

officer concerned, and that the wrongful exercise of the discretion does not make the arrest invalid. The officer has power only within the limits allowed by law, and must exercise his powers strictly in accordance with law. When he fails to do so his action is illegal, and the arrest is unlawful. If the arrest is unlawful, there is no offence under section 224, Indian Penal Code, in escaping from it. In the present case we find that the Sub-Inspector failed to comply with the law, and that his arrest of the accused was unlawful. They were, therefore, rightly acquitted, and we dismiss this appeal.

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APPELLATE CIVIL.

*Before Mr. Justice Shephard and Mr. Justice
Subramania Ayyar.*

JAYINILABDIN RAVUTTAN (COUNTER-PETITIONER, PLAINTIFF
AND PURCHASER), APPELLANT,

1896.
March 20, 23.
April 1.

v.

VIJIA BAGUNADHA AYYARAPPA MAIKAN GOPALAR
(DEPENDANT, PETITIONER), RESPONDENT.*

*Civil Procedure Code—Act XIV of 1882, s. 311—Setting aside a sale on the ground
of material irregularity—Non-disclosure amounting to fraud.*

A creditor had obtained a decree on the footing of a mortgage and in execution brought the property of his judgment-debtor to sale. At the time of sale the decree-holder, who had obtained leave to bid, entered into an agreement with P to the effect that if P would dissuade other persons from bidding, he (the decree-holder) would purchase the whole property for Rs. 83,000 and convey it on certain terms to P. P thereupon exerted his influence and succeeded in persuading would-be purchasers from bidding and in consequence the property was sold on 11th April 1891 for Rs. 83,000, which was a little more than half its actual value. The sale was confirmed on 29th June 1891 and the judgment-debtor who at the time of the sale was a minor under the Court of Wards, attained his majority on 21st April 1894 and filed this petition praying to set aside the sale on the 15th May 1894:

Held, that the omission on the part of the decree-holder to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment debtor to say that in point of law no leave to bid was granted and that the

* Appeal against Order No. 131 of 1895.

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withholding of information is no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser, and that therefore the sale must be set aside.

APPEAL against the order of C. Venkobachariar, Subordinate Judge of Tanjore, passed on civil miscellaneous petition No. 487 of 1894.

The petitioner (defendant in original suit No. 85 of 1882) presented a petition dated 15th May 1894 under section 311 of the Code of Civil Procedure, asking the Subordinate Court of Tanjore to set aside the auction sale dated 11th April 1881 of a portion of his zamindari for a debt of about Rs. 42,306 incurred by his father, which sale was confirmed on 29th June 1891. At the time of the sale petitioner was a minor under the Court of Wards and attained his majority on 21st April 1894. The petition was opposed by Jayinilabdin (the auction purchaser) as counter-petitioner. The following objections to the validity of the auction sale were relied upon by the petitioner.

(1) That the sale took place before the expiration of thirty days from the dates on which the sale notices were alleged to have been published in the villages (the dates of publication in the villages were 13th and 15th March 1891).

(2) That the proclamations of sale were not as a matter of fact published in the villages.

(3) That the interest of the Zamindar in the villages was not properly described in them.

(4) That on the date of sale an agreement was entered into between Papanad Zamindar and Jayinilabdin, in consequence of which intending purchasers were dissuaded from bidding at auction.

(5) And lastly that the petitioner sustained damages, as the villages were sold for prices much below what they were worth.

The counter-petitioner denies that there was any fraud in the sale, and says that it took place after thirty days from the date of the affixing of the notification of sale in the Court-house, and that the notifications were published in the villages. He further states that he did not dissuade intending purchasers from bidding at auction, that he entered into no agreement with Papanad Zamindar, that there was no agreement that he should purchase the villages for low prices, that the prices fetched were fair, and that petitioner suffered no damage. It is contended further that the petition is barred and that it is unsustainable.

