

## APPELLATE CIVIL.

*Before Panton and Mallik JJ.*

UMAMOYEE DASYA

*v.*

JATAN BEWA.\*

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Feb. 2.

*Execution of Decree—Application for execution by assignee of decree without notice of assignments. effect of—Limitation—Civil Procedure Code (Act V of 1908), s. 47 and O. XXI, rr. 16, 22, 90.*

Execution of a decree by the assignee of the decree without service of the necessary notice on the assignor of the decree is not merely irregular, but unlawful and the judgment-debtor is entitled to get the benefit of such illegality, though he might have notice of such assignment.

*Kassum Goolam Hoosain Vazir v. Dayabhai Amarsi* (1) and *Notan Das v. Lachhman Singh* (2) followed.

*Brajlal Marwari v. E. M. Atkinson* (3) distinguished.

Where a sale is a nullity, no question of limitation arises.

*Joggeswar Mahata v. Jhapal Santal* (4) followed.

Appeal from Appellate Order by Umamoyee Dasya and another, the heirs of the assignee of the decree-holder.

These two appeals arose out of two applications for setting aside a rent sale on the ground of material irregularity and substantial injury.

The rent decree was originally obtained by Raman Dasya on the 21st February, 1922. She sold the decree along with the rent land to Chandra Mohan Singha by a conveyance on the 6th March, 1924. The decree was executed by the transferee on the 29th April,

<sup>o</sup> Appeals from Orders Nos. 102 and 103 of 1926, with Revision Case No 346 of 1926, against the orders of Bimal Chandra Chatterji, officiating Subordinate Judge of Rangpur, dated Jan. 16, 1926, reversing the orders of Phanindra Kumar Sinha, Munsif of Kurigram, dated June 8, 1925.

(1) (1911) I. L. R. 36 Bom. 58.

(3) (1920) 5 P. L. J. 639.

(2) (1921) I. L. R. 2 Lah. 230.

(4) (1923) I. L. R. 51 Calc. 224.

1924. Notice under Order XXI, rule 22, of the Code of Civil Procedure was served on the judgment-debtor on the 13th May, 1924. Judgment-debtor No 3 filed an application on the 23rd May, 1924, praying for time to file objections. The sale was held on the 5th July 1924, at which the said transferee was the auction-purchaser. Rent land, 220 bighas in area, was sold for Rs. 564 odd. Symbolical possession was taken on the 19th October, 1924.

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Application under Order XXI, rule 90 and section 47 of the Code was filed on the 13th November, 1924. Another application under section 47 of the Code was filed on the 30th March, 1926. It was alleged by the petitioners that they came to know of the sale at the time of delivery of possession through Court.

The applications were opposed by the wives of the assignee.

The trial Court dismissed the applications. On appeal by the judgment-debtors, the order of the trial Court was reversed.

Hence this appeal.

*Sir Provash Chunder Mitter* (with him *Babu Jitendra Mohan Sen Gupta*), for the appellants, contended that the applications for setting aside the sale were barred by limitation. Art. 166 of the Limitation Act applies and not Art. 181; *Satish Chandra Kanungoe v. Nishi Chandra Dutta* (1), *Haripada Haldar v. Barada Prasad Roy Chowdhury* (2). The only irregularity found by the Court of appeal below is non-service of notice under Order XXI, rule 16 of the Code, which is not an irregularity in publishing or conducting the sale and could not, therefore, attract the operation of Order XXI, rule 90. If the applications are treated as being under section

(1) (1919) I. L. R. 46 Calc. 975.

(2) (1924) I. L. R. 51 Calc. 1014.

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47, the said irregularity would not vitiate the sale. Further, one of the judgment-debtors having entered appearance in the execution proceedings on the 23rd May, 1924, and not taking any objection on this score earlier, the present applications would be barred by the principle of constructive *res judicata*: see *Mungul Pershad Dichit v. Grija Kant Lahiri* (1), *Ram Kirpal v. Rup Kuari* (2), *Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh* (3) and *Coventry v. Tulshi Pershad Narayan Singh* (4). The Court of Appeal below should have held that non-service of notice under Order XXI, rule 16, did not make the sale a nullity: *Brajlal Marwari v. E. M. Atkinson* (5). Further the requirements of Order XXI, rule 16, had been substantially complied with, inasmuch as the notice which was served on the judgment-debtors in the form prescribed under Order XXI, rule 22, mentioned the fact that the applicant for execution was an assignee of the original decree-holder.

*Babu Mrityunjay Chatterji*, for the respondents. The applications for setting aside the sale were under section 47 of the Code, and if I can succeed in showing that the sale was a nullity, the discussion of the questions raised by my learned friend becomes unnecessary. The provisions of Order XXI, rule 16, requiring service of notice of the intended execution by the assignee of a decree on the assignor as well as on the judgment-debtors are imperative, and non-compliance with the said provisions vitiates the whole execution proceedings and the sale in pursuance thereof is a nullity: *Notan Das v. Lachhman Singh* (6).

