

In *Lachhman Prasad v. Durga Prasad* (1) it was said that the preference of full blood to half blood followed as a logical result of the custom of *stribant*. Lord HALSBURY is reported to have said once that law was not a logical science. This is equally, if not more, true of a custom. No doubt there have been cases in which effect has been given to necessary implications of a particular custom. It seems to us impossible to say that the contention put forward by the appellant is by any means a necessary implication of the custom of *stribant*.

For the above reasons, we are of opinion that the present case is not governed by the decision of their Lordships of the Judicial Committee in *Nabi Baksh v. Ahmad Khan* (2), and the question referred to the Full Bench should be answered in the negative.

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*Raza and
 Srivastava,
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 APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava and
 Mr. Justice E. M. Nanavutty*

RAM LAL MISRA, PANDIT, (PLAINTIFF-APPELLANT) v. RAJENDRA NATH SANYAL, BABU (DEFENDANT-RESPONDENT)* 1932
November. 29

Contract Act (IX of 1872), section 23—Auction sale—Agreement between two persons not to bid at an auction sale, whether against public policy—Execution of decree—Several decree-holders applying for rateable distribution—Secret agreement between a decree-holder and the purchaser not to bid against him with a view to defraud other decree-holders—Agreement, whether fraudulent and void—Maxim, in pari delicto potior est conditio possidentis, applicability of.

Held, that an agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy.

*Second Civil Appeal No. 339 of 1931, against the decree of Pandit Tika Ram Misra, Subordinate Judge, Malihabad at Lucknow, dated the 31st of July, 1931, upholding the decree of Babu Mahabir Prasad Varma, Munsif, (South) Lucknow, dated the 28th of November, 1930.

(1) (1916) 19 O. C., 165.

(2) (1924) I. L. R., 5 Lah., 278.

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The plaintiff in execution of his simple money decree attached a property of the judgment-debtor and put it to sale and another person who also held a money decree against the judgment-debtor obtained an order from the execution court to share rateably in the sale-proceeds of the property. The plaintiff entered into a secret agreement with the defendant not to raise the bids against him and as a consideration for it the defendant agreed to make good to the plaintiff the difference between the total amount due to him under the decree and the amount that he would get under rateable distribution as a result of which the plaintiff did not bid beyond a certain amount and so the defendant got the property in the execution sale at a low price.

Held, that the case is not merely of an honest combination between two bidders to purchase the property at an advantageous price, but goes further by resorting to a secret artifice for the purpose of defrauding the rival decree-holder and therefore the object of the agreement was fraudulent and it was therefore void under section 23 of the Contract Act.

Held further, that as the fraud had been successful inasmuch as a rival decree-holder had received no more than his rateable share at the sale-proceeds, the plaintiff and the defendant both were equally parties to the fraud, and under the circumstances the maxim *in pari delicto potior est conditio possidentis* applied and the plaintiff was not entitled to any relief from the court *Ambika Prasad Singh v. R. H. Whitwell* (1), dissented from. *Doolubdass Peltamber Dass v. Ramlohl Thackoorseydass* (2), *Galton v. Emuss* (3), *In re Carew's Estate Act* (4), *Heffer v. Martyn* (5), *Jyoti Prokash Nandi v. Jhowmull Johurry* (6), relied on. *Fuller v. Abrahams* (7), and *Levi v. Levi* (8), referred to.

Messrs. *J. M. Basu* and *Zahur Ahmad*, for the appellant.

Messrs. *Hyder Husain*, *D. N. Bhattacharji*, *L. P. Srivastava*, and *R. K. Srivastava*, for the respondent.

SRIVASTAVA and NANAVUTTY, JJ. :—This is an appeal by the plaintiff against the decree dated the 31st of July, 1931, of the Subordinate Judge of Malihabad affirming the decree dated the 28th of November, 1930, of the Munsif, (South) Lucknow.

(1) (1907) 6 C. L. J., 111.

(3) (1844) 13 L. J. R., Equity, 388.

(5) (1867) 36 L. J. R., 372.

(7) (1821) 6 Moo. C. P., 316.

(2) (1850) 5 M. I. A., 109.

(4) (1859) 28 L. J. R., Equity, 218.

(6) (1908) I. L. R., 36 Cal., 134.

(8) (1833) 6 Car. and Pay, 239.

