

Before Mr. Justice Norris and Mr. Justice Beverley.

1888
August 4.

BHIM SINGH (PLAINTIFF) v. SARWAN SINGH (DEFENDANT).*

Sale in execution of decrees—Failure by purchaser to make the deposit required by s. 306 of the Civil Procedure Code—Material irregularity in conducting sale—Civil Procedure Code (Act XIV of 1882), ss. 244, 306, 308, 311 and 312.

Failure on the part of the person declared to be the purchaser at a sale in execution of a decree to make, and on the part of the officer conducting the sale to receive, the deposit of 25 per centum on the amount of the purchase-money in the manner required by s. 306 of the Code of Civil Procedure constitutes a material irregularity in conducting the sale, which must be inquired into upon an application under s. 311, and consequently a separate suit to set aside a sale on such a ground will not lie.

Intisam Ali Khan v. Narain Singh (1) dissented from.

THE facts of the case which gave rise to this appeal were as follow:—

The defendant Sarwan Singh and one Kashi Nath Pandey had both obtained money decrees against the plaintiff Bhim Singh, and had proceeded to execute them at the same time. The plaintiff's 8 annas share in mouzah Manamath being attached in execution of one of the decrees, an order was passed under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders; and thereafter the property was advertised for sale in the month of October 1885. On the application of the plaintiff Bhim Singh, the sale was postponed till the 9th November 1885, and without any fresh sale proclamation being made it actually took place on the 10th November. The plaintiff alleged that, owing to the date of the sale not being known, no bidders attended, and as a matter of fact the only persons who did bid for the property were the defendant's karpardaz and his pleader, and the property was knocked down to the defendant Sarwan Singh for Rs. 150. It was further alleged by the plaintiff, and found as a

* Appeal from Appellate Decree No. 486 of 1888, against the decree of F. Cowley, Esq., Judicial Commissioner of Chota Nagpur, dated the 25th of November 1887, reversing the decree of Syed Abdul Aziz, Munsiff of Chatra, dated the 31st March 1887.

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fact by the Court of first instance, that no earnest money was deposited by the defendant, as required by s. 306 of the Code, and that he did not deposit the purchase-money in Court, and the plaintiff complained that, notwithstanding that fact, the Court passed an order on the 9th January 1886 confirming the sale, and that thereafter the defendant applied for leave to deposit the purchase-money and earnest money, which was granted.

The plaintiff contended that owing to the irregularities in publishing and conducting the sale the property had been sold at a gross under-value, and that instead of Rs. 150 it ought to have fetched Rs. 1,000, and he accordingly prayed that the sale might be set aside.

The defendant denied, amongst other things, that any irregularity had taken place or that the plaintiff had suffered any loss, and contended that the suit would not lie having regard to the provisions of ss. 311 and 312 of the Code of Civil Procedure. The other contentions raised by the defendant are not material for the purpose of this report.

Kashi Nath Pandey, at the time the plaintiff instituted this suit, also instituted a suit to have the sale set aside on similar grounds to that urged by the plaintiff, and by the consent of the parties both suits were tried together.

Amongst the issues raised in the case was one as to whether the question between the parties was not one that should have been decided in the execution proceedings, and whether the suit was not on that account barred. This was the only issue material for the purpose of the decision of the appeal by the High Court.

The Munsiff, having decided the other issues in favour of the plaintiff and Kashi Nath, and having held upon grounds which fully appear in the judgment of the High Court that the suit was not barred, set aside the sale, and ordered the defendant to pay the costs of the two suits, and declared that Kashi Nath Pandey was entitled to have the property sold in execution of his decree.

The defendant Sarwan Singh thereupon appealed against the decree in Bhim Singh's suit, and at the hearing of the appeal Bhim Singh failed to appear either in person or by pleader, though he had filed a vakalatnama.

The Judicial Commissioner reversed the decree of the Munsiff for reasons which are fully stated in the judgment of the High Court, and dismissed the plaintiff's suit with costs.

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The plaintiff Bhim Singh now preferred this second appeal.

Baboo Jogesh Chunder Roy for the appellant.

Baboo Dwarka Nath Chuckerbutty and Baboo Surendra Nath Roy for the respondent.

