

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mahomed Meera Ravuthar and Others (representatives of Jainilabdin Ravuthar) v. Sarvasi Vijaya Raghunadha Ayyarappa Meikan, Gopalar, from the High Court of Judicature at Madras; delivered 9th December 1899.

Present at the Hearing :

LORD HOBHOUSE.

LORD DAVEY.

SIR RICHARD COUCH.

[*Delivered by Lord Hobhouse.*]

The suit in which this Appeal is presented was commenced in the year 1882. The Appellants whose names are now on the Record were substituted for the original Appellant, the Plaintiff in the suit and Appellant below, on his death; but there has been no change of interest and it will be convenient to use the name of Appellant for all. The Appellant sought to enforce a charge on the zemindari estate of Singavanam against the then owners, the present Respondent who was a minor, and his father, who has since died. Another suit was brought by another person for the same purpose in the year 1883. Both Plaintiffs obtained decrees. When the Respondent's father died the estate passed into the management of the Court of Wards. In March 1891 the Appellant obtained an order in execution of his decree for sale of eight villages parts of the estate. They were sold, apparently in execution of both decrees, in the month of April 1891. There was then due in the suit of 1882 upwards of Rs. 60,000, and in the suit of 1883 upwards of Rs. 17,000. The Appellant who held the decree in the suit of

1882 obtained leave to bid at the sale, and he was declared to be the purchaser. He took possession, and was in possession when the present proceedings commenced.

In April 1894 the Respondent came of age and the Court of Wards handed over the Singavanam estate to him. On the 15th May 1894 he presented a petition under Section 311 of the Civil Procedure Code for the purpose of annulling the sale of 1891. That is the section which empowers persons whose property has been sold to set the sale aside on the ground of material irregularity in publishing or conducting it. In his petition the Respondent alleged a number of irregularities, but as to all except one the Courts below have found either that the allegation was erroneous or that the irregularity had not caused substantial injury.

The remaining charge was thus stated :—

“That on the date of sale an agreement was entered into between Papanad Zemindar and Jainilabdin in consequence of which intending purchasers were dissuaded from bidding at auction.”

The Subordinate Judge treats this charge as raising the following points for decision :—

“(1.) Whether there was any agreement between the Papanad Zemindar and the Counter-Petitioner on the date of sale, 6th April 1891, and (2.) Whether in consequence thereof, intending purchasers were prevented from bidding at auction.”

There was clearly a written agreement between the Papannad Zemindar and the Appellant, dated 6th April 1891 (Rec. p. 18), by which the Appellant agreed that if he should purchase the villages he would resell them to Papannad for Rs. 85,000. The Subordinate Judge found that there was a further verbal agreement between the two to the effect that they would dissuade persons from bidding, and that

some persons were so dissuaded. The villages were knocked down to the Appellant at the price of Rs. 78,000, and the Subordinate Judge found that with some outgoings he paid Rs. 83,000.

Of the value of the property he says "The highest value may be between $1\frac{1}{4}$ and $1\frac{1}{2}$ lac "roughly taken" (p. 326). He arrived at the conclusion that owing to the dissuasion of bidders the villages were undersold, causing substantial injury to the Respondent, and that he was bound to set aside the sale under Sections 311, 312 of the Code (p. 327).

The Subordinate Judge proceeds on the ground that when a decree-holder obtains leave to bid, he is placed in a position of exceptional delicacy, and becomes subject to restrictions not applying to other people. He quotes a passage from a judgment of the High Court of Calcutta (*Woopendro Nath Sircar v. Brogendronath Mundul* (I.L.R. VII., Calcutta 347)) :—

"We think that when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property, and if he or his agent dissuades others from purchasing at the sale, that, of itself, is a sufficient ground why the purchase should be set aside."

With the decision of that case no fault is to be found. The decree-holder there was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant debtor; and there was clearly a conflict between their duty and their interest. The passage extracted from the judgment was not necessary for the decision, and in their Lordships' opinion it is too sweeping in its terms. In the 16th Indian Appeals p. 114 it is laid down that leave to bid puts an end to the disability of

the mortgagee, and puts him in the same position as any other purchaser. All purchasers are bound to abstain from breaches of trust and from intimidation or falsehood in keeping off bidders. But nothing of that sort is alleged in the present case.

On appeal the High Court were in substantial agreement with the Subordinate Judge on the facts of the case. But they do not accept his conclusions of law. They say :—

“The order is made under Section 311 of the Code, and it is based on the ground of irregularity in the conduct of the sale. In our opinion there has been no irregularity within the meaning of the section. No charge is made against the person conducting the sale. The charge is made against the Respondent and those who acted in concert with him, and it amounts to this: that they acted in such a way as to prevent the best price being obtained and thus caused loss to the judgment-debtor. So far as this particular charge is concerned we are further of opinion that it does not amount to a charge of fraud. Putting aside for the present the fact that the purchaser was the decree-holder, and confining our attention only to the agreement made before, and the conduct of the parties at, the sale, we do not think that any fraud was established.”

