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authority of the decision of the Full Bench; and though there is a difference of opinion in the case of *Abed Mollah v. Diljan Mollah* (1) between the Judges who decided that case and the Judges who decided the cases reported in 8 C. W. N., we think it necessary at the same time to point out that one of the Judges who was a party to the judgment in the case of *Abed Mollah v. Diljan Mollah* (1) was himself a party to the two judgments reported in the cases in 8 C. W. N., and therefore we must conclude that he had subsequently reason to modify the opinion expressed in the case of *Abed Mollah v. Diljan Mollah* (1). We do not think it, therefore, necessary to refer the matter to the Full Bench as we hold that the matter under consideration has already been decided by a judgment of a Full Bench. We are therefore of opinion that a *Durmokararidar* is a person having an interest in the *mokarari* tenure which he has a right to protect and therefore he is a person within the meaning of section 310A of the Code of Civil Procedure, whose immoveable property has been sold. We think that the Munsif was wrong in holding that the petitioner had no *locus standi* to make the deposit under section 310A of the Code of Civil Procedure.

We accordingly make the Rule absolute, set aside the order of the Munsif rejecting the application, and direct that the Munsif do accept the application, and proceed to deal with it according to law.

The case of *Administrator-General of Bengal v. Mahomed Kholil* (2) on which the lower Court appears to have relied, we may observe, was decided before the Full Bench case of *Paresh Nath Singha v. Nabogopal Chattopadhyaya* (3) and cannot therefore be accepted as an authority in support of the view taken by the lower Court.

Rule absolute.

32 C. 111 (=8 C. W. N. 757.)

[111] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Bodilly.

DEONANDAN SINGH v. MANBODH SINGH.*

[15th and 21st June, 1904.]

Sale for arrears of revenue—Act XI of 1859, ss. 5, 6, 13, 25, 32—Equitable relief—Fraud—Irregularity—Separate shares, sale of—Notice—Description of property—Appeal to Commissioner, specification of grounds in.

No revenue sale can be set aside on the ground of fraud, when the sale would have taken place whether or not the fraud had been committed; nor can the equitable relief of conveyance to the party affected by the fraud be enforced against the auction-purchasers, when some of them are innocent and *bona fide* purchasers.

Amirunessa Khatoon v. The Secretary State for India (4) followed.

Bhoobun Chunder Sen v. Ram Soonder Surma Mezoondar (5) distinguished.

An erroneous entry of the name of a proprietor in a notice under section 6 of Act XI of 1859 does not vitiate a sale.

Ram Narain Koer v. Mahabir Pershad Singh (6) followed.

The non-issue of a notice under section 5 of Act XI of 1859 is a mere irregularity which does not make a sale a nullity, nor shall the sale be annulled

Appeal from Original Decree, No. 171 of 1901, against the decree of Shashi Bushan Chowdhry, Additional Subordinate Judge of Chupra, dated March 22, 1901.

(1) (1902) I. L. R. 29 Cal. 459.

(2) (1901) 5 C. W. N. (Notes) cxxxii.

(3) (1901) I. L. R. 29 Cal. 1.

(4) (1883) I. L. R. 10 Cal. 68.

(5) (1877) I. L. R. 3 Cal. 300.

(6) (1886) I. L. R. 13 Cal. 208.

upon such ground under s. 33 of that Act, unless such ground should have been specified in the appeal to the Commissioner.

Balkishen Das v. Simpson (1) and *Gobind Lal Roy v. Ramjanam Missar* (2) followed.

Mohabir Pershad Singh v. The Collector of Tirhoot (3) dissented from.

[*Rel.* 6 C. L. J. 163; *Ref.* 6 C. L. J. 99=11 C. W. N. 107; *Fol.* 10 C. W. N. 137=2 C. L. J. 325; *Diss.* 37 Cal. 407; *Ref.* 32 Cal. 502; 18 C. L. J. 97=21 I. C. 354; 15 C. W. N. 38; 42 Cal. 755.]

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APPEAL by the defendants, Deonandan Singh and others.

