1954 *Present :* **Nagalingam S.P.J.**

P. SARNELIS APPUHAMY, Appellant, *and* H. V. RAM ISWARA, Respondent

S. C. 75—C. R. Colombo, 40,917

Condictio indebiti—*Auction sale of immovable property—Notarial fees—Exorbitant sum charged—Payment made under mistake of fact—Remedy of purchaser.*

A purchaser at a public auction of immovable property is entitled to sue a notary for the refund of exorbitant fees paid under a mistake of fact to the notary for attesting the conditions of sale. The obligation in such a case arises out of quasi-contract.

APPEAL from a judgment of the Court of Requests, Colombo.

After a public auction of immovable property had been concluded, the purchaser was presented a bill by the auctioneer setting out the amount due from him. The purchaser, without scanning the bill, paid the full amount, assuming that he had been charged reasonable sums under the various heads set out in the bill. On the following day he was informed by his clerk that he had been charged no less than a sum of Rs. 500 as notarial fee for attesting the conditions of sale. In the present action he sought to recover what he regarded as the unconscionable excess of the notarial fee charged.

H. W. Jayewardene, with *P. Ranasinghe*, for the plaintiff appellant.

H. W. Tambiah, with *S. Sharvananda* and *H. L. de Silva*, for the defendant respondent.

Cur. adv. vult.

December 15, 1954. NAGALINGAM S.P.J.—

This appeal involves a question of some importance relating to the rights and obligations of a purchaser at a public auction of immovable property in regard to the notarial fees payable by him for having the conditions of sale attested.

The appellant was declared the purchaser of certain premises which were put up for sale by public auction at the instance of the owner by a firm of auctioneers, and at the sale the appellant was declared the purchaser thereof at or for the price of Rs. 90,000.

That the auctioneer did, before the commencement of the sale, read out the conditions of sale, P1, is common ground. Of those conditions only two need be noticed. One is that where the purchase price exceeds a sum of Rs. 100, the purchaser should pay one-tenth of the purchase amount to the auctioneer at the conclusion of the sale ; the other is

that the purchaser should also pay to the auctioneer his commission fixed at 2½ per cent. and all advertisement and other charges " as also the notary's fees and value of stamps for conditions of sale, the costs of drawing conditions and the clerk's fee ".

The auctioneer's evidence is that before the auction the conditions of sale were read out " and the charges were left on the table for the would be purchasers to see ". But he significantly adds that at that stage not only could he not specify the one-tenth of the purchase money, the reason for which is obvious, but also the amount of the notary's fee, the reason not being so obvious in this case. He amplified this evidence under re-examination and expressly stated that if a purchaser saw him before the sale he would not have been able to tell him what the notary's fees would amount to. He again makes an enigmatic statement that he would not have found out from the notary either. Why he could not have found out he does not say. He however says that " *after the sale whatever the notary asks I pay* ".

On the auctioneer's evidence it is difficult to resist the conclusion that prior to the commencement of the auction he had no knowledge of what fee the notary would charge to attest the conditions of sale and consequently no would-be purchaser could have obtained that information even if he had made inquiries directed to that end.

The plaintiff's case is that after the sale had been concluded he was presented a bill setting out the amount due from him, which it is admitted contained the several items such as 1/10th purchase money, auctioneer's commission, advertisement charges, notary's fees, &c., but the plaintiff says that he did not scan the bill for one reason that he had no knowledge of the English language, for another, that he assumed that he would be charged reasonable amounts under the various heads set out therein. He adds that he asked the auctioneer what the amount of the bill was and on being informed it was Rs. 12,086·50, he drew out a cheque for that amount and handed it to the auctioneer. On the following day he gave the bill to his clerk to make the necessary entries in his books of account, when he was informed and became aware for the first time that he had been charged no less than a sum of Rs. 500 as notary's fees for attesting the conditions of sale. Promptly, he says, he came to his proctor in Colombo and entrusted the matter to him asking him to take steps to recover what he regarded as the unconscionable excess of the notary's fees charged.

Mr. Vandersmagt who conducted the sale and Mr. McHeyzer, another auctioneer of standing, both expressed the view that a sum of Rs. 500 for attesting the conditions of sale in question they considered exorbitant. The learned Commissioner has accepted that evidence and though learned Counsel for the respondent has sought to challenge the finding of the Commissioner that a sum of Rs. 500 was in fact exorbitant, no adequate grounds have been adduced for differing from the view taken by the learned Commissioner.