The facts of the case are briefly these :

The plaintiff Ram Lal held a simple money decree against one Jwala Prasad for about Rs.1,300. He put this decree into execution and attached a property known as Harşamal-ka-Bagh belonging to the judgment-debtor. This property was subject to certain mortgages in favour of one Mahabir Prasad. The property was ordered to be sold subject to Rs.9,642 due in respect of these mortgages. One Pearey Lal also held a money decree against the same judgment-debtor for more than double the amount of the plaintiff's decree. The execution court made an order allowing Pearey Lal to share rateably in the sale-proceeds of the property. The auction sale started on the 12th of September, 1927, went on for several days and ultimately on the 20th of September the sale was closed in favour of the defendant on his final bid of Rs.1,360. There were only two bidders on this date, namely the plaintiff who bid Rs.1,355 and the defendant who bid Rs.1,360. After the sale had been confirmed, the defendant tendered the sum of Rs.10,573-4-8, being Rs.9,642 on account of principal and the interest thereon, to Mahabir Prasad, mortgagee. The latter refused to accept this amount and brought a suit to enforce his mortgages. It was held by this Court that Mahabir Prasad was not entitled to anything more than Rs.9,642 plus interest on it. Mahabir Prasad then appealed to the Privy Council. The defendant thereupon made a compromise with Mahabir Prasad and paid him Rs.7,000 more.

The plaintiff came into Court on the allegation that on the 20th of September, 1927, the defendant approached the plaintiff and asked him not to raise the bids against him and that as a consideration for this he offered to pay off the prior mortgages and also to make good the whole amount due to the plaintiff under his decree. As a result of the rateable distribution which had been ordered by the executing court, the plaintiff received only Rs.383-4-9.

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out of the sale-proceeds. He therefore claimed from the defendant the difference between this amount and the amount due to him under the decree. He also claimed interest on this amount at the rate of Re.1 per cent. per month.

The defendant pleaded in his defence that the plaintiff himself had approached him to purchase the property, that he had represented to him that the charge of Mahabir Prasad amounted to Rs.9,642 only and that he had agreed to pay to the plaintiff the difference between the amount due to him under his decree and the amount which he might receive in rateable distribution on condition that he had to pay no more than Rs.9,642 to the mortgagee. It was also averred that in any case the agreement set up by the plaintiff was illegal, fraudulent and opposed to public policy.

The learned Munsif found that the object of the agreement was to defeat the rights of the other creditors. As such it was fraudulent and involved injury to third persons, and was, therefore, void and unenforceable. On appeal the learned Subordinate Judge has held that the object of the agreement was to deprive the rival decree-holder of his legitimate dues and to cause loss to the judgment-debtor. He has in the result held the agreement to be void on the ground of its being opposed to public policy.

The learned counsel for the plaintiff-appellant has, in the first place, pointed out that the plaintiff had obtained the permission of the court to bid at the auction sale. It is not disputed that this was so. Therefore on the authority of the decisions of their Lordships of the Judicial Committee in *Mahabir Pershad Singh v. Macnaghten* (1) and *Mahommed Meera Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (2) it must be held that he was in the same position as any other purchaser subject to no exceptional restrictions.

(1) (1889) L. R., 16 I. A., 107.

(2) (1899) L. R., 27 I. A., 17.

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The next question is whether the agreement can be regarded as opposed to public policy. The lower appellate court has based its opinion on the decision of MUKERJI, J., of the Calcutta High Court in *Ambika Prasad Singh v. R. H. Whitwell* (1). If the learned Judge intended to hold that if the object of a combination of intending purchasers is to make a fair bargain, only in that case it is lawful and that it is unlawful and opposed to public policy if the object is to obtain the property at a sacrifice, then with all respect we do not find ourselves able to subscribe to the proposition in these terms. The learned Judge referred to two English cases, namely *Fuller v. Abrahams* (2) and *Levi v. Levi* (3), and a large number of American cases in support of his opinion. The American cases cited were not available to us either in the Court library or in the library of the Bar Association. We have not therefore been able to examine them. In *Levi v. Levi* (3) there is a dictum to the effect that an agreement of several persons not to bid at an auction was an indictable offence. Their Lordships of the Judicial Committee referring to this dictum in *Doolubdass Pettamber Dass v. Ramloll Thackoorseydass* (4) remarked that "this was a mere dictum in a *Nisi Prius* case and cannot, we think, be relied upon." In Halsbury's Laws of England, Vol. I, at page 512 also, in the footnote, it is pointed out that this dictum suggesting that such an agreement is an unlawful conspiracy does not seem to be based on any sound principle or to be good law. The case of *Fuller v. Abrahams* (2) seems to have been decided on the special facts of that case. It was found that the purchaser and one of his friends were the only two bidders at the sale. The rest of the company had been debarred from bidding by the purchaser stating to them that he had a claim against, and had been ill-used by, the late owner of the barge which was the

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(3) (1833) 6 Car. and Pag., 239.

(2) (1921) 6 Moo. C. P., 316.

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subject of sale. The Court held that a sale under these circumstances could not be supported.

