

PRIVY COUNCIL.

ARUNACHELLAM (OBJECTOR),

and

ARUNACHELLAM AND ANOTHER (BY THEIR GUARDIANS)

PETITIONERS.*

P. C.
J. C.*
1888.
June 27.

[On appeal from the High Court at Madras.]

Civil Procedure, 1882, s. 311.—*Alleged irregularity attending sale in execution—
Failure to prove substantial injury resulting.*

A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, viz., insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more.

No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged mis-description :

Held, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Olpherts and Macnaghten v. Mahabir Pershad Singh* (1) referred to and followed.

APPEAL from two orders (16th October 1883) of the High Court reversing two orders (9th August 1882 and 26th September 1882) of the Subordinate Court of the Madura District.

The question now raised was whether there had been such an irregularity in a sale in execution of a money decree involving substantial injury to the judgment-debtor that it had been rightly set aside under s. 311 of the Code of Civil Procedure. The appellant was the purchaser at the sale, and the respondents were the judgment-debtors, whose property had been sold in execution, the sale having been afterwards cancelled in pursuance of the orders of the High Court.

The property sold was an estate lying within the Sivaganga zamindari, consisting of fifteen villages, of which the first, Kattanur, gave its name to the whole estate.

* *Present* : LORD MACNAGHTEN, SIR BARNES PEACOCK, and SIR RICHARD COUCH.
(1) L.R., 10 I.A., 25; reported as *Macnaghten and another v. Mahabir Pershad Singh* in I.L.R., 9 Cal., 656.

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The family to which the respondents belonged owned one-half of Kattanur in possession, and in 1879 obtained the remaining half in mortgage to secure the sums of Rs. 2,582 and Rs. 14,000.

The decree as to which the question of its due execution had arisen was obtained on 6th January 1880 by Tolaja Rama Rao in a suit of 1879 against the present respondents besides others, and on the 30th January 1882, an application was made by Tolaja for execution of his decree by sale of the village Kattanur in satisfaction of a sum of Rs. 5,083 then due upon that decree. An order for attachment of the property was made on the 7th March, the usual proclamation of approaching sale was made on the 11th March, and on the 25th May an order for sale was made with the customary notification, the sale to take place on the 22nd July. The notification stated that "the right herein below mentioned of the defendants in the said property will be sold." Then followed the boundaries and other description of the village of Kattanur and its hamlets about to be sold. No complaint was then made to the Court that this description was insufficient. On the 27th July, several days after the village had been put up for sale, and the day before it was actually sold, these respondents presented an application praying for a postponement of the sale on the grounds that steps were being taken to set aside the decree and that the Court already held funds sufficient to satisfy the judgment-creditor. The Court refused to postpone the sale, unless the debtors paid into Court the balance of the judgment-creditor's claim, and on the next day these respondents filed another petition suggesting another mode of meeting the creditor's demand. In neither of these petitions was any complaint made against the mode in which the property was described or put up for sale.

Having been put up on the 22nd July and four following days, the property was sold on the 28th to the present appellant for Rs. 20,500. And on the 29th, the judgment-debtor petitioned the Court to set aside the decree on account of irregularities causing loss. It was complained that the decree might have been satisfied by selling one hamlet only, named Pottapicheri, which it was said would have fetched about Rs. 10,000. The petition proceeded: "It is the object of law that the balance of the decree debt should be collected by selling Kattanur and its hamlets one after another. In direct contravention to it, the village of

Kattanur, &c., and its hamlets were all sold together in one lot, inclusive of the said mortgage right and the proprietary right, and this fact is brought to the notice of the Court as irregular. The mirrors, who are the owners of the said village, have thereby sustained a heavy loss to the extent of Rs. 40,000." This petition was presented on behalf of these respondents as plaintiffs in Original Suit No. 28 of 1882.

