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31 C. 811=1 Cr. L. J. 850.

But he has come to the conclusion that sanction may be given to prosecute Jhalan Jha for having given false testimony in respect of one particular matter, viz., that he did not know Ramadhin Singh.

We have gone through the judgments of both the Deputy Magistrate and the Sessions Judge, and after a careful consideration we have come to the conclusion that this is not a fit case in which the sanction granted by the Sessions Judge, should be maintained. The Deputy Magistrate, who had the witnesses before him and who was in a position to observe their demeanour and to weigh their testimony upon a careful analysis of the facts and weighment of their statements, thought it inexpedient in the ends of justice to grant the sanction. The learned Sessions Judge did not have the same advantage. Upon a small residuum of the case he thought that sanction may be given for the prosecution of Jhalan Jha under section 193 of the Indian Penal Code. We are of opinion that such sanction would lead to no result excepting harassment and become the means of satisfying what the Deputy Magistrate called an "old grudge." The power of granting sanctions possessed by Appellate Courts ought in our opinion to be exercised carefully, especially when sanction is refused by the Court of first instance.

For these reasons we are of opinion that the Rule ought to be made absolute, and we accordingly make it absolute.

The opposite party appeared by learned Counsel and wanted to be heard. The Rule was issued upon the Magistrate of the district, and sanction having been granted by the Sessions Judge for purposes of public justice, Buchar Gope as the opposite party has no *locus standi*. We do not feel disposed to vary the practice of this Court by hearing Mr. Hill on behalf of Buchar Gope.

Rule made absolute.

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31 C. 815 (=8 C. W. N. 686.)

[815] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

MAHABIR PERSHAD SINGH *v.* DHANUKDHARI SINGH.*

[17th June, 1904.]

Evidence—Civil Procedure Code (Act XIV of 1882), ss. 291 and 311—Direct evidence, how far necessary—Sale—Price.

Although there may not be direct evidence connecting an alleged material irregularity in the publication or conduct of a sale, with the inadequacy of price at such a sale as cause and effect, yet in order to enable the Court to set aside a sale under s. 311 of the Civil Procedure Code, there must be evidence of circumstances, which will warrant the necessary or at least reasonable inference, that the inadequacy of price at the sale was the result of the irregularity complained of.

[On appeal 34 Cal. 709 P. C.=11 C. W. N. 789=6 C. L. J. 11=9 Bom. L. R. 651=17 M. L. J. 353, Ref. 16 I. C. 394.]

APPEAL by the decree-holders, Mahabir Pershad Singh and another.

This appeal arose out of an application to set aside a sale on the ground of fraud and material irregularity in publishing and conducting the sale. The petitioners stated that 24th November 1902 was the last date fixed for sale after several adjournments, and on that date one

* Appeal from Order No. 150 of 1903, against the order of Upendra Nath Bose, Subordinate Judge of Gya, dated the 31st March 1903.

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of the decree-holders Mahabir Pershad Singh told their servants that he (Mahabir Pershad) whold consent to an adjournment, if he was paid the adjournment costs and interest; that Rs. 180 was paid to the said decree-holder in Court, who told the petitioner's servants to file an application through a pleader; that the pleader for the petitioners being engaged in some other Court could not file the application for postponement at the time when all applications for the day were received by the Court; that therefore the application was filed after some delay, and owing to this delay, the decree-holder fraudulently through his servants began to bid at the sale, and the decree-holder having refused to [816] give his consent in writing to a postponement, the Court rejected the application for postponement; that then the sale took place and valuable properties of the petitioners were sold at a nominal price, which the decree-holders purchased; that the sale having been completed all the bidders left, but the purchaser having failed to deposit the poundage fee, the said sale was annulled, and the properties were resold on the next day, and the decree-holder purchased them again at the same price at which they were purchased on the first occasion; that owing to the fraud of the decree-holders the properties were sold at an inadequate price, and that thereby the petitioners sustained substantial loss; and that there was irregularity in publishing and conducting the sale. The auction-purchasers *inter alia* pleaded that the judgment-debtors were estopped from filing the petition for setting aside the sale; that all the allegations made by the petitioners were false; that they did not agree to any postponement of sale; and that the properties were not sold at an inadequate price. It appeared that the hour for the sale on 24th November 1902 was not specified. The learned Subordinate Judge found that no fraud was committed by the decree-holder, but having found that the non-specification of the hour of sale was a material irregularity, and the properties were sold at an inadequate price, set aside the sale.

