enquiries under section 202 or any other preliminary investigation.

The Rule is made absolute in these terms, and there will be further enquiry in the manner we have indicated.

S. K. B. *Rule absolute.*

APPELLATE CIVIL.

Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjea.

KUMED BEWA

v.

PRASANNA KUMAR ROY.*

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May 6.

Execution of decree—Notice of execution—Sale—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22 and 90—Omission to serve notice, effect of—Whether subsequent sale void—Question relating to execution of decree—Second appeal.

Omission to serve a notice under the provisions of O. XXI, r. 22 of the Civil Procedure Code is not by itself sufficient to render a sale, which has been subsequently held, void.

Sahdeo Pandey v. *Ghasiram Gyawal* (1) not followed.

Though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22 of the Civil Procedure Code is one which cannot be made under the provisions of O. XXI, r. 90 of the Code, but must be one made under the provisions of s. 47 of the Code, still in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold.

Lakshmi Charan Sen v. *Sris Chandra Roy* (2) referred to.

* Appeal from order, No. 223 of 1911, against the order of B. C. Mitter, District Judge of Murshidabad, dated Feb. 3, 1911, confirming the order of Gajanan Banerjee, 2nd Munsif of Jangipore, dated Sept. 26, 1910.

(1) (1893) I. L. R. 21 Calc 19. (2) (1910) 13 C. L. J. 162.

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A second appeal lies from an order passed on appeal on an application to set aside a sale on the ground, that no notice had been served as required by O. XXI, r. 22 of the Code.

SECOND appeal by the petitioners (representatives of the judgment-debtors), Kumed Bewa and others.

This appeal arose out of an application to set aside a sale held in execution of a rent decree. The petitioners, who were the representatives of the judgment-debtors, alleged, that no notice was served upon them under O. XXI, r. 22, that no sale proclamation was served and that no attachment was issued; and as such the sale was bad in law. The opposite party (the auction purchaser) denied the allegations made by the petitioners, and contended that omission to serve a notice under O. XXI, r. 22, was only an irregularity, and that the sale could not be set aside in the absence of proof of substantial injury caused to the judgment-debtor on account of such omission. The Court of first instance having held, that omission to serve a notice was only an irregularity, and that in as much as the petitioners did not suffer any substantial injury on account of such omission, refused to set aside the sale. On appeal, the learned District Judge affirmed the decision of the first Court.

Against this decision the petitioners appealed to the High Court.

Babu Chandra Shekhar Banerjee for *Babu Ram Chandra Majumdar* (with him *Babu Harish Chandra Roy*), for the respondent, took a preliminary objection that no second appeal lay. The application was under O. XXI, r. 90 of the new Code of Civil Procedure, and no second appeal lay against an order passed on appeal under this section.

Babu Biraj Mohan Majumdar, for the appellants. The application was one under s. 47 of the new Code

of Civil Procedure, and as such a second appeal lay. The sale was sought to be set aside on the ground that no notice under O. XXI, r. 22 was served, therefore the sale could not take place at all, and the question raised was one as to the execution of the decree. It was held in the case of *Ashton* v. *Madhabmani Dasi* (1) that omission to serve a notice was itself sufficient to set aside the sale. See also the case of *Sahdeo Pandey* v. *Ghasiram Gyawal* (2).

Babu Chandra Sekhur Banerjee. Omission to serve a notice was utmost an irregularity and the sale could only be set aside on showing that the petitioners suffered substantial injury on account of such omission: see *Lakshmi Charan Sen* v. *Sris Chandra Roy* (3). Upon the findings arrived at by the Courts below, the sale could not be set aside.

Babu Biraj Mohan Majumdar, in reply.

BRETT AND N. R. CHATTERJEA JJ. The only question raised in this appeal is whether the omission to serve a notice under the provisions of O. XXI, r. 22 of the new Code of Civil Procedure corresponding to section 248 of the old Code is by itself sufficient to render a sale, which has subsequently been held, void. In the present case, an application was made by the present appellants, to have a sale set aside on that ground and the Court of first instance treating the application as one under O. XXI, r. 90 of the new Code came to the conclusion that the judgment-debtors had failed to prove any irregularity which, by reason of the fact that it had caused substantial injury to them, would be a sufficient ground for setting aside the sale. On appeal before the District Judge, the main question which seems to have been contested was

(1) (1910) 14 C. W. N. 560; 11 C. L. J. 489.

(2) (1893) I. L. R. 21 Calc. 19, 23.

(3) (1910) 13 C. L. J. 162.

