

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sillery v. W. Don Juan Harmanis and another, from the Supreme Court of the Island of Ceylon; delivered November 28th, 1882.*

Present:

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR ROBERT P. COLLIER.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

THE Appellant in this case was, in 1871, the owner of a coffee estate or plantation in the island of Ceylon, called Bathford, which was subject to two mortgages in favour of Charles Cowan for 2,000*l.* and Rs. 20,000 respectively, with interest at 8 per cent per annum, and also to a lease for 10 years from the 1st of July 1872 to the Ceylon Company, Limited, at the yearly rent of Rs. 2,500, in which it was provided that the Company should pay the rent to Charles Cowan on behalf of the Appellant in part payment of the interest on the mortgages, the interest being 700 rupees per annum in excess of the rent. On the 27th of March 1871, the Appellant being indebted to the Respondent Harmanis in the sum of 36*l.* 15*s.* 2*d.* for the construction of a wooden store on the estate, the latter brought an action against the Appellant in the District Court of Kandy for its recovery. The summons in the action was served on the Appellant, who duly entered an appearance on the 4th of April 1871, and on the 7th of April left the island of Ceylon, and has not since returned to it. The action

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was proceeded with, and on the 18th of December 1871 Harmanis obtained a judgment *ex parte* in it against the Appellant for 36*l.* 15*s.* 2*d.* and interest and costs. On the 21st of December a writ of execution was issued against the property of the Appellant, which, having been twice extended and reissued, was finally extended and reissued on the 30th of October 1873, returnable on the 3rd of December 1873.

On or about the 29th of October 1873 the sale of the Bathford estate, in execution of the decree, was advertised in the Government Gazette to take place on the 24th of November 1873, the description of the property to be sold being, "All that coffee estate called Bathford estate, containing in extent 212 acres, more or less, together with the buildings and plantations thereon situate," &c. On the 31st of October 1873 one A. O. Joseph, the proctor for Mr. Cowan and for the Ceylon Company, sent to the fiscal of Kandy, the officer charged with the execution, two letters, one giving notice of the mortgages but without stating the rate of interest, and the other stating that the estate was leased for 10 years from the 1st of July 1872 but not mentioning the rent. On the 24th of November 1873 the estate was put up for sale, when these letters were read and the Respondent Harmanis was declared the purchaser at the sum of 16 rupees. Of this sum 15 rupees 38 cents were retained for the expenses of the sale, and the remaining 68 cents were deposited in the Kandy katcheri. The sale was confirmed by the District Court, and on the 23rd of February 1874 the fiscal executed a conveyance to Harmanis of all the right, title, and interest of the Appellant in the estate. On the 2nd of March 1874 Harmanis sold and transferred to the Respondent Holloway an undivided half part or share of the estate, subject to the mortgages and lease for 8 rupees; and on the 18th of September 1874 he executed

a mortgage of the other half with other property to Holloway to secure Rs. 9,000 and interest.

On the 4th of August 1875 the Appellant brought an action in the District Court of Kandy against the two Respondents, alleging in his libel that the sale in execution was invalid and void by reason of the judgment being a nullity, and also by reason of the sale having been made subject to the mortgages and lease; and prayed that the ex parte judgment should be declared a nullity by reason of gross and material irregularities, and that the sale in execution should be declared null and void, and the Appellant be permitted to enter into his defence in the original action. On the 29th of September 1876 this action was dismissed with costs; and the Appellant having appealed to the Supreme Court of Ceylon, the judgment of dismissal was affirmed.

On the 11th of October 1878 the Appellant commenced the action which is the subject of this Appeal, alleging that the advertisement in the Government Gazette materially misdescribed the property to be sold, in that the property was described as the Bathford estate, and the fiscal had power to sell only his reversionary interest, and that the misdescription seriously affected his interests, and praying that the sale of the 24th of November 1873, and the fiscal's conveyance, might be set aside. The Defendant denied that the sale was impeachable for irregularity, and pleaded the judgment in the former action as *res judicata*. As to the value, there was some evidence that the estate, about the time of the execution, was worth 7,000*l.* The District Judge held that the plea of *res judicata* was sustained, and also said that, in his opinion, the Plaintiff's right at the date of the sale was of no value; and the action was dismissed with costs. The Plaintiff appealed to the Supreme Court of Ceylon, which held that the judgment of the

Lower Court on the plea of *res judicata* was right, and added that, apart from the question of *res judicata*, they did not see that the Plaintiff had shown any ground on which the sale in execution could be set aside; and from this judgment the Plaintiff has appealed to Her Majesty in Council.

Their Lordships are of opinion that the 53rd and 54th sections of the Ceylon Ordinance No. 4, 1867, are a conclusive answer to the action. By section 53 it is enacted:—"The  
 " fiscal or deputy fiscal shall report every sale  
 " of immovable property made by him or under  
 " his directions within a week after the same  
 " shall have been so made, and it shall be open  
 " to the debtor, or any other party impeaching  
 " such sale on the ground of irregularity or  
 " informality, or to the fiscal or deputy fiscal,  
 " if any such ground shall be made apparent to  
 " him within 30 days of the sale, to state or  
 " report to the Court his objections to the sale  
 " being confirmed, and the Court having inquired  
 " into the same summarily, shall either confirm  
 " or disallow the sale as to it shall appear just  
 " and reasonable, but no sale shall be disallowed  
 " unless a material irregularity in publishing or  
 " conducting the sale shall be shown, and that  
 " the applicant has sustained substantial injury  
 " by reason of such irregularity. The fiscal, or  
 " his deputy, shall either grant the conveyance  
 " or withhold the same for a time, or absolutely,  
 " according to the directions which the Court  
 " shall give him;" and by section 54:—"No sale  
 " shall be held bad on the ground of irregularity  
 " or informality the objections to which shall  
 " not be made within 30 days, as prescribed by  
 " the preceding section." The irregularity, if  
 any, was only in the description in publishing the sale, and no application was made to set the sale aside. The Plaintiff has not shown that the want

of bidders was caused by this irregularity ; and if the Lower Courts are right in their opinion as to the value, he has not sustained any injury ; but it is not necessary to decide that question. The terms of the Ordinance are positive, and the Appellant cannot excuse his non-compliance with it by his absence from Ceylon. He knew of the action, and might have instructed some person to watch the proceedings, and the Chief Justice says in his judgment that it is not the practice of the Ceylon Courts that formal notice should be given to a defendant of the steps taken to enforce a judgment by execution.

This being their Lordships' view of the case, it is not necessary for them to give any opinion upon the defence of *res judicata* ; but it is not to be inferred from their not doing so that they concur in the opinion of the Ceylon Courts on that question. They will humbly advise Her Majesty that the judgment of the Supreme Court of Ceylon ought to be affirmed and this Appeal dismissed ; and the Appellant will pay the costs.

