

## LETTERS PATENT APPEAL.

*Before Sir Shadi Lal, Chief Justice and Mr. Justice LeRoussignol.*

JAGGAN NATH (JUDGMENT-DEBTOR) Appellant,

*versus*

DAUD AND ANOTHER (REPRESENTATIVES OF VENDEE)  
Respondents.

1928

April 3.

Letters Patent Appeal No. 178 of 1922.

*Civil Procedure Code, Act V of 1908, section 104, Order XXI, rule 92, and Order XLIII, rule (1) (j)—whether a second appeal lies from an order on an application to set aside a sale on the ground of material irregularity or fraud—and whether “irregularity” includes failure to give notice under Order XXI, rule 66.*

On 14th November 1911, the judgment-debtor (appellant) made an application to have a sale of immoveable property in execution of a decree set aside on the ground of material irregularity and fraud in publishing or conducting the sale. This application was allowed by the Subordinate Judge, but dismissed on appeal by the District Judge. The judgment-debtor then preferred a second appeal to the High Court, and the question for decision was whether a second appeal lay from the order of the District Judge passed on appeal against an order setting aside the sale in execution of a decree.

*Held*, that the order of the Subordinate Judge setting aside the sale was made under Order XXI, rule 92 (2) of the Code of Civil Procedure and was consequently appealable under Order XLIII, rule 1, clause (j), and that the law does not allow a second appeal from an order made on appeal from that order *vide* section 104.

The effect of adding the words “or fraud” in rule 90 of Order XXI of the present Code is to take the application, setting up fraud in publishing or conducting the sale, out of the purview of section 47 (corresponding to section 244 of the Code of 1882) and to bring it within the operation of rule 90. The rulings under the Code of 1882 which laid down that an application made on the ground of fraud could come only under section 244 of the Code must, therefore, be regarded as obsolete.

*Held also*, that the failure of the Court to issue notice under Order XXI, rule 66 before drawing up the proclamation of the sale is an irregularity in publishing the sale within the meaning of rule 90 of that Order.

1928

AGGAN NATH  
v.  
DAUD.

*Bipin Bikari Bejali v. Kanti Chandra Mandal* (1), and  
*Sheodhyan v. Bhola Nath* (2), referred to.

*Appeal under clause 10 of the Letters Patent from  
the judgment of Mr. Justice Abdul Raof, dated the  
3rd July 1922.*

NANAK CHAND, for Appellant.

GHULAM RASUL, for Respondent.

The judgment of the Court was delivered by—

SIR SHADI LAL C. J.—The facts relevant to the question of law involved in this appeal are simple and do not admit of any dispute. On the 14th November 1911 the judgment-debtor made an application to have a sale of immoveable property in execution of a decree set aside on the ground of material irregularity and fraud in publishing or conducting the sale. This application was allowed by the Court of first instance, but dismissed on appeal by the District Judge. Thereupon, the judgment-debtor preferred a second appeal to the High Court, and the question for decision is whether a second appeal lay from the order of the District Judge passed on appeal against an order setting aside the sale in execution of a decree. Now, sub-section (2) of section 104 of the Civil Procedure Code lays down in express terms that no appeal shall lie from any order passed in appeal under that section. Sub-section (1) of that section enumerates the various orders which are appealable, and clause (i) provides that an appeal shall lie from an order made under the rules from which an appeal is expressly allowed by those rules. It is manifest that an order made under Order XXI, rule 92, is appealable under Order XLIII, and the question is then reduced to this, whether the order made by the Subordinate Judge was one under rule 92 of Order XXI.

That rule refers to an order confirming or setting aside a sale in execution of a decree, and the order passed in the present case was an order setting aside the sale. There can, therefore, be no doubt that the order of the Subordinate Judge was appealable under Order XLIII, rule 1, clause (j), and that the law does

(1) (1913) 18 Indian Cases 715.

(2) (1899) I. L. R. 21 All. 311.

not allow a second appeal from an order made on appeal from that order.

A reference to Order XXI, rule 90 shows that an application to set aside a sale can now be made, not only on the ground of material irregularity, but also on the ground of fraud, in publishing or conducting the sale; and in this matter the new Code makes a departure from the law contained in the Code of 1852. The rulings under the old Code which laid down that an application made on the ground of fraud could come only under section 244 (corresponding to section 47 of the present Code) must be regarded as obsolete. The effect of adding the words "or fraud" to the present rule is to take the application setting up fraud in publishing or conducting the sale out of the purview of section 47 and to bring them within the operation of rule 90.

Mr. Nanak Chand for the judgment-debtor, however, contends that one of the grounds on which his client attacked the sale was the failure of the Court to issue notice under Order XXI, rule 66, before drawing up the proclamation of the sale, and that this defect cannot be regarded as an irregularity in publishing or conducting the sale. This contention is, in our opinion, untenable. We think that an irregular preparation of the proclamation of sale is an irregularity in publishing the sale within the meaning of Order XXI, rule 90. This view has been taken by the Calcutta High Court in *Bipin Bihari Bejali v. Kanti Chandra Mandal* (1). Indeed, the Allahabad High Court has held 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 in publishing the sale *Sheodhyan v. Bhola Nath* (2). We must, therefore, hold that the application of the judgment-debtor fell under Order XXI, rule 90, and that no second appeal lay from the order of the District Judge.

The appeal is, therefore, dismissed with costs.

A. R.

*Appeal dismissed.*

1923

JAGGAN NATH  
v.  
DAUD.

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