

and it is in respect of that order that this appeal has been brought. Section 588 of the Code of Civil Procedure does not allow an appeal from an order under section 319. Mr. *Madho Prasad* has contended that the order made by the Court below must be regarded as a decree under section 244, the parties being the decree-holders and the judgment-debtor. This contention is in my opinion unsound. The decree-holders, as such, were not entitled to obtain delivery of possession. It was only by reason of their having purchased the property of the judgment-debtor at auction that they could apply for possession, and it was only in their character as auction-purchasers that they did make their application for possession. Their status as auction-purchasers was distinct from their character as decree-holders and—as observed in the judgment of the Full Bench in *Sabhajit v. Sri Gopal* (1)—it was a pure accident that the decree-holders were also auction-purchasers. As I have said above, as decree-holders, the respondents could not claim possession, and therefore their application for delivery of possession was not, and could not be, one under section 244. It purported to have been made under section 319, and that was the only section under which it could have been made. As no appeal lies from an order under section 319, the preliminary objection must prevail and this appeal must be, and it is, dismissed with costs.

Appeal dismissed.

Before Know, Offg. Chief Justice and Mr. Justice Aikman.

JAGAN NATH (JUDGMENT-DEBTOR) v. MAKUND PRASAD (DECREE-HOLDER),
AND BALDEO PRASAD (AUCTION PURCHASER).*

Civil Procedure Code, section 311—Execution of decree—Application to set aside sale in execution—What applicant must prove.

It is not sufficient for an applicant under section 311 of the Code of Civil Procedure to show that there has been material irregularity in publishing or conducting a sale, and that a price below the market value has been realised; but he must go on to connect the one with the other, that is, the loss with the irregularity as effect and cause by means of direct evidence. *Tassaduk Rasool Khan v. Ahmad Husain* (2) referred to.

* First Appeal, No. 36 of 1895, from an order of Syed Muhammad Jafar Husain Khan, Subordinate Judge of Barilly, dated the 5th January 1895.

(1) I. L. R., 17 All., 222.

(2) L. R. 20, I. A. 176.

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THIS was an appeal from an order of the Subordinate Judge of Bareilly dismissing a judgment-debtor's application to set aside a sale in execution of a decree against him. The facts of the case are thus stated in the order of the lower Court:—"In execution of a decree held by Makund Prasad the whole of the village of Barkhana Harchandpur was put up for sale. During the progress of the sale proceedings one Musammat Sarsuti instituted a suit in this Court to establish her right to one-third of the village. An application was presented on her behalf for postponement of the sale on the ground that she had instituted the suit for declaration of her right to one-third of the village. Thereupon it was ultimately ordered that the sale should be postponed. On the 28th June 1894 an application was made on behalf of the decree-holder to the effect that the order of postponement related to one-third of the village and not to the whole, but the officer conducting the sale would postpone the sale of the whole village, and praying that the officer be informed that the order related to only one-third of the village. Thereupon in the presence of the pleaders of both parties it was ordered that the sale of one-third of the village should be put off and not of the remaining two-thirds. The 20th July was fixed for the sale, and on that date the officer in charge of the sale proceeded to sell the two-thirds of the village, which was knocked down for Rs. 6,100 to Baldeo Prasad."

The judgment-debtor thereupon applied to have the sale set aside on the ground that after the order for postponement the sale could not legally have been held without the issue of a fresh proclamation of sale, and alleging that in consequence of this irregularity the property had fetched a price far below its proper value.

The lower Court found that, though there was an irregularity in holding the sale without issue of a fresh proclamation, and though the price fetched by the property was decidedly low, yet the judgment-debtor was bound to prove that the lowness of price was necessarily the result of the said irregularity, and that as he had failed to establish the connection between the two he was not entitled to have the sale set aside. The Court therefore dismissed the application.

The judgment-debtor appealed to the High Court.

Mr. *Roshan Lal*, for the appellant.

Mr. *D. N. Banerji* and Pandit *Sundar Lal*, for the respondents.

