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We must therefore set aside the judgment and decree of the lower Appellate Court as being vitiated by the admission of inadmissible evidence, and send the case back to that Court in order that it may dispose of the appeal before it after excluding from its consideration the sale certificate in question. We may add that the view we take as to the necessity of a remand in such a case, is in accordance with that taken by this Court in the case of *Womes Chunder Chatterjee v. Chundee Churn Roy Chowdhry* (1).

The costs of this appeal will abide the result.

Appeal allowed ; Case remanded.

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[385] APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mitra.

KOKIL SINGH v. EDAL SINGH.*

[22nd February, 1904.]

Second appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 290, 311, 312, and 388.—Order setting aside a sale—Fraud, allegation of—Non-compliance with the provisions of s. 290 of the Code of Civil Procedure—Limitation—Date of sale.

Where an application is made to set aside a sale, the main basis of which is fraud, such an application comes under s. 244 of the Civil Procedure Code; and a second appeal lies to the High Court against an order passed by the Court of First Instance, setting aside a sale on the ground of fraud, although the Lower Appellate Court found that there was no fraud in the case.

Umakanta Roy v. Dino Nath Sanyal (2) distinguished.

Bhubon Mohun Pal v. Nanda Lal Dey (8) and *Hira Lal Ghose v. Chundra Kanto Ghose* (4) followed.

Mere non-compliance with the provisions of section 290 of the Civil Procedure Code in conducting a sale, does not *ipso facto* make the sale a nullity; therefore limitation would run in such a case from the date of the sale.

Gobind Lal Roy v. Ram Janam Misser (5) and *Tasadduk Rasul Khan v. Ahmad Husain* (6) referred to.

[Ref. 35 Cal. 61. F. B.—6. C. L. J. 320.—11. C. W. N. 1011.]

APPEAL by auction-purchaser Kokil Singh.

The facts of the case for the purposes of this report are as follows:—

Pokhan Singh and another brought a suit upon a mortgage bond against the executants of that bond, and one Edal Singh, [386] a puisne mortgagee, and obtained an *ex parte* decree on the 19th December, 1900. In execution of that decree the properties covered by the mortgage were sold, and one of them was purchased by one Kokil Singh, on the 19th March, 1902. The sale was confirmed on the 18th May, following. Kokil Singh took out his sale certificate and obtained delivery of possession through Court on the 4th June, 1902. Edal Singh on the 21st June 1902, put in an application under s. 311 of the Code of Civil Procedure for setting aside the aforesaid sale on the grounds that the sale proclamation was not at all served; that a false return was given in Court in

* Appeal from Order No. 212 of 1903, against the order of H. Holmwood, District Judge of Patna, dated the 11th of May 1903, affirming the order of Jogendra Nath Deb, Subordinate Judge of Patna, dated the 24th of January, 1903.

(1) (1881) I. L. R. 7 Cal. 293.

(2) (1900) I. L. R. 28 Cal. 4.

(3) (1899) I. L. R. 26 Cal. 324.

(4) (1899) I. L. R. 26 Cal. 539.

(5) (1893) I. L. R. 21 Cal. 70; L. R.

20 I. A. 165.

(6) (1893) I. L. R. 21 Cal. 66; L. R.

20 I. A. 176.

respect thereof; that there were material irregularities resulting in substantial injury; and that, inasmuch as the provisions of section 290 of the Civil Procedure Code were not complied with, the sale was *ipso facto* void. These allegations were denied by the decree-holders and the auction-purchaser, who further pleaded that the application was time-barred. The learned Subordinate Judge having found that the application before him though it proceeded under ss. 311, Civil Procedure Code, and 244, Civil Procedure Code, fell under s. 244 of that Code on the ground of fraud and illegality, held that the application was within time and set aside the sale on the ground of fraud. He further held that owing to omission to comply with the provisions of section 290 of the Civil Procedure Code there could have been no sale in compliance with the conditions required by that section. On appeal, the learned District Judge of Patna, Mr. Holmwood, held that there was no fraud in the case and that the application must be regarded as one falling under s. 311 of the Code of Civil Procedure, and therefore it was barred by limitation, not having been made within 30 days from the date of the sale; but, inasmuch as there had been no publication of the notice in the Sub-Judge's Court, he held that the 30 days' limitation never began to run and that the application under s. 311 of the Code of Civil Procedure was not time-barred. He further held the omission to comply with the provisions of s. 290 of the Civil Procedure Code to be a material irregularity in conducting the sale, and that substantial injury resulted therefrom. Upon these findings he confirmed the decision of the First Court.

