the first respondent, he and the appellant will also pay and receive proportionate costs. The costs of the fourth and fifth respondent in the appeal and their own Memorandum of Objections proportionate to their success will come out of the partible estate.

Appeal No. 325 *of* 1918.

This is the appeal from the suit brought by Gurusami Pandian for a declaration that he was the nearest reversioner entitled to succeed to the zamindari on the death of the Rani Gnanamani, the mother of the last zamindar who was in possession then. It is now settled that such a declaration cannot be claimed and should not be given: see the ruling of the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyer*(1).

Furthermore, we have found that he has no such right in the connected Appeal. This Appeal therefore fails and must be dismissed. No costs.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Oldfield and Mr. Justice Seshagiri Ayyar.

JAYARAMA AYYAR (AUCTION-PURCHASER, APPLICANT), APPELLANT,

v.

VRIDHAGIRI AIYAR AND FOUR OTHERS (DECREEHOLDER AND JUDGMENT-DEBTORS), RESPONDENTS.*

1920, April, 14.

Civil Procedure Code (V of 1908), *O. XXI, rr.* 54(2), 66, 67 *and* 90—*Non-publication of proclamation of sale in the village—Announcement of a wrong place as the place of sale—Sale held not in the place ordered by Court, but in the wrong place—Sale, illegal and null and void and not merely irregular.*

Where a proclamation of sale of lands in execution of a decree, as framed by the Court, was not published in the village where the lands were situate but the process-server intimated at the village that the sale would be held at a place and by an officer different from those fixed by the proclamation, a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely 'irregular' within the meaning of Order XXI, rule 90, Civil Procedure Code.

Basharutulla v. *Uma Churn Dutt*, (1889) I.L.R., 16 Calc., 794, applied.

(1) (1916) I.L.R., 39 Mad., 634 (P.C.).

* Appeal against Order No. 321 of 1919.

JAYARAMA AYYAR v. VRIDHAGIRI AIYAR.

APPEAL against the Order of J. C. STODART, District Judge of South Arcot, in Interlocutory Application No. 233 of 1919 in Execution Application No. 18 of 1919, in Original Suit No. 26 of 1915.

In this case which related to the legality of an execution sale of certain lands, the proclamation of sale stated that the sale would take place at Cuddalore before the Central Nazir. This proclamation was not actually published in the village where the lands were situate, but the process-server entrusted with the duty of publishing it announced in the village that the sale would take place at the District Munsif's Court of Villupuram. But the sale actually took place at Cuddalore. The further facts appear from the Judgment of OLDFIELD, J.

K. V. Krishnaswami Ayyar for appellant.

N. Chandrasekhara Ayyar for respondent.

OLDFIELD, J.

OLDFIELD, J.—These proceedings were marked in the lower Court by grave irregularities; and it is the more necessary that in correcting these irregularities, we should be careful to do nothing which would inflict unfair prejudice on either party.

The sale, which is the subject of these proceedings, was according to the proclamation to be held by the Central Nazir of the Cuddalore District Court on 10th July 1919 and it was held accordingly. On the evening of that day the judgment-debtor represented to the Court that bidders had not come and that the sale was open to objection on other grounds, with which we are not concerned. Afterwards, and this was material in connexion with the representation that bidders had not come, he brought to the notice of the Nazir that the process-server charged with the duty of making the proclamation in the village had proclaimed that the sale would be held not by the Central Nazir at Cuddalore but by the District Munsif's Court of Villupuram. This communication from the judgment-debtor to the Nazir was brought to the notice of the Court on the next day, 11th July 1919, and I am constrained to express my disapproval of the Court's method of doing business by accepting representation of this kind made by a subordinate officer. Such complaints should be considered by the Court only when they are made to it in open Court in the usual way.

The Court then, however, at once cancelled the sale of the three items of property which had been sold the previous day, of which the second and third items, those purchased by the appellant are the subjects of the present appeal. It also directed the refund to the purchasers of their deposits and lastly it ordered that a fresh sale should be held on 20th August on a fresh proclamation. It does not appear that any communication of these orders was made, at all events at the time, to the present appellant. For, on 24th July 1919, he paid into Court the remainder of the purchase money due from him, and on 12th August 1919 applied for confirmation of sale and the grant of sale certificate; and again this cancellation of the sale was obviously an irregularity of considerable moment.

On 29th July 1919, the Court had obtained a draft proclamation, apparently from the decree-holder, and altered the date fixed for sale to 4th September 1919. Later, it may be said that as regards items other than 2 and 3, to which I shall return, the Court passed an order that the original sale should be continued as it was the Court's own fault that it was not held properly and as, properly speaking, there was no sale; and later on the sale was stopped by an order of this Court, dated 6th November 1919.

