

PRIVY COUNCIL.

THAKUR BARMHA

v.

JIBAN RAM MARWARI.

P. C.*
1913Nov. 10,
11, 25.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Sale in execution of decree—Description of property in schedule to execution proceedings—Confirmation of sale—Order granting certificate of sale of property different from that described in schedule—Alleged mistake—Order set aside as having been made without jurisdiction.

Certain property to be sold under a decree was described in the schedule to the application for execution, and in the proclamation of sale as a six-anna share of a mahal subject to an existing mortgage; and after the sale had been confirmed the auction-purchasers applied for a certificate of sale, and, alleging that a mistake had been made in the schedule by the omission of the word "not," asked to have the purchased property declared in the certificate to be a six-anna share of the mahal *not* encumbered by the mortgage. The alleged mistake was stated to have been corrected before the sale by an advertisement in the Calcutta Gazette. The Subordinate Judge granted a certificate of sale in that form, and his order was upheld by the High Court.

Held (reversing those decisions), that what is sold at a judicial sale can be nothing but the property attached, which in this case was the property described in the schedule in the execution proceedings. It was not a case of misdescription which might have been treated as an irregularity. Identity and not description had here to be dealt with. An existing property was accurately described in the schedule and the order of the Subordinate Judge granted a sale certificate which stated that another and a different property had been purchased at the judicial sale. If by mistake the wrong property was attached and sold, the only course was for the decree-holders to commence the execution proceedings over again. The advertisement in the Gazette purporting to correct the alleged mistake could not validate a sale of property which was not that to which the attachment related. The order of the Subordinate Judge was made without jurisdiction as there was no power to sell in the

* *Present* : LORD MOULTON, SIR JOHN EDGE AND MR. AMBER ALI.

judicial proceedings the property which the certificate of sale declared had been purchased. Their Lordships set aside the order confirming the sale together with the sale certificate granted thereunder.

APPEAL from a judgment and decree (26th June 1906) of the High Court at Calcutta, which affirmed an order in execution of decree (20th December 1904) of the Court of the Subordinate Judge of Godda, in the Sonthal Parganas.

The representatives of the judgment-debtor were the appellants to His Majesty in Council.

The judgment-debtor was one Raja Thakur Barmha, Jiban Ram Marwari and Ishwar Das Marwari the first and second respondents were holders of certain decrees against him, and the other respondents were auction-purchasers of immoveable property sold in execution of those decrees.

The principal questions for determination on this appeal were (i) whether the Court had jurisdiction to make the order of 20th December 1904; and (ii) whether the property of the judgment-debtor (a six-anna share of Tappa Patsanda, one of his estates in the Sonthal Parganas) was an unencumbered share or one subject to mortgages.

Raja Thakur Barmha was heavily indebted, and he had mortgaged an 8-anna share in Tappa Patsanda to Anant Ram Marwari. On 8th September 1902, Anant Ram brought a suit in which he obtained a mortgage decree against him: and on 1st May 1903, the sale in execution of that decree was stayed on the condition that the judgment-debtor hypothecated an additional 2-anna share of the mortgaged property as an additional security. Raja Thakur Barmha had also borrowed various sums of money from one Gobardhan Das who on 24th February 1902 obtained decrees against him for two sums of Rs. 21,702 and Rs. 4,522 and in execution of those decrees he attached the 8-anna

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unencumbered share in Tappa Patsanda. In order to stay the sale Raja Thakur Barmha mortgaged a 3-anna share of that property to him on 13th November 1902.

A third creditor, Jiban Ram Marwari the first respondent, obtained a money decree against Raja Thakur Barmha on 23rd October 1903 for Rs. 42, 946, and on 31st October 1903 he applied for execution of that decree; and a 6-anna share of the 16 annas of Tappa Patsanda was brought to sale and purchased on 27th July 1904 by the son of Anant Ram Marwari for Rs. 1,12,000. It was in respect of the sale of that property that the present appeal arose. On 1st August 1904, a 10-anna share of the same property was sold in satisfaction of Anant Ram Marwari's decree and was purchased by him for Rs. 2,93,000.

The description of the property in the application for execution in Jiban Ram Marwari's case, is set out in the judgment of the Judicial Committee. The same description was given in the order for attachment, and in the sale proclamation.

