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of bringing the offence within the exception is indeed great; but there may be facts and circumstances proved, which necessarily lead to an inference of consent, and from which the Jury may find that the deceased took the risk of death with his own consent.

I do not understand that Mr. Justice White in the two cases of *Shamshere Khan* v. *Empress* (1) and *Queen* v. *Kukier Mather* (2) meant to lay down any other proposition of law than two: *first*, that the 5th exception to section 300 of the Indian Penal Code should not be taken to be confined to the case where two men by concert fight each other with deadly weapons; but that it may also apply in the case of two bands of men entering into a premeditated fight in concert with each other with deadly weapons: and *second*, that the 5th exception stands upon different grounds from the 4th exception. And so far as these two propositions are concerned, I agree with him. I do not think that the said learned Judge meant to lay down, as he could not lay down, any general rule applicable to all cases of the kind; when in each case, the question must be determined upon evidence whether the deceased took the risk of death with his own consent; and this must necessarily depend upon the particular facts proved. And as I read his judgments, the conclusion that he arrived at was upon the facts proved in each of the two cases before him.

T. A. P.

CIVIL RULE.

Before Mr. Justice Tottenham and Mr. Justice Trevelyan.

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May 14.

BAGAL CHUNDER MOOKERJEE (ONE OF THE JUDGMENT-DEBTORS, OBJECTOR) *v.* RAMESHUR MUNDUL (DECREE-HOLDER) AND ANOTHER (AUCTION-PURCHASER), AND ANOTHER (JUDGMENT-DEBTOR).*

Sale in execution of decree—Setting aside of sale—Irregularity—Civil Procedure Code (Act XIV of 1882), *ss.* 290, 291—*Appeal—Civil Procedure Code Amendment Act of* 1888.

Where a sale in execution of decree was adjourned on the application of one of two judgment-debtors, who waived the issue of a fresh proclamation

* Civil Rule No. 303 of 1891 against the decree of R. F. Rampini, Esq., Judge of Burdwan, dated the 23rd of December 1890, affirming the order of Baboo Kalidhan Chatterjee, Munsiff of Ranigunge, dated the 22nd of February 1890.

(1) I. L. R., 6 Calc., 154. (2) Unreported.

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of sale, and the interests of both were sold,—*Held*, on the application of the other judgment-debtor to set aside the sale, that the omission to issue a fresh proclamation of sale, under section 291 of the Civil Procedure Code, amounted only to an irregularity, and did not vitiate the sale.

Held further, that the District Judge had jurisdiction to hear the appeal from an order passed after the 1st of July 1888, under the Civil Procedure Code Amendment Act of 1888, although the execution proceedings were commenced before that date.

Rameshur Singh v. *Sheodin Singh* (1) and *Satish Chunder Rai Chowdhuri* v. *Thomas* (2) followed in principle.

THIS was an application by one Bagal Chunder Mookerjee, one of the judgment-debtors, under section 311 of the Civil Procedure Code, to set aside a sale in execution of decree.

One Rameshur Mundul in execution of his decree attached mouzah Joalbhangâ and caused a proclamation of sale to be issued. The sale was fixed for the 18th day of June 1888. On that date the other judgment-debtor, Sukhoda Sunderi, applied for postponement of the sale to the 2nd day of July 1888. On the 2nd day of July 1888, the property was sold to one Mohesh Chunder Bhuttacharji, without any fresh proclamation of sale. On the 18th day of July 1888, the petitioner, Bagal Chunder Mookerjee, applied to the first Court to set aside the sale. That Court, on the 22nd day of February 1890, dismissed the petition.

He then appealed to the District Judge, who, on the 23rd day of December 1890, dismissed the appeal, confirming the order of the first Court. The District Judge held that the omission to issue a fresh proclamation amounted only to an irregularity, and that the petitioner did not sustain any substantial injury by reason of such irregularity.

Thereupon the petitioner, on the 19th day of February 1891, obtained from NORRIS and BEVERLEY, JJ., a rule calling upon the opposite party to show cause why the said sale should not be set aside, on the ground that the execution proceedings, in the course of which the sale was held, having been commenced before the 1st day of July 1888, the District Judge had no jurisdiction to hear the appeal, and that the sale having been postponed for more than seven days, and no fresh proclamation having been published, the sale was void.