The following judgments were delivered by the High Court (NORRIS and BEVERLEY, JJ.) :—

NORRIS, J.—The facts of this case are as follows :—

The defendant and one Kashi Nath Pandey had each obtained a money decree against the plaintiff; either one or both of the judgment-creditors attached 8 annas of mouzah Manamath, the property of the plaintiff, the judgment-debtor. After the attachment, the Court executing the decree made an order under s. 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders. The attached property was sold and purchased by the defendant, who however did not make the deposit required by s. 306 of the Code.

The plaintiff and Kashi Nath each brought a suit to have the sale set aside. The two suits were tried together by the Munsiff, who set aside the sale.

The defendant appealed to the Judicial Commissioner against the decree setting aside the sale passed in the suit brought against him by the plaintiff. The plaintiff-respondent did not appear at the hearing of the appeal, and the Judicial Commissioner decided the case *ex parte*; he reversed the Munsiff's decree, and dismissed the suit with costs.

The issues framed by the Munsiff were applicable to both suits; the only one which it is material to consider is the first, which ran thus "Whether the suit for setting aside the sale will lie, or ought the plaintiff to have given petition for setting aside the sale under s. 312 of the Civil Procedure Code?"

Upon this issue the Munsiff's judgment was as follows: "As regards the issue No. 1, I am of opinion that neither Kashi Nath Pandey nor Bhim Singh (the plaintiff) were precluded from

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bringing a suit, as the facts of the case show that in consequence of the earnest money and the purchase money not being paid in time, there was in fact no sale—see *Intizam Ali Khan v. Narain Singh* (1).” On appeal to the Judicial Commissioner only one ground of appeal apparently was argued, which in effect ran thus: “The Munsiff in deciding issue No. 1 has held that plaintiff was entitled to sue to set aside the sale of 8 annas of Manamath, but this is wrong, because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place.” Upon this point the Judicial Commissioner said: “It seems to me that this plea is good under cl. (c) of s. 244 of the Code of Civil Procedure. The question whether there had in law been a sale of Bhim Singh’s property in execution of the decree held by Sarwan Singh against Bhim Singh was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was consequently one to be determined by order of the Court executing the decree and not by separate suit. I set aside the Munsiff’s decree in this suit, in which Bhim Singh was plaintiff and Sarwan Singh defendant, and direct that this suit be dismissed.”

In special appeal two points were raised: First, that the lower Appellate Court was in error in holding that the suit would not lie, and that it was barred under clause (c) of s. 244 of the Civil Procedure Code; second, that no issue having been raised as to the suit being barred under clause (c), s. 244 of the Civil Procedure Code, and no such grounds having been taken in the petition of appeal, the lower Appellate Court ought not to have allowed the defendant to urge that point.

I do not think that there is anything in the second objection.

It is true that no issue was raised as to the suit being barred under clause (c) of s. 244 of the Code of Civil Procedure; but the determination of the point did not depend upon evidence; it was a pure point of law, and I think the Judicial Commissioner was justified in dealing with it if it was properly raised before him by the grounds of appeal.

It is not I think correct to say “that no such grounds were taken in the petition of appeal,” for, though there is

no distinct reference to clause (c) of s. 244, there is in the petition of appeal a distinct allegation that the Munsiff was wrong in decreeing the suit, "because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." This I think meant "the question raised is one between the parties to the suit and no separate suit will lie."

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The decision of the first point taken before us is not free from difficulty, and involves a careful consideration of ss. 244, 311, and 312 of the Code.

Two questions seem to arise upon a consideration of these sections with reference to the facts of this case; first, does a decree-holder cease to be "a party to the suit in which the decree was passed" if he becomes an auction-purchaser? and second, when do "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination?

Upon the first question there is a conflict of authority—see *Vivara ghava Ayyangar v. Venkatacharyar* (1) and *Hera Lal Chatterjee v. Gourmoni. Debi* (2).

The second question has lately been discussed by Mahmood, J., at great length in *Ramchhaibar Mier v. Bechu Bhagat* (3).

I have carefully considered both these questions; and had it been necessary to decide them, I should have thought it well to refer them to a Full Bench; but in the view I take of the applicability of ss. 311 and 312 to this case, I do not think it is necessary.

There remains one more question for consideration, *viz.*, does a non-compliance with the provisions of s. 306 of the Code constitute "a material irregularity in conducting the sale" which must be inquired into upon an application under s. 311, or does it furnish ground for a suit to set aside the sale? I am of opinion that such non-compliance is "a material irregularity" in conducting the sale which must be inquired into upon an application under s. 311.