The sale in execution of Jiban Ram Marwari's decree was held by the Subordinate Judge of the Sonthal Parganas, and the sale in execution of Anant Ram Marwari's decree was held by the Subordinate Judge of Bhagalpur. On 29th July 1904, the Deputy Commissioner of the Sonthal Parganas asked the Subordinate Judge to stay the sale in execution of Jiban Ram Marwari's decree, but the sale had then been already closed. On 25th August 1904, the judgment-debtor applied under sections 311 and 244 of the Civil Procedure Code, 1882, to have the sale set aside, but he withdrew that application on 18th November 1904. On 20th December 1904, the auction-purchaser at the sale in execution of Jiban Ram Marwari's decree applied (without notice to the

judgment-debtor) for the issue of a sale-certificate in his name as purchaser of the 6-anna share of Tappa Patsanda which was not encumbered by the mortgage of Anant Ram Marwari, and the Subordinate Judge passed an *ex parte* order granting that application.

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As reasons (*inter alia*) for this order he held that the fact that an unencumbered 6-anna share had been sold was shown by a statement in the order-sheet of the execution proceedings made by the Subordinate Judge on 14th November 1903, that the attachment was effected of the same share of the property of the judgment-debtor in execution cases Nos. 3 and 4 of 1902; and also by a sale-notification published in the Calcutta Gazette in consequence of a petition filed by the decree-holders on 27th February 1904.

Raja Thakur Barmha preferred an appeal under section 244 of the Civil Procedure Code from the order of the Subordinate Judge to the High Court and also filed a petition under section 622 of the Civil Procedure Code and section 15 of the Charter Act on which an order was made calling on the respondents to show cause why the order of 20th December 1904 should not be set aside.

The High Court (BRETT and GUPTA JJ.) affirmed the order of the Subordinate Judge, being of opinion that the appeal did not lie, and that there was no ground for interference on revision. After referring to the description of the property in the application for execution, the order for attachment and the proclamation of sale the judgment of the High Court, proceeded:—

“In the copy of the sale-proclamation that was published in the Calcutta Gazette the description of the property is different. It is there stated to be ‘the zamindari right, title and interest in a 6-anna share in mahal Tappa Patsanda bearing towji No. 462, and sudder-jama Rs. 1,402-9 of the Dumka Collectorate, thana Matragama, Sub-Registry

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Godda, district Sonthal Parganas, which is not covered by the mortgage bond of Babu Anant Ram Marwari and others of Shujaganj, and also another two annas share of the said Tappa which has been tendered as security in execution of the decree of Babu Anant Ram and others.' The learned Subordinate Judge, on considering these documents, has come to the conclusion that there was possibly an error in the application for execution and in the sale proclamation by omitting the word 'not,' which was subsequently included in the copy of the sale-proclamation that was published in the Calcutta Gazette. If this view were correct that there has been such a mistake, this would be a ground for setting aside the sale on account of irregularity, and not a ground for our interfering with the order of the Subordinate Judge passed on 20th December 1904. The property was brought to sale on 26th June 1904, and the proceedings show that the property was described as described in the application for sale, but at the time of the sale it appears that a note was entered in the bid-sheet to the following effect :—' Be it known that out of 6 annas of Tappa Patsanda which has been advertised for sale, 3 annas has been given as security in money execution cases Nos. 3 and 4 of 1902, Gobardhan Das and others, decree-holders v. Raja Thakur Bramha.' It is suggested that the entry was made in order to indicate that the property offered for sale was the 6 annas unencumbered share, and not the share which was subject to the mortgage of Babu Anant Ram Marwari.

"We think that the description given in the application for execution, in the sale-proclamation and order of attachment is not very happily worded, but its meaning need not necessarily be restricted to the 6 annas of mahal Tappa Patsanda which was subject to Anant Ram's mortgage. The fact that at the time when the sale-proclamation was published on the 27th February 1904 in the *Calcutta Gazette*, a description was given which clearly indicated that the property which it was intended to sell was the unencumbered 6 annas, and the fact that at the time of sale this circumstance was also mentioned to the officer conducting the sale go to support the view that what was intended to be sold was the 6 annas unencumbered share. It is also to be observed that in the 13th paragraph of the petition which the judgment-debtor addressed to the Dupty Commissioner of Sonthal Pergannahs on the 15th July 1904 that is to say, before the date of sale, he stated that 6 annas of Tappa Patsanda was under attachment and advertized for sale in execution of certain decrees amounting to Rs. 2,00,000 in the Court of the Subordinate Judge of Godda, and that the remaining ten annas share of the said estate was on sale in execution of a decree of Anant Ram Marwari and others of Bhagalpur for Rs. 2,98,000 in the Court of the

