

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan, Acting Chief Judge and ¹⁹²⁹ Mr. Justice Gokaran Nath Misra. January, 29,

KAMAKHYA DUTT RAM (PLAINTIFF-APPELLANT) v. LALA SHYAM LAL AND OTHERS (DEFENDANTS-RESPONDENTS).*

Execution of decree—Judgment-debtor dying after auction sale but before its confirmation—Confirmation of sale without bringing legal representatives on record, validity of—Civil Procedure Code (Act V of 1908), section 68 and order XXI, rules 66, 67, 68, 69 and 70—Transfer of sale proceedings to Collector under section 68 of the Code of Civil Procedure—Sale postponed till further order and held the next day without fresh proclamation—Want of fresh proclamation, whether a material irregularity—Temporary injunction—Sale carried out in defiance of a temporary injunction, validity of—Pleader of decree-holder purchasing property in execution sale, effect of, on the validity of the sale.

Where execution proceedings were transmitted to the Deputy Commissioner under section 68 of the Code of Civil Procedure and the judgment-debtor died after the auction sale but before its confirmation and the Deputy Commissioner confirmed the sale without bringing the legal representatives of the deceased judgment-debtor on the record of the execution case and without notice to them, *held*, that as the sale had taken place during the life-time of the judgment-debtor and there are no provisions in the Code of Civil Procedure which require legal representatives of a judgment-debtor, who died after the sale, to be brought on the record for the purpose of confirmation, therefore, the sale was not void.

Where the property was purchased in the auction sale by the pleader of the decree-holder it may be that the pleader by purchasing the property at an auction sale in execution of a decree in which he was professionally engaged on behalf of the decree-holders, had infringed certain rules of conduct for instance rule No. 275 of the Oudh Civil Digest but that

* First Civil Appeal No. 77 of 1928, against the decree of Babu Gopendra Bhushan Chatterji, Subordinate Judge of Fyzabad, dated the 25th of February, 1928, dismissing the plaintiff's suit.

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cannot be given the effect of invalidating the sale and the provisions of order XXI, rule 73 have no application to the case.

Where a sale was postponed by the sale-officer who ordered that "this sale be postponed till further order and the case be laid before this Court tomorrow" and the sale was resumed and concluded the following day, *held*, that the order of the sale-officer had the effect of postponing the sale *sine die* and that though under order XXI, rule 70, the provisions of rules 66—69 of that order are inapplicable to a case in which the execution of a decree has been transferred to the Collector but as the same rules have been made by the Local Government in exercise of its powers under section 70 of the Code of Civil Procedure therefore a fresh proclamation of sale had become necessary after the postponement and there was a material irregularity in publishing the sale but as it is not proved that the irregularity had caused any substantial injury therefore the sale could not be set aside.

A sale carried out in defiance of a temporary injunction is not void for that reason.

The Delhi and London Bank, Ltd. v. Ram Narain (1), *Manohar Das v. Ram Autar Pande* (2), *Puzhakkal Edom v. Mahadeva Pattar* (3), *Beli Ram and Brothers v. Ram Lal* (4), relied on.

Messrs. *Ali Zaheer, K. P. Misra, Ali Mohammad* and *A. C. Mukerji*, for the appellant.

Messrs. *M. Wasim* and *P. D. Rastogi*, for the respondents.

HASAN, A. C. J. and MISRA, J. :—This is the plaintiff's appeal from the decree of the Subordinate Judge of Fyzabad, dated the 25th of February, 1928.

The facts are as follows. Shyam Lal respondent No. 1 and others held a decree passed by the Court of the Subordinate Judge of Fyzabad for a sum of Rs. 16,600 and odd against one B. Sitapat Ram now deceased. Under the provisions of section 68 of the Code of Civil

(1) (1887) I. L. R., 9 All., 497.

(2) (1908) I. L. R., 25 All., 431.

(3) (1917) 35 Mad., L. J., 96.

(4) (1925) I. L. R., 6 Lah., 380.

Procedure, proceedings in relation to the execution of this decree were transmitted to the Deputy Commissioner of Fyzabad and on the 27th of October, 1925, the property in suit was purchased by the respondent Lala Shyam Behari Lal respondent No. 4 for a sum of Rs. 8,000 at a public auction held by the Deputy Commissioner. B. Sitapat Ram died on the 3rd of November, 1925, and on the 4th of December, 1925, the Deputy Commissioner confirmed the sale. The appellant is the son of B. Sitapat Ram and the object of the suit out of which this appeal has arisen is to avoid the sale of the 27th of October, 1925. The suit has been dismissed by the court below as we have already said.

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In support of the prayer for the declaration that the sale was void several grounds were urged before the lower court, but at the hearing of the appeal before us only such of the grounds were reiterated as we shall state in this judgment.

