

# The Indian Law Reports.

Calcutta Series.

## APPELLATE CIVIL.

*Before Mitter and Akram JJ.*

FATEH CHAND MAHESRI

*v.*

AKIMUDDIN CHAUDHURI.\*

1939

July 5, 6, 24.

**Execution of Decree**—*Auction sale—Sale held during recess for Friday prayer, if illegal and vitiated by material irregularity—Code of Civil Procedure (Act V of 1908), O. XXI, r. 90—Civil Rules and Orders, Chap. 1, r. 1, sub-r. (4).*

Sub-rule (4), r. 1 of Chap. 1 of Civil Rules and Orders does not require the suspension of sales on Fridays between 12-30 and 2 p.m. There is, therefore, no irregularity in the conduct of the sale held by the *nāzīr* during the recess, when the work of the Court is suspended for Friday prayers, within the meaning of r. 90 of O. XXI of the Code of Civil Procedure.

APPEALS FROM ORIGINAL ORDERS preferred by the decree-holder.

The facts of the case and arguments in the appeal are sufficiently stated in the judgment.

*Sarat Chandra Basak, Hemendra Chandra Sen and Satyendra Chandra Sen* for the appellant.

*Nares Chandra Sen Gupta, Bhupendra Nath Roy Choudhury, Joges Chandra Sinha and Nurul Huda* for the respondents.

*Cur. adv. vult.*

The judgment of the Court was as follows:—

These appeals by the decree-holder auction-purchaser are directed against the order of the learned Subordinate Judge of Jalpaiguri, dated December 2, 1938, by which he has set aside the sale.

The appellant sued his mortgagor and the puisne mortgagee. He got the preliminary decree on August 25, 1932, and the final decree on March 6, 1933. Thereafter there were some proceedings between the parties in an earlier execution started in the year

\*Appeals from Original Orders, Nos. 1 and 2 of 1939, against the orders of Satya Saran Guha, Subordinate Judge of Jalpaiguri, dated Dec. 2, 1938.

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1933. These are not material to these appeals. On September 8, 1936, the relevant execution-proceeding was started by the appellant (O. C. Execution Case No. 52 of 1936). In this execution the appellant wanted to sell the mortgaged properties, which consisted of about 65 *hâls* of land in the Alipur Duars. They were divided into seven lots. The first six lots comprised *khâs* agricultural lands and the seventh lot an extensive waste, intended to be brought under tea cultivation, but which could not and even now cannot be planted with tea shrubs on account of statutory restrictions.

In the course of this execution, the said seven lots were sold on September 27, 1936. The appellant purchased them for Rs. 23,025. This sale was, however, set aside by the Court on March 23, 1937. The Court held that the sale was an irregular one and the price fetched was inadequate. It expressed the opinion that, according to the judgment-debtor's oral evidence, at least Rs. 500 per *hâl* was the proper price. After this order, the execution case (O. C. Execution Case No. 52 of 1936) stood revived. The Court again issued a notice under O. XXI, r. 66 of the Code for the settlement of the terms of the sale-proclamation. Relying mainly upon some conveyances produced by the judgment-debtors, the Court came to the conclusion that Rs. 800 per *hâl* for the plots of land mentioned in lots Nos. 1 to 6 and Rs. 400 per *hâl* for lot No. 7 ought to be the advertised price. These conveyances have been exhibited in this case also and we will deal with them when considering the question of the adequacy of the price at which the appellant has purchased. The sum of Rs. 39,574 was inserted in the sale-proclamation as the estimated value of the seven lots in accordance with that basis. On August 20, 1937, the sale was held and the decree-holder purchased all the seven lots for Rs. 20,050. The bid sheet (I-76) shows that there were three other bidders, Nazimuddin Muhammad, Bhagwan Das Mahesri and Mahi Kanto Barman and that there was keen competition amongst the bidders.