The appellant, with a view to confer jurisdiction on the Court of Requests, claimed a refund of only Rs. 300 while he has averred in his plaint that a sum of Rs. 157·50 would be more than a reasonable fee

for the notary and that under the Notaries Ordinance the notary would have been entitled to much less. When the appellant came to Court his case was that he paid the sum of Rs. 500 on account of notary's fees under protest. That averment the plaintiff at no time sought to substantiate. In fact his case was, as set out earlier, that in ignorance of the fact that he was charged as much as Rs. 500 and assuming that he had only been charged a reasonable figure for the notary's services, he paid that amount which was included in the total amount of the bill. The learned Commissioner does not reject the evidence of the plaintiff but has taken the view that " if the plaintiff chose to pay the bill like a Duke without scrutinising the items, he has only to blame himself ".

I do not think that there is any principle of law which precludes the plaintiff from recovering money paid under these circumstances ; on the other hand, I think ample authority may be found for the contrary proposition. First and foremost is the principle of Roman Dutch Law that where money has been paid under reasonable error of fact to a person not entitled, an action lies for its recovery [1]. Grotius deals with the topic under the broad heading that one person should not enrich himself at the expense of another and states that under this head falls : " the recovery of what one has ignorantly paid as a debt without being really indebted " (*condictio indebiti*). Nathan[2], dealing with what is or what is not a reasonable mistake, says, " reasonable ignorance is as a general rule *ignorance of what has been done by another* or of the existence of a state of things which is of such a kind that a very careful man may labour under it. In the case of such ignorance the *burden of proof lies upon the person who denies it*, who must show the full knowledge of the party alleging ignorance. This is in full accordance with the general principle that reasonable ignorance of fact, or mistake as to fact, excuses the ignorant or mistaken party from performance of a contract or after he has already performed it, entitles him to relief ". Can it be said that where a man does not scrutinize a bill presented to him because he assumes that in accordance with the normal standards of professional propriety a reasonable amount would have been charged as fee and pays it that he is exposing himself to the criticism that he has committed an unreasonable error of fact? The standard to be applied is set out by Voet and is to be found in the note to the passage already cited from Nathan :

> " An ordinarily careful person . . . . . is not required to make too scrupulous an investigation with reference to a fact not immediately apparent and will in case of a mistake be entitled to relief. "

The case of the plaintiff is not different from that of a guest at a hotel who pays a bill presented to him without entering upon a detailed scrutiny, for conduct of such nature, it is unnecessary to say, would bring him down in people's estimation ; but where later on examination of the bill he finds either the total or some of the items are incorrect, and claims a rectification of the bill and a refund of any excess paid by him, I do not think that opinion could be divided on the question whether he was

[1] *Lee, Introduction to Roman Dutch Law, 4th ed., page 346.*
[2] *Common Law of South Africa, 1st ed., Vol. II, p. 560, section 774.*

guilty of a lack of reasonable diligence, and all will be agreed that such conduct is above criticism. The conduct of the plaintiff is no different from that of the hotel guest. His behaviour is not different from that of any other reasonably prudent and honourable man. I do not think the law requires that when a man deals with another that it should be on the footing that the man with whom he deals is other than an honourable man. I am therefore of the opinion that on these facts the plaintiff is entitled to succeed.

Learned Counsel for the respondent however raised the question as to whether it was competent for the plaintiff to sue the defendant or whether the plaintiff's rights were not in fact to be pursued against the owner who had put up the property for sale. In support of that proposition the case of *Ismail v. Ratnapala* [1] has been cited. That is a case where an action was instituted by a purchaser at an auction sale against the refund of the commission paid to him after the sale had been set aside by Court on the ground of misdescription of the property. It was held there that the action did not lie against the auctioneer, who was entitled to retain the fee paid for services rendered by him, but as the sale proved abortive the purchaser had to look to the person at whose instance the property had been put up for sale and to him alone. That proposition, I do not think, can be doubted, but it has no application to the facts of the present case. This is not a case where the claim is for the recovery of the legitimate fee charged by a notary on the basis of damages sustained in consequence of the sale proving abortive—but the action here is to recover what was improperly charged and paid under a reasonable error, the sale itself being a valid one. I need only add that this action is not based upon a breach of a contract entered into between the plaintiff and the defendant but, as sufficiently indicated already, it is based upon the very wide principle of obligations arising out of quasi-contracts.

