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been framed, we must look to the value of the subject-matter of the relief, that is to say the money value of the loss which the plaintiffs apprehend; and in this case we must follow the practice of this Court, and assess the value of the relief at the value of the 11 *bighas*, 3 *kathas*, in respect of which possession is claimed. The Taxing Officer finds that in 1910 the plaintiffs purchased the entire holding of 11 *bighas*, 18 *kathas*, at a Civil Court auction sale for Rs. 1,323-10-6 and that the proportionate value of the 11 *bighas*, 3 *kathas*, is Rs. 1,239-10-6. The *ad valorem* fee payable upon this sum is Rs. 90 and there is, therefore, a deficit of Rs. 80 in the present case. It may be that the value of the property at the time of the suit was less, though this is not probable, than its value eight years earlier, but the appellants had an opportunity of proving its real value before the Taxing Officer and as no proof was given we are not in a position to say that the Taxing Officer's decision is incorrect I think, therefore, that his decision must be affirmed.

The learned Vakil for the appellants desires two days' time to pay the deficit court-fee. If the amount is not paid by the 3rd instant, the appeal will be dismissed without further reference to a Bench.

DAWSON MILLER, C. J.—I agree.

## LETTERS PATENT.

*Before Dawson Miller, C.J. and Mullick, J.*

RAJA WAZIR NARAIN SINGH

v.

BHIKHARI RAM.*

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*August, 3.*

*Code of Civil Procedure*, 1908 (*Act V of* 1908), *section* 51, *Order XXI, rules* 62, 64 *and* 68—*Attachment, whether absence*

*Letters Patent Appeal No. 11 of 1922.

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*of, invalidates sale—Sale within* 30 *days of proclamation, whether valid—Appeal—abandonment of point, whether may be re-opened at later stage—Remand, appeal from order of High Court Judge sitting singly—Letters Patent of the High Court of Judicature at Patna, Clause* 10.

An execution sale of immovable property is not void merely by reason of an omission to attach the property before the sale or merely because it was held before the expiration of 30 days from the date of the sale proclamation.

*Kishory Mohan Roy* v. *Muhammad Muzaffar Hussain*(1), *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee*(2), *Hari Charan Singh* v. *Chandra Kumar Dey*(3), *Sheodhyan* v. *Bholanath*(4), and *Tasadduk Rasul Khan* v. *Ahmad Hussain*(5), followed.

*Panchanan Das Majumdar* v. *Kunja Behari Malo*(6) and *Sorabji Coovarji* v. *Kala Raghunath*(7) not followed.

*Thakur Barmha* v *Jiban Ram Marwari*(8), explained.

Where a point which goes to the root of the suit is not argued before an appellate court it must be taken to have been abandoned, and if a further appeal is permissible and no appeal is preferred it is not open to the party who abandoned the point to re-open it subsequently in the same case.

*Hansraj* v. *Bijai Ram Singh*(9), approved.

*Semble.*—That an appeal lies from the order of a Judge of the High Court sitting singly remanding a case.

Appeal under the Letters Patent by the decree-holder.

The facts of the case material to this report are stated in the judgment of Dawson Miller, C. J.

*Jalgobind Prasad* and *Ambica Prasad Upadhya*, for the appellant.

*Naresh Chandra Sinha* and *B. Prasad*, for the respondents.

(1) (1891) I. L. R. 18 Cal. 133.
(2) (1867) 8 W. R. 9.
(3) (1907) I. L. R. 34 Cal. 787.
(4) (1899) I. L. R. 21 All. 311.
(5) (1894) I. L. R. 21 Cal. 66; L. R. 20 I. A. 176.
(6) (1917) 42 Ind. Cas. 259.
(7) (1912) I. L. R. 36 Bom. 156.
(8) (1914) I. L. R. 41 Cal. 590; L. R. 41 I. A. 38.
(9) (1917) 40 Ind. Cas. 621.

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DAWSON MILLER, C. J.—This is an appeal under clause 10 of the Letters Patent from a decision of Das, J. It arises out of an application made by the respondents under section 213 of the Chota Nagpur Tenancy Act to set aside a sale of their tenure in execution of a rent decree obtained by the appellants, their landlords.

