

SRINIVASA  
v.  
RATHNA-  
SARAPATHI.

The resolution of the Municipal Council of 25th July 1888 was, therefore, *ultra vires*. We must set aside the decree of the Subordinate Judge and decree in plaintiff's favor for Rs. 424-2-5 with costs in both Courts.

## APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

SUBBARAYADU (PETITIONER), APPELLANT,

v.

PEDDA SUBBARAZU (COUNTER-PETITIONER), RESPONDENT.\*

*Civil Procedure Code—Act XLV of 1882, ss. 311, 622—Application to set aside execution sale—Remedy of one claiming adversely to the judgment-debtor—Revision petition—Jurisdiction.*

One alleging himself to be the undivided brother and, as such, the legal representative of a deceased judgment-debtor applied to have set aside a sale of certain property alleged by him to be joint family property, which had taken place in execution of the decree. He did not make the purchaser a party to such application. The Court of first instance dismissed the application. On appeal, the Appellate Court made the purchaser a party to the proceedings, and holding that there was irregularity in conducting the sale reversed the order of the Court of first instance:

*Held*, (1) that the Appellate Court was wrong in so holding upon evidence recorded by the Court of first instance when the purchaser was not a party to the proceedings;

(2) that the proper remedy of the applicant was a regular suit and not a proceeding under Civil Procedure Code, 311.

APPEAL under Letters Patent, s. 15, against the order of Mr. Justice PARKER made on civil revision petition No. 199 of 1890. By that petition the petitioner prayed the High Court to revise the order of C. A. Bird, District Judge of Godavari, in appeal suit No. 72 of 1889, reversing the order of R. Hanumanta Rau, District Munsif of Tanuku, made on miscellaneous petition No. 1338 of 1888.

The petitioner, before the District Munsif, prayed for the cancellation of the sale of certain land which had taken place in execution of a decree passed against his undivided brother Subba-

\* Letters Patent Appeal No. 32 of 1891.

razu (since deceased). The widow of the deceased judgment-debtor had been brought on to the record in execution proceedings as his representative. This was objected to as an irregularity, and further irregularities in the publication of the proclamation of sale and in the conduct of the sale were alleged, as well as consequent injury to the petitioner. The District Munsif held that neither the irregularities nor the injuries were proved, and accordingly dismissed the petition.

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On appeal the District Judge first joined the execution, purchaser as a party to the present proceedings, and subsequently made an order, by which he directed the petitioner to be brought on to the record as the representative of the deceased judgment-debtor and set aside the order confirming the sale. The execution-purchaser preferred the above petition under Civil Procedure Code, s. 622.

The petition came on for hearing before Mr. Justice PARKER who dismissed it on the grounds stated in the following judgment of the High Court. The petitioner preferred this appeal under Letters Patent, s. 15.

*Sviranga Charyar* for appellant.

Mr. *W. S. Gantz* for respondent.

JUDGMENT.—In small cause suit No. 1032 of 1886: on the file of the Sub-Court at Ellore, plaintiff obtained a decree against petitioner's brother Subbarazu, and upon his death made his widow a party to execution proceedings. He then attached certain property and brought it to sale, at which petitioner, before us, became purchaser. Thereupon the brother of the judgment-debtor applied for the sale being set aside and stated that as undivided brother he was the judgment-debtor's legal representative; that the property sold in execution was joint family property, and that there was material irregularity in conducting and publishing the sale. He did not, however, make the purchaser a party to his application, and the District Munsif held that no material irregularity was proved, and dismissed the application. On appeal, the Judge made the purchaser a party to the proceedings, and, being of opinion, that there was irregularity in publishing the sale, cancelled the order refusing to make the appellant representative of the judgment-debtor and the order confirming the sale. The purchaser applied to this Court for the order being set aside under section 622, Civil Procedure Code. Mr. Justice

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Parker rejected his application on the ground that the Judge did not set aside the sale, though he intended to do so, and that, as the purchaser was in possession, he was not prejudiced. Hence this appeal under the Letters Patent.

The District Judge recorded no finding that by reason of the irregularity in publishing the sale any loss was sustained, and in the absence of such finding, it was not competent to him to set aside the sale. Although the purchaser was made a party on appeal, the Judge was in error in finding that there was irregularity in publishing the sale upon evidence recorded by the District Munsif when the purchaser was not a party to the proceedings, without giving him an opportunity to test the evidence by cross-examination and to cite rebutting evidence, if any. Again, the application shows that if the property attached and sold was joint as stated therein, it must have survived to the applicant on the death of his brother and thereby become his exclusive property. When a person seeks to set aside a sale by reason of a title adverse to that of the judgment-debtor at the date of attachment, his proper remedy as observed in *Asmatunnissa Begum v. Ashruff Ali* (1) is a regular suit and not a proceeding under section 311. If the property was, on the other hand, the separate estate of the deceased judgment-debtor his widow was his legal representative. We do not see our way to confirm the order of the District Judge or of the learned Judge who upheld it. We set aside the order of the District Court and restore that of the District Munsif. The respondent will pay appellant's costs in this Court and in the Lower Appellate Court.

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(1) I.L.R., 16 Cal., 488.