

an enquiry evidence adduced by the assessee purporting to disclose the real income of the assessee is relevant and admissible, not for the purpose of varying or affecting the assessment made for the purpose of imposing the tax under the Act, but in order to show either that no penalty ought to be imposed, or that the amount of the penalty ought to be less than the maximum prescribed under s. 28.

In my opinion the Income-tax Officer was not justified in refusing to admit such evidence. For these reasons, and to this extent, the answer to the question propounded is in the negative.

BAGULEY, J.—I agree.

MACKNEY, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Justice Mya Bu.

BIMALANANDAN PRASAD

v.

THE UNITED REFINERIES, LIMITED,

AND OTHERS.*

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In re THE
COMMISSIONER OF
INCOME-TAX,
BURMA

v.
A.A.R.
CHETTYAR
FIRM.

PAGE, C.J.

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Jan. 23.

Execution—Notice to judgment-debtor and legal representative—Civil Procedure Code (Act V of 1908), O. 21, r. 22—Effect of sale without notice—Object of the rule—Conduct disentitling to benefit of rule—Statutory protection—Public policy—Intention of Legislature.

A sale held in the course of execution proceedings without the issue of a notice to the legal representative of a party in a case to which Order 21, rule 22, of the Civil Procedure Code applies is irregular and inoperative as against such legal representative.

Manmatha Nath Ghose v. Lachmi Debi, I.L.R. 55 Cal. 96; *Raghunath v. Sundar Das*, 41 I.A. 251; *Rajagopala Ayyar v. Ramanujachariar*, I.L.R. 47 Mad. 288; *Srishchandra Nandi v. Rahatannessa Bibi*, I.L.R. 57 Cal. 825—*followed*.

* Civil First Appeal No. 53 of 1932 from the order of the District Court of Hanthawaddy in Civil Execution No. 30 of 1931.

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This rule, however, being enacted solely in aid of judgment-debtors and their legal representatives, such persons can be precluded by their own conduct from challenging the validity of an order made without the prescribed notice having been issued.

Ledgard v. Bull, 13 L.A. 134; *Vishnu Sakharan v. Krishnarao*, I.L.R. 11 Bom. 153—*followed*.

Where a statute or rule is enacted not merely for the benefit of the person or the class of persons to which it applies, but upon grounds of public policy and public interest, a person in whose favour the enactment operates cannot be barred by his conduct from invoking its aid. In each case regard must be had to the intention of the Legislature in enacting the rule.

The King v. The Inhabitants of Hipswell, 8 B. & C. 466; *Leslie, Limited v. Sheill*, (1914) 3 K.B. 607; *Nawab of Murshidabad v. Chowdhuri*, I.L.R. 56 Cal. 252; *Ex-parte Prail*, 11 Q.B.D. 334—*referred to*.

The appellant, as the legal representative of a deceased judgment-debtor, applied to have the sale of a refinery in execution of a decree set aside on the ground that he had not been served with the prescribed notice under O. 21, r. 22, of the Code. As a matter of fact notice of the intended sale was published, and held by the Court to have been duly served on the appellant by substituted service. Moreover, he appeared in the sale proceedings in the Executing Court, and had unsuccessfully applied for the postponement of the sale and a consent order was passed by the High Court with regard to the terms of the sale.

Held, that the appellant was precluded by his own conduct from disputing thereafter the jurisdiction of the Court to order the sale.

Hay for the appellant. A notice of the application to execute the decree was issued to the judgment-debtors but the advocates for the judgment-debtors refused to accept it on the ground of want of instructions in that behalf. Thereafter one of the judgment-debtors died, and no attempt was made to being his legal representative on the record. The decree-holder, with full knowledge of the death of the judgment-debtor proceeded to have his decree executed, and the Court ordered a sale of the properties without any notice to the legal representative. Order 21, rule 22, rendered it imperative that notice of execution should be issued to the appellant as the legal representative of the deceased judgment-debtor. The only notice of execution that was served was upon two of the five defendants. Failure to issue a notice

of execution to the appellant as the legal representative of the deceased judgment-debtor, therefore, vitiated the sale. See *Smith v. Kailash Chandra Chakraverty* (1); *Raghunath Das v. Sundar Das* (2); *Rajagopala Ayyar v. Ramanujachariar* (3); *Chandi Prasad v. Janna* (4); *Srishchandra Nandi v. Rahatannessa Bibi* (5).

