

APPELLATE CIVIL.

Before Hon'ble Mr. R. F. Rampini, Acting Chief Justice, and
Mr. Justice Ryves.

SATISH CHANDRA MUKHERJEE *

v.

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June 30.

Setting aside sale, application for—Agreement with a co-lessee of judgment-debtor and the decree-holder—Dissuading purchaser from bidding—Civil Procedure Code (Act XIV of 1882), ss. 244, 311.

An agreement with the co-lessee of the judgment-debtor and the decree-holder that he would purchase the property and then sell it to the co-lessee for the amount of his decree, in consequence of which the co-lessee refrained from bidding at the sale, is not by itself sufficient to vitiate a sale.

Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar (1) explained and followed. *Woopendro Nath Sircar v. Brojendro Nath Mundul* (2) distinguished.

APPEAL by the decree-holder, auction-purchaser.

The appellant in this case obtained a decree for over Rs. 5,700 against Colonel A. R. Porter, the petitioner in this case. In execution of the said decree, the decree-holder attached and brought to sale the house of the Home Farm at Ballygunge belonging to Colonel Porter and himself purchased the property for Rs. 5,685. Colonel Porter applied to the Additional District Judge of Alipore to have the sale set aside on various grounds, amongst which may be mentioned non-publication of the writ of attachment and sale proclamation, inadequacy of price as the direct result of fraud. The allegation of fraud, which Colonel Porter contended vitiated the sale, was that Mrs. Evennett, the partner in the business of the Home Farm, was dissuaded from bidding at the sale by the decree-holder.

* Appeal from Original Order, No. 222 of 1906, against the order passed by C. T. Beachcroft, District Judge of 24-Parganas, dated 4th April 1906.

(1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.

(2) (1881) I. L. R. 7 Calc. 346.

The learned District Judge held on the evidence that there was ample proof of the publication of the writ of attachment and the sale proclamation and the price fetched at the sale was adequate. He, however, held on the authority of *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1) that the agreement between Mrs. Evennett and the decree-holder amounted to a conflict between the duty and the interest of the decree-holder and the judgment-debtor and was sufficient to vitiate the sale.

Babu Hara Prasad Chatterji (Babu Shoshee Shikhar Basu with him) for the appellant. The District Judge has misunderstood the case of *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1). The Calcutta case referred to in that case, *Woopendro Nath Sircar v. Brojendro Nath Mundul* (2), is inapplicable. Mrs. Evennett is not the purchaser.

No one appeared for the respondent.

Cur. adv. vult.

RAMPINI A.C.J. AND RYVES J. This appeal arises out of an order of the Additional District Judge of Alipore setting aside a sale in execution of a decree under the provisions of sections 244 and 311 of the Civil Procedure Code. The judgment-debtor in his application stated that there had been no attachment of the property sold, that the decree-holder fraudulently and dishonestly caused the suppression of the service of the sale-proclamation on the property sold and that no sale-proclamation was ever served on the property and that the decree-holder, who was the auction-purchaser, with fraudulent intention, under-estimated the value of the property and purposely abstained, with a view to cause wrongful loss to the petitioner and wrongful gain to himself, from mentioning the share of the petitioner in the property sold. These are the only allegations of fraud. The petitioner, however, went

1) (1899) I. L. R. 23 Mad. 227; L. R. 27 I. A. 17.

(2) (1881) I. L. R. 7 Calc. 346.

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on to say that "On account of non-publication of the sale, there were no *bona fide* bidders at all and although your petitioner's co-sharer Mrs. Evennett was present on the first day of the sale, and she and the decree-holder bid against each other on the second day she desisted from bidding any further, and the petitioner believes that she was dissuaded by the decree holder from bidding any further." In consequence of all these circumstances it was alleged that the property had been sold at a grossly inadequate price.

The lower Court has found on the evidence and we agree with that finding that there is no reason to suppose that the attachment of the property and service of the sale proclamation were not duly made. The property in question is a leasehold of some 17 bighas situated at some distance from Pallygunge in a lonely and jungly locality and belonged to the judgment-debtor and Mrs. Evennett, who carried on a farming business upon it. The judgment-debtor had erected buildings upon the property and had expended a considerable amount of money in so doing. The decree-holder's decree at the time of the application for sale amounted to Rs. 5,697-7-9 pies. The money was due for materials supplied to the judgment-debtor for the erection of some of these farm buildings. There were other decrees also outstanding on similar accounts. The lease had two years to run at a monthly rental of Rs. 50 with the stipulation that, if the rent was not paid for two months, the lease should terminate; and there was a clause in it under which the lessees had the option to buy the property for Rs. 15,000, and if they failed to exercise this option, the buildings that had been erected would become the property of the lessor. It appears that Rs. 15,000 was not a cheap price for this piece of land, which, from its locality and nature, is unsuitable for anything but farming purposes, which had not in the past proved very successful. It is not easy therefore to estimate the market value of the judgment-debtor's share in the lease. On the first day of the sale it appears that Mrs. Evennett made a bid of Rs. 5,630. This was the highest bid on that occasion. It was, however, not accepted

and the property was put up again the next day, when it was knocked down to the decree-holder for Rs. 5,685.

