

## MISCELLANEOUS CIVIL

Before Mr. Justice Muhammad Raza and Mr. Justice  
H. G. Smith

MAHABIR SINGH (PURCHASER-APPELLANT) v. LAL AMBIKA  
BAKSH SINGH (OBJECTOR-RESPONDENT)\*

1933,  
August, 1

*Civil Procedure Code (Act V of 1908), Order XXI, rule 88—  
Oudh Civil Rules, rule 211—Execution of decree not trans-  
ferred to Collector—Sale officer of Collector's court appointed  
by civil court to conduct the sale—Three properties sold in  
one lot—Objection by a person claiming pre-emptive rights  
with respect to one property only—Sale officer, whether can  
decide the objection about pre-emptive right—Civil Court,  
whether can question sale-officer's order confirming the sale  
—Jurisdiction of civil court to go behind sale officer's order.*

In a case where execution of decree is not transferred to the Collector but the properties being non-ancestral the civil court appoints the sale officer in the zilla court to conduct the sale under rule 211 of the Oudh Civil Rules, the sale officer cannot decide disputed questions of law and fact when he had simply to conduct the sale. He cannot, therefore, decide the question whether a certain person had pre-emptive right in respect of one of the three properties sold in one lot and can enforce that right under Order XXI, rule 88 of the Code of Civil Procedure. Such an order of the sale officer can be questioned by the civil court in confirming the sale for it cannot be bound by the acts of the sale officer that are not warranted by law.

Messrs. *Ali Zaheer, Radha Krishna and B. K. Dhaon*,  
for the appellant.

Mr. *Hyder Husain*, for the respondent.

RAZA and SMITH, JJ.:—Parmanand and others had obtained a decree for sale of certain mortgaged property against Thakur Chandar Bhukhanpal Singh and others, on the 30th of June, 1921, for Rs. 5,550, costs and interest. The following properties were to be sold in execution of the decree:

(1) a 5 annas 4 pies share (mohal Chandar Bhukhanpal Singh) in village Khanipur;

\*Miscellaneous Appeal No. 14 of 1932, against the order of Babu Bhagwati Prasad, Subordinate Judge of Partabgarh, dated the 23rd of December, 1931.

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(2) a 2 annas 8 pies share (mohal Krishnapal Singh) in village Khanipur; and

(3) a 2 annas 3 pies and 8 karants share in village Ranjitpur.

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The Subordinate Judge of Partabgarh (Executing Court) ordered that all these three properties should be sold in one lot. As the properties were "non-ancestral," the civil court appointed the sale officer in the zilla court to conduct the sale under rule 211 of the Oudh Civil Rules then in force. The sale of the properties could not be finished on the date fixed for the sale and there were some adjournments. On the 3rd of August, 1931, Lal Ambika Bakhsh Singh was the sole bidder of all the three properties. His bid on that date was the highest bid, for Rs.10,200. Mahabir Singh filed an application on that date, claiming pre-emptive right in respect of the mohal Krishnapal Singh property. Paragraphs 4 and 5 of his application run thus:

4. "That the applicant is anxious to purchase mohal Krishnapal Singh in village Khanipur claiming the privileges given under rule 88, Order XXI of the Code of Civil Procedure."

5. "That by this application the applicant joins in the highest bid for the whole property under sale, along with a stranger bidder, but his bid may be considered with respect to the property in mohal Krishnapal Singh and that the applicant be required to pay into court the sale-proceeds in proportion to the value of the property sold for mohal Krishnapal Singh, the remaining sum to be paid by the other bidder for the remaining property."

The pre-emptive right of Mahabir Singh was denied by or on behalf of Lal Ambika Bakhsh Singh, but the sale officer decided the question in favour of Mahabir Singh,

and held that Mahabir Singh was entitled to enforce his right of pre-emption in respect of the mohal Krishnapal Singh property, under Order XXI, rule 88 of the Code of Civil Procedure. The result was that the sale officer did not accept the bid of Lal Ambika Bakhsh Singh, so far as the mohal Krishnapal Singh property was concerned; but accepted his bid in respect of the other two properties. He calculated the price of the mohal Krishnapal Singh property at Rs.4,634-6-0, and of the other two properties at Rs.5,565-10-0. Thus Mahabir Singh was declared to be the purchaser of the mohal Krishnapal Singh property for Rs.4,634-6-0, and Lal Ambika Bakhsh Singh of the other two properties for Rs.5,565-10-0. The papers were then sent back to the court of the Subordinate Judge of Partabgarh, as the sale was to be confirmed by that court. Lal Ambika Bakhsh Singh filed his objections as against Mahabir Singh in the court of the Subordinate Judge of Partabgarh on the 29th of August, 1931. Mahabir Singh contested the objections of Lal Ambika Bakhsh Singh on various grounds. The learned Subordinate Judge framed several issues and found as follows:

1. The application of Lal Ambika Bakhsh Singh is maintainable under section 151 of the Code of Civil Procedure (if not under Order XXI, rule 88).

