

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Field.

THAKOOR MAHATAB DEO AND OTHERS (JUDGMENT-DEBTORS) v.
LEELANUND SINGH AND OTHERS (DECREE-HOLDERS).*

1881
July 7.

*Execution—Irregularity in Publishing and Conducting a Sale—Waiver of
Irregularity by the Judgment-Debtor.*

Previous to the date fixed for the sale of certain property in execution of a decree, the judgment-debtors presented a petition, praying for a month's further time to be allowed them in order that they might complete the arrangements they were making for the purpose of paying off the debt, and stating that the decree-holders had attached and advertised the property for sale. That petition being refused, the sale took place; and subsequently the judgment-debtors came in and objected to the sale, and asked to have it set aside, on the ground that there had been material irregularity in the publication of the attachment and sale-proclamation, and that, consequently, they had suffered substantial injury. The Subordinate Judge refused to hear evidence on this point, holding that the petition was an admission that the proceedings were in order.

Held, that the petition presented prior to the sale did not amount to an admission by the judgment-debtors that the publication and proclamation of the sale had been duly made; and that, consequently, the Court was bound to hear the evidence tendered by the judgment-debtors on that point, and to find whether there had been such irregularities in publishing and conducting the sale as to occasion substantial injury to the judgment-debtors.

Girdhari Singh v. Hurdeo Narain Singh (1) distinguished.

THIS was an appeal from an order of the Subordinate Judge of Bhagalpore, refusing to set aside the sale of certain property belonging to the appellants, the judgment-debtors, which had been purchased by the decree-holders. It appeared that the sale had been fixed for the 6th October 1879, and that, on the 27th September, the judgment-debtors had presented a petition, setting out that the decree-holders had attached and advertised for sale the property in question, but that they were making arrangements to pay off the debt, and desired a month's

* Appeal from Order, No. 55 of 1881, against the order of Hafez Abdul Karim, Subordinate Judge of Bhagalpore, dated the 24th January 1880.

1881
 THAKOOR
 MAHATAB
 DEO
 v.
 LEELANUND
 SINGH.

time to enable them to complete such arrangements. That petition was refused, and the sale was proceeded with on the 6th October 1879, the decree-holders becoming the purchasers. The judgment-debtors then applied to have the sale set aside, on the ground that there had been a material irregularity in the publication of the attachment and sale-proclamation on the property, and that the boundaries of the mouza sold had not been stated; and that, consequently, they had suffered a substantial injury by the property having been sold much under its value. The Subordinate Judge held, that the petition of the 27th September amounted to an admission by the judgment-debtors that the publication of the attachment and sale-proclamation had been made in due order, and that there had been no such irregularity in specifying the boundaries as alleged, as they had been sufficiently stated; and consequently, having refused to hear the petitioners' evidence with respect to the irregularity in the publication of the attachment and sale-proclamation on the property, dismissed the petition.

The judgment-debtors, accordingly, now appealed to the High Court against that order.

Baboo *Kasi Kant Sen* for the appellants.

Mr. *R. E. Twidale* for the respondents.

The judgments of the Court (PRINSEP and FIELD, JJ.) were as follows:—

PRINSEP, J.—This is an appeal against an order of the Subordinate Judge of Bhagalpore refusing to set aside a sale. The Subordinate Judge proceeded mainly upon a petition presented by the judgment-debtors on the 27th September 1879, asking for a postponement of the sale fixed for the 6th October following, on the ground that they had not been able to close their negotiations to raise money to pay off the debt. The Subordinate Judge considered that it was clear from that petition that the judgment-debtors had, before the sale, acknowledged and admitted the publication of the attachment and sale-proclamation.

We find nothing in that petition in any degree amounting to such an admission, or to a waiver on the part of the judgment-debtors of any objection to any irregularity. In fact, had the application been granted, it would have been necessary to issue a fresh proclamation, unless the judgment-debtors had consented by some subsequent act of theirs to waive such formality.

1881
 THEAKOOR
 MAHATAB
 DEO
 v.
 LEEELANUND
 SINGH.

The other objection taken is, that the Subordinate Judge did not examine the witnesses for the judgment-debtors, who were present at the hearing of the case. It appears from the record at the end of the examination of the first witness, that there are ample grounds for this contention. The Subordinate Judge having erroneously proceeded upon the petition, which had been made by the judgment-debtors, and having in consequence refused to examine the witnesses produced by the judgment-debtors to prove material irregularity in publishing or conducting the sale, which resulted in substantial injury to them, it becomes necessary to return the case to the Subordinate Judge, in order that he may examine all the witnesses tendered by the parties, and then return the case to this Court with a distinct finding as to whether there has been a material irregularity in publishing or conducting the sale, which has resulted in substantial injury to the judgment-debtors.

FIELD, J.—I am of the same opinion. I think that this case is distinguishable from the case of *Girdhari Singh v. Hurdeo Narain Singh* (1), decided by their Lordships of the Privy Council. In that case, the judgment-debtor applied for a postponement of the sale, and his petition contained the following passage: "Under such circumstances, it is prayed that a postponement of one month be granted, *the attachment and the notification of sale being maintained.*" Now the words italicized were held by the Privy Council to amount to an admission, that there was no such mistake or irregularity as would be likely to mislead. There are no such words in the present case, and further it is to be observed, that the petition made by the judgment-debtors (appellants) was disallowed by the Court.

Case remanded.

(1) L. R., 3 I. A., 280.