(1) (1881) L. M. R. 8 Calc. 51

L. R. 8 I. A. 123.

(2) (1883) I. L. R. 6 All. 269 ;

L. R. 11 I. A. 37.

(3) (1924) 29 C. W. N. 413

(4) (1904) I. L. R. 31 Calc. 822f

(5) (1920) 5 P. L. J. 639.

(6) (1921) I. L. R. 2 Lah. 230.

Even if the notice on the judgment-debtors under Order XXI, rule 22, by reason of its mention of the fact of assignment of the decree, be held to be a notice on the judgment-debtors under Order XXI, rule 16, there is no such notice on the assignor. The sale, therefore, is a nullity, and, as such, the question of limitation does not arise : *Joygeswar Mahata v. Jhapal Santal* (1). The discussion about constructive *res judicata* also becomes merely academic.

*Sir Provash Chunder Mitter*, in reply.

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*Cur. adv. vult.*

PANTON J. This is an appeal from an order of the Subordinate Judge of Rangpur, reversing an order of the Munsif, 1st Court, Kurigram. The matter relates to execution proceedings. A decree for rent was made on the 21st February, 1922. On the 6th of March, 1924, the decree-holder sold the decree to the first appellant. On the 29th April, 1924, the appellant sought to execute the decree. On the 13th May, 1924, he prayed for service of notice on the judgment-debtors. This notice was in the form prescribed for a notice under Order XXI, rule 22. But in the body of it mention is made of the fact of the appellant's purchase of the decree. The order sheet in the case records that this notice was served. On the 5th July, 1924, the appellant purchased the property at the execution sale and was thereafter put into possession. On the 13th November, 1924, the judgment-debtor made an application purporting to be an application under Order XXI, rule 90, and section 47 of the Code of Civil Procedure to have the sale set aside on the ground of irregularity in publishing and conducting it, but without reference to an alleged defect in the notice under Order XXI,

(1) (1923) I. L. R. 51 Calc. 224.

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rule 16, to which I shall presently refer. On the 30th March, 1926, the judgment-debtor made another application purporting to be an application under section 47, complaining that no notice under Order XXI, rule 16, had been served. Both these applications were dismissed by the Munsif. On appeal to the Subordinate Judge, this order was set aside on the ground that no notice under Order XXI, rule 16, had been served upon the original decree-holder who had assigned the decree.

In appeal, it is urged, first, that both these applications were barred by limitation; secondly, that the judgment-debtors did in effect have the necessary notice and showed no cause against the execution proceedings and that consequently this application was barred by constructive *res judicata*; thirdly, that the notice to which I have referred, although it was in the form prescribed for a notice under Order XXI, rule 22, did in fact state that the applicant was an assignee of the decree and that for all practical purposes this was a notice under Order XXI, rule 16; fourthly, it is urged that so far as Order XXI, rule 90, is concerned it applies only to irregularities in publishing and conducting the sale and not to events which happened before. Finally, it was argued that the finding of the Court below that the price at the sale was inadequate is based on no evidence.

So far as we are concerned with the application under Order XXI, rule 90, the present application was clearly barred by limitation and this part of the case needs no further consideration.

The real question for our decision is as to the effect which must be given to the failure of the present appellant to serve proper notice under Order XXI, rule 16. Even, if the notice to which I have referred namely, the notice purporting to be under Order XXI,

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rule 22, can be taken to be in effect one under Order XXI, rule 16, on the judgment-debtor, it is plain that there was no notice on the assignor of the decree as the rule requires. It was held in *Kassum Goolam Hoosein Vazir v. Dayabhai Amarsi* (1) that execution of a decree without service of the necessary notice on the assignor of the decree is not merely irregular but unlawful. This decision was followed in *Notan Das v. Lachhman Singh* (2), where, after a review of the authorities, the learned Judges held that a sale of this description was void. A contrary view was taken in *Brajlal Marwari v. E. M. Atkinson* (3). But in our opinion the facts here are such as will not admit of the application of the principle of *Mungul Pershad Dichit v. Grija Kant Lahiri* (4) and the sale being a nullity, no question of limitation arises: see *Joggeswar Mahata v. Jhapal Santal* (5). In this view of the case it is not necessary to consider the other points which have been raised.

The appeal fails and is dismissed with costs. Hearing fee, one gold mohur.

This judgment will also govern the other appeal which is also dismissed with costs.

The Rule is discharged with costs.

MALLIK J. I agree.

*Appeal dismissed.*

S. M.

(1) (1911) I. L. R. 36 Bom. 58.

(2) (1921) I. L. R. 2 Lah. 230.

(3) (1920) 5 P. L. J. 639.

(4) (1881) I. L. R. 8 Calc. 51

L. R. 8 I. A. 123.

(5) (1923) I. L. R. 51 Calc. 224.