[387] Mr. O'Kinealy (Babu Kulwant Sahay with him) for the respondent took a preliminary objection to the hearing of the appeal, on the ground that, inasmuch as the Lower Appellate Court found that there was no fraud in the case, the application to set aside the sale came under s. 311 of the Code of Civil Procedure and by virtue of s. 588 of the Code of Civil Procedure there was no second appeal, see *Uma Kanta Roy v. Dino Nath Sanjyal* (1).

The *Advocate-General*, (Mr. J. M. Woodroffe), Babu Umakali Mookerjee, Dr. Ashutosh Mookerjee, Babu Surendra Nath Roy and Babu Joy Gopal Ghosha with him) for the appellant. A second appeal lies, see *Bhubon Mohun Pal v. Nanda Lal Dey* (2), *Hara Lal Ghose v. Chundra Kanto Ghose* (3) and *Nemai Chand Kanji v. Deno Nath Kanji* (4). Fraud was charged and that being so, the case comes under s. 244 of the Code of Civil Procedure. Supposing there was no second appeal, the High Court could interfere under s. 622 of the Code, the question of limitation being a question of jurisdiction, see *Kailash Chandra Halder v. Bisso Nath Paramanick* (5), *Manisha Eradi v. Siyali Koya* (6) and *C. Ross Alston v. Pitambar Das* (7). Upon the merits non-compliance with the requirements of s. 290 of the Code of Civil Procedure was a material irregularity within the meaning of s. 311 of the Code, but the sale was not a nullity, see *Tasadduk Rasul Khan v. Ahmad Husain* (8) and therefore, in order to set aside such a sale, limitation would run from the date of the sale. Fraud having failed, and the application having

(1) (1890) I. L. R. 28 Cal. 4.

(2) (1890) I. L. R. 26 Cal. 324.

(3) (1899) I. L. R. 26 Cal. 539.

(4) (1898) 2 C. W. N. 691.

(5) (1896) 1 C. W. N. 67.

(6) (1887) I. L. R. 11 Mad. 220.

(7) 1903 I. L. R. 25 All. 509, 523.

(8) 1893 I. L. R. 21 Cal. 66;

L. R. 26 I. A. 165.

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FEB. 22. been made after thirty days of the sale, it ought to have been rejected, being barred by limitation.

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31 C. 385. Mr. *O'Kinealy*. The cases cited by the other side are distinguishable In the case of *Kailash Chundra Haldar v. Bisso Nath Paramanick* (1), the application on the face of it appears to be barred by limitation The Madras case also stood on the same footing. If the Court had at the initial stage jurisdiction to [388] entertain the application, it could not be said that anything done illegally later on was without jurisdiction. There was no want of jurisdiction in this case, and there was no illegal exercise of jurisdiction. This was not a case in which limitation began to run, as being a case in which the sale ought not to have taken place, being outside the provisions of the Civil Procedure Code. Section 166 of the Limitation Act had no application.

Babu Umakali Mookerjee, in reply.

BRETT AND MITRA, JJ. The appeal arises out of proceedings taken in execution of a mortgage decree, which had been obtained on the 19th December, 1900 by Pokhan Singh and others against the mortgagors and Edal Singh, a puisne mortgagee, who had obtained a decree on his mortgage and had brought to sale and had purchased some of the mortgaged properties. The mortgaged properties were put up for sale on the 19th March 1902, and one of them was purchased by the present appellant. The sale was confirmed and possession was afterwards delivered on the 4th June, 1902.

On the 21st June 1902, two applications were made to the Court executing the decree by the judgment-debtor, Edal Singh, the respondent in the present appeal. One under s. 108, Civil Procedure Code, was to have the decree set aside, the other under s. 311, Civil Procedure Code, was to have the sale set aside. In support of both applications, allegations of fraud were made against the decree-holders. The Subordinate Judge dismissed the application under s. 108, Civil Procedure Code, holding that the grounds put forward to support it had not been substantiated. With that application we have no concern in this appeal.

The other application although ostensibly under s. 311, Civil Procedure Code, the Subordinate Judge has treated as one falling under s. 244, Civil Procedure Code. In his judgment he points out that the main basis for the application was fraud, and he deals in detail with the various facts and circumstances on which the applicant relied to support his case that there had been fraud on the part of the decree-holder. He found that there had been a [389] fraudulent concealment of the various processes issued by the Court and a complete failure, the result of fraud, to comply with the provisions of s. 290, Civil Procedure Code. He held that the omission to publish a copy of the sale notification in the Court of the Subordinate Judge executing the decree was manifestly the result of design and not of mistake—the object being to conceal from the present respondent the fact that the property was to be sold. Finding therefore that the application before him although it proceeded under s. 311, Civil Procedure Code, and s. 244, Civil Procedure Code, fell under s. 244, Civil Procedure Code, on the ground of fraud and illegality, he held that the application had been brought within time and he set aside the sale on the ground of fraud. He further held that owing to the omission to comply with the provisions of s. 290, Civil Procedure Code, there could

(1) (1398) 2 C. W. N. 691.

have been no sale in compliance with the conditions required by that section, and that the sale on that account was illegal. On that ground also he held that the sale should be set aside.