With regard to the points thus raised for decision the Subordinate Court found that the proclamation of sale was made and duly published in the villages; but that there was material irregularity within the meaning of section 311, Civil Procedure Code, inasmuch as thirty days did not intervene between the posting up of the proclamation in the villages and the date fixed for the sale. He held on the authority of *Tasadduk Rasul Khan v. Ahmad Husain*(1) and *Arunachellam v. Arunachellam*(2) that though this material irregularity occurred, the sale ought not to be set aside in the absence of proof of substantial damage of the petitioner. As to the third objection the Subordinate Judge found that the interest of the Zamindar in some of the villages was not properly described in the sale proclamations, but held on the authority of *Olpherts v. Mahabir Pershad Singh*(3), *Arunachellam v. Arunachellam*(2) that this was not a sufficient ground for setting aside the sale. He also held that it was not proved that this irregularity caused any damage to the petitioner. As to the fourth ground of objection the Subordinate Judge held that the agreement (exhibit C) was made on the date of sale between Papanad Zamindar and Jayinilabdin (counter-petitioner) as follows:—

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“Agreement executed on the 6th April 1891 to Sabhapati Pillai Avergal, son of Sivachithambaram Pillai of Kilappaluvor of Trichinopoly district, residing in Mahamombu Chavadi, Pookkara Street, Third Division, Tanjore, by Chinnayya Rowther *alias* Zainoolabdin Rowther, son of Mohamed Maera Rowther, residing at Okkur, Pattukottai taluk, Tanjore district. Execution petitions having been put in for the purpose of the realization of the decree amounts in these two suits, namely, original suits Nos. 85 of 1882 and 21 of 1883 on the file of the Subordinate Court of Tanjore, the decrees whereof hold liable these eight villages as hypotheca, namely, Karakkottai, Kambarkovil, Omakkavayal, Kuttangudi, Irambavayal, Sirukottaiyur, Vennathur and Kodamangalam comprised in the Zamindari of Singavanam of Pattukottai taluk, this day has been set down for the sale of the said eight villages which are held liable for the decrees. Consequently, if I should purchase the said villages at auction sale as agreed upon in our conversation, I shall, as per request made by you to me, convey to you at your expense the said eight villages to be purchased

(1) I.L.B., 21 Calc., 66. (2) I.L.R., 12 Mad., 19. (3) L.R., 10. I.A., 25.

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at auction sale on my receiving from you payment in cash on any date within one year, Rs. 85,000 being the price of the said eight villages as agreed to now, together with interest thereon at three-fourth per cent. per mensem from this day to the 1st April of the ensuing year 1892, that is to say, within one year and every sort of expenditure incurred in respect of the said villages with interest thereon at the rate aforesaid. If any other than myself should purchase at auction some (any) of the said eight villages, the sale amount in respect of the villages which may be so purchased at auction shall be deducted from the said sum of Rs 85,000 and the remaining sum together with interest, &c., thereon as set forth above shall on payment on any date within one year be received by me and the villages which may be purchased by me at auction will be conveyed to you. If, as set forth above, the amount, &c., be not paid and sale deed obtained within one year, this agreement shall stand null and void."

The Subordinate Judge held that the above agreement was made for the benefit of the Papanad Zamindar and counter-petitioner, and that in consideration of the counter-petitioner consenting to reconvey the villages if he should purchase them, the Papanad Zamindar undertook to prevent bidders from competing with him in the auction, and that the agreement was verbal and was a condition precedent to the agreement (exhibit C).

With regard to the value of the villages the Subordinate Judge found that they were worth $1\frac{1}{2}$ lakhs of rupees or about Rs. 70,000 more than the amount realized by the auction, and that this loss was attributable, not to pure accident, but to want of fair competition in the auction due to the compact between the Papanad Zamindar and counter-petitioner to dissuade people from bidding.

