APPELLATE CIVIL.

Before Mukerji and Jack JJ.

SADHIS RAM ATOI

v.

KUNJA BIHARI BANERJI.*

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July 8, 9, 10.

Setting aside sale—Suit to set aside sale under Assam Land and Revenue Regulations—Maintainability, Conditions of—Limitation—"Or" when "and"—Meaning of words—Surety for a defaulting sarbarâkâr, *if can be proceeded against before selling defaulter's attached movables—Assam Land and Revenue Regulation (I of 1886), ss. 69, 70, 80, 82, 91, 146.*

The word "or" in sub-s. (2) of s. 82 of the Assam Land and Revenue Regulation of 1886 is used in the sense of the word "and"; and a suit in a civil Court to annul a sale under the Regulation is not maintainable unless both the conditions mentioned in that sub-section are satisfied.

A sale having become final under the Regulation, a further order for confirmation of that sale (as under the Code of Civil Procedure) is not required.

The period of limitation for filing a suit in a civil Court for setting aside a sale under the Regulation runs from the date of that sale becoming final, and not from the date of its confirmation, if made.

Under the Assam Land and Revenue Regulation of 1886, the revenue authorities can proceed against the surety of a defaulting *sarbarâkâr* before putting up to sale the movable properties of that *sarbarâkâr* previously attached by them.

APPEAL FROM ORIGINAL DECREE by the plaintiff.

The material facts of the case and the arguments in the appeal appear in the judgment.

Bijan Kumar Mukherjea, Sanat Kumar Chatterji and *Bishwa Nath Naskar* for the appellant.

Prakash Chandra Majumdar and *Manmatha Nath Ray (jr.)* for the respondent.

Cur. adv. vult.

*Appeal from Original Decree, No. 113 of 1934, against the decree of J. P. Baruah, Special Subordinate Judge of Assam Valley Districts, dated Aug. 14, 1933.

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MUKERJI J. The plaintiff is the appellant in this appeal. The facts of the case, shortly stated, are the following:—

One Sharat Chandra Chaudhuri was appointed *sarbarâkar* in respect of a *mouzâ*, Bara Khetri, in the month of September, 1928. The plaintiff stood surety on behalf of the said Sharat Chandra Chaudhuri in respect of the said appointment by executing a security bond, whereby he hypothecated certain immovable properties. The revenue payable for the said *mouzâ* was Rs. 26,500 and the plaintiff's properties were taken as being valued at Rs. 28,000, which was the valuation which the plaintiff had put upon the properties. Thereafter, there was a proposal to split up *mouzâ* Bara Khetri into two parts, one of which was to go by the name of Uttar Bara Khetri and the other, Dakshin Bara Khetri. This proposal of the Commissioner was accepted by the Government on November 9, 1928. Thereafter sureties were called for for an aggregate amount of Rs. 13,000 for an appointment which was to be made of the said Sharat Chandra Chaudhuri as *sarbarâkar* in respect of *mouzâ* Uttar Bara Khetri; and one Pratap Narayan Datta having offered himself as a surety, he was accepted as such, the property offered by him as security being taken as being valued at Rs. 4,600 and the plaintiff was accepted as a surety in respect of the balance of Rs. 8,400. On May 29, 1929, the *sarbarâkar* defaulted in the payment of the instalment then due. Upon that, his movables were attached, the said movables being valued at Rs. 3,000; but they were never sold. In the meantime, proclamation being issued for the sale of the hypothecated properties, which were covered by the plaintiff's surety-bond, the said properties were sold at auction on August 13, 1929 and were purchased by the defendant at a price of Rs. 6,200. The plaintiff's case further was that he would have taken steps to prevent his hypothecated properties being put up to sale, but he was misled; because, he came to know on enquiry that the

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sarbarâkar had made over the amount for which he was in default to the surety Pratap Narayan Datta, and also because he was under the impression that the movables of the *sarbarâkar*, which had been already attached, would be first put up to sale and that only if such sale failed to fetch the requisite amount that the immovable properties hypothecated were to be sold. Upon this statement of facts, the plaintiff instituted the suit for a declaration that the sale was improper and not in accordance with law and that the defendant by his purchase had acquired no title to the properties. In some of the paragraphs of the plaint he complained of several irregularities and illegalities in connection with the sale and also alleged that the price fetched at it was grossly inadequate. The defendant, in his written statement, denied that there was any irregularity in connection with the sale and also pleaded that, if there was any irregularity in the conduct of the sale, it was the Government who was responsible and, inasmuch as the Government was highly interested in the result of the suit, the Government should be made a party thereto. So far as this last-mentioned plea was concerned, it was overruled by the Subordinate Judge. The learned Judge, on dealing with the merits of the case, held that the suit should be dismissed and he ordered accordingly. From this decree dismissing the suit, the plaintiff has preferred this appeal.

