and to the established usage, the plaintiffs are entitled to maintenance. It laid some stress upon the fact that, had it not been for the custom of Pachete, the father of the plaintiffs would have had a share of the estate. And under these circumstances the Court held that by Hindu law the plaintiffs themselves were entitled to maintenance. It probably so held under the idea that the plaintiffs had been excluded from inheritance. If the lower Court's argument holds good, it will equally hold good in favor of every member of the family who can claim descent from any common ancestor of himself and the existing raja. The *raj* has endured for about seventy generations of men. Had it not been, therefore, for the custom of Pachete, there would be very little of the estate left in the possession of any single branch of the family. But if the custom of Pachete is to be held to entitle all descendants of those who were by it originally excluded from inheritance to claim maintenance from the raja at rates to be fixed by themselves or by the Court, there will be still less left for the raja himself; and in a few generations the raja for the time being would find himself ruined by these compulsory maintenances. We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right. We, therefore, set aside the decrees of the lower Court, and order the suits to be dismissed with costs.

Appeal allowed.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

HARBUNS SAHAI AND OTHERS (PURCHASERS) *v.* BHAIRO PERSHAD SINGH AND OTHERS (JUDGMENT-DEBTORS).*

1879
Feb. 19.

Act X of 1877, *s.* 290—*Lapse of Time between Proclamation and Actual Sale—Postponement of Sale—Decree under Act VIII of* 1859—*Order made setting aside Execution Proceedings under Act X of* 1877—*General Clauses Act* (*I of* 1868), *s.* 6.

An application made on the day of sale by the judgment-debtor that a part only of his property may be sold instead of the entirety, cannot be

* Appeal from Original Order, No. 236 of 1878, against the order of Moulvi Mahomed Norul Hossein, Subordinate Judge of Shahabad, dated 12th July 1878.

1879

HARBUNS SAHAI v. BHAIRO PERSHAD SINGH.

considered such a "consent" as, by virtue of s. 290 of Act X of 1877, would do away with the necessity of a proclamation for sale being issued thirty days before the day fixed for sale.

Where successive postponements of the day of sale have been made, but the last of these is made by the Court on its own motion, without any application for postponement of sale being made on the part of the judgment-debtor (although such postponement might be for his benefit), a strict compliance with the rule that thirty days must elapse between the proclamation and the actual day of sale is requisite.

Roy Gowree Nath Sahoy v. *Shah Fukeer Chand* (1) distinguished.

Where a decree for sale of certain property was obtained under Act VIII of 1859, and the property was sold, but an order was passed after the new Code of Procedure, Act X of 1877, had come into force, setting aside such sale,—

Held, that an appeal would lie from such an order under Act X of 1877.

Runjit Singh v. *Meherban Koer* (2) followed.

IN November 1875 one Gourpersad Sahoo obtained a decree against one Seetul Pershad, and on the 12th of November 1877 applied for execution; on the 16th an order was issued fixing the sale for the 4th February 1878, a proclamation to that effect being affixed to the Court-house. On the day fixed for sale the judgment-debtor applied for a postponement, which was at first refused, but on the judgment-creditor consenting, the sale was postponed for one week on the understanding that the judgment-debtor should pay off his debt within the week; three several postponements were granted after this week had elapsed, the last of which was granted on the 28th February, when a fresh sale-proclamation was issued, and the sale fixed for the 1st of April 1878. On the 27th March the judgment-debtor applied to the Court asking that his property should be taken charge of by the Collector under s. 326 of the Code. The sale was then ordered to be postponed until the 8th May. A fresh proclamation was issued on the 8th April, on which date the Court itself applied to the Collector to act under s. 326. No answer to this application having been received from the Collector, the Court, on the 8th May 1878, issued another sale-proclamation, fixing the date of sale for the 3rd of June.

On that date the judgment-debtor applied that an eight-pie share only of his property might be sold, this being sufficient to

(1) 18 W. R., 347. (2) I. L. R., 3 Calc., 662.

pay off his judgment-creditor. This application was granted, and the property was sold to one Harbuns Sahai and others for Rs. 5,000, which amount was entirely insufficient to pay off the judgment-creditor.

The judgment-debtor then applied to have the sale set aside, on the ground that thirty days had not elapsed, as prescribed by law, between the date of the proclamation of sale, the 8th May, and the date of the sale itself, the 3rd June; and that, under s. 290 of the Civil Procedure Code, the sale was irregular, and owing to the irregularity the property had been sold at an inadequate price.