2. The sale officer was only acting like a ministerial officer of the court and as such could not determine questions arising under Order XXI, rule 88 of the Code of Civil Procedure. The civil court cannot be bound by the acts of the sale officer that are not warranted by law.

3. Mahabir Singh is a co-sharer within the meaning of Order XXI, rule 88 of the Code of Civil Procedure. Mahabir Singh, however, could not claim preference as against Lal Ambika Bakhsh Singh, as the three properties were being sold in

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one lot, and he was not a co-sharer in the remaining two properties. His bid cannot be held to be a bid contemplated by Order XXI, rule 88 of the Code of Civil Procedure.

4. Mahabir Singh had made no distinct bid as required by law.

5. No question or estoppel arises in this case.

The result was that the application of Lal Ambika Bakhsi Singh was granted on the 19th of December, 1931. He was declared to be the auction-purchaser of the entire property, and was permitted to deposit the remaining sum of Rs.4,634-6-0 by the 23rd of December, 1931. The sale was confirmed in his favour on the 23rd of December, 1931.

Mahabir Singh has appealed to this Court, challenging the findings of the learned Subordinate Judge on the points decided against him. He has also filed a revision, on the same grounds, under section 115 of the Code of Civil Procedure, by way of precaution. It is noticeable that neither the decree-holders nor the judgment-debtors are parties to the appeal or revision filed in this Court.

The properties, which were to be sold in execution of the decree, have been sold, and the sale has already been confirmed by the executing court (Subordinate Judge of Partabgarh). No question arises, therefore, so far as the *confirmation* of sale is concerned.

Mahabir Singh's learned counsel contends that the learned Subordinate Judge had no jurisdiction to go behind the order of the sale officer. The sale officer alone had the power to declare the purchaser or purchasers, and his declaration could not be questioned by the civil court in execution proceedings.

This is the only question which was discussed at the hearing of this appeal (or revision) before us.

In our opinion this contention is not well-founded, and must be overruled. We think the civil court, in confirming the sale, cannot be bound by the acts of the sale officer that are not warranted by law. It should be borne in mind that the *execution of decree* was not transferred to the Collector in this case. The Collector (or the Assistant Collector nominated by the Collector) was appointed by the civil court simply to conduct the sale according to the rules then in force. The sale officer could not, in our opinion, decide the disputed questions of law and fact when he had simply to conduct the sale. He could not, therefore, decide the question whether Mahabir Singh had pre-emptive right in respect of one of the three properties mentioned above and could enforce that right under Order XXI, rule 88 of the Code of Civil Procedure. It should be borne in mind that all the three properties were to be sold in one lot under the order of the civil court. The sale officer had no power to disregard, or interfere with, that order. He could not split up the three properties into two lots, declaring Mahabir Singh to be the auction-purchaser of one lot (that is, the mohal Krishnapal Singh property) and Lal Ambika Bakhsh Singh, the auction-purchaser of the other lot (that is, the remaining two properties). The bid of Lal Ambika Bakhsh Singh was for all the three properties. There was, in fact, no bid of Mahabir Singh. What Mahabir Singh had done was that he had put in an application, claiming the right of pre-emption in respect of the mohal Krishnapal Singh property only, out of the three properties put up for sale, and asking the sale officer to allow him to purchase that property only as against Lal Ambika Bakhsh Singh on payment of the price which might be determined or fixed by the sale officer. He had worded paragraph 5 of his application to suit his purpose. It appears that he was conscious of the weakness of his claim under Order XXI, rule 88 of the Code of Civil Procedure, as all the three properties were being sold in one lot; but

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he was not prepared (or entitled) to bid for all the properties under Order XXI, rule 88 of the Code of Civil Procedure. The said rule is in the following terms:

“Where the property sold is a share of undivided immovable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharer.”

All the three properties were being sold in one lot, and Lal Ambika Bakhsh Singh had bid Rs.10,200 for that lot without specifying any particular sum for any one property out of the three properties. Mahabir Singh had not bid any sum for the lot consisting of the three properties. He had not bid any particular sum for the mohal Krishnapal Singh property even. What he had said in his application was that “his bid may be considered with respect to the property in mohal Krishnapal Singh, and that the applicant be required to pay into court the sale-proceeds in proportion to the value of the property sold for mohal Krishnapal Singh, the remaining sum to be paid by the other bidder for the remaining property.” It is difficult to understand what he meant by stating in the said paragraph of his application that “by this application the applicant joins in the highest bid for the whole property under sale along with a stranger bidder.” It is neither alleged nor shown that he had any claim for pre-emption in respect of the mohal Chandra Bhukhanpal Singh property, or the Ranjampur property. How could he join in the highest bid for all the three properties under sale when he was going to purchase only the mohal Krishnapal Singh property? We think paragraph 5 of the application was worded, as it is, simply to show in appearance that the applicant was claiming the right of pre-emption under Order XXI, rule 88 of the Code of Civil Procedure. In our opinion the sale officer could not entertain his claim, and should not have decided the question in his favour in the way he did. He should have referred the

claimant, Mahabir Singh, to the civil court executing the decree, or should have referred the question to that court for decision. The relevant portions of rule 211 of the Oudh Civil Rules, then in force, are in the following terms:

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(1) "Where the property to be sold in execution of a decree is an interest proprietary or under-proprietary in a mahal or part of a mahal, whether the revenue be paid to Government or to an assignee, and the decree is not sent to the Collector for execution under section 68, the Court shall appoint the Collector, or any Assistant Collector whom the Collector may nominate, to conduct the sale and shall at the same time send him a copy of the proclamation of the sale made by the Court under Order XXI, rule 66, in Form No. O.73."