The notice that appeared in the newspapers was not a good notice under Order 21, rule 22.

Jones for the 1st respondent. The sale in execution proceeded with the full knowledge of the appellant. In fact, there was a consent order passed at the instance of all the parties under which the sale-proceeds were to be deposited in Court. Appellant has, therefore, no right to question the legality of the sale now. He is estopped from disputing the validity of the sale. See *Protap Chunder Dass v. Arathoon* (6); *Uttam Krithy v. Khetra Nath Chattopadhyaya* (7).

[PAGE, C.J. Can there be an estoppel against a statute?]

The notice under Order 21, rule 22, need not be in any particular form. So long as the judgment-debtor is made aware of the execution proceedings it is enough.

Failure to bring the legal representative on the record, after service of notice on the original judgment-debtor who had since died, is a mere irregularity, and does not *ipso facto* vitiate the sale. *Tarangini Debi v. Raj Krishna Mondal* (8); *Doraswami v. Chidambaram Pillay* (9). Notice was served, in this case, on the advocate for the appellant, and it

(1) I.L.R. 11 Pat. 241.

(2) 41 I.A. at p. 255.

(3) I.L.R. 47 Mad. 288.

(4) I.L.R. 49 All. 830.

(5) I.L.R. 58 Cal. 825.

(6) I.L.R. 8 Cal. 455.

(7) I.L.R. 29 Cal. 577.

(8) 32 C.W.N. 418.

(9) I.L.R. 47 Mad. 63.

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was only after such service that the judgment-debtor died.

Chandi Prasad v. Jamma cited by the appellant relates to Order 21, rule 66, and not rule 22.

Hay in reply. The consent order was made solely in connection with the appeal to the Privy Council.

Raghunath Das v. Sundar Das was decided under the old Code, and on failure to issue a second notice to the Official Assignee, who was in possession of the property at the time of execution, it was held that no title passed to the purchaser. The provisions of the present Code are more stringent, and must be complied with strictly.

PAGE, C.J.—This appeal must be dismissed.

Although I am not able to accept *in toto* the grounds either in law or in fact upon which the order of the District Court was based, I am of opinion that the order dismissing the appellant's application was correct, and must be confirmed. The appellant applied under s. 47 of the Civil Procedure Code to the District Court of Hanthawaddy for an order that the execution proceedings in Civil Execution No. 30 of 1931, and the sale of a refinery held in the course of the said proceedings, be declared null and void. There are no merits in the application, and, in my opinion, if it was granted the Court would be condoning what is in effect an abuse of the process of the Court.

On the 10th September 1930 a decree was passed in favour of the 1st respondent by the High Court on appeal from an order of the District Court of Hanthawaddy of the 16th July 1929, against the 2nd, 3rd, 4th and 5th respondents and one Rai Bahadur Robinandan Prasad, of whom the appellant