To go back to items 2 and 3: on the purchaser's application for confirmation of sale and sale certificate of 12th August 1919 notice was issued to the decree-holder, who contended, that the sale should be set aside, that a resale should be ordered, and that the purchaser's petition should be dismissed; and in these proceedings the order now under appeal was passed.

It is material that there has in this case been an order (now appealed against) which was passed after notice to all concerned, and which was passed after every opportunity had been given for the production of evidence. In these circumstances, greatly as we must regret the irregular manner in which the then District Judge, Mr. Edgington, passed the order by which the sale was in the first instance set aside, we think we can disregard that order and deal with the matter simply with reference to what had happened afterwards in connexion with the application of 12th August 1919. As I have pointed out, there was no prejudice to the appellant, the purchaser, or to any one else owing to any omission of the Court to hear them or to take

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evidence. These proceedings were perfectly regular and we therefore examine the order now under appeal simply on its merits and without regard to what had happened at the earlier stage.

The order under appeal purports to be passed under Order XXI, rule 90, on the ground of a material irregularity in publishing the sale proclamation. We have been shown no valid objection to the lower Court's finding that the sale proclamation, as it was framed by the Court, was not published in the village. The process-server owing to carelessness, or some other reason, substituted for the selling officer and place of sale fixed by the Court a different selling officer and a different place of sale. Besides finding that this occurred and that it was an irregularity, the lower Court has also, as rule 90 requires, found that the plaintiff decree-holder sustained substantial injury by reason of that irregularity. We do not think it necessary to follow the lower Court in that part of its order, because we do not think that rule 90 is applicable at all. The mistake, so to describe it, made by the process-server resulted not in any irregularity, but in an illegality which invalidated the proceedings.

Mr. Krishnaswami Ayyar, on behalf of the appellant, has referred to a number of authorities dealing with the facts in particular cases, which were or were not held to constitute irregularities or illegalities. It is unnecessary to go through those cases, because the decision in each rested on the facts in it, and because it does not appear that any general rule for distinguishing between an irregularity and an illegality has ever been laid down. It would appear, in fact, that the distinction is one of degree, and that an irregularity of so serious a nature as to render impossible the publicity which affords one main security for the fairness of public sales must be deemed to be an illegality. This view that the question is one of degree, is implied, it seems to me, in the judgment of Mr. Justice HEATON in *Krishnaji* v. *Bomanji*(1), and although I am doubtful as to the correctness of the main conclusion reached by the learned judges in that case, I avail myself of the support, which the view I take receives, from Mr. Justice HEATON's observation that although the facts

(1) (1909) 11 Bom. L.R., 380.

before him did not constitute such an illegality as would render the sale in question void, yet he wished at the same time to be clearly understood not to ignore that in other cases there might be other circumstances which, combined with similar ones, would amount to an illegality such as the Court could act on.

The nearest case perhaps to the facts before us is *Basharutulla* v. *Uma Churn Dutt* (1). There, the property that had been advertised for a particular date was sold on that date, but at an earlier hour than that stated in the proclamation, and the Court said that in those circumstances it seemed to it that there was no sale within the meaning of the Code and that the proclamation of the time and place and the holding of the sale at such time and place advertised were conditions precedent to its being a sale under the Code at all. It appeared to the Court that the property never had been sold under the Code, and consequently the plaintiff was entitled to a declaration that whatever took place when the property was put up for sale had no effect as against him. It seems to me that if, when a proclamation was made any of the usual and effective methods prescribed or permitted by the Code for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders, but to divert them to a place where the sale is not to be held, the result must be in the words of *Basharutulla* v. *Uma Churn Dutt*(1) that the property had never been sold under the Code at all.

In these circumstances the order of the lower Court must be confirmed and the appeal dismissed. As regards the question of costs we bear in mind that the decree-holder and the judgment-debtor were in fact present during the sale, and apparently it was not until the sale was concluded that the latter made any objection to the manner in which it had been proclaimed or conducted. There is then the fact that throughout the proceedings, apparently without objection from the decree-holder who ordinarily would have their direction, have been carried on in the highly irregular manner to which we have referred. In these circumstances we think that we are justified in making no order as to costs in this Court.

(1) (1889) I.L.R., 16 Calc., 794.

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SESHAGIRI AYYAR, J.—I entirely agree. The facts have been fully stated by my learned brother. The question for consideration is whether the Court sale should be regarded as having been irregularly conducted or whether it was illegal. As this point was argued with some insistence by Mr. Krishnaswami Ayyar, I propose to say a few words on it.

