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As to the service of summons in the present case, one defendant, Joseph Polycarp Lackersteen, has not entered an appearance in the suit, nor has he been served with the writ of summons; he is out of the jurisdiction and cannot be found; others have been served, but have not appeared. I ask on the authority of *Hancox v. Spittle* (1) for an order that the Receiver may execute the conveyance for all parties whether under disability or not.

Mr. Agnew, Mr. White, Mr. Allen, and Mr. Sale appeared for some of the defendants, and consented to the order.

WILSON, J.—I cannot make an order as regards the defendant Joseph Polycarp, as he has not been served or entered appearance, but the order may run that the Receiver do convey on behalf of all parties other than Joseph Polycarp.

Attorney for the applicants: *C. C. Robinson.*

Attorneys for other parties: *S. Dignam, J. Camell, A. Watkins, G. C. Farr, and J. F. Watkins.*

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Prinsep.

MOHUNT MEGH LALL POOREE (JUDGMENT-DEBTOR) v. SHIB
PERSHAD MADI AND OTHERS (DECREE-HOLDERS).*

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March 18.

Execution—Irregularities in Proclamation of Sale—Evidence of such Irregularities—Nazir's Report—Civil Procedure Code (Act X of 1877), ss. 274, 287, 289, 290, 291, and 295—Sale to satisfy Judgment-Creditor who has not attached.

The proclamation of sale required by s. 274 of the Civil Procedure Code, to be made at some place adjacent to the property to be sold, and the fixing up of a copy of the order in a conspicuous part of the property, are acts which must precede the posting of the notices in the Court-house as required by s. 290.

* Appeal from Order, No. 275 of 1880, against the order of Major W. L. Samuells, Officiating Deputy Commissioner of Hazareebagh, dated the 4th of August 1880.

(1) 3 Sm. and Giff, 478.

Where the sale-proceeds of a portion of several parcels of property are sufficient to satisfy the decree of a judgment-creditor who has attached the property, another judgment-creditor, although he has not attached the property, is still entitled to have the remainder of the property sold to satisfy his decree under the provisions of s. 295 of the Civil Procedure Code.

Three mouzas were attached in execution of decrees obtained by *A* and *B*. Prior to the sale, *C*, who had also obtained a decree against the owner of the land, applied for leave to execute his decree, in order that he might participate in the sale-proceeds under s. 295 of the Civil Procedure Code. Upon the day fixed for the sale, the Deputy Commissioner was unable, through illness, to attend; and he postponed the sale for three days. Two of the mouzas were sold, and realized more than enough to satisfy the decrees of *A* and *B*. The third was then sold in satisfaction of *C*'s decree. Upon an application by the judgment-debtor to set aside the sale on the ground of irregularity, it appeared, that notice of the sale had been posted in the Court-house more than thirty days before the date fixed for the sale, but had only been published on the properties to be sold five days before that date; that notice of the existence of a mortgage on the properties, but no further particulars, was given, and the mortgagee was allowed to purchase; and that the Deputy Commissioner had accepted the reports of the Nazir and Court-peon as to the proclamation of sale, and had refused to allow the judgment-debtor to give evidence of its insufficiency.

Held, that the proclamation of sale on the property having taken place only five days prior to the date of sale, and the particulars of the mortgage not having been given, there had been such material irregularities in the publication as to entitle the judgment-debtor to give evidence of them and the other allegations made by him, in order to show that he had suffered material injury by reason of such irregularities.

Held also, that the Deputy Commissioner was not entitled to proceed upon the reports of the Nazir and Court-peon, but was bound to hear the evidence tendered by the judgment-debtor, though he was justified, under s. 291, in postponing the sale as he had done.

Okhoy Chunder Dutt v. Erskine and Co. (1), *Sreenath Thakoor v. Watson and Co.* (2), and *Shah Koondun Lall v. Noor Ali* (3) followed.

Held further, that the third judgment-creditor, who had not attached the property, was still entitled to have the sale proceeded with and his decree satisfied under the provisions of s. 295.

THIS was an application on the part of the judgment-debtor, in three execution cases, to set aside a sale held in the Court of the Deputy Commissioner of Hazaréebagh on the 18th May 1880, the properties sold consisting of three mouzas,—viz., Kharn,

(1) 3 W. R. (Mis.), 11.

