Before Mr. Justice Mukerji and Mr. Justice Niamat-ullah.

DIP CHAND (APPLICANT) *v.* SHEO PRASAD AND OTHERS (OPPOSITE PARTIES).*

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Civil Procedure Code, section 115, *order XXI, rules* 89 *and* 92(2)—*Application for setting aside execution sale—Failure to implead all purchasers—Applicant not bound to ascertain and implead them—Duty on court to give notice to all persons affected—Revision—Scope of section* 115, *clause* (c)—*Adopting rule of procedure not warranted by law.*

In execution of a simple money decree the property of the judgement debtor was sold in three lots and was purchased by several persons, some of whom purchased on their own behalf and some on behalf of others. The judgement-debtor applied under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside. In this application he mentioned the names of the purchasers according to his knowledge, but failed to implead all the real purchasers. He repaired this omission later on, but beyond 30 days after the sale. His application was rejected on this ground. He appealed and being unsuccessful applied in revision.

Held that order XXI, rule 89, of the Civil Procedure Code does not require the applicant to nominate any person as the opposite party, and it is not essential that there should be an application in writing in which the auction purchasers must be shown as opposite parties, as defendants are described in a plaint. Order XXI, rule 92(2) indicates that the duty of giving notice to all persons affected should rest on the court or its officials, and there is nothing to indicate that the applicant for setting aside the sale should trace out who are the parties affected by his application and make them parties to it.

Held, also, that where a court had acted, as in the present case, by inventing a rule of procedure for itself, which was not warranted by the law, the case was not one of a mere wrong decision on a point of law, and the High Court was not only competent to interfere in revision but should interfere.

* Civil Revision No. 251 of 1927.

If the result of a decision by the lower court is an illegal action, or action which may be described as material irregularity, the High Court has jurisdiction to interfere under section 115, clause (*c*), although the result may have been arrived at by following a ruling of the High Court.

Yad Ram v. *Sundar Singh* (1), distinguished. *Ishar Das* v. *Asaf Ali Khan* (2), *Balakrishna Udayar* v. *Vasudeva Ayyar* (3), *Dhanwanti Kuer* v. *Sheo Shankar* (4), *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (5), *Umed Mal* v. *Chand Mal* (6), referred to. *Karamat Khan* v. *Mir Ali Ahmad* (7) and *Ali Gauhar Khan* v. *Bansidhar* (8), disapproved. *Sarvi Begum* v. *Haider Shah* (9) and *Ramraj Singh* v. *Rabi Prasad* (10), referred to.

Dr. *Kailas Nath Katju*, for the applicant.

Messrs. *Peary Lal Banerji* and *Shabd Saran*, for the opposite parties.

MUKERJI and NIAMAT-ULLAH, JJ. :—This is an application to revise the order of the Munsif of Chandausi, dated the 16th of June, 1927, and arises under the following circumstances.

In execution of a simple money decree against the applicant his property was sold in three lots on the 10th of March, 1927. One Shiam Behari purchased the lot No. 1. The second lot was purchased on the spot by one Birj Bhukan Saran, but he declared that he was purchasing the same for one Kunwar Bahadur. The third lot was purchased on the spot by one Sarra Mal, but he declared that he was purchasing the property for himself and one Mohammad Raza Khan. On the 2nd of April, 1927, the judgement-debtor put in an application to the court stating that he had deposited the decretal amount and the 5 per cent. on the

(1) (1923) I. L. R., 45 All., 425.
(2) (1911) I. L. R., 34 All., 186.
(3) (1917) I. L. R., 40 Mad., 793.
(4) (1919) 4 Pat. L. J., 340.
(5) (1892) I. L. R., 20 Cal., 8.
(6) (1926) I. L. R., 54 Cal., 338.
(7) Weekly Notes, 1891, p. 121.
(8) (1893) I. L. R., 15 All., 407.
(9) (1911) 9 A. L. J., 12.
(10) (1921) 63 Indian Cases, 140.

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purchase money, and asked that the sale might be set aside. The application was, as the application itself mentioned, under order XXI, rule 89, of the Civil Procedure Code. In the body of the application the judgement-debtor said that the purchasers were Shiam Behari, Kidar Nath and Sarra Mal. It appears that Brij Bhukan Saran was the clerk of the pleader B. Kidar Nath, and B. Kunwar Bahadur was the brother of B. Kidar Nath. The judgement-debtor, apparently, took the purchase by Brij Bhukan Saran as a purchase by his master, B. Kidar Nath, himself. It also seems to be clear that Sarra Mal's purchase was taken by the judgement-debtor to be entirely for himself without a partner.