Another line of argument put forward on behalf of the respondent was that as the notary had been employed by the owner of the property and as by the conditions of sale already referred to the purchaser agreed to pay the notary's fees and as the owner had agreed to pay to the notary Rs. 500 for attesting conditions of sale, the plaintiff was properly charged that sum.

First of all, in regard to the question of fact as to whether there was a promise by the owner of the property to pay the defendant a sum of Rs. 500, I entertain grave doubts though the learned Commissioner has answered this question in the affirmative. The owner, it is true, gave evidence and categorically stated that he had agreed to pay Rs. 500. It is not pretended that the notary examined the title or prepared an abstract of title for the benefit of the intending purchasers, or that he searched the encumbrances or that he even drew up the conditions of sale. The conditions of sale, according to the auctioneer, had been prepared by him in his own office. Those conditions consist of a printed form. The only task the notary had to perform was to explain the conditions, which had already been explained by the auctioneer at the commencement of the sale, attest the signature and prepare the attestation required under the Notaries Ordinance. The conditions of sale

[1] *(1920) 22 N. L. R. 374.*

were not even sent for registration. In these circumstances, it would be straining one's sense of propriety and fairness to accept the evidence of the owner of the property that he had agreed to pay such a large sum as Rs. 500 for attesting the conditions of sale. The defendant himself gave no such evidence. The owner's evidence, if examined, reveals that, according to him, he had not only agreed to pay the notary Rs. 500 but had also instructed the auctioneer to recover that amount and pay to the notary. The auctioneer, on the other hand, who was cross-examined in detail on behalf of the defendant, was not put a single question suggesting that the owner had given such instructions. On the other hand, his evidence, as stated earlier, completely destroys that suggestion for, according to him, he could not have informed the purchasers before the conclusion of the sale what the notary's fees were going to be.

I have therefore reluctantly come to the conclusion that the evidence of the owner on this point should be rejected, but the position nevertheless requires examination on the assumption that there was such an agreement between the owner and the notary. It has not been suggested—and indeed the contrary is established—that any intending purchaser was informed that a sum of Rs. 500 would be charged by way of notary's fees.

In these circumstances, one might even go further and say, as learned Counsel for the respondent was forced to admit, that at the conclusion of a sale there would be nothing to prevent a dishonest owner from making a secret gain by announcing that he had agreed to pay some fabulous figure to the notary by way of his fees. One answer to that is that the purchaser would dispute that amount and the sale may fall through. Another answer would be that if the purchaser agreed to pay, there will be nothing more to be said about it.

It seems to me, however, that where a sum which would not ordinarily be regarded as a fair charge on the part of a notary is intended to be claimed, such amount should be stated before the commencement of the sale and the purchasers apprised as to the extent of their liability in regard to those fees ; in fact it would be far more satisfactory if the notary's fees were in all cases announced—the reason for the contrary practice that the sale may not go through appears to me to be unsound. Had it been established that at the conclusion of the sale it was pointedly brought to the notice of the plaintiff that he was being charged Rs. 500 as notary's fee and thereafter he proceeded to complete the transaction, without protest, there can be little doubt that he would be bound by the payment he made. But the circumstances here are different. It was on the reasonable hypothesis that the amounts charged were in accordance with the usual and normal rates adopted by the members of the profession and in ignorance of the fact that he was being called upon to pay a sum of Rs. 500 that the plaintiff gave the cheque inclusive of that sum to the auctioneer. The condition that the purchaser was to pay the notarial fees cannot mean, in the absence of the amount being specified, anything more than that the purchaser would have to pay only a reasonable amount, if not indeed the fee prescribed by the Notaries Ordinance.

In these circumstances there can be little doubt that the plaintiff has made out his case. I would therefore set aside the judgment of the learned Commissioner and enter judgment for the plaintiff as prayed for with costs both of appeal and in the lower Court.

Appeal allowed.