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and it is well that we have had the advantage of two learned arguments upon it; but I confess that the result of that argument is that, however reluctant we may be to accept a state of things which is calculated in some instances to work hardship to minors, I think that we must take it to have been the law, that, where a minor is represented in the manner sanctioned by the law, and the person so representing him adopts a procedure to which particular consequences attach by the Code, then those consequences must affect the minor. For this reason I think that s. 97 must be regarded as precluding the minor from re-opening the matter involved in a former suit from which the person acting for him has withdrawn. I also think that there are no grounds on which we can allow the issue of fraud to be raised at this stage of the proceedings.

Appeal dismissed.

Attorneys for appellant: Messrs. *Watkins & Co.*

Attorney for respondents Khetter Mohun and Nundamoni: *Mr. Hart.*

Attorney for respondent Matisoondari: Baboo *Ukhey Chund Dutt.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice O'Kinealy.

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December 14.

DURGA SUNDARI DEVI, WIDOW OF MONOANJAN DAS (AUCTION-PURCHASER) v. GOVINDA CHANDRA ADDY (DECREE-HOLDER) AND OTHERS (JUDGMENT-DEBTORS).*

Sale in Execution of decree—Application to set aside sale—Appeal from order rejecting application—Civil Procedure Code (Act XIV of 1882), s. 313—"Saleable interest."

There is no appeal to the High Court from an order refusing to set aside a sale, unless such order is made under ss. 294, 312, or 313 of the Civil Procedure Code.

A misrepresentation or concealment in the sale notification which induces a purchaser to buy a property for much more than it is really worth (although that misrepresentation or concealment may be fraudulent), is no ground for setting aside a sale under s. 313 of the Civil Procedure Code.

The meaning of s. 313, is, that when a purchaser under an execution sale buys a property, which turns out to have no existence at all, or to be

* Appeal from order No. 91 of 1883, against, the order of W. MacPherson, Esq., Additional Judge of 24-Pergunnahs, dated the 26th March 1882.

of no saleable value whatever, the Court may then set aside the sale under s. 313.

IN this case one Monnoranjan Das at an execution sale, purchased certain immovable properties described as lots 2 and 3 in the proclamation of sale, for the price of Rs. 7,100 and Rs. 23,550 respectively. The decree under which the purchase was made was passed on a mortgage bond, and directed the realization of the decretal amount from the mortgaged properties.

In pursuance of that decree the lots were advertised for sale, and it was admitted at the hearing, that the description in the sale proclamation tallied exactly with the description of the property as given in the mortgage deed. The sale proclamation was published in accordance with s. 289 of the Civil Procedure Code, and in addition a translation of the same was published in the *Calcutta Gazette* of the 4th January 1882.

The auction purchaser applied to the Court to have the above-mentioned sale set aside on the ground of fraud and misrepresentation, and on the ground that the decree-holder had no "saleable interest" in the property within the meaning of s. 313 of the Code.

The allegations of fraud were—(1). The making of a false affidavit by the decree-holder suppressing all mention of incumbrances on the property, (the incumbrances being, alienation of portions of a taluk, and the existence of certain mourasi mokarari leases at permanently fixed but low rentals). (2). Publishing in the *Calcutta Gazette* an incorrect translation of the sale proclamation, thereby misleading the auction purchaser. (3). Advertising the same land twice over in 2 or more lots. (4). Declaring in the sale proclamation that lot 2 was lakhiraj, whereas it was not.

As regards the absence of any saleable interest, it was contended that the assets were insufficient to pay the Government Revenue, and that all that was purchased was a liability to pay so much out of pocket every year.

The additional Judge before whom the application came on for hearing, found that the leases which were omitted to be mentioned in the affidavit of the decree-holder did not constitute "incumbrances" within the contemplation of s. 287, and that

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the decree-holder was not bound to disclose them; that the purchaser at the time of the sale had been correctly informed as to what was being sold, and that if he had been misled by the advertisement in the *Calcutta Gazette*, he had only himself to blame; and found that as regards the two last grounds of fraud the purchaser had failed to make out his case, and further, holding that "saleable interest" in the property, meant, not a question of profit and loss, but a saleable interest in the property itself, apart from all consideration of profit and loss, rejected the application.

