

dismissed for non-service of summonses upon the defendants. Under Order IX, rule 4, such a plaintiff has the right to institute a fresh suit subject, of course, to the law of limitation. Similarly the dismissal of the previous application in the present case cannot operate as an estoppel and does not debar him from making the present application inasmuch as the previous application had been rejected without adjudication on merits. The point was considered by the Calcutta High Court in *Langat Singh v. Janki Kuar*⁽¹⁾ and the cases cited there support the view which I am inclined to take on the point.

This application is, therefore, allowed as indicated above. There will be no order for costs in this application.

MACPHERSON, J.—I agree.

Application allowed.

APPELLATE CIVIL.

Before Courtney Terrell, C.J. and Khaja Mohamad Noor, J.

CHHATERBIJAI SINGH

v.

DAMODAR DAS.*

1932.

November,
16.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 90—sale held in lots—irregularity extending to all the lots—inadequacy of price in respect of some only of the lots—sale, whether should be set aside in respect of all the lots.

In a proceeding under Order XXI, rule 90, Code of Civil Procedure, 1908, where both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale, the court may be justified in setting aside the sale of that part only, but in cases where the irregularity extends

* Miscellaneous Appeals nos. 81 and 85 of 1931, from an order of Babu Debi Prasad, Subordinate Judge of Shahabad, dated the 21st March, 1931.

(1) (1911) I. L. R. 39 Cal. 265.

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to the whole property and to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shewn to be inadequate.

Appeal by the judgment-debtors.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

C. P. Sinha, for the appellants.

Government Pleader and *D. N. Varma*, for the respondents.

COURTNEY TERRELL, C.J.—Appeal no. 85 of 1931 is from a decision of the Subordinate Judge of Shahabad, the appellants being the judgment-debtors. The plaintiffs in the suit had obtained a decree against the judgment-debtors for a considerable sum of money and proceeded to sell certain properties belonging to the judgment-debtors as joint family property. The property was located in several distinct villages and it was advertised for sale in separate lots and ultimately sold. Certain of the judgment-debtors being share-holders in the defendants' family asked that the sale should be set aside under Order XXI, rule 90, of the Civil Procedure Code on the ground that there were irregularities in the conduct of the sale and that they had suffered loss or damage on account of such irregularities. The learned Subordinate Judge found as a fact, after considering the evidence, that there had been serious irregularities in the conduct of the sale inasmuch as the sale proclamation had not been served on the spot and that the irregularity extended to all the lots which were ultimately sold. But in considering the application to set aside the sale of each and every lot he proceeded to divide the lots into two classes. Notwithstanding that the irregularity extended to the whole of the property sold, he pointed out that as to three of them, on his view of the evidence, no loss could be shewn to

have been sustained in respect of those lots inasmuch as the sale price obtained was within measurable distance of the advertised value.

In support of the learned Subordinate Judge's decision it has been argued that the Court was perfectly entitled; having regard to the proviso to Order XXI, rule 90, to divide the sale into separate plots and to set aside the sale in respect of some only of the lots and I can well understand that as a broad proposition that may well be true but the circumstances under which that can be done are limited only to cases, in my opinion, in which both the irregularity and the injury to the objector can be satisfactorily allotted to one part only of the sale in which case that part of the sale may properly be set aside. There may conceivably be other circumstances but in cases such as I have described the Court may well be justified in setting aside the sale. But here where the irregularity extends to the whole property and to all the lots it is not justifiable to retain the efficacy of the sale with respect to some of the plots only in which the sale price obtained cannot be shewn to be inadequate in view of the advertised sale value. On this point the judgment-debtors who have objected are, in my opinion, justified in their objection to the order of the learned Subordinate Judge and a fresh sale proclamation should be issued and the entire property put up for sale.

As to the appeal no. 81 of 1931 that objection was dismissed. It was an objection by one of the shareholders in the defendants' joint family property. The objection was dismissed for reasons into which it is unnecessary to go. The objection of the shareholders in appeal no. 85 of 1931 having been efficacious and the sale having been set aside it is not necessary to consider whether or not the objection in appeal no. 81 of 1931 was justified and accordingly I would allow appeal no. 85 of 1931 with costs and as to appeal no. 81 of 1931 I would dismiss that appeal but

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without costs. Appeal no. 81 of 1931 was not pressed and we are not in a position to say anything as to its merits.

KHAJA MOHAMAD NOOR, J.—I agree.

Appeal no. 81 dismissed.

Appeal no. 85 allowed.

COURTNEY
TERRELL,
C. J.

APPELLATE CRIMINAL.

Before Courtney Terrell, C.J.

November,
8, 1917.

(On difference of opinion between Scroope and Agarwala, JJ.)

KING-EMPEROR

v.

RAM CHANDRA SAHU.*

Penal Code, 1860 (Act XLV of 1860), section 21, clauses (4) and (9)—“apprentice” peon serving process without remuneration, whether is a “public servant”—clause (9)—unpaid peon authorized by Munsif to serve process, whether is “specially authorized” within the meaning of clause (4).

Section 21 of the Penal Code, 1860, provides:—

“The words ‘public servant’ denote a person falling under any of the description hereinafter following, namely.....”

Fourth.—Every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate, or keep any document, or to take charge or dispose of any property or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court; and every person specially authorized by a Court of Justice to perform any of such duties.....

Ninth...... and every officer in the service or pay of Government or remunerated by fees or commission for the performance of any public duty.....”

Held, per Courtney Terrell, C.J. and Agarwala, J. (Scroope, J. dissentiente)—(i) When a person who has no

* Government Appeal no. 4 of 1932, from a judgment of Mr. S. N. Patnaik, Sub-Deuty Magistrate, 2nd Class, Bargarh, dated the 23rd of April, 1932.