(2) 4 W. R. (Mis.), 4.

(3) 10 W. R., 3

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Kharkhan, and Palmo. It appeared that these mouzas had been attached in execution of two decrees held by Mohanund Dutt and Norchunder Dutt, but prior to the sale, a third decree-holder, Sheo Pershad Madi, applied for leave to execute his decree in order that he might participate in the sale-proceeds under the provisions of s. 295 of the Civil Procedure Code; but no prohibitory order had been issued or served in respect of this decree. The two first mentioned mouzas were in the first instance put up for sale and realized a sum more than sufficient to satisfy the decrees of the two judgment-creditors who had attached the properties, and on the same day, and immediately after they had been sold, the remaining mouza was put up and sold in spite of the protest of the judgment-debtor, and all three decrees were satisfied. Amongst the grounds upon which the judgment-debtor sought to have the sale of all three properties set aside, he alleged that the notices of sale were not published in the villages to be sold, which were situated sixty miles from Hazareebagh, until the 10th May 1880, only five days before the date of the sale, which was fixed for the 15th May, and that, consequently, sufficient time was not allowed for purchasers to attend the sale; that as the decrees, on account of which the two mouzas, Kharn and Kharkhan, were attached and sold, amounted to Rs. 4,579-3, and the sale-proceeds thereof amounted to Rs. 6,800, there was no necessity for the Court to proceed with the sale of Palmo; and that the sale, though fixed for the 15th May, did not actually take place till the 18th, and in consequence of such delay, the sale should not then have been proceeded with until fresh notices had been issued under s. 259 of the Civil Procedure Code. He further objected to the sale on the ground of the inadequacy of the price obtained through the properties having been imperfectly described, no further particulars being given with regard to a mortgage thereon other than the mere fact of its existence, and that, as the mortgagee who was in possession had become the auction-purchaser, under these circumstances he had suffered material injury, of which and of the other allegations contained in his petition he offered to produce evidence. The Deputy Commissioner, however, refused to admit the evidence, and,

acting upon the reports of the Nazir and peon, dismissed the petition and confirmed the sale.

Accordingly from this order the judgment-debtor appealed to the High Court.

Mr. *W. C. Bonnerjee*, Mr. *R. E. Tyndale*, Baboo *Troylucko-nath Mitter*, and Baboo *Joggut Chunder Dey* for the appellant.

Baboo *Chunder Madhub Ghose*, Baboo *Kallymohun Dass*, and Baboo *Tarrucknath Sen* for the respondents.

The following judgments of the Court (CUNNINGHAM and PRINSEP, JJ.) were delivered:—

PRINSEP, J.—In execution of two decrees held by Nor-chunder Dutt and Mohanund Dutt, the right, title, and interest of the judgment-debtor, appellant, in three mouzas, Kharu, Kharkhan, and Palmo, were attached and advertised for sale. Meantime a third decree-holder, Sheopershad, applied to execute his decree, in order that, under s. 295 of the Civil Procedure Code, he might participate in the sale-proceeds.

The two first mentioned properties were then sold, and realized a sum more than sufficient to liquidate the decrees of the judgment-creditors who originally put the Court in motion. The remaining property was next sold, and all the decrees have been satisfied.

Various objections were then taken to the sale, which were disallowed by the Deputy Commissioner of Hazareebagh, and the judgment-debtor has now appealed against that order. It is first of all contended by Mr. *W. C. Bonnerjee*, for the judgment-debtor, appellant, that, as the decrees under execution were satisfied by the two properties first sold, no further sale should have been held. What would be the effect of an application made by those whose decrees were under execution to abstain from further proceedings on another decree-holder who had merely applied to execute his decree so as to obtain the benefit of s. 295, that is, to participate in the assets realized in execution of the other decrees, we are not called upon to decide, because it does not appear that in the case now before us the

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two decree-holders, who are actually executing their decrees, made any such application. That the amount realized by the sale of the first two properties was sufficient to satisfy their decrees is immaterial, since by the interposition of another decree-holder, under s. 295, that sum would not be payable to them alone. It would be subject also to the claim of this stranger, who, under s. 295, would be entitled to a rateable distribution of the assets. It could not then be said that by the amount realized from the first sale the decrees under execution were satisfied. We think, therefore, that the lower Court rightly proceeded to sell the third property, Palmo.