The auction purchaser appealed.

The *Advocate General* (*Mr. Paul*), *Mr. Bell*, *Baboo Kali Mohun Das*, *Baboo Chunder Madhub Ghose*, and *Baboo Doorga Mohun Das* for the appellants.

The *Advocate General* contended that the lower Court had passed the order under s. 313 of the Code, and that inasmuch as the property had been lowered in value by reason of the putni leases, which were not set out in the proclamation, it was not the same property which was put up for sale, and that the sale should be set aside.

Baboo Ambica Churn Bose, and *Baboo Bhowani Ghurn Dutt* for the respondents.

The judgment of the Court (*GARTH, C. J.* and *O'KINEALY, J.*) was delivered by

GARTH, C. J.—This is an appeal from an order of the District Judge, confirming a sale in execution.

The circumstances were these—;

One *Monoranjan Das* became the purchaser at the sale of certain immovable property described as lots 2 and 3; and he petitioned the Court that the sale should be set aside, and his deposit returned to him, upon the ground, that there had been a fraudulent misrepresentation in the sale notification, and that consequently he had bought a property very different in its nature and value from that which purported to be sold. There is no doubt that he purchased *the same property* which was mentioned in the notification; but it was far less valuable, than he had

reason to believe it to be on account of certain putni leases of which no notice was given, and for certain other reasons, which he alleges to have been known to the execution creditor, and fraudulently concealed by the way in which the property was described in the sale notification.

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The subject-matter of the petition appears to have been gone into very carefully by the District Judge, who made an order rejecting the application, and confirming the sale.

The purchaser now appeals to us upon the ground, that the order was one refusing to set aside the sale under s. 313 of the Code of Civil Procedure; (see clause (16) s. 588,) that is to say, he contends that the application to the Court below was made upon the ground, that the judgment-debtor had virtually no saleable interest in the property which purported to be sold.

Unless the order confirming the sale was made under s. 313, or under ss. 294 and 312, there would be no appeal to this Court. And it is not pretended that the order was made under either of the two last mentioned sections.

The question, therefore, which we have to decide is this. Having regard to the nature of the appellant's contention in the Court below, and assuming, as we do, for the purposes of this question, that there was a fraudulent misrepresentation and concealment on the part of the decree-holder with respect to certain encumbrances and other disadvantages attaching to the property sold, which rendered that property of much less value to the purchaser than it would otherwise have been, was that misrepresentation and concealment any ground for setting aside the sale under s. 313? This question has been argued at great length and with much ability by the learned Advocate-General, who has contended, that if the property sold was substantially and to any considerable extent of less value to the purchaser, by reason of the existence of the putni leases and other disadvantages which we have mentioned, it was in fact *not the same property*, which was put up for sale, and that the sale should, therefore, be set aside under s. 313.

We are unable to construe the section in this way. We think that what it really means, is this; that if a purchaser under an execution sale buys a property, which turns out to

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have no existence at all, or to be of no saleable value whatever, the Court may then set the sale aside under s. 313. But we think that any misrepresentation or concealment in the sale notification, which induces a purchaser to buy a property for much more than it is really worth, (although that misrepresentation or concealment may be fraudulent) would be no ground for setting aside the sale under s. 313.

Such misrepresentation or concealment may be very good ground for an application to the Court below to set aside the sale, and we do not doubt that the District Judge acted very properly in entertaining the application in this case; but as we consider that the application was not one under s. 313, we think there is no appeal to this Court from his decision. The only remedy for the applicant, as far as we can see, is a regular suit.

The learned Advocate-General has very properly called our attention to two cases decided by this Court, which he admits are directly opposed to his contention; one, a case of *Protap Chunder Chuckerbutty v. Panioty* (1) decided by Mr. Justice Wilson and Mr. Justice Maclean; and the other *Ram Coomar Dey v. Shushoo Bhoosun Ghose* (2) decided by Mr. Justice Cunningham and Mr. Justice Maclean.

In both these cases it was held, that an incumbrance upon a property sold in execution, by way of mortgage or otherwise, is not sufficient to enable an auction purchaser to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property; and unless we are disposed to differ from those cases, and to refer the question to a Full Bench, which we are not, their authority is of course binding upon us.

