

Present : Fisher C.J. and Driberg J.

ARUMUGAM PULLE v. DURAYA.

136—D. C. (Inty.) Kurunegala, 12,480.

Sale under mortgage decree—Bids subject to acceptance by Court—Condition not incorporated in contract with purchaser—Power of Court to refuse confirmation.

Where, at a sale held under a mortgage decree, there was a condition that the bids were subject to the acceptance of Court, but this condition was not incorporated in the contract entered into between the auctioneer and the purchaser,—

Held, that the Court had no power to refuse confirmation of the sale where the purchaser had complied with the conditions embodied in the contract.

A PPEAL from an order of the District Judge of Kurunegala setting aside a sale of property held under a mortgage decree. Among the conditions read out at the sale was one to the effect that "all bids are subject to acceptance of Court." But this condition was not incorporated in the contract entered into between the auctioneer and the highest bidder. The learned District Judge refused to confirm the sale.

H. V. Perera, for purchaser, appellant.

Hayley, K.C. (with *Ferdinands*), for defendant, respondent.

October 4, 1928. FISHER C.J.—

This is an appeal from a judgment refusing to accept a bid, admittedly the highest bid, at a sale of mortgaged property held under a decree for sale. The learned Judge from very excellent motives has decided to treat the sale held under the decree as a nullity, for the present at all events, with the result that the appellant who has acted in strict accordance with all the obligations imposed on him by the conditions of sale finds himself debarred from getting a transfer of the property which he has purchased. The learned Judge justifies his action on the fact that at the top of the printed conditions of sale the words "All bids subject to acceptance of Court," which were read out at the sale with the other conditions are inserted in manuscript. In my opinion, those circumstances cannot interfere with or affect the right of the appellant to have the property duly transferred to him in view of the fact that in addition to having complied with all the conditions himself, he holds

1928.
 FISHER C.J.
 Arumugam
 Pulla v.
 Duraya

a contract duly executed by the auctioneer to convey the property to him. That contract, which is governed by and was executed in accordance with section 2 of Ordinance No. 7 of 1840, does not contain the condition alluded to and in an action upon that contract it would not be open to the vendor to give oral evidence of a condition which is not embodied in the contract. It is clear law that terms offered and representations made during the negotiations of a contract which are not contained in the final agreement are excluded from the contract. An additional stipulation cannot be introduced. This is not like the ordinary case of confirming or refusing to confirm a sale. In such a case the question of confirmation turns on conditions anterior to the sale, and the question is whether all conditions under which it is laid down that the sale should be held had been performed at the time the sale was held. In the result, therefore, the appellant who has been required to perform his part of the contract and has performed it, has a binding contract with a person legally authorised to sell the property and is entitled to have effect given to the legal consequences of such a situation. As regards the so-called condition of sale, the present case shows the difficulties to which it may give rise, and though it is not necessary to definitely pronounce on its legality or illegality in this case, I think it may safely be said that it is a condition to which the plaintiff in such an action as the present action could successfully object.

In my opinion the order refusing to accept the appellant's bid must be set aside and a transfer of the property to the appellant should be carried out in the ordinary way. The respondent must pay the appellant's costs of this appeal.

DRIEBERG J.—I agree.

Appeal allowed.