The decree was obtained in the year 1915. After one unsuccessful application to obtain execution the decree-holders made a fresh application in July, 1918, asking for realization of the decretal amount by attachment and sale of the judgment-debtors' movable property and in case the decree still remained unsatisfied by attachment and sale of their immovable property, namely, an 8-annas interest in village Mohanpore. This was not the tenure or holding in respect of which the rent decree was obtained. It appears that an application was made under section 210 (*2*), to the Deputy Collector who had the powers of a Deputy Commissioner for permission to sell the property in question in this appeal without first making an application for the sale of the tenure or holding in respect of which the arrears of rent had accrued. Permission was granted but it does not appear that the Deputy Collector's reasons were recorded. Section 210 (*3*) of the Act provides that property referred to in clause (*2*) may be brought to sale if immovable in the manner provided in the sections therein named of the Code of Civil Procedure of 1882 including section 284, which corresponds to Order XXI, rule 64, of the present Code, which gives the executing Court power to order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold and the proceeds or a sufficient portion thereof paid to the party entitled under the decree to receive the same. No preliminary attachment of the property was in fact made but the judgment-debtors were served with notice of the sale and were aware of the date thereof. The sale having been advertized took place on the 9th May,

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1919. Two of the judgment-debtors, the respondents in the present appeal, filed an objection under section 213. Their grounds of objection were (*1*) that the property sold belonged to them only and not to the other judgment-debtors; and (*2*) that there had been a material irregularity in publishing the sale. The first ground of objection was given up and we are no longer concerned with it. In support of the second ground they contended that there had been no preliminary attachment as required by the Civil Procedure Code and further that the sale was held within less than thirty days from the date of the notification. The Subdivisional Officer held that these irregularities were not material and further that the judgment-debtors had sustained no substantial injury by reason of the irregularities.

On appeal by the judgment-debtors to the Judicial Commissioner it was held that the failure of the Deputy Collector to record his reasons for permitting the sale and the failure to attach the property under the provisions of the Civil Procedure Code as well as the fact of holding the sale within thirty days of the sale proclamation under Order XXI, rule 68, of the Civil Procedure Code, were material irregularities and rendered the sale void. The learned Judicial Commissioner further found that there was substantial injury to the appellants adding:

> "although in the view I take such a finding is unnecessary. This injury resulted from the prejudice to their rights which to my mind must of necessity follow from the adoption of the shortened procedure."

A second appeal was preferred by the decree-holders to the High Court and was heard before Das, J., who held that mere non-compliance with the provisions of Order XXI, rule 62, of the Civil Procedure Code, does not *ipso facto* make the sale a nullity and that the sale should not be set aside without proof of substantial injury to the judgment-debtors. He further considered that the finding of the learned

Judicial Commissioner as to substantial injury was not a proper finding in law as it was based upon the view that non-compliance with the rule mentioned necessarily prejudiced the rights of the judgment-debtors. He accordingly set aside the order of the learned Judicial Commissioner and remanded the case to him for a decision according to law with directions to come to a definite finding as to whether the judgment-debtors sustained substantial injury, and if so, whether such injury was sustained by reason of the admitted irregularity. It would appear from this judgment that no point was taken before the learned Judge on behalf of the judgment-debtors that the sale was void either by reason of the non-attachment of the property or by failure of the Deputy Collector to record his reasons for permitting the sale under section 210 of the Chota Nagpur Tenancy Act and it is not suggested before us now that these points were argued before him.

When the case went back on remand Mr. Foster had succeeded Mr. Reid as Judicial Commissioner of Chota Nagpur. Mr. Foster found that the irregularities complained of were material, as the sale was held twenty-eight days instead of thirty days after the notice published in Court. The price fetched at the sale was considerably below the value set upon the property by the judgment-debtors but there is no finding as to what the value of the property was. No evidence was produced to show that the low price was directly due to the irregularity, the judgment-debtors were present at the time of the sale and the learned Judicial Commissioner considered that if the property were worth Rs. 6,000 as they stated it was very unlikely that they could not have raised a loan of under Rs. 500 to save the property by depositing the decretal amount. He also considered that the absence of attachment and the fact that the sale was held within thirty days of the notice did not cause any substantial injury to the judgment-debtors. He accordingly dismissed the

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appeal. Again it should be pointed out that it was nowhere argued before Mr. Foster that the sale was void by reason of any irregularity which had taken place.

From this order the judgment-debtors preferred a second appeal to the High Court which again came before Das, J. The learned Judge did not differ from the conclusions of fact arrived at by the learned Judicial Commissioner but it was argued before him that the failure to attach the property before sale rendered the sale a nullity. The learned Judge acceded to this view and set aside the judgment of the learned Judicial Commissioner and declared that the sale was inoperative and ought to be set aside, but as the point had not been argued before him on the previous occasion when he made the order of remand he ordered the judgment-debtors, the appellants before him, to pay the costs of that appeal and of the hearing before the Judicial Commissioner on remand.

