

1910

TULSHA
v.
MATHURA
PURI.

reference in his will to any property whatsoever save and except the *asli pattis* in the village of Hariha.

For these reasons we dismiss the appeal with costs.

Appeal dismissed.

1910
June 17.

Before Mr. Justice Sir George Know and Mr. Justice Griffin.

BADRI PRASAD (AUCTION-PURCHASER) v. TEJ SINGH (OBJECTOR).*

Civil Procedure Code (1882) section 170—Appeal—Contempt of court—Property of person in contempt sold to realize a fine, but sale afterwards set aside on the submission of the person in contempt.

No appeal lies from an order refusing to confirm a sale held by the Court to realize a fine imposed by it for contempt under section 170 of the Civil Procedure Code, 1882.

The Court has power to refuse to confirm such a sale if the fine and costs are paid in by the person guilty of contempt, and the Court considers that the contempt is purged.

THE facts of this case were as follows:—

Tej Singh and Baldeo Das were summoned as witnesses in a case. They failed to comply with the summons and warrants were issued against them. The warrants could not be served. Thereupon a proclamation was made against them under section 168 of the former Code of Civil Procedure. They failed to appear on the date fixed by the proclamation, and were fined Rs. 100 each, in realization whereof their zamindari property was put up to sale, under section 170 of the Code and sold in one lot to the appellant. On the date of the sale Tej Singh proposed to pay up the fine and costs due from him, but the amin refused to accept it because he had been directed to sell both persons' properties in one lot for the aggregate sum of Rs. 200. After the sale, Tej Singh made an application, purporting to be under section 311 of the Code, to set aside the sale on the ground of material irregularities; and the sale was set aside by the Subordinate Judge. The auction-purchaser appealed.

Babu Jogindro Nath Chaudhri (with him Munshi Gulzari Lal), for the respondents, took a preliminary objection to the hearing of the appeal:—There is no appeal from an order setting aside a sale held under section 170. Section 588, clause (16), provides an appeal from order setting aside or refusing to set

* First Appeal No. 130 of 1909 from an order of Banke Behari Lal, Subordinate Judge of Aligarh, dated the 17th of September, 1909.

aside sales held under certain specified sections. Section 170 is not included among them. Section 311 speaks of sales held "under this chapter." It is clearly not applicable to the sale held in this case. The order of the Subordinate Judge was not, therefore, one under section 311. He expressly acted under section 151 of the new Code. The sale had not yet passed a title to, or conferred a right upon, the purchaser; before that, it had to be confirmed, and a certificate had to be obtained; and the Court, acting under section 151, set it aside. Neither the old nor the new Code gives a right of appeal from such an order. By order XVI, rule 13, what is made applicable is the procedure which relates to attachment in execution of decree, up to sale, and confirmation of sale. All that the new Code has done is to assimilate the procedures in the two cases. But it does not confer a right of appeal, which has to be given specifically by the Legislature; section 647 of the old Code cannot be called in aid for such a purpose; *Ghasiti Bibi v. Abdul Samad* (1).

Mr. G. W. Dillon (with him Munshi Govind Prasad), for the appellant:—

A sale held under section 170 does not require confirmation or a sale certificate. It is only sales in execution of decrees that do so. (*Vide* section 316). The purchaser at once got an absolute title; and section 151 (new Code) was misapplied. The Court had no jurisdiction to deal with the application. The application to set aside the sale was in terms one under section 311. It was only under that section that the Court could listen to him; he was a person in contempt and the court could not listen to him at all otherwise. In disposing of the application the Court treated the matter exactly as if it were an application under section 311 and went into exactly the same questions which would have to be decided in a case under section 311. An order passed on an application under, and purporting to be under, section 311 is appealable. It is doubtful if the lower court acted at all under section 151 (new Code). The order is really one made under order XXI, rule 92: in effect it is so; it is therefore appealable. He then addressed the Court on the merits of the case.

(1) (1907) I. L. R., 29 AL., 596.

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Babu *Jogindro Nath Chaudhuri* was not heard in reply.