The property in suit previous to its devolution upon B. Sitapat Ram belonged to Rai Bahadur B. Sri Ram, C.I.E., who made a testamentary disposition in respect thereof on the 22nd of May, 1912. On the death of the testator this property together with other properties passed to B. Sitapat Ram under the provisions of the said will and the first ground of the claim is that under those provisions B. Sitapat Ram had only a life interest and the remainder came to be vested in the appellant. The learned Subordinate Judge has interpreted the will in question and come to the conclusion that the property in suit devolved on B. Sitapat Ram in absolute estate. We agree with the learned Subordinate Judge. A Bench of this Court consisting of one of us and Mr. Justice RAZA had, in a previous case, an occasion to decide this question of the interpretation of the will of Rai Bahadur B. Sri Ram. The Bench

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decided that B. Sitapat Ram acquired proprietary interest under the provisions of clause 4 of that will in the properties mentioned in schedule 4 of the schedules attached to the will. Admittedly the property now in suit is entered in the said schedule. A copy of the judgment dated the 9th of March, 1928 (First Civil Appeal No. 54 of 1927) will be attached to this judgment. The will was similarly interpreted in another judgment of this Court dated the 9th of November, 1926, a copy of which is filed on the record of this case (exhibit A1).

The second argument in support of the appeal is that the sale in question was held in spite of an injunction issued by the Court of the Subordinate Judge of Benares. The facts bearing on this part of the case are that a brother of the appellant, namely Viddyadat Ram, had filed suit for partition of the family property including the property now in suit in the Court of the Subordinate Judge of Benares. To this suit his father Sitapat Ram and his brother the present appellant and other members of the family were made party defendants. Viddyadat Ram during the pendency of the partition suit moved the Court of the Subordinate Judge of Benares for issue of an injunction to restrain the sale which was being held at Fyzabad in execution of the decree held by the respondents Nos. 1 to 3. The Subordinate Judge of Benares ordered the desired injunction to issue on the 2nd of October, 1925 (exhibit 11) after due service of notice on the decree-holders, and a copy of the order was also transmitted by means of a letter dated the 21st of October, 1925 to the Court of the Subordinate Judge of Fyzabad (exhibit 10) as also to the Deputy Commissioner of Fyzabad (exhibit 21). The last mentioned letter with a copy of the order passed by the Subordinate Judge of Benares on the 2nd of October, 1925 reached the hands of the officer in

charge of the sale on the 26th of October, 1925. Thereupon the said officer passed the following order:—

“After a perusal of the said letter and the order passed by the Deputy Commissioner of this district it is ordered that this sale be postponed till further order and the case be laid before this Court tomorrow (exhibit 2.)”

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On the following day, that is the 27th of October, 1925, the sale officer recorded the following order:—

“This case came up to-day. As no order for postponement of the sale has been passed by the Subordinate Judge, Fyzabad, it is ordered that the order dated the 26th of October, 1925, be cancelled and the sale proceedings be resumed.”

The result was that the sale was held and concluded on the 27th of October, 1925, as already stated. It is not necessary to decide as to whether the Court of the Subordinate Judge of Benares had jurisdiction to issue the injunction which he had issued. We will assume that he had. The execution proceedings having gone into the hands of the Deputy Commissioner of the district the issue of an injunction to the Court of the Subordinate Judge of Fyzabad, which had passed the decree originally, was obviously futile. There can be no doubt however as the facts stand that the sale was held in teeth of the injunction. The question therefore is as to whether the sale is void for that reason. We are of opinion that it is not. The matter is wholly covered by two decisions of the Allahabad High Court: *The Delhi and London Bank Ltd. v. Ram Narain* (1); *Manohar Das v. Ram Autar Pande* (2); one decision of the High Court of Madras: *Puz-*

(1) (1887) I. L. R., 9 All., 497.

(2) (1903) I. L. R., 25 All., 431.

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hakka! Edom v. Mahadeva Pattar (1) and one decision of the High Court at Lahore : *Beli Ram & Brothers v. Ram Lal* (2). We are in entire agreement with those decisions. We therefore reject this ground also.

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The third ground of attack is that the auction sale of the 27th of October, 1925, was confirmed by the Deputy Commissioner on the 4th of December, 1925 without bringing the legal representatives of the deceased judgment-debtor B. Sitapat Ram on the record of the execution case and without notice to them and that therefore the sale is void. In agreement with the court below we are unable to accept this argument. The sale had taken place in the life-time of the judgment-debtor and there are no provisions in the Code of Civil Procedure which require legal representatives of a judgment-debtor, who has died after the sale, to be brought on the record for the purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale takes place behind the back of his representatives, but we express no opinion on that point. It may be mentioned that the Deputy Commissioner had directed the issue of notice to the representatives of the deceased judgment-debtor under his order dated the 11th of November, 1925 (exhibit 6). Unfortunately notice was not served. This fact however does not affect the validity of the confirmation.