It would be convenient to deal in the first place with some of the illegalities or irregularities complained of on behalf of the plaintiff and to leave out for the present for separate consideration hereafter one question of irregularity or rather of jurisdiction as the plaintiff desires to make it out to be. Now, those irregularities were of the following description. It was said that there was no attachment in respect of the properties that were sold; and on this point the learned Subordinate Judge held that no attachment was necessary, because the properties had

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already been hypothecated. It was also urged that no notice under O. XXI, r. 66, of the Code was issued and that there was no valuation of the properties mentioned in the sale proclamation. The learned Subordinate Judge found that these two irregularities had been made out and he also found that there had been no beating of drum in connection with the proclamation. Our attention has also been drawn on behalf of the appellant to another irregularity, of which he had made a grievance in his petition of appeal to the Commissioner and also in his petition to the Local Government, namely, that in the sale proclamation the place where the properties were to be sold was not mentioned. We find that this complaint also is well founded. But the learned Subordinate Judge, having found these facts in favour of the plaintiff, went on to consider the value of the properties and, after a careful consideration of the materials that are on the record on that question, he has come to the conclusion that the price fetched at the sale cannot be regarded as inadequate, having regard to the fact that at auction sales anything approaching the market-value of a property is hardly realised. He has also come to the conclusion that at the sale that took place, a number of bidders were present and that there was nothing to show that any insufficiency in the price, even if there was any, was due to any of the irregularities or even to the cumulative effect of all. We are of opinion that, in view of the finding last mentioned, which we find is amply borne out by the materials on the record, it is not possible to say that the plaintiff was entitled to succeed on the ground of any of these irregularities.

Furthermore, the learned Subordinate Judge has found that the suit, regarded as one for setting aside the sale, was barred under the provisions of s. 80, sub-s. (*2*) of the Assam Land and Revenue Regulation, 1886. It may be mentioned here that the sale took place on August 13, 1929; that thereafter an application was made by the plaintiff to the Commissioner, who, by an order passed on January 3, 1930,

declined to set aside the sale; and that thereafter the plaintiff preferred a further appeal to His Excellency the Governor-in-Council and that appeal was also dismissed. Section 82, sub-s. (*2*) says :—

> A suit to annul such a sale shall not be entertained upon any ground, unless that ground has been specified in an application made to the Commissioner or Chief Commissioner and under s. 79, or unless it is instituted within one year from the date of the sale becoming final under s. 80.

On behalf of the appellant it has been contended in the first place that the two conditions specified in this sub-section are disjoined by the word "or" and that in this respect the provision contained in this sub-section is materially different from the analogous provision contained in the Revenue Sale Law. On the strength of the appearance of the word "or" in this sub-section, it has been argued that, upon a true construction of it, it should be held that, if one of these conditions is satisfied, an appeal would be competent. We are of opinion that this contention is not well founded. The two conditions are so different in their nature that it is impossible to maintain that, if only one of the conditions is fulfilled, an appeal would be competent. One of these conditions is that the ground to be taken in the appeal must be one which has been specified in the application made to the Commissioner or Chief Commissioner under s. 79 and the other is that the suit is to be instituted within one year from the date of the sale becoming final under s. 80. The word "or" as it appears in this sub-section must, in our opinion, be regarded as having been used in the sense of "and" and, in our opinion, the sub-section means that unless both the conditions are specified, the suit would not be maintainable.

