[FULL BENCH.]

1920.

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

JABBAR *v.* MARIKAR *et al.*

52—D. C. Colombo, 48,197.

Partition—Agreement by co-owner to sell property to a third party when he purchased it at the sale among co-owners — Is agreement obnoxious to Ordinance ?

The plaintiff in a partition case entered into an agreement with a third party, who was to finance the plaintiff, to sell the property to him should the plaintiff become the purchaser when it was sold among co-owners. The appellant (a defendant) moved that the commission to sell the land should be subject to the condition that the plaintiff should not have the right to bid for or purchase the property when put up for sale among co-owners.

Held, that it was premature at that point to investigate the question whether the plaintiff had committed any fraud.

Held, further, that the agreement by a co-owner to purchase on behalf of a third party was not obnoxious to the Partition Ordinance.

The law intends that co-owners shall have the privilege of pre-emption ; but it does not limit the privilege. It does not preclude them from making an advantageous sub-sale subsequent to a purchase, nor does it preclude them from arranging for such a sub-sale in advance.

BERTRAM C.J.—" If it appeared to the Court that a co-owner had put himself in such a position that his participation in the auction would be equivalent to an abuse of the Court's process, I apprehend that the Court would have an inherent power to restrain such a participation."

THE plaintiff entered into a notarial agreement with one B. L. Mohamado Haniffa, the clauses of which material to the action were as follows :—

(1) Whereas the said Abdul Jabbar was declared entitled to an undivided half share of the land . . . . and under the decree in the said case the said land was ordered to be sold :

(2) And whereas the said sale has been advertised to be held on November 22, 1919 :

(3) And whereas the said Abdul Jabbar, as one of the co-owners, is entitled to bid for and purchase the whole of the said land at the said sale for a sum of Rs. 8,000, at which sum the said land has been purchased and valued by the Commissioner.:

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(4) And whereas the said Mohamado Haniffa has agreed to supply the said Abdul Jabbar with money to purchase the said land at the said sale for a sum not exceeding Rs. 8,500 :

And whereas the said Abdul Jabbar has agreed to convey to the said Mohamado Haniffa by a valid and effectual deed the said land . . . . in the event of the said Abdul Jabbar bidding for and purchasing the said land at the said sale for a sum not exceeding Rs. 8,500, and a certificate of sale being duly issued to the said Abdul Jabbar by the District Court, Colombo, in the said action No. 48,197 :

Now this agreement witnesseth . . . . In the event of the said Abdul Jabbar becoming the purchaser of the said land for the said sum of Rs. 8,500 or any lesser sum . . . . he shall convey by a valid and effectual deed the said land to the said Mohamado Haniffa.

The substituted defendant filed the above agreement in Court, and moved that the plaintiff be disqualified from bidding and purchasing the land as a co-owner.

The District Judge (W. Wadsworth, Esq.) made the following Order : "I consider the objection premature. If there is any fraud in the sale, the Court can be moved at the proper time."

The substituted defendant appealed.

Tisseveerasinghe (with him *Croos-Dabrera*), for appellant.—One co-owner bidding for a stranger is a fraud on the other co-owners, for at that stage in the auction none but co-owners are admitted as bidders. See *2 Lor. 41, 2 Pereira's Laws of Ceylon 212.* By such a proceeding the other co-owners and intending purchasers might successfully be defrauded. The sale practically would be nominally to the plaintiff but virtually to Mohamado Haniffa, who is not a co-owner, and not entitled to bid when the land is put up amongst co-owners only. When rules under section 8 of the Partition Ordinance have not been followed the sale was cancelled. (*(1898) Matara Cases 10.*)

The object of section 8 in confining the sale in the first instance to co-owners is clear. See Indian Partition Act 4 of 1893, sections 2, 3, and English Partition Act, 31 and 32 Vic., c. 43, sections 3, 4, and 5.

The objection is not premature, as the contention is that the plaintiff on the day he entered into the agreement ceased to be a co-owner for the limited purposes of section 8, and there should, therefore, be a declaration that he is not qualified to bid.

To allow a sale under these circumstances and then move to have it set aside if the plaintiff purchased will create complications and involve parties in unnecessary expense. Sale under a Partition Ordinance cannot be set aside as ordinary sales. (*15 N. L. R. 135.*)

A. St. V. Jayawardene, for respondent.—Agreement amongst co-owners not to bid against each other is not inequitable (*2 C. L. R. 33*). It is not illegal for two parties to agree not to bid against each other at a public sale. *In re Carew's Estate.*[1] An agreement between two co-owners in a sale under the Partition Ordinance is not illegal, and the sale is not thereby vitiated. *Wettesinghe v. Jayan.*[2] There is no fraud in the agreement made by the plaintiff in this case, and the present application is premature.

