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opinion, takes away an appeal in the matter, because the Code does contemplate this matter being heard under certain possibilities by one Judge and then takes away an appeal from his decision.

Under these circumstances it seems to me that on neither of these grounds can an appeal be entertained on the merits. The two cases in the Madras and Bombay High Courts, *viz.*, *Achaya v. Ratnavelu* (1) and *Bombay-Persia Steam Navigation Company v. The Zuari* (2), take the same view of the matter, and as to those decisions it is sufficient for us to say that we entirely agree with them. In the result this appeal will be dismissed with costs.

T. A. P.

Appeal dismissed.

Before Sir W Comer Petharam, Knight, Chief Justice, and Mr. Justice Gordon.

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July 18.

BASHARUFULLA (ONE OF THE DEFENDANTS) v. UMA CHURN DUTT
(PLAINTIFF) AND OTHERS (DEFENDANTS).*

Sale in execution of decree—Proclamation of sale—Sale before hour fixed—Civil Procedure Code (Act XIV of 1882), s. 287—Sale set aside as being no sale—Execution—Possession, Recovery of.

A property, advertised for sale under s. 287 of the Code of Civil Procedure, was sold on the day fixed, but at an earlier hour than that stated in the proclamation: *Held*, that there had been no sale within the meaning of the Code; proclamation of the time and place of sale and the holding of the sale at such time and place, being conditions precedent to the sale being a sale under the Code.

THIS was a suit for possession of a certain jumma under the following circumstances:—

The defendants, Nos. 2, 3, 4 and 5, who were the landlords of the plaintiff, had obtained a rent-decree against the plaintiff, and in execution of this decree, the jumma belonging to the plaintiff was advertised for sale, the sale being fixed for the 20th June 1885.

* Appeal from Appellate Decree No. 1671 of 1888, against the decree of Baboo Krishna Mohun Mookerjee, Subordinate Judge of Khulna, dated the 28th of July 1888, reversing the decree of Baboo Saroda Pershad Chatterjee Munsiff of Baglahat, dated the 30th June 1888.

(1) I. L. R., 9 Mad., 253.

(2) 1. L. R., 12 Bom., 171

Before the day on which the sale was fixed arrived, the plaintiff arranged with his landlord to stay the sale on payment of a portion of the decretal money, and on a *kistibundi* being entered into this arrangement was communicated by the landlord to his Naib with directions to him to stay the sale. On the 20th June the plaintiff and the defendant's Naib proceeded to the Court House to stay the sale, reaching the Court before twelve o'clock. On so arriving, they discovered that the sale had been held by the Munsiff at 10-30 instead of at twelve o'clock, as advertised, and that there being no other purchasers at that early hour, the jumma in question was purchased by the defendant No. 1, a pleader of the Court. The plaintiff (after failing to come to terms with the purchaser) then applied under s. 311 of the Civil Procedure Code to have the sale set aside. This application was rejected, and the sale was in due course confirmed. The plaintiff thereupon brought this present suit to recover possession of the jumma.

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The defendant No. 1 alone appeared, and contended that as the sale had not been held fraudulently, it could not be set aside.

The Munsiff found that it had not been established that the sale at an early hour was the effect of a preconcerted plan on the part of the decree-holder with the intention of defrauding the plaintiff; that, if such facts had been shown, they would have formed good reasons for setting aside a sale under an application made under s. 311 of the Code, but that the plaintiff had failed to substantiate such facts in his application under that section, which had been dismissed by an order which had been unappealed against; that under s. 244 of the Civil Procedure Code, the plaintiff could not raise the question again in a civil suit; but that at least, if such a suit as the present would lie, there must be clear evidence (which there was not) to show that the defendant No. 1 was a party to the fraud (if any) alleged. He therefore dismissed the suit.

The plaintiff appealed to the Subordinate Judge, who held that the sale held before the hour fixed was absolutely void, and reversed the decision of the Munsiff.

The defendant appealed to the High Court.

Moulvi *Mahomed Yusuf*, for the appellant, contended, that what had taken place was a mere irregularity, and the sale could

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only be set aside on that ground under s. 311 of the Code; a suit being expressly excluded by that section and cited *Sharodu Churn Chuckerbutty v. Mahomed Isuf Meah* (1), which followed the case of *Virararaghava v. Venkata* (2), on the question as to whether the suit would lie.

Baboo *Srinath Banerjee*, for the respondent, contended, that the sale proclaimed under s. 287 of the Code had not been carried out; and that there had been no sale within the meaning of the Code and therefore no property could pass to the purchaser.

