting decree at the date of confirmation. The argument is that sections 282 and 283 contemplate the existence of a decree-holder at the time of confirmation of the sale, and he proceeds " when, however, the decree ceases to exist, there is no decree-holder who can make an application or support it when made."

I most respectfully beg to differ. Sections 282 and 283 contemplate the presence of the decree-holder in the event of an application to set aside a sale, but I can find nothing in these

[1] *I. L. R. 2 Bom. 540.*

[2] *I. L. R. 10 All. 83.*

[3] *1 Tam. 6.*

[4] *(1903) 7 N. L. R. 274.*

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sections which requires his presence at the confirmation of a sale. Indeed, confirmation is obtained by *ex parte* application, and may under the Code be so obtained at any time after the prescribed limit of thirty days, so long as no application has in the meantime been made to set aside the sale. I must, therefore, dissent from the statement that sections 282 and 283 of the Code contemplate a valid and subsisting decree at the time of confirmation.

Wendt J., in a brief judgment, says: "The true principle appears to me to be that the confirmation of the sale is a step in the execution of the decree which the Court has no jurisdiction to take if the decree no longer exists."

As indicated by me, the crux of the matter is whether or no the confirmation of a sale is a step in the execution of the decree. Mr. Justice Wendt apparently thought it was. I wish that he had stated his reasons for his opinion.

That a decree when set aside in appeal ceases to exist is manifest; it is equally manifest that no step can be taken to execute a decree which has ceased to exist. But is the confirmation of a sale a step in execution? Sales are confirmed by our Courts after decrees have been fully satisfied and satisfaction of judgment has been entered. How can it be said that the confirmation of a sale under circumstances is a step in execution of the decree, when at the time of confirmation the writ has been returned fully executed, the decree satisfied, and satisfaction entered of record? The confirmation of a sale is a step taken by a Court to enable the purchaser to vest himself with title to property purchased by him at a sale authorized by that Court. The sale, no doubt, is a step in execution, but not the act of the Court in assuring to a *bona fide* purchaser property which he purchased at such a sale.

Confirmation is a step consequential on, incidental to, or arising from, the execution of a decree, but, despite a clear indication of my views, nothing was urged at the argument in support of the assertion that it was a step in execution of a decree.

If confirmation is a step in execution, so also must the issue of the Fiscal's transfer, and even the issue of a writ to enable the purchaser to obtain possession of the property purchased. I need hardly dwell on the inconvenience, hardship, and, I may even say, injustice to innocent purchasers which must result from this view of the law. I can see no reason for the assertion that whereas confirmation of a sale is a step in execution, any step subsequent thereto is only consequential on the execution of the decree. They are a succession of steps each following upon the other, and all consequential on the sale in execution of the decree.

"Execution," it is said, "is the life of the law." The policy of the law is to protect innocent purchasers. There is the clearest possible authority for the proposition that the reversal of a decree does not affect rights to property *bona fide* acquired at a sale

regularly held in execution of a decree valid and subsisting at the date of the sale (*Jan Ali v. Jan Ali Chowdray*).[1] It is contended that, in view of the requirement of our law that a sale should be confirmed, this applies only to the case of a sale which has been confirmed. But what is important is the principle underlying the decision, which applies with as much force to the case of a purchaser who has, as in this instance, parted with his money in exchange for the right to obtain title to and possession of property sold in execution, and who, I think, is entitled to receive that which he has purchased and paid for, unless it is quite clear that the Court is prevented from fulfilling its part.

A purchaser at a sale in execution may at any time find after he has paid full consideration, and the amount has been paid into Court and drawn by the plaintiff, that, despite the utmost despatch on his part, the decree has been reversed before he obtains confirmation. If it is the law that such a sale cannot be confirmed, the purchaser takes nothing by his sale, and in cases in which the money has been drawn by the plaintiff, the purchaser for his pains is left to recover the money as best he can.

It is a matter of common knowledge that the full market value of property is seldom realized at Fiscal's sales. If it is realized that this is the position in which a purchaser at such a sale may find himself, it will certainly not tend to improve matters. It is at all times open to a defendant who contemplates appealing from a judgment to move for a stay of execution. There is, therefore, no hardship in the sale of his property pending appeal.

