

PRIVY COUNCIL.

P. C.* MACNAGHTEN AND ANOTHER (JUDGMENT-CREDITORS) v. MAHABIR
 1882
 November 24. PERSHAD SINGH AND ANOTHER (JUDGMENT-DEBTORS.)

[On appeal from the High Court at Fort William in Bengal.]

*Sale in execution of decree—Civil Procedure Code (Act X of 1877), s. 311—
 Irregularity in publication of intended sale.*

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of the first instance, which found that proclamation had been made.

Held, that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s. 311 of Act X of 1877.

Held, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.

APPEAL from a decree (22nd April 1881) of the High Court reversing a decree (25th September 1880) of the Officiating Subordinate Judge of Zillah Tirhoot.

This appeal arose out of an order made by the High Court in its Appellate Jurisdiction in reference to the sale of fourteen villages in the Tirhoot District, in execution of a decree which had been obtained by the appellants against the respondents. In 1879 on two separate dates, 15th September and 20th November, the right, title, and interest of the respondents in twenty villages in that district were sold in execution, and purchased by the appellants, leave having been granted to them to bid at the sales. The respondents afterwards applied to have the sales set aside, on the ground that

* *Present*: LORD FITZGERALD, SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

the villages had been sold at an inadequate price, attachment processes not having been executed, and the sale proclamation not having been published in the villages.

This application having been rejected by the Subordinate Judge, who found that the sale proclamations had been published, the High Court (MITTER and MACLEAN, JJ.) on appeal, while maintaining the finding of the lower Court as to the fact of the proclamations having taken place, reversed its decision, and set aside the sale.

The High Court afterwards, on the 19th September 1881, reviewed its judgment as to six of the villages.

The judgment (22nd April 1881) on appeal was as follows :—

“The application was made on the ground that a property of a very large value was sold at a grossly inadequate price, attachment processes and sale proclamations not having been duly executed and published in the villages. Upon both these points the lower Court has found against the appellants. As regards the adequacy or otherwise of the value, the finding is manifestly against the weight of the evidence. Of the 20 villages sold, 19 were let in ticca by two leases in favour of the respondents. The net rent payable annually, under the two leases, was Rs. 4,172 and odd. The leases also cover 20 villages, one of which has not been sold. There is evidence to shew that the twentieth village sold, and which is not covered by the lease, is of comparatively more value than the unsold village of the lease. Therefore, upon the evidence, it may be safely taken that the villages sold yielded annually a little over Rs. 4,172. The lower Court remarks that the appellants adduced no evidence to show what is the general rate of value of landed property in the district. It is true that no direct evidence has been given upon that point; but instances in which property has been sold in the district, at not less than 20 years' purchase, have been proved. Calculating at that rate, it is clear that the villages sold are worth about Rs. 60,000.

“Upon the question, whether the sale proclamations were duly published, we do not think that the finding of the lower Court is wrong; but it may be reasonably supposed that the non-specification of the Government revenue in the sale pro-

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clamations published is one of the causes which caused the diminution in the price. Such a mistake or omission is an irregularity contemplated by s. 311 of the Civil Procedure Code—*Girdhari Singh v. Hurdeo Narain* (1). It is true that this irregularity was not made one of the grounds of the appellant's application in the lower Court, but it is patent upon the face of the proceedings.

“ We therefore reverse the decision of the lower Court and set aside the sale of the mouzahs in question.”

In review of the above the judgment was as follows :—

“ The judgment of this Court proceeded upon the ground that the Government revenue of the mouzahs sold (the auction-sale of which was sought to be set aside) was not specified in the sale proclamation, and we were of opinion that that was such an irregularity as really affected the prices which those mouzahs fetched at the auction-sale. We further found that the prices which were paid by the petitioners, who were the purchasers and decree-holders, were inadequate.

“ It is contended on behalf of the petitioners now before us, that in respect of six mouzahs, namely, Badwa, Bazitpur, Sarsawa, Shafipur, Jahangira and Arazi Gungbarar Hardaspur, the ground upon which the judgment of this Court proceeds is not applicable, inasmuch as the Government revenue of these six mouzahs was specified in the sale proclamation. It is admitted now by the learned pleader, who appears on behalf of the judgment-debtors, that in respect of these mouzahs the Government revenue was specified in the sale proclamation; but he contends that in stating the revenue of Bazitpur, instead of putting Rs. 547 odd annas, which is the correct amount, the amount mentioned in the sale proclamation of that mouzah was Rs. 500, and a similar mistake is pointed out in respect of Jahangira, the correct amount being Rs. 335-7-9, and the amount mentioned in the sale proclamation having been Rs. 345. It is not denied that in respect of the other mouzahs, the Government revenue was correctly specified. Therefore, as regards those four mouzahs, our order is not right and must be set aside. With reference to Bazitpur and Jahangira, the mistakes are so trivial and unimport-

(1) L. R., 3 I. A., 230.

tant that we do not think that they in any way affected the prices of those mouzahs.

"We are, therefore, of opinion that in respect of all these six mouzahs, our judgment is not right; and we accordingly amend it, by directing that the appeal of the judgment-debtors, in respect of these six mouzahs, should be dismissed. In all other respects our judgment will stand."

On this appeal Mr. *Macnaghten*, Q. C., and Mr. *J. T. Woodroffe* appeared for the appellants.