Dr. *Rash Behary Ghosh* (Babu *Lakshmi Narain Sinha* with him). Non-specification of the hour of sale at an adjourned date is not a material irregularity within the meaning of section 311 of the Civil Procedure Code. The date was mentioned, but not the hour, and it could not be said for such omission there was any paucity of bidders. The judgment-debtor himself asked for an adjournment, and he waived his right to take any objection on the ground of material irregularity. There was no evidence on the record that, admitting non-specification of the hour of sale was a material irregularity, the inadequacy of price was the result of the irregularity complained of.

Babu *Saligram Singh*, for the respondent. Non-specification of the hour of sale is a material irregularity: see *Bhikari Misra* v. *Rani Surjamoni* (1) and *Surno Moyee Debi* v. *Dakhina Ranjan* [817] *Sanyal* (2) in the case of *Gur Buksh Lall* v. *Jowahir Singh* (3). If from the circumstances it might be fairly inferred that the irregularity in the conduct of the sale was the cause of the inadequacy of the price, the sale ought to be set aside. In this case it is to be inferred from the paucity of bidders that the low price fetched was due to irregularity.

Dr. *Rash Behary Ghosh* in reply. The case of *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal* (2) is clearly distinguishable. In that case

(1) (1901) 6 C. W. N. 48.
(2) (1896) I. L. R. 24 Cal. 291, 294.
(3) (1893) I. L. R. 20 Cal. 599.

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there was no certainty that the sale would take place on the day it was held. The sale was contingent upon the disposal of the claim case. In all cases of irregularity under s. 311 evidence must be given of substantial injury having resulted. See *Tassaduk Rasul* v. *Ahmad Husain* (1). It cannot be the law that, given an irregularity and deficiency of price, then this deficiency must be the result of the irregularity : see *Lala Mobaruk Lal* v. *The Secretary of State for India in Council* (2). Omission to specify the hour only could in no way cause injury. Injury may be inferred where the inference is reasonable. Witnesses must be produced to prove that, but for the irregularity they would have been at the sale and bid for the property. See *Jagannath* v. *Makund Prasad* (3). There must be such a connection between the irregularity and the injury that a reasonable man could infer from the circumstances that the one was the result of the other. The Judicial Committee in the cases of *Olpherts* v. *Mahabir Pershad Singh* (4), *Arunachellam Chetti* v. *Arunachellam Chetti* (5), *Tassaduk Rasulkhan* v. *Ahmad Hussain* (1), said that there should be direct evidence to connect injury with material irregularity. The learned Subordinate Judge misapprehended the language of section 311 of the Civil Procedure Code and the judgment of the Judicial Committee.

MACLEAN, C. J., AND MITRA, J. This is an appeal under s. 588, cl. (16) of the Code of Civil Procedure from an order of **[818]** the Subordinate Judge of Gya, setting aside a sale held on the 25th November 1902 in pursuance of an order made on the 11th June 1901, under s. 89 of the Transfer of Property Act. The appellants, the mortgagees, were themselves the auction-purchasers.

The judgment-debtors, the mortgagors, based their application for setting aside the sale on various grounds of fraud and material irregularity, but the only ground given effect to by the Lower Court is that the order made by the Court on the 22nd September 1902, adjourning the sale to the 24th November 1902, at the request of the judgment-debtors did not specify the hour of sale as prescribed by s. 291 of the Code, and that, therefore, there was material irregularity vitiating the sale.