From this decision the present appeal is brought by the decree-holders. Two points have been argued before us in support of the appeal: (*1*) that the learned Judge, whose decision is now under appeal, ought not to have allowed the point, upon which his decision was based, to be taken as it had not been argued before him on the previous occasion; and (*2*) that the failure to attach the property although irregular does not render the sale void. In support of the first point it is argued that the order of remand which set aside the decree of the Judicial Commissioner was a final order from which an appeal would lie to a Division Bench and that, no appeal having been preferred from that decision on behalf of the judgment-debtors, the learned Judge ought to have considered the point raised before him as precluded by his previous judgment, under the provisions of section 105 of the Civil Procedure Code. Assuming that an appeal lay from Das, J., I think that there is much force in the argument that where a point which goes

to the root of the suit is not argued before an appellate Court it must be taken to have been abandoned and if an appeal is permissible and no appeal is preferred the party who abandoned the point should not be allowed to reopen it subsequently in the same case [see *Hansraj* v. *Bijai Ram Singh* (1).] It is unnecessary, however, to decide this question as in the view I take of the second point the appellants must succeed.

In my opinion the failure to attach the property before sale, although an irregularity under the Civil Procedure Code, does not render the sale null and void. In *Kishory Mohan Roy* v. *Muhammad Muzaffar Hussain*(2) it was held that a sale is not to be considered a nullity merely by reason of the absence of any attachment. In that case the sale had been confirmed and a sale certificate granted before the question arose. In my opinion this fact does not distinguish that decision from the present case because if the sale was in fact a nullity by reason of the absence of attachment its subsequent confirmation could not make it valid. That case followed the earlier decision of Jackson, J., in *Sharoda Moyee Burmonee* v. *Wooma Moyee Burmonee* (3) which also held that an attachment was not an essential preliminary to an execution sale. The case of *Kishory Mohan Roy* v. *Muhammad Muzaffar Hussain* (2) was referred to with approval and followed by Woodroffe, J., in *Hari Charan Singh* v. *Chandra Kumar Dey* (4). The High Court at Allahabad has also held in *Sheodhyan* v. *Bholanath* (5) that the absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity and is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. The object of the attachment is, as stated in that case, to bring the property under the control of

(1) (1917) 40 I. C. 621.
(2) (1891) I. L. R. 18 Cal. 188.
(3) (1867) 8 W. R. 9.
(4) (1907) I. L. R. 34 Cal. 787.
(5) (1899) I. L. R. 21 All. 311

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the Court with a view to preventing the judgment-debtor from alienating it and the requirement that the order of attachment should be publicly proclaimed is merely one of the requirements of law for perfecting the attachment. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder. It is difficult to see why the absence of attachment which is primarily in the interests of the decree-holder can prejudice the rights of the judgment-debtor who has due notice of the sale.

It was contended, however, that the Court has no power to sell property not ordered to be sold by the decree unless such property has first been attached, and Order XXI, rule 64, was relied upon in support of this argument. That rule no doubt gives the Court, executing the decree power, to order that any property attached by it and liable to sale shall be sold or only such portion thereof as may seem necessary to satisfy the decree. The object of this rule would appear to be to give the Court a discretion to sell the whole or a part of the attached property as it thinks fit, but under section 51 of the Code, which relates to procedure in execution, the general powers of a Court executing decrees enable it to order execution by attachment and sale or by sale without attachment of any property. It seems clear, therefore, that the jurisdiction of the Court to sell without attachment exists. Again the irregularity arising by reason of the sale within thirty days of the proclamation although clearly an irregularity has not the effect of making the sale a nullity without proof of substantial injury thereby to the judgment-debtor. It was so decided by their Lordships of the Judicial Committee in *Tasadduk Rasul Khan* v. *Ahmad Hussain*.

(1) (1894) I. L. R. 21 Cal. 66; L. R. 20 I. A. 176.

The case of *Thakur Barmha* v. *Jiban Ram Marwari* (1) was relied on by the respondents for the proposition that nothing could be sold at a Court sale except the property attached. The effect of that decision, however, as I read it, merely is that where property is in fact attached and sold under the description mentioned in the schedule, what is in fact sold is the property comprised within the description and not some other property which was not in fact attached and sold. In that case a 6-annas share in a certain *mahal*, described as subject to a mortgage in the schedule to which the attachment referred, was attached in execution and advertized for sale and eventually sold. Some months later the purchasers applied for a certificate of sale alleging that there had been a mistake in the schedule which ought to have described the property as a 6-annas unencumbered share. Ten annas were subject to the mortgage and six annas were free, and no doubt a mistake had been made. A sale certificate was granted by the Subordinate Judge with the altered description of the property and a notification was issued in the *Calcutta Gazette* describing the property as unencumbered. This procedure was approved by the High Court but on appeal to His Majesty in Council their Lordships held that that which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers and that the effect of the certificate was to make the sale that of a property not attached which could not be sold in such proceedings. It was held that it was not a matter of mere mis-description which could be treated as an irregularity but one of identity and that an existing property accurately described in the schedule had been sold, whereas the order of the Subordinate Judge granted a sale certificate which stated that another and different property had been purchased at the sale, and that what was done could not validate a sale of property which had not in fact taken place. The

(1) (1914) I. L. R. 41 Cal. 590; L. R. 41 I. A. 38.

