

1902  
JAN. 31.  
—  
CRIMINAL  
REVISION.  
—  
29 C. 457.

Procedure, and in the view that we take, no notice was necessary to the parties before the Sessions Judge could act.

On the second point we think that we cannot properly express an opinion. It affects the merits of the case against the petitioners. It is said that the petitioners took a less prominent part in the offence than the man who has been convicted. That will be for the Magistrate, who holds the trial, to determine. It is sufficient for us to point out that they have never been tried.

The third ground is sufficiently dealt with by the explanation given by the Magistrate.

The Rule is therefore discharged.

*Rule discharged.*

29 C. 459.

APPELLATE CIVIL.

*Before Mr. Justice Pratt and Mr. Justice Geidt.*

ABED MOLLAH v DILJAN MOLLAH.\* [28th May, 1902.]

*Civil Procedure Code Amendment Act (V of 1894) s. 310-A—Immoveable property—Sale—Whether an under-raiyat is entitled to make an application under that section.*

An under-raiyat is not entitled to make an application under s. 310-A of the Civil Procedure Code to set aside the sale of a holding sold in execution of a decree for arrears of rent obtained against the raiyat.

ABED MOLLAH, the auction-purchaser, obtained from the High Court this Rule.

In execution of a decree obtained for arrears of rent by one Mohendra Nath Bose against Haran Karikar and others, the *jote*, [460] of the judgment-debtors was attached and sold. The petitioner, Abed Mollah, purchased the said *jote* on the 6th August 1901. On the 30th August 1901 Diljan Mollah, the opposite party, applied to the Munsiff's Court at Basirhaut to have the sale set aside under s. 310-A of the Civil Procedure Code on the allegation that he was an under-tenant of the judgment-debtors. On the 14th September 1901, the learned Munsiff overruled the petitioner's objection that the opposite party was not competent to apply under s. 310-A of the Civil Procedure Code and set aside the sale.

Maulvi Zahadar Rahim Zahed for the petitioner.

Babu Sarat Chander Dutt for the opposite party.

PRATT AND GEIDT, JJ. In this case what is described as the jama of the judgment-debtor was advertised for sale. By this we understand that what was put up for sale was the *jote* or holding of a raiyat.

An under-tenant or sub-raiyat of the judgment-debtor applied under s. 310-A of the Code of Civil Procedure and was permitted to pay in the decretal amount, etc., as provided by that section.

The question before us in this Rule is whether the lower Court had jurisdiction to allow the deposit and to set aside the sale.

In the Full Bench case of *Paresh Nath Singha v. Nobogopal Chattopadhyaya* (1) the question for decision was whether a mortgagee can come in under s. 310-A; and it was held that he could. The Full Bench did not decide, nor was it the case before them, that an under-raiyat could come in under that section. In the unreported case of *Wazaddin v. Nur Bux*

\* Civil Rule No. 3098 of 1901.

(1) (1901) I. L. R. 29 Cal. 1.

which was referred to this Court under s. 617, Civil Procedure Code, and which reference was decided on the 13th of March 1901, it was held that where a superior tenure had been sold, the howladar under the tenure-holder is not a person whose immoveable property has been sold within the meaning of s. 310-A, Civil Procedure Code.

The learned pleader for the opposite party in this case contends that the word jama may be applicable to a tenure-holder. If that be so, then the case just cited is a direct authority against [461] his contention that a person holding under a tenure-holder can have the sale set aside. We think, however, that it is the case of a deposit being made by an under-raiyat, and that the reasons given in the case just cited are equally applicable in a case like the present. In the case of *Bepin Behary Sarnokar v. Kali Dass Chatterjee* (1), which was a case in which the deposit had been made under s. 310-A by an under-tenant of non-agricultural land, the learned Judges observed: "It would seem, to say the least, extremely doubtful whether the applicant would have any status to pay in the amount of the decree under s. 310-A." That observation was not necessary for the purposes of that case, still we consider that the opinion so expressed is entitled to due weight. That opinion is in accord with what we think is a right construction of the law.

We accordingly made the Rule absolute with costs, and direct that the order setting aside the sale be set aside.

*Rule made absolute.*

29 C. 461.

PRIVY COUNCIL.

PRESENT:

*Lords Hobhouse, Macnaghten, Robertson, Sir Richard  
Couch and Sir Ford North.*

KONG YEE LONE & CO. v. LOWJEE NANJEE (2).  
[2nd May and 13th June, 1901].

[*On appeal from the Court of the Recorder of Rangoon.*]

*Contract—Wagering Contracts—Gambling transactions—Contract Act (IX of 1872) s. 30—Contracts for sale and purchase of goods without intention to complete them by delivery and payment—Agreement for "differences"—Suit on promissory note given for differences—English Gaming Act (8 & 9 Vict. c. 10.)*

Where the circumstances as to contracts for sale, purchase and delivery of goods at a given time and place are such as to warrant the legal inference that the contracting parties never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, the contract is not a commercial transaction, but a wager on the rise or fall of the market.

[462] There is no distinction between the expression "gaming and wagering" in the English Gaming Act, 1845, and the earlier Indian Act, XXI of 1848, and the expression "by way of wager" used in s. 30 of the Indian Contract Act (IX of 1872).

Transactions for the purchase and sale of goods comprised two classes of contracts—the one class suitable to traders, such as the defendants were, and all duly fulfilled by delivery and payment, and the other class extravagantly large and left without any attempt at fulfilment.

(1) (1901) 6 C. W. N. 336.

(2) This case was duly reported and despatched to Calcutta in July 1901, but was not received.