The Subordinate Judge has found, and we see no reason to dissent from his finding, that the market value of the property sold is about Rs. 35,000. At the sale the highest bid was offered by the appellants, and that was only Rs. 18,500. The price fetched at the sale was, therefore, inadequate.

Section 291 of the Code expressly provides that, when the Court adjourns the sale, it should be adjourned to a specified day and hour. In *Surno Moyee Debi* v. *Dakhina Ranjan Sanyal* (6), the omission to specify the hour of sale was held to be a material irregularity. The same view has been taken in *Bhikari Misra* v. *Rani Surjamoni Pat Maha Dai* (7) and *Venkata Subbaraya* v. *Zamindar of Karvetinagar* (8). It is the duty of the Court to specify the date and hour of sale, notwithstanding that the adjournment is due to the application of the judgment-debtor. We agree in the view of the Subordinate Judge as to the irregularity in the order of the 22nd September, 1902.

(1) (1893) L. R. 20 I. A. 176. 182.
(2) (1885) I. L. R. 11 Cal. 200.
(3) (1895) I. L. R. 18 All. 37.
(4) (1882) L. R. 10 I. A. 25, 30.
(5) (1888) L. R. 15 I. A. 171.
(6) (1896) I. L. R. 24 Cal. 291.
(7) (1901) 6 C. W. N. 48.
(8) (1896) I. L. R. 20 Mad. 159.

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But these findings alone will not warrant the Court in setting aside the sale under s. 311, Civil Procedure Code. The applicant must satisfy the Court that he has sustained substantial injury by reason of the irregularity. The inadequacy of price realised at the sale must be shown to be the result of the irregularity. The Subordinate Judge has come to the conclusion relying on *Bhikari Misra* v. *Rani Sarjamoni Pat Maha Dai* (1), [819] that the inadequacy of price was the result of the irregularity in the order adjourning the sale to the 24th November.

The arguments before us have centred on the last point. The qeustion is one of fact.

In *Olpherts* v. *Mahabir Pershad Singh* (2), *Arunachellam Chetti* v. *Arunachellam Chetti* (3) and *Tassaduk Rusulkhan* v. *Ahmad Husain* (4), the Judicial Committee would appear to have held that there should be direct evidence connecting an alleged material irregularity in the publication or conduct of a sale with the inadequacy of price at such a sale, as cause and effect, in order to enable the Court to set aside the sale. To the same effect is the decision of the High Court at Allahabad in *Jagannath* v. *Makund Prasad* (5). Admittedly there is no direct evidence in this case connecting the inadequacy of price with the non-specification of the hour of sale in the order of the 22nd September. The witnesses Barhamadeo Narayan Singh and Cheddi Singh, who say they were willing to bid for the property at the sale, do not say or suggest that they were deterred or misled from attending at the sale, on account of the non-specification of the hour. They say they knew nothing about the sale; but the sale had been duly proclaimed.

In *Gur Buksh Lall* v. *Jawahir Singh* (6), *Surna Moyee Debi* v. *Dakhina Ranjan Sanyal* (7), *Jamini Mohan* v. *Chundra Kumar* (8), *Bhikan Misra* v. *Surjamoni Pat Maha Dai* (1), *Sheoratan Singh* v. *Net Lal Sahu* (9) and *Venkata Subbaraya Chetti* v. *Zamindar of Karvetinagar* (10), however, the rigidity of the rule as to the necessity of direct evidence was relaxed and we have been asked to infer that the cause of loss to the judgment-debtors was the non-specification of the hour of sale, though there is no direct evidence on the point. Assuming that these cases have correctly laid down the law and have rightly interpreted the decisions of the Judicial Committee referred to above, it is clear that there must be evidence of circumstances, which will warrant the necessary [820] or at least reasonable inference that the inadequacy of price at the sale was the result of the irregularity complained of.