One of the purchasers took exception to the application on the ground that the two other purchasers, B. Kunwar Bahadur and Mohammad Raza, had not been impleaded. Thereupon the judgement-debtor asked that notices might be issued to those purchasers also. This application was made more than 30 days after the sale, which, as we have already stated, was held on the 10th of March, 1927.

The learned Munsif held that the application of the judgement-debtor for setting aside the sale must fail, because he had failed "to implead two of the auction purchasers within the period of limitation". Incidentally, we may mention that the sale in favour of Shiam Behari, at any rate, might have been set aside. However, that is a point which has not been discussed before us, and need not be separately considered, in the view we take of the whole case.

The judgement-debtor took an appeal to the learned District Judge, and it was heard by a learned Subordinate Judge. That officer upheld the order of the court of first instance, and dismissed the appeal. The judgement-debtor has come in revision.

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A preliminary point has been taken on behalf of the respondents that no revision is competent. The learned counsel has taken his stand on several cases, and the case on which he relies most is the case of *Yad Ram* v. *Sundar Singh* (1), a case decided by three learned Judges, one of whom dissented from the opinion of the two others. In this case the judgement-debtor sold his property, after the auction sale, and yet applied for the setting aside of the sale. The court of first instance held that the judgement-debtor having sold his property was not a person competent to apply for the setting aside of the sale. In arriving at this conclusion, the learned Judge of the court of first instance followed a decision of this Court in *Ishar Das* v. *Asaf Ali Khan* (2). It was held by BANERJI, J., that, in the view he took of section 115 of the Code of Civil Procedure as interpreted by their Lordships of the Privy Council in *Balakrishna Udayar* v. *Vasudeva Ayyar* (3), the High Court had no jurisdiction to entertain the application in revision. His Lordship was of opinion that the only matter in which the High Court could interfere was a matter in which the question of jurisdiction was involved. He pointed out that even clause (*c*) of section 115 must have "relation to the question of jurisdiction". It was on this ground that the learned Judge declined to interfere. PIGGOTT, J., gave different reasons for coming to the same conclusion. He thought that it was impossible for him to say that in following a decision of this Court, namely, the case of *Ishar Das* v. *Asaf Ali Khan*, the court below had acted illegally or with material irregularity. That was in substance the reason why the learned Judge refused to interfere with the order of the court below,

(1) (1923) I. L. R., 45 All., 425. (2) (1911) I. L. R., 34 All., 186.
(3) (1917) I. L. R., 40 Mad., 793.

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although he noticed that in respect of the actual decision the Allahabad High Court stood singularly alone in its view. WALSH, J., dissented and was inclined to follow, on the merits, the judgement of MULLICK, J., in the case of *Dhanwanti Kuer* v. *Sheo Shankar* (1). From the report it does not appear that this learned Judge expressed any detailed opinion on the question of jurisdiction.

There can be no doubt that a Full Bench case, although it may be the decision of two learned Judges against the decision of a third, is always entitled to respect from a Division Bench presided over by only two Judges. But what was actually decided in this case of *Yad Ram* is what we have already described The net result of the opinion of the two learned concurring Judges was that the revision was thrown out. This case can be easily distinguished from the one before us. The question that had to be decided by the court of first instance in *Yad Ram's* case was a question of pure law, namely whether a certain person was or was not entitled, on a correct interpretation of a certain rule of law, to apply for the setting aside of the sale. We are prepared to concede, and indeed we must concede, that a revisional court is not a court of appeal, and it is not every erroneous decision on a point of law or fact that can be corrected by the High Court in its revisional jurisdiction. In the case before us it is not a mere matter of interpretation of law. The court below has required, where the law itself does not require, that it should have before it an application in writing in which certain persons, namely the auction purchasers, should be shown as opposite parties, as the defendants are described in a plaint.

(1) (1919) 4 Pat. L. J., 349.

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In our opinion the learned Munsif invented a procedure of his own, quite unwarranted by rule 89, order XXI, of the Code of Civil Procedure. It is not a case of a mere wrong decision on a point of law.

