

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice

Sir George Knox.

1906
March 10.

WAZIR ALI (PLAINTIFF) v. JANKI PRASAD AND OTHERS (DEFENDANTS).
*Execution of decree—Procedure—Postponement of sale by Assistant Collector
—Power of Assistant Collector to cancel his own order of postponement—
Clerical error—Irregularity.*

An application, purporting to be made by a decree-holder, was presented to an Assistant Collector on the day fixed by the latter for the sale of certain immovable property. The applicant stated that the decretal money had been paid and asked for the postponement of the sale. The Assistant Collector thereupon granted the application and struck off the execution proceedings, but, discovering his error immediately afterwards, cancelled his order and held the auction a few hours later.

Held, that the Assistant Collector could cancel his original order and that the subsequent sale was not thereby rendered illegal. *Syed Tuffazal Hossein Khan v. Raghu Nath Prasad* (1) referred to.

IN this case the sale of certain ancestral property in execution of a decree transferred to the Collector of Ballia under section 320 of the Code of Civil Procedure was fixed for the 20th of November, 1903. The duty of conducting the sale had been made over by the Collector to an Assistant Collector. Shortly before the sale was to take place an application was made to the Assistant Collector, purporting to be an application by the decree-holder, stating that the money due had been paid and that the sale might therefore be postponed. The Assistant Collector, without considering whether this application was presented by a person lawfully entitled to make it, passed an order granting the application and striking off the execution proceedings. Immediately after doing so he found out his error, cancelled the order which he had by inadvertence passed, and proceeded with the sale. On the 5th of January, 1904, the Collector set aside the sale. The purchaser thereupon brought the suit out of which this appeal arose praying that the sale of the 20th of November, 1903, might be confirmed. The Court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiff's claim. This decree was, however, reversed in appeal by the District Judge, who held that the sale was "utterly illegal"

* Second Appeal No. 1260 of 1904, from a decree of L. Marshall, Esq., District Judge, Ghazipur, dated the 20th of August, 1904, reversing a decree of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Ghazipur, dated the 10th of June, 1905.

(1) (1871) 7 B. L. R., 186.

1906

WAZIR ALI
v.
JANKI
PRASAD.

and that it did "not matter whether there was in any other respect any irregularity causing substantial injury." The plaintiff appealed to the High Court.

Messrs. *A. E. Ryves* and *B. E. O'Connor*, for the appellant.

Mr. G. P. Boys, for the respondents.

STANLEY, C.J. and KNOX, J.—This second appeal arises out of a suit brought by the plaintiff, who is appellant here, in which he prayed that an order of the Collector of Ballia, dated the 5th of January, 1904, cancelling an auction sale held on the 20th of November, 1903, in respect of certain property, might be set aside and that a decree confirming the sale might be passed in his favour. The sale with which we are concerned was a sale of ancestral property held by a Collector to whom execution of the decree had been transferred under section 320 of the Code of Civil Procedure. The sale was fixed for and was held on the 20th of November, 1903, by the Assistant Collector of Ballia, to whom the Collector had made over the duty of conducting the sale. It is said that before the sale was actually held an application was made to the Assistant Collector, purporting to be an application by the decree-holder, stating that the money due had been paid and that the sale might therefore be postponed. The Assistant Collector without looking into the question whether this application was presented by a person lawfully entitled to make it, passed an order granting the application and striking off the execution proceedings. Immediately after doing so he found out his error, cancelled the order which he had already passed, and a few hours later proceeded to hold the auction. The lower appellate Court considered that this action on the part of the Assistant Collector could not be deemed a clerical error, that the Assistant Collector had no power to cancel the order which he had passed, and that the sale was therefore utterly illegal, and that he was not called upon to consider the other points raised in appeal before him as to whether there had been any other irregularity causing substantial injury. In the appeal before us this point has been again urged with considerable vigour, and we have been asked to uphold the judgment of the lower appellate Court on the ground that the Assistant Collector's proceedings were so far wholly irregular. In reply, however, to this

argument our attention was directed by the learned counsel for the appellant to the case of *Syud Tuffazal Hossein Khan v. Raghu Nath Prasad* (1) and to the judgment of their Lordships of the Privy Council in that case. The order which their Lordships were considering in that case was very much the same as in the present case. The auction sale in that case was being held by a Civil Judge. He passed in the first instance an order directing the sale and then set aside the order he had just passed, without any notice to the appellant, who was in ignorance of and had no opportunity of opposing it. It was contended that the Civil Judge was not able to correct his error, but it was held by their Lordships that a Judge, so far as the practice of his Court will allow him, should recall and cancel an error which he had set forth *per incuriam* and an order which he would not have made if duly informed as to the facts. The words used by their Lordships are important. They are as follows:—"To proceed so far as the practice of his Court will allow him, to recall and cancel an invalid order, is not simply permitted to, but is the duty of a Judge, who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor. It would be a serious injury to the suitor himself to suffer him to attempt to execute an inoperative order." We are therefore unable to agree with the learned Judge in the view which he took that the sale was utterly illegal, and that it did not matter whether there was in any other respect any irregularity causing substantial injury. Irregularity both in the publication and in the conduct of the sale had been alleged and had been put in issue, and the learned Judge should have tried these issues, which were again repeated before him in the grounds of appeal. We set aside the judgment of the lower appellate Court upon the preliminary point and we remand the case to that Court under the provisions of section 562 of the Code, with directions to readmit the appeal under its original number in the register and to proceed to determine it upon its merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

(1) (1887) 7 B. L. R., 186.

1906

WAZIR ALI
v.
JANKI
PRASAD.