They then go on to show by reference to English authorities that an agreement between persons not to bid is no ground for setting aside the sale, or even for opening the biddings. And they conclude thus :—

“The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the Zemindar the purchaser did not go beyond the limits of what he was entitled to do in order to make a good bargain.”

The learned Judges do not comment on the dictum of the Calcutta High Court, but it is clear that their view of the rule of law is in accord with that which has been pronounced by this Board.

Their Lordships agree in these conclusions. The logical result of them is that the High Court, finding that the matters alleged by the Respondent did not amount to irregularity within the meaning of Section 311 under which the petition was presented, and were of innocent character so as not to afford ground for setting aside the sale, should have dismissed the petition.

They go on however to take a point which so far as the Record shows, and for anything that Counsel can point out to the contrary, is raised for the first time in their judgment. It is certainly not mentioned in the Respondent's petition, and certainly was not in the mind of the Subordinate Judge as one of the issues to be tried. The Respondent alleged in his petition that the Appellant had never obtained leave to bid at all, an assertion which was found to be erroneous. The Appellant was not confronted with the assertion that having obtained leave to bid, he had done so by committing a fraud upon the Court.

The learned Judges held that, inasmuch as the Appellant got leave to bid, his omission "to disclose the agreement to the Court amounted to a fraud on the Court, entitling the judgment-debtor to say that in point of law, no leave to bid was granted." They then lay down that "there was a duty incumbent on the Appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The

“ withholding of information is in our judgment
 “ no less a ground for cancelling a sale than
 “ actual misrepresentation on the part of the
 “ Applicant who becomes the purchaser.” On
 these grounds they set aside the sale.

It seems to their Lordships that the positions taken by the learned Judges raise serious questions relating to the procedure of the Courts. It is very important that one who seeks to set aside a purchase completed under the sanction of the Court should state the grounds on which he claims to impeach it, and should not be allowed after trial of the case to rely on other grounds which have not been the subject of trial or adjudication in the Court which takes the evidence. It is not easy to formulate a rule which will fit every case, but the principle is clear enough, that a party shall not be condemned in Court on allegations which turn on evidence, and which he has not been led to rebut by evidence. Whether fresh issues may be introduced, and how, without injustice is a question of detail in each case; but their Lordships are led to think that in this case the essential principle has not been kept in sight.

It has been shown that the Subordinate Judge's view of the mortgagee's position is the view expressed in the dictum of the Calcutta High Court above quoted, and it is one which does not require the Petitioner to allege or the Court to decide that leave was improperly obtained. Therefore no attention was paid to that question, which is wholly distinct from the questions of irregularity, and from the question whether the conduct of the Appellant at the time of sale had the effect of lowering the purchase money.

The High Court however saw that the Subordinate Judge was wrong in law, and that the sale could not be impeached without getting

rid of the leave to bid. They did not remand the case for a new issue, but they decided for themselves that the order was obtained by a fraud upon the Court and therefore the position of the parties was the same as if no leave had been granted at all. The only foundation assigned for this decision that the Appellant had committed a fraud not laid to his charge, is a passage to this effect:—"It is admitted that "nothing was said about it (viz. the agreement) "when application for leave was granted. That "the agreement was in existence at that time "there is no manner of doubt."

Their Lordships must say that it is very embarrassing to find the case decided in appeal on a new charge which, considered in its bearing in law or on character, is of greater gravity and importance than all the other charges put together, without any reduction to writing of the terms of the admission, which is used to support it, or any record of the mode in which it was made, or any reason assigned why a new issue should not be tried; indeed without any recognition that it is a new issue. As the statement stands it is uncertain what is meant by "the agreement."

There are two agreements; one written and one verbal. The written one was with a nominee of Papannad, who says that it was for the benefit of the Respondent his brother-in-law. What that means is not clear, and though the agreement was re-affirmed six months after the sale, it has not been acted on by either party. Its effect would, as the High Court observes, be to take away from the Appellant himself any motive for bidding above Rs. 85,000 on his own behalf; but the creditor as such never has any motive for bidding higher than to secure his own debt, which is equally for the advantage of himself and his debtor. Why such an agreement should prohibit any

other bidder in any but some indirect way it is difficult to see.

The verbal agreement to dissuade bidders is another matter. But if that is the agreement of which the High Court is speaking, it is impossible to say that there is no manner of doubt that it was in existence when the Appellant's application was made, or even when the leave was given. On the contrary the evidence relating to this agreement, which indeed is extremely vague on every point, does not state when it was made. Consistently with the record it may have been made at any time during the six days over which the sale extended. There are no findings as to the material dates, and they can not be collected from the evidence in the Record. There is no reason why there should be such findings or evidence because though very material to the new issue, they are not material to the issues raised by the petition.