The suit was brought by the plaintiffs, Manbodh Singh and others, for the declaration that the sale of mehal Panapur bearing tauzi No. 3127, for arrears of revenue, was irregular and [112] contrary to law, and the plaintiffs having sustained heavy loss thereby, it was prayed that the sale might be set aside. It was alleged that the plaintiffs and the defendants Nos. 1 to 40 were the co-sharers of the mehal sold, which was an *ijmali kalam*, that the defendants Nos. 1 to 16 purposely allowed the mehal to fall into arrears, although the plaintiffs and other maliks had all along paid their share of Government revenue, and giving false hope to the plaintiffs that they would get the mehal exempted from sale and the arrears cleared, they purchased it themselves in the name of the defendant No. 49. Besides the ground of alleged fraud on the part of the defendants, the following illegalities were urged: (i) that the proclamation of sale was not properly framed and published, (ii) that the sale proclamations should have mentioned the share or shares intended to be exempted from the sale, (iii) that the name of the proprietor mentioned in the sale proclamation, Bikao Singh was wrong, (iv) that the arrears for which the sale took place were not for the June kist of 1897 alone but for previous years as well, and a notice under section 5 of Act XI of 1859 was necessary, and (v) that the price fetched, namely, Rs. 800, was grossly inadequate.

The contesting defendants denied fraud, and they also denied that there was any irregularity or that the price fetched was inadequate.

The Subordinate Judge decreed the suit. He held that the sale had been fraudulently brought about by the defendants, that the properties were not properly described in the sale notification, that Bikao Singh, who was dead, had no interest in the property sold, that although the sale notification stated that the property was to be sold for the arrears of the June kist of 1897, amounting to Rs. 145, the sum really represented arrears for the years 1895-96 and 1896-97 as well, and that therefore a notice under section 5 was necessary and that the sale was in the absence of such notice *ipso facto* void, irrespective of any pecuniary loss. He further held that the property was really worth a lakh of rupees and was therefore sold for a nominal sum. The 15th issue was whether the plaintiffs had raised all the points now taken in their appeal to the Commissioner. With regard to it the lower Court held: "The 15th issue was not argued. It is a fact that [113] all these objections were urged before the Commissioner in appeal."

Babu Umakali Mukerjee (Babu Mahendra Nath Roy, Babu Biraj Mohan Mazumdar and Babu Sailendra Nath Palit with him), for the appellants, contended that upon the facts alleged by the plaintiffs themselves, no fraud was made out which would vitiate sale: see *Doorga Singh v. Sheo Pershad Singh* (4). The objection as to want of notice under s. 5 of Act

(1) (1898) I. L. R. 25 Cal. 838; L. R. I. A. 165.
25 I. A. 151.

(3) (1871) 15. W. R. 137.

(2) (1893) I. L. R. 21 Cal. 70; L. R. 20

(4) (1889) I. L. R. 16 Cal. 194.

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JUNE 15, 21. XI of 1859 not having been taken in the appeal to the Commissioner, the sale cannot be set aside on that ground. It has not been shown that the inadequacy of the price was the result of the alleged irregularities: *Tasad-duk Rasul Khan v. Ahmed Husain* (1).

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C. W. N. 787. Mr. Sinha (Babu Dwarkanath Mitter and Babu Kshetra Mohan Sen with him), for the respondents, contended that fraud on the parts of the defendant had been sufficiently made out. There was a representation made to the plaintiffs not to pay and they were dissuaded from putting in the money. Fraud vitiated the sale: *Amirunessa Khatoon v. The Secretary of State for India in Council* (2) [BODILLY, J. See the proviso to s. 33 of Act XI of 1859.] Besides, the purchase was fraudulently made in the name of nephew. The defendants are entitled to the equitable relief given in *Bhoobun Chunder Sen v. Ram Soonder Surma Mozoomdar* (3). As to the error in naming the proprietor in the sale notice, no doubt no name need be given, but when given, it is submitted that the correct name should be put in: see *Annada Charan Mukhuti v. Kishori Mohon Bai* (4) and *Hem Chandra Chowdhry v. Sarat Kamini Dasya* (5). As to want of notice under s. 5, see *Mohabeer Pershad Singh v. The Collector of Tirhoot* (6). The ground was taken before the Commissioner. See also *Theorutton Singh v. Net Lall Sahu* (7) as to the inadequacy of the price. Babu Umakali Mukerjee, in reply.