The provisions of the Civil Procedure Code and the general principles to which I have referred lead me to the conclusion which, I think, is just to all parties; that conclusion is that the confirmation of a sale in execution of a decree is not a step in execution, and is a step which a Court has jurisdiction to take even after the decree has been set aside in appeal.

A decree for money is executed by the issue of a writ to the Fiscal. That writ empowers him to levy if necessary by the seizure and sale of the property of the defendant the amount stated in the writ, which is the amount decreed, and costs. When the Fiscal returns the writ to Court after a full levy and pays the amount into Court, and certainly when, as in this instance, the full amount due to the decree has been paid out of Court to the decree-holder, that decree has been fully executed. It is incapable of being further executed. The subsequent confirmation of a sale held in pursuance of such a decree cannot surely be said to be a step in execution of a decree when it is clear that the decree has been fully executed. If it is not so in the case I have instanced, it is not so in the case under consideration, where the facts are identical in all material particulars, and, indeed, it is not so in any case. If, as I hold, confirmation

[1] *10 W. R. (Sutherland) 154.*

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is not a step in execution of a decree, there is no foundation for the contention that the Court had no jurisdiction to make such an order merely because the decree had been set aside at the date of the application for confirmation.

The applicant for confirmation is in this case—as in many if not most others—a stranger to the action. The only person interested in the execution of a decree is the decree-holder.

I find it difficult to see why a third party who applies for confirmation of a sale in execution should be said to be taking a step to execute a decree in which he clearly has not the slightest interest.

The judgment in the case of *Umesh Chandra Dass v. Shib Narain Mandal*[1] is instructive. "The question raised in this appeal," said the Judges," is whether an application by a decree-holder, who has purchased a property in execution of his own decree, asking the Court to confirm the sale, is an application to take some steps in aid of execution of the decree. Referring to the application itself in this case, we find it was really made by the decree-holder in his capacity as purchaser of the property in question. It was indeed made not by the decree-holder as such, but by the auction purchaser; and viewing it in this light, it could hardly be said that it was an application in aid of execution of the decree."

It is true that as a second reason for their conclusion, that application for confirmation of a sale in execution, even where the decree-holder was the purchaser, was not a step in aid of execution, these Judges pointed out to the fact that no application to confirm a sale was necessary under the Indian Code, but that does not weaken the first of the two grounds on which their conclusion is based.

It is the decree-holder alone who can take a step in aid of execution. An application by the purchaser for confirmation of a sale in execution is not a step in execution, even when the purchaser is the decree-holder.

The order from which this appeal has been taken is founded on the assumption that the Court had no jurisdiction to confirm this sale, because its decree had then been reversed. This is, in my opinion, an incorrect view of the law.

It was somewhat faintly urged that in view of the length of time which appellant permitted to elapse before he applied for confirmation of the sale, that such confirmation should be denied him. As at present advised, I am not satisfied that a Court can refuse to confirm a sale on the ground of mere lapse of time. It is not, however, necessary to consider whether in a matter for which express provision is made in our Code of Civil Procedure a Court has power to refuse to confirm a sale in exercise of a supposed inherent right, as no case for equitable relief was ever presented to or considered by the Court of first instance.

[1] *I. L. R. 31 Cal. 1011.*

For these reasons I think the appellant is entitled to be restored to the position in which he was before the order of confirmation was vacated. I would, therefore, allow the appeal, with costs.

DE SAMPAYO J.—

This appeal involves a point of practice of considerable importance. It is concerned with the power and duty of a Court with regard to the confirmation of a sale in execution of a decree which has been set aside after the sale but before its confirmation. In this case the Court entered a decree against the defendants for default of appearance on August 17, 1911. In execution of the decree, which was one for payment of money, three lands of the defendants were seized and sold on November 9, 1911. One of the lands was purchased by one Kiri Banda. The sale to him was on his application confirmed by the Court on January 16, 1912, and no question now arises with regard to it. The appellant, Mr. Vythilingam, was the purchaser of the two other lands, but no application was made by him for the confirmation of the sale to him till 1921. In the meantime the defendants applied to re-open judgment, and on an appeal taken from a refusal of the application, the Supreme Court on September 4, 1914, set aside the decree, and allowed the defendants to file answer and defend the action.