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whether the application was preferred under O. XXI, r. 90, corresponding to section 311 of the old Code or under section 47 of the new Code corresponding with section 244 of the old Code. The learned Judge appears to have been of opinion that the application was one under r. 90 of O. XXI of the new Code, but at the same time he held that even if it could be regarded as an application under section 47, as the judgment-debtors had failed to prove any substantial loss resulting from any irregularity, the application to set aside the sale could not succeed. The judgment-debtors have appealed to this Court and a preliminary objection is taken to the competency of the appeal on the ground that, as the application was one under O. XXI, r. 90, no second appeal would lie. The learned pleader for the appellants has, however, contended that the application could not be one falling under O. XXI, r. 90, because the service of the notice under section 248 of the old Code was not a matter arising in the execution of the decree itself, and he has further contended that the omission to serve the notice under section 248 of the old Code is itself sufficient to render the sale void. He has referred us to the decision of this Court in the case of *Ashton* v. *Madhabmoni Dasi* (1). On the other hand the learned pleader for the respondent has relied on the decision of this Court in the case of *Lakshmi Charan Sen* v. *Sris Chandra Roy* (2). We have considered these two decisions carefully and, in our opinion, they do not support the view that the omission to serve the notice required by O. XXI, r. 22, is sufficient to render a subsequent sale void. In the case of *Ashton* v. *Madhabmoni Dasi* (1), on which the appellant's vakil relies, reference is made to the decision of the Privy Council in the case of

(1) (1910) 11 C. L. J. 489 ; 14 C. W. N. 560. (2) (1910) 13 C. L. J. 162.

Malkarjun v. *Narahari* (1). Their Lordships of the Privy Council, in dealing with the question whether a sale held without the issue of a notice under section 248 of the Code is a nullity, expressed the opinion that the omission would constitute a serious irregularity entitling the judgment-debtors to vacate the sale, but at the same time they laid down that, after the sale had become complete, the sale was a reality which could be defeasible only in the way provided by law, and they seemed to favour the opinion which was afterwards expressed by this Court in the case of *Lakshmi Charan Sen* v. *Sris Chandra Roy* (2), which is relied on by the learned pleader for the respondents, that though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22, is one which cannot be made under the provisions of O. XXI, r. 90 of the new Code corresponding with section 311 of the old Code, but must be one made under the provisions of section 47 of the new Code corresponding with section 244 of the old Code still, in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold. The learned pleader for the appellants has also referred to the case of *Sahdeo Pandey* v. *Ghasiram Gyawal* (3) to support the contention that the omission to serve the notice renders the sale void. We are not, however, prepared to follow the decision in that case, and consider that we are bound by the decision of the Privy Council which has been followed in the two cases which have been already mentioned and which are reported in 11 and 13 C. L. J. In the

(1) (1900) I. L. R. 25 Bom. 337; L. R. 27 I. A. 216.

(2) (1910) 13 C. L. J. 162.

(3) (1893) I. L. R. 21 Calc. 19.

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present case both the lower Courts have found that the judgment-debtors failed to prove that they have suffered any substantial loss by the sale, and, in these circumstances, we consider that both the lower Courts were justified in the conclusion at which they arrived that the sale could not be set aside.

The result, therefore, is that the appeal is dismissed with costs.

S. C. G. *Appeal dismissed.*

APPELLATE CIVIL.

Before Justice Sir Cecil Brett and Mr. Justice N. R. Chatterjea.

1912

May. 8.

GOUR CHANDRA DAS

v.

SARAT SUNDARI DASSI.*

Letters of administration—Revocation—Probate and Administration Act (V of 1881), s. 50, Expl. (4)—"Just cause"—"Useless or inoperative," meaning of—Disagreement between administrators, whether a just cause for annulling letters of administration.

A mere disagreement between administrators is not a "just cause" for annulling the letters of administration under s. 50, expl.(4) of the Probate and Administration Act.

The words "becomes useless and inoperative" in s. 50, expl. (4) of the Probate and Administration Act, imply the discovery of something which if known at the date of the grant would have been a ground for refusing it *e.g.*, the discovery of a later will or codicil, or subsequent discovery that the will was forged, or that the alleged testator is still living.

Bal Gangadhar Tilak v. *Sakwarbai* (1) and *Annoda Prosad Chatterjee* v. *Kalikrishna Chatterjee* (2) followed.

APPEAL by the petitioner, Gour Chandra Das.

*Appeal from original Decree, No. 545 of 1909, against the decree of W. S. Coutts, District Judge of Dacca, dated Sept. 18, 1909.

(1) (1902) I. L. R. 26 Bom. 792. (2) (1896) I. L. R. 24 Calc. 95.