Nextly, it has been argued on behalf of the appellant that the suit was not barred by limitation because of an order which was passed by the Deputy Commissioner on January 24, 1930, in which it was stated

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that the sale was confirmed. It has been argued that, inasmuch as the sale took place under the provisions of the Code of Civil Procedure, the provisions of the Code as regards confirmation of the sale are applicable and it was therefore that the Deputy Commissioner on January 24, 1930, recorded the aforesaid order. Our attention has also been drawn to the sale-certificate that was issued in this case and in which it was said that the purchase took effect on January 24, 1930. Relying upon this date, that is, January 24, 1930, as the date of the confirmation of the sale, it has been argued that Art. 12, cl. (*c*) of the Limitation Act applies, and that, therefore, the plaintiff has got one year from the date when the sale is confirmed to institute a suit for the purpose of setting aside the sale. In our judgment, this contention also is not well founded. The Regulation does not speak of any confirmation of the sale. It is quite true that the procedure that is prescribed for the sale is the procedure that is to be followed under the Code of Civil Procedure. But that does not make all the provisions of that Code applicable, specially when it is not expressly stated in the Regulation that after a sale has become final it is necessary to have another order from the authority holding the sale for the purpose of getting the sale confirmed. Furthermore, on a question of limitation, with regard to which there is a special provision contained in the Regulation itself, it would not, in our opinion, be right to travel beyond the Regulation and to go to the Limitation Act for the purpose of finding out an Article to be applied to a suit for setting aside the sale. Section 82, sub-s. (*2*) clearly lays down the time by which the suit will have to be instituted and reading that sub-section with the provisions of s. 80 it is perfectly clear that the sale became final in the present case when the appeal to the Commissioner was dismissed, namely, January 3, 1930. The suit, inasmuch as it was laid beyond a year from that date, was barred by limitation.

As already stated, there was another complaint urged on behalf of the plaintiff as against the sale and the plaintiff relied upon it as giving rise to a question of jurisdiction. Now, that complaint is this. It was urged that under s. 146 of the Regulation, which is a section appearing in Chap. VIII thereof headed "procedure," any person, who has become liable for any amount as surety for a defaulter or Revenue Officer, may be proceeded against in the manner prescribed in Chap. V, as if he were a defaulter for such amount. It has been argued that having regard to the provisions of this section, the procedure to be followed for the purpose of enforcing the security as against the plaintiff is the procedure contained in Chap. V. The only section of Chap V, which may be taken to apply to a case where property other than the property in arrears is to be put up to sale is s. 91 of the Regulation. It may be stated here that there are certain papers on the record which show that different views used to be taken by different authorities on this question. For instance, there is an order of Mr. Bentinck, Commissioner of the Assam Valley Districts, dated January 3, 1930, in which he expressed the view that a sale of this kind is not governed by the provisions of Chap. V of the Regulation. On the other hand there are other documents, specially an order of the Governor-in-Council dated October 20, 1931, in which it has been held that Chap. V is applicable and that the sale of the present description, in circumstances such as there are in the present case, is to be regulated by the provisions of s. 91 of the Regulation. It appears also that in the Assam Land and Revenue Manual a note has been inserted whereby it has been made clear that when a *mouzâdâr* defaults and the estate pledged by his surety is sold in consequence under the Regulation, the sale, being of an estate for arrears other than its own, is governed by the provisions of s. 91. So, at the present moment, there is hardly any dispute that the sale of

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the present nature has to be held under the provisions of s. 91 of the Regulation. That being the position, it has been argued on behalf of the appellant that the conditions laid down in sub-s. (*1*) of s. 91 have got to be complied with before the properties could be legally put up to sale. Now, cl. (*1*) of s. 91 says:—

> If an arrear cannot be recovered by any of the foregoing processes, and the defaulter is in possession of any immovable property, other than the estate in respect of which the arrear has accrued, the Deputy Commissioner may proceed against any of that other property situated within his district according to the law for the time being in force for the attachment and sale of immovable property under the decree of a civil Court.