On appeal the District Judge has confirmed the order of the Subordinate Judge, but for different reasons. As the date of the sale was the 19th March, 1902 and the application to have it set aside was not made till the 21st June 1902, he has held, and no doubt rightly, that if the application be held to fall under s. 311, Civil Procedure Code, it must be considered to have been barred. Being then of opinion that "the only question he had to consider was whether the illegality under s. 290, Civil Procedure Code, read with s. 287, Civil Procedure Code, vitiated a sale to which objection could only be taken under s. 244, Civil Procedure Code," he held that the finding of the Subordinate Judge of fraud was based merely on the omission to comply with the provisions of s. 290, Civil Procedure Code, and he remarked that he was unable to understand how the Subordinate Judge could saddle the decree-holder with fraud on account of the unfortunate error of the Court ordering the sale. He held accordingly that there was no fraud in the case and that the application must be regarded as falling under s. 311, Civil Procedure Code. Inasmuch, however, as there had been no publication of the notice in the Sub-Judge's Court he held that the 30 days' limitation never began [390] to run, and that the application under s. 311, Civil Procedure Code, was not barred. Holding the omission to comply with the terms of s. 290, Civil Procedure Code, to be a material irregularity in conducting the sale and further finding that substantial loss had resulted to the judgment-debtor from that irregularity, he confirmed the order of the Subordinate Judge setting aside the sale.

Against this order the auction purchaser has appealed to this Court and by way of extra precaution has also made an application under s. 622, Civil Procedure Code.

A preliminary objection is raised that no appeal lies, and in support of it reliance is placed on the ruling of this Court in the case of *Umakanta Roy v. Dino Nath Sanyal* (1). It is urged that as the District Judge held that there was no fraud proved and in fact no allegation of fraud made in support of the application, and that therefore it was one falling under s. 311, Civil Procedure Code, and as he treats it as such, there can be no appeal against his order. We are unable to accept this view. Fraud was certainly alleged by the applicant in his application. Distinct facts and circumstances were relied on before the Subordinate Judge, as proving that there was fraud. The Subordinate Judge fully considered these facts and circumstances and held on them that fraud had been proved. On that account he treated the application as one falling under s. 244, Civil Procedure Code, and set the sale aside on account of the fraud in the proceedings which he held to have been proved before him. The appeal was argued at length before the District Judge and there is nothing to show that the allegations of fraud were not supported before him. This case is clearly distinguishable from the case relied on in support of the objection, in which it appears that although an allegation of fraud had been put forward in the application, no attempt had been made in either of the Lower Courts to support it.

In our opinion ample authority that an appeal lies in the present case is afforded by the rulings of this Court in *Bhubon Mohun Pal v. Nanda Lal Dey* (2) and *Hira Lal Ghose v. Chundra Kanto Ghose* (3). It

(1) (1900) I. L. R. 28 Cal. 4.

(2) (1899) I. L. R. 26 Cal. 824.

(3) (1899) I. L. R. 26 Cal. 539.

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has not been contended before us that the [391] appellant as auction purchaser had no right to appeal. Undoubtedly he had a right as such. We fully agree in the view expressed by the learned Chief Justice in the case last mentioned that to appreciate whether a case is or is not within s. 244, Civil Procedure Code, it is necessary to consider what the application was and whether at the time it was made it was an application under the section. The whole basis on which the application rested was that fraud had been committed and facts and circumstances were relied on to support it. The Subordinate Judge found that fraud had been proved. The District Judge from his judgment does not appear to have fully grasped the view taken by the Subordinate Judge and the mere fact that, owing to a misconception of the case, he held that no question of fraud arose would not deprive the present appellant, who, it may be observed, had to meet the allegations of fraud, from his right to appeal.

We hold therefore that a second appeal lies and it is not necessary therefore to consider whether the application to this Court under s. 622, Civil Procedure Code, can stand, as on our finding such an application is unnecessary.