is the sole heir and legal representative, *inter alia* for a sum of Rs. 2,35,000 with interest, and for the sale of the refinery "should the amount of the decree not be paid." In the original suit (Civil Regular No. 11 of 1928) out of which the present execution proceedings arise, the 1st respondent was the plaintiff, the 2nd, 3rd, 4th and 5th respondents the 1st, 2nd, 3rd and 4th defendants, respectively, and Rai Bahadur Robinandan Prasad the 5th defendant. On the 10th October 1929 an application for execution of the original decree was filed by the 1st respondent in Civil Execution No. 57 of 1929, and the property in suit was sold in execution of the decree then subsisting. This sale was set aside, and the execution proved abortive. On the 23rd May 1931 a fresh application for execution by way of attachment and sale of the refinery was filed by the 1st respondent, and it was held by the District Court, and it is not now disputed, that due notice thereof was served on the judgment-debtors. It may be taken for the purpose of this appeal that the sale proclamation was duly drafted and published; no argument to the contrary was presented to the Court at the hearing of the appeal, and I am satisfied that the applicant has not sustained any substantial injury by reason of any irregularity in connection with the proclamation or the publication of the sale. On the 30th November 1931 the refinery was sold, and was purchased at the execution sale by the 6th respondent. On the 2nd January 1932 the appellant under s. 47 of the Code filed the application out of which the present appeal arises.

Now, the only ground upon which it was contended either in the District Court or at the hearing of the appeal that the sale should be declared void, or in the alternative set aside, was that on the 13th

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June 1931 the 5th defendant died, and that no notice had been issued to the appellant as the legal representative of the 5th defendant requiring him to show cause why the decree should not be executed against him, as provided in Order 21, rule 22, of the Code. In my opinion this contention cannot be sustained.

On the 5th August 1931, on the application of the respondents 1 to 3, the appellant as the sole heir and legal representative of the 5th defendant (who was the 4th appellant in an appeal to His Majesty in Council from the decree of the 10th September 1930), was brought on the record in lieu of the 4th appellant. On the 12th August 1931 the 1st respondent applied to the District Court of Hanthawaddy for an order (i) "that the name of Bimalanandan Prasad be substituted for that of Rai Bahadur Robinandan Prasad as his legal representative ; (ii) that notice of the application for execution by way of sale of the refinery be issued to Bimalanandan Prasad through his advocates Messrs. Cowasjee, Anklesaria and Jeejeebhoy." Accordingly, the appellant was brought on the record as the legal representative of the 5th defendant. In these circumstances it is unnecessary to consider whether, having regard to s. 50 and Order 22, rules 4 and 12, it is a material irregularity not to bring the legal representative of a deceased defendant upon the record (see *Taragini Debi v. Raj Krishna Mondal* (1), and in any event, even assuming that the appellant had not duly been brought upon the record in these proceedings, in my opinion he thereby sustained no substantial injury. On the 11th September 1931 the 1st respondent applied that notice of the execution proceedings by way of substituted service should be served upon

(1) 32 C.W.N. 418.

the appellant both by registered post and, by advertisement in the "Pioneer" newspaper, and, on the 21st September 1931, the District Court ordered that the following notice should be served upon the appellant in the manner therein stated:

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Notice to show cause.

IN THE DISTRICT COURT OF HANTHAWADDY AT
RANGOON IN THE PROVINCE OF BURMA.

CIVIL EXECUTION No. 30 of 1931.

Arising out of Civil Regular Suit No. 11 of 1928.

UNITED REFINERIES (BURMA), LIMITED (DECREE-
HOLDERS)

7.

RAM RAGHUBIR LAL AND FOUR OTHERS (JUDGMENT-DEBTORS).

TO BIMALANANDAN PRASAD of Daranagar, Benares City, son and legal representative of Rai Bahadur Robinandan Prasad (deceased), the 5th defendant above named.

WHEREAS the decree-holders have made application to this Court for the execution of their decree by the sale of the oil refinery buildings and lands situate at Thilawa, and forming the subject-matter of the suit, and whereas the Court has ordered the sale to be held you are hereby notified to appear before this Court on or before October 15th, 1931, to show cause, if any, why the said sale should not be held, failing which the sale will proceed.

Given under my hand, etc.

(Sd.) JOHN P. DOYLE.

NOTE.—The above to be sent to "The Pioneer" for publication. Also to be served by Registered Post on Bimalanadan Prasad.

On the 22nd October 1931 substituted service of the notice was held to have been duly effected, and it was ordered that a proclamation should be drawn up for a sale of the property on 30th November 1931.