First Subordinate Judge of Bhagalpur. The letter which the Deputy Commissioner wrote to the Commissioner of the Division on the 29th July 1904, shows that it was then generally understood that the 10 anna share had been sold in Bhagalpur and the remaining 6-anna share was being sold in Godda. The learned counsel, however, has contended that if the 6-anna share was offered for sale it was the duty of the decree-holder under section 287 to have mentioned that the 6 annas was subject to the 3 annas mortgage in favour of Gobardhan Das. That fact, however, was mentioned at the time of sale and was notified to the purchaser and the mere fact that mention of this encumbrance was not made in the application for execution or in the sale-proclamation would not in itself be sufficient to vitiate the sale.

"In our opinion it is clear that the intention of the parties was that the 6 annas unencumbered share should be sold, and that was the share which was in fact sold and purchased by the auction-purchaser, and we think that no sufficient grounds have been made out for our interference with the order passed by the Subordinate Judge on the 20th December 1904 directing the issue of the sale certificate to the purchaser. The grounds which have been taken against the execution proceedings are such as might have been taken in an application to set aside the sale, but we find that in this case the judgment-debtor, after making an application to set aside the sale, afterwards withdrew it."

On this appeal,

A. M. Dunne, for the appellant, contended that the Subordinate Judge had no jurisdiction to make the order of 20th December 1904 granting the sale certificate. It was an entirely erroneous order because instead of describing in the sale certificate the property as it was described at the time of the attachment, and at the sale of 27th July 1904, which was property encumbered by a mortgage, the certificate was made to describe another property which was unencumbered and had not been attached, or sold at the said sale. The property of the judgment-debtor, which had been attached and sold, was the equity of redemption in a six-anna share subject to the mortgage of 5th August 1895; and it was absolutely necessary that the sale certificate granted should have corresponded in its terms

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with the description of the property so attached and sold; but it described a different property. The fact that the sale had been confirmed could give no validity to an incorrect and consequently invalid certificate of sale. If a mistake had been made, as was suggested in the respondents' case, the only proper course was to commence the execution proceedings *de novo*.

Dr. Gruyther K.C. and *E. U. Eddis*, for the respondents, contended, mainly on grounds appearing in the High Court judgment, that if property which ought not to have been sold had been wrongly sold the proper remedy for the judgment-debtor was an application under section 311 of the Civil Procedure Code, 1882, a proceeding specially provided for persons whose property has been wrongly sold. In such a proceeding, if material irregularity in publishing or conducting the sale were proved, by which substantial injury had been done, the sale could have been set aside. Such an application had been made, but the objection now taken was not put forward, and the application was eventually withdrawn. Thereupon, the application under section 311 having failed, the Court confirmed the sale in accordance with section 312, and a sale certificate was duly granted under section 315. From the order granting the sale certificate no appeal lay to the High Court, and that Court rightly held that there were no grounds for revision. The fact was that a mistake had been made in the schedule to the application for execution by the omission of the word "not," which made it appear that the property was encumbered, when it really was unencumbered property. That appeared from documents referred to in the judgment of the High Court. That error was corrected in an advertisement in the Calcutta Gazette of 27th February

1904. No substantial injury to the judgment-debtor had been shown, and it was submitted that the order under appeal had been rightly upheld by the High Court and should not now be set aside.

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Counsel for the appellant was not called on to reply.

