1945 *Present:* **Soertsz A.C.J. and Canekeratne J.**

SULEHA UMMA, Appellant, *and* NAGOOR MOHAMADO, Respondent.

65—D. C. (Inty.) Colombo, 1,913.

Contract—Sale under Partition Ordinance—Condition that property "shall be liable to be re-sold" on failure of payment of purchase price within one month—Default of purchaser—Interpretation of phrase "shall be liable to be re-sold".

Where one of the conditions of a sale under the Partition Ordinance was that "the property shall be liable to be re-sold" if there was default on the part of the purchaser to pay the full purchase price within one month—

Held, that the Court had no discretion to allow the money to be deposited after the time fixed had elapsed; the effect of the words "shall be liable to be re-sold" was that, in the event of default, the property had to be re-sold unless the parties came to a settlement.

APPEAL from an order of the District Judge of Colombo.

W. S. de Saram for the second defendant, appellant.

A. Gnanapragasam (*with him H. S. Perimpanayagam*), for the purchaser, respondent.

Cur. adv. vult.

October 18, 1945. SOERTSZ A.C.J.—

This was a sale held under the Partition Ordinance on notarially attested conditions of sale No. 53 of April 1, 1942. At that sale Nagoor Mohamado, the tenth respondent to this appeal, became the purchaser, being the highest bidder at Rs. 750. In compliance with condition 3, he paid Rs. 75, that is one-tenth of the purchase amount, and by condition 5 undertook to pay the balance *within one month*. Admittedly, he made default in that respect. He did not pay the balance of the purchase price within the one month, and by operation of condition 7 by which he was bound he forfeited his deposit, and the property became liable to be re-sold at his risk. On April 19, 1942, the purchaser moved for time till May 31, 1942, to pay the balance due. The Proctor for the plaintiff had no objection to that, but the Court, even if we assume that it had a discretion to interfere with the contract of the parties and grant an extension of time because condition 7 provided that "the property *shall be liable to be re-sold*," and not peremptorily, that it "*shall be re-sold*" exercised that discretion only to the extent of making the consent of the other co-owners the condition for the allowance of the time asked for. Again on May 29, 1942, weeks after the month had expired, another application was made for an extention of time till the end of June, 1942, and once more the Court directed "File consent of first and second defendants". This was not done, but the balance due was deposited in Court on June 19 or 20, 1942, and on July 1, 1942, certificate of sale was issued. On July 23, 1942, this sale was confirmed. On September 15, 1942, the second defendant, the appellant now before us, filed objections to all that had gone before, and after inquiry into them the certificate of sale was recalled and the Court fixed a date for consideration of the question whether the sale should be confirmed or not, with an opportunity given to the second defendant to be heard on that question.

At that inquiry the objections taken to the sale were that—

(*a*) the land had been undervalued, that it was reasonably worth Rs. 1,500 and that, therefore, the advertisement of the sale had been inadequate;

(*b*) the purchaser, the tenth respondent, was a nominee of the plaintiff-respondent and that the sale was bad for that reason;

(*c*) the balance of the purchase money was not deposited within the month fixed for its deposit and that, consequently, the sale proved abortive.

I do not see any reason for taking a different view from that of the trial Judge in regard to (*a*) and (*b*) when he held against the second defendant. But objection (*c*) appears to me to be quite formidable, and has to be seriously considered. Conditions 3, 5 and 7 of the conditions on which

this sale was held are substantially the same as the conditions upon which Fiscals' sales are held under sections 260, 261 and 262 of the Civil Procedure Code except that section 262 provides that where the balance purchase money is not deposited within 30 days, the property *shall be re-sold;* whereas condition 7 says the property *shall be liable to be re-sold.* I must suppose that it was in view of this difference in phraseology, that the trial Judge held that the Court is vested with a discretion in regard to this sale to allow the balance to be deposited after the time fixed had elapsed; in other words, to say whether the property should be re-sold or not. He said " I think the Court has the descretion to allow a party to deposit money after the time allowed in the conditions of sale provided no prejudice was caused. In this case, I fail to see how any prejudice was caused to the parties because the purchaser did not deposit the entire balance purchase money till the 20th of June". Conceding, for the sake of argument, the validity of the statement in the first sentence of that passage, namely, that the Court has a discretion, what I fail to see is how the trial Judge can say that he fails to see how prejudice was caused in consequence of the breach of the condition in regard to the deposit of the balance. That, to my mind, is an assertion, impossible to make in the circumstances of a case like this, for its validity must depend on so many unascertained, and now unascertainable facts. Such an assertion is in reality, nothing more than idle speculation as if—to take a familiar example in order to make my meaning clear—a brotherless man should presume to answer, one way or the other, if he were asked whether, if he had a brother, he would like cheese. Indeed, in this instance, the lack of data for making an answer is not quite as bad as all that for, although the area of possible prejudice is not completely explorable now, there is adducible, for instance, the prejudice caused to the owners of the land by the purchaser's being absolved from the forfeit of the one-tenth deposit that he had incurred. And again, there is the prejudice that must result from getting their money many weeks later than they were entitled to it. *Bis dat qui cito dat.* Moreover, a second sale, in view of the conditions of sale, could never have worsened their position. It might have greatly improved it.

But in regard to the concession made a moment ago, namely, that condition 7 by providing that, in the event of default, the property shall *be liable to be re-sold*, vested a certain discretion in the Court to say whether it shall or shall not be re-sold, the trial Judge's view appears to be based on the interpretation of the phrase " shall be liable to be re-sold, " as meaning " may be re-sold " and not as meaning " shall be re-sold ". But it is well established that, in some circumstances, " may " is construed not as giving a discretionary power but as imposing an imperative duty, or to state that proposition more accurately by the use of the word " may " it is signified that the Judge has a power given him, but, in certain circumstances, it becomes his duty to exercise that power. In regard to the question in what circumstances such a duty arises, the general principle appears to be that if the person to whom the power is given " has nobody's interest to consult but his own, the power is permissive merely, but if a duty to others is at the same time created, the exercise of the power will

be imperative ". But assume that there was no such duty in this instance, although, in my opinion there was, still the discretion so vested was, of course, a judicial discretion. In other words, the Court was not given a charter as free as the wind to give vent to its own generous and good natured impulses. As Jessel M.R. observed in *Wallis v. Smith* [1], " it is of the utmost importance as regards contracts . . . . that the Courts of Law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that the Judges know the business of the people better than the people know it themselves ".

In this case, if it were only a matter of inclination, having regard to the time that has elapsed, I would leave things as they have come to be, but after careful search for a good reason to indulge and to support that inclination, I can find none upon which I can say that there is justification here for the contract, entered into by the parties deliberately and in solemn form, not being put into effect.

I would, therefore, set aside the order of the trial Judge and, unless the parties can come to some settlement, and I wish they could, I would direct that the property be re-sold on the footing that there was default on the part of the purchaser in regard to his undertaking in condition 7. I would allow the appellant costs in a sum of Rs. 105 in respect of the inquiry in the Court below and of this appeal.

CANEKERATNE J.—I agree.

Order set aside.