The case having gone back, the Court on December 1, 1914, after the trial of an issue as to jurisdiction, entered decree in favour of the defendants, and dismissed the plaintiff's action. Nothing was done in the case with regard to the sale in question until May 27, 1921, when the Court on the application of the appellant made an *ex parte* order confirming the sale. After a lapse of nine years from the sale, I think the Court should, as a matter of ordinary precaution, have given notice to the defendants, and the result of that omission was that the Court confirmed the sale without reference to the fact, to which the Court's attention had not been drawn, that the decree had been set aside and the action itself dismissed. The defendants then came forward and moved to set aside that order, and this appeal is taken from an order setting aside the order of confirmation accordingly.

It is contended on behalf of the appellant that as no application was made under section 282 of the Civil Procedure Code to set aside the sale, the Court was bound under section 283 to confirm the sale, as it, in fact, had done. But I am not convinced that the hands of the Court are tied in this manner if, in fact, the decree in execution of which the sale took place has itself been set aside. The proviso to section 283 requires the Court to stay its hand if the judgment debt is found to have been satisfied at the time of the issue of the writ of execution. That proviso does not, of course, apply to the circumstances of this case, but I think that it is indicative of the spirit of the law with regard to sales in pursuance

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of a decree now no longer existent. I cannot accept the argument that execution proceedings stop with the execution sale. In my opinion the confirmation of a sale is part of the execution proceedings, and a sale is not complete until it is confirmed. The provision of section 290 for the Fiscal going into and retaining possession of the property sold until confirmation of the sale, and the other matters provided for in Chapter XXII. on " Execution " likewise have regard to the duties of the Court in respect of the due and complete execution of its own decree. In this connection section 289 is noticeable, for it provides that the execution-debtor shall not be divested of his title by virtue of the sale until confirmation of the sale and the execution of the Fiscal's conveyance. Any act done by the Court for divesting him of his title, such as the confirmation of the sale, is surely part of the execution proceedings. It is not necessary to discuss the effect of those provisions further in the present case, but I have no doubt that the confirmation of a sale is something done in the course of execution. This being so, it follows that if at that stage there is no decree to execute the Court's power to go on with, the execution proceedings ceases also. This matter was considered in two local cases, namely, *Idroos Lebbe v. Mira Lebbe*[1] and *De Mel v. Dharmaratne.*[2] The second of these cases is on all fours with the present case. There also the decree had been set aside after the sale but before its confirmation, and it was held that an order confirming the sale was rightly vacated on the application of the judgment-debtor. Layard C.J. observed : " A sale under a decree is incomplete until confirmation by the Court, and the Court's power to confirm a Fiscal's sale is dependent on the sale being held in pursuance of a decree. It is the existence of a valid decree which gives the Court jurisdiction to act." Wendt J., whose opinion on a point of practice is specially valuable, also said : " The true principle appears to me to be that the confirmation of the sale is a step in the execution of the decree which the Court has no jurisdiction to take if the decree no longer exists." Both the learned Judges approved the decision of Lawrie J. in *Idroos Lebbe v. Mira Lebbe* (*supra*). The arguments addressed to them are similar to those addressed to us now. For instance, it has been sought to get over the authority of the decision in *Idroos Lebbe v. Mira Lebbe* (*supra*) by suggesting that Lawrie J. had mistakenly followed two Indian decisions, and had failed to note that section 316 of the Indian Code, which provides for the Court granting a certificate of sale to the purchaser when the sale has become absolute by confirmation, has the proviso : " Provided that the decree under which the sale took place was still subsisting at that date," whereas our Code has nothing corresponding to that proviso. Layard C.J., in the first place, pointed that section 316 had reference only to the issue of a certificate