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In *Galton v. Emuss* (1) Knight BRUCE, V.C., remarked as follows :

“Two men being desirous of buying an estate of a third are acquainted with each other’s intention and with a view of obtaining the estate in the most beneficial manner, one agrees to retire from the contest and leaves the purchase open to the other. No intention or intimation of fraud is suggested as between these two parties. There is no authority to show that an arrangement to retire from being a competitor for an estate is illegal.”

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In *re Carew’s Estate Act* (2) the facts were that a piece of land was advertised for sale. Two adjoining land owners were desirous of purchasing it; they agreed that one alone should attend the sale and purchase, if it should be sold for a sum not exceeding a sum named. If the land was purchased, terms were arranged, and it was to be divided between them. It was held that the agreement between the purchasers was not contrary to equity; and that it did not vitiate the contract.

The head-note of the case, *Heffer v. Martyn* (3), which concisely sets forth the point decided in the case, is as follows :

A paid *B* a sum of money not to bid at a public auction. *B* attended the sale and did not bid. *A* bought the property. Held that *A* was entitled to a decree for specific performance against the vendors. In Halsbury’s Laws of England, Vol. I, page 512, the law has been stated thus :

“An agreement between two or more persons not to bid against each other at an auction, even if

(1) (1844) 13 L. J. R., Equity, 388. (2) (1850) 28 L. J. R., Equity, 218.
(3) (1867) 36 L. J. R., 372.

amounting to what is popularly known as a 'knock-out', would not seem to be illegal or to invalidate the sale."

The same view was accepted by FLETCHER, J. in *Jyoti Prokash Nandi v. Jhowmull Johurry* (1). It may be noted that the learned Judge dissented from the decision of his Court in *Ambika Prasad Singh v. R. H. Whitwell* (2) as well as from the decision in the two English cases, *Fuller v. Abrahams* (3) and *Levi v. Levi* (4). Thus the weight of the English authorities seems to be against the view taken in *Ambika Prasad Singh v. R. H. Whitwell* (2) and we are of opinion that an agreement between two persons not to bid against each other at an auction sale is perfectly lawful and cannot be considered to be opposed to public policy.

We, however, think that the decision of the court below should be upheld, though on a slightly different ground. Section 23 of the Contract Act provides that every agreement of which the object or consideration is unlawful is void. Amongst the objects enumerated in that section as unlawful is one in which the consideration or object is fraudulent. In the present case the object of the secret arrangement arrived at between the parties clearly was to deprive the rival decree-holder, Pearey Lal, of his legitimate share in the amount which was to be paid by the defendant to the plaintiff over and above the amount which he was to get as his share in the rateable distribution made by the Court, or, in other words, to benefit the plaintiff at the expense of Pearey Lal. The case therefore, in our opinion, is not merely of an honest combination between two bidders to purchase the property at an advantageous price, but goes further by resorting to a secret artifice for the purpose of defrauding a third person, namely the rival decree-holder, Pearey Lal. We have therefore no hesitation in holding that

(1) (1908) I. L. R., 36 Cal., 134.

(3) (1821) 6 Moo. C. P., 316.

(2) (1907) 6 C. L. J., 111.

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the object of the agreement in the present case was fraudulent and it is therefore void under section 23 of the Contract Act.

It may also be pointed out that the fraud has been successful inasmuch as Pearey Lal has received no more than his rateable share in the sale-proceeds. The plaintiff and the defendant both are equally parties to the fraud and under the circumstances the maxim *in pari delicto potior est conditio possidentis* applies. In this view also the plaintiff is not entitled to any relief from the Court.

The result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

FULL BENCH

Before Mr. Justice Muhammad Raza, Mr. Justice Bisheshwar Nath Srivastava, and Mr. Justice H. G. Smith

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PARBATI, MUSAMMAT, AND ANOTHER (PLAINTIFFS-APPELLANTS) *v.* MOHAMMAD IBRAHIM AND OTHERS (DEFENDANTS-RESPONDENTS)*

Limitation Act (IX of 1908), Article 132—Foreclosure suit—Mortgage deed entitling mortgagee to sue on default in payment of interest or to remain silent—Suit filed within 12 years of the term fixed in the deed but after 12 years of the default in payment of interest, if time-barred.

Where a deed of mortgage entitles a mortgagee to institute a suit for a relief under the mortgage on default being made in payment of interest agreed to be paid yearly and there is a further covenant to the effect that the mortgagee may not sue on such a default, the limitation does not commence to run from the date of the default. The mortgage money does not "become due" within the meaning of Article 132 of the Limitation Act until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. Therefore a suit for foreclosure by the mortgagee filed within 12 years from the date of the expiry of the term fixed in the mortgage deed but more than 12 years after the

* First Civil Appeal No. 32 of 1931, against the decree of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Rae Bareilly, dated the 24th of November, 1930.