

the condition of the property admits of, for a great number of years, it may fairly be concluded that he has relinquished all right and claim to the remnant of what once belonged to him. In this case upwards of a quarter of a century has passed since the plaintiff's village was washed away, and there is no suggestion of any evidence in support of the continued existence of any portion of his old estate, beyond the (alleged) identity of site, or of any right of the plaintiff therein.

With this expression of our opinion of the law as applicable to cases, like that before us, we remit the case to the Divisional Bench.

The 26th May 1865.

Present:

The Hon'ble C. B. Trevor and G. Campbell,
Judges.

Sale of (Government property)—Non-deposit of earnest-money—Power of Attorney—Agent (powers of).

Case No. 309 of 1864.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 26th May 1864.

The Collector of Dacca (Plaintiff),
Appellant,

versus

Nund Lall Ray and others (Defendants),
Respondents.

Baboo Kishen Kishore Ghose for Appellant.

Baboos Kalee Mohun Doss, Nuleet Chunder Sein, and Sreenath Banerjee for Respondents.

Suit laid at Rupees 13,550.

Suit for damages sustained on a re-sale of a Government estate. The original sale was made under certain conditions laid down by the Board of Revenue which merely provided for the payment of the purchase-money, and (on failure thereof) for re-sale at the risk of the defaulting purchaser; but not for the rejection of a bid if a deposit of earnest-money were not made, and for the continuance of the sale irrespective of it. **Held** that the non-deposit of the earnest-money did not affect the validity of the sale.

A power of attorney authorizing an agent to bid for a particular estate on a particular date does not limit him as to time of purchase. The power not being limited to a particular date is good whether the sale be held on one date or another.

The Collector of Dacca sues the defendant for damages sustained on a re-sale of a

talook which defendant had purchased, but failed to pay for.

The plaintiff alleges that a notification was issued for the sale of the zemindary rights of Government in an 8-annas share of Jowl Batwal Tarakandee, which was a khas mehal, bearing a sudder jumma of rupees 708.08; that the notification contained a condition to the effect that, in the event of default in the deposit of the purchase-money, a re-sale would be made at the risk of the auction-purchaser; that on the 8th September 1863, the four first defendants purchased the property in question through their mooktear, the defendant Shib Narain Ghose, for a consideration of 20,100 rupees; that as they failed to pay in the purchase-money agreeably to the conditions of sale, a re-sale was made on the 23rd November of the same year for 6,550 rupees; that by defendants' failure to pay for the mehal that they had purchased, the re-sale became necessary, and Government has thereby sustained a loss of 13,550 rupees, the difference between the price at the two sales, and under the condition of the sale notification, which was published in the *Gazette* of the 11th August 1863, defendants were justly liable for that amount. Hence the present action.

The defendants, Joogul Kishore Roy, Bungshee Budun Roy, and Ramanath Roy, pleaded that they neither bid for nor purchased the Government estate Jowl Batwal Tarakandee; that when the sale of the khas mehal had been fixed by the Board of Revenue for the 13th Srabun 1270, they, in conjunction with Huro Lal Roy and Than Singh, defendants, executed a power of attorney in favour of the defendant Shib Narain Ghose, empowering him to bid in that sale; that as the sale did not take place *on the day fixed*, the power of attorney became null and void; that after a second notification had been issued, fixing another date of sale, no new power was given to the agent; that by the mooktearnamah given, no general power had been given to the agent to purchase for them without reference to time; hence they cannot be liable for an unauthorized act of the defendant, Shib Narain Ghose, though he may be responsible to Government; that, moreover, the power was a joint one on the part of five persons; hence the agent could not bid for the others, omitting the name of one; and, if he did so, he is liable, and not the parties whose instructions he has disobeyed; that as no earnest-money had been paid by them, the purchas-

ers, the sale was not complete; and, having only bid at an auction-sale, they cannot be responsible for damages, which can only, in a case like the present, under the notification of sale and the general Sale Regulations, be thrown on a purchaser who has, after depositing the earnest-money, failed to fulfil his first purchase, in which case, doubtless, the property is to be sold at the risk of the first purchaser; that the sale notification, moreover, did contain no condition affecting with liability a bidder who might fail to deposit the earnest-money. Hence the present suit, which is contrary to those conditions, and in itself not warranted by law, should be dismissed.

The defendant, Huro Lal Roy, pleads pretty much to the same effect with the above defendants. He adds that the agent Shib Narain Ghose acted in opposition to his instructions in bidding such a large sum as 20,100 rupees, he having been restricted to 3 or 4,000 rupees.

The agent, Shib Narain Ghose, pleads that he was empowered by the defendants to bid for them at the sale of the mehal, and did so in good faith; that consequently the action will lie against his disclosed principal, and not against himself; that, though in the power of attorney it was recited that $7\frac{1}{2}$ annas of the talook should be purchased in the name of Huro Lal, and $7\frac{1}{2}$ annas in those of Joogul Kishore Roy, Bungshee Budun Roy, and Romanath Roy, and a one-anna share for Than Singh, still, previous to the sale, the latter expressed his inability to pay for his share, and it was arranged amongst them that Huro Lal should purchase 8 annas, and the other three grantors of the mook-tearnamah, the remaining 8 annas; that for this reason Than Singh was not entered in the sale-register; that Huro Lal Roy and Joogul Kishore Roy were present at the time of the sale, and instructed him to make the highest bid, and secure the property. Hence it is clear that they, and not he, are liable in the present action.

