Before Mr. Justice Morris and Mr. Justice Prinsep.

1881 *May* 25.

KALYTARA CHOWDHRAIN (DECREE-HOLDER) *v.* RAMCOOMAR GOOPTA (JUDGMENT-DEBTOR).*

Execution of Decree — Sale in Execution — Material Irregularity — Civil Procedure Code (Act X of 1877), ss. 274, 289, 311.

Under ss. 289 and 274 of the Civil Procedure Code, it is necessary that a copy of the sale-proclamation should be affixed to some conspicuous place on the property attached; and the omission to do so is a material irregularity within the meaning of s. 311 of the Code of Civil Procedure.

If it is proved that the price obtained for property sold at an execution-sale is greatly inadequate, and if it be also proved that there has been a material irregularity in publishing or conducting the sale, the Court will presume that the irregularity was the cause of the inadequacy of price, until proof is given to the contrary.

Gopee Nath Dobey v. *Roy Luchmeeput Singh* (1) approved.

THIS was an appeal from an order of the Subordinate Judge of Tippera, dated the 28th of February 1880, setting aside a sale in execution of a decree. The judgment-creditor, who was also the purchaser at the sale, appealed to the High Court, and the appeal was decided on the 21st of August 1880. In their judgment the learned Judges (MORRIS and PRINSEP, JJ.) say:—"So far as the evidence goes, we think it clear that the price realized was very much below the proper value of the property sold. It is on record that, in addition to the decree-holder, who purchased, there were only two bidders; and this paucity of bidders, no doubt, accounts for this unfortunate result. Substantial injury to the debtor is, therefore, established; but the law (s. 311) also requires that such substantial injury must have been the result of some material irregularity proved to have taken place in publishing or conducting the sale. In the present case the irregularity complained of is stated to have been the omission to publish the sale-proclamation on the property attached by affixing it on some conspicuous place thereon." The learned Judges went on to say:—"Reading

Appeal from order No. 124 of 1880, against the order of Baboo Uma Churn Kastogiri, Subordinate Judge of Tippera, dated the 28th February 1880.

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s. 289 of the Civil Procedure Code with s. 274, we are of opinion that the sale-proclamation cannot properly be made, unless it be affixed on some conspicuous part of the property attached. Here the evidence shows that the sale-proclamation, though made by beat of drum near the debtor's cutchery, yet was not affixed on the cutchery itself, but only on a *burh* tree in Rampore Hat, the exact position of which, with reference to the attached property, is doubtful. As to this, it is contended before us, that it is not shown that this omission or irregularity was the direct cause of the small price bid at the sale. If strict proof were required of this, a sale would rarely, if ever, be set aside, although the gravest irregularity might have been committed, and although a grossly inadequate price might have been obtained. The best evidence on the point would, no doubt, be that of a person stating that he was prepared to attend and bid for the property; but that, although he was cognizant of the attachment, he was not informed of the sale, because no proclamation had been fixed up on any portion of the property. But it would be impossible for a Court always to insist on such strict proof, because the debtor would be nearly always unable to obtain it even if such evidence did exist. Whenever, therefore, there is any great inadequacy in the price obtained, and there is also proof that there has been some material irregularity in the sale-proceedings, a Court is always inclined to connect one with the other, and to presume that the substantial injury has been the result of the irregularity. Such is the principle on which the case of *Goopee Nath Dobey* v. *Roy Luchmeeput Singh* (1) was decided. Some cases have been brought to our notice, in which the Court required strict proof rather than presumption, but each case must be decided on the particular facts established. In the present case we think that it has not been shown that it was affixed in the manner required by law on any conspicuous spot within the attached property, because it has been left in doubt whether the *burh* tree in Rampore Hat is or is not within that property. If Rampore Hat is not within the attached property, then, in our opinion, there has been a material irregularity in the proclamation of sale, which may reason-

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ably be presumed to have caused the extreme inadequacy of price, which constitutes the substantial injury sustained by the debtor. The case will, therefore, be sent to the Subordinate Judge in order that the parties may have an opportunity of submitting evidence before him on this issue. 'Is the *burh* tree in Rampore Hat within or without the attached property?' After taking such evidence as the parties may produce, the Subordinate Judge will return the record with his findings thereon for the opinion of this Court." The Subordinate Judge, on the 5th of March 1881, found that the *burh* tree was not proved to be within the attached property, and returned this finding to the High Court. The appeal then came on for final disposal.

Mr. *H. Bell*, Mr. *W. M. Dass*, and Baboo *Rash Behary Ghose* for the appellant.