(1) I. L. R., 12 All., 510. (2) I. L. R., 11 Calc., 658.

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On the rule coming on for argument,

Dr. *Trailokya Nath Mitter* and Baboo *Nalin Ranjan Chatterji*, appeared for the petitioner.

Baboo *Srinath Das* and Baboo *Boikant Nath Das* appeared for the opposite party.

Dr. *Trailokya Nath Mitter*, in support of the rule, contended that the language of section 291 of the Civil Procedure Code was peremptory, and therefore the omission to publish a fresh proclamation of sale vitiated the sale. Section 290 of the Civil Procedure Code must also be followed when under section 291 an adjournment has been allowed, unless both the judgment-debtors waive the issue of a fresh proclamation. *Bakhshi Nand Kishore* v. *Malak Chand* (1), *Sadhu Saran Singh* v. *Panchdeo Lal* (2).

Baboo *Srinath Das* in showing cause against the rule contended that after the adjournment of the sale under section 291 of the Civil Procedure Code, no fresh proclamation was necessary. Illegality consisted in doing a thing which was prohibited by law, but omission to do something prescribed by law was only an irregularity. The sale was good—*Rameshur Singh* v. *Sheodin Singh* (3), *Satish Chunder Rai Chowdhuri* v. *Thomas* (4), *Nana Kumar Roy* v. *Golam Dey* (5).

The judgment of the Court (TOTTENHAM and TREVELYAN, JJ.) was as follows:—

This is a rule obtained by one of two judgment-debtors to show cause why a sale held in execution of a decree against him should not be set aside, as being null and void for default in the issue of a fresh proclamation under section 291 of the Code of Civil Procedure, upon an adjournment being granted at the instance of the other judgment-debtor, who had waived any fresh proclamation.

The present petitioner was no party to the petition for adjournment.

The courts below held, that the omission to issue a fresh proclamation amounted only to an irregularity, and that no substantial injury had thereby been caused to the petitioner.

Another ground, urged for setting aside the decree of the Lower Appellate Court, is that that Court had no jurisdiction to hear the

(1) I. L. R., 7 All., 289.
(2) I. L. R., 14 Calc., 1.
(3) I. L. R., 12 All., 510.
(4) I. L. R., 11 Calc., 658.
(5) I. L. R., 18 Calc., 422.

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appeal, inasmuch as the execution proceedings were commenced before the 1st of July 1888, and when an appeal from the Munsiff's order confirming the sale would lie to the High Court and not the District Judge.

It is not contended that there was any irregularity or defect in the original sale proclamation. And so far as the proclamation that was published is concerned, there has been no transgression of the provisions of section 290.

It has been argued by the vakeel for the petitioner, that section 290 must be equally followed when under section 291 an adjournment has been allowed, unless all the judgment-debtors waive the issue of a fresh proclamation. But we think it clear that this is not so.

For supposing that under section 291 a sale has been, in the discretion of the Court, and not upon application, adjourned for 15 days, and a fresh proclamation has to be published, it would be impossible to hold, that under section 290 it would be illegal to hold such adjourned sale, until after the expiration of at least thirty days from the date of the fixing up of the fresh proclamation in the Court of the Judge.

The High Court at Allahabad has held in *Rameshur Singh* v. *Sheodin Singh* (1), that whereas the doing of a thing by the Court which is prohibited by law is an illegality, which renders the thing done null and void, the omission to do something which is prescribed may be only an irregularity. And in a case very similar to the one before us, this Court has held in *Satish Chunder Rai Chowdhuri* v. *Thomas* (2), that the omission to publish a fresh proclamation was only an irregularity. We see no reason for dissenting from this opinion: and we find that the cases cited on behalf of the petitioner are not on all fours with this one.

As regards the objection taken to the jurisdiction of the District Judge, to hear the appeal, it was not seriously pressed before us; and we are not disposed to attach any weight to it. The amendment of the Procedure Code did not repeal the previous law, but merely altered the forum of appeal in such cases, and we think the District Judge had jurisdiction.

The rule must be discharged with costs.

A. F. M. A. R. *Rule discharged.*

(1) I. L. R., 12 All., 510. (2) I. L. R., 11 Calc., 658.