It is to be observed that s. 306 deals with two persons present at a sale of immovable property under Chapter XIX of the Code,

(1) I. L. R., 5 Mad., 217. (2) I. L. R., 13 Cal., 326.

(3) I. L. R., 7 All., 641.

1888 *viz.*, "the person declared to be the purchaser" and "the officer
 BHIM SINGH conducting the sale." The duty of "the person declared to be
 the purchaser" is "to pay immediately after such declaration a
 SARWAN deposit of twenty-five per centum on the amount of his purchase-
 SINGH. money to the officer conducting the sale."

The duties of "the officer conducting the sale" are of a two-fold character. In the first place there are the duties which are inherent to his position as an auctioneer; and, in the second place, there are the duties prescribed to him by the Code. Amongst the duties inherent to his position as an auctioneer are—(a) the duty of knocking down the property to the highest bidder, and (b) the duty of demanding the deposit of twenty-five per centum. Amongst the duties prescribed to him by the Code is that of "*forthwith* putting up the property again and selling it" if default is made in making the deposit. The word *forthwith* is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.

This I think is the clear meaning of s. 306.

And this view is strengthened by a reference to s. 308, which regulates the procedure upon default being made in payment of the balance of the purchase-money. In that case the property is to be *re-sold*; and such re-sale cannot take place without the issue of a fresh sale-proclamation and the performance of all the other conditions precedent to a sale prescribed by the Code.

It may be that, if the Legislature had been silent as to the duty of the officer conducting the sale upon default being made in making the deposit, that the failure of the person declared to be the purchaser to make the deposit would not have been an irregularity in conducting the sale; but it seems to me impossible to conceive of a greater irregularity in the conduct of a sale than the failure of the officer conducting it to do what the Legislature has in express terms told him to do on a default being made in the making of the deposit.

I am aware that this view is opposed to that taken by the Allahabad High Court in *Intizam Ali Khan v. Narain Singh* (1), but I venture respectfully to think that an examination of the facts of that case will show that the judgment cannot be treated as an authority.

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In that case *Intizam Ali Khan*, the judgment-debtor, had applied to have a sale of his property, which had been sold in execution of a decree, set aside, *inter alia*, on the ground of a non-compliance with the provisions of s. 306. The application was made and could only have been made under s. 311; and although the Court held that, "inasmuch as the indispensable conditions of the law as contained in s. 306 of the Civil Procedure Code were not fulfilled by the person declared to be the purchaser, the sale was not bad by reason of an irregularity in publishing or conducting it, but was no sale at all," it yet set aside the sale under s. 312, which only authorizes the setting aside of a sale on the ground of a material irregularity in publishing and conducting it.

In the result therefore I am of opinion that the plaintiff's suit and this appeal should be dismissed, but under the circumstances of the case without costs.

BEVERLEY, J.—I concur in holding that the present suit will not lie for the following reason :—

The ground upon which it is sought to set aside the sale is the non-compliance with the provisions of s. 306 of the Code. I concur with my learned colleague in holding that such a non-compliance, if substantiated, would amount to an irregularity in conducting the sale such as is referred to in s. 311. It should, therefore, in my opinion have been made the subject of objection under that section before the sale was confirmed. Sections 311 and 312 provide a special procedure, open to both the decree-holder and the judgment-debtor, for the determination of disputes arising out of irregularities in publishing and conducting sales, and I am of opinion that it was the intention of the Legislature that all such disputes should be determined under the provisions of those sections in the course of the execution

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proceedings, and not by way of a regular suit after the sale has been confirmed. Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under s. 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

H. T. H.

Appeal dismissed.

PRIVY COUNCIL.

P. C.*
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March
8 & 9,
April 21.

HARI SARAN MOITRA (PETITIONER) v. BHUBANESWARI DEBI (FOR HERSELF AND AS GUARDIAN OF JOTINDRAMOHUN LAHIRI, A MINOR) AND ANOTHER (OBJECTORS).

[On appeal from the High Court at Calcutta.]

Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey v. Shamasoondery Debia* (1) referred to, and applied in this case.

* *Present* : LORD HOBHOUSE, LORD MACNAGHTEN, SIR B. PEACOCK, and SIR R. COUCH.

(1) 3 Moore's I. A., 229.