Cur. adv. vult.

[114] RAMPINI AND BODILLY, JJ. The suit out of which this appeal arises was brought by the plaintiffs to set aside the sale under Act XI of 1859 of certain shares of mehal Panapur in which they were interested. The sale took place on the 13th December, 1897.

The Subordinate Judge has given the plaintiff a decree. He has held (i) that the sale was brought about by fraud and was therefore void; and (ii) that there were illegalities in connection with the sale, which vitiated it. These illegalities are (a) that in the notice issued under sections 6 and 13 of Act XI of 1859 the names of the proprietors of the shares about to be sold were wrongly described, (b) that this notice did not comply with the provisions of section 13 of the Act, and (c) that it was necessary to issue a notice under section 5 of the Act, and that as no such notice was issued, the sale was illegal and of no effect.

The defendants appeal and impugn the correctness of these conclusions of the Subordinate Judge.

Now, first, as to the alleged fraud. It is averred that the principal defendant Deo Nandan told the plaintiff Agin Singh about two days before the sale that he would pay up the arrears, which amounted to Rs. 145, for which the shares of the estate in question were about to be sold, that he induced Agin Singh to believe this, that he never intended to pay up the arrears, which is shown by the fact that he never paid up the arrears, though the Collector agreed to receive them, and that he brought the share himself for Rs. 800, though he had brought about Rs. 7,000 or 8,000 to pay up the earnest-money on his purchase. On the other hand, the appellants point out that the plaintiff Agin Singh was present at the sale, and must therefore have known that the arrears had not been paid, and so, by paying them himself, might have prevented the sale from taking place.

(1) (1898) I. L. R. 21 Cal. 66.

(2) (1888) I. L. R. 10 Cal. 68.

(3) (1877) I. L. R. 3 Cal. 300.

(4) (1892) 2 C. W. N. 479.

(5) (1902) 6 C. W. N. 526.

(6) (1871) 15 W. R. 137.

(7) (1902) I. L. R. 30 Cal. 1.

We are of opinion that the fraud committed by the defendant Deo Nandan, if any, was not such as to render the sale void. It was not such fraud as brought about the sale. The sale would have taken place whether or not the defendant Deo Nandan had had any communication with the plaintiff Agin Singh or not. The plaintiffs may have a good claim against the defendant Deo Nandan for damages for breach of contract, or for a conveyance in his favour of the plaintiff's share in the estate purchased by him, but they can have no right to have the sale set aside as having been brought about by fraud. In this view we are fortified by the decision of this Court in *Amirunessa Khatoon v. The Secretary of State for India* (1).

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It has been urged before us by Mr. Sinha, for the respondents, that we should give the plaintiffs in this suit the equitable relief to which they would seem to be entitled, as was done in the case of *Bhoobun Chunder Sen v. Ram Soonder Surma Mozoomdar* (2), but we are unable to do so, because many of the defendants in this suit are innocent and *bona fide* purchasers, who were no parties to the fraud, and against whom the plaintiffs have no right to equitable relief.

In respect of the illegalities held by the Subordinate Judge to vitiate the sale, they appear to us to be mere irregularities.

The fact that in the notice under sections 6 and 13 there was entered the name of a deceased proprietor Bikao Singh, who was not the proprietor of the separated share about to be sold, would seem to be immaterial, for the reasons given in the case of *Ram Narain Koe v. Mahabir Pershad Singh* (3). According to the law it is not necessary to enter in a notice under section 6 the names of any proprietors at all. The entry of Bikao Singh's name in the notice was therefore superfluous. To enter wrongly in such a notice that which it is superfluous to enter in it cannot be an illegality, which renders the sale an entire nullity.