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decision is no authority for the proposition that if no attachment is in fact made the Court has no power to sell property at all.

It is true that, in spite of the decisions already referred to of the Calcutta High Court, that Court in the more recent case of *Panchanan Das Majumdar* v. *Kunja Behari Malo* (1) decided in 1917, held that the Court has no jurisdiction to sell property in execution which has not been duly attached. In that case the decision of their Lordships of the Judicial Committee in *Thakur Barmha* v. *Jiban Ram Marwari* (2) was relied upon in support of the decision but, as already stated, in my opinion, the decision of the Judicial Committee does not support the proposition there laid down. The High Court of Bombay in the case of *Sorabji Coovarji* v. *Kala Raghunath* (3) has also expressed the view that no sale can take place without attachment. In that case before the sale actually took place an appeal against the order for sale made by the executing Court was preferred to the District Judge. Pending that appeal the property was sold. The District Judge dismissed the appeal but on second appeal to the High Court that Court set aside the sale considering that property could only be brought to sale after it had been duly attached and whilst it remained under attachment. That case, however, was complicated by the fact that before sale the decretal amount of the attaching decree-holders had been paid into Court and the property released from attachment, but it was ordered, nevertheless, to be sold at the instance of other judgment-creditors who applied for rateable distribution of the money paid into Court and a further sale of the property which had been released but not re-attached. In so far as that case and the later decision of the Calcutta High Court in *Panchanan Das Majumdar* v. *Kunja Behari Malo* (1) differ from the earlier decisions of the Calcutta High Court and the decisions of the Allahabad High Court

(1) (1917) 42 Ind. Cas. 259 (2) (1914) I. L. R. 41 Cal. 570; L. R. 41 I.A, 38,
(3) (1912) I. L. R. 36 Bom. 155.

already referred to, I prefer to follow the latter which, in my view, express the correct principle. In my opinion this appeal should be allowed with costs here and in each of the Courts below and the order of the Subdivisional Officer rejecting the judgment-debtors' objection and affirming the sale should be restored.

MULLICK, J.—I agree.

## APPELLATE CIVIL.

*Before Dawson Miller, C. J. and Mullick, J.*

MAHARAJA KESHO PRASAD SINGH

*v.*

CHANDRIKA PRASAD SINGH.*

1922.

*August, 3.*

*Hindu Law—widow, gift by, effect of—whether gift may be challenged by persons other than reversioners*—Zarpeshgi, *whether is a mortgage or a lease.*

A gift by a Hindu widow of the whole of the property of her deceased husband of which she is in possession is valid against every one except the revisioners and it is also valid as against the latter unless they elect to treat it as a nullity and sue for possession within 12 years of their interest becoming vested.

*Ramphal Rai* v. *Tula Kuari*(1), *Kishori Pal* v. *Sheikh Bhusai Bhuiya*(2), *Naba Krishna Roy* v. *Hem Lal Roy*(3), *Bakhtawar* v. *Bhagwana*(4), *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi*(5), *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*(6), *Abdulla* v. *Ram Lal*(7), *Pilu bin Appa Nalvade* v. *Babaji bin Narumang*(8) and *Rangasami Gounden* v. *Nachiappa Gounden*(9), referred to.

See *Raghubar Singh* v. *Jethu Mahton*(10), Rep.)

*First Appeals Nos. 232 and 233 of 1919, from a decision of M. Syed Hasan, Subordinate Judge of Arrah, dated the 30th July, 1919.

(1) (1884) I. L. R. 6 All. 116, F.B.
(2) (1909-10) 14 Cal. W. N. 106.
(3) (1905) 2 Cal. L. J. 144.
(4) (1910) I. L. R. 32 All. 176.
(5) (1907) I. L. R. 34 Cal. 329; L. R. 34 I. A. 87.
(6) (1908) I. L. R. 30 All. 1; L. R. 35 I. A. 1.
(7) (1912) I. L. R. 34 All. 129.
(8) (1910) I. L. R. 34 Bom. 165.
(9) (1919) I. L. R. 42 Mad. 523; L. R. 46 I. A. 72.
(10) *Ante*, p. 171.