

this Court held that the special and extraordinary remedy, by invoking the revisional powers of this Court, should not be exercised unless as a last resource for an aggrieved litigant. Again, in the case of *Gopal Das v. Alaf Khan* (3), Mr. Justice Straight, whose judgment was afterwards affirmed on appeal, is reported to have said:—"The recognised rule of this Court is that if a party to civil proceedings applies to us to exercise our powers under s. 622, he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally, irregularly or without jurisdiction done by a Subordinate Court." These last two cases apply in every way to the case I am now considering. The learned counsel for the applicants admits that they have open to them a remedy by way of suit in which they can question the decision of the Subordinate Judge so far as it is injurious to them. Admittedly they have not availed themselves of that remedy, and therefore, adopting and acting on the precedents above cited, I think that this Court should not grant to them the extraordinary remedy by way of revision for which they have applied. For this reason I think this application should be rejected. It is therefore unnecessary for me to enter into its merits or to come to any finding as to whether the reasons set forth in the application are or are not good grounds for the exercise of the revisional jurisdiction of this Court. I dismiss this application with costs.

Application dismissed.

Before Mr. Justice Burkitt.

ALI GAUHAR KHAN (APPLICANT) *v.* BANSIDHAR (OPPOSITE PARTY).*

Civil Procedure Code, s. 311—Execution of decree—Application to set aside sale in execution—Decree-holder a necessary party to such application.

The decree-holder is a necessary party to an application under s. 311 of the Code of Civil Procedure.

* Miscellaneous application, No. 5 of 1893, for revision under s. 622 of the Code of Civil Procedure.

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Hence where a judgment-debtor applied under the above-mentioned section to have a sale in execution of a decree against him set aside and made no attempt to implead the decree-holder until long after limitation had expired. *Held* that the application must be dismissed. *Karamat Khan v. Mir Ali Ahmed* (1) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Muftaba* and Babu *Becha Ram Bhattacharji* for the applicant.

BURKITT, J.—This is an application for revision of an order passed by the District Judge of Aligarh on the 13th of January 1893, affirming on appeal an order of the Munsif of Aligarh passed under s. 311 of the Code of Civil Procedure cancelling the sale of certain property. It appears that the property was sold on the 20th of February 1892, and was bought by one Ali Gauhar Khan. On the 25th of February, the judgment-debtor made an application to the Court under s. 311 asking to have the sale set aside. The applicant impleaded as respondent to this application only the auction-purchaser, and did not implead the decree-holder. In subsequent proceedings, but long after the limitation period had expired, the decree-holder was made a party to the case and served with notice of the proceedings. At the first hearing in the course of these proceedings the auction-purchaser objected that the application was bad for want of parties, alleging, as I understand, that the decree-holder was a necessary party and that he was brought on the record of the case too late. The contention was that the absence of the decree-holder was fatal to the proceedings and that he was brought on the record too late to cure the original defect.

The first matter which requires to be decided in this case is:—was the decree-holder or was he not a necessary party to this application? It has been decided by this Court in a recent case, *Karamat Khan v. Mir Ali Ahmed* (1), that to an application under s. 311 of the Code of Civil Procedure the auction-purchaser is a necessary party and that his non-joinder within the fixed period of limitation is fatal to the application. It seems to me that the reasons given by the learned judge who decided that case apply even more forcibly to the

(1) Weekly Notes, 1891, p. 121.

case of a decree-holder. I cannot conceive how it could be considered that he is not a necessary party to an application the practical effect of which, if granted, would be to deprive him, for a time at least, of the fruits of his decree. In such a matter he has a great, and indeed I may say, an overwhelming interest, and is entitled to be heard fully in support of the sale. It is quite possible to imagine a case in which, if the decree-holder were not a party to such an application, the judgment-debtor and the auction-purchaser might collude together to defraud the decree-holder. I am therefore of opinion that the decree-holder was an absolutely necessary party to this application. Admittedly he was not made a party to it till long after the limitation period of 30 days had expired. The Munsif, consequently, when he brought the judgment-debtor on the record as a party, exercised a power with which he was not vested by law, and, as that order has been confirmed on appeal by the Judge, it is one to which the provisions of s. 622 are applicable.

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I notice that in his judgment, applying s. 34 of the Code of Civil Procedure, the District Judge has held that the applicant, by not taking at the earliest opportunity his objection as to misjoinder, must be considered to have waived that objection. In this matter, too, I think the learned Judge was wrong. It appears that the objection was taken at the first hearing, and an objection so taken must be held to have been taken at the earliest opportunity. The case of *Imam-ud-din v. Liladhar* (2) is an authority for this proposition.

The result of the foregoing conclusions is briefly that as the judgment-debtor was a necessary party to the application, and as he was not made a party to it till after the expiry of the limitation period, the Court below in making him a party acted without jurisdiction. The case accordingly comes within the purview of s. 622 of the Code of Civil Procedure. Therefore, setting aside the concurrent orders of the two lower Courts, I direct that the application under s. 311 for cancelment of the sale be rejected. The applicant is entitled to costs in all three Courts.

Application rejected.