On the 7th August an identical petition was put in on behalf of the respondents as defendants in suit No. 44 of 1879. Both petitions were disposed of on the 9th August by an order which was one of the two orders appealed to the High Court. The order was as follows: "The village of Kattanur with its hamlets was attached as one lot and sold as such. It is now alleged that such a sale was irregular, and that it has caused substantial injury to the defendants, and that hamlet after hamlet ought to have been sold. If anybody had suggested it at the time of the sale, it could have been done; and Sabapathi Chetti, who by so many petitions protested against the sale did nothing of the kind. There is no irregularity, I think, in selling a property in the manner it was attached. Here the property was attached in one lot and was sold as such." The petition was accordingly rejected.

On the 25th September two more petitions were presented to the Subordinate Court that the sale should be set aside. On the 29th, the order was made, which was the second of the two orders appealed to the High Court, that the sale would be confirmed unless an order to the contrary should be made by the High Court within an interval allowed. That time having elapsed, and no order to the contrary having been received from the High Court, the sale was confirmed on 30th September. The specification of the property in the sale certificate was in the same terms as in the notification. Meantime, on the 9th September, an appeal had been preferred by the judgment-debtors to the High Court against the order of the 9th August on the ground of irregularity on the part of the lower Court in selling the whole estate when the sale of a part would have been sufficient, "and in not appropriating the moneys already in Court to the credit of the decree."

• By the order of the Chief Justice, dated 19th September, the appeal was admitted on the ground of the "grievous and irreparable loss alleged to have accrued to the appellant," the Chief Justice observing that "he saw no irregularity."

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On the 27th September 1882, an application to the High Court to direct the lower Court to postpone confirmation of the sale till the then pending appeal from the order of the 9th August should have been disposed of was rejected. Consequently the sale was confirmed by the lower Court on the 30th September, and a certificate followed as above stated.

On the 7th November 1882, the present appellant was on his own application made respondent in the two appeals then pending in the High Court. In these, the order of remand, of which the effect is stated in their Lordships' judgment, was made on 30th April 1883, and was followed by the judgment of the High Court, dated 16th October 1883. This order directed that the orders of the Subordinate Court confirming the sale and refusing to cancel it should be set aside, adding that, as the appellants to the High Court, who were the judgment-debtors, had not asked, as they might have done at the right time for the amendment of the proclamation of sale, they should pay the costs in both Courts.

On this appeal Mr. *J. D. Mayne* for the appellant argued that the orders of the Subordinate Court were correct and should not have been cancelled. The High Court had set aside the sale upon a ground of objection which was for the first time suggested in the Appellate Court. There had been no insufficiency in the description nor any mis-description of the property which could have prejudiced the purchaser. Nor had any proof been given that the judgment-debtors had sustained substantial injury by reason of any irregularity in the publishing or conducting the sale. So that the mis-description, if any, had taken place was not a material irregularity within the meaning of s. 311 of the Code of Civil Procedure. He referred to *Opherts and Macnaghten v. Mahabir Pershad Singh*(1).

For the respondents, Mr. *R. V. Dyne* and Mr. *H. Cowell* argued that there had been on the part of the executing Court such a failure to comply with the provisions of the Code of Civil Procedure and of s. 287 in particular as to vitiate the sale in execution and that it had been rightly set aside.

Mr. *J. D. Mayne* was not called on to reply.

Their Lordships' judgment was delivered by

Sir RICHARD COUCH.—This is an appeal against two orders

(1) L.R., 10 I.A., 25; I.L.R., 9 Cal., 656, *nom. Macnaghten and another v. Mahabir Pershad*.

and one judgment of the High Court of Madras which reversed the proceedings of the Subordinate Court of Madura in execution of a decree in a suit which had been brought in that Court. The respondents were defendants in the suit, and in execution of the decree which had been obtained against them, a village called Kattanur was sold by the order of the Court and was purchased by the appellant. The High Court, by their judgment, which is now appealed against, set aside the sale, and the grounds upon which they did so are stated by them to be that: "It is clear that the description of the properties advertised for sale was most imperfect. The judgment-debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property, and there was nothing to indicate the possession by the judgment-debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case."

"It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs. 40,000 together with mortgage claim for Rs. 40,000 for Rs. 20,000." Then they say they must set aside the order confirming the sale and also another order made upon another petition by which an application to set aside the sale was refused.

