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Another point taken before us is that, inasmuch as an application was made to set aside the sale under section 311 of the Code, the application under section 310A will not lie. The proviso to section 310A runs as follows: "Provided that, if a person applies under the next following section to set aside the sale of his immoveable property, he shall not be entitled to make an application under this section." With regard to this proviso we think it is sufficient to say that the application under section 311 was made after that under section 310A had been rejected on the ground that that section had not retrospective effect, and that that application was made by judgment-debtors other than those who made the application under section 310A.

Under these circumstances we think that this appeal must be allowed with costs, which we assess at five gold mohurs.

The order of the Subordinate Judge of 5th September 1894 will be reversed, and, it being understood that the amount required to be deposited by the provisions of section 310A was deposited within thirty days from the sale, the sale will be set aside.

S. C. C.

Appeal allowed.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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March 10.

NET LALL SAHOO AND OTHERS (DEGREE-HOLDERS, AUCTION-PURCHASERS, APPELLANTS) v. SHEIKH KAREEM BUX AND ANOTHER (JUDGMENT-DEBTORS, OBJECTORS, RESPONDENTS.)*

Execution of decree—Sale in—Mortgage decree—Civil Procedure Code (XIV of 1882), section 311—Irregularity—Death of judgment-debtor before sale—Judgment-debtor, Omission to bring in representatives of deceased—Minor judgment-debtor, Absence of a guardian "ad litem" for—Adult judgment-debtor described as minor.

In a mortgage decree *M* was one of the judgment-debtors, and the guardian *ad litem* of two of the other judgment-debtors, *viz.*, *J* her minor daughter and *K* another person wrongly described as a minor. After the decree was made absolute, proceedings were taken in execution, but upon payment of a part of the decretal amount the sale was stayed. *M* then died, and, although her heirs were some of the other judgment-debtors, no one was brought on the record as her representative, and no one appointed guardian *ad litem* either for *J* or *K*. Upon a fresh application for sale, in which the

* Appeal from Original Order No. 23 of 1895, against the order of Babu Madhub Chunder Chakravarti, Subordinate Judge of Shahabad, dated the 1st of December 1894.

parties were described as in the decree, the sale was held. An application under section 311 of the Civil Procedure Code (1882) was then made on behalf of *J* and *K* to set aside the sale.

Held, that the omission to bring in the representatives of the deceased judgment-debtor did not vitiate the sale. *Sheo Prasad v. Hira Lall* (1), *Aba v. Dhondu Bai* (2), referred to. *Krishnappa v. Unnessa Begam* (3), not followed. *Romeshurry Dasi v. Durga Dass Chatterjee* (4), distinguished.

Held, also, that neither the absence of a *guardian ad litem* for *J* nor the description of *K* as a minor affected the validity of the proceedings.

Taqi Jan v. Obaidulla (5), referred to.

THE facts of this case and the arguments on both sides sufficiently appear from the judgment of the High Court.

Mr. *J. T. Woodroffe*, Dr. *Rash Behari Ghose* and Babu *Raghunandan Prasad* for the appellants.

Moulvie *Mahomed Yusuf* and Moulvie *Mahomed Habibulla* for the respondents.

The judgment of the High Court (TREVELYAN and BEVERLEY, J.J.) was as follows :—

The respondents in this case are two out of several judgment-debtors against whom a mortgage decree was made on 2nd June 1893. In that decree the judgment-debtor No. 8 was one Mussummat Makhduman, *nika* wife of Halim Chowdhry, deceased, and Nos. 9 and 10 were the two respondents, Karim Buksh and Mussummat Jaigia, who were described as minors under the guardianship of the said Mussummat Makhduman.

The decree having been made absolute on 29th July 1893, an order for sale of the mortgaged properties was made on 5th August, but on payment of part of the money due the sale was stayed, and the execution of the decree remained in abeyance. The balance of the decretal money not having been paid, the decree-holder on 25th June 1894 made a fresh application for sale, the judgment-debtor being described as in the decree and the former application. Meanwhile on 24th November 1893 Mussummat Makhduman had died, and no steps were taken either to sub-

(1) I. L. R., 12 All., 440.

(2) I. L. R., 19 Bom., 276.

(3) I. L. R., 15 Mad., 399.

(4) 7 C. L. R., 85.

(5) I. L. R., 21 Cal., 866.

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stitute her legal representative on the record, or to appoint another guardian *ad litem* for the minors. The sale having taken place on the 7th August 1894, some of the other judgment-debtors applied on 3rd September to have the sale set aside under the provisions of section 310A of the Code of Civil Procedure, and that application having been disallowed on the 5th September, the present respondents on the following day, 6th September, preferred the present application under the provisions of section 311 of the Code. The application was based on several grounds which are considered at length in the order of the Subordinate Judge, by which he set aside the sale.

One of those grounds was that Mussummat Makhduman, who was, as already stated, one of the judgment-debtors under the decree, had died after the order for sale had been made, and that no one had been substituted as judgment-debtor in her place, nor had any fresh guardian *ad litem* been appointed for Mussummat Jaigia, who is admittedly a minor. Another ground was that the respondent Karim Buksh had been described in the proceedings throughout as a minor, although it was proved as a matter of fact that he was forty-five years of age. The learned Subordinate Judge also held that the sale was not duly published as provided by sections 274 and 289 of the Code of Civil Procedure, and that the omission in the sale proclamation of the *abwabs* which were leviable in the bazar sold was a serious omission. He also held that substantial loss had occurred to the judgment-debtors by the sale, and that such loss was entirely due to those irregularities.

