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Following, therefore, the decision of the Full Bench, we come to the conclusion that this exhibit 25 is a mortgage-deed. No other point has been taken and we, therefore, confirm the decree under appeal and dismiss this appeal with costs.

*Decree confirmed.*

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## APPELLATE CIVIL.

*Before Mr. Justice Batchelor and Mr. Justice Chaulal.*

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July 16.

PARASHRAM HANMANTA PATIL (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. BALMUKUND LACHIRAM MARWADI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS.\*

*Civil Procedure Code (Act XIV of 1882), secs. 311, 312, 244 (c)—Decree—Execution of decree—Sale—Absence of notice to judgment-debtor—Application to set aside sale on grounds of absence of notice and property sold at undervalue—Dismissal of application—Second appeal—"Publishing or conducting" sales, meaning of.*

Certain property was sold in execution of a decree against the applicant. He applied to the Court seeking to have the sale set aside on the ground that no notice had been issued to the applicant under section 248 of the Civil Procedure Code, 1882, and that in consequence the property was sold at an undervalue. The Court of first instance dismissed the application; and the dismissal was upheld by the lower appellate Court. On second appeal a preliminary objection was taken that the order dismissing the application fell under section 312 of the Code and was not appealable.

*Held*, that the application did not fall under section 311 and the order dismissing the same did not come within section 312 of the Code.

*Held*, further, that the order fell under section 244 (c) of the Code and was appealable as a decree. The question involved was "a question relating to the satisfaction of the decree" within the meaning of the clause.

The non-issue of a notice to a party concerned is not a material irregularity in publishing or conducting the sales, within the meaning of section 311 of the Civil Procedure Code (Act XIV of 1882). It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale.

\* Second Appeal No. 885 of 1907.

The words "publishing or conducting" in section 311 of the Code refer respectively to the proclamation of sale under section 237 and to the action of the officer by whom the sale was held.

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The sale took place eight years after the decree

*Held*, that as no notice was issued to the appellant the order of both the lower Courts must be reversed and the sale set aside.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Násik confirming the order passed by V. V. Pataskar, Subordinate Judge at Málegaon.

Proceedings in execution.

In execution of a decree certain property of the applicant was sold. The applicant applied to the Court on the grounds that the sale should be set aside as no notice was given to him as required by section 248 of the Civil Procedure Code 1882, and that therefore the property was sold at an undervalue.

The Court of first instance dismissed the application on the grounds that no irregularity had been alleged and that there was nothing to show that the price realized was not fair.

This order was upheld by the lower appellate Court.

The applicant appealed to the High Court.

*S. S. Patkar*, for the applicant.

*R. R. Desai*, for the respondent.

BATCHELOR, J. :—A preliminary objection has been raised by Mr. Desai for the respondents to the effect that in this case no second appeal lies. That objection is founded upon the argument that the order passed by the District Judge is an order under section 312 of the Civil Procedure Code. If that is the real character of the order, it follows that under sub-section 16 of section 388 no second appeal is permissible. With a view to decide this question it is requisite to see whether the order appealed from is an order under section 312 or not, and to that end we must look to the application which the order refuses. If that application, in the words of section 311, is an application "to set aside the sale on the ground of material irregularity in publishing or conducting it," then no doubt the order falls under section 312.

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Now the application here seeks to have the sale set aside on the ground that no notice has been issued to the applicant in the matter and that in consequence the property was sold at an under-value. Thus the question is whether the non-issue of notice to a party concerned is a material irregularity in publishing or conducting the sale. In our opinion it is not. It is rather an irregularity in proceedings which are anterior to the publishing or the conduct of the sale. We think that the words "publishing or conducting" the sale refer respectively to the proclamation of sale under section 287 and to the action of the officer by whom the sale was held. In our opinion, then, this application does not fall under section 311, and the order consequently does not fall under section 312. That being so, the order in our opinion falls under clause (c) of section 244. It has been suggested that clause (c) of section 244 is inapplicable inasmuch as the decree was already executed, but the question involved was none the less a "question relating to the satisfaction of the decree" within the meaning of the clause. Upon this point reference may be made to *Hira Lal Ghose v. Chundra Kanto Ghose*<sup>(1)</sup>. The result, therefore, is that in our opinion the second appeal is competent and upon the merits we have no doubt that the order made is not sustainable. Though the sale took place eight years after the decree, no notice was issued to the appellant, who in his application has protested his willingness to pay Rs. 779 for this property which has fetched only Rs. 490.

For these reasons we set aside the order made and direct that the property be resold, if necessary, after due notice to all the parties including the present appellant. We say 'if necessary,' because it may be that the best disposal of the property will be to accept the offer of the present appellant. The appellant must have his costs throughout.

*Order set aside.*

R. R.

(1) (1899) 26 Cal. 539.