his written statement says that the whole of the rents for the first three years and for a portion of the fourth, 1295, have been paid, that the account is not correct as the claim for cesses and interest is excessive, and that the rent of 1295 was not due when the suit was brought. How this can be said to be an admission that anything was payable at the time the action was brought I quite fail to understand, or even if the statement that the rent of 1295 was not due be struck out, there is still a statement that the whole of the rent for 1292, 1293 and 1294, and part of 1295, has been paid, and that the amount claimed is not due, as the interest and cesses are excessive. Section 150 is highly penal in its character, and I do not think can be put in force against a defendant unless he has intentionally admitted money to be due and has not paid it.

For these reasons, I am of opinion that defendant has not in this case admitted that any money is due from him to the plaintiff within the meaning of section 150, and I think that the judgment must be set aside and the case sent back to the Munsif, who will replace it upon his file and try the issues according to law, taking such evidence upon them as the parties may think fit to produce.

I think that all the costs in all Courts up to this time should abide the ultimate event of the litigation.

Appeal allowed and case remanded.

C. S.

Before Mr. Justice Pigot and Mr. Justice Banerjee.

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January 5.

GUR BUKSH LALL AND OTHERS (JUDGMENT-DEBTORS), *v.* JAWAHIR SINGH AND OTHERS (DECREE-HOLDERS AND AUCTION-PURCHASERS).*

Sale in execution of decree—Setting aside sale—Material irregularity—Inadequacy of price—Substantial injury—Civil Procedure Code (Act XIV of 1882), *s.* 311.

The relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price.

Where, upon an application to set aside a sale in execution of a decree, the material irregularity in the publication and conduct of the sale complained of, was the notifying of an incumbrance which did not really exist,

* Appeal from Order No. 223 of 1892, against the order of Baboo Sham Chand Dhur, Subordinate Judge of Gaya, dated the 8th March 1892.

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and which must in the ordinary course of things, lower the value of the property, *held* that it may fairly be inferred that the irregularity in the conduct of the sale was the cause of the inadequacy of the price.

Macnaghten v. *Mahabir Pershad Singh* (1) and *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (2), referred to.

THIS appeal arose out of an application by the judgment-debtors to set aside a sale in execution of a decree on the ground of material irregularity in the publication and conduct of the sale, and of their having sustained material injury by reason of such irregularity.

The properties forming the subject-matter of the execution sale complained of had been mortgaged by the judgment-debtors in favour of Jawahir Singh and others, the present decree-holders, and also in favour of Kerat Singh and others. These mortgagees brought suits upon their respective mortgages, and the suits were decreed on one and the same day, and the decree now under execution, amongst other things, directed that in the event of the monies due to the two mortgagees not being paid, the said mortgaged properties should be sold, and the sale proceeds, after deducting the costs of sale, should first of all be paid to the plaintiffs in the two suits. At the time of the sale, however, the Nazir recorded, in the heading of the memorandum of sale bids, the following note :—"Be it known that the property is mortgaged in the case of Kerat Singh, decree-holder," and there was evidence on the record, which the Court below did not disbelieve, that at the time of the sale the Nazir verbally notified the existence of the above-mentioned mortgage.

The Court below held that there was no material irregularity in the publication and conduct of the sale, and that the judgment-debtors had failed to show that they had sustained any injury by the sale, and it, accordingly, rejected their application.

From this decision the judgment-debtors appealed

Baboo *Saligram Singh* and Baboo *Mahabir Sahai*, for the appellants.

Mr. *C. Gregory*, Moulvi *Mahomed Yusuff*, Baboo *Umakali Mukerji* and Baboo *Koruna Sindhu Mookerji*, for the respondents.

(1) I. L. R., 9 Calc., 656. (2) I. L. R., 11 Calc., 200.

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The arguments are sufficiently set out in the judgment of the Court (PIGOT and BANERJEE, JJ.) which, after stating the nature of the appeal and the decision of the Court below, continued—

Against the order rejecting their application, the judgment-debtors have preferred this appeal, and it is contended on their behalf—

First, that the sale having been held, with notice of Kerat Singh's mortgage, when it was clearly intended by the decree under execution that it should be held free of that mortgage, the Court below ought to have set aside the sale as illegal and invalid;

Secondly, that at any rate the Court below ought to have held that the circumstance, set out above, constituted a material irregularity in the conduct of the sale;

Thirdly, that the Court below ought to have held upon the evidence. that the judgment-debtors had sustained substantial injury by reason of such irregularity.

The first contention is based upon the following facts:—

(After stating the facts of the case as above given the judgment continued)—

Now it is clear from the terms of the decree that the sale directed by it was intended to be free of the mortgage to Kerat Singh, and it is equally clear that the effect, if not the intention of the notification of Kerat Singh's mortgage at the time of the sale, must have been to lead intending purchasers to think that the sale was subject to that mortgage. And if that was so, the sale took place in a manner which was contrary to the obvious intention of the decree.