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(3) "Objections and claim shall be preferred to the Court enforcing the decree, and shall be disposed of by the Court."

(4) "The Deputy Commissioner or other officer appointed to sell shall not postpone the sale, save under the Court's direction received prior to the lot being knocked down; or on unconditional payment of the whole amount proposed to be realised by the sale; or on delivery by the decree-holders of a receipt in full of his demand against the person whose property is about to be sold. Should payment of the amount to be realized by sale be made, or the receipt of the decree-holder be delivered before the lot is knocked down, the Deputy Commissioner or other officer as aforesaid shall immediately report the circumstance for the information and orders of the Court which directed the sale, and shall postpone the sale, pending further instructions."

(5) "The Deputy Commissioner or other officer will report to the civil court enforcing the decree the result of the order for sale, retaining in deposit the amount realised, pending further instructions."

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Sub-rule 3 of rule 211 quoted above appears to be very clear on the point under consideration. It would have been better if the sale officer had read Order XXI, rule 88 of the Code of Civil Procedure, and rule 211 of the Oudh Civil Rules more carefully at the time the claim for pre-emption was put forward by Mahabir Singh and was objected to by Lal Ambika Bakhsh Singh. Had he done so, no difficulty would have arisen in the case, and he would never have declared Mahabir Singh auction-purchaser of any property out of the three properties mentioned above as against Lal Ambika Bakhsh Singh, who had made his bid for all the three properties for the sum of Rs.10,200. In our opinion the proceedings of the sale officer were not warranted by law, and could be questioned by the civil court in confirming the sale. The civil court had jurisdiction to go behind the order of the sale officer to determine who was the auction-purchaser in whose favour the sale should be confirmed. It found that Mahabir Singh could claim no right of pre-emption as against Lal Ambika Bakhsh Singh under Order XXI, rule 88 of the Code of Civil Procedure, and so it rejected the claim of Mahabir Singh, and confirmed the sale in favour of Lal Ambika Bakhsh Singh, who had made his bid for all the three properties which were put up for sale in one lot.

If the order of the learned Subordinate Judge is taken to be an order under Order XXI, rule 88 of the Code of Civil Procedure, or an order under section 151 of the Code of Civil Procedure, then no appeal lies from that order, and the appeal must, therefore, be dismissed. If the order be regarded as one passed under Order XXI, rule 92 of the Code of Civil Procedure an appeal lies, but in our opinion there is no force in it. The application for revision under section 115 of the Code of Civil Procedure should also be dismissed, as the lower court does not appear to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a



jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. We do not think it necessary to decide definitely in this case whether an appeal or a revision lies from the order of the lower court, as in the view taken by us, Mahabir Singh has no case either for appeal or for revision. Nothing has been urged which weakens the force of the judgment of the learned Subordinate Judge, or inclines us to sustain the appeal or the revision.

The result is that we dismiss the appeal, and also the revision filed by Mahabir Singh. The appeal is dismissed with costs. We pass no orders as to costs in the revision.

*Appeal dismissed.*

## REVISIONAL CIVIL,

*Before Mr. Justice Muhammad Raza and Mr. Justice  
H. G. Smith*

HAJI ABDUL QAYUM & CO., FYZABAD (APPLICANT) v. THE  
COMMISSIONER OF INCOME TAX, UNITED PROV-  
INCES (OPPISITE PARTY)\*

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*Income Tax Act (XI of 1922), sections 23(4), 27, 30(1) and 31—  
Refusal of Income Tax Officer to make fresh assessment under  
section 27—Appeal to Assistant Commissioner, Income Tax  
—Order in appeal, whether one under section 31—Reference  
to High Court, when lies—Income Tax Officer, whether  
can make assessment arbitrarily.*

When an Income Tax Officer refuses to make a fresh assessment under section 27 and rightly or wrongly there is an appeal to the Assistant Commissioner of Income Tax and a decision by him, there is certainly an order made under section 31 of the Act, and a reference can be made to the High Court. *A. K. A. C. T. V. V. Chettyar v. The Commissioner of Income Tax (1)*, referred to.

\*Application (under section 66 of the Indian Income Tax Act) No. 2 of 1932, against the order of Wali Mohammad, Commissioner of Income Tax Central and United Provinces, Lucknow, dated the 9th of May, 1932.

(1) (1928) I.L.R. 6 Rang. 652.