

Gustavo Romeo Vincenti - - - - - *Appellant*

v.

Stephen J. Borg - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF MALTA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH OCTOBER, 1955**

Present at the Hearing:

LORD MORTON OF HENRYTON
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW
MR. L. M. D. DE SILVA

[*Delivered by MR. DE SILVA*]

This appeal is from a judgment of the Court of Appeal of Malta of the 15th June, 1953, which affirmed a judgment of the Civil Court of Malta of the 28th May, 1951, granting to the respondent a declaration that he had on the 3rd September, 1948, validly exercised a right of pre-emption in respect of certain immovable property situated in Malta. The appellant contended on a number of grounds that the respondent was not entitled to exercise the said right, but of these only one was urged on this appeal, namely that subsection 2 of section 1520 of the Civil Code of Malta barred the respondent from exercising the right.

The facts which are relevant to the point argued before their Lordships, and to the decision they have arrived at, can be shortly stated. On the 24th July, 1946, the Civil Court made an Order that the property which is the subject matter of this case be sold by auction. On the 20th June, 1947, a sale notice appeared in the Government Gazette that an auction would take place on the 18th July, 1947. On the 17th July the sale was adjourned. On the 30th December, 1947, a second sale notice appeared in the Government Gazette announcing that the sale would take place on the 22nd January, 1948. On that date and also on the 29th January, 1948, and the 19th and 26th of February, 1948, the sale was further adjourned. Finally on the 28th February, 1948, as the result of an auction held on that date the property was "adjudicated" under the relevant sections of the Code of Organisation and Civil Procedure of Malta to one Theuma for £21,300.

It was permissible under the law of Malta for higher bids to be made after the auction. Such bids were made and the property was finally adjudicated to the appellant on the 1st April, 1948, for the price of £32,200.

The respondent on the 3rd September, 1948, acting as attorney for and on behalf of two nieces, exercised a right of pre-emption and it is the validity of the exercise of this right that is being challenged. The

advertisements of the two sales though published in the Government Gazette were not served (as was permissible under certain provisions of law which appear later) on the respondent or on the parties on whose behalf he acted. The latter were at all times material to the advertisements and the sale absent from Malta.

It is convenient at this stage to refer to the relevant law of Malta relating to sales by auction. It is to be found in the Code already mentioned.

Section 313 provides that after the lapse of a stated period "the Court shall, upon the demand of the creditor or of the debtor to be made by an application, appoint one or more days for the sale by auction, and order the issue of advertisements."

Section 314 (1) provides:—

"The advertisement shall be signed by the Registrar and shall state the date of the judgment or decree ordering the sale by auction, the nature of the thing to be sold, the place of the sale and the day and hour in which the auction is to begin and to end."

Section 315 (1) requires the advertisement to be served on certain persons and to be posted up at certain places.

Section 315 (2) provides:

"It shall be lawful for the Court to order such advertisement to be published in one or more periodical newspapers."

Section 315 (3) provides that with regard to immovable property:

"the posting up and publication of the advertisement shall, unless the Court otherwise directs, take place, . . . at least fifteen days before the day appointed for the sale by auction."

Section 356 provides:—

"The right of pre-emption or re-purchase in respect of immovable property sold by auction, whether in favour of the debtor or of any other person, ceases after four months from the date of the registration of the act of adjudication in the Public Registry:

Provided that such right shall not be exercisable by any person, except the debtor, on whom, upon the demand, even verbal, of the debtor or of the execution creditor, the advertisement of the auction shall have been served."

It will be seen that the only limitations upon the exercise of a right of pre-emption in respect of immovable property sold by auction under an Order of Court were that:—

"(i) no person other than the debtor could exercise a right of pre-emption if the advertisement of the auction had been served on him as prescribed by the section:

(ii) the right to exercise it by persons entitled to do so ceased after four months from the date of the registration of the act of adjudication in the Public Registry."

A later enactment, the Civil Code, in dealing with rights of pre-emption provided by section 1520 in respect of sales by judicial auction that:

"1520. (1) Where the sale was made by judicial auction, the right of pre-emption shall not be competent to the persons to whom notice of the proposed sale was given by service of a copy of the advertisement mentioned in section 314 of the Code of Organization and Civil Procedure (Chapter 15).

(2) The provisions of this section shall also apply to absent persons if the said advertisement shall have been published in the Government Gazette at least one month before the day fixed for the sale."

It will be seen that the limitations on rights of pre-emption imposed by section 356 of the Code of Organisation and Civil Procedure were extended by section 1520 of the Civil Code.