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It is true, as stated by the High Court, that the judgment-debtors had proprietary rights in a part of the property and were only mortgagees of the other part. The decree was obtained in January 1880, and an application was made to the Court for the execution of it, and attachment was made of the village, which contained 15 hamlets; there was the usual proclamation of the sale and notification that it was to be on the 22nd of July 1882 and the usual warrant, and apparently the judgment-debtors knew perfectly well that the whole of the village was going to be sold. They state in an application which they made that "the Kattanur village of these plaintiffs has been attached on account of the said debt, and the sale is fixed by this Court for the 22nd instant." Notwithstanding this, the first complaint which was made by them was on the 29th July 1882, and in their petition they complained that the village had several hamlets attached to it, and if one of them alone had been sold it would have been sufficient. They also complained that one moiety of the villages

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belonged to them by right of mortgage, and the other they had their property in, raising for the first time the objection upon which the High Court has founded its judgment. The sale was completed, and they then petitioned the High Court on the 9th September 1882. In this petition they state that the villages ought to have been sold each by itself and not all in one lot, and that the villages being separately numbered for the attachment there was no necessity for a representation that they should be separately sold.

Upon that petition an order appears to have been made by the Chief Justice in which he says: "I see no irregularity. The judgment-debtor might have applied that the sale should be made in lots." There is a distinct opinion of the Chief Justice that the judgment-debtors might, if they had considered the sale of the villages in one lot would have been unfair, have made an application to have them sold in lots, which they did not do. However, notwithstanding the Chief Justice's opinion that there was not any irregularity, he admitted the appeal, and the High Court, when the appeal came before them, made this order: "We require the Court below to ascertain and report what is the interest enjoyed by the family in the villages; whether it intended to sell the mortgage and other rights; whether the appellants in that Court made any complaint of the insufficiency of description in the proclamation of sale; and whether any injury has occurred to the appellants from any such insufficiency." It would appear from what the High Court then directed to be ascertained and reported that they were satisfied with the opinion which had been expressed by the Chief Justice that there was no ground for saying that the sale ought to be set aside because it had not been sold in lots.

A report was made by the Subordinate Judge, and it is this: "There are four points sent down for report: (i) The interest enjoyed by the family in the villages is as stated in the judgment of their Lordships; (ii) the sale proclamation says that the right, title, and interest will be sold, and this must include the mortgage and other rights, but they were not specified; (iii) no complaint was made of the insufficiency of description in the proclamation of sale. Two petitions are relied on by the petitioners, one dated the 29th July 1882 and the other dated the 7th August 1882. The first petition is said to be before the High

Court, The second petition makes no such complaint; (iv) as I find that no such complaint was made, I thought that any evidence as to any injury resulting from such insufficiency was unnecessary.”

Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating this sale—for that appeared to be the contention of the counsel for the respondents—the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, mis-description. It appears to come within what was laid down by this Board in the case in the 10th Indian Appeals, page 25(1), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any mis-description of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

* There is another objection to this decree of the High Court. The law provides, by s. 311 of Act XIV of 1882, that an objection may be taken by the judgment-debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity, did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the High Court in

(1) *Olpherts and Macnaghten v. Mahabir Pershad Singh.*

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doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them and they give judgment, they assume that there was a substantial injury and that the property, in consequence of this mis-description, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and; therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court, which were appealed against, affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant—*Lawford, Waterhouse, & Lawford*,
Solicitors for the respondents—*Rowcliffes, Rawle & Co.*

PRIVY COUNCIL.

P.C. & J.C.*
1888.
May 3 & 4.
June 23.

APPASAMI ODAYAR AND OTHERS (PLAINTIFFS),

and

SUBRAMANYA ODAYAR AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Madras.]

*Limitation Act, 1859, s. 1, cl. 13—Partition suit for share of joint family estate—
Failure to prove participation in the family coparcenary within the period.*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiffs' father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

* *Present* : Lord MACNAGHTEN, Lord HOBHOUSE, and Sir R. COUCH.