

Present : De Sampayo and Schneider JJ.

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HAMIDU v. GUNASEKERA et al.

57—D. C. Matara, 9,322.

Partition—Person entitled to a building and not to the soil—Is he a co-owner?—Sale among co-owners—Partition Ordinance, 1863, s. 8.

A person who has no interest in the soil, but has only in a building on the land, is not a co-owner of the common property, so as to entitle him to come in among the class of persons entitled to bid at a sale among co-owners under section 8 of the Partition Ordinance.

THE facts are set out in the judgment of the District Judge (C. W. Bickmore, Esq.) :—

I don't think much of the objections raised regarding the formal conduct of the sale. I am inclined to think that the Commissioner did not make any definite refusal to accept the seventh defendant's bid. I expect there was a more or less informal discussion, and the Commissioner then proceeded to accept seventh defendant's bids with the reservation that the matter could be discussed in Court. I think that is why he made no mention of the fact in his return to the commission. He thought it was for plaintiff to bring the matter up. I think plaintiff reached his limit, and allowed the property to be knocked down to seventh defendant. I do not believe he stopped merely because, as he says, he thought they were trying to run him up and land him with the property at a high figure. The real question is whether a person who only owns a house on the land is entitled to bid as a co-owner at the sale. There does not appear to be any definite decision on this question, and I think I am entitled to approach the question *de novo*.

In this case it seems to me that all the circumstances point to the propriety of accepting seventh defendant's bid as a co-owner. He lives on the land, and his family have been living there for a very long time. Plaintiff is a person of different race, who originally came to be interested in the land through a purchase at a Fiscal's sale by his father-in-law. The property has fetched much more than the value plaintiff put on it in his plaint, and considerably more than the appraised value. On the other hand, it is quite possible that to order a fresh sale, and exclude seventh defendant from bidding would mean a decrease in the amount realized. Plaintiff now says he is prepared to pay Rs. 4,000 for the property, so he can hardly be heard to say that the present sale at Rs. 3,040 has prejudiced him as a co-owner by forcing him to pay a higher price than the land is worth.

As a matter of fact a second sale would be very awkward indeed, the bidding would probably force the price up to an exaggerated figure.

There is one other point. There is a recent decision to the effect that compensation for buildings is a fixed sum determined by the Commissioner, and is not to be varied proportionately to the price

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realized. This is contrary to what has been the practice hitherto which has been confirmed by a series of decisions. The converse appears to have been lost sight of, that if a much smaller price is realized the soil owners may get very little for their shares. I collected a number of cases where this principle, if put into effect, would have worked obvious injustice, I think from this point of view, too, it is only right that a person who owns a house on a land to be sold should be given the right to interest himself in the sale.

Keuneman (with him *M. W. H. de Silva*), for appellant.

Soertsz, for respondents.

July 26, 1922. DE SAMPAYO J.—

I am afraid the order of the District Judge refusing to interfere with the sale of the property in question cannot stand. The action was brought for the partition of a certain land which contained plantations as well as certain buildings. The seventh defendant had only an interest in one of the buildings. After investigation the Court made a decree declaring the plaintiff and some of the defendants to be owners of the soil, and as regards the seventh defendant he was declared entitled to one-sixteenth of buildings marked Nos. 1, 2, and 3 in the plan. The Court, instead of a partition, ordered a sale of the property, and issued a commission to one Mr. Ferdinand to carry out the sale. The Commissioner put up the property for sale on conditions approved of by Court. The first person to bid was the plaintiff. Then the seventh defendant put in a bid, to which the plaintiff objected. The ground of the plaintiff's objection was that the seventh defendant was not a co-owner and was not entitled to bid, in view of section 8 of the Partition Ordinance. Plaintiff thereupon asked either that that bid should be rejected and the sale go on among other persons, or the Commissioner should refer the matter to Court for its decision. The Commissioner was not inclined to adopt either suggestion, and accordingly the sale went on, and was concluded in favour of the seventh defendant who was the highest bidder. Before the conditions of sale were signed by the seventh defendant, however, he informed the Commissioner that he bought not only for himself, but for the third defendant as well who was a co-owner of the soil. The Commissioner took the signatures of both the third defendant and the seventh defendant as purchasers, and reported the matter to Court. The plaintiff persisted in his objection, and put in a petition stating the same objection, and asked for an inquiry. An inquiry was held, and substantially the same facts as I have mentioned were elicited in the course of the inquiry. The District Judge overruled the objection, and confirmed the sale. This appeal is taken by the plaintiff from the order of the District Judge.

I think the plaintiff's objection is well founded. Section 8 of the Ordinance provides for carrying out of a sale when a decree for

the sale of a common property has been given by Court, and it lays down that the property should first be put up for sale among the owners thereof. It appears clear that in this enactment the property contemplated is the common property, which by the decree is to be sold. That being so, the seventh defendant, who had no interest at all in the soil, but had only a right to a small undivided share in one of the several buildings, cannot be said to be an owner of the common property so as to entitle him to come in among the class of persons entitled to bid under section 8. As a matter of fact a person entitled merely to an interest in a building on a land which is become the subject of a partition action can only obtain compensation for the interest in the building, and cannot get any share of the land in the partition.

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It is argued that unless the seventh defendant was allowed to bid at the sale and protect his own interest, it would be a great hardship, but if his claim would only be compensation, and if, as is the case always, the property is first put up for sale among the co-owners at an appraised value, taking into consideration the value of the buildings and everything else on the land, a person entitled to a share in a building cannot incur a loss in any case, because out of the proceeds of the sale his compensation must be paid first. In connection with the point involved in this case, the case of *De Silva v. Siyadoris*¹ was cited, and I think that case clearly supports the proposition that a person who is merely interested in any building on a land is not a co-owner with the others who are entitled to shares in the land itself.

I think we must interfere with the order of the District Judge, and set aside the sale held by the Commissioner, and direct that the Court should take other steps for the purpose of carrying out the sale ordered by the decree.

The plaintiff is entitled to the costs of the inquiry as well as this appeal.

SCHEIDER J.—I agree.

Set aside: