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CHANDRA
KUNWAR
v.
CHAUDHRI
NABPAT
SINGH.

Solicitors for the appellant in both appeals :—*Ranken, Ford,
Ford & Chester.*

Solicitors for the respondents in both appeals :—*Barrow,
Rogers & Nevill.*

J. V. W.

P. C.
1906
*November 14.
December 14.*

GAJRAJMATI TEORAIN AND OTHERS (PLAINTIFFS) v. AKBAR HUSAIN
AND OTHERS (DEMANDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

Sale in execution of decree—Material irregularity in conduct of sale—No proof of substantial injury—Postponement of sale—Order staying sale withdrawn and sale held without issue of fresh proclamation—Civil Procedure Code (Act XIV of 1882), sections 290, 291, 244 and 311, 312.

A proclamation of sale in execution of a decree fixed the sale for 20th February 1897. By an order of the Subordinate Judge of Gorakhpur, made *ex parte* on 11th February, the sale was stayed, and on 16th the Collector acting on that order, struck the proceedings off the pending file. On 22nd February, in consequence of notice received from the Subordinate Judge that the order staying the sale had been set aside, the sale was brought on in continuation of the sales listed for the 20th, which had not been finished, and on the 23rd the property of the judgment-debtors was sold to the decree-holder who had obtained leave to bid. On application for confirmation of the sale the judgment-debtors applied under section 311 of the Civil Procedure Code to have the sale set aside; but the Subordinate judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage, and that decision was upheld by the High Court. In a suit to have the sale annulled on the grounds stated in the application under section 211, one of which was that the sale was illegal without the issue of a fresh proclamation of sale: *Held* by the Judicial Committee that the suit was not maintainable. Assuming that a fresh proclamation should have been issued, the omission was an irregularity which had involved no loss to the judgment-debtors, whose only course was to object, as they did, to the confirmation of the sale, which they could not afterwards impeach by regular suit.

APPEAL from a decree (January 31st, 1902) of the High Court at Allahabad, which reversed a decree (January 12th, 1899) of the Subordinate Judge of Gorakhpur and dismissed the appellants' suit with costs.

The main questions for determination on this appeal related to the validity of a sale in execution of decree held on 23rd February 1897, and to the right to maintain a suit to set aside

Present :—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE and Sir ARTHUR WILSON.

the sale after proceedings by application under section 311 of the Code of Civil Procedure (Act XIV of 1882) had been unsuccessfully taken.

The decree in execution of which the sale in execution of 23rd February 1897 was held was made by the High Court at Allahabad on 13th May 1885 and modified on appeal a decree made on 7th July 1884 by the Subordinate Judge of Gorakhpur. The decree-holder was one Muhammad Kazim for himself and as heir of one Muhammad Hadi, deceased, and at the time when the suit out of which the present appeal arose, was brought, the interest of the decree-holder had become vested in the respondents Akbar Husain, Imtiaz Husain and Inayat Husain and also in Murtazai Bibi the widow of Muhammad Kazim, Sakina Bibi his sister, Janina Bibi the widow of Muhammad Hadi, and Akbari Bibi his daughter.

The judgment-debtors were Gajrajmati Teorain and Achraj Nath Tewari, as heir of Anarkali and Dilbasi. Achraj Nath Tewari is now represented by the appellants other than Gajrajmati Teorain.

The decree was a mortgage decree and directed the sale of the immovable property hypothecated.

For some years the appellants successfully resisted execution of the decree by sale of the property. On the 18th September 1896, certain objections made by them were dismissed, amongst them being one that execution could not proceed until a certificate of succession to the estate of Muhammad Kazim had been obtained. Eventually an order was made for the sale of the property and a sale proclamation was issued on 21st December 1896 directing a sale by the Collector of Basti on 20th February 1897.

On 17th February 1897 the respondents Inayat Husain and Imdad Husain obtained permission to bid at the sale. Previously, however, an application had been made on 10th February 1897 on behalf of one Tripati Bishambhar Nath who was no party to the decree or execution proceedings for the postponement of the sale on the ground that he had instituted a suit to establish his right to the property proclaimed for sale, and on 11th February 1897 the Subordinate Judge ordered the sale to be stayed; but Inayat Husain on 19th February 1897, on hearing of that order,

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applied to the Subordinate Judge to set it aside, and an order was made to that effect, but directing that the sale "will be only of the interest of the judgment-debtor in the property to be sold." The sale was therefore proceeded with, but there being other sales to be got through, the property was actually sold on 23rd February to Imdad Husain and Inayat Husain for Rs. 22,000.

The judgment-debtors then made an application to the Court of the Subordinate Judge of Gorakhpur, under section 311 of the Code of Civil Procedure to set aside the sale.

The main objections then made by the decree-holders were that the application was not governed by section 311; that the circumstances under which the order postponing the sale was given and withdrawn constituted an irregularity; that the postponement of the sale prevented intending purchasers from appearing; that the notification of sale contained no specification of the particulars required by section 287 of the Civil Procedure Code; that a fresh notification ought to have been issued for the sale of 23rd February 1897, and that the judgment-debtors had sustained substantial injury by the irregularities in the sale proceedings.

On 22nd May 1897 the Subordinate Judge dismissed the application, holding that it properly fell under section 311 of the Code; that the proceedings taken were regular; and that the sale could not be set aside, as the property had been sold for full value and no substantial injury had resulted to the judgment-debtors. And he made an order confirming the sale.

Against the order dismissing the application the judgment-debtors appealed to the High Court, and that Court in February 1898 dismissed the appeal, on the ground that, although some of the proceedings were irregular, yet as no injury had been sustained by the judgment-debtors the sale could not be set aside.

The judgment-debtors on 5th May 1898 brought the present suit to set aside the sale, asserting that it "was incapable of enforcement." The defence was that the suit was not maintainable.

Of the ten issues settled, only two were now material—(4) whether the application for execution, and the sale held in pursuance of it were according to law? and (5) whether the order for sale was made according to law?

The Subordinate Judge held that the irregularities complained of were not irregularities in publishing or conducting the sale, and therefore the proper remedy was by suit and not by application under section 311 of the Code; and that the sale was bad in law because no fresh proclamation of sale was issued after the order of postponement of 11th February 1897; and he made a decree in favour of the plaintiff that the decree should be set aside.

On appeal the High Court (SIR JOHN STANLEY, C.J., and BURKITT, J.) held that the questions raised in the suit were questions which had been properly raised under section 311 of the Code on the application made under that section; and the dismissal of that application was, under section 312 a bar to the present suit. The material part of their judgment was as follows:—

“The reply to the suit made by the defendants is that the suit as framed is not maintainable. It appears that when the sale took place in February 1897, an application was made to the court executing the decree under section 311 of the Code complaining of various matters, and amongst other matters alleging first of all that the sale proclamation had not been properly made and also that the sale took place on the 23rd February 1897 without the issue of a new proclamation. The reason for the sale taking place in the way mentioned is that the judgment-debtor by an *ex parte* application made in another suit obtained from the Court hearing that suit an injunction restraining this sale.

“That order was passed on the 11th February 1897. On the 19th of the same month the decree-holder applied to the Court alleging that the judgment-debtor had obtained that order by fraudulent misrepresentations and the order was thereupon discharged.”

“There was nothing then to prevent the sale taking place as already ordered, but from press of work in the Collector's office the sale did not take place till the 23rd of February. On the application mentioned above under section 311, the Subordinate Judge overruled all the objections made to the sale and confirmed it. On appeal to this Court it was held that the decision of the Subordinate Judge was right. This Court held that though there may have been some irregularities, yet as it clearly appeared that the judgment-debtor had at the auction-sale obtained a higher price than the property probably was worth he had suffered no substantial loss and that the application was therefore properly rejected. The judgment-debtor having thus failed by applications has now instituted this suit in which he reiterates one or two of the objections taken in his application under section 311 and adds to them some further grounds for having the sale set aside. He sets forth six grounds for this suit. The first of these was that the sale had been postponed on the 11th February and that afterwards it took place without issue of a fresh proclamation. That question was fully disposed of in the appellate order of this Court in the appeal mentioned above and is a matter concerning the publishing

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or conducting the sale within the meaning of section 311.
. The Court executing a decree has no right or authority to inquire whether that decree was properly passed or not. All that it has got to do is to execute it, and moreover we may add that this question was disposed of on another occasion by a predecessor of this learned Subordinate Judge. For the above reasons we are of opinion that every one of the grounds raised to substantiate the suit are questions which should have been raised on an application under section 311, and under the proviso to section 312 no regular suit will lie under such circumstances. The proper procedure is by application—a remedy which the judgment-debtors had already exhausted.”

THE High Court therefore allowed the appeal, reversing the decree of the Subordinate Judge, and dismissed the suit.

On this appeal,

H. Cowell for the appellants contended that the sale was void on the ground that a fresh proclamation should have been published before the sale could legally take place on 23rd February 1897. The sale was fixed for 20th February, but was stayed by the order of 11th February and that order operated as an adjournment *sine die* of the sale as fixed by the original proclamation. When the order staying the sale, therefore, was withdrawn, there was no day fixed for the sale to take place, and a fresh proclamation was necessary under section 291 of the Code of Civil Procedure before any sale could be legally held; and it could not under section 290 be held before 30 days after the proclamation. The omission to issue a fresh proclamation, and holding the sale without one, were not merely irregularities but illegalities which entitled the judgment-debtor to have the sale set aside without showing that substantial injury had resulted. Reference was made to *Bakhshi Nand Kishore v. Malak Chand* (1); *Ganga Prasad v. Jag Lal Rai* (2) and Civil Procedure Code (Act XIV of 1882), sections 286, 287, 290, 291.

DeGruyther for the respondent Inayat Husain contended that the suit was barred by sections 244 and 312 of the Civil Procedure Code. The matter of the suit was one which should have been decided in execution of decree; and a suit could not by the express terms of section 312 be brought after an application under section 311 had been refused on the same grounds. Although non-compliance with the provisions of section 290 is a material irregularity within section 311, its effect is not to nullify the

(1) (1885) I. L. R., 7 All., 289

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

sale unless substantial injury is proved; *Tasadduk Rasul Khan v. Ahmad Husain* (1). Here no substantial injury has resulted.

Cowell replied. The case was not within section 244 of the Code.

1906, December 14th.—The judgment of their Lordships was delivered by LORD MACNAGHTEN:—

This is an appeal from a decree of the High Court at Allahabad, reversing the decree of the Subordinate Judge, and dismissing, with costs, a regular suit brought for the purpose of annulling a sale in execution proceedings.

The sale was held under a decree of the Subordinate Judge of Gorakhpur by the Collector of Basti. The sale proclamation was duly issued. The sale was fixed for the 20th of February 1897. It was held on the 23rd, but before the Collector had finished the sales listed for the 20th.

It appears that an order was made *ex parte* on the 11th of February 1897 by the Subordinate Judge of Gorakhpur staying the sale. On the 16th of February the Collector of Basti, in obedience to this order, struck the proceedings off the pending file. However, on the 22nd, in consequence of notice received from the Court of the Subordinate Judge, from which it appeared that the order staying the sale had been set aside, the case was then brought forward, as the Collector notes, "in continuation of the sale proceedings in other cases." The sale was commenced, but adjourned till the following day. On the 23rd the decree-holders, who had leave to bid, purchased at the auction the interest of the judgment-debtors, and the sale was concluded in their favour subject to confirmation by the Civil Court.

On the application for confirmation the judgment-debtors applied to have the sale annulled. The Subordinate Judge confirmed the sale, finding that, although there were irregularities in the conduct of the sale, the judgment-debtors had not sustained any damage. On appeal the High Court at Allahabad confirmed the decision of the Subordinate Judge.

Then the judgment-debtors brought this suit.

The order committing the sale to the Collector of Basti is not in evidence, nor does it appear clearly in what capacity the Collector

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sold, or on what grounds the order staying the sale was made, or on what grounds it was revoked, or whether any notice was ever given to the public that the sale had been stayed, and that the case was for a time struck off the pending file. It appears, however, to have been assumed in the present litigation, and their Lordships assume for the purpose of their judgment, that the case came within section 291 of the Code of Civil Procedure, and that when the stay of proceedings was removed, a fresh proclamation ought to have been issued in compliance with the terms of that section.

The Subordinate Judge held that, inasmuch as no fresh proclamation was issued, the sale was void, and therefore he pronounced a decree in favour of the judgment-debtors.

The Court of appeal, assuming that a fresh proclamation ought to have been issued, held that the omission was an irregularity which had involved no loss to the debtor; that the only course open to the judgment-debtors was to object, as they did, to the confirmation of the sale, and that it was not competent for them to impeach the sale by regular suit.

Their Lordships are of opinion that the decision of the High Court is perfectly right. The provisions of the Code of Civil Procedure are, in their opinion, clear on the point.

Their Lordships will, therefore, humbly advise his Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants :—*Barrow, Rogers, and Nevill.*

Solicitors for the respondent, Syed Inayat Husain :—*Ranken, Ford, Ford and Chester.*

J. V. W.