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There remains for consideration only one other argument which was pressed upon us in appeal. It was contended on behalf of the defendant appellant that there had been a family settlement which bound the parties and which constituted a bar to the present claim. There is in reality before us no case of family settlement nor was any such case set up in the court below. [The judgement then referred to certain evidence and concluded as follows:—] There was no family settlement which would bar the present suit.

The appeal, therefore, fails, but we modify the decree of the court below by directing that the parties do bear their own costs in the court below. In this Court also they will bear their own costs.

*Appeal dismissed.*

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*Before Justice Sir Cecil Walsh and Mr. Justice Banerji.*

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*March*, 28.

MOHAN LAL (JUDGEMENT-DEBTOR) *v.* KALI CHARAN (DECREE-HOLDER) AND NIRANJAN LAL AND ANOTHER (AUCTION-PURCHASERS).*

*Civil Procedure Code, order XXI, rules* 66 *and* 90—*Execution of decree—Application by judgement-debtor to set aside sale on the ground of inaccuracy of the sale proclamation.*

*Held* that it is not open to a judgement-debtor, when making an application under order XXI, rule 90, of the Code of Civil Procedure, to object to the sale proclamation upon the ground that certain material entries therein were incorrect, when he might have impugned its accuracy when notice was sent to him under rule 66 (2).

THE facts of this case are fully stated in the judgement of the Court.

Munshi *Panna Lal*, for the appellant.

* First Appeal No. 142 of 1926, from an order of Syed Iftikhar Husain, Subordinate Judge of Budaun, dated the 6th of July, 1926.

Munshi *Harnandan Prasad* and Munshi *Shambhu Nath Seth*, for the respondents.

WALSH and BANERJI, JJ. :—This is a judgement-debtor's appeal against an order of the learned Subordinate Judge of Budaun dismissing his application to set aside a sale.

The facts of this case are that a decree was passed in favour of Lieut. Raja Kali Charan against the appellant, Lala Mohan Lal. In execution of that decree certain property was put up for sale on the 20th of April, 1926. On the 17th of April, 1926, an application was presented, signed by the judgement-debtor and the decree-holder, praying that the sale fixed for the 20th be postponed for a month and that it was unnecessary to publish a fresh proclamation for sale. Upon the application being put up, the decree-holder's pleader stated that if fresh proceedings had to be taken he did not consent to the sale being postponed. However, the Judge declined to postpone the sale. At the sale the property was bid for by Niranjan Lal, but Niranjan Lal had the names of himself and Indar Prasad recorded by the sale officer as the purchasers of the property. On the 27th of April, 1926, an application was filed under order XXI, rule 90, of the Code of Civil Procedure by the appellant, Lala Mohan Lal, and he stated in the application the fact of time having been given by the decree-holder, and he being a resident of Bareilly thought that the sale would be postponed and, therefore, he could not attend the court at Budaun; that there were serious irregularities in the conduct of the sale and that certain encumbrances were notified to be on the property which were contrary to facts, that the property was worth Rs. 10,000 and its approximate value was Rs. 7,279-11-0 and the sale having

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taken place for a sum of Rs. 2,150, the price was very low. There were various other allegations about irregularities in the sale proceeding. The auction-purchaser opposed this application and the learned Judge of the court below dismissed the application on the ground that in his application under order XXI, rule 90, the judgement-debtor had impleaded one and not both the auction-purchasers. It has been urged by the advocate for the appellant that under order XXI, rule 90, it was unnecessary to mention the name of the auction-purchasers. All that was incumbent on the court hearing the application was that it should direct notice of the application to be issued to the auction-purchasers, and it was no part of the duty of the judgement-debtor to name in his application all the auction-purchasers. His contention further was that the case of *Karamat Khan* v. *Mir Ali Ahmad* (1) and that of *Ali Gauhar Khan* v. *Bansidhar* (2) were no longer good law in view of the provisions of the Code now. It is unnecessary to decide the question, as the matter, in our opinion, must be decided on another point.

The learned vakil for the respondent has supported the order of the learned Subordinate Judge on the ground that it was not open to the judgement-debtor to come forward and challenge the details entered in the sale proclamation, as he, upon the notice which was issued to him under rule 66, ought to have appeared before the court and brought to the notice of the court that there were incorrect statements in that proclamation.

The other points raised by the judgement-debtor have all been found by the court below to be incorrect, namely, that there were no irregularities as alleged by the judgement-debtor. The court below had no

(1) Weekly Notes, 1891, p. 121. (2) (1893) I.L.R., 15 All., 407.

doubt come to the conclusion that the property sold was free from encumbrances but that encumbrances had been notified in the sale proclamation. He says :—

" The property put to sale was 2 biswas out of 5 biswas 4 biswansis and odd. Two encumbrances of the 30th of September and the 27th of October, 1920, were notified. This property is of *patti* Ram Prasad, *Khata Khewat* No. 9. The 4 biswansis only of this *patti* are mortgaged in the bond of the 30th of September and 3 biswansis are mortgaged in the bond of the 27th of October. They have a burden over 3 biswas and 4 biswansis only. After deducting 2 biswas to be sold in this decree there remain more than 3 biswas and 4 biswansis. When property can be assigned to all the mortgages without overlapping the share mortgaged in any one of them, the property mortgaged in one bond cannot be said to be mortgaged in the other."

We have come to the conclusion that the judgement-debtor cannot raise this question inasmuch as it was open to him to point out to the court that the encumbrances, as mentioned by the decree-holder and certified to by the registration office, ought not to be entered in the sale proclamation, as it was possible to assign different portions of the property to the different mortgages. In the absence of the judgement-debtor it was impossible for either the court or the decree-holder to find out whether the property now sold was or was not subject to the two other mortgages. The law has been now made clear by the additions to rule 90 made by the rules framed by this Court under the rule-making powers, but those rules do not govern the facts of the present case; but we see no reason to hold that the law was any different from what the law has now been declared by the rules to be the law applicable to such cases.

We are, therefore, of opinion that this appeal must fail and we dismiss it with costs.

*Appeal dismissed*