[1] *1 Tam. 6.*

[2] *(1903) 7 N. L. R. 274.*

after the sale had been confirmed, and not to section 312 which corresponds to our section 283; and in the second place he observed that the two Indian decisions did not turn upon anything contained in section 316, but were independent rulings on the jurisdiction of a Court to confirm a sale when the decree had been reversed since the sale. I am content to follow the local decisions above referred to, because, if I may say so, I am in entire accord with them. The two Indian decisions are *Mul Chand v. Makta*[1] and *Basappa v. Dundaya*,[2] which, so far as I know, have never been over-ruled or dissented from. In further support of the argument on behalf of the appellant, the case *Umish Chandra Dass v. Shik Narain Mandul*[3] was cited to the effect that the application by the purchaser to confirm the sale was not a step in aid of execution, but that decision was expressly based on the ground that under the Indian Code no application for confirmation was necessary, a point on which our Code differs from the Indian Code. It is contended, however, that the position of a stranger who purchases is different from that of the execution-creditor who purchases under his own writ. But in every case an auction purchaser undertakes a certain risk, and in *Basappa v. Dundaya* (*supra*) and *Doya Moyi v. Sarat Chunder*[4] it was held that the purchaser must satisfy himself that there was a subsisting decree before he applied for confirmation. The judgment of the Privy Council in *Zaimulabdeen v. Muhammed*[5] has, however, been cited as an authority to the contrary. There their Lordships, no doubt, observed generally that there was a distinction between *bona fide* purchasers who were no parties to the decree and the decree-holders themselves, and that such purchasers had nothing to do further than to look to the decree and the order of sale. But the circumstances were peculiar. It is not a case in which the decree had been absolutely reversed, but a case in which the decree had been modified as to amount, the effect of which was that the proceeds of a previous sale were sufficient to satisfy the modified decree. I think the judgment of the Privy Council must be taken to apply to the special circumstances of that case and not to extend further. Indeed, the only issue was whether the sale should be set aside on the ground of the subsequent modification of the decree. The principle meant to be enforced, I think, is that which was laid down by the Privy Council in *Rewa Mapton v. Ram Kishen Singh*[6] as follows: " If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of the execution than he is as to the correctness of the judgment upon which the execution issues." If the decree is wholly reversed and the Court has nothing to execute, there is no jurisdiction in the Court to proceed with the execution or to confirm the sale, which,

[1] *I. L. R. 10 All. 83.*
[2] *I. L. R. 2 Bom. 540.*
[3] *I. L. R. 31 Cal. 1011.*
[4] *I. L. R. 25 Cal. 175.*
[5] *I. L. R. 10 All. 66.*
[6] *L. R 13 I. A. 106.*

according to what has been stated above, is part of the execution proceedings. Moreover, the case which the Privy Council decided was a separate suit brought to set aside the sale, and the Privy Council did not deal with, and had no occasion to deal with, the specific question whether the Court should confirm a sale after the decree itself has been wholly set aside.

The remaining point is whether the fact that the execution-creditor has drawn the proceeds sale paid into Court by the appellant disentitles the defendants to the relief granted to them by the Court. I have already indicated my opinion that the Court ought not to have allowed the money to be drawn before the sale was confirmed. In any case, the circumstance of the money being paid out of Court does not, in my opinion, affect the defendants. The appellant had his remedy to reclaim the money from the execution-creditor, and if, on account of the lapse of time, he now finds himself unable to pursue it, he is himself to blame for his want of diligence. The amount was only Rs. 35. If, as alleged, the appellant has since 1911 been in possession of the lands, he must have recouped himself for the money paid, and there is no special equitable consideration sufficient to induce the Court to look upon his case with favour.

In my opinion the appeal should be dismissed, with costs.

Bertram C.J.—

I agree with the judgment of my brother De Sampayo. As the judgment is executed by sale, and as the sale is not complete till confirmation, I fail to see how confirmation, at whosesoever instance applied for, can be other than a step in the execution. I think that by the nature of things a Court is precluded from confirming a sale held in execution of a decree which has since ceased to exist.

Appeal dismissed.