It is further objected that no proclamation of sale was made on the spot as required by s. 274; that the Deputy Commissioner should have given the judgment-debtor an opportunity of proving this; that he improperly received in evidence and acted on the reports of the Nazir and peon; that even if the proclamation was made on the spot, it admittedly was not made until the 10th May, five days before the day fixed for sale, and therefore not in sufficient time; that the property was not described in the sale-proclamation; that the Deputy Commissioner was not competent to adjourn the sale for three days in consequence of his sickness; that the mortgagee in possession should not have been allowed to purchase; and that, in consequence of all these irregularities, substantial injury has been caused, an inadequate price, much below the proper value of the properties, being obtained.

It is in the first place clear, that the Deputy Commissioner was wrong both in accepting as evidence the reports of the Nazir and peon regarding the sale-proclamation having been regularly made, and in refusing to give the judgment-debtor an opportunity to adduce evidence to the contrary. The case quoted by him—*Alimoody Chowdhry v. Chunder Nath Sen* (1)—is not in point. On the other hand it has been repeatedly held, that such reports are not legal evidence: *Okhoy Chunder Dhur v. Erskine & Co.* (2), *Sreenath Thakoor v. Watson & Co.* (3), *Shah Kpondun Lall v. Noor Ali* (4).

(1) 24 W. R., 227.

(2) 3 W. R. (Mis.), 11.

(3) 4 W. R. (Mis.), 4.

(4) 10 W. R., 3.

But even if the sale-proclamation was made, it admittedly was not made until the 10th May, five days before the day fixed for sale. We are informed by the appellant's counsel, and this is not disputed by the respondents' pleader, that the place on which it is said to have been made is sixty miles from the Court holding the sale. It is pressed on us by the learned counsel for the appellant, that although the law, s. 290, declares that it is necessary only that there should be an interval of thirty days between the date of fixing up of the sale-proclamation on the Court-house and the day of sale, that "fixing up" cannot be done until proclamation has been duly made and reported to the Court. The terms of the law, s. 290, certainly leaves this in doubt, and it is difficult to understand the object of enacting a specific term, thirty days from any proceeding not the final proceeding, unless the other necessary proceeding is considered merely formal and of no material effect on the sale. It appears to me, however, that the making of a sale-proclamation on the spot is a most material proceeding, for it must be presumed that, ordinarily, purchasers will be those living in the neighbourhood, best informed of the real value of the property, and most likely to purchase from the situation of the property with respect to their own residence or properties held by them. Of course, in some cases it may be that the value of the property to be sold may put it beyond the power of neighbours to compete at the auction, and that the bidders can only be capitalists residing near the Court-house; but such would be exceptional cases, and in seeking the object of the Legislature, we must look to the vast majority of the cases which occur. It appears to me, too, that it could not have been intended that a copy of the sale-proclamation should be "fixed up in the Court-house" until it was actually reported to the Court that the proclamation itself had been made under s. 274. I further think that the order in which these proceedings should be taken is indicated by the order in which they are expressed in s. 290. If this view be not accepted, the Court in each case would have to determine whether a sale-proclamation had been made in a reasonable time before the date of sale, so as to give a fair opportunity to persons likely to purchase, who live on or near the

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property to be sold, although a term is specified with regard to the fixing up of the copy of the sale-proclamation in the Court-house. Such a rule would not only be inconvenient, but would be contrary to what I conceive to be the intention of the Legislature, viz., to fix some term which must expire between the last formality to bring a property to sale, and the sale itself. I, therefore, have no hesitation in holding that if the proclamation was made on the spot only five days before the date fixed for sale, there has been "a material irregularity in publishing it." It would, however, be incumbent on the person seeking to set aside the sale, the judgment-debtor, to show that "he has sustained material injury by reason of such irregularity."

As regards the objection taken regarding the adjournment of the sale for three days, in consequence of the illness of the Deputy Commissioner, we consider that that officer exercised a wise discretion given to him by law (s. 291) in refusing to hold the sale of properties of such large value except under his personal superintendence, which, in his absence from illness, would be impossible.