It is said, however, that in the case of *Narharmal Marwari v. Sadut Ali* (3) Mr. Justice Pontifex and Mr. Justice Field took a different view of the section; and we are asked to adopt their ruling.

But as we understand that case, the learned Judges then took precisely the same view of the law, as was taken in the other two cases.

The facts were these. On the 21st of February 1880, three bighas of land were purchased by the appellant at an execution sale under a rent decree. At the time of that sale a decree had

(1) I. L. R., 9 Calc. 506. (2) I. L. R., 9 Calc. 627. (3) 8 C. L. R., 496.

been obtained by the mortgagee of the same (amongst other) property, by which that property was ordered to be, and was subsequently, sold on the 11th of March 1880, under which sale the purchaser obtained possession.

Under these circumstances the appellant, who purchased under the 1st sale in February 1880, applied to set aside the sale upon the ground that the execution debtor had no saleable interest in the three bighas, and the Court appeared to be of that opinion.

Mr. Justice Pontifex in giving judgment explains his view of the case in this way.

“Whether there was a saleable interest would depend upon whether these three bighas were included in the mortgage, and were affected by the decree made on the 7th October 1879 by the Subordinate Judge of Hooghly. If these three bighas of land were included in the mortgage, and the decree was a mortgage decree, directing a sale of the mortgaged property, then it is clear, that on the 7th October 1879, when that decree was made, being previous to the attachment under the rent decree, the mortgagor would no longer have a saleable interest in the property in specie, because the mortgage decree binding the land, the sale of the 21st February 1880 by the Howrah Court would not carry the property itself, but could only carry a right in the surplus proceeds of sale under the mortgage decree.”

Whether the learned Judge was right in that case in saying, that the mortgagor had no saleable interest in the three bighas sold to the appellant, may, perhaps, be open to doubt; but it is clear, that the principle of the Court's decision was, that if the three bighas were included in the mortgage, the mortgagor had no saleable interest in them at the time of the sale to the appellant. We think, therefore, that this case does not assist the present appellant in any way; and it was certainly not treated by the learned Judges in the other two cases as in any way opposed to their view.

The Advocate-General has very properly abstained from going into the facts of the present case, seeing that we are against him upon the point of law. It is not pretended here, that the judgment-debtor had not some interest in the property sold; or that the appellant has not bought, in one sense, the property

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which was described in the sale notification. All that is contended for is, that the property was so misdescribed, or that there was that concealment of the incumbrances upon it, that the purchaser has bought a totally different thing from that which he intended to buy; or in other words, that he has brought a property charged with heavy incumbrances, instead of a property free from incumbrances.

Then Mr. Bell has further argued, that although we may have no power to entertain the question on appeal, we may do so under s. 622 of the Code of Civil Procedure.

The answer is, that we have not before us any application under s. 622, but an appeal against the District Judge's order. And even if this were such an application, I, for one, should not be disposed to grant it. The Judge in the Court below has not acted without jurisdiction; and, so far as I can see, he has been guilty of no irregularity.

We think, therefore, that there is no ground for this appeal, and that it should be dismissed with costs, which we assess at Rs. 150.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

1884
 January 11.

GOPAUL CHUNDER CHUCKERBUTTY (PLAINTIFF) v. NILMONEY MITTER AND OTHER (DEFENDANTS)*

Onus Probandi—Ejectment, Suit for.

When a plaintiff seeks to eject persons from premises claimed by him, on the ground that they are in wrongful possession of the premises, he is bound to show that he or some of the persons under whom he claims have been in possession of the property within twelve years before suit. A mere allegation in the plaint that the persons sought to be ejected were the tenants of the person through whom the plaintiff claims, will not shift the burden of proof.

Rao Karan Singh v. Babar Ali Khan, (1) explained and distinguished.

Appeal from a decision of PIGOT, J., dated 8th February 1888.

THE plaintiff stated that in 1865 the house and premises known as No. 150, Chitpore Road, Sobabazaar, belonged to one Mittunjoy

(1) L. R. 9 I. A. 99.