On September 17, 1937, the mortgagor, Akimuddin Chaudhuri, filed his application under O. XXI, r. 90 of the Code for annulling the sale and on September 20, following, the heirs of the puisne mortgagee filed a similar application. Many objections were taken, but the one material for these appeals was formulated in the applications filed by the heirs of the puisne mortgagee in the following form:—

The bidding at the sale in dispute was caused to be held by the *nâzir* on August 20, 1937, at 1 p.m. At that time the work of the Court remained suspended according to law, as it was the time for the *namâz* (prayer for Mahomedans). The bidding at the sale having taken place at that time, the said sale is wholly illegal and without force and effect (I-86).

A ground, in substance the same, but formulated in different language, was mentioned in the application filed by the mortgagor (I-81).

The Subordinate Judge, as we have already stated, annulled the sale by his order, dated December 2, 1938. He found—

(1) that the sale-proclamation and other processes in the execution case had been duly served;

(2) that the sale was held between 12-30 p.m. and 2 p.m. during the *namâz* recess. The bidding may have commenced before 12-30 p.m. but the properties were knocked down after 12-30 p.m. but before 2 p.m. This according to him was a material irregularity in conducting the sale;

(3) that the *nâzir* notified that he would hold the sale after 2 p.m. When most of the persons who had come to offer bids had left on that assurance he commenced the sale and finished it before their arrival. This was according to him another material irregularity;

(4) that the price fetched at the sale was inadequate and the inadequacy was the result of the aforesaid irregularities.

The first finding has not been challenged before us by the respondents, but the other findings and conclusions have been challenged by the appellant.

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There cannot be any doubt that the sale would be an irregular one, if the *nâzir* had told the intending bidders that he would commence the sale after 2 p.m., but held the same before that time, after the intending bidders had left the place of sale on his assurance. We will accordingly first sift the evidence bearing upon this point.

The judgment-debtors examined eight witnesses on the point. They are:—

(1) Habibar Rahman (I-98). (2) Sahitajuddin Pradhan (I-99). (3) Golamuddin Sarkar (I-100). (4) Girimaddin Mahammad (I-101). (5) Amirulla Sarkar (I-102). (6) Naitan Charan Ray (I-104). (7) Mafizuddin Sarkar (I-106). (8) Nachhimuddin Chowdhury (I-108).

The first seven witnesses say in their examination-in-chief that they came to Court between 10-30 and 11 a.m. intending to bid. Each of them came with money, the amount ranging from Rs. 2,200 to Rs. 6,500. The sale was not commenced before 12-30. At or about 12 o'clock, the *nâzir* declared that he would commence the sale after *namâz* time (*i.e.*, after 2 p.m). They left,—witnesses 1 to 5 to say their prayers and No. 6 (Naitan Charan Ray) to attend to the Registration Office. They came back shortly before 2 p.m. and found that the bidding was over. The last witness is the mortgagor's son. He says that he was at the place of sale up to 12 or 12-30. All the intending bidders went away for the *namâz*, when the *nâzir* said that he would hold the sale after 2 p.m. He also went away for the *namâz*. All came back at about 1-30 p.m. and found that all was over. The learned Judge did not place much reliance on the Mahomedan witnesses, apparently on the ground that their sympathies would be with the judgment-debtors who were Mahomedans, but he has placed great reliance on the evidence of Naitan Charan Ray.

Habibar Rahman's story is improbable and we do not believe it. According to him his father, who is

a *jotedâr*, had sent him with Rs. 2,200 for the purpose of offering bids. He was a young man aged about 20 or 21 years old, who had never attended a Court sale before. He cannot say whether the *nâzir* was a Hindu or a Mahomedan. His evidence discloses that both he and his father are under the influence of the mortgagor. It is doubtful on his evidence whether his father had the means to advance him Rs. 2,200.