As regards the first ground taken by the learned Subordinate Judge, it has been contended before us that so far from the sale being void, because Makhduman was dead at the time the property was sold and that no one had been put on the record in her place, the omission was not even an irregularity, but that the order for sale made during her lifetime fixed upon the Court the responsibility of selling, and that no further proceeding was necessary at the instance of the judgment-creditors. In support of his contention Mr. Woodroffe relied on the Full Bench decision in *Sheo Prasad v. Hira Lall* (1), which was followed by the Bombay High Court in the case of *Aba v. Dhondu Bai* (2). On the other hand, a different view was

(1) I. L. R., 12 All., 440,

(2) I. L. R., 19 Bom., 276.

taken in the case of *Krishnayya v. Unnessa Begam* (1), but in that case the Full Bench decision of the Allahabad Court was not considered. The case of *Romeshurry Dasi v. Durga Dass Chatterjee* (2) also goes to support the contention that the omission to place the heir of Makhduman on the record would affect the regularity of the proceedings, but that case was decided upon a peculiar state of circumstances, and the sale was really set aside, because the process of the Court had been abused. We are of opinion that the omission did not vitiate the sale, but was at most an irregularity. The order for sale was made, and the former execution proceedings were taken, in the lifetime of Makhduman. Her heirs appear to be also parties to the decree, and had they wished to satisfy the decree and save the property from sale (which, however, is not alleged), it was open to them to do so.

The absence of a guardian *ad litem* for Jaigia stands upon the same footing. The order for sale having been made when she was properly represented, it was binding upon her, and if there had been any wish to satisfy the decree on her behalf, she could have applied to do so through a next friend, as in fact she has preferred the present appeal. Nor are we prepared to say that the description of Karim Buksh as a minor in any way affects the validity of the proceedings. This description may, indeed, be treated as surplusage, as was done in the case of *Taqi Jan v. Obaidulla* (3). Karim Buksh now states that he never had any notice of the suit, but the Subordinate Judge has not gone into that question, and we think that we cannot in an application under section 311 of the Code go behind the decree and enquire as to whether or not he was served with a summons in the original suit.

The proceeding, which the law provides for relieving a person not served with a summons from the liability of a decree, is to be found in section 108 of the Civil Procedure Code. A proceeding under section 311 must, we think, assume the regularity of the decree in execution of which the property has been sold. But whether that is so or not, we think that it is under section 108 only that Karim Buksh is entitled to put forward any irregularity which he says was caused by his being described as a minor. But even

(1) I. L. R., 15 Mad., 399.

(2) 7 C. L. R., 85.

(3) I. L. R., 21 Calc., 866.

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assuming that the matters abovementioned were irregularities, they do not, in our opinion, justify the order setting aside the sale, inasmuch as we are not satisfied that the judgment-debtors have suffered any substantial loss by the sale.

Their Lordships then dealt with the evidence, and came to the conclusion that the judgment-debtors did not sustain any substantial loss in consequence of the sale, and set aside the order of the Court below, and directed that the application under section 311 be dismissed with costs.

S. C. C.

Appeal allowed.

Before Mr. Justice Trevelyan and Mr. Justice Beverley.

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 March 31.

RAGHUNUNDUN MISSER (DECREE-HOLDER, APPELLANT) v. KALLYDUT MISSER (JUDGMENT-DEBTOR, RESPONDENT.) *

Limitation Act (XV of 1877), Schedule II, Article 179—Application for leave to bid—Step in aid of execution of a decree.

An application by the decree-holder for leave to bid at the sale in execution of the decree is not a step in aid of execution within the meaning of the Limitation Act, Schedule II, Article 179.

Toree Mahomed v. Mahomed Mubood (1) and *Ananda Mohan Roy v. Hara Sundari* (2), referred to. *Bansi v. Sikree Mal* (3) dissented from.

ON the 30th January 1895 the decree-holder, Raghunundun Misser, made an application to the Court of the Munsif at Sewan, in the District of Sarun, which passed the decree, for the purpose of obtaining a certificate for execution in the jurisdiction of the Munsif of Rampore Baulia. The judgment-debtor objected that the last application for execution, dated 3rd September 1891, having been made more than three years before the present application, the latter was barred by limitation. The decree-holder contended that there was an application made by him on the 30th January 1892, asking the Court's permission to bid at the sale in execution, and that this was a step in aid of execution within the meaning of Article 179, Schedule II of the Limitation Act, XV

* Appeal from Appellate Order No. 344 of 1895, against the order of Babu Ananta Ram Ghose, Subordinate Judge of Sarun, dated the 17th of August 1895, affirming the order of Babu P. C. Roy, Munsif of Sewan, dated the 25th of April 1895.

(1) I. L. R., 9 Calc., 730.

(2) I. L. R., 23 Calc., 196.

(3) I. L. R., 13 All., 211.