Mrs. Evennett, in her evidence, stated that she came intending to bid on the second day and was ready to bid up to Rs. 6,000, that she did not do so because the decree-holder's pleader asked her not to bid, and an agreement was come to between them that the decree-holder should sell her the property for the amount of his decree, and that, relying on this assurance of the decree-holder's pleader, she did not bid. She admitted in her cross-examination that she thought that the decree-holder wanted to bid up to his claim. He told her that he would settle it for less with her; he said he would be reasonable and so she asked him to let her pleader know the lowest amount he would take and to write to her on the subject. That was before the sale on the second day. She thought the decree was for Rs. 5,830; it was not over Rs. 6,000. She further stated that she offered the decree-holder Rs. 3,000 after the sale. The decree-holder himself also gave evidence. He denies that he had any talk with Mrs. Evennett before the sale. He says "After the sale was over, Mrs. Evennett asked me whether I could return to her the property sold. I said I could return it, if the decretal amount was paid to me. I said I could return it, if I got Rs. 5,700 decreed by this Court and nearly Rs. 140—the costs of the High Court." This is all the material evidence as to what happened.

On these materials, the lower Court has found that Mrs. Evennett was willing to bid up to Rs. 6,000. It says:—
"Taking her evidence with that of the decree-holder I think there must have been some understanding between them that they would not bid against each other, but that she would get the property back for the amount of the decree." Accepting this finding which is the most favourable to the judgment-debtor that can be arrived at, in our opinion it would not be sufficient to justify, as the lower Court rightly held, the setting aside of the sale. The lower Court, however, has gone on to hold that Mrs. Evennett was in a fiduciary relation to the judgment-debtor and was taking advantage of her.

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partner's absence to buy his share as cheaply as she could and to effect this, came to an understanding with the decree-holder. Then quoting a passage from the judgment of the Privy Council in *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1), he held that this arrangement was in itself sufficient to vitiate the sale and consequently he ordered it to be set aside.

It appears to us that the learned Additional Judge has misapplied the ruling of the Privy Council. The ruling on which he relies is *Mahomed Mira Ravuthar v. Savvasi Vijaya Raghunadha Gopalar* (1). The facts of that case are set out in *Jayinilabdin Ravuttan v. Vija Ragnadha Ayyarappa Maiken Gopaliar* (2) and are very similar to the facts found in this case. In that case, the judgment-debtor was a minor under the Court of Wards. His property worth Rs. 1,50,000 was put up for sale under two mortgage decrees. The principal judgment-debtor obtained leave to bid at the sale and had previously entered into a written agreement with one Papanad Zemindar to purchase the property himself and sell it to Papanad Zemindar for Rs. 85,000, and it was agreed between them that the Zemindar should dissuade other persons from bidding at the auction. It was found that the Zemindar had dissuaded persons from bidding and the decree-holder himself bought the property for Rs. 78,000. The application to set aside that sale further alleged that the sale took place before the expiration of 30 days from the date on which the sale-notice had been published, that as a matter of fact the proclamation of sale had not been published in the villages and that the petitioner's interest in the villages had not been properly described.

The Court of first instance held that this contract vitiated the sale. On appeal, the High Court of Madras held that this in itself was not enough to set aside the sale. It, however, set aside the sale on another ground, namely, that the decree-

(1) (1899) I. L. R. 23 Mad. 227 ; L. R. 27 I. A. 17.

(2) (1896) I. L. R. 19 Mad. 315.

holder, when he applied for leave to bid, had suppressed from the knowledge of the Court the fact that he had entered into such an agreement with Papanad Zemindar, and that this suppression of fact amounted to fraud upon the Court, entitling the judgment-debtor to say that, in point of law, no leave to bid was granted. Their Lordships said that "the case was one in which there was a duty incumbent upon 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."

On appeal to the Privy Council, this judgment was set aside and the sale was affirmed.

The learned Additional Judge relies on a passage in the Privy Council judgment to be found on pages 232 and 233, namely, "the decree-holder was acting in concert with, and partially for the benefit of, one who stood in a fiduciary relation to the infant-debtor; and there was clearly a conflict between their duty and their interest." Those remarks refer to a dictum of the Judges of the High Court of Calcutta in *Woopendra Nath Sircar v. Brojendro Nath Mundul* (1). The facts of that case are very different. There the decree-holder sought to sell the property belonging to a minor, who was under the guardianship under the Court of Wards of one Radha Mohan, who was the uncle of the decree-holder and lived jointly with him. In that case it was proved that the agent of Radha Mohan, the manager of the infant judgment-debtor, dissuaded persons from bidding at the sale with the result that the decree-holder himself bought the property at a cheap price to the benefit of both Radha Mohan and himself. In setting aside that sale, the learned Judges of the High Court said—"We think that when liberty is given to a decree-holder to bid at the sale of the judgment-debtor's property, he is bound to exercise the most scrupulous fairness in purchasing that property; and, if he or his agent dissuades others from purchasing

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at the sale, that of itself is a sufficient ground why the purchase should be set aside." With reference to these remarks, their Lordships of the Privy Council said that the dictum was too sweeping in its terms. At the same time they pointed out that the decision of the Calcutta High Court in itself was correct, because the decree-holder there was acting in concert with and partially for the benefit of one, who stood in a fiduciary relation to the infant debtor, and there was clearly a conflict between their duty and their interest.

Now, in this case, Mrs. Evennett obtained no benefit whatever from the sale. At the utmost, she refrained from making a bid because probably she hoped that she would obtain the property more cheaply from the decree-holder, but there was no duty on her to bid at all and, on her own showing, the agreement was that she could get the property on payment of the amount of the decree-holder's decree, which she herself stated was between Rs. 5,830 and Rs. 6,000.

We, therefore, think that there was no fraud on the part of the decree-holder, which would justify us in setting aside the sale. There are no other grounds for setting aside the sale. We, therefore, set aside the order of the Court below and decree the appeal with costs.

Appeal decreed.

S. M.