

1920.

*Present : De Sampayo J.*ISMAIL *v.* RATNAPALA.

138—C. R. Galle, 1,930.

*Sale by order of Court under the Entail and Settlement Ordinance—
Misdescription—Sale set aside by Court—Action against auctioneer
by purchaser for refund of commission.*

“ It is to the party at whose instance a sale takes place that the purchaser must look for repayment, not only of the purchase money, but of the expenses and charges if the sale becomes abortive.”
Where a purchaser sued the auctioneer for return of commission and charges paid by purchaser,

Held, in the circumstances of the case, that he was not entitled to recover same from the auctioneer.

THE facts appear from the judgment.

De Zoysa, for plaintiff, appellant.

Jayawickreme, for defendant, respondent.

September 17, 1920. DE SAMPAYO J.—

The decision of the question involved in this action depends partly on facts and partly on law. It appears that an order was made by the District Court under the Entail and Settlement Ordinance, 1876, for the sale of half of a certain house, and the defendant, an auctioneer, was appointed to carry out the sale. The sale as advertised by the defendant was half, not only of the house, but of the land on which it stands, and the plaintiff became purchaser at the sale, and in accordance with the conditions of sale, he paid Rs. 76 for the defendant's commission and charges. On account of the misdescription of the property to be sold, and also because the Secretary of the Court, in whose presence the sale was, according to the Court's directions, to have been held, was absent at the sale, the District Court set aside the sale. The plaintiff now sues the defendant to recover the sum of Rs. 76 paid to the defendant as his commission and charges. The Commissioner of Requests dismissed the plaintiff's action, holding that the defendant in the circumstances of the case was not liable.

We are not now concerned with the reasonableness of the grounds on which the Court set aside the sale, but the circumstances are relevant to the question of the defendant's liability. The absence of the Secretary at the sale can hardly be a sufficient reason for depriving the defendant of his commission and the expenses incurred

by him. As regards the description of the property, the conditions of sale which were submitted to and approved by the Court contained the same description, and the applicant for the sale and the Court were as much responsible for the mistake of the defendant. Moreover, the plaintiff was not in any way misled. It was admitted by him in this case that he knew that he was buying half the house only. Indeed, in the proceedings under the Entail and Settlement Ordinance he resisted the setting aside of the sale, stating that he, in fact, bought half the house, exclusive of the soil. Nor was the misdescription intentional on the part of the defendant. It appears that the house stood partly on one land and partly on another, and in the endeavour to specify it he gave descriptions which, when literally read, included the lands. It should further be noted that one of the conditions of sale was that " if any unintentional error or misstatement shall have been made in the description of the property, the same shall not vitiate the sale, and the auctioneer shall not be responsible."

The Court might well have confirmed the sale, because the owners would have been benefited by the misdescription rather than otherwise, and because the actual purchaser himself said he was not prejudiced and opposed the cancellation of the sale.

In view of all these facts it does not seem equitable to compel the defendant to refund the money unless there is some distinct rule of law to the contrary. I am not aware of such a rule of law. Principle appears to me to suggest, on the other hand, that it is to the party at whose instance a sale takes place that the purchaser must look for repayment, not only of the purchase money, but of the expenses and charges if the sale becomes abortive. In No. 104, Interlocutory, D. C. Colombo, No. 45,781,¹ which was the case of an execution sale, this Court held that the purchaser was entitled to recover from the execution-creditor the amount of fees and charges paid to the auctioneer. I do not see much difference between an execution-creditor and a party on whose application the Court makes an order for sale of entailed property. In any event I am unable to discover any authority for depriving the auctioneer of the commission which has been received by him for his services and of the necessary charges incurred by him, and I am not disposed to interfere with the dismissal of the plaintiff's action.

The appeal is dismissed, with costs.

Appeal dismissed.

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DE SAMPAYO
J.

*Ismail v.
Ratnapala.*

¹ S. C. Min., Nov. 29, 1918.