The next objection is, that the properties were imperfectly described in the sale-proclamation. The law requires that a proclamation of sale shall specify, as fairly and accurately as possible, any incumbrance to which the property is liable, and also every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property. I observe that only the right, title, and interest of the mortgagor (that is, the equity of redemption) were sold, and that the sale-proclamation states that the property is subject to a mortgage. It appears that the mortgagee is in possession of these properties, and that he is the purchaser at the auction-sale. Now it is clear that, to enable a bidder to form any definite idea of the value of these properties, the amount of the outstanding debt should have been specified. Unless that was declared, the mortgagee would be the only person who was in possession of this information; and if that information were withheld, he would be able to bid at an advantage with regard to other bidders. Such an omission, where

the mortgagee in possession is himself the purchaser, affords strong *prima facie* grounds for believing that an inadequate price was obtained.

We, therefore, remand this case to the Deputy Commissioner, and direct that he do give the parties an opportunity to adduce such evidence as they may desire on the points indicated, and decide the case accordingly.

CUNNINGHAM; J.—This is an appeal from an order refusing to set aside a judgment sale of immoveable property on the ground of material irregularities in publishing and conducting it, whereby the appellant has sustained substantial injury.

One of the alleged irregularities was, that no proclamation was made on the spot in conformity with ss. 289 and 274, Civil Procedure Code. No opportunity was given to the execution-debtor of proving this, the Court satisfying itself with the reports of the Nazir and peon as sufficient proof of the proclamation. This was irregular. In the next place, it is admitted that the proclamation on the spot, if made at all, was not made till five days before the sale. With regard to this the intention of ss. 289 and 290 must, in my opinion, be taken to be that the proclamation should be made on the property in question before or at the same time that the copy of it is fixed up in the Court-house, and that the reason of the omission in s. 290 of reference to the proclamation on the spot as one of the events which must occur at a specified time before the sale, is, that the Act regards the proclamation on the spot and the fixing of it up in the Court as simultaneous proceedings.

In the present instance, as the distance of the property from the Court was sixty miles, the period allowed was clearly inadequate, and there was a material irregularity which, if it can be shown that there has resulted material injury (of which gross inadequacy of price would be an indication), would entitle the judgment-debtor to have the sale set aside.

Another of the alleged irregularities is the inadequate description of the properties in the proclamation of the sale. Section 287 of the Civil Procedure Code requires that any incumbrance to which the property is liable should be stated, as well as every other thing which the Court considers material

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for the purchaser to know in order to judge of the nature and value of the property. In this case the proclamation stated the fact of an incumbrance, but omitted to specify the amount of the mortgage debt still outstanding. This would leave the incumbrancer in a more favorable position than any one else to judge of the value of the equity of redemption, and as he was the purchaser, it is probable enough that this irregularity did occasion substantial injury to the judgment-debtor.

The order of the lower Court must accordingly be set aside, and the case remanded to the Deputy Commissioner to rehear the application with reference to the observations made above.

Costs will abide the result.

Case remanded.

APPELLATE CRIMINAL.

Before Mr. Justice Pontifex and Mr. Justice Field.

1881
 March 25.

IN THE MATTER OF THE PETITION OF ROCHIA MOHATO (APPELLANT).

THE EMPRESS v. ROCHIA MOHATO.*

Evidence Act (I of 1872), s. 32, cl. 1, and s. 33—"Questions in Issue"—Charges added at Sessions—Depositions before Magistrate—Witness dying or absconding—Charge to Jury—Omission to notice Evidence—Qualification of Jurymen.

In the proceedings before a Magistrate on a charge of causing grievous hurt, two (among other) witnesses, one of whom was the person assaulted, were examined on behalf of the prosecution. The prisoners were committed for trial. Subsequently the person assaulted died, in consequence of the injuries inflicted on him. At the trial before the Sessions Judge, charges of murder and of culpable homicide not amounting to murder were added to the charge of grievous hurt. The deposition of the deceased witness was put in and read at the Sessions trial.

Held, that the evidence was admissible either under s. 32, cl. 1, or s. 33 of the Evidence Act, notwithstanding the additional charges before the Sessions Court.

* Criminal Appeal, No. 162 of 1881, against the order of H. Beveridge, Esq., Officiating Sessions Judge of Patna, dated the 19th February 1881.