The Code itself gives some indication as to when a sale can be regarded as irregular and when illegal. In Order XXI, rule 90, which permits an aggrieved party to come to Court to set aside a sale, the language employed is that it may be set aside on the ground of material irregularity or fraud in *publishing or conducting* it. Where there is no publication or conduct of the sale, it is, I think, a right inference to draw from rule 90 that the sale should be regarded as illegal. In the present case, on the facts which my learned brother has fully stated, my conclusion is that there has been no publication at all. If a sale is held at a place to which the proclamation at the village makes no reference, and *per contra* invites bidders to go to another place, I am prepared to hold that there was no proclamation leading up to the sale. Mr. Krishnaswami Ayyar drew our attention to cases where there has been no beating of a drum and it was held that such a mistake should be regarded only as an irregularity. As Mr. Chandrasekara Ayyar pointed out, under the rules it is not obligatory to beat the drum and the proclamation may be made in any other manner which the people of the village are accustomed to hear. Therefore, the decision in *Trimbak Ravji* v. *Nana* (1), that the omission to beat the drum is only an irregularity, does not affect the present case.

The present case, I agree, with my learned brother, is practically covered by the authority of *Basharutulla* v. *Uma Churn Dutt*(2). In that case the question was whether if a sale was held at an hour anterior to the one mentioned in the proclamation the sale was irregularly conducted or whether it was illegally held. The learned Judges came to the conclusion that there was a violation of the fundamental conditions of the sale, namely, the time of sale, and that consequently the sale was a nullity. The same argument can be used with reference to a sale held at a place different from the one mentioned in the proclamation.

(1) (1886) I.L.R., 10 Bom., 504. (2) (1889) I.L.R., 16 Cal., 794.

I concede that it is not easy to draw the line between an irregularity and an illegality, but I am clear that where a substantial provision of law has been violated, and that has the effect of not attracting persons who could be expected to be present for the purpose of bidding at the sale, the sale should be regarded as having been illegally conducted. As regards the decision chiefly relied on by Mr. Krishnaswami Ayyar, namely, *Krishnaji* v. *Bomanji*(1), I agree with my learned brother in dissenting from the conclusion reached in that case. Mr. Justice CHANDAVARKAR, J., bases his conclusion mainly on *Arunachellam* v. *Arunachellam* (2). In the latter case, the Judicial Committee had before it a case of misdescription of property, and their Lordships were of opinion that a mere description would be only an irregularity. Their Lordships laid stress on the fact that the judgment-debtor was throughout present and acquiesced in the irregularity, and that when he found that there was no other means of vacating the order he resorted to this expedient of setting aside the sale. The principle on which their Lordships rested their decision was estoppel. There is no such question in this case. I do not think that case is an authority for the broad proposition which CHANDRAVARKAR, J., has deduced in *Krishnaji* v. *Bomanji*(1).

In *Nana Kumar Roy* v. *Golam Chunder Dey* (3), the proclamation was in the Collector's office. Mr. Krishnaswami Ayyar argued that as the proclamation in the Court or in the Collector's office and the proclamation in the village are all mentioned together in the Code no distinction should be drawn between one mode of proclamation and another. I am unable to agree with him. The failure to proclaim in the Collector's office will not have as serious an effect on bidders as the failure to proclaim in the village. It is in the latter place that people who are likely to purchase will gather. That is the most important part of the procedure relating to proclamation and, if it is violated, such a violation does not stand upon the same footing as the failure to affix a copy of the proclamation in the Collector's office.

There is only one other decision to which reference may be made, and that is *Rang Lal Singh* v. *Ravaneshwar Pershad*

(1) (1909) 11 Bom., L.R., 380. (2) (1889) I.L.R., 12 Mad., 19 (P.C.).
(3) (1891) I.L.R., 18 Calc., 422 (F.B.).

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Singh(1). In that case, the Judicial Committee had to consider a case of sale which was held some days after the date mentioned in the proclamation. The facts of that case make it clear that that was a case of mere irregularity. The sale itself was being adjourned from day to day and ultimately it was fixed for the day on which the usual Court sales were held. That was the 13th July. On 13th July the presiding officer happened to be absent on leave and the sale was held on the day when he returned. The people in the locality were apparently aware that in consequence of the absence of the presiding officer the monthly sales would not be held on the usual day but would be held immediately on the return of the presiding officer. On those facts the Judicial Committee came to the conclusion that there was only an irregularity, and that it would not vitiate the sale unless substantial loss was proved. That case is no authority for this case, where there was no proclamation relating to the place where the sale is actually held.

For these reasons I agree that the order of Mr. STODART is right and that this appeal must be dismissed.

N.R.

(1) (1912) I.L.R., 39 Calc., 26 (P.C.).