

## APPELLATE CIVIL.

Before Mukerji and Guha JJ.

1929

Dec. 16.

NARESHCHANDRA MITRA

v.

MOLLA ATAUL HUQ.\*

*Execution of decree—Writ of attachment not mentioning property, attachment whereof prayed for in execution petition—Sale Proclamation mentioning the same—Auction sale, if valid—Irregularity—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 64, 66, 90.*

The decree-holder, in his execution petition, sought to execute his decree against the judgment-debtor, by the attachment and sale of one-third part of premises No. 46/6, Canal East Road, Entally, but the writ of attachment issued by the court mentioned one-third part of premises No. 46/1 on the same road, a property situated about half a mile from the former, and which did not belong to the judgment-debtor. The boundaries of the property were correctly given, and the only error was in giving the No. as 46/1 instead of 46/6. The sale proclamation was issued for the sale of the part of premises No. 46/6, and it was sold for Rs. 5,000 to the decree-holder, no other bidder being present. On the judgment-debtor's application under Order XXI, rule 90 of the Code, the Subordinate Judge set the sale aside on the ground that there was no legal attachment of the property sold, on account of the misdescription in the writ of attachment. On appeal to the High Court,

*held* that an auction sale held in execution of a decree is not invalid for want of attachment, if the sale proclamation correctly mentioned and described the property which is sold.

*Sharoda Moyee Burmonee v. Wooma Moyee Burmonee* (1), *Kishori Mohun Roy v. Mahomed Mujaffar Hossein* (2), *Tincouri Debya v. Shib Chandra Pal Chowdhury* (3), *Sheodhyan v. Bholanath* (4), *Sasirama Kumari v. Meherban Khan* (5), *Muthiah Chetty v. Palaniappa Chetty* (6) and *Ma Pua v. Mahomed Tambi* (7) followed.

*Panchanan Das Majumdar v. Kunja Behari Malo* (8) dissented from.

*Thakur Barmha v. Jiban Ram Marwari* (9) explained.

APPEAL by decree-holder opposite party.

The decree sought to be executed was that of the High Court, Ordinary Original Civil Jurisdiction,

\*Appeal from Original Order, No. 4 of 1929, against the order of Surjmani De, Subordinate Judge of 24-Parganas, dated Sept. 15, 1928.

(1) (1867) 8 W. R. 9 C. R.

(2) (1890) I. L. R. 18 Calc. 188.

(3) (1894) I. L. R. 21 Calc. 639.

(4) (1899) I. L. R. 21 All. 311.

(5) (1911) 13 C. L. J. 243.

(6) (1921) I. L. R. 45 Mad. 90.

(7) (1923) I.L. R. 1 Ran. 533.

(8) (1917) 42 Ind. Cas. 259.

(9) (1913) I. L. R. 41 Calc. 590 ;

L. R. 41 I. A. 38.

in Suit No. 132 of 1923 and was for Rs. 11,000 with interest at 6 per cent. per annum, from the date of the decree till payment. In pursuance of a notice under Order XXI, rule 22 of the Code, the judgment-debtor objected that the value of the property proceeded against in his execution petition by the decree-holder was at least Rs. 30,000, whereas the decree-holder contended it was Rs. 8,000. Eventually, both the valuations were ordered to be given in the sale proclamation, and this disposed of Miscellaneous Case No. 62 of 1927. The whole property (No. 46/6, Canal East Road, Entally) was subject to the equitable mortgage of one Ramgopal Lohia for 1 lakh of rupees. It was sold by auction on 11th January, 1928, and the decree-holder (who had obtained leave to bid) being the only bidder present his bid of Rs. 5,000 was accepted. Thereupon, the judgment-debtor filed an application under Order XXI, rule 90, alleging fraud and irregularity in the conduct of the sale and praying that the sale be set aside. One of the irregularities was that the property, having been put up to sale without attachment, the sale was invalid in law. The Subordinate Judge set the sale aside for the ends of justice on account of this irregularity. This was in Miscellaneous Case No. 12 of 1928. The decree-holder opposite party appealed to the High Court.

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*Mr. Gunadacharan Sen* (with him *Mr. Manindranath Ray*), for the appellant.