The learned counsel for the respondents has strongly relied on a dictum of PIGGOTT, J., in the case of *Yad Ram* v. *Sundar Singh* (1), to be found at page 428. The learned Judge has said that he could not see how the court of first instance could be said to have acted illegally or with material irregularity in following a decision of this Court. With all respect, there is another view of the matter. The *result* of the decision is something entirely different from the reasons of the decision. The result of the decision in the case before his Lordship was that the court of first instance held that the judgement-debtor was not a person entitled to make the application. That decision might be wrong or right. It was arrived at by following a decision of this Court. The following of the decision of this Court constituted the reason of the decision; but the *reason* is something different from the *result*. If the *result* was an illegal action, or action which may be described as material irregularity, this Court would certainly have jurisdiction to interfere under the express language of section 115, clause (*c*), although the result may have been arrived at in a way which is entirely unexceptionable. We are, therefore, unable to agree with PIGGOTT, J., although we have the highest respect for his opinion.

The learned counsel for the respondent relied on the Privy Council case of *Balakrishna Udayar* v. *Vasudeva Ayyar* (2) and argued that for our interference under clause (*c*) of section 115 of the Code of

(1) (1923) I. L. R., 45 All., 425. (2) (1917) I. L. R., 40 Mad., 793.

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Civil Procedure there must be a question of jurisdiction. We have carefully read that case, and we are of opinion that that interpretation should not be put on their Lordships' judgement. It is true that at page 799 of the report their Lordships delivered themselves as follows:—"It will be observed that the section applies to jurisdiction alone, the irregular exercise, or non-exercise, of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." But, having said so, their Lordships said something further which clearly indicates that all that their Lordships meant to lay down was that the revisional court was not a court of appeal on a question of fact or a question of law. In the very case which was before their Lordships they approved of the exercise of the powers under section 115 of the Code of Civil Procedure by the High Court.

There are many cases in which their Lordships themselves have interpreted the law in the way in which we propose to interpret it. In *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (1), a purchaser at a court sale made an application for the setting aside of the sale on a ground which could not afford him any relief in the execution department. The learned Judge executing the decree entertained his application and set aside the sale. A Division Bench of the High Court interfered and set aside the Subordinate Judge's order. Their Lordships of the Privy Council approved of the conduct of the High Court. Their Lordships observed, at page 11 of the report, that the Subordinate Judge, in acting as he did, exercised the jurisdiction which did not vest in him and failed to exercise the jurisdiction which he

(1) (1892) I. L. R., 20 Cal., 8.

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had. This decision was, no doubt, given under the old Act of 1882; but there is no difference in the present law and the old law.

The latest pronouncement of their Lordships of the Privy Council will be found in the case of *Umed Mal* v. *Chand Mal* (1). In this case their Lordships approved of the interference by the Chief Commissioner of Ajmer-Merwara. The grounds on which the Chief Commissioner had interfered were approved of, and their Lordships pointed out that the fact that a person very much interested in the result of the litigation was absent from before the court was itself a sufficient ground for interference by the highest court of appeal, as a court of revision.

We are of opinion that where a court has acted, as in the present case, by inventing a rule of procedure for itself, which is not warranted by the law, the High Court is not only competent to interfere but should interfere.

The learned counsel for the respondents has urged that the Munsif, in refusing to set aside the sale, was only following a case of this Court decided in *Karamat Khan* v. *Mir 'Ali Ahmad* (2). The learned counsel said that it being a two Judge case should be followed by us. We have already noticed his argument that the court below should not be said to have acted illegally or with material irregularity because it purported to follow a ruling of this Court. We shall not consider again that argument.

The case in the 1891 Allahabad Weekly Notes has not been followed unanimously in this Court. It was, no doubt, followed by a single Judge in *Ali Gauhar Khan* v. *Bansidhar* (3), but we have got

(1) (1926) I. L. R., 54 Cal., 338. (2) Weekly Notes, 1891, p 121.
(3) (1893) I. L. R., 15 All., 407.