KNOX and GRIFFIN, J.J. :—Tej Singh and Baldeo Das were summoned as witnesses in a civil suit. It appears that they did not attend in answer to the summons, with the result that first a warrant of arrest was issued to enforce their attendance, and, when that did not suffice, a fine was imposed upon them in their absence, their property was attached and an order was passed to sell the same for the purpose of satisfying the fine imposed and the costs incurred in consequence of the attachment. Although the Court ordered the attachment of both the immovable and movable property, only immovable property was attached. The amount of immovable property attached was far in excess of the fine imposed and the costs incurred. The property was put up to sale and purchased by the appellant for Rs. 250. There is no dispute that the property attached is of far greater value than the amount paid by the appellant at the sale. The learned counsel, who appears for the appellant, boldly and frankly allowed that his client was in the position of a fortunate purchaser who has at an auction sale purchased property at a price much below its real value. The fact that the property attached consists of 599 bighas, 6 biswas of land, bearing a jama of Rs. 597-12-10, is quite enough to show that Rs. 250 was an absurdly low price. The court before which the sale officer submitted his report, refused to accept the sale as a sale. In a very careful judgement, that court has given good reasons for the position it took. It ordered Tej Singh to pay in Rs. 100 the fine imposed, and all the costs of the attachment and sale within 15 days from the date of its order. That sum was duly paid in and the court considered that, as far as Tej Singh was concerned, he had purged himself of any contempt in which he may have stood. In appeal before us it is urged that the Court had no jurisdiction to set aside the sale which according to the law had become final. The contention is that neither section 311 of the old Code, nor order XXI, rule 90, of the new Code applied to this case. We think that there is considerable force in this contention. The result then is that the Code of Civil Procedure, previous to the present Code, appears to have intended that any order passed under section 170 of that Code should not be open to appeal. That section contains a

special provision that if a person whose attendance was required pays into court the fine and costs, then the Court shall order the property to be released from attachment. The very existence of this provision shows that the Court may, before the sale becomes final, accept from the person guilty of contempt the costs and fine and release the property intended for sale from attachment. It may be said that it is somewhat straining the language of the section to hold that if a sale officer has put up the property for sale and a purchaser has come forward, still the Court is empowered to order the release of property from attachment. We do not think there is much force in this contention. It appears to us to be a novel idea that the action of a ministerial officer should have such finality. It is for the Court to say whether the action of its ministerial officer amounts to a sale by putting its confirmation upon that act. That stage was never reached in the present case. The order passed by the court below was an order under section 170 of the Code of 1882 which governs the procedure in the present case and no appeal is provided from that order. We therefore hold that no appeal lies, and we dismiss the appeal with costs.

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Appeal dismissed.

Before Mr. Justice Tudball and Mr. Justice Chamier.

JADDO KUNWAR (DEFENDANT) v. SHEO SHANKAR RAM AND OTHERS (PLAINTIFFS) AND RADHA KISHAN SINGH AND OTHERS (DEFENDANTS).*

Hindu Law—Mitakshara—Joint Hindu family—Joint family property sold in execution of mortgage executed by managing member—Suit by other members for redemption—Act No. IV of 1882 (Transfer of Property Act), section 85—Parties—Representative capacity of managing member.

Although the manager of a Joint Hindu family is not as a rule entitled to sue or liable to be sued on behalf of the family—*Padmakar Vinayak Joshi v. Mahadev Krishna Joshi* (1) and *Kashinath Chimnaji v. Chimnaji Sadastiv* (2)—nevertheless in certain circumstances the whole family may be bound by the result of suits brought by or against the manager, notwithstanding that some members of the family were not made parties thereto. *Balwant Singh v. Aman Singh* (3), *Debi Singh v. Jia Ram* (4), *Sundar Lal v. Chhitar Lal* (5), *Dhurm*

1910
 July 8.

* First Appeal No. 83 of 1909 from a decree of Chhajju Mal, Subordinate Judge of Ghazipur, dated the 18th of December, 1908.

(1) (1885) I. L. R., 10 Bom., 21. (3) (1910) *Supra* p. 7.
 (2) (1906) I. L. R., 30 Bom., 477. (4) (1902) I. L. R., 25 All., 214.
 (5) (1906) 3 A. L. J., 644; 4 A. L. J., 17.