

1952

Present : Pulle J. and L. M. D. de Silva J.

B. K. BAPTIST *et al.*, Appellants, and L. EKANAYAKE,
Respondent

S. C. 130—D. C. Galle, 439

Sale under mortgage decree—Discretion of Court to set it aside—Scope of.

On the date of a hypothecary sale a person distributed pamphlets among prospective purchasers to the effect that the interest of the mortgagor was something other than that described in the mortgage decree, and the sale advertisement. The pamphlet deterred many persons from bidding and depressed very substantially the amount which was realised at the sale. For this sole reason the sale was set aside on application made by the judgment debtor.

Held, that the mere fact that the title of the mortgagor was disputed at the sale was not by itself a reason for setting aside the sale.

APPPEAL from a judgment of the District Court, Galle.

J. M. Jayamanne, for the purchasers appellants.

Malcolm Perera, for the defendant respondent.

Cur. adv. vult.

December 10, 1952. L. M. D. DE SILVA J.—

In this case the defendant mortgaged to the plaintiff certain undivided shares and other interests in a land. Decree was eventually entered under which in default of payment the premises mortgaged by the defendant were ordered to be sold. These premises were correctly described in the schedule to the decree which referred, *inter alia*, to the interest of the defendant in a land called Gederawatte thus :—

All that undivided $\frac{1}{4}$ plus $\frac{1}{40}$ parts of the soil and soil share trees $\frac{1}{8}$ share of the planter's share of the plantations standing on the middle portion $\frac{1}{8}$ part of the planter's share of the three plantations standing on the Western side of the said portion together with the entirety of tiled white washed house 13 cubits standing thereon of the land called Gederawatta.

A commission for the sale of this interest, which in its description showed some signs of indefiniteness, duly issued and a sale was held. On the day of the sale one Suriaratchi who described himself as the plaintiff in Partition case No. 3,922 distributed pamphlets among prospective purchasers to the effect that the interest of the defendant in Gederawatta (also known as Gamage Divelwatte) was something other than that

described in the decree and the sale advertisement. The learned District Judge has found that the pamphlet deterred many persons from bidding and depressed very substantially the amount which was realised at the sale. We do not doubt the correctness of this finding. For this sole reason the learned District Judge relying on the case of *Cader et al. v. Mohamed et al.*¹ set aside the sale on application made by the judgment debtor. With all respect we do not think the learned District Judge had sufficient reason for the order he made.

In the case referred to it was held by this Court "that when sales are held by an auctioneer acting on orders of the Court, and selling a land on conditions of sale approved by the Court, and subject to the confirmation of the sale by Court, the question that really arises is whether in setting aside the sale, or in refusing to confirm it, the Judge is exercising properly, and in a judicial manner, a discretion which he has expressly reserved to himself. When a Judge is considering how he is to exercise that discretion, I do not think he is limited to the grounds upon which sales held by the Fiscal are set aside. In this instance in the view taken by the Judge of what actually happened on the occasion of the sale, it is impossible for us to say that he has exercised his discretion in a wrong or improper manner and, therefore, we ought not to interfere with his order".

The discretion which a District Court exercises in an application to set aside a sale under a mortgage decree should not be lightly interfered with. But it is a judicial discretion and, if on examination, it is found that the reasons which influenced the learned Judge are entirely insufficient then this Court has to interfere.

On a sale under a mortgage decree the right, title and interest of the mortgagor is sold and this may, on an examination of title, prove to be less than the interest mortgaged.

As stated by the auctioneer who held the sale, persons disputing the title of the mortgagor in the interest mortgaged not infrequently inform prospective purchasers that the title is disputed. If in fact the claim asserted by a disputant is genuine and sound and the mortgagor's title is imperfect the disputants, to say the least, often save themselves the trouble and expense of litigation with a purchaser in this way. If the claim asserted is not genuine and made at the instance of a prospective purchaser purely with the object of depressing the price the judgment debtor may be able to find relief in appropriate civil or criminal proceedings but that is not a matter for our decision in this case. Be that as it may the mere fact that the title of a mortgagor is disputed at a sale is not by itself a reason for setting aside a sale. It may, combined with other facts, afford ground for such a consequence. In this case the learned Judge has not found, and there is no evidence upon which we can say, that the purchaser was responsible for the distribution of the pamphlets. Further there is no material whatever in this case upon which it can be suggested that the claim asserted by Suriaratchi was not genuine. Even in the affidavit supporting the petition the judgment debtor has not stated that he was entitled to the interest mortgaged nor

¹ (1938) 40 N. L. R. 136.

has he given evidence to that effect. It is of course impossible to state exhaustively the circumstances in which a court should set aside a sale but the sole reason given by the learned District Judge is in our opinion clearly insufficient.

We would therefore set aside the order of the learned District Judge of the 13th March, 1951, and send the case back for further proceedings on the basis that the sale held on the 7th August, 1950, was valid.

PULLE J.—I agree.

Order set aside.
