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was not presented until the 29th January 1907, one day after the decree in plaintiff's favour had been passed.

The appellants filed no appeal from the decree which had been passed against them. In support of his objection the learned vakil for the respondent relies on a decision of the Calcutta High Court in *Madhu Sudan Sen v. Kumini Kanta Sen* (1), and on a decision of this Court in *Salig Ram v. Brij Bilas*, (2). These decisions support the preliminary objection taken. Were the matter *res integra* there might be something to be said in appellants' behalf; but we are bound by the decision of this Court. When the case went back to the Court of first instance, it was heard in the presence of the defendants, who, we are told, adduced evidence. We consider that the defendants, if they intended to appeal from the order of remand, might well have asked the Court of first instance to defer hearing the case until their appeal against the order of remand had been disposed of; but they did not do so. We are bound by the decision in the case of *Salig Ram v. Brij Bilas*, mentioned above. We, therefore, sustain the preliminary objection and dismiss the appeal with costs.

Appeal dismissed.

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March 5.

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

TUHI RAM (PLAINTIFF) v. IZZAT ALI AND OTHERS (DEFENDANTS).*

Execution of decree—Sale of ancestral property—Civil Procedure Code, section 320—Rules framed by Local Government—Application under Rule 17 (XIIIA).

One of several co-owners of ancestral property which had been sold by the Collector under the Rules † framed by the Local Government under section 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending, applied under Rule 17 (XIIIA) to have the sale set aside, making at the same time the necessary payments into Court required by the Rule.

† The rules referred to are as follows :—

17 (XII). The decree-holder, or any person whose immovable property has been sold under these rules, may apply to the Collector to set aside the sale

* First Appeal No. 99 of 1906 from a decree of H. David, Subordinate Judge of Meerut, dated the 17th of February 1906.

(1) (1905) I. L. R., 32 Calc., 1023. (2) (1907) I. L. R., 29 All., 659.

Hold that upon the presentation of the latter application under Rule 17 (XIII) the Collector was bound to set aside the sale, and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII). *Net Lal Sahoo v. Sheikh Kureem Bux* (1) and *Puresh Nath Singha v. Nabogopal Chattopadhyaya* (2) referred to.

THE facts of this case are as follows. One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral, and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under

on the ground of a material irregularity in publishing or conducting it, and in the event of the sale being set aside, the Collector may sanction the refund of auction fees.

But no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Collector that he has sustained substantial injury by reason of such irregularity.

17 (XIII). If no such application as is mentioned in the last preceding rule be made or if such application be made and the objection be disallowed, the Collector shall pass an order confirming the sale as regards the parties to the suit and the purchaser.

If such application be made, and if the objection be allowed, the Collector shall pass an order setting aside the sale.

17 (XIII A). Any person whose immovable property has been sold may, at any time within 30 days from the date of sale, apply to the Collector to have the sale set aside on his depositing in Court—

- (a) for payment to the purchaser, a sum equal to 5 per cent. of the purchase money; and
- (b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

If such deposit is made within 30 days the Collector shall pass an order setting aside the sale: Provided that, if a person applies under rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this rule. Nothing in this rule shall be construed to relieve the judgment-debtor from any liability he may be under, in respect of costs and interest not covered by the proclamation of sale.

(1) 1896 I. L. R., 23 Calc., 686. (2) (1901) I. L. R., 29 Calc., 1.

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Rule 17 (XII) of the Rules framed by Government under section 320 of the Code of Civil Procedure. On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, depositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His application was rejected by the Collector on the 11th of November 1904, on the ground, apparently, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. The present suit was then instituted by the auction purchaser asking that the sale at which he purchased might be declared a good and valid sale. The Court of first instance (Subordinate Judge of Meerut) found that the sale was invalid and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Pandit *Moti Lal Nehru*, for the appellant.

The Hon'ble Pandit *Sundar Lal*, for the respondents.

STANLEY, C. J., and BURKITT, J.—The matters which have led to this appeal are shortly as follows:—One Multan Singh obtained a decree for sale on a mortgage made by the defendants, and in execution of that decree had the property put up for sale. Part of the property was non-ancestral and this portion was sold by the Civil Court. The remainder being ancestral, the sale of it was transferred to the Collector. On the 20th of September 1904, the Collector sold this portion to the plaintiff for a sum of Rs. 25,000. On the 5th of October 1904, Izzat Ali, one of the co-owners of the property, filed an objection to the sale alleging material irregularities in its conduct and consequent loss of a substantial nature, and praying that the sale should be set aside under Rule 17 (XII). On the 19th October following one of the defendants, Abdul Hai, also a co-owner, applied to the Collector under Rule 17 (XIIIA) to have the sale set aside, depositing at the same time in Court a sum equal to 5 per cent. of the purchase money and also the amount of the decree. His

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application was rejected by the Collector on the 11th of November 1904, on the ground, so far as we understand the order, that there was pending an application by Izzat Ali to have the sale set aside on the ground of material irregularity in the conduct of it. The Collector seems to have held that Abdul Hai, one of the owners of the property, could not apply under Rule 17, (XIIIA) so long as there was pending an application on the part of another co-owner under Rule 17 (XII). In his order the Collector says:—"It has been urged that he (i.e., Abdul Hai) is only a mortgagor under the second mortgage represented by the amount of Rs. 2,234-8-0 and that Izzat Ali is a mortgagor under the first mortgage also represented by the amount of Rs. 24,632; that they are therefore different persons. I am unable to accept this contention. They are both judgment-debtors and originally joint defendants in the suit, and I hold that Abdul Hai is not entitled to make the application under section 310A unless the application under section 311 is withdrawn." He therefore, as the application of Izzat Ali had not been withdrawn, rejected the application of Abdul Hai. We do not profess to understand exactly the meaning of the language used by the Collector, but we take it that he refused the application of Abdul Hai on the ground that he alone was not a person who could apply under Rule 17 (XIIIA). We may point out that by oversight he cited in his order section 310A and section 311 of the Code of Civil Procedure instead of Rule 17 (XII) and 17 (XIIIA) of the Rules of Government passed under section 320.