The learned Judges below lay down that "there was a duty incumbent on the Appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid." There is nothing to show that the position of this Appellant differed from that of other judgment creditors, and taking the remark as a general one it requires qualification. In *Coaks and others v. Boswell and others*, 11 App. C. 232 the Court of Appeal stated the rule to be that a person whose position precluded him from purchasing (it was a solicitor in that case) must when he applied for leave to purchase either abstain from laying any information before the Court or must lay before it all the material information he possesses. That rule is considerably narrower than the rule laid down by the High Court, and yet it seemed to the House of Lords to be too broadly stated. Lord Selborne held that it is not the duty of the Applicant to

give information which is not requested, and concerning which there is no implied representation positive or negative direct or indirect in what is actually stated. Lord FitzGerald states the rule with nearly equal caution though in an affirmative instead of a negative form. "If he professes to give the Court information "on any particular subject with a view to guide "its discretion and obtain its approval of the "proposed sale, he is bound to lay before the "Court all the material information he possesses "on that particular subject."

In order to judge whether an applicant has misled the Court, all material circumstances attending the application should be known. It is material to know whether the application was made *ex parte* or on notice. Their Lordships attach great importance to the obligation which rests on all persons seeking *ex parte* orders to be thoroughly open with the Court. But was this order made *ex parte*? When this question was asked during the argument no certain answer could be given. Mr. Branson thought it a matter of general practice to make such orders *ex parte*, and Mr. Mayne thought otherwise. From the observations of the High Court their Lordships infer that the order was made on notice to and with the approval of the Court of Wards, which if true is a very important circumstance.

Had the issue of fraud been raised, inquiry must have been made of the officer of the Court of Wards as to the communications made to him, and as to the line which he took about the sale in the Civil Court. He may have known of the written agreement with Papannad. On what grounds did the guardians rest their approval of the plan of which the High Court speak, and in what form was it given? All these matters are left in the dark so completely that we cannot

be certain even whether the order was or was not made *ex parte*.

Another case was referred to (*Sheonath Doss v. Janki Prosad Singh and others*) which is reported I.L.R. 16 Calc. p. 132. It has only an indirect bearing on the obligations of a decree-holder who asks leave to bid; but it opened another discussion on procedure in an important matter. In this case the Calcutta High Court dwelt on the necessity of great caution in granting leave to bid; indeed it laid down such conditions as would make the granting of leave a very rare thing instead of being, as their Lordships believe it is, a very common thing. These conditions are drawn from English practice, partly from cases in which the applicant was a trustee or solicitor for the debtor, and they are applicable to a system under which the decree-holder has the conduct of the sale.

Doubtless the conduct of the sale gives opportunities for influencing its course one way or another, which do not follow on the mere leave to bid. The Civil Procedure Code clearly throws on the Court the whole responsibility of conducting the sale. From the observations of the High Court their Lordships infer that this sale was conducted as the law directs; but nothing express is said about it, and the Respondent's Counsel contended that the ordinary practice is to allow the decree-holder to conduct the sale; and suggested it as probable that in this instance the Appellant conducted the sale.

It is always unsatisfactory to reverse a decree for the reason that the ground on which it rests was not that on which the parties came to issue. But it is obvious that great injustice may be done by shifting the issue in the Court of Appeal, and so deciding without due investigation. There has in this case been a departure from recognised principle, which is

calculated to lead to injustice; and though their Lordships cannot say, the case not being tried, that it has led to injustice, they are far from clear that it has not. A controversy raised about the propriety of proceedings during a sale has been treated as if it were a question whether a fraud was committed on the Court prior to the sale. For the decision of that question it is important to know every incident bearing on the application to the Court; the precise dates of the application, of the order, and of the agreements alleged to have been concealed; the proceedings in Court; the parties present; the state of their knowledge, and so forth. None of these things has been sifted nor so far as appears has the Appellant had any reason for sifting them till the High Court came to decide the case in appeal. Their judgment is founded on an admission very vaguely stated and on a view of the obligations attaching generally to applicants for leave to bid which are unduly onerous at least to decree-holders at arms' length with their debtors. It is of course conceivable that if all relevant matters were ascertained the present Appellant would be found to have fallen short of his duty; but in the present state of the case all their Lordships can say is that the Respondent has neither alleged nor proved the fraud on which alone he can sustain the present order. Their Lordships will humbly advise Her Majesty to discharge the order and to dismiss the petition with costs in both Courts. The Respondent must pay the costs of the Appeal.