The judgment of the Court (PETHERAM, C. J., and GORDON, J.) was delivered by

PETHERAM, C. J.—This is a suit which has been brought by the plaintiff against the defendants, claiming various reliefs, and, among other things, the plaintiff claims to set aside the sale of certain property as being fraudulent, and, in addition to that, he claims to recover possession of that property from the defendants, and he claims any other relief to which he may be found entitled. The Judge has decreed the suit, and the appeal has been preferred to this Court, really on the ground that such a suit will not lie at all by reason of the provisions of the Code of Civil Procedure.

The facts of the case are that the present plaintiff had a decree passed against him for a sum of money due to certain persons, some of whom were his landlords, or at all events his judgment-creditors. He did not pay that money, and his property was attached and was proclaimed for sale by reason of the plaintiff's failure to pay the sum decreed, and according to the proclamation, the sales, amongst which the sale of this particular property was one, were advertised to take place on a certain day. Before that day arrived, the present plaintiff arranged with his creditors to pay them off the amount of their decree by instalments, and that the property should be released from attachment and not sold, and upon the faith of that arrangement, both the present plaintiffs and his three creditors attended at the place of sale at 12 o'clock on the day stated in the proclamation and

(1) I. L. R., 11 Calo., 376.

(2) I. L. R., 5 Mad., 217.

found, when they got there, that the sales were all over; and that the sales, instead of commencing at 12 o'clock, had commenced at about 10 o'clock, and concluded before 12 o'clock, the advertised time. Under these circumstances, an application was made by the plaintiff to get that proceeding set aside for irregularity, and that proceeding was disposed of by an arrangement made between the plaintiff and the present defendants that a certain sum of money should be paid by the present plaintiff, being the amount which the purchasers had paid; and that the purchasers should withdraw all claim to the property. The proceeding to set aside the sale accordingly went off upon that arrangement being come to, but afterwards, as the Judge finds, the purchasers, the present defendants, refused to carry out their part of the agreement in this sense, that they said, we decline to give up all claim to this property upon the payment of the purchase-money into Court. Upon this, the arrangement fell through, and the purchasers got possession of the property under their sale certificate, and upon that the plaintiff brings this suit for the purpose of getting back his property, and of having it declared that this sale did not affect his right to possession at all.

If what took place was a mere irregularity, then the only proceeding for setting the thing aside was a proceeding under s. 311 of the Code of Civil Procedure, the latter portion of that section providing that no suit shall be brought to set aside a sale for mere irregularities; but if the sale took place under such circumstances that it was not a sale under the Code at all, then it is contended that no property passed under it, and that the judgment-debtor has a right to bring this suit to get back his property, and to have it declared that the purchasers have no right to it at all.

The question then is, whether what took place here was an irregularity only, or whether there was no sale within the meaning of the law at all.

By s. 287 of the Code, it is provided that, when any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall

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1889 state the time and place of sale, and shall specify fairly and accurately certain other things.

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There is then a provision in the Code that, before a sale takes place, the time and place of sale shall be advertised. It is perfectly true that there is no provision in the Code that the sale shall take place at the time and place advertised, but it is clear that such a provision must be implied, and that consequently no sale can take place under the Code except at the time and place advertised under the Code.

As a matter of fact, the sale in this case did not take place at the time advertised. When the time advertised arrived, the property had been sold, and the whole thing was over; and when persons came for the purpose of attending the sale at the time advertised, they found that the property had been sold, and that they were too late.

Under these circumstances, it seems to us that there was no sale within the meaning of the Code at all, and that this proclamation of the time and place of sale and the taking place of the sale at the time and place advertised are conditions precedent to its being a sale under the Code at all. Under these circumstances, it appears to us that this property never has been sold under the Code, and consequently the plaintiff is entitled to a declaration that whatever took place when the property was put up for sale has no effect as against him, and that he is entitled to recover this property.

A case has been cited, which was decided by Mr. Justice Pigot and Mr. Justice Beverley, of *Sharoda Churn Ohuckerbutty v. Mahomed Isuf Meah* (1). That case proceeded upon s. 244 of the Code of Civil Procedure, and not upon the sections now under our consideration. It seems to us that that case has no bearing upon the present one, and that the Judge was right in the conclusion at which he arrived, and this appeal must be dismissed with costs.

T. A. P.

Appeal dismissed.

(1) I. L. R., 11 Calo., 376.