Tisseveerasinghe, in reply.

Cur. adv. vult.

September 2, 1920. BERTRAM C.J.—

I have read the judgment of De Sampayo J. and agree with the views therein expressed. On one point, however, I should like to reserve my opinion. If it appeared to the Court that a co-owner had put himself in such a position that his participation in the auction would be equivalent to an abuse of the Court's process, I apprehend that the Court would have an inherent power to restrain such a participation.

But such a question does not in fact arise. The law no doubt intends that co-owners shall have the privilege of pre-emption, but it does not limit the privilege. It does not preclude them from making an advantageous sub-sale subsequent to a purchase, nor does it preclude them from arranging for such a sub-sale in advance. I have come to the conclusion that it was the intention that every co-owner should be entitled to make the most advantageous possible use of the privilege which the law confers upon him. By such an arrangement as the present the appellant does not prejudice the other owners. The effect of the arrangement is to enhance the price so that every co-owner shares the advantage of the sale.

I agree, therefore, that the appeal should be dismissed, with costs.

DE SAMPAYO J.—

Certain points of law relating to the auction of a land under a decree for sale in a partition action have arisen for decision in this case. The plaintiff was declared entitled to an undivided half share of the land, and the defendants to the rest of the land in certain proportions. The third defendant having died, the appellant was substituted in his place. The Court entered a decree for sale, and a commission to carry out the sale was issued to John Peiris, an auctioneer. The land was valued by the Commissioner at Rs. 8,000, and was advertised for sale on November 22, 1919. The sale was, as usual, to be first among the co-owners at the appraised value. For certain reasons the sale did not take place on that day, and the commission being returnable on November 25, 1919, the plaintiff's proctor on December 8, 1919, moved that the

[1] (*1858*) *26 Beav. 187.*

[2] (*1891*) *2 C. L. R. 33.*

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commission be extended and re-issued to the Commissioner. When this motion came on for consideration on February 13, 1920, the substituted defendant produced a notarial agreement entered into by the plaintiff and a third party, and, by way of objection to the extension of the commission, made a counter motion. The terms of this motion were not embodied in any written memorandum, but it appears from the petition of appeal that the application to Court was "to have the plaintiff disqualified from bidding at the sale on the ground that he had entered into a notarial agreement with a stranger to bid at the sale nominally for himself but to purchase the land on behalf of the said stranger." The agreement, which was dated November 8, 1919, was to the effect that the plaintiff should bid for the property up to Rs. 8,500 at the sale on November 22, 1919, and that if he purchased the property at that or any less sum, he should, after obtaining a certificate of sale, convey the property to the other party to the deed for such sum, the other party agreeing to advance to the plaintiff the purchase money and the charges connected with the sale. The District Judge considered that the objection was premature, and that if there should be any fraud at the sale the Court could be moved at the proper time, and he accordingly allowed the plaintiff's motion to extend and re-issue the commission.

There is no precedent for the order asked for, and I consider it impossible for the Court to make such an order. I can understand the Court setting aside or otherwise interfering with a particular sale, after it has taken place, on the ground of fraud or irregularity, but I do not think that the Court can or ought to make an order beforehand that a co-owner shall not bid at a sale to be held under the decree. Such an order, to say nothing else, will, I think, amount to contravention of the express provision of the Partition Ordinance. For section 8 provides that the property shall be put up for sale first among the co-owners, and I cannot hold that the Court has authority to exclude one or more co-owners and order that the sale shall be only among the rest of them. I entirely agree with the District Judge that the objection in any event was premature. If the plaintiff or any other party should become the purchaser at any sale, it would then be time enough for the Court to consider any circumstances vitiating the sale and to make such order as it might think fit.

