

REVISIONAL CIVIL.

*Before Mr. Justice Mukerji.*1925
November,
26.

RAM SARAN DAS (APPLICANT) v. GIRDHARI LAL AND OTHERS (OPPOSITE PARTIES).*

Civil Procedure Code, order XXI, rule 90—Execution of decree—Application to set aside sale on ground of material irregularity—Subsequent application giving additional particulars, made beyond time—Revision.

Where an application to set aside a sale held in execution of a decree on the ground of material irregularity in publishing and conducting it has been filed within time, the court is not debarred from considering a subsequent application giving further details as to the reasons why the sale should be set aside, merely because such second application was not filed within thirty days of the sale.

Held, also, that revision lay where the lower appellate court had refused to consider such second application and had reversed the first court which had set the sale aside. *Harbans Lal v. Kundan Lal* (1) and *Yad Ram v. Sundar Singh* (2), distinguished.

THIS was an application in revision against an order of the third Additional Subordinate Judge of Aligarh, whereby he reversed the order of a Munsif setting aside a sale in execution of a decree. The sale was held on the 17th of September, 1924. On the 14th of October, 1924, the judgement-debtor applied to the executing court to set aside the sale upon the ground that there was material irregularity in the publishing and conducting of it and that the price fetched was in consequence too small. On the 25th of October, 1924, the petitioner put in a further application pointing out that two incumbrances to the total amount of Rs. 5,807 had been shown in the proclamation of sale, whereas no such incumbrances actually

* Civil Revision No. 105 of 1925.

(1) (1898) I.L.R., 21 All., 140. (2) (1923) I.L.R., 45 All., 425.

existed at the date of the advertisement. The Munsif found that this was a fact, and in consequence set aside that sale. On appeal the Subordinate Judge reversed the decision and confirmed the sale, being of opinion that the Munsif was not entitled to consider the matters alleged in the application of the 25th of October, 1924, inasmuch as that application had been filed more than thirty days from the date of the sale. The judgement-debtor came to the High Court in revision.

Babu *Hem Chandra Mukerji*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite parties.

The judgement of MUKERJI, J., after stating the facts as above, thus proceeded :—

The learned Subordinate Judge has misread the ruling in *Harbans Lal v. Kundan Lal* (1). All that was laid down there was that when an application is made for setting aside the sale on the ground of material irregularity in publishing and conducting a sale and consequent substantial loss, it is not open to the judgement-debtor to rely on some other grounds for the same purpose. In this case the application was based on the ground of material irregularity, and it was only by way of additional particulars that it was pointed out that two heavy incumbrances which did not exist had been notified. On the merits, therefore, the applicant has a good case. If the applicant succeeds, the case will have to go back to the court of first instance, because the lower appellate court has remarked that the auction-purchaser had no opportunity of meeting the allegation that the incumbrances notified did not in fact exist.

Mr. *Piari Lal Banerji* on behalf of the respondent has taken up the plea that no revision lay and he relies on the Full Bench case of *Yad Ram v. Sundar Singh* (2). That case is clearly distinguishable. In

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this case the learned Judge of the appellate court had to consider whether the allegation made on the 25th of October, 1924, could or could not be taken into consideration in deciding the application made on the 14th of October, 1924. While purporting to follow a ruling of this Court, he really misread that ruling and refused to consider the application of the 25th of October, 1924. If he had considered the application of the 25th of October, 1924 and had come to the conclusion rightly or wrongly that he should not consider the application because the judgement-debtor had no right to apply for an amendment of this previous application, I should have held that no revision lay. But he did not at all consider the application of the 25th of October, 1924. He had jurisdiction to consider the matter and he refused to consider it. In doing so he acted with material irregularity. I hold that a revision does lie. I allow the application, set aside the order of the court below and also the order of the court of first instance and send back the case to the court of first instance.

Costs in this Court and in the lower appellate court will abide the result.

Application allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Sulaiman.

EMPEROR v. INDAR SINGH.*

Act No. XLV of 1860 (*Indian Penal Code*), sections 403 and 406—*Dishonest misappropriation and criminal breach of trust—Misappropriation not necessarily for the benefit of the misappropriator himself—Trustee repudiating the trust and setting up the rights of a third person.—Provision for civil liability no bar to criminal liability.*

Section 403 of the *Indian Penal Code* is in no way restricted to appropriating property to one's own use. If a trustee

* Criminal Revision No. 449 of 1925, from an order of Kameswar Nath Rai, Additional Sessions Judge of Moradabad, dated the 21st of July, 1925.

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