An appeal was preferred to the Commissioner of the Meerut Division, with the result that, allowing the appeal, he set aside the order confirming the sale. In consequence of this order the present suit was instituted.

The Rules to which we have referred are Rules framed by the Local Government under section 320 of the Code of Civil Procedure for regulating the sale of ancestral lands by the Collector. Rule 17 (XIIIA) corresponds with section 310A of the Code. The Court below dismissed the plaintiff's suit and hence this appeal.

It was argued before us at considerable length that no appeal lay from the Collector's order to the Commissioner, but in the

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view which we take of the case it is unnecessary to determine this question. It appears to us that when Abdul Hai deposited the money required to be deposited by the Rule in question the Collector was bound to pass an order setting aside the sale and had no option in the matter. The language of the Rule is as follows:—"If such deposit is made within 30 days the Collector shall pass an order setting aside the sale." But it is said that the proviso to the section justified the Collector in passing the order now impeached. That proviso is that if a person applies under Rule 17 (XII) to set aside the sale of his immovable property, he shall not be entitled to make an application under this Rule, that is Rule 17 (XIII A). The contention is that inasmuch as Izzat Ali, one of the co-owners, made the application to which we have referred under Rule 17 (XII), Abdul Hai could not, in view of the language of the section, succeed in an application to have the sale set aside under Rule 17 (XIII A). It is said that "any person whose immovable property has been sold" must mean all the owners of the property and not a single co-sharer, and that Abdul Hai being only a co-sharer without the concurrence of the other co-sharers could not take advantage of the rule. We are unable to take this view of the section. It appears to us that the words "any person whose immovable property has been sold" enable co-sharers of the property which has been sold to apply to the Court to have the sale set aside, and that it is not necessary that all the co-sharers should join in the application. So soon as Abdul Hai made his application and paid the money as required by the Rule, it was in our opinion the duty of the Collector to pass an order setting aside the sale. He ought not, after the deposit was made, to have entertained the application which was made by Izzat Ali. We are confirmed in this view of the section by two decisions of the Calcutta High Court, namely in *Net Lall Sahoo v. Sheikh Kareem Bux* (1) and *Paresh Nuth Singha v. Nubogopal Chuttopadhyaya* (2). Whether or not, therefore an appeal lay to the Commissioner, we are of opinion that the Collector acted *ultra vires* in proceeding to confirm the sale

(1) (1896) L. L. R., 23 Cal., 686. (2) (1901) I. L. R., 29 Cal., 1.

after Abdul Hai had made the deposit and filed an application to have the sale set aside under the provisions of Rule 17 (XIII A). We therefore dismiss the appeal with costs.

Appeal dismissed.

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APPELLATE CIVIL.

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March 5.

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

ASHARFI KUNWAR AND OTHERS (DEFENDANTS) v. RUP CHAND
(PLAINTIFF).*

Hindu law—Adoption—Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.

Held that according to the law and custom prevailing amongst the Jain community a widow has a power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindus*, to give a son in adoption after the death of her husband.

Held also that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal v. Banarsi Das* (1) followed. *Chotay Lal v. Channo Lal* (2), *Amava v. Mahadganda* (3), *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshamma* (4) and *Radha Mohan v. Hardai Bibi* (5), referred to.

Held also that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *prima facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassie v. Sreenath Bose* (6) and *Sardar Singh v. Ram Kunwar* (7), followed. *Tacoorden Towarry v. Ali Hossein Khan* (8) referred to. *Tarinee Churn Chowdhry v. Sharoda Soondree Dossee* (9), *Chowdhry Pudem Singh v. Koer Oddey Singh* (10), *Gooroo Prosunno Singh v. Nil Madhub Singh* (11) and *Har Dyal Nag v. Roy Krishko Bhoomick* (12) distinguished.

* First Appeal No. 32 of 1906 from a decree of Nihal Chandar, Subordinate Judge of Saharanpur, dated the 8th of November 1905.

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| (1) (1907) I. L. R., 29 All., 495. | (7) Weekly Notes, 1902, p. 62. |
| (2) (1878) L. R., 6 I. A., 15. | (8) (1874) L. R., 1 I. A., 192: at p. 206. |
| (3) (1896) I. L. R., 22 Bom., 416. | (9) (1869) 11 W. R., 468. |
| (4) (1899) I. L. R., 22 Mad., 398. | (10) (1869) 12 W. R., P. C. R., 1. |
| (5) (1899) I. L. R., 21 All., 460. | (11) (1873) 21 W. R., 84. |
| (6) (1868) 9 W. R., 463. | (12) (1875) 24 W. R., 107. |