The Subordinate Judge therefore set aside the sale on the condition of petitioner paying Rs. 83,000 due to the counter-petitioner within six months from the date of his order (15th March 1895). Each party to bear their own costs.

Both parties appealed to the High Court. The counter-petitioner against the order setting aside the sale in civil miscellaneous appeal No. 131 of 1895 and the petitioner against the order to pay Rs. 83,000 within six months in civil miscellaneous appeal No. 120 of 1895.

The other points argued appear sufficiently from the order of the High Court.

Bhashyam Ayyangar and *Desikachariar* for appellant.

Pattabhirama Ayyar for respondent.

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ORDER.—The appellant is the purchaser of eight villages sold on the 11th April 1891 at an auction sale held in execution of decrees passed against the respondent and his father. The respondent, who was at the date of sale a minor, has obtained an order setting aside the sale, and against that order this appeal is brought.

The material facts found by the Subordinate Judge and forming the ground for his order are as follows :—

One of the decrees, in execution of which the sale was held, was a mortgage decree obtained by the appellant himself. The amount due under that decree at the time of the sale was about Rs. 60,000. The other decree was held by a third person whose agent, as it will appear, was Sundaram Chetti. The amount due under that decree was about Rs. 17,000. On the day for which the sale was advertised, the 6th of April, an agreement was made between the appellant and a person representing the Papanad Zamindar to the effect that the former should purchase the whole property for Rs. 85,000 and convey it on certain terms to the Zamindar. On the same day the appellant obtained from the Court leave to bid. So far there is no doubt as to the facts. But the Judge further finds that it was part of the agreement between the Zamindar and the appellant that the Zamindar shall dissuade other persons from bidding at the auction and that the Zamindar acted in accordance with the undertaking with the result that the eight villages were finally knocked down to the appellant at an aggregate price which was substantially below their real market value. The price which the appellant paid was Rs. 78,070, with the expenses of sale and the like amounting to Rs. 83,000. The real value of the property is according to the Judge's estimate about Rs. 1,50,000. This estimate is attacked by the appellant's vakil mainly on the ground that the statement (exhibit xxxi) on which the Subordinate Judge relies under-estimates the proportionate peishkash payable by the eight villages. The evidence with regard to the statement which purports to show the income of the villages for five years and the peishkash payable on each is not altogether satisfactory. The witness who speaks to it does not say for what purpose it was prepared, nor does he mention the materials on which he worked. It must be

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assumed that the calculation of the peishkash payable by the purchaser is correct, and that accordingly the figure given in exhibit xxxi is much lower than it should be. The inference naturally arising is that the other figures representing the income are also too low. We cannot accede to the suggestion that we must accept the figures representing the income as correct and reject the figures supposed to represent the peishkash, and thus arrive at the conclusion that the net income of the villages is less than what exhibit xxxi would make it appear to be. There is, however, other evidence in support of the Subordinate Judge's finding. There is the evidence of the same witness who speaks to exhibit xxxi, namely, the late manager under the Court of Wards, with reference to another statement made by him regarding the value of the villages. His evidence with regard to this statement in which the value is put at a figure exceeding Rs. 1,50,000 is much more satisfactory. There is other evidence as to the prices which witnesses say they were prepared to give for single villages, and there is the circumstance of large claims being made by the appellant for melvaram payable in respect of some of the villages. On the whole there is, in our opinion, ample evidence to support the Judge's finding as to the value of the villages.

In regard to the other matters of fact on which the Subordinate Judge has recorded findings we also agree with him. The sale began on the 6th April and each village was put up as a separate lot. No village was sold on that day, but the biddings were by order of the Court carried on from day to day till the 11th, when finally all the eight villages were sold and bought by the appellant. This seemingly extraordinary way of conducting a sale is said not to be unusual. Looking at the reports of the bids on the 11th of April, which of course was the only day on which serious bids were made, we find that in the case of Kambarkovil, Ilambavayal, Kodamangalam, Karakottai and Sirukottaiyur there was only one bidder besides the two decree-holders, one of whom was represented by Sundaram Chetti. In the case of Vennattur those two were the only bidders. In the case of Kuttangudi there were two other bidders. For the most valuable village Karakottai the two decree-holders were the only bidders whose bids could be regarded as serious.