The Principal Sudder Ameen has decided the case on simply one ground. He is of opinion from the conditions of the sale that the payment of the earnest-money was necessary to make the contract complete; that the defendant admittedly did not deposit the earnest-money, and there being no contract, the present action for damages, founded on a breach of a contract, and on injury resulting from that breach, cannot be maintained. Moreover, the defendants, for their failure

to deposit the earnest-money, might have been sued for damages, but Government, by re-selling the property, has waived any right which it may have had to bring such an action. He consequenly dismissed the plaintiff's claim without enquiry into any other point and with costs.

From this judgment an appeal has now been preferred to this Court. It is contended on the part of Government that the contract of the purchase and sale is complete when the bid having been made has been accepted by the seller; that the payment of earnest-money is only demanded for the security of Government; that Government may, under the condition subject to which this sale was made, forego its claim to the deposit of earnest-money, allowing to the purchaser a period of 15 days for the payment of the entire sum bid, as it has done in the present case; and that the failure at the end of the period to pay up the purchase-money renders the purchaser liable under those conditions to an action for damages like the present; that consequently the decision of the lower Court should be reversed.

The sale of the property of Government, out of which the present suit has arisen, was made under certain conditions laid down by the Board of Revenue, and not under the conditions of any public Sale Law. In determining, therefore, the validity of the sale, we must have recourse in the first instance to those conditions. The fourth condition upon which the question before us turns is to the following effect: "If the amount of purchase-money exceeds Rupees 100, one-fourth of the amount bid is to be immediately deposited. If the balance be not paid by noon of the fifteenth day after the sale, reckoning the day of sale as one, or if the day be a close holiday, then by noon of the first succeeding office day the sale is to be cancelled, the sum deposited being forfeited to Government, and the mehal to be again put up for sale at the risk of the defaulting purchaser."

Now, there can be no question that irrespective of particular Statutes when the terms of sale have been agreed on, and the bargain struck, and everything the seller has to do with the property is complete, the contract of sale is absolute, as between the parties without actual payment or delivery, and, in the case of land, the property then vests in the buyer, who, though he acquired the right of ownership, is not entitled to enter on possession until the price be paid. It

is true that in certain public Sale Laws* a bid is never finally accepted until the deposit of a portion of the purchase-money has been paid; and in case the deposit is not made, the bid is rejected, the sale proceeds, and the bid next in amount to the one rejected is considered the highest, and if no one bids beyond that, the property is knocked down to that person who becomes the purchaser. But these conditions are prescribed by laws, and affect none but sales made under those laws, which the present is not. The question, then, for us to determine is simply this: has the fourth condition above cited imported into this sale the condition of the public Sale Law, which is the essence of defendant's case, and made the tender of earnest-money a condition precedent to the final acceptance of the bid? Looking to the wording of the condition, we think there is no ground for the contention raised by the defendant, respondent; but it simply requires that one-fourth of the purchase-money shall, if the price exceed 100 rupees, be immediately deposited, and the remainder by noon of the fifteenth day after the sale, failing which the estate shall be again put up for sale at the risk of the defaulting purchaser. Here there is no provision regarding the rejection of the bid should the deposit not be made, and the continuance of the sale irrespective of it; it is merely a condition for the payment of the purchase-money. One-fourth is to be paid immediately, and the balance fifteen days after; and the mehal is to be re-sold at the risk of the purchaser, if it be not paid within that time. The terms are merely, in short, made for the security of Government, who can act with them either with greater or less strictness, who may forego the payment of the one-fourth, if it pleases, and accept the payment of the whole purchase-money on the fifteenth day from the sale.

Looking at the transaction in this light, we are clearly of opinion that the purchase by the defendant was complete; that he failed to act up to the conditions of the sale, and has justly rendered himself liable to the difference between his bid and that sum which was eventually realized.

Here the appellant's case ends. But the defendants, taking advantage of section 348 of Act VIII. of 1859, have urged that, admitting their liability under the condition of the sale, the agent, who bid in their names, was not empowered by them to act; that they simply empowered him to bid at a sale of the pro-

perty which was fixed to take place on the 13th Srabun 1270; that this sale took place on another date; and that consequently being beyond the authority of the agent, his purchase must be considered to have been made on his own account, and not on theirs, and he alone must be made liable.

We have perused the power of attorney granted by the defendant to the agent Shib Narain Ghose, and see not the slightest ground for the present contention. It empowers him to bid for the particular estate to be put up on a particular day, but limits him in no way as to time of purchase; and it may fairly be inferred from it that the intention of the parties executing the deed, in mentioning the date, was only to designate the day on which the sale was fixed to take place by authority, and not to limit him to the time or date on which the purchase was to be made. The postponement of the sale was accidental, and the power to purchase not being limited to a particular date was good whether the sale were held on one date or on another. We consider, therefore, that the agent had sufficient authority from the defendant to bid, and that the Collector, in accepting that authority, construed it correctly.

As to the plea raised by the different defendants as to the conduct of the agent, to the effect that he had purchased the property in the names only of three and not of four persons, and has bid beyond what he was empowered verbally to do, these are points arising out of his conduct which may be raised in suits between the principals and their agents; but as we have found the agent legally empowered to purchase the property for the defendants, even if they were well founded, they could in no way affect the validity of the purchase from Government by the agent. We will only remark that, as far as the defendant Shib Narain's conduct has been before us in this case, it seems to us to be marked by the strictest good faith.

Under this view of the whole case, we reverse the judgment of the Court below as against all the defendants, except Shib Narain Ghose, and decree to the plaintiff the sum of 13,550 rupees with interest at 12 per cent. from the date of suit to the date of realization, with costs of all Courts payable by defendants, respondents. The defendant Shib Narain is released from the suit, and will obtain his costs from the defendants.