

[Act, and the reasons assigned in the judgment in *Narain Singh v. Chatarbhuji Singh* for the order passed therein commend themselves to us. It is unnecessary for us to recapitulate the reasons which are given in that judgment. Upon the merits the decision of the Court below based upon section 43 of the Civil Procedure Code is not supported by the learned vakil who represents the respondents.

We therefore allow this appeal, set aside the decree of the lower appellate Court, and inasmuch as the material issues in the appeal have not been determined and the appeal was decided upon a preliminary point, we remand the case under the provisions of section 562 of the Code with directions that it be reinstated in its original number in the file of pending appeals and be determined according to law. On the re-hearing of the appeal it will be open to the Court below to deal with the question of the insufficiency in the court fee paid by the defendants appellants in that Court. The appellants will have their costs of this appeal. All other costs will abide the event.

*Appeal decreed and cause remanded.*

*Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.*

BEHARI SINGH (AUCTION-PURCHASER) v. MUKAT SINGH AND ANOTHER  
(JUDGMENT-DEBTORS).\*

*Civil Procedure Code, sections 244 and 311—Execution of decree—Property sold as non-ancestral after inquiry by Court and notice to judgment-debtors—Plea that property was in fact ancestral barred.*

Where after an inquiry as to the nature of the property, of which the judgment-debtors had notice, a Court in execution of a decree caused certain immovable property to be sold by auction as non-ancestral, the judgment-debtors standing by and neglecting to supply the Court with any information as to the nature of the property sold, it was held that it was not competent to the judgment-debtors subsequently to seek to have the sale set aside upon the ground that the property was ancestral and ought to have been dealt with in the manner provided by law in respect of such property. *Shirin Begam v. Agha Ali Khan* (1) followed. *Arunachellam Chetti v. Arunachellam Chetti* (2) referred to. *Sukhdeo Rai v. Sheo Ghulam* (3) not followed.

\* Appeal No. 48 of 1905 under section 10 of the Letters Patent.

(1) (1895) I. L. R., 18 All., 141. (2) (1888) L. R., 15 I. A., 171.  
(3) (1882) I. L. R., 4 All., 332.

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ONE Risal Singh, holding a money decree against Mukat Singh another, applied in execution of that decree for the attachment and sale of certain immovable property of his judgment-debtors. Upon this application the executing Court (Subordinate Judge of Farrukhabad) issued notice to the judgment-debtors under section 287 of the Code of Civil Procedure calling upon them to state whether the property sought to be sold was or was not ancestral. The judgment-debtors paid no attention to this notice. Thereupon inquiry was made from the Collector, and the result of his investigation was a finding that the property was not ancestral. The Subordinate Judge thereupon proceeded to carry out the sale of the property as if it was not ancestral. After the sale had been carried out, the judgment-debtors applied to have it set aside upon the ground that the property sold was ancestral property. The Subordinate Judge was of opinion that the judgment-debtors' objection to the sale was a valid objection and set aside the sale, and this order was confirmed on appeal by the District Judge. The auction purchaser thereupon appealed to the High Court. His appeal was dismissed by a single Judge of the Court (See Weekly Notes, 1905, p. 183) : hence the present appeal.

Mr. *W. Wallach* and *Munshi Gulzari Lal*, for the appellant.

*Babu Jogindro Nath Chaudhri* and *Babu Surendra Nath Sen*, for the respondents.

STANLEY, C.J. and BURKITT, J.—This appeal must be allowed. The facts which have given rise to the litigation are shortly as follows:—The decree-holders applied to the Court in execution of a decree to have certain lands of the judgment-debtor sold. The Court upon this application caused notices to be issued under section 287 of the Code of Civil Procedure calling upon the judgment-debtors to state whether the property was ancestral or not. The judgment-debtors paid no heed to this notice. Thereupon inquiry was made of the Collector, and the result of his investigation was a finding that the property was not ancestral. Accordingly the Court in the exercise of its jurisdiction carried out the sale, holding that the property was not ancestral. The judgment-debtor, after the execution of the decree had been carried

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out, objected to the sale on the ground that the land was ancestral. Both the lower Courts held that this objection was fatal to the sale, and passed an order setting aside the sale. On second appeal to this Court the learned Judge before whom the appeal came acceded to the contention of the respondents and dismissed the appeal, holding that the case was governed by the decision in the case of *Sukhdeo Rai v. Sheo Ghulam* (1). It appears that a later decision of a Bench of this Court, the facts of which appear to be substantially on all fours with those of the present case, was not laid before the learned Judges of the Courts below. It is the case of *Shirin Begam v. Agha Ali Khan* (2). In that case the law was carefully considered in a lengthy judgment of the Court, and it was there held that in an application under section 311 of the Civil Procedure Code to set aside a sale in execution of a decree it is necessary for the applicant to show that not only was there material irregularity in publishing or conducting the sale, but that substantial injury also had been sustained in consequence of such irregularity ; also that in such a case it is not competent for the applicant to raise nor for the Court to entertain any plea as to the jurisdiction of the Court executing the decree, as, for example, a plea that the property sold was ancestral and ought to have been sold in accordance with the provisions of section 320 of the Code. Now it seems to us to be unnecessary to reconsider the questions which were decided in these cases inasmuch as it was conceded by the learned advocate for the respondents that if, as a matter of fact, it was determined by the Court below on investigation that the property was not ancestral, he could not succeed on the question raised by him either under section 311 or under section 244. As a matter of fact, as we have pointed out, the learned Subordinate Judge did decide that the property was not ancestral, and thereupon ordered the sale. This concludes the question. We think that some observations which fell from their Lordships of the Privy Council in a case which bears a close analogy to the present case are worthy of being referred to here, because it is apparent in this case that the judgment-debtor, although notice was served upon him to state what the nature of the property was, whether ancestral or non-ancestral, abstained

(1) (1882) I. L. R., 4 All., 332.

(2) (1895) I. L. R., 18 All., 141.

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from giving any information and allowed the sale to proceed on the basis that it was not ancestral property, he in fact refused to give the Court any assistance whatever.' In the case of *Arunachellam Chetti v. Arunachellam Chetti* (1), their Lordships in the course of their judgment, referring to the fact that the property which was the subject-matter of a sale had been insufficiently described in the proclamation for sale, observe:—"The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in *Olpherts v. Mahabir Pershad Singh* (2), that if there was really a ground of complaint and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property, whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant, that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated." We think that these words of their Lordships are peculiarly applicable to the circumstances of the present case. We therefore hold that under the circumstances neither under section 244 nor section 311 of the Code of Civil Procedure was the judgment-debtor entitled to come forward and ask to have the sale set aside. We therefore allow this appeal, set aside the decree of the learned Judge of this Court and also the decrees of the Courts below, and direct that the objection of the judgment-debtors filed on the 18th of May 1894 do stand dismissed with costs in all Courts.

*Appeal decreed.*

(1) (1888) L. R., 15 I. A., 171.

(2) (1882) L. R., 10 I. A., 25.