*Mr. Tarakeshwar Pal Chaudhuri* (with him *Syed Nasim Ali*), for the respondent.

MUKERJI AND GUHA JJ. In this case, the Subordinate Judge has allowed an application under Order XXI, rule 90 of the Code of Civil Procedure, and set aside a sale on the ground that there was no legal attachment, as the writ of attachment gave an inaccurate description of the property sold. The boundaries of the property were correctly given, but instead of describing it as 46/6, Canal East Road, No. 46/1 was given. He held that there was in fact no attachment of the property to be

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sold, *i.e.*, No. 46/6, but that the attachment was made of No. 46/1. The question in the appeal, therefore, is whether a sale held without attachment is necessarily bad.

The appellant decree-holder contends that the omission to attach is a mere irregularity, while the respondent judgment-debtor relies upon Order XXI, rule 64 of the Code and two decisions, namely, the decision of Fletcher J. in *Panchanan Das Majumdar v. Kunja Behari Malo* (1), and that of the Judicial Committee in *Thakur Barmha v. Jiban Ram Marwari* (2), for the proposition that the sale was without jurisdiction.

The question arose under Act VIII of 1859, in the case of *Macnaghten v. Mahabir Pershad Singh* (3), but was given up and so was not decided. It also arose under that Act in the case of *Sharoda Moyee Burmonee v. Wooma Moyee Burmonee* (4), in which it was held that an attachment was not an essential preliminary to a judicial sale. It again arose under the Code of 1882 (compare section 284, of which the wording was the same as in Order XXI, rule 64 of the present Code) in *Kishory Mohun Roy v. Mahomed Mujaffar Hossein* (5), where it was held that the attachment is a measure resorted to for the protection of the decree-holder and the purchaser against intermediate alienation, and that, after a sale has been confirmed, it is not to be considered a nullity because there was no attachment. This view was approved of in the case of *Tincouri Debya v. Shib Chandra Pal Chowdhury* (6). Absence of attachment has been considered a mere irregularity in *Sheodhyan v. Bholanath* (7), *Sasirama Kumari v. Meherban Khan* (8), *Muthiah Chetty v. Palaniappa Chetty* (9) and *Ma Pwa v. Mahomed Tambi* (10).

(1) (1917) 42 Ind. Cas. 259.

(2) (1913) I. L. R. 41 Calc. 590 ;  
 41 I. A. 38.

(3) (1882) I. L. R. 9 Calc. 656 ;  
 L. R. 10 I. A. 25.

(4) (1867) 8 W. R. 9 C. R.

(5) (1890) I. L. R. 18 Calc. 188.

(6) (1894) I. L. R. 21 Calc. 639.

(7) (1899) I. L. R. 21 All. 311.

(8) (1911) 13 C. L. J. 243, 249.

(9) (1921) I. L. R. 45 Mad. 90.

(10) (1923) I. L. R. 1 Ran. 533, 537.

The case of *Panchanan Das Majumdar v. Kunja Behari Malo* (1) is the only case of this Court, in which a different view has been taken. We are unable to agree in the interpretation that case has given to the decision of the Judicial Committee in the case of *Thakur Barmha v. Jiban Ram Marwari* (2), upon which it purports to proceed. In the case before the Judicial Committee, the property that was under attachment and sold was a 6 annas share of a *mehál* subject to a mortgage and after the sale the purchaser applied for correction of the certificate of sale by adding the word "not" to the description of the property, the result of which would be to pass an unencumbered 6 annas share, an entirely different property from what was attached and sold. The case is no authority for the proposition that an auction is invalid for want of attachment, even though the sale proclamation correctly mentioned and described the property which is sold.

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The order appealed from must, therefore, be set aside and the case remanded to the court below to take evidence in respect of the application under Order XXI, rule 90, Civil Procedure Code, which has not been done and to dispose of it as a whole and in accordance with law.

The appeal is allowed. Costs of the appeal will be costs in the cause, hearing-fee 3 gold mohurs.

*Case remanded.*

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(1) (1917) 42 Ind. Cas. 259.

(2) (1913) I. L. R. 41 Calc. 590 ;  
 41 I. A. 38.