

1870.
 VITHU
 MA'NKU
 v.
 AMRIT JOTIA'

PER CURIAM :—There is a difference between this case and that alluded to by the District Judge, and reported in the second volume of the Bombay High Court Reports at p. 342 (2nd ed.) In the latter case both parties were admittedly sharers, and the original plaintiff wished to be declared “*vadil*,” and the High Court refused so to declare.

In the present case the original plaintiff alleges that the original defendant has never shared in the management of the *watan* at all, and that he (the plaintiff) is sole owner. This is a different matter, as, under Act XI. of 1843, the Collector must choose between the sharers. If, therefore, the original defendant be not a sharer, his appointment would not be legal. We consider, therefore, that the District Judge was in error in not trying the present appeal on its merits; and we reverse his decree, and return the case to the District Court for this purpose: costs to follow.

Decree reversed and suit remanded.

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June 29.

Miscellaneous Appeal No. 6 of 1869.

VIRsingA'PPA' bin BASLINGA'PPA' *Appellant.*
 SADA'SHIVA'PPA' A'PPA' GOLKHANDI and
 ANANTACHA'RYA bin HARI ACHA'RYA ... *Respondents.*

Court's Sale—Setting aside Sale—Fraud in conducting Sale—Irregularity—Civ. Proc. Code, Secs. 256 and 257.

The provision contained in Sec. 256 of the Code of Civil Procedure, that applications to set aside a Court's sale of immoveable property must be made within thirty days from the date of the sale, relates only to applications to set aside the sale for irregularity, and not to cases in which there has been a fraud committed by the officer of the Court who conducts the sale.

THIS was a miscellaneous appeal from an order passed by J. R. Naylor, Acting Senior Assistant Judge of Kaládgi, refusing to set aside a sale alleged to have been made by auction in execution of a decree, on the ground that the sale had already been confirmed by his predecessor.

The facts of the case were as follow :—Sadáshiváppá, one of the respondents, obtained a decree against the appellant upon a money claim, and, in execution of that decree, attached certain lands and villages belonging to the latter. The proclamations of sale were issued on or about the 28th of March 1867. The sale was commenced before the 28th of April, and was then postponed to the 29th and 30th, when the Názár informed the people assembled that fresh advertisements would be necessary, and that the sale would take place again. On the 5th of May the Názár reported that the property had been sold, and represented the two respondents as the purchasers, one of whom, Sadáshiváppá, was also the execution-creditor, at whose instance the property was sold. He further requested an immediate confirmation of the sale, on the ground that sowing-time had arrived. Before this, namely, on the 30th of April, Sadáshiváppá had applied to have the sale set aside, on the grounds that it had taken place within a month of the notification, and that in consequence very few people attended, and that the price obtained was very low. On the 14th of June the appellant forwarded by post a petition asking that the sale should be cancelled, and alleging several illegalities in the conduct of it. But the sale was confirmed by the Judge, Mr. Sandwith, on the 19th of June. On the 25th of June the same Judge suspended this confirmatory order without recording any reasons. On the 27th Sadáshiváppá applied to withdraw his petition of the 30th of April, on the ground that he had found that he had incurred no loss by the lowness of the price; and on the 29th the sale was reaffirmed. In the month of October following the Názár disappeared.

Upon the evidence in the case, Mr. Naylor found that there had been no *bonâ fide* sale by auction, and that the Názár, in league with the two respondents, had been guilty of gross fraud. But he declined to interfere with the sales, on the ground that they had already been confirmed by Mr. Sandwith.

Against this order Virsingáppá appealed, and the appeal was argued before WESTROFF, C.J., LLOYD and KEMBALL, JJ.

1870.
 VIRSINGA'PPA
 BASLINGA'PPA
 v.
 SA'DASHIV-
 A'PPA' A.
 GOLKHANDI
et al.

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 VIRSINGA'PPA
 BASLINGA'PPA
 v.
 SADA'SHIV.
 A'PPA' A.
 GOLKHANDI
et al.

Nánábhái Haridás, for the appellant:—As the Judge has found that there was collusion between the Názár and the judgment-creditor, and that the price obtained was absurdly below the real value, there was in fact no actual sale—no sale that could be confirmed; and, therefore, Secs. 256 and 257 of the Code of Civil Procedure have no application, and the clause that limits the application to set aside the sale to thirty days does not apply.

Anstey (with him *Shántáram Náráyán* and *Vishnu Moreshwar*), for the respondents:—This court has no jurisdiction. There was an appeal open to the other side, and the order appealable was that in confirmation of the sale. But the thirty days allowed by law for the appeal have now passed. The words of Section 256, “namely, no sale shall be set aside on the ground of such irregularity, unless the applicant shall prove to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity,” imply that after confirmation the sale becomes absolute. [WESTROPP, C.J.:—But this section is conversant with cases of irregularity only, not of fraud.] Then the fraud of the Názár should not prejudice the execution-creditor, who was no party to it, and who even petitioned against the sale on the 30th of April. A contract by a purchaser at an auction not to bid against another is not illegal; *Heffer v. Martyn* (a); *Galton v. Emuss* (b); *Re Carew's Estate* (c); Sugden on Vendors and Purchasers, 117 (14th ed.). In *Heffer v. Martyn* Lord Romilly said, speaking of such a contract, “I had to consider this in the matter of *Re Carew's Estate*; and I came to the conclusion that it is not illegal.” Also, with regard to alternative advertisements see *Govind Hari Válekar v. Bank of India* (d).

Nánábhái, in reply:—The Judge has found that there was no auction-sale, and also that the confirmation by Mr. Sandwith was the result of the Názár's fraudulent representations.

(a) 36 L. J. Ch. 372. (b) I. Col. 243; S. C. 13 L. J. Ch. 388.
 (c) 26 Beav. 187. (d) 4 Bom. H. C. Rep., A.C.J. 164.

WESTROPP, C.J.:—We do not think that Secs. 256 and 257 of the Code of Civil Procedure are of any application in the present case, as they do not relate to cases in which fraud is shown. Mr. Anstey says, and says correctly, that in the first petition of the appellant there was a clause which alleged what is tantamount to fraud; and if that had been inquired into by Mr. Sandwith, and if he had made his order on it, there would have been some difficulty in interfering with it. But Mr. Sandwith did not at all inquire into the fraud. His attention may have been diverted from the charge of fraud by its long sequel in the petition, and there has been no investigation of that charge. Mr. Sandwith took no evidence on the collusion between the Názar and the execution-creditor. The charge of fraud is, therefore, not *res judicata*. We think, accordingly, that, as a case of fraud has been clearly made out, the order confirming the sale, as well as the order of Mr. Naylor refusing to set aside the confirming order, should be reversed. We order the property to be put up again to auction, a proper time for which will be fixed on by Mr. Naylor. The respondents must pay the costs of these proceedings. The purchase-money, if lodged in court by the purchasers (the respondents), should be refunded after deducting those costs, and any other expenses relative to the sale or otherwise which may be just.

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Order reversed.

Referred Case.

July 12.

BA'BA'JI bin LAKSHMAN *Plaintiff*.
MA'RUTI bin RA'GHOJI *Defendant*.

Promissory Note bearing English and Native Dates—Computation of Time—Payment.

The period of payment stipulated in a promissory note bearing both English and Native dates should, when the parties are Hindús, be reckoned according to the Native calendar.

CASE stated by Ráv Bahádur Janárdhan Vásudevji, Judge of the Court of Small Causes at Puná, for the orders of the High Court:—