We have now to consider whether the order of the District Judge on appeal can be maintained. We are of opinion that it cannot, and that the appeal must go back to him for rehearing, and for the following reasons. The view which the District Judge has adopted that as the provisions of s. 290, Civil Procedure Code, were not observed, the sale which had been held in execution of the mortgage-decree was in fact no sale, and no limitation could run from the date of that sale is not one which we can accept as correct. In the case of *Gobind Lal Ray v. Ram Janam Misser* (1), their Lordships of the Privy Council say in their judgment. "In the opinion of their Lordships, a sale is a sale made under Act XI of 1859 within the meaning of that Act, when it is a sale for arrears of Government revenue, held by a Collector or other officer authorised to hold sales under the Act, although it may be contrary to the provisions of the Act either by reason of some irregularity in publishing or conducting the sale or in consequence of some express provisions for exemption having been directly contravened." The same principle in our [392] opinion equally applies where the sale has been held in execution of a decree by a Court duly authorized to hold such sales. In the case of *Tasaduk Rasul Khan v. Ahmad Husain* (2) and another, it has been held by this Court that non-compliance with the provisions of s. 290, Civil Procedure Code, in conducting a sale is a material irregularity within the meaning of s. 311, Civil Procedure Code, but its effect is not to make the sale a nullity without proof of substantial injury thereby to the judgment-debtor. We are unable therefore to agree with the District Judge that in this case by reason of the omission to comply with the provisions of s. 290, Civil Procedure Code, limitation cannot be held to have commenced to run against the debtor. Limitation must be held to have run from the date of the sale and if therefore the application be found to fall under s. 311, Civil Procedure Code, it is barred. The order of the District Judge is therefore set aside.

The District Judge however appears, as we have already noticed, to have not grasped the meaning of the Subordinate Judge's judgment, and to have misconceived his conclusions and the reasons on which they

(1) (1893) I. L. R. 21 Cal. 70; L. R. 20 I. A. 165.

(2) (1893) I. L. R. 21 Cal. 66; L. R. 20 I. A. 176.

were based. He has in consequence failed to consider at all the case of fraud, which the Subordinate Judge held to have been proved, or to have been taken into consideration the facts and circumstances which induced the Subordinate Judge to arrive at his conclusions, or to give any reasons for finding that these conclusions were incorrect. We are unable therefore to deal finally with the appeal, as it comes before us. We accordingly direct that the appeal be sent back to the District Judge for rehearing and for decision, after taking fully into consideration the question of fraud, which was presented in the Court of the Subordinate Judge and the facts and circumstances on which the Subordinate Judge relied in arriving at the conclusion that the proceedings, in which the sale was held, were vitiated by fraud, and on that account, the sale should be set aside. Costs will abide the result.

The application under s. 622, Civil Procedure Code, being unnecessary, it is dismissed.

Appeal allowed. Case remanded.

31 C. 393 (=8 C. W. N. 115.)

[393] APPELLATE CIVIL.

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

MAFIZUDDIN v. KORBAD ALI CHOWDHURI.*

[3rd September, 1903.]

Revenue—Sale for arrears of Revenue—Encumbrance, avoidance of—Revenue Sale Law (Act XI of 1859), ss. 37, 53.

A purchased an estate, at a sale for arrears of revenue in the name of his servant. Thereupon, one of the defaulting proprietors brought a suit against the said servant and other persons, for setting aside the sale and obtained a decree for reconveyance on certain terms.

Owing to this litigation another default occurred in payment of revenue and the estate was again put up for sale and re-purchased by A.

Held, in a suit by A to recover *khas* possession by annulling certain alleged incumbrances, that he was not entitled to do so, as the second sale was owing to his default and the case fell within section 53 of Act XI of 1859.

[Dist. 8 C. L. J. 387 Rel. on 19 I. C. 974=17 C. W. N. 984; Ref. 6 C. L. J. 472; 37 Cal. 559.]

SECOND APPEAL by the defendants, Mafizuddin Mian and others.

This appeal arose out of an action brought by the plaintiffs as auction purchasers at a sale for arrears of revenue to recover *khas* possession of certain immoveable property on declaration of title. The plaint set out that the defendants Nos. 2 to 7 had a *putni taluk* in fourteen annas share of Taluk Ramganga Sen, and that the other two annas share was in *khas* possession of the *talukdars*. Four annas of the said *taluk* belonged to one Babani Charan Roy and twelve annas to one Erfanuddin Kaji, and it was sold for arrears of Government revenue on the 23rd September 1889, which (the plaintiffs) purchased in the name of their servant. [394] Erfanuddin Kaji brought a suit to set aside the sale, and in that suit it was ordered that, if Erfanuddin Kaji paid into Court $\frac{2}{3}$ ths of the purchase-money, he would get a decree conveying to him twelve annas

* Appeal from Appellate Decree, No. 706 of 1901, against the decree of J. H. Temple, Additional District Judge of Backergunge, dated February 1, 1901, affirming the decree of Bejoy Keshub Mitra, Munsif of Bhola, dated, March 9, 1900.