The auction-purchaser contended that, after a proclamation had once issued, and the sale had been subsequently postponed, it was not necessary that a period of thirty days should elapse between the date of postponement and the sale, so as to allow of thirty days' notice of sale to be given; and that further, the judgment-debtor had himself consented to the sale, as he had applied to the Court for the sale of an eight-pie share; and such an application was "a consent" such as is referred to in s. 290, and cured any irregularity which might have taken place.

The Subordinate Judge held, that "the consent" referred to in s. 290 must be given before the date of the sale was fixed; and that therefore the judgment-debtor's application of the 3rd June was not such "a consent" as would operate as a waiver of the proclamation; that the sale had been irregular, and had caused substantial injury to the judgment-debtor, as his property had been sold at a very inadequate price. He therefore ordered the sale to be set aside, and the purchase-money to be refunded.

The auction-purchaser appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry*, with him Baboo *Chunder Madhub Ghose* and Baboo *Jodoo Nath Sahai* for the appellants. —The written consent of the judgment-debtor to the sale, given by his putting in his petition for a sale of an eight-pie share, does away with the necessity for a proclamation of sale thirty days previous to the sale. The 3rd of June was, moreover, simply fixed by adjournment, and therefore, as a proclamation had once issued, it was not necessary to proclaim the sale

1879

HARBUNS SAHAI v. BHAIRO PERSHAD SINGH.

again thirty days before the date of the adjourned sale—*Roy Gowree Nath Sahoy* v. *Shah Fuheer Chand* (1).

Mr. *M. L. Sandel* for the respondents.—No appeal will lie in this case as it is governed by Act VIII of 1859, and s. 257 of that Act lays down that an order setting aside a sale shall be final. Supposing, however, the appeal to lie, it is necessary, where land is sold in execution of a decree, that thirty days' notice be given; no such time was allowed to elapse between the proclamation and the sale in our case. This is such an irregularity as would vitiate the sale.

Baboo *Mohesh Chunder Chowdhry* in reply.—An appeal will lie under s. 588 (*m*) of Act X of 1872—*Runjit Singh* v. *Meherban Koer* (2).

The judgment of the Court was delivered by

AINSLIE, J. (BROUGHTON, J., concurring).—The appeal was filed on the 31st of August 1878, and is from an order dated the 13th of July 1878, setting aside a sale of land in execution of a decree, which decree was made in November 1875. The sale was set aside on the ground of irregularity causing substantial injury. The first application for execution of the decree was made on the 12th of November 1877, after the new Civil Procedure Code came into operation. It is objected that no appeal lies, on the ground that the case is governed by Act VIII of 1859, and that s. 257 of that Act (the old Procedure Code) enacts that an order setting aside the sale shall be final.

It is contended, on the other hand, that the order is appealable under s. 588 (*m*) of the new Code, which gives an appeal. It appears to us that the appeal lies. The opinions recorded by the Chief Justice and Mr. Justice Jackson in the Full Bench case of *Runjit Singh* v. *Meherban Koer* (2) support this view, and we see no reason to differ from these learned Judges. As regards the merits of the case, the law requires a sale of land in execution to be preceded by a notice published at least

(1) 18 W. R., 347. (2) I. L. R., 3 Calc., 662.

thirty days before the sale. The sale in this instance took place upon the 3rd of June 1878. The proclamation was made upon the 10th of the preceding month of May.

It is contended, however, that there was a written consent to the sale given by the judgment-debtor, such a consent as by virtue of s. 290 of the new Code does away with the necessity for a proclamation to be made thirty days before the sale.

It is further contended that the day on which the sale took place (3rd of June) was really fixed by adjournment, the sale having been originally fixed for the 3rd of May.

The written consent upon which the appellants rely is an application made by the judgment-debtor upon the day of the actual sale.

This application was for the sale of an eight-pie share of the property, on the ground that such a fractional part would realize by sale enough to satisfy the outstanding balance due on the decree. Section 284 of the new Code authorizes the Court to sell such portion of the property attached as may be sufficient to satisfy the decree.