Sheik Ismail Sahib was one of the most frequent bidders. The account he gives of himself when examined as a witness for the

respondent is not very satisfactory, and it seems doubtful whether in his bids he really meant business. Sundaram Chetti, the agent of the other decree-holder, was not examined, and it is not certain whether his employer had obtained leave to bid. The probability is that the bids were made merely with the view of raising the price to such a figure as to secure the payment of the debt due under that decree as well as the debt due to the respondent. This remarkable absence of competition, notwithstanding the fairly full attendance at the auction, might, if otherwise unexplained, be attributed to the fact that there were two decree-holders in the field. But there is evidence that effort was made to prevent competition. There is the evidence of several persons present at the sale whom the Judge has believed. Their story is strongly corroborated as well by the evidence with regard to the terms on which the agreement of the 6th April was made, especially the evidence of the District Registrar, as by the fact that the public did abstain from competing. There is in addition the significant fact that the vakil Srinivasa Pillai is not prepared to deny positively the conversation to which the District Registrar speaks.

The question then is whether, on the facts as found by the Subordinate Judge, the order was rightly made. The order is made under section 311 of the Code, and it is based on the ground of irregularity in the conduct of the sale. In our opinion there has been no irregularity within the meaning of the section. No charge is made against the person conducting the sale. The charge is made against the respondent and those who acted in concert with him, and it amounts to this: that they acted in such a way as to prevent the best price being obtained and thus caused loss to the judgment-debtor. So far as this particular charge is concerned we are further of opinion that it does not amount to a charge of fraud. Putting aside for the present the fact that the purchaser was the decree-holder and confining our attention only to the agreement made before and the conduct of the parties at the sale, we do not think that any fraud was established. There is some authority for the position that an agreement between two persons not to bid against each other will constitute sufficient ground for opening the biddings. (Bigelow on Fraud, p. 580. *Pachayappan v. Narayana*(1) founded on Sugden's "Vendors and Purchasers,"

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old edition, p. 93.) But according to the better opinion, that is not good law. It was distinctly held in "*In re Carew's Estate Act*"(1) that such an agreement, made with the view of dividing the land between the two parties to it, was no ground for setting aside the sale (see *Doorga Singh v. Sheo Pershad Singh*(2)). The object of such an agreement and the means by which the object is gained are alike lawful and innocent, and the number of persons who enter into the agreement can make no difference. It is not suggested that there was any intimidation practised or any obstruction offered to possible bidders, nor again is it said that any misrepresentations were made at the auction in order to deter people from bidding. Probably the zamindar is a man of influence in the neighbourhood and there was some sympathy for the family of the judgment-debtor. These circumstances, together with the presence of the decree-holders as bidders, account for the facility with which other rivals were kept out of the field. The means by which competition was discouraged at the auction were clearly of an innocent character. In employing them, as in making the agreement with the zamindar, the purchaser did not go beyond the limit of what he was entitled to do in order to make a good bargain. (*Mogul Steamship Company v. McGregor, Gow & Co.*(3)).

The case, however, against the purchaser assumes a different complexion when it is remembered that he was not a stranger to the property, but a mortgagee holding a decree who, without special leave to bid, could not become purchaser. The case illustrates the importance of exercising the discretion to grant leave sparingly, and only in cases where it is made clear that the sale will be advantaged thereby. Ordinarily it is not to the advantage of a sale that a person who has enjoyed special opportunities of knowing the property and its value should be allowed to compete with strangers. They are naturally led to think that his bid represents the extreme value of the property (*Tennant v. Trenchard*(4)).