The argument is that s. 146 of the Regulation, by making s. 91, sub-s. (*1*) applicable to a sale of this kind, requires that before the sale can take place, the conditions laid down in that sub-section have been fulfilled. One of the conditions of that sub-section is that the arrears could not be recovered by any of the foregoing processes and, on reference to the previous section, it would appear that two of the foregoing processes were contained in s. 69 and s. 70, s.69 relating to attachment and sale of movables of the defaulter and s. 70 providing for the sale of the defaulting estates. It is clear, however, that, when the hypothecated property of a surety is put up to sale, one of these foregoing provisions, namely, that contained in s. 70 cannot apply. But the argument is that the provisions, in so far as they are applicable, should be applied; and that, therefore, the movables of the defaulter for seizure of which processes had already issued should have been put up to sale and the result of that sale should have been awaited in order to see whether the arrears could be realized or not and it was only when it would be found after the sale of the movables that the arrears could not be realized that it would be open to the authorities to put the plaintiff's properties to sale. As a matter of construction of s. 146 of the Regulation, my own view is that that section merely lays down the procedure under which the sale would take place. It says, any person may be proceeded against in the manner prescribed in Chap. V; and though certain

conditions are laid down in sub-s. (*1*) of s. 91 which have to be fulfilled in order to bring to sale the estate of the defaulter other than the defaulting estate, in my opinion, it was not intended by s. 146 that those provisions would have to be complied with before the properties of the surety are put up to sale. Indeed, the view that I take seems to receive support from the fact that with regard to a sale to be held in respect of properties belonging to a surety one of the provisions going before that contained in s. 91, namely, the provision contained in s. 70 of the Regulation is admittedly inapplicable. At the same time, I am of opinion that the procedure which has hitherto obtained in the province with regard to the sales of immovable properties belonging to the surety, that is to say, of proceeding against the movables of the defaulter before proceeding against the surety and which, as far as we are able to see from the papers before us, was the procedure that was attempted to be resorted to in the first instance in the present case, is a procedure which is fair and reasonable. It appears from the order of the Governor-in-Council dated October 20, 1931, to which reference has already been made, that the Government took the view that the opening words of s. 91 show that before the defaulter's immovable property can be sold thereunder, the other processes mentioned in Chap. V must be exhausted, and that the same procedure should be adopted with regard to sales of properties hypothecated by sureties. Apparently, the Government have adopted what text-book writers and Judges have characterised as a humane construction and, inasmuch as that construction is fair and reasonable it is open to the Courts to adopt it. But, however that may be, what has happened in the present case is that, although steps were taken first of all to have the movables of the defaulter sold, those steps proved infructuous and while the movables which had been attached remained in the custody of the other surety, Pratap Narayan Datta, the revenue authorities finding that the said Pratap Narayan

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Datta was not going to produce the movables before the Court, proceeded to put up the plaintiff's properties to sale for the purpose of enforcing the surety-bond which he had executed. It may be stated here that, according to the terms of the surety-bond, it was not necessary that the remedies as against the defaulter should have been exhausted. The surety-bond distinctly states that if the revenue due is not paid in due time the surety would remain liable for the amount mentioned in the schedule. As a matter of strict construction of s. 146, I am inclined to take the view that the course which was adopted in the present case was one which was open to the revenue authorities to take for the purpose of realizing the amount. There is, however, another objection and that is, in my opinion, a fatal objection to the plaintiff's succeeding on this ground. The suit, even though it may be taken as a suit to set aside the sale on the aforesaid ground, was a suit which would come within the provisions of s. 82, sub-s. (*2*) of the Act. However much it may be said that the revenue authorities would have no jurisdiction to proceed to realise the arrears from the properties of the surety, the plaintiff, in order to get over this bar of limitation, will have to show that the proceedings that were taken were *ab initio* void. That cannot be said of the proceedings that were taken in the present case. All the different steps in the procedure have been laid down in the Regulation itself and if some of the steps have not been taken by the revenue authorities which they should have taken, still it was a sale held under the provisions of the Regulation and the plaintiff, in order to succeed, will have to get that sale set aside. And once it is stated that it is a suit for the purpose of setting aside the sale held under the Regulation, the suit will have to comply with the provisions of sub-s. (*2*) of s. 80. In that view of the matter the suit as laid must be held to be barred.