The judgment of their Lordships was delivered by LORD MOULTON. This is an appeal against a judgment and decree of the High Court of Judicature at Fort William in Bengal, dated 26th June 1906, affirming an Order of the Court of the Subordinate Judge of Godda in the Sonthal Pergunnahs, dated 20th December 1904, granting a certain sale certificate to the second set of respondents hereto, described as auction-purchasers. The facts of the case so far as is necessary for the decision of this appeal are as follows:—

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On the 23rd October 1903 the respondents Jiban Ram Marwari and Ishwar Das Marwari (described as the decree-holders), obtained judgment against the original appellant Rajah Thakur Barmha (now represented by his heirs and legal representatives), for a sum of 42,562 rupees and interest, and on the 31st October 1903 the decree-holders applied for execution of the decree by attaching and selling the property mentioned in the application. It is only material to refer to the first item in the schedule specifying that property which reads as follows:—

"The defendant's zamindari and milkiat right in the six annas out of 16 annas of Mahal Tappa Patsanda bearing towzi No. 462 and sudder-jumma of Rs. 2,402-9-0 (for the 16 annas) payable in Dumka Collectorate. This property is mortgaged in the bond of Babu Anant Ram Marwari and others, decree-holders, inhabitants of Bazar Shujaganj, in the Town of Bhagalpur, and also a two annas share of the said Mahal, which has been hypothecated as security on behalf of the defendant in the case of execution of a mortgage decree of the

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said Babu Anant Ram Marwari and others, decree-holders, against the judgment-debtor, in the First Court of the Subordinate Judge of Bhagalpur, in all eight annas share of the said Mahal, together with all rights and interests of the judgment-debtor and the *kamat* land, *nami* and *bename* jalkar, phalkar, bankar, &c., and kachari house appertaining to the estate. The estimated value is Rs. 50,000."

In the ordinary course an order was made for the sale of the attached property mentioned in the above schedule by public auction, and proclamation of the sale was made in the required manner. The sale commenced on the 16th June 1904, but for a long time the bids were insufficient and the sale was not finally concluded until the 28th day of July, 1904.

On the 20th day of December 1904, an application was made on behalf of the auction-purchasers to obtain a sale certificate for the six annas share of Tappa Patsanda purchased by them at the auction sale. In making this application they alleged that a mistake had been made in the schedule of the property to be sold in that the word "not" had been omitted from the description of the six annas in question and that the property should have been described as being six annas not mortgaged under the bond of Babu Anant Ram Marwari. At that date 10 annas of the property were so mortgaged while the remaining six annas were free from any mortgage. They claimed that their certificate should be made out as being a certificate of the purchase by them of the six unencumbered annas instead of (as described in the schedule) six annas subject to the existing mortgage. The Subordinate Judge granted them a certificate in the form which they desired and the High Court sustained his order. It is from this order that the present appeal is brought.

Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached,

and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached, namely, the six unencumbered annas,—a property which could not be sold in such proceedings inasmuch as it was not the property attached.

An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the order of the Subordinate Judge grants a sale certificate which states that another and a different property has been purchased at the judicial sale. It was beyond the powers of the Court to make such an order, inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased.

Counsel for the respondents sought to support his case by referring to documents in other judicial proceedings tending to support the view that a mistake had been made in drawing up the schedule, and that the property intended to be inserted therein was the unencumbered 6 annas. Their Lordships are of opinion that all such matters are irrelevant. If by a mistake the wrong property was attached and an order made to sell it, the only course open to the decreeholders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one. Moreover, it

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is impossible to attribute to the public to whom the attached property is offered in sale a knowledge of proceedings in other suits which might have led them to suspect that an error had been made. The only relevant document brought to their Lordships' notice in this respect was an advertisement in the Calcutta Gazette which, though purporting to be a description of the attached property, differed from the description in the schedule by representing that the property to be sold was free from the mortgage. This want of correspondence between the advertisement in the Calcutta Gazette and the schedule of the attached property in the proclamation of sale constitutes an additional irregularity which it might need the assistance of the Court to cure if the sale were regular in other respects, but it cannot validate a sale of property which was not the property to which the attachment related.

Their Lordships therefore will humbly advise His Majesty that this appeal should be allowed, and that the order of the Subordinate Judge confirming the sale, together with the certificate granted thereunder, dated the 20th December 1904, should be set aside. This will of course have the effect of setting aside all subsequent proceedings on the part of the auction-purchasers based thereon.

The respondents will pay the costs of the application to the Subordinate Judge of the 20th December 1904 and of the appeal to the High Court of Judicature at Fort William in Bengal, and also the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Theodore Bell & Co.*

J. V. W.