The more important question, however, is whether the agreement between the plaintiff and the third party constitutes a good ground of objection if the plaintiff becomes the purchaser. For this purpose I shall assume that the agreement is still operative, although the particular sale which it contemplated had lapsed before the date of the motion. Counsel for the substituted defendant-appellant put the matter as high as a case of fraud. I am unable to take that view. I am not aware of any principle of law on which

it can be declared that a co-owner is disqualified from purchasing the property with the intention of selling it again to another. The circumstance that he makes a previous agreement to sell in the event of his becoming the purchaser at the sale does not surely make any difference. It is said that the other co-owners would be placed at a disadvantage, as they may not be able to compete on a footing of equality with the co-owner who has behind him a prospective buyer. That may be so in certain circumstances, but the provision of the Ordinance for the sale among the co-owners is not intended to ensure such equality. The disadvantage, if any, will be the same if one of the co-owners is possessed of more means than the others or is able to raise money beforehand for the purchase, but a co-owner in that position is not disqualified from bidding at the sale. On the other hand, a poor co-owner by entering into such an agreement as the present may be able to overcome the power of money on the part of a richer co-owner. The only authority cited on behalf of the substituted defendant-appellant is *Sinne Lebbe v. Moonesinghe*.[1] That was a case which arose under the old Partition Ordinance, No. 21 of 1844. It is noticeable that the accepted fact in that case was not only that one of the co-owners bid, not for himself, but for a stranger, but that the transfer was subsequently made out directly in favour of the stranger at the co-owner's request. Moreover, it was a Court of Requests case, and presumably the decision was that of a single Judge only. I am unable to accept it as sound. So far as I know, it has never been followed. On the other hand, such transactions as the present have not been uncommon since, and effect has been given to them without objection. Now that the question has been raised, however, I am unable to agree that any element of fraud is involved in such an agreement as that between the plaintiff and the third party. It is a speculation which a co-owner, in my opinion, is at liberty to enter into if he chooses. It may be borne in mind in this connection that under the English law it is not illegal for two parties to agree not to bid against each other at a public sale, and the sale is not thereby vitiated. *In re Carew's Estate*,[2] *Heffer v. Martyn*.[3] This principle has been extended in Ceylon to an agreement between two co-owners in regard to a sale under the Partition Ordinance. *Wettesinghe v. Jayan*.[4] It was suggested that the policy of the law was to keep the property in the family of the co-owners. This cannot be, because the co-owners may not belong to the same family, but may be persons deriving title by purchase or some mode of acquisition other than inheritance. The fact appears to me to be that the Ordinance has no further purpose in view than giving a right to the co-owners to bid and purchase in the first instance in preference to the general public, and is not

[1] *(1857) 2 Lor. 41.*
[2] *(1858) 26 Beav. 187.*
[3] *(1867) 36 L. J. Ch. 372.*
[4] *(1891) 2. C. L. R. 33.*

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concerned with anything which a co-owner may intend to do after purchasing. Though the partition of a land is now the subject of a statute, the principles of the Roman-Dutch law are still invoked in a case not expressly provided for. If the law were such as is contended on behalf of the appellant, one would expect some indication of it in the Roman-Dutch law, which is as strict as any system of law in regard to fraud ; but there is no such trace. On the contrary, *Voet 10, 2, 22* on the *actio familiæ erciscundæ* contemplates such an arrangement as the present. For, after alluding to the determination of the preference by means of auction among the heirs, Voet proceeds "*admisso etiam quandoque ad licitationem emptore extraneo, si se non sufficere ad justa pretia offeranda aut vincendos coheredes vilius licitantes, heredum unus profiteatur.*" It will be noticed that the reason stated for recognizing a stranger's intervention is that any low bidding by one of the heirs may thus be met in the interest of those who are unable to purchase with their own money. This passage in *Voet* is based on the *Code 3, 37, 3,* which lays down the same rule in connection with the action *communi dividundo.* I do not, therefore, see any reason why a co-owner's agreement to re-sell to a stranger, with the possibility of realizing a *justum pretium,* should be regarded as involving any fraud on the other co-owners.

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

SCHNEIDER A.J.—

In this action, brought under the provisions of the Ordinance for the partition or sale of lands held in common (No. 10 of 1863), the learned District Judge decreed the plaintiff to be entitled to half and each of the three defendants to one-sixth of the property. He ordered a sale. Upon an application by the plaintiff for a re-issue of the commission for sale, the appellant, who is the defendant substituted in place of the third defendant, deceased, opposed the issue of the commission unconditionally. He asked that it should issue with the condition attached that the plaintiff should not have the right to bid for or purchase the property when it was put up for sale among the owners. He stated—and this is a fact—that the plaintiff had entered into an agreement notarially attested with A, who is a stranger to the partition action, to sell and convey the property to A should the plaintiff become the purchaser of it when it was sold among the owners. By this instrument A agreed to finance the plaintiff, to enable the plaintiff to purchase the property when put up for sale among the owners for any price not exceeding Rs. 500 above the upset price at which the property would be put up for sale, and the plaintiff agreed to sell and convey the property to A at the price at which he would purchase it should he become

the purchaser, or in the event of the failure to perform this agreement specifically to repay to A with interest all moneys advanced by A to him.