It was argued for the respondents that it was not shown that the Nazir read out at the time of the sale what was written in the heading of the memorandum of sale bids. But there is evidence on the judgment-debtors' side, which has not been disbelieved by the Court below, and which we see no reason for disbelieving, showing that the mortgage of Kerat Singh was notified at the time of sale. Then, again, it was argued that even if it be held that the Nazir proclaimed what was written in his proceeding, it was, as the Court below has observed, only the statement of a fact, and was not calculated to lead any one to suppose that the sale was subject to

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Kerat Singh's mortgage; and that if the statement had not been of a harmless character, two of the judgment-debtors, who are shown to have been present at the time of the sale, would never have allowed it to go unchallenged. But we are unable to accept this argument as valid. What was proclaimed by the Nazir was, it is true, the statement of a fact; but it gave only half the fact, and not the whole of it; which was, that the properties were mortgaged to Kerat Singh, but were put up to sale free of his mortgage; and the proclaiming of the former part of the full statement without the latter was evidently calculated to mislead. Then, as to the inference to be drawn from the presence of two of the judgment-debtors, the evidence is not precise as to whether they were present when the sale commenced and the Nazir notified the existence of Kerat Singh's mortgage, and there is nothing to show that they had any reason to suspect or anticipate any misdescription by the Nazir, which would render their presence at the very commencement of the sale probable.

The sale then with notification of Kerat Singh's mortgage was, in our opinion, held contrary to the obvious intention of the decree; and the question is whether it was for that reason absolutely illegal and invalid. We are inclined to think it was. When a decree orders sale of property and directs, either expressly or by necessary implication, that the sale should be held in a certain way, non-compliance with such direction is something more than an irregularity, and would, in our opinion, render the sale absolutely illegal and invalid by reason of its being held contrary to the only warrant for it.

But even if it was not so, still, as urged by the appellants in their second contention, the facts noticed above would certainly constitute a material irregularity in the conduct of the sale.

It remains, then, to consider the question raised in the third contention of the appellants, namely, whether it has been shown that they have sustained substantial injury by reason of the above-mentioned irregularity.

Now, though the appellants have not given any sufficient and satisfactory evidence of the value of the property sold, that adduced for the respondents, namely, the evidence given by their witness, Sheo Sahay, who bid at the sale for his uncle, the auction-purchaser,

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clearly goes to show that the properties, taken in the aggregate, sold for a very inadequate price. The documentary evidence adduced for the respondents goes to show that the different portions of the mehal in question (Dariapur) sold at the rate of Rs. 250 per *dam*. According to the last-named witness, though that was the former rate of value, there has been a deterioration of the property since the last three years owing to deposit of sand, and the rate now ranges between Rs. 175 and Rs. 225 a *dam;* accepting the witnesses' statement as to deterioration of the property, but taking, as we think we may fairly do, the higher of the two reduced rates given by him for the correct rate, the value of the shares sold, that is—

17 kauris 15 bauris kacha,		or about	$\frac{17}{80}$	dams pucca.
5 annas 4 pie	do.	or	$26\frac{2}{3}$	"
1 anna 18 dams	do.	or	$9\frac{1}{2}$	"
and 1 anna 9 dams	do.	or	$7\frac{1}{4}$	"

would be about Rs. 9,815, and the total price fetched at the sale is only Rs. 6,055, which is certainly inadequate.

With reference to this evidence the Court below in its judgment observes:—"But it will be seen that all the *taktás* of Dariapur are not equal, and presumably, therefore, the witness in making that statement was referring to some of them." The witness, however, does not offer any such explanation, and the observation of the Court below does not appear to be sufficiently warranted by the evidence.

Then there arises the question whether there is anything to show that the inadequacy of price was occasioned by the irregularity complained of. The appellants have adduced some evidence to show that it was; but we are not prepared to accept that evidence as sufficiently reliable, especially when the Court below has disbelieved it. That being so, the case of *Macnaghten* v. *Mahabir Pershad Sing* (1) might be relied upon by the respondents as showing that the appellant's case under section 311 of the Code of Civil Procedure must fail. But though at first sight that case might seem to lend some support to such a contention, yet, as

(1) I. L. R., 9 Calc., 656.

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pointed out by the majority of the Full Bench in *Lala Mobarak Lal* v. *The Secretary of State in Council* (1), their Lordships of the Privy Council did not, in that case, intend to lay down any positive rule applicable to all cases. All that was held in that case was that the mere fact of inadequacy of price and the existence of an irregularity being shown would not be sufficient in every case to warrant the inference that the one was the cause of the other, and that in the case before their Lordships there was nothing to justify the conclusion that the inadequacy of price was occasioned by the non-statement of the revenue in the sale proclamation. The relation of cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. In the present case, seeing that the irregularity complained of was the notifying of an incumbrance which did not really exist, and seeing that such a notice must, in the ordinary course of things, lower the value of the property sold, and observing that the property really worth Rs. 9,800 was sold for only Rs. 6,055, we think we may fairly infer that the irregularity in the conduct of the sale was the cause of the inadequacy of the price.

For the foregoing reason, we think that the order of the Court below should be reversed, and the sale complained of set aside. The purchaser is entitled to receive back his purchase-money.

The appellants are to have the costs of this appeal, the Court below, and of the hearing fee in this Court. The costs of this Court to be payable in equal proportion by the decree-holder and the auction-purchaser.

Appeal allowed.

A. F. M. A. R.

(1) I. L. R., 11 Calc., 200.