The agreement of the 6th April was clearly material to the consideration of the question whether leave to bid should be granted. The effect of the agreement was practically to preclude the appellant from going beyond Rs. 85,000. It was supposed to be made for the benefit of the judgment-debtor, and the friends of the

(1) 28 L.J. Ch., 218.
(3) L.R., 28 Q.B.D., 614.

(2) I.L.R., 16 Calc., 194.
(4) L.R., 4 Ch., 547.

latter concurred in it on that supposition. But it is plain that in reality the agreement, if carried out, left the judgment-debtor at the mercy of the zamindar. Had he become the purchaser, he could not have been compelled to convey the property to the judgment-debtor. The arrangement was of such a nature that it could not possibly have been countenanced by any Court having regard to the interest of the minor judgment-debtor. It is admitted that nothing was said about it when application for leave was made. That the agreement was in existence at that time there is no manner of doubt. In our opinion the omission on the appellant's part to disclose the agreement to the Court amounted to a fraud upon the Court entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. The case is one in which there was a duty incumbent on the appellant to disclose all the circumstances within his knowledge bearing on the question of the expediency of his being allowed to bid. Without such disclosure it is impossible for the Court to exercise its discretion. The withholding of information is, in our judgment, no less a ground for cancelling a sale than actual misrepresentation on the part of the applicant who becomes the purchaser. In the foregoing remarks we have laid no stress on the fact that the judgment-debtor was a minor. We have only assumed that there was no consent on his part, as a person *sui juris* to the arrangement under which the sale took place. Obviously a judgment-debtor, who being of full age, had consented to the arrangement, could not afterwards have challenged the sale. But the judgment-debtor was a minor and he is entitled to challenge the sale if it is shown that his interests were not duly protected by those whose duty it was to have regard to them. If, independently of any decree, the minor's property had been put up to auction and bought by the mortgagee under an arrangement similar to that actually made, there can be no doubt that on his coming of age the mortgagor would have been entitled to repudiate the transaction. Had the guardians of the minor done their duty by him, a reserve price would probably have been fixed on the property, the application of the decree-holder for leave to bid would have been resisted, and they certainly would not have acquiesced in a plan so perilous to the minor's interest as that which with their approval, was conceived and carried out. For these reasons we agree that the sale must be set aside,

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Both the above questions may, in our judgment, be properly raised between the judgment-debtor and the purchaser who is a party to the decree.

In modification of the order appealed against we direct as follows :—

Unless the respondent pays into Court the sum of Rs. 83,000 within one week from the re-opening of the Subordinate Court, the eight villages must be advertised again for sale to the highest bidder at the upset price of Rs. 83,000. The effect of this will be that, if there is no higher bidder, the appellant will be held to his bargain. As the appellant has been in possession lawfully, he is entitled to the mesne profits in lieu of interest up to the date of payment or that of the fresh sale if any. There will be no order against the appellant with regard to mesne profits nor any in his favour as to interest. Each party to bear his own costs of the appeal.

APPELLATE CIVIL.

Before Mr. Justice Shephard and Mr. Justice Subramania Ayyar.

TIRUMALASWAMI AYYANGAR (PLAINTIFF), APPELLANT,

v.

TIRUMALAI GOUNDAN AND ANOTHER (DEFENDANTS),
RESPONDENTS.*

Patta, grant of—Effect of reversal—Appeal to Board of Revenue.

The grant of a patta by a Collector is conditional on the result of an appeal against such grant to the Board of Revenue.

SECOND APPEAL against the decree of T. Weir, District Judge of Coimbatore, in appeal suit No. 39 of 1893, reversing the decree of G. Ramaswami Ayyar, District Munsif of Coimbatore, in original suit No. 206 of 1891.

Suit for possession of lands and damages for loss of produce.

The facts of the case were as follows :—

The plaintiff and first defendant, both darkhasted in or about June 1887 for the lands in dispute. The Tahsildar appears to

* Second Appeal No. 523 of 1895.