There is in our opinion no evidence from which it can be legitimately inferred that the loss was the result of the irregularity in this case. It is not even suggested in the evidence that any one was likely to be prevented or was in fact prevented from coming to bid on account of the non-specification of the hour. The witnesses, to whom we have referred—and they are the only witnesses,—say nothing to the effect that it was due to the fact that the hour was not mentioned that they did not attend the sale. This part of the case of the judgment-debtors was not the real case upon which their application to set aside the sale was based. The real case of the respondent was one of grave fraud against the appellants, a case which absolutely failed in the Court below, and

(1) (1901) 6 C. W. N. 48.
(2) (1882) L. R. 10 I. A. 25.
(3) (1888) L. R. 15 I. A. 171.
(4) (1893) L. R. 20 I A. 176.
(5) (1895) I. L. R. 18 All. 87.
(6) (1893) I. L. R 20 Cal. 599.
(7) (1896) I. L. R. 24 Cal 291.
(8) (1901) 6. C. W. N. 44.
(9) (1902) 6 C. W. N. 688.
(10) (1896) I. L.R. 20 Mad. 150.

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which has not been even argued before us. On the other hand, the circumstances of the case lead to the conclusion that the non-specification of the hour was regarded as immaterial. The notice of sale as originally published gave the 19th May as the date and 12 A.M. as the hour. The sale was on that day postponed for one week at the request of the judgment-debtors. The order of that date fixed no hour of sale on the 26th May and no complaint was made. On the latter day the judgment-debtors paid to the decree-holders Rs. 1,000, and obtained a further postponement to the 21st July 1902. On the 21st July the judgment-debtors again obtained an adjournment to the 22nd September 1902. Again, on that date the judgment-debtors applied for and obtained postponement of the sale to the 24th November 1902. On all these occasions they waived a fresh sale proclamation. They never asked the Court to fix an hour; the 21st July, 22nd September, and the 24th November, were days of sale in the District of Gya, fixed according to Rule No. 100 made by the High Court (p. 32), and 12 A.M. is the usual hour for such sale to commence.

The judgment-debtors in their application to set aside the sale did not complain of any irregularity in the non-specification of the hour of the sale fixed on the 21st July, 22nd September or the 24th November, the ordinary sale days in the District of Gya. The sales are held by the *Nazir*; he begins usually at 12 A.M. and [821] he goes on successively with the execution cases in the order they stand in the list, unless otherwise ordered by the Court. The judgment-debtors complained in paragraph 15 of their petition of such non-specification only in the order of the 19th May adjourning the sale to the 26th May, as it was an unusual day of sale. But the sale did not take place on the 26th May.

We are, therefore, of opinion that there is no reasonable ground for holding that the irregularity in the order of the 22nd September 1902 resulted in substantial injury to the respondents.

No attempt has been made to support the judgment of the Lower Court on any other ground.

The order of the Subordinate Judge must be set aside and the appeal decreed with costs.

Appeal allowed.

31 C. 822 (=8 C. W. N. 672.)

[822] APPELLATE CIVIL.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Mitra.

COVENTRY *v.* TULSHI PERSHAD NARAYAN SINGH.*

[16th May, 1904.]

Decree—Execution—Mortgage—Mitakshara family—Civil Proceedure Code (Act XIV of 1882) s. 248, notice under—Order for substitution of the heirs of the deceased Judgment debtor—Sale proclamation—Order of sale—Postponement—Estoppel——Res judicata.

Held, that a legal representative of a deceased judgment-debtor, who was the managing member of a family governed by the Mitakshara system of Hindu Law, having allowed execution to proceed actively for nearly a year without the slightest objection having twice successfully obtained stay

* Appeal from Order No. 176 of 1903 against the order of Gobind Chandra Basak Subordinate Judge of Muzaffarpur, dated the 16th March 1903.