Sahitajuddin Pradhan says that he came to bid with Rs. 4,000. The land which he intended to purchase was 30 or 40 miles from his house with a big river intervening. He is a small *jotedâr*. The annual rent of the *jote* in which he has co-sharers was only Rs. 147. That indicates his financial position. He was intimate with the mortgagor. It is highly improbable that such a man, who lives by cultivation, would think of purchasing a piece of land 30 or 40 miles away from his house. He further says that he came to know of the intended sale from an advertisement in the newspaper "Janamat." The sale was never advertised in that newspaper but in another of the name of "Trisota" (Ex. G, II-21).

Similar comments are applicable to the evidence of Golamuddin Sarkar, Girimaddin Mahammad (he came to depose without summons), Amirulla Sarkar and Mafizuddin Sarkar. We are of opinion that none of the aforesaid witnesses was present in Court at the date of sale. Some of them had no means to buy and none of them could have any attraction for any of the lots which were far away from their places of residence.

Naitan's evidence is that he read the advertisement in the newspaper "Trisota" five days before the sale date. He came to Court on the date of sale with Rs. 6,000 intending to purchase 16 *hâls* of land included in the Kamlai *jote* (probably lot No. 6). He admits in his cross-examination that he had no lands near that *jote* which was about 30 miles away

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from his residence. After reading the advertisement he went to find out the nature of the land included in the said *jote* which he did not know before. It is a mystery how he found out the *jote*. In cross-examination he had to admit that he never heard the *nâzir* saying that he would hold the sale after 2 p.m., but he heard it from other people present.

It is admitted by the mortgagor's son that he was present at the place of sale up to 12 or 12-30 and heard the *nâzir* make the aforesaid statement. Still the said fact is not stated in the application under O. XXI, r. 90, filed by his father and made a ground for challenging the sale. None, including the judgment-debtor's son, complained against the conduct of the *nâzir* to the Court on the date of sale or at any time before the bids were put up before the Court for acceptance, which, according to the usual practice, is done at the end of the day when the presiding Judge is about to rise for the day. No suggestion was made to the *nâzir* in cross-examination that he had stated that he would begin the sale after 2 p.m. The learned Subordinate Judge has overlooked these salient facts in coming to his aforesaid finding which we cannot accept. This part of the judgment-debtor's case appears to us to be an afterthought.

Dr. Basak, appearing for the appellant, has challenged what we have enumerated as the second finding of the learned Subordinate Judge. He says that it must be held on the evidence that the sale was finished by the *nâzir* before the prayer time, that is before 12-30 p.m. We think that the learned Subordinate Judge has given cogent reasons for holding that the *nâzir* finished the sale after 12-30 p.m. The evidence leads us to the conclusion that the bidding was commenced before 12-30 p.m. and continued after that. Having regard to the number of lots that were put to sale and the number of bids offered we are of opinion that it would not be unreasonable to hold that the sale was completed by the

*nâzir* at about 1 p.m. This finding renders it necessary to decide the question as to whether the holding of the sale between 12-30 and 2 p.m. on that day amounted to material irregularity in the conduct of the sale.

August 20, 1937, the date of sale, was a Friday. That is a day when Mahomedans say their *jummâ* prayers between 12-30 and 2 p.m. Rule 1 of Chap. 1 of the Civil Rules and Orders issued by this Court deals with the sittings of Courts. Sub-rule (4) of that rule runs thus :—

The sittings of Courts shall be suspended from 12-30 p.m. to 2 p.m. on every Friday to enable Mahomedan employees, pleaders and their clerks, witnesses and litigants to say their *jumma* prayers; but the work in the offices attached should not be suspended during this period, provided that Mahomedan employees of Government should, if they so desire, be permitted to absent themselves during the time the sittings of the Courts are suspended and that other Mahomedans having business in the offices should not be required to attend during that time.

A few more rules have some bearing on the question before us. They are r. 7 of the same chapter, rr. 234 and 237 and the note appended to r. 232 of Chap. 10.