The only point argued on this appeal is that the provision in subsection 2 of section 1520 barred the respondent from exercising a right of pre-emption.

The appellant contends that the publication of the advertisement in the Gazette of the 30th December, 1947 complied with the terms of section 1520 (2) and therefore that it is not competent for the respondent who was an "absent person" to exercise a right of pre-emption. The respondent denies that the terms of section 1520 (2) have been satisfied.

Reference has already been made to two sale notices in the Government Gazette. A sale notice appeared in The Gazette of the 20th June, 1947 to the effect that a sale would take place on the 18th July, 1947. Another sale notice appeared in the Gazette of the 30th December, 1947 that a sale would take place on the 22nd January, 1948. It will be seen that in each of these notices the interval of time between the date of publication and the date fixed for the sale in the notice was less than a month. Under subsection 2 of section 1520 in order to preclude "absent persons" from exercising their right of pre-emption there must be an interval of "at least one month" between the date of publication and "the day fixed for the sale". If the words "the day fixed for the sale" mean the day fixed in the notice for the sale it is clear that neither notice satisfied the requirements of the subsection. The appellant contends that the words "day fixed for the sale" in the subsection do not mean the day fixed in the notice but the day on which the sale was actually held, namely, the 28th February, 1948. If that interpretation were correct more than a month would have elapsed between the date of publication of each of the notices and the "day fixed for the sale" and the terms of the subsection would have been complied with.

The interpretation sought to be put upon the words "day fixed for the sale" by the appellant is contrary to the natural meaning of the words in the context in which they appear, namely, the day fixed in the notice for the sale and, if a departure from that meaning is permissible, it would be for some strong reason.

It was argued for the appellant that the "day fixed for the sale" in subsection 2 of section 1520 should not be confused with the day "appointed" for the sale in subsection 1 of section 313. The words used in the two subsections are no doubt different but their Lordships do not think any significance should be attached to the difference. They are appropriate in the context of each subsection to indicate the day on which the sale is to be held.

Reliance was placed upon sections 1396 and 1397 of the Civil Code which are:—

"1396. A sale is a contract whereby one of the contracting parties binds himself to transfer to the other a thing for a price which the latter binds himself to pay to the former.

"1397. A sale is complete between the parties, and, as regards the seller, the property of the thing is transferred to the buyer, as soon as the thing and the price have been agreed upon, although the thing has not yet been delivered nor the price paid; and from that moment the thing itself remains at the risk and for the benefit of the buyer."

It was said that a sale did not take place until there had been a concluded contract and that the "day fixed for the sale" could not be ascertained until there had been a concluded contract. The words "day fixed for the sale", on the meaning of the word "sale" contended for by the appellant, would mean the day fixed for the conclusion of the contract and could be determined whether or not a contract is concluded

on that day. What the appellant is striving to contend is that "the day fixed for the sale" means "the day of the sale" ignoring the words "fixed for."

It was argued for the appellant that the legislature has enacted s. 1520 (2) for the protection of a purchaser, and that no interpretation of it should be adopted which would make it possible by fixing the date of sale at less than one month from the date of publication of the advertisement in the Government Gazette to take away the protection afforded. Their Lordships are unable to accept this contention. The right of pre-emption is recognised and preserved in the statute law of Malta. In order to mitigate the uncertainty consequent on a possible exercise of rights of pre-emption after a judicial auction, the legislature in the case of immovable property by section 356 of the Code of Organisation and Civil Procedure placed a time limit for the exercise of those rights and took away altogether the rights from persons other than the debtor upon whom the advertisement of the auction had been served. By section 1520 (2) of the Civil Code an alternative to service of the advertisement was provided for the special case of "absent persons". It was provided that publication of the advertisement in "the Government Gazette at least one month before the day fixed for sale" would deprive "absent persons" of their rights of pre-emption. Under section 315 an interval of only 15 days was necessary between the publication of the advertisement and the day appointed for the sale, and an advertisement in the Gazette was not compulsory. The necessity for publication in the Gazette, and the necessity for that publication to be at least one month before the sale, appear to have been imposed by the legislature for the benefit and protection of persons who were entitled to rights of pre-emption. But even if it were otherwise the consequence suggested by the appellant, referred to earlier, does not justify a departure from the natural meaning of the words "fixed for the sale."

For these reasons their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondent the costs of this appeal.



In the Privy Council

GUSTAVO ROMEO VINCENTI

v.

STEPHEN J. BORG

[DELIVERED BY MR. DE SILVA]

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