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against it at least two later decisions, namely, *Sarvi Begum* v. *Haider Shah* (1), and *Ramraj Singh* v. *Rabi Prasad* (2). In these cases two different learned Judges of this Court held that an application for setting aside a sale under order XXI, rule 89, might be made *orally*. If an application could be made orally, how possibly could the decree-holder, or the auction purchaser, be shown, in the oral application as the opposite parties, as is done in the case of a plaint? We may point out that the decision of 1891 Weekly Notes need not be followed on the ground of *stare decisis*. The point raised is one of procedure alone, and not of substantive law. It cannot be said that people have acted on the basis of this ruling for a number of years and have accepted the rule laid down in the case as a substantive rule of law of the country. Further, we may point out that the ruling was given under the old Code, and the present law is, surely, not exactly the same as it was in 1882. We do not say that the result of the language employed in the Act of 1908 necessarily implies that a judgement-debtor asking for the setting aside of a sale after deposit of money should not show the persons interested in opposing the application, as the opposite party. All that we mean to say is that the language is not the same, and the ruling given on consideration of a different language of the Code need not necessarily be binding on us. In the earlier Code (section 310A) nothing was said as to who should be given notice of the application of the judgement-debtor to set aside a sale. Under the present Act, order XXI, rule 92, sub-rule (2), paragraph 2 runs as follows:—"Provided that no order shall be made unless notice of the application has been given to all persons affected thereby." This rule would indicate that the duty

(1) (1911) 9 A. L. J., 12. (2) (1921) 63 Indian Cases, 140.

of giving notice should rest on the court of its officials At least there is nothing to indicate that the judgement-debtor, or the applicant for the setting aside of he sale, should trace out who are the parties affected by his application and make them parties to it. The duty sought to be cast on the applicant implies an investigation as to who are the actual purchasers and who have purchased for whom. The short period of 30 days might be materially shortened if the judgement-debtors were called upon to hold an investigation into the matter. There is no rule which says that the time occupied in obtaining a copy of the report of the sale officer would be excluded from the period of 30 days. For all these reasons we are of opinion, with all respect, that the case of *Karamat Khan* v. *Mir Ali Ahmad* (1) is no longer good law and is not binding upon us.

Coming to the merits of the case, we have given sufficient indication to show that we are of opinion that the application should succeed. Rule 89 does not require the party making the application to nominate any person as the opposite party. The facts of this very case show how difficult it may be for the applicant to discharge this duty in certain circumstances. The judgement-debtor appears to have been actually present on the spot, yet he was misled as to who were the actual purchasers. There is no question of "bringing anybody on the record." The learned Judge who decided the case of *Ali Gauhar Khan* v. *Bansidhar* (2), speaks of the decree-holder being "brought on the record." The execution case was one in which the decree-holder was a principal actor, and no question of his being brought on the record could arise. The auction purchaser and the

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

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decree-holder being already on the record, the unnecessary procedure of showing them as the opposite party cannot be insisted upon, unless there was a clear warrant to the effect in rule 89. In the result, we allow the application in revision, set aside the orders of the learned Munsif and the Subordinate Judge, and set aside the sale.

APPELLATE CIVIL.

Before Mr. Justice King and Mr. Justice Bennet.

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RAM SARUP AND OTHERS (PLAINTIFFS) *v.* RAM RICHHPAL AND OTHERS (DEFENDANTS).*

Mortgage—Subrogation—Property comprised in second mortgage being a fraction of that in the first—Third mortgagee and another person together paying off first mortgage—Third mortgagee gets priority over the second to the extent of a corresponding fraction of his contribution.

Where the third mortgagee and another person together paid off the first mortgage in full, *held*, on suit by the second mortgagee, that the third mortgagee was entitled to priority over the second to the extent of the sum which he had contributed for the discharge of the first mortgage; but as the property comprised in the second mortgage was only a fraction of that comprised in the first, the right of priority would be limited to the corresponding fraction of the amount contributed.

Hanumanthaiyan v. *Meenatchi Naidu* (1), distinguished. *Saminatha Pillai* v. *Krishna Ayyar* (2), followed.

Messrs. *P. L. Banerji* and *H. P. Sen*, for the appellants.

Dr. *Kailas Nath Katju* and Mr. *Misri Lal Chaturvedi*, for the respondents.

* Second Appeal No. 2145 of 1927, from a decree of S. Nawab Hasan, Additional Subordinate Judge of Bulandshahr, dated the 2nd of June, 1927, reversing a decree of Brijnandan Lal, Additional Munsif of Bulandshahr, dated the 9th June, 1926.

(1) (1911) I. L. R., 35 Mad., 188. (2) (1913) I.L.R., 38 Mad., 548.