The appellant contended that this agreement amounted to fraud. The learned District Judge held that it was premature at that point of the proceedings to investigate the question whether the plaintiff had committed any fraud or not, and that the question should await developments after the sale had actually taken place. It is from this ruling the appellant has appealed. In my opinion that ruling is right. But whatever be the view taken, I do not think the plaintiff's act could be called a fraud. Even granting that it is fraud for one owner to purchase as a mere nominee of a stranger to the action property when put up for sale among the owners, it does not follow that the plaintiff is guilty of fraud because he entered into the agreement mentioned. It is quite possible that the plaintiff may not bid at all, or become the purchaser, or that having become the purchaser he may not transfer to A, and the terms of his agreement may not entitle A to compel specific performance. I would accordingly have dismissed the appeal for the same reasons as the District Judge gave for his order, but the appeal was pressed on the ground that the agreement entered into by the plaintiff was contrary to the provisions or the object of the provisions of the Partition Ordinance, and especially of section 8 of that Ordinance. It therefore becomes necessary to consider this argument. I have no fault to find with the contention that the intention of the Ordinance is to keep the property as far as possible among the owners. The preference given to a partition over a sale of the property, the right of pre-emption of the interests of the mere planter given to the soil owner, the provision that the sale of the property shall be amongst the owners in the first instance in every case of sale—all point unmistakably to that being the intention. But it seems to me that the real question is not what the intention of the Ordinance is, but whether, granting the intention to be that which it is contended it is, was it intended to fetter the owners in the exercise of their ordinary rights, that is to say, whether, when the provision was enacted that the sale shall be held first amongst the owners, was it intended that any of the owners who desired to purchase should not purchase with money he has borrowed for the purpose of so purchasing, or that when he had become the owner of the property by purchase at the sale amongst the owners he should not subsequently sell that property to a stranger to the action ? If the contention submitted on behalf of the appellant is to prevail, it is not possible to stop short of those conclusions.

It seems to me unreasonable to hold that it was intended to fetter an owner who is a purchaser or an intending purchaser in the manner contended. Why should not an owner who has not the money purchase the interests of his co-owners with money he borrows ?

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It is possible that if he should not purchase by that means, that one of his co-owners may purchase the property for a trifle beyond the upset price to the prejudice of all the other owners. The greater the liberty given to the owners to promote competition amongst themselves, the more likely it is that the property will fetch a good price. It was contended that an owner should not be permitted to purchase in his own name really but virtually as the nominee of an outsider. Why not? It must be conceded that once an owner has become the purchaser, there is no legal impediment to his selling the property to any one and at any price he pleases. He may do this the moment he acquires title. What is the practical difference between his doing that and entering into an agreement to re-sell to a stranger who finances him to enable him to purchase, and selling to that stranger the moment he acquires title? I see no difference. I am therefore of opinion that it was never intended by the provisions that the sale shall be amongst the owners to fetter any one of the co-owners from the exercise of his right to borrow money, or to purchase with money supplied by strangers, or to enter into an agreement with a stranger to sell when he had become the purchaser, or to purchase having previously entered into an agreement to sell to a stranger. It is possible that facts may be proved which may show that one owner had become the purchaser in circumstances tantamount to a fraud upon his co-owners. In such a case the intervention of the Court might be invoked to prevent the perpetration of the fraud. But such a case is quite different from the present. Here all the owners stood to benefit if the plaintiff abided by his agreement and became the purchaser. He was not to benefit any more than any other owner, as his agreement was to sell at the same price at which he purchased, and he was to purchase at any price not exceeding Rs. 500 over the upset price. The upset price is the market price of the property as ascertained by the Commissioner's valuation. The fact should not be lost sight of, that if the owners fail to purchase the property, it is put up "immediately" for sale by auction to the highest bidder. In that sale there is no upset price. It is quite possible that the property may then be sold for less than the upset price at which it was put up for sale amongst the owners. Therefore, an owner who enters into an agreement similar to that into which the plaintiff had entered will, in such a case, have done that which was in the best interests of all the owners.

The appeal should therefore be dismissed, with costs.

Appeal dismissed.