It was argued for the appellants that the omission to state the revenue assessed on the villages, described in the proclamations of the intended sales, was not a fatal irregularity; because it had not been shewn to have caused substantial injury to the applicant. The burden of showing such injury was upon him; also, the objection could not be effectively taken for the first time in the Court of appeal, which was not in a position to find this substantial injury. The Appellate Court had attempted to find it in the inadequacy of price; but that inadequacy had not been connected with the irregularity, as effect with cause; nor was there any recorded evidence on which the Appellate Court could have arrived at this result. Moreover, the omission to state the revenue having taken place, in regard to some, but not in regard to all, of the villages, (as appeared from the review,) while inadequacy of price was taken to have resulted in reference to all, that general inadequacy, if occasioned at all, appeared not to be traceable to the omission. *Girdhari Singh v. Hurdeo Narain Singh* (1) was cited.

The respondents did not appear.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This was an application to set aside a sale of certain property in execution of a decree in consequence of irregularity. The application was made under s. 311 of the Civil Procedure Code of 1877, chap. X. By that section it is enacted that "the decree-holder or any person whose immovable property has been sold under this chapter may apply

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to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but 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." Irregularity, therefore, alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. It has also been held that inadequate price of itself is not a sufficient ground for setting aside a sale, unless there is irregularity. The question, therefore, in this case is whether an irregularity did occur, and, if so, whether that irregularity caused injury to the applicant; the injury complained of being the inadequacy of the price which was realised at the sale. The principal irregularity complained of was that no notification of the sale was properly published. Section 286 of the same Code provides that "sales in execution of decrees shall be conducted by an officer of the Court, or by any other person whom the Court may appoint, and, except as provided in s. 296, shall be made by public auction in manner hereinafter mentioned." Then s. 287 says: "When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible the property to be sold; the revenue assessed upon the estate, or part of the estate, when the property to be sold is an interest in an estate, or a part of an estate paying revenue to the Government;" and certain other things.

In addition to the irregularity as regards the notification of the sale, another alleged irregularity was complained of, *viz.*, that the attachment was not properly notified. Whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale, it is not necessary to inquire, inasmuch as that point was given up by the applicant on the trial before the Judge. The question then is solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation

had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published. The parties went down to trial upon that point, evidence was given, and the learned Judge of the first Court held that the proclamation had been published, and the High Court affirmed the decision of the first Judge in that respect. There are, therefore, two concurrent findings of the Courts that a proclamation was published.

The Judge consequently refused to set aside the sale. The parties appealed to the High Court. They never took any objection in their grounds of appeal to the form of the proclamation, or stated that there was an irregularity in not having stated all that was required by the Act, and, amongst other things, the revenue which was assessed upon the estate. When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated, and the High Court at that time considered that all the proclamations were alike, and that in each of the proclamations with regard to the 20 mouzahs which were sold the amount of revenue had not been stated. It may be inferred from the grounds of review that the Court themselves first took the point; but whether it was taken by the Court or by the applicant is immaterial, because their Lordships are of opinion that the objection could not be taken for the first time in the Court of Appeal. Even if the objection could have been properly taken at that stage of the proceedings, if no question was raised before the lower Court as to whether any injury had been sustained by the applicant by reason of the proclamations not stating the amount of revenue, that question was never tried in the lower Court, and no evidence had been given with reference to it.

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity,—it would have been necessary to go on and show that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject

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before the lower Court, though by s. 311 the onus lay upon the applicant to prove, to the satisfaction of the Court, that he had sustained substantial damage in consequence of the irregularity ; nor was there any finding of the lower Court upon it, because the question was never raised.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say : " But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price. " There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

The High Court, however, upon the ground that there was an irregularity, and that it had caused substantial injury to the applicant, reversed the decision of the lower Court. Upon that a review was applied for, and then it was discovered that the objection as to the non-statement of the revenue did not apply to six of the mouzahs and six of the sales ; and the High Court, having found that the proclamation in respect of those six did contain the amount of the revenue, set aside their former decision as to them, and upheld it as to the other fourteen. But when they upheld the sale as to the six they never adverted to the fact that, as they had fallen into a mistake as to them, they might equally have fallen into a mistake as to the other fourteen. They found that the inadequacy of price as regards the six did not arise from the non-statement of the amount of revenue. They might, therefore, have reasonably supposed that their former supposition, that the inadequacy of price as to the fourteen was occasioned by the non-statement in the notice of sale of the amount of revenue, was as much without foundation as it was as to the six ; but instead of that they upheld their decision as to the fourteen, and set it aside as regarded the six. The question now is whether the judgment of the High Court as regards the four-

teen is correct in holding that there was an irregularity in the non-statement of the amount of revenue in the proclamation which could be relied on upon appeal, and that the appellant had sustained substantial injury by reason of that irregularity.

Their Lordships think that it was too late for the applicant to make the objection; and even if it were not too late for him to make the objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was inadequacy of price occasioned by the non-statement of the revenue in the sale proclamation.

Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to affirm the decision of the first Judge. They think that the respondents must pay the costs of this appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse and Lawford.*

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FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

RUDRA KANT SURMA SIRCAR AND OTHERS (DEFENDANTS) v. NOBO
KISHORE SURMA BISWAS (PLAINTIFF).

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March 9.

SAMOD ALI, DEFENDANT v. MAHOMED KASSIM AND OTHERS
(PLAINTIFFS.)*

Limitation (Act XV of 1877), s. 7—Minority—Right to Sue—Personal exemption—Assignment by Minor.

Under s. 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by s. 7 of the

* Full Bench Reference made by Mr. Justice Wilson and Mr. Justice Field, dated the 6th September 1882, in appeals from Appellate Decrees Nos. 434 and 1927 of 1881.