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KNOX, OFFICIATING C. J.—This is a first appeal from an order passed by the Subordinate Judge of Bareilly. In that order the Subordinate Judge relying upon the precedent of *Tassaduk Rasul Khan v. Ahmad Husain* (1) declined to set aside a sale of immovable property on the ground that the judgment-debtor, who was impugning the sale, had failed to prove that any substantial injury had been sustained by him by reason of an alleged material irregularity in the publication of the sale. The material irregularity alleged arose under the following circumstances. The property originally advertised for sale was 20 biswas of the village of Barkhana Harchandpur. The proclamation for sale of 20 biswas was duly made, and the 20th of July fixed as the date on which the sale was to be held. One Musammat Sarsuti instituted a suit laying claim to one-third of the property advertised for sale, and she followed up her suit by an application that the sale might be postponed pending the result of her suit. Her application was at first granted, and orders were issued for adjournment of the sale. Upon this the decreeholder pointed out that the claim of Musammat Sarsuti extended only to one-third of the property advertised for sale and that there was no reason why the remaining two-thirds should not be sold. Upon this fresh orders were issued to the Collector, who was to hold the sale, directing him to proceed with the sale of two-thirds of the village. Two-thirds of the village were accordingly sold on the 20th of July, the date originally fixed on the first proclamation for sale, and purchased for Rs. 6,100 by one Baldeo Prasad. The period that intervened between the first order directing postponement of the sale and the second order directing the sale to proceed as to two-thirds was an interval of 14 days. The contention before us is that under the circumstances fresh proclamation should have been made. In support of this contention the learned counsel for the appellant referred us to *Shib Prokash*

(1) L. B., 20 I. A., 176.

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Singh v. Sardar Doyal Singh (1). It was there held that a fresh proclamation was a necessity and the omission to issue it a material irregularity. The question whether a fresh proclamation was or was not necessary need not be decided in the present case, as we are able to dispose of the appeal on other grounds, and in fact in the precedent just quoted the case before the Calcutta Court was remanded for evidence and decision upon what is the material point in all these cases, *viz.*, whether, in the event of a material irregularity having taken place, substantial injury has or has not been sustained by reason of the occurrence of the irregularity complained of. In the present appeal one of the pleas raised is that the evidence on the record proves substantial injury, and some attempt was made to satisfy us that substantial injury to the judgment-debtor had been made out. There is a strong probability that the property was sold considerably below its ordinary market value, but there is not one word in the evidence which connects the low price, if it was a low price, realised with what is alleged as the material irregularity. The learned counsel for the appellant endeavours to get over this difficulty by asking us to follow the ruling in *Ganga Prasad v. Jag Lal Rai* (2). That was a ruling of a Divisional Bench of this Court in which the learned Judges who heard the case differed. There can now be no question whatever as to what is the law, as the matter has been fully considered and decided by their Lordships of the Privy Council in *Tassaduk Rasul Khan v. Ahmad Husain* (3). It was contended on behalf of the respondents in that case that the non-compliance with the interval of 30 days between proclamation and sale made the sale a nullity. Their Lordships say in most distinct terms that they cannot accede to that contention. They allow there had been a material irregularity, but, following previous rulings of the Privy Council to the same effect, they laid down clearly that in all cases of irregularity under-s. 311, evidence must be given of substantial injury having resulted, and that it was incumbent on the judgment-debtors, who were respondents,

(1) I. L. R., 3 Cal., 544.

(2) I. L. R., 11 All., 333.

(3) I. R., 20 I. A., 176.

to prove that they sustained substantial injury by reason of such irregularity. They further laid down that loss is not to be inferred from the mere fact that a sale was bad without full compliance with section 290, a section which, their Lordships pointed out, contemplates direct evidence on the subject.

AIKMAN, J.—I concur with the learned officiating Chief Justice. I need not recapitulate the facts of the case, which have been clearly set forth in his judgment. Assuming for purposes of argument that there was in the case before us a material irregularity in the failure of the Court to issue a fresh proclamation of sale after it had exempted from sale part of the property originally advertised, I think it must be held that appellant has failed to prove that the low price which his property fetched at the auction was due to that irregularity. The judgment of their Lordships of the Privy Council in the case of *Tassuluk Rasul Khan v. Ahmad Husain* (1) makes it clear that it is not sufficient for an applicant under section 311 to show that there had been material irregularity in publishing or conducting a sale and that a price below the market value has been realised, but he must go on to connect the one with the other, that is, the loss with the irregularity, as effect and cause by means of direct evidence. The contention of the learned counsel for the appellant that the sale was a nullity, a contention based on a decision of this Court, *Ganga Prasad v. Jag Lal Rai* (2), is deprived of any force by reason of the same ruling of their Lordships of the Privy Council, as in it their Lordships declined to accede to a similar contention.

Per Curiam. The order of the Court is that the appeal is dismissed with costs.

Appeal dismissed.

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(1) I. L. R., 21 Calc., 66.

(2) I. L. R., 11 All., 333.