Baboo *Ishur Chunder Chuckerbutty* and Baboo *Loll Mohun Doss* for the respondent.

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

PRINSEP, J.—Having found in concurrence with the lower Court that a copy of the proclamation of sale was not affixed to some conspicuous place within the property attached and to be sold, and that the very inadequate price realized may be fairly attributed to this omission, it becomes necessary to consider the point taken by the learned Counsel for the appellant that this was a formality not required by the law then in force. The proceedings were taken on the 30th July 1879, and were therefore to be regulated in accordance with the Code of Civil Procedure as amended by Act XII of 1879. Section 289, as it now stands amended by Act XII, is to the following effect:—

"The proclamation shall be made in manner prescribed by s. 274 on the spot where the property is attached, and a copy thereof shall be fixed up in the Court-house; and in the case of land paying revenue to Government, also in the Collector's office."

It is contended by Mr. H. Bell, that the manner in which the proclamation is to be made on the spot refers merely to the

beating by drum, and that the provision made for the affixing of a copy of the sale-proclamation in the Civil Court and in special cases also in the Collector's Court, and the omission of any similar provision regarding a copy on the spot, indicates the intention of the Legislature not to require this formality. I am unable to accept this view of the law. A consideration of s. 289 as it originally stood will clearly show the reason for the addition made to it by the Amending Act.

"The proclamation shall be made in manner prescribed by s. 274 on the spot where the property is attached."

This is how the law was first expressed, and applying s. 274 to make a sale-proclamation on the spot where the property was attached, it was necessary to use the words of s. 274, that it should be "proclaimed at some place on or adjacent to such property (*i. e.*, the property to be sold) by beat of drum or other customary mode, and a copy should be fixed up in a conspicuous part of the property."

The law was altogether silent regarding the affixing of a copy of the sale-proclamation elsewhere. This omission was discovered, and accordingly an addition was made to s. 289, by enacting "and a copy thereof shall be fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector's office."

This in no way affected the previous part of s. 289, which still remained in force. I cannot, moreover, suppose, that the Legislature can have intended to enact that the fixing up of a copy of the sale-proclamation on a conspicuous part of the property should be discontinued without some express provision to that effect, as it is one of the most important formalities in connection with the due publication of a proclamation, and is always necessary in the making of proclamation under other laws for other purposes, to supplement the proclamation by word of mouth after beating of the drum.

We therefore set aside the sale, and dismiss this appeal with costs.

MORRIS, J.—Assuming that Act X of 1877, as amended by Act XII of 1879, regulates the procedure to be adopted in this case, I think that the construction put on s. 289 by my

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learned colleague is the right construction. It seems to me that the Legislature never intended to discard one of the most important elements in the publication of a sale-proclamation, —*viz.*, the affixing a copy of the order of proclamation of sale on a conspicuous part of the property to be sold. Section 289, as originally drafted, by its terms, limited the making of the proclamation to "the spot where the property is attached," so it was to correct this apparent limitation that the Amending Act extended the mode of making the proclamation by adding the words "and a copy thereof shall be fixed up in the Court-house, and in the case of land paying revenue to Government, also in the Collector's office." These additional words, or at least the substance of them, is to be found in s. 274; and it is evident that, by supplying them to s. 289, the Legislature simply intended to prescribe the adoption of precisely the same mode of making the proclamation of sale as it had previously prescribed in s. 274, for making attachment of immoveable property.

Appeal dismissed.

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

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REASUT HOSSEIN AND ANOTHER (PLAINTIFFS) *v.* CHORWAR SINGH AND OTHERS (DEFENDANTS).*

Covenant—Forfeiture—Breach of Covenant—Joinder of Plaintiff—Co-Sharers—Mokurari.

Where it is optional with several joint lessors to avail themselves of a condition of re-entry upon breach of certain covenants, one or more of the lessors cannot insist upon a forfeiture without the consent of the others.

Held, therefore, in a suit which was brought for the cancellation of a mokurari lease, and the recovery of *seer* possession, on the ground of forfeiture for breach of covenant, that all the co-sharers should join as plaintiffs; and that as some of the co-sharers, who were made defendants, appeared and opposed the cancellation of the lease, the suit must be dismissed.

THIS was a suit brought by the plaintiffs for the cancellation of a mokurari lease, which had been granted by one Mussa-

* Appeal from Original Decree, No. 298 of 1879, against the decree of Baboo Poresh Nath Banerjee, Subordinate Judge of Patna, dated the 30th June 1879.