

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

IMAM-UN-NISSA BIBI (AUCTION-PURCHASER) v. LIAKAT HUSAIN AND OTHERS
(JUDGMENT-DEBTORS).*

Sale in execution—Notice of application for execution—Act X of 1877 (Civil Procedure Code), ss. 248, 311.

The omission to give the notice required by s. 248 of Act X of 1877 to the judgment-debtor, on application for execution of the decree, affects the regularity of the sale which subsequently takes place in execution of the decree, and the validity of the entire execution-proceedings. *Ramessuri Dassie v. Doorgalass Chatterjee* (1) followed.

Held, therefore, where execution of a decree was applied for against the legal representative of a deceased judgment-debtor, and the notice required by s. 248 of Act X of 1877 was not given to such legal representative, and certain immoveable property belonging to the deceased judgment-debtor was sold, that such sale had been properly set aside by the Court executing the decree by reason of such omission.

Quere.—Whether such omission was an irregularity in “publishing or conducting” the sale, within the meaning of s. 311 of that Act.

THIS was an application to the High Court for the exercise of its powers of revision under s. 622 of Act X of 1877. The facts of the case are stated in the judgment of Straight, J.

Mr. Conlan and Munshi Ram Prasad, for the petitioner.

Babus Oprokash Chandar Mukarji and Ram Das Chakarbati, for the opposite parties.

The High Court (PEARSON, J., and STRAIGHT, J.,) delivered the following judgments:—

STRAIGHT, J.—This is an application for revision under s. 622 of the Civil Procedure Code of an order passed on appeal by the Judge of Allahabad, dated the 30th April, 1880, upholding a decision of the Munsif setting aside a sale held in execution of decree on the 20th December, 1878, at which the applicant before us, Imam-un-nissa Bibi, became the auction-purchaser. It appears that one Umrit Begam held a decree for some Rs. 27 in respect of

* Application, No. 84B. of 1880, for revision under s. 622 of Act X of 1877 of an order of W. Tyrrell, Esq., Judge of Allahabad, dated the 30th April, 1880, affirming an order of Babu Mritonjoy Mukarji, Munsif of Allahabad, dated the 3rd May, 1879.

costs against Abu Ali, Liakat Husain minor, represented by Nasiban Bibi as guardian, and Khairat Husain represented by Budha Bibi as guardian. Before any execution-proceedings were taken upon this decree Abu Ali died, on the 2nd August, 1878, leaving his mother Haidri Begam his heiress and legal representative. Shortly after his death Umrit Begam applied for execution of decree, but no notice as required by s. 248 of the Code was given by the Court to Haidri Begam his legal representative. The property was attached on the 22nd September, 1878, and on the 20th of November following sale-notifications were published, the sale being held on the 20th of December, and the present applicant, as before stated, becoming the purchaser at the price of Rs. 30. On the 19th of January, 1879, Haidri Begam lodged objections to the sale on the ground that as the legal representative of Abu Ali she had not received the notice provided for by s. 248, and prayed that it might be set aside. The Munsif decided in her favour, and upon appeal the Judge adopted a similar view, being of opinion that not only had inadequacy of price been satisfactorily established, but that the failure to give the notice required by s. 248 rendered the sale notification so radically bad that there was an "irregularity in publishing the sale," to which the terms of s. 311 would be applicable. A decision of this Court—*Nonidh Singh v. Sohan Kooer* (1)—was referred to by both the lower Courts as being apposite to this view, and it has also been quoted before us as an authority fatal to the maintenance of a sale held under the circumstances disclosed in the present application. There it was held that, when the High Court had passed an order postponing a sale, and such order arrived at the Collector's office the day after the sale, the publication of the sale was irregular as the order postponing it invalidated the notification of sale. It is now contended for the applicant that the failure to give the notice required by s. 248 was not a "material irregularity in publishing or conducting" the sale, and that it was not competent for the lower Courts, in dealing with the validity or otherwise of the sale, in reference to the terms of s. 311, to go so far back in the execution-proceedings as the stage provided for by s. 248. I confess that in the view I take of the matter I should be disposed to regard the circumstances

(1) N.-W. P. H. C. Rep., 1872, p. 135.

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of this case as outside and beyond the operation of s. 311, and to hold that the sale of the 20th December, 1878, could not be sanctioned; the Court executing the decree not having had the power, by reason of certain necessary preliminaries remaining unfulfilled, to issue its warrant for the execution of the decree. While I am not prepared to dissent from the views expressed by the lower Courts as to the applicability of s. 311, it certainly does appear to me that the sale of the 20th of December, 1878, was void "*ab initio*" as being held in pursuance of a warrant for execution irregularly and illegally granted against the legal representative of a deceased person, who had had no opportunity of showing cause why it should not be issued. Such a proceeding was as much "*ultra vires*" as it would have been for the Court trying the original suit to pass a decree against a person not a party to it. The provisions of ss. 248 and 249 seem to me peremptorily to require, as a condition precedent to the issue of a warrant for execution of decree, that the legal representative of a deceased judgment-debtor should upon notice duly given have an opportunity of showing cause. Although not as yet published in the authorised reports, there is a decision of the Calcutta High Court (1) by a Division Bench consisting of White and Morris, J.J., which supports the view I have expressed, and treats the failure to give notice under s. 248 as going to the very root, not only of the execution-sale itself, but of the whole proceedings in execution. However, whether the opinion I am inclined to entertain be correct or not, I am certainly not disposed upon this application under s. 622 to disturb the order of the lower Courts setting aside the sale of the 20th December 1878. I would dismiss it with costs.

PEARSON, J.—The opinion expressed by the Calcutta High Court in the case of *Ramessuri Dassie v. Doorgadass Chatterjee* (1) that the omission to give the notice required by s. 248 of the Procedure Code to the judgment-debtor affects the regularity of the sale, and the validity of the entire execution-proceedings, appears to me to be undisputable. I therefore hold that the sale in the present case was rightly set aside by the lower Courts: and I concur with my honorable colleague in dismissing the application which has been preferred to us under s. 622 of the Code with costs.

Application rejected.

(1) I. L. R., 6 Calc., 103.