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this view. It appears to us, that the point arose directly in that case as it also arises directly here.

The decision of the lower Courts is, therefore, correct. The appeal is dismissed with costs.

*Appeal dismissed.*

*Before Mr. Justice Prinsep and Mr. Justice Field.*

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July 28.

BONOMALI MOZUMDAR (JUDGMENT-DEBTOR) v. WOOMESH  
CHUNDER BUNDOPADHYA (DECREE-HOLDER).\*

*Sale in Execution of Decree—Irregularity—Material Injury—Presumption—Civil Procedure Code (Act X of 1877), s. 311—Witnesses, Laches in summoning.*

On an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale, it appeared that there had been a material irregularity in publishing the sale; but no witnesses were called to prove that substantial injury had been caused thereby. It also appeared that seventeen days after the applicant had applied for proclamations to be issued to his witnesses, he deposited the requisite fees; and that, subsequently, there was a delay of seven days in the office in issuing such proclamations, which were ultimately issued only three days prior to the day fixed for the hearing. On the applicant alleging that, in consequence of such delay, he had not been allowed a fair opportunity to produce his witnesses,—

*Held*, that the Court cannot presume that substantial injury has been caused from the mere fact of there having been a material irregularity in publishing a sale; but when both a material irregularity and substantial injury have been proved, the Court may reasonably presume that the substantial injury is due to such irregularity.

*Held* also, that the applicant having been guilty of laches himself, could not be allowed to set up the delay in the office, as a ground for the non-production of his witnesses.

*Gopee Nath Dobay v. Roy Luchmeeput Singh* (1) considered.

THIS was an appeal against an order rejecting an application under s. 311 of the Civil Procedure Code (Act X of 1877) to set aside a sale.

\* Appeal from Original Order, No. 142 of 1881, against the order of Baboo Jugatdurlubh Mozumdar, Officiating Subordinate Judge of Furreedpore, dated the 5th February 1881.

The lower Court found that there had been a material irregularity in publishing the sale, and the principal allegation of the appellant was, that he had not been allowed an opportunity of producing his witnesses to show that he had sustained substantial injury by reason of such irregularity. He also alleged, that the sale had never been published at all; but the lower Court held, that if this was so, it could not be set aside under the provisions of s. 311, that section applying only to cases in which there had been an irregularity in publishing or conducting the sale, and in addition that there was no other section under which a sale could be summarily set aside.

The application having been rejected, the judgment-debtor now appealed.

*Baboo Grija Sunker Mozumdar* and *Baboo Bycant Nath Das* for the appellant.

*Baboo Rashbehary Ghose*, *Baboo Busunt Coomar Bose*, and *Baboo Radlom Kinkar Roy* for the respondent.

The judgments of the Court were as follows :—

FIELD, J.—The first point, which it will be convenient to dispose of in this appeal, is the allegation that the appellant was not afforded fair opportunity of producing his witnesses. Now, the facts as to this objection are these. He applied for and obtained an order for the issue of a proclamation on these witnesses on the 8th January. He did not put in the requisite court-fees for the issue of these proclamations until the 25th January,—that is, seventeen days afterwards, although he was aware on the 8th January that the 5th February had been fixed for the hearing. Now, it appears to us, having regard to the ordinary despatch with which business is done in the mofussil, that he might have been well aware when he paid in the court-fees on the 25th January, after seventeen days, that it was improbable that these proclamations could have been served in such time as to allow of the witnesses being in attendance on the 5th February. As a matter of fact, the proclamations did not issue till the 2nd February, and although this delay of seven days in the office is a delay which would have

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given the appellant some ground of complaint if he himself had acted with reasonable expedition, yet, having regard to the fact that he himself delayed seventeen days in the first instance, we think he cannot be allowed to set up the laches of the office, so as to succeed in this appeal.

The next question is concerned with substantial injury. The provisions of s. 311 of the Code are:—"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." An argument has been addressed to us to the effect, that the fact of irregularity being proved, the Court ought to presume substantial injury; and in support of this argument the case of *Gopee Nath Dobay v. Roy Luchmeeput Singh* (1) has been quoted. It appears to us, that the judgment of the learned Judges in that case does not support the contention sought to be based thereupon. As we understand that judgment, it merely comes to this, that if the fact of irregularity is proved, and also the fact of substantial injury, then the Court may reasonably presume that the substantial injury was due to the irregularity, or, as the words of the section show, was caused "by reason of such irregularity." We think that this is a reasonable presumption in most cases; and explained in this way, the judgment is one which has our concurrence. But it certainly does not support the argument of the learned pleader, that from the fact of irregularity a Court ought to presume that there was substantial injury,—a presumption which might be contradicted in many cases by the fact of the property having been sold for its fair value.

It is then contended, that in this case there is not an irregularity, but an entire absence of any notification, and that this being so, the provisions of s. 311 are not applicable. If the provisions of this section do not apply, we are not aware of any section of the Code under which this application could have been made; but it appears to us that the facts in this case, if true, would have amounted to an irregularity within the meaning of that section. The appeal is dismissed with costs.

(1) 1 C. L. R., 349.

PRINSEP, J.—I am of the same opinion. I would only add that I have always considered the judgment in the case of *Gopee Nath Dobay v. Roy Luchmeeput Singh* (1) as bearing the interpretation put upon it by my learned colleague, and in that view, I have followed that judgment in other cases decided by me while sitting in other Division Benches of this Court.

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*Appeal dismissed.*

*Before Mr. Justice Prinsep and Mr. Justice Field.*

KRISTOMOHINY DOSSEE (DECREE-HOLDER) v. BAMA CHURN NAG  
CHOWDRY AND OTHERS (JUDGMENT-DEBTORS).\*

1881  
August 29.

*Execution—Mortgage-Decree—Stay of Sale pending Administration-Suit—  
Appealable Order—Civil Procedure Code (Act X of 1877), s. 244, cl. (c).*

In execution of a decree on a mortgage-bond executed by the father of the judgment-debtors, since deceased, which decree directed that the mortgage lien should be enforced—*first*, by sale of the property specifically mortgaged; and *secondly*, if the debt remained unsatisfied, by the sale of the other property in the possession of the judgment-debtors, the judgment-creditor proceeded to have the mortgaged property sold. After the issue of the sale-notification, and three days prior to the date fixed for the sale, one of the judgment-debtors applied to have the sale stayed, on the ground that an administration-suit was pending with respect to the property of his father, the mortgagor, and also asked that a receiver might be appointed and arrangements made for the purpose of paying off the mortgage-debt and saving the property from being sold. On this application the Court passed an order staying the sale.

*Held*, that such order was appealable, being a question arising between the parties to the suit in which the decree was passed and relating to the execution of that decree, and as such coming within the provision of cl. (c), s. 244, Act X of 1877 (Civil Procedure Code).

*Held* also, that the Court was wrong in passing such order, inasmuch as there were no reasonable grounds why a secured creditor should be debarred from enforcing his security pending the administration-suit.

*Gumbhirmal and Bana Chand v. Chejmal Jodhmal* (2) distinguished.

\* Appeal from Original Order, No. 180 of 1881, against the order of Baboo Krishna Mohun Mookerjee, Second Subordinate Judge of the 24-Parganas, dated the 2nd May 1881.

(1) 1 C. L. R., 349.

(2) 11 Bom. H. C. R., 151.