Another objection urged upon us against the validity of the sale is that the defendant-respondent Lala Shyam Behari Lal, being a pleader of the Court, was prohibited by law from purchasing the property in suit at a public auction. B. Shyam Behari Lal was the pleader in the case both of the decree-holders Lala Shyam Lal and others and also of his father Lala Gopal Das who was also a decree holder in whose favour an

(1) (1917) 35 Mad. L.J., 96.

(2) (1925) I.L.R., 6 Lah., 380.

order for rateable distribution of the proceeds of the sale had been made. He was never a pleader of the judgment-debtor. On these facts alone we are not prepared to hold that the sale in question is void. It may be that the pleader in question, by purchasing property at an auction sale in execution of a decree in which he was professionally engaged on behalf of the decreeholders, has infringed certain rules of conduct, for instance Rule No. 275 of the Oudh Civil Digest. But this cannot be given the effect of invalidating the sale. Our attention was drawn to rule 73 of order XXI of the Code of Civil Procedure in this connection. We are of opinion that that rule has no application to this case. Accordingly we reject this argument also.

It is contended that the sale in question was conducted with material irregularity which has resulted in substantial injury to the judgment-debtor. This argument is founded on the following facts:—

The sale was originally fixed to be held on the 20th of October, 1925. On that date the officer-in-charge of the sale postponed it for the 22nd of October, 1925, on the ground that no bidders had come (exhibit 13). The proceedings were again placed before the said officer on the 26th of October, 1925, and having regard to the injunction issued by the Subordinate Judge of Benares the said officer passed the following order:—“This sale be postponed till further order and the case be laid before this Court tomorrow.” (Exhibit 2). To this order we have already referred. On the following day, that is on the 27th of October the sale was resumed and concluded (exhibit 3). It is argued that by the order of the 26th of October, 1925, the sale having been postponed *sine die*, it could not be held on the day following and a fresh proclamation of

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sale became necessary. In support of this argument reliance is placed upon the provisions of order XXI, rule 69, of the Code of Civil Procedure.

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We accept the argument in so far that the order passed on the 26th of October, 1925, had the effect of postponing the sale *sine die*; but under rule 70 the provisions of rules 66 to 69 are inapplicable to a case in which the execution of a decree has been transferred to the Collector and the present case is one in which such a transfer had taken place. This, however, is not conclusive because the same rule has been made by the local Government in exercise of its powers under section 70 of the Code of Civil Procedure. The rule is rule 986, Government Rule Manual. We therefore, hold that there was a material irregularity in publishing the sale. But we are not satisfied that the appellant has sustained substantial injury by reason of such an irregularity. An elaborate calculation of the value of the ten items of immoveable property sold was made by the learned Counsel for the appellant in the course of his arguments before us and it was pointed out as against the opinion of the court below that though portions of the property sold were subject to an incumbrance of over Rs. 23,000 every item of the property sold was not so encumbered. But the result of elimination of the unencumbered portions of the property sold leads us to the conclusion that, having regard to the total value of the property sold, the appellant, might have suffered a loss of Rs. 3,000 on the whole. This is a very strict test for judging injury. It might be that the property could have fetched Rs. 3,000 more had it been sold privately after prolonged negotiation. In the circumstances we cannot hold that the irregularity has caused any substantial injury.

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This disposes of the grounds on which the suit, out of which this appeal arises, is founded. We will now notice but not decide a plea raised in defence to the effect that the suit was barred by section 47 of the Code of Civil Procedure. As we are going to dismiss the appeal on merits we refrain from deciding the point raised by this plea.

The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

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ZAHIRUDDIN (PLAINTIFF-APPELLANT) v. KHAN BAHADUR ALI HUSAIN (DEFENDANT-RESPONDENT).*

Pre-emption—fictitious price entered in the sale-deed—Pre-emption to be allowed on payment of fair market value not exceeding price entered in the deed—Market value, determination of—Price actually paid, how far a fair indication of market value.

If the plaintiff in a suit to enforce the right of pre-emption under the Oudh Laws Act succeeds in showing that the price stated in the sale-deed in fictitious, he is not entitled to acquire the property for the price actually paid, but he must pay for it a price equivalent to the fair market value to be determined by the court which should not exceed the sale-price mentioned in the deed. If there is no evidence given by the parties which may enable the court to determine the market value of the property sold it would be perfectly open in such a case to the court to consider the price paid as a fair indication

* Second Civil Appeal No. 260 of 1928, against the decree of Rai Bahadur Thakur Rachhpal Singh, District Judge of Fyzabad, dated the 30th of April, 1928, reversing the decree of Pandit Krishna Nand Parde, Additional Subordinate Judge of Sultanpur, dated the 3rd of December, 1927, decreeing plaintiff's suit.