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It is therefore unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right, and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

SMALL CAUSE COURT REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Trevelyan.

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June 15.

MACKENZIE LYALL & CO. *v.* OHAMROO SINGH & CO.

Sale by auction—Auctioneers—Agent bidding "kutcha-pucca"—Usage of trade—Custom—Condition of sale.

An agent of the defendants made, at an auction sale, a bid for certain goods: this bid was not at the time accepted by the auctioneers, but was referred to the owners of the goods for approval and sanction, the agent agreeing to such reference. The conditions of sale contained no clause stipulating for such procedure.

Previous to any reply being received by the auctioneers from their principals, the principals of the agent bidding refused to acknowledge the bid of their agent.

In a suit brought by the auctioneers to recover a loss on a re-sale of the goods, the plaintiffs set up a usage of trade, whereby it was alleged that the bidder at such a sale was not at liberty to withdraw his bid until a reasonable time had been allowed for the auctioneers to refer the bid to the owner of the goods. The only evidence on this point was that of an assistant to the firm of the plaintiffs, who stated "that such an arrangement had never been repudiated:" *Held*, that the conditions of sale containing no clause to the effect of the usage claimed, and there being no sufficient evidence that the usage was so universal as to become part of the contract by operation of law, there was no contract between the parties, and therefore that no suit would lie.

ON the 5th November 1888, Messrs. Mackenzie, Lyall and Co., auctioneers, put up for sale, under their usual conditions of sale, certain cases of zanella cloth.

* Small Cause Court Reference No. 3 of 1889, made by G. U. Sconce, Esq., Chief Judge of the Court of Small Causes, Calcutta, dated the 9th of April 1889.

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For lots 287 and 288, two cases of zanella cloth, one Kartick Singh, an agent of the defendants, made a bid of seven annas per yard; for lots 289 and 290 of the same cloth, he made a bid of six annas per yard.

At the time of making the above bids, Kartick Singh was informed by the auctioneers, who did not actually knock down the goods to him, that his bids were accepted "*kutcha-pucca*" and that he would be informed later on, if his offer was accepted, and to this he replied: "All right, when it is made *pucca*, inform us." At the trial a "*kutcha-pucca*" bid was explained as being equivalent to a "firm offer," and it was stated that, by the custom of trade, a man who makes a "firm offer" is bound not to withdraw it at least till a reasonable time, say two or three days, has elapsed for its acceptance, the auctioneers meanwhile undertaking to submit the offer to their principals. The only evidence, however, given on this point was that given by an assistant in the plaintiffs' firm who stated that such an arrangement had never been repudiated.

On 6th November, Messrs. Mackenzie, Lyall & Co. received a letter from the defendants, the principals of Kartick Singh, repudiating the contracts on the ground that Kartick Singh had no authority to bid for the goods on their behalf. On the 7th November, the plaintiffs having heard from their principals, wrote to the defendants, informing them that their offer had been accepted. The defendants however refused to take delivery of any of the goods, although requested so to do. The goods were therefore put up again for sale on the defendants' account, the price fetched at such re-sale showing a loss of Rs. 1,003,-8-6, and after a request for payment of this amount, Messrs. Mackenzie, Lyall and Co. sued Chumroo Singh and Co. in the Court of Small Causes for the balance due. The conditions of sale made no reference to "*kutcha-pucca*" bids, nor contained any clause stipulating for the procedure relied on.

The learned Chief Judge found that the custom relied on by the defendants, if it existed, was unreasonable; and on the question of the repudiation of the contracts by the defendants, he found that Kartick Singh was the defendants' agent, having authority to bid at the sales; that the repudiation or withdrawal by the defendants of the bid made by them, being prior in point of

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time to the acceptance of such bid by the plaintiffs, the defendants were not liable. He therefore dismissed the suit, but at the request of the pleader for the plaintiffs made his judgment contingent on the opinion of the High Court as to whether or not the defendants were liable, notwithstanding their repudiation of the bid before acceptance of the bid by the plaintiffs was communicated to them.

On the hearing of the reference,

Mr. *Acworth* for the plaintiffs referred to Pollock on Contracts (4th Edition), p. 24.

Mr. *Bonnerjee* and Mr. *Garth* for the defendants were not called upon.

The opinion of the Court (PETHERAM, C.J., and TREVELYAN, J.) was delivered by

PETHERAM, C.J.—The question in this case is, whether there was any contract between the parties.

The plaintiffs in this case are auctioneers carrying on business in this city, and the defendants are merchants, and on some day the plaintiffs published an advertisement of the goods they had to sell, and they also published the conditions of sale. On the occasion of this sale, an agent of the defendants attended the sale and bid for certain lots, and the auctioneer who held the sale did not knock down the lots, but intimated to the bidder that his bid was accepted *kutcha-pucca*.

Now, the first thing that occurs to one to do is to look at the conditions of sale to ascertain whether there are any conditions which deal with an intimation of this kind, and we find that there are not. The plaintiffs say that, by the custom of the sale room, an intimation of this kind is an intimation that the goods were put up by them for sale, subject to a reference to the owners of the goods if, I suppose, the bids are below a certain amount. What they undertake to do is, they undertake to submit the bid to the owners within a certain time, but until it has been so submitted there can be no acceptance of the bid. In this case, the defendants withdrew the bids, or repudiated the bids, or at all events they wrote to the auctioneers intimating that they did not intend to purchase the goods. In an

ordinary sense, it is clear that a bid made at auction can be retracted before it has been accepted, the reason being that until the goods are knocked down there is no contract with any one. He who makes the offer may withdraw unless he is under a contract not to do it, because until it is accepted there is no contract between the parties. The defendants having withdrawn the bids before they were accepted, it is clear there was no contract of sale. Mr. Acworth admits that what took place could not amount to a contract of sale, but he contends that there is, by the custom of these sale rooms, an implied agreement, or an agreement by the bidder that, in consideration of the agreement by the auctioneers to submit the offer to their principals, the bidder promises not to retract his bid until it has been either accepted or refused. It may be that that very often takes place. There is no evidence to show that there was such a contract in this case. Indeed the evidence is the other way, because if it were part of each contract, you would expect to find it mentioned in the conditions of sale, but the auctioneers do not place anything of the kind in the conditions of sale. Then, is there any evidence that there was so universal a custom as to become part of the contract by operation of law? There is no evidence of that kind. The only evidence given on the subject is the evidence of one of the assistants in the sale room, that such an arrangement had never been repudiated. That in my opinion is absolutely insufficient to establish a custom of this kind, and I think, therefore, that, under these circumstances, there was no contract, and there being no contract there could be no breach and no cause of action, and the learned judge of the Small Cause Court was right in dismissing the suit so far as the goods were concerned.

I think it right to add that if any persons in the position of auctioneers wish to incorporate any such special arrangements as this in their contracts, it ought at least to be made a portion of the conditions on which they sell.

In the result, the questions referred to us will be answered in the negative.

T. A. P.