It appears to us that this application did not amount to such a consent in writing as under s. 290 would operate as a waiver of the proclamation. We think that it merely amounted to a request made by the judgment-debtor that if his property must be sold, at any rate it was unnecessary to sell the whole of it; and it is to be further noted that there was a second application to sell a further share of eight pies, which, according to the result of the first sale, would have probably sufficed to satisfy the decree; and that this must be taken to be what the judgment-debtor consented to, if his consent is to be relied on.

With regard to the second objection, namely, that the 3rd of June was merely an adjourned day, it appears that the decree was passed on the 29th of November 1875, and the first application for execution was made on the 12th of November 1877. On the 16th of November 1877 the sale was fixed for the 4th of February 1878, and a proclamation was made on the 27th of November 1877 in the Court-house. On the day fixed for the sale, the judgment-debtor applied for a postponement, which was at first refused, but later on the same day the judg-

1879

HARBUNS SAHAI v. BHAIRO PERSHAD SINGH.

ment-debtor made another application, and, with the consent of the judgment-creditor, the sale was postponed for a week, on the condition that the judgment-debtor would pay the debt within that period; if he did not do so, the sale was to take place on the 12th of February.

On the 11th of February another application was made for postponement. It was granted, and the sale was postponed until the 23rd of February.

There was another adjournment until the 1st of April, and a fresh proclamation was made on the 28th of February in the Court-house. Three days before the 1st of April the judgment-debtor applied to have the money raised, not by sale, but by his property being taken under the management of the Collector under s. 326 of the Code. Thereupon the sale was postponed until the 6th of May, and the Court published a new proclamation on the 5th of April in the Court-house. The Court at the same time referred to the Collector asking him to act under s. 326; but as the Collector did not reply, the Court itself fixed the 3rd of June for the sale.

The cases cited do not support the contention that this should be treated as an adjourned sale, requiring no fresh notification. The first case—*Roy Gowree Nath Sahoy* v. *Shah Fukeer Chand* (1)—was a mere adjournment *de die in diem*, which constantly must happen when the list of properties for sale is more than can be sold in one day. In the other cases fresh notice had been expressly waived. In the present instance the adjournment of the 8th May was not at the request of the debtor, though it may have been in his interest, and there was no waiver; and therefore a strict compliance with the law was requisite.

Lastly, on the question of substantial injury, we think that the debtor made out a sufficient case for the cancelment of the sale. He made an application which the Court could have complied with under s. 284. The fact that an eight-pie share had been sold for Rs. 5,000 was good evidence that the application was reasonable, and therefore the Court was bound to exercise its discretion. "Discretion, when applied to a Court of law, means

(1) 18 W. R., 347.

1879.

HARBUNS SAHAI v. BHAIRO PERSHAD SINGH.

discretion guided by law. It must be governed by rule and not by humour. It must not be arbitrary, vague, and fanciful, but legal and regular"—Lord Mansfield in *Wilkes's case* (1). The result of the refusal to exercise its discretion has been, as far as we can judge, to sacrifice the property of the debtor, one-half of which might have been saved altogether, whereas it was all sold at an inadequate price. The sale of the entire two-annas share was irregular from want of due notice, and was moreover one which the Court in the exercise of a sound discretion ought not to have held at all.

We would therefore dismiss the appeal with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

NANACK CHAND AND ANOTHER (PLAINTIFFS) *v.* TELUCKDYE KOER AND OTHERS (DEFENDANTS).* 1879 *April* 8.

Rival Mortgage Decree-holders—Priority of Mortgage—Priority of Possession.

In a suit for possession between two purchasers, who had bought the same property at two several auction-sales under decrees obtained on two several mortgage-bonds,—*held*, that no question could arise as to which mortgage was prior in point of time, but that the real question to be decided was, which of the parties could prove a prior title to possession.

ONE Jhem Narain (defendant No. 2), on the 2nd July 1868, executed two separate mortgage-bonds, giving as security the same property in each, the one being in favor of the plaintiff No. 1 and defendant No. 3, the other in favor of one Luchumun Lall.

The plaintiff No. 1 and the defendant No. 3 obtained a decree on their mortgage-bond on the 29th March 1869, for the sale of the mortgaged property. On their applying for the

* Appeal from Appellate Decree, No. 638 of 1878, against the decree of Baboo Roy Matadin Bahadoor, Subordinate Judge of Gya, dated the 9th January 1878, reversing the decree of Syed Golam Sharuf, Second Sudder Munsif of that District, dated the 21st August 1877.

(1) 4 Burrough's Rep., 2539.