This disposes of the objections on which the plaintiff took his stand for the purpose of getting the

sale set aside on the grounds of irregularity or illegality. But there is one other part of the case which was put forward before the Court below and which has been disposed of by the learned Subordinate Judge in these words :—

A new question of law had been introduced by the plaintiff's pleader during the later stage of the hearing of the suit, and which had been protested to by the defence. It is contended that the splitting up of the Bara Khetri *mouzâ* into 2 *mouzâs* made the security bond of plaintiff null and void and that his property was not legally liable to be sold for the default of Sharat Chandra, who actually became the *sarbarâkar* of the newly created Bara Khetri *mouzâ*. I hold that plaintiff is barred not only by waiver but also by estoppel to take up such a plea now. He submitted to the changed order of things and continued as surety for Sharat Chandra (whatever might have been the area of his jurisdiction to the extent of Rs. 8,400). Further, this ground was not especially urged in his appeal to the Commissioner under the provisions of s. 82 (2) of the Regulation, and so the plaintiff is debarred from raising such a new plea in the civil Court.

It seems to us that the learned Judge has been in error in disposing of this matter in the way that he has done. It must be stated here that, if the suit is based upon this ground, it is not a suit for setting aside the sale but only for a declaration that the sale was void *ab initio*. A suit of this character would not be a suit for setting aside the sale, nor a suit under the general law for a similar purpose. It would be a suit for a declaration that it was outside the powers of the revenue authorities to bring the properties to sale because the plaintiff was under no liability under his surety-bond. The learned Subordinate Judge was also in error in supposing that it was necessary that the ground should have been taken in the application to the Commissioner. In the application to the Commissioner the facts relevant to this question were stated and in the appeal which the plaintiff preferred to the Local Government the facts were similarly stated. But the ground itself, not being a ground either of mere irregularity or illegality,—and for the purposes of an application of that nature irregularity and illegality stand on one and same footing,—this question can very well be agitated in a civil Court, even though it was not raised in that application. It is difficult to make out what the learned Subordinate Judge means by saying that

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there was waiver or estoppel on the part of the plaintiff. There are no materials whatsoever upon which such a conclusion could be come to. The facts upon which this ground is based are set out in para. 2 of the plaint. It does not appear that any issue with regard to this matter was framed; because as a matter of fact, the statement contained in this paragraph was not attempted to be refuted in the written statement of the defendant. It appears also that the plaintiff went into evidence with regard to this matter and examined certain witnesses from the revenue department and made out a *prima facie* case to the effect that he never entered into a fresh surety bond and did not continue to act as a surety after the *mouzâ* had been split up. The original offer he had made was with regard to a very different contract, as has been stated above, and that offer could not hold good, unless there was consent on the part of the offerer, in respect of an appointment of the *sarbarâkar*, which in its essence was a different appointment. The *mouzâ*, for which the appointment was made, was only a part of the other *mouzâ* and the amounts of revenue and of the security were also different. But it appears that, although the facts were set out in the plaint, no special point of this matter was made in the paragraph of the plaint where the irregularities and illegalities, upon which the plaintiff was relying for relief in the plaint, were set out. And it also appears that the defendant went into evidence first and it was after the defendant's evidence had been closed that the plaintiff called witnesses and attempted to get it established that he was not liable under the original surety bond, having regard to the altered circumstances. In these circumstances, we think we should accede to the prayer which the defendant has made, namely, that now that the plaintiff is relying upon this case he should be given proper opportunity to rebut it. It appears that when evidence was being given on behalf of the plaintiff with regard to this matter, an application was put in

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on behalf of the defendant objecting to that course. The Subordinate Judge apparently did not take any notice of this objection then and, although the judgment was not delivered till after three months had expired from the date on which evidence had closed, the question of affording the defendant an opportunity to adduce rebutting evidence was not thought of by the Court or the parties.

Having regard to the fact that, although the case had been made in the plaint there was no distinct prayer for relief on the basis of it, that there was no issue framed and that the defendant had given evidence before any evidence on this question was led by the plaintiff, we think it right that the case should be sent back to the Court below in order that this part of it may be re-tried. The questions which we have dealt with already in this judgment will not be allowed to be re-opened.

The result is that the appeal will succeed and no question, which has already been dealt with in this judgment, being allowed to be re-opened, the case will be tried only on the question of the plaintiff's liability on the basis of the surety bond. It is only this matter which the Court below will investigate further and having done so the said Court will dispose of the case in accordance with law.

Costs of this appeal will abide the result.

JACK J. I agree.

Case remanded.

A. K. D.