

merely an authority, but they are founded upon elementary principles of equity. It is manifest in this case that the sale of the property as unincumbered was a *mala fide* sale and fraud upon all intending purchasers.

For these reasons we allow the appeal, set aside the decree of the Court below, and decree the suit of the plaintiff in terms of the prayer in the plaint, with costs.

Appeal decreed.

Before Mr Justice Banerji and Mr Justice Aikman.

SHEODHYAN AND ANOTHER, (OBJECTIONS) v. BHOLANATH AND OTHERS
(OPPOSITE PARTIES).*

Civil Procedure Code, section 311—Execution of decree—Sale in execution—Sale without previous attachment—Material irregularity.

Held that the absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. *Ram Chand v. Pitam Mal* (1); *Ganga Prasad v. Jag Lal Rai* (2); *Harbans Lal v. Kundan Lal* (3) and *Tasadduk Rasool Khan v. Ahmad Husain* (4) referred to. *Mahadeo Dubey v. Bholanath Dicit* (5) distinguished.

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

Munshi *Gobul Prasad* for the appellants.

Munshi *Ram Prasad* for the respondents.

BANERJI and AIKMAN, JJ.—This is an appeal from an order refusing to set aside an auction-sale of the property of the appellants, held in execution of a decree obtained by the respondents against the appellants. It appears that a portion of the said property had been attached before judgment, that after the decree was passed an application for execution was made, and that thereupon the remainder was also attached in the manner provided by law. The property was then sold, but the sale was set aside on the ground of material irregularity in publishing and conducting it. This was on the 23rd of April 1898. On that date the Court made

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* First Appeal No. 6 of 1899 from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Moradabad, dated the 7th January 1899.

(1) (1888) I. L. R., 10 All., 506.

(3) Weekly Notes, 1898, p. 212

(2) (1889) I. L. R., 11 All., 333.

(4) (1893) I. L. R., 21 Calc. 66.

(5) (1882) I. L. R., 5 All. 86.

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a further order that the decree-holders should take further steps on the 25th of that month. On the 25th the decree-holders do not appear to have made any further application, and thereupon the case was removed from the file of pending cases. On the 6th of May following the decree-holders presented another application for execution and prayed for the sale of the six villages which have now been sold. The property was not attached a second time, but the usual proclamations of sale were issued, and the sale actually took place on the 20th of August 1898. We notice that, during the pendency of the execution proceedings and before sale, the judgment-debtors filed an application on the 11th of August 1898, in which they stated that the property had been attached. This application was made in connection with the decree-holders' prayer for the arrest of the judgment-debtors. After the auction-sale of the property on 20th of August 1898, the judgment-debtors applied to have the sale set aside on various grounds, one of which was that after the case had been struck off the file on the 25th of April 1898, the attachment of the property had come to an end; that the sale of the 20th of August 1898 was effected without a fresh attachment; and that the sale was consequently illegal and void. The Court below overruled the objections and confirmed the sale. It found that the judgment-debtors had not sustained any injury in consequence of the irregularities alleged by them. This finding has not been questioned in the appeal before us, so that we may take it that the judgment-debtors have not suffered any substantial loss within the meaning of section 311 of the Code of Civil Procedure. It is urged before us that, by the striking off of the execution case on the 25th of April 1898, the attachment which had been placed upon the property had determined, and that by reason of the property not being attached a second time there was an illegality in the sale which vitiated the sale. On the question of the effect which the striking off of an execution case has upon an attachment of property made in the case, there is a conflict of authority, but in the view which we take of this case we do not think it necessary to enter into a consideration of that question. In our opinion the

absence of attachment, assuming in this case that the property was sold without a previous attachment which subsisted at the date of sale, did not amount to anything more than a material irregularity in the publishing of the sale. An attachment is a step towards the sale of the judgment-debtor's property. The object of an attachment is to bring the property under the control of the Court, with a view to prevent the judgment-debtor alienating it, and thereby preventing its sale in execution of the decree. In the case of immovable property, one of the requirements of the law for perfecting an attachment is that the order of attachment should be publicly proclaimed. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation, and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder enforceable under the decree. The publication of the attachment is thus a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may therefore be deemed to be a material irregularity in the publishing of the sale. That was the view taken in the case of *Ram Chand v. Pitam Mal* (1). We were much pressed with the Full Bench decision in *Mahadeo Dubey v. Bholanath Dichit* (2); but it seems to us that the principle of the ruling of their Lordships of the Privy Council in *Tasadduk Rasool Khan v. Ahmad Husain* (3) makes the decision in *Mahadeo Dubey v. Bholanath Dichit* inapplicable to the present question. In that case their Lordships of the Privy Council held, with reference to a proclamation of sale issued in violation of the provisions of section 290 of the Code of Civil Procedure, that that was nothing more than a material irregularity, and did not *ipso facto* vitiate the sale, as had been held by this Court in *Ganga Prasad v. Jag Lal Rai* (4). The same principle applies

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(1) (1888) I. L. R., 10 All., 506.

(2) (1882) I. L. R., 5 All., 86.

(3) (1898) I. L. R., 21 Calc., 66.

(4) (1889) I. L. R., 11 All., 333.

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to the question before us, and this seems to have been the opinion of the learned Judges who decided the case of *Harbans Lal v. Kundan Lal* and others (1). In this view it is not necessary to consider the effect of section 490 of the Code of Civil Procedure or of the striking off of the execution case on the 25th of April 1898 upon the question of attachment. As the absence of attachment was, in our opinion, a material irregularity in publishing the sale, and as it has not been proved in this case that such irregularity resulted in substantial injury to the judgment-debtors, the Court below was right in refusing to set aside the sale. We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Blair and Mr. Justice Burkitt.

CHETAN CHARAN DAS AND OTHERS (DEFENDANTS) v. BALBHADRA DAS (PLAINTIFF).*

Parties to a suit—Death of plaintiff after hearing but before judgment—Judgment given by Court in ignorance of plaintiff's death—Judgment and decree valid—Doctrine of nunc pro tunc.

The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour of the deceased plaintiff. *Held*, that, nothing remaining to be done by the parties on the day when judgment was reserved, the judgment should read as from that date, and the decree was a valid decree. *Cumber v. Wane* (2), *Ramacharya v. Anantacharya* (3) and *Surendro Keshub Roy v. Doorgasoodery Dossee* (4) followed.

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

Mr. E. A. Howard and Munshi Ram Prasad, for the appellants.

Mr. D. N. Banerji, Babu Jogindro Nath Charudhri and Babu Satya Chandar Mukerji, for the respondent.

* First Appeal No. 50 of 1897, from a decree of Maulvi Saiyid Muhammad Sirajuddin, Subordinate Judge of Agra, dated the 15th September 1896.

(1) Weekly Notes, 1898, p. 212

(2) 1 Smith L. C., 10th Ed. 325.

(3) (1895) I. L. R., 21 Bom., 314.

(4) (1892) I. L. R., 19 Calc., 513.