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to have the partition made by the Collector according to the law for the time being in force for the partition of estates.

We are of opinion that this contention must succeed. We think that the section in question is imperative in its terms, and we are not aware of any case in which it has been held that a Civil Court is at liberty to proceed in any way other than that therein prescribed. The case of *Debi Singh v. Sheo Lall Singh* (1) has been brought to our notice; but that case clearly differs from the present. That was a case in which the plaintiffs held a certain share in proprietary right and another share in *mokararri* right in a certain village, which village formed a portion of a revenue-paying estate, and they asked the Court to define the portion of the village from which they might collect the rents they were entitled to, without in any way carrying out a partition of the estate itself. That case, we think, is quite distinguishable from the present, and affords no ground for holding that a Civil Court is not bound by the distinct provisions of section 265 of the Code.

We accordingly allow the appeal, set aside the final decree of the lower Court of the 18th December 1893, and direct that the Subordinate Judge do proceed in accordance with the provisions of section 265 of the Code of Civil Procedure. As the defendant did not appear in the lower Court, where he might have raised this objection, we make no order as to the costs of this appeal.

S. C. C.

Appeal allowed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Beverley.

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 March 10.

ASHRUF ALI CHOWDHRY AND OTHERS (JUDGMENT-DEBTORS) v. NET
 LAL SAIHU AND OTHERS (DECREE-HOLDERS.)*

Civil Procedure Code (XIV of 1882), section 310A. and section 311—Civil Procedure Code Amendment Act (V of 1874)—Sale in execution of mortgage-decree—Application by mortgagor under section 310A., Civil Procedure Code.

The judgment-debtor in a mortgage-decree passed under section 88 of the Transfer of Property Act (IV of 1882) may apply to set aside a sale under

* Appeal from Original Order No. 349 of 1894, against the order of Babu Kader Nath Mozumdar, Subordinate Judge of Shahabad, dated the 5th of September 1894.

the provisions of section 310A. of the Civil Procedure Code (XIV of 1882, as amended by Act V of 1894).

After the rejection by the lower Court of an application under section 310A., judgment-debtors other than the applicant made an application under section 311 of the Code :—

Held, that the present application under section 310A. was not barred by reason of the proviso to that section.

NET LAL SAHU and others obtained a decree on a mortgage lease, directing the sale of the mortgaged property on the 2nd June 1893, and the order for sale was made absolute on the 29th July 1893. The decree-holders applied for execution of the decree on the 1st August 1893, and the 9th September 1893 was fixed for sale, but part of the decretal money having been paid by the judgment-debtor, the sale was stayed, and “the execution case disposed of on part satisfaction.” The decree-holder again applied for execution on the 27th June 1894, and the 6th August 1894 was fixed as the day of sale. The sale took place on the 7th August 1894, and the decree-holder purchased the mortgaged property at the sale. The judgment-debtors, Ashruf Ali and others, made an application under section 310A of the Code of Civil Procedure to set aside the sale. The application was refused by the Subordinate Judge on the 5th September 1894. He said :—

“The decree-holder’s pleader contends that Act V of 1894 is not applicable to the present case, inasmuch as the sale has been held in pursuance of a decree passed long before the said Act came into force (2nd March 1894). I am of opinion that the Act cannot have any retrospective effect, as held by the Full Bench in the case of *Girish Chunder Bose v. Apurba Krishna Das* (1) which was decided by the High Court on the 8th August 1894.”

On the 6th September a petition was filed on behalf of the judgment-debtors under section 311 of the Civil Procedure Code, and the present appeal was preferred by them to the High Court on the 17th September 1894 against the order of the Subordinate Judge, dated 5th September 1894, refusing the application under section 310A.

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

(1) I. L. R., 21 Calc., 940.

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Mr. J. T. Woodroffe, Dr. Ras Behari Ghose and Babu Raghunandan Prasad for the respondents.

The arguments on both sides sufficiently appear from the judgment of the High Court.

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

On the 2nd June 1893 the respondents in this appeal obtained a decree against the appellants and others upon certain mortgage bonds under the provisions of section 88 of the Transfer of Property Act ; the 1st July 1893 being fixed as the date on which the money found to be due was to be paid. On the 29th July 1893 the decree was made absolute. On 5th August an order was made for the sale of the mortgaged properties, and the sale was advertised, but on 9th September the sale was stayed on payment of a portion of the amount of the decree and the execution proceedings remained in abeyance. On the 27th June 1894 the respondents applied to continue the execution proceedings and to bring the properties to sale. A fresh proclamation was issued fixing 6th August for the sale, and on the following day the properties were put up to sale, and were (with the permission of the Court) purchased by the decree-holders. Within thirty days of the sale the appellants deposited in Court the amount of the decree and applied to have the sale set aside under the provisions of section 310A of the Code of Civil Procedure. The application, however, was disallowed on the authority of the Full Bench decision in *Girish Chunder Bose v. Apurba Krishna Das* (1), in which it was held that that section would not apply when the decree had been made before the passing of Act V of 1894, by which Act section 310A was introduced into the Code. That Full Bench decision has since been overruled by the decision of the Full Court in the case of *Jagadanund Singh v. Amrita Lall Sircar* (2), and the appellants accordingly urge that they are entitled to the benefits of that section.

But it is contended before us that that section applies only to sales under the Code in execution of decrees for money, and

(1) I. L. R., 21 Calc., 940.

(2) L. R., 22 Calc., 767.

will not apply to the case of a sale of mortgaged property in execution of a decree made in pursuance of the provisions of the Transfer of Property Act. We think that there is no force in this contention. Section 310A enacts that "any person whose immovable property has been *sold under this chapter*" may apply in terms of the section; and, although the order for sale was made under the provisions of the Transfer of Property Act, we think we must hold that the sale itself took place under the Code. By section 104 of the Transfer of Property Act the High Court is given power to make rules for carrying out the provisions contained in the chapter on Mortgages, and by the rules framed by this Court (C. O. No 13, dated 27th April 1892), the provisions of the Code were made applicable to sales of mortgaged property ordered by the Court under the Transfer of Property Act. That being so, we think we must hold that the mortgaged properties were sold under Chapter XIX of the Code. No doubt the holder of a mortgage-decree occupies a somewhat better position than that of the holder of a decree for money. His decree gives him a special lien upon the property mortgaged as security for his debt; but it is only in the event of the mortgagor failing to pay according to his contract that the mortgagee has the right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money. [Transfer of Property Act, section 58 (b)].

The provisions of section 86 of the Transfer of Property Act allow a further time within which the mortgagor may pay up the amount found to be due from him and so save the property from sale. And in the case of *Poresh Nath Mozumdar v. Ranjadu Mozumdar* (1) it has been held by this Court that in a suit for foreclosure the mortgagor may redeem at any time before an order absolute for foreclosure has been made under section 87 of the Act. It is only one step further, and we think that it does violence to no principle of justice, to hold that before the sale has been confirmed the mortgagor may come in and enjoy the benefit which the Legislature has thought fit to confer on all those, whose immovable property has been sold in execution of a decree.

(1) I. L. R., 16 Calc., 246.

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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.

1896
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.