Rule 7 provides that no judicial work involving trial of cases or hearing of petitions shall be done in chambers or at the residence of judicial officers. Rule 237 provides that sales of property in execution of decrees other than livestock, agricultural produce and things ordinarily sold in local markets and not brought up to the Court premises, shall be held by the *nâzir* or some other officer of the Court or by a person specially appointed by the Court in the presence of the presiding Judge. The note to r. 232 is that "as judicial sales form an important function of Courts it is desirable that presiding Judges should from time to time have sales conducted in the Court room in their immediate presence". Rule 234 provides that sales should commence on the date and hour fixed and the properties should, in the absence of any special direction from the Court, be put up in the order appearing in the list prepared

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by the District Judge. The sales should be conducted from day to day, and *throughout the day* (unless the Court is closed) till the list is exhausted.

From these rules which we have quoted it appears that a sale can be held by the *nâzir* or the person appointed to conduct the sale when the presiding Judge is not sitting in the Court room. The *nâzir* can approach him, if he requires directions, when the presiding Judge is in chambers. The Court is not closed when the sittings are suspended on Fridays during the period mentioned in r. 1, sub-r. (4). The office-work goes on and the Judge, who retires to his chamber, can attend there to his administrative and other work not involving hearing of suits and petitions. An intending bidder does not come within the first part of sub-r. (4). Nor does he fall within the category of persons whose presence "may be required" by the Court or its officers. Sub-r. (4) of r. 1 accordingly does not require the suspension of sales on Fridays between 12-30 and 2 p.m. In fact r. 234, which we have quoted above, casts a duty on the officer holding the sale to go on *throughout the day*. We are accordingly of opinion that there was no irregularity when the *nâzir* held the sale in question between 12-30 p.m. and 2 p.m. The question whether the price fetched was adequate or not, therefore, loses its importance, for assuming that the price fetched was inadequate the sale cannot be annulled as there was no fraud or material irregularity either in publishing or conducting the questioned sale. As, however, the learned Subordinate Judge has recorded a finding on the point we propose to state our views on that point also.

The first thing to be noticed is that the lands of lot 7 cannot be as valuable as the lands of the other lots. They are waste lands intended for tea plantation but they cannot be put to the intended use because of statutory restriction. The learned Subordinate Judge in fact valued them at half the rate which he fixed for the lands of lots Nos. 1 to 6 when he settled the terms of the sale-proclamation. The second fact



to be noticed is that agricultural lands had depreciated greatly in value at the time the questioned sale was held. The price fetched for such lands in the years 1916 to 1925, when the price of crops was very high, can afford no criterion for the value in the year 1937. The conveyances, Exs. 1(b), 1(c) and 1(d) [which were marked as Exs. (1), (2) and (3) in the proceedings under O. XXI, r. 66 of the Code], produced on behalf of the judgment-debtor are accordingly of no use. Ex. 1(e) (= Ex. 4) is of the year 1932. It shows that lands were sold at the rate of Rs. 1,000 per *hál*. We do not know the nature of those lands. The evidence is that since 1932 the prices have still gone down. Naitan Charan Ray, one of the judgment-debtor's witnesses, admits that in 1935 he purchased lands at the rates varying from Rs. 110 to Rs. 163-8 per *hál*. The appellant has proved conveyances of the years 1935 and 1936 (Exs. D to D 3) for lands in the same locality as the lots sold in execution. The price paid works out from Rs. 350 to Rs. 450 per *hál*. The price fetched at the questioned sale for lots Nos. 1 to 6 works out at almost the same figure. We, accordingly, hold that it has not been proved that the price fetched was inadequate, regard being had to the fact that prices fetched at Court-sales are somewhat lower than what a seller gets by private treaty. A purchaser at a Court-sale has to take into account the costs he is likely to incur in resisting applications under O. XXI, r. 90 of the Code. We, accordingly, allow both the appeals and confirm the sale.

We discharge the receiver, and direct him to make over possession to the appellant, the decree-holder auction-purchaser. He will submit his accounts in the Court below and get them passed there. He is to get his final discharge from the Court below.

The appellant must have costs against the appearing respondents. Hearing fee 2 gold *mohurs*.

*Appeals allowed.*