The Subordinate Judge finds that the provisions of section 13 were not complied with in this notice, because there is no mention in it of the separate account shares which are excluded. But the details of the shares about to be sold are fully given in the notice and it is explained in a note at the foot of the notice that "when in cols. 5, 7 and 9 there is an entry that only a share is to be sold, then it ought to be understood that there is a separate account in respect of such a share and that other share and shares of the mehal will be exempted from sale." Now, in the notice issued for the sale on the 13th December, 1897, of the shares of the estate of mehal Panapur, there are entries in cols. 5, [116] 7 and 9; so that it should have been understood that there were separate accounts in respect of the other shares and that they were not to be sold. We consequently consider that the provisions of section 13 of the Act were sufficiently complied with.

There remains the contention that no notice under section 5 of the Act was issued; and that in this case it was necessary to issue such a notice and its non-issue vitiates the sale.

It would seem to us, however, that the issue of a notice under section 5 was not required. Such a notice is only necessary when the sale is to take place for arrears other than those of the current year or of the year immediately preceding. The sale took place in December, 1897, for arrears of the June and March kirts of 1897. The demand for the June

(1) (1883) I. L. R. 10 Cal. 68.
(2) (1877) I. L. R. 3 Cal. 300.

(3) (1895) I. L. R. 13 Cal. 208.

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kist was Rs. 94-13-1½ and for the March kist, Rs. 118-8-8½. The arrears for which the property was sold amounted to Rs. 145. It would therefore, appear that the arrears must have been due partly for the June kist and partly for the March kist, payments having satisfied the arrears of all previous kists. But the plaintiffs contend that the Collector's books show that he was in the habit of crediting payments first to current and then to arrear demands, and the Subordinate Judge makes out that adopting this system of apportionment, part of the sum of Rs. 145 was due for arrears of 1895-96. But it would seem to us that the Collector was not bound to apportion the payments in this manner. In making up the account of the arrears before the sale he must have added the payments together, deducted their total amount from the sum of the total demands, and finding that the arrears did not exceed the demands for the kists of March and June, as in fact was the case, issued no notice under section 5, because in the circumstances no notice was necessary under the law. He would seem to us to have been entitled to do so.

However this may be, it cannot, we think, be held that the issue of a notice under section 5 was a condition precedent to the sale taking place, the non-compliance with which makes the sale no sale, as in case of its being found that there were no arrears for which a sale could legally be held: see *Balkishen Das v. Simpson* (1). The non-issue of such a notice would seem to be [117] an irregularity. The opinion to the contrary effect expressed in *Mohabeer Pershad Singh v. The Collector of Tirhoot* (2) is an *obiter dictum* and would seem to be at variance with the views of their Lordships of the Privy Council, as expressed in *Gobind Lal Roy v. Ramjanam Misser* (3). Moreover, the non-issue of a notice under section 5 would seem to be an irregularity of the nature contemplated by section 33 of the Act, and, hence, it must be specified in the appeal to the Commissioner, and if not so specified, cannot be urged in a subsequent suit: *Gobind Lal Roy v. Ramjanam Misser* (3). Now, the particular objection now taken to the non-issue of the notice under section 5 was, strictly speaking, not specified in the appeal to the Commissioner in this case, for the objection taken was as to the non-issue of a notice in respect of a sum of Rs. 206 due for the June kist of 1895, for which it was supposed the estate had been sold. In any case the inadequacy of the price for which the property was sold is neither proved, nor can be inferred, to be the result of the want of this notice under section 5, and accordingly the sale is not voidable on this ground.

For these reasons we decree this appeal with costs.

Appeal allowed.

32 C. 118.

[118] APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

G. S. HAYS v. PADMANAND SINGH.*

[2nd and 10th December, 1903.]

Mesne profits—Limitation—Act (XV of 1877) s. 14 Sch. II, Art. 109—"Cause of a like nature"—Res judicata—Past and future mesne profits, previous suit for—Civil Procedure Code (Act XIV of 1882) s. 13. Expl. III.

*Appeal from Original Decree, No. 233 of 1900, against the decree of Shashi Bhusan Chatterjee, Subordinate Judge of Purneah, dated April 30, 1900.

(1) (1898) I. L. R. 25 Cal. 833; L. R. (3) (1893) I. L. R. 21 Cal. 70; L. R. 20 25 I. A. 151. I. A. 165.

(2) (1871) 15 W. R. 137.