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PREM SUKH CHUNDER v. INDRO NATH BANERJEE.

We think the case of *Lalla Dabee Pershad* v. *Santo Pershad* (1) was wrongly decided, and that the omission to answer interrogatories delivered after leave granted under section 121 does not render the party so omitting to answer liable to have his defence struck out under section 136.

Before Sir W. Comer Petheram, Kt., C.J., Mr. Justice Pigot, Mr. Justice O'Kinealy, Mr. Justice Macpherson and Mr. Justice Ghose.

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March 24.

NANA KUMAR ROY (JUDGMENT-DEBTOR) *v.* GOLAM CHUNDER DEY (DECREE-HOLDER).*

Sale in execution of decree—Proclamation—Civil Procedure Code, Act XIV of 1882, *ss.* 289, 311, 312—*Substantial injury—Irregularity.*

A sale of revenue-paying land is not *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by section 289 of the Code of Civil Procedure.

An omission so to fix up such notice is an irregularity the remedy for which can only be by an application under section 311.

An order of an Appellate Court under section 312 confirming a sale cannot be the subject of a second appeal.

CASE referred to a Full Bench by PRINSEP and BANERJEE, JJ. The referring order was as follows :—

"This is an appeal by the judgment-debtor against an order of the Judge of Bankura, upholding an order of the Munsiff of Bishenpur, confirming a sale in execution of decree. The Lower Appellate Court has held that as the judgment-debtor has failed to show that the slight damage that he has sustained was brought about by reason of the irregularity complained of, the sale cannot be set aside.

"It is contended for the appellant that as the sale was held without fixing a copy of the sale proclamation in the Collector's office as required by section 289 of the Code of Civil Procedure (the property sold being land paying revenue to Government) it

* Full Bench reference on appeal from Order No. 27 of 1890 from the order of the District Judge of Bankura, dated the 16th November 1889, affirming an order of the Munsiff of Bishenpur, dated the 27th June 1889.

(1) I. L. R., 10 Calc., 505.

was not merely vitiated by a material irregularity, but was absolutely null and void, and should be set aside even if no substantial injury was shown to have resulted by reason of the defect in publishing it.

"In answer to the objection that section 588 of the Code bars an appeal against an Appellate order confirming a sale, it is urged that the application of the judgment-debtor, being one for setting aside a sale that was absolutely void, ought to be regarded, not as one under section 311 of the Code, but as an application invoking the inherent power of the Court to set aside an act of its own which was a nullity; that the order rejecting that application was not an order contemplated by section 312 or section 588, clause 16; that as the decree-holder is the purchaser that order should be regarded as determining a question under clause (*c*) of section 244, and that in that view it is a decree as defined in section 2 of the Code, and a second appeal consequently lies. In support of his contention, the learned vakeel for the appellant cited the cases of *Bakshi Nand Kishore* v. *Malak Chand* (1), *Sadhusaran Singh* v. *Panchdeo Lal* (2), and *Ballodeb Lall Bhagat* v. *Anadi Mohapattur* (3), and also an unreported decision of this Court in Appeal from Order No. 324 of 1888, *Manada Sunduri Debi* v. *Ramranjan Chuckerbutti*.

"In our opinion the appellant's contention does not appear to be sound. We do not see any reason why the defect in the publication of the sale proclamation here complained of should be regarded as anything more than a material irregularity as contemplated by section 311. This is the view that has been taken of the matter in several cases, of which we may notice the following:—*Bandy Ali* v. *Madhub Chunder Nag* (4), *Tripura Sunduri* v. *Durga Churn Pal* (5), and *Satish Chunder Rai Chowdhry* v. *Thomas* (6).

"If this view is correct, the appeal will fail as well on the merits as on the preliminary ground that a second appeal is barred in this case under section 588, the order complained of being one

(1) I. L. R., 7 All., 289.
(2) I. L. R., 14 Calc., 1.
(3) I. L. R., 10 Calc., 410.
(4) I. L. R., 8 Calc., 932.
(5) I. L. R., 11 Calc., 74.
(6) I. L. R., 11 Calc., 658.

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specified in that section, and therefore not being a decree as defined in section 2.

"The reported cases cited for the appellant are not exactly in point. But the unreported decision referred to above does support the appellant's contention; and as it is in conflict with our view and with some of the cases mentioned above, we think it necessary to refer the following questions to a Full Bench:—

"*First.*—'Whether an appeal lies against an order of an Appellate Court upholding an order of the First Court confirming an execution sale of land paying revenue to Government, when such sale is held without fixing a copy of the sale proclamation in the Collector's office, as required by section 289 of the Code of Civil Procedure, and the decree-holder is the purchaser.'

"*Second.*—'Whether an execution sale of land paying revenue to Government, held without fixing a copy of the sale proclamation in the Collector's office, as required by section 289 of the Code of Civil Procedure, is liable to be set aside without any proof of substantial injury by reason of the defect in publishing the sale.'"

Baboo *Karuna Sindhu Mukerji* for the appellant—As to the objection taken before the Division Bench that no second appeal lies in this case, inasmuch as section 588 of the Code bars an appeal against an appellate order confirming a sale, I say that the application of the judgment-debtor being one to set aside a sale which was absolutely void, ought to be regarded, not as one under section 311 of the Code, but as an application invoking the inherent power of the Court to set aside an act of its own which was a nullity. The order rejecting the application was, the decree-holder being the purchaser, appealable as having determined a question under clause (*c*) of section 244 of the Code.—*Balladeb Lall Bhagat* v. *Anadi Mohapattur* (1), *Basharutulla* v. *Uma Churn Dutt* (2), *Viraraghada Ayyangar* v. *Venkatacharyar* (3), *Saroda Churn Chuckerbutty* v. *Mahomed Isuf Meah* (4). On the merits, section 289 of the Code has not been complied with, the proclamation not having been fixed up in the Collectorate. This makes the sale void, and it ought to be set aside,

(1) I. L. R., 10 Calc., 410.
(2) I. L. R., 16 Calc., 794.
(3) I. L. R., 5 Mad., 217.
(4) I. L. R., 11 Calc., 376.

even though no substantial injury has been shown to have resulted from the defect in publishing. I refer to *Sadhusaran Singh* v. *Panch Deo Lal* (1), *Bakshi Nand Kishore* v. *Malak Chand* (2), *Ganga Prasad* v. *Jag Lal Rai* (3). An infringement of section 290 of the Code has been held to be not merely an irregularity, but a vitiation of the sale—*Sadhusaran Singh* v. *Panch Deo Lal* (1). The general rule to be deduced from section 311 is that every irregularity vitiates a sale and makes it void. The case of *Mohendro Narain Chaturaj* v. *Gopal Mundul* (4) points out what is an irregularity in publishing, and that non-publication of a notice is not an irregularity, but is a defect vitiating the sale. In *Indro Chunder* v. *Dunlop* (5), which was a case of the validity of an attachment, it was held that the omission to fix the notice up in the Collectorate rendered the attachment bad. The unreported case of *Manada Sunduri Debi* v. *Ramranjan Chuckerbutti* (6) is in my favor.

Baboo *Srinath Das* (with him Baboo *Nil Madhub Sen*) for the respondent:—As a principle of interpretation of statutes a distinction must be drawn between cases in which an official omits to do something which a statute enacts shall be done, and cases in which he does something which a statute enacts shall not be done. In the former case the omission may not amount to more than an irregularity in procedure; in the latter the doing of the thing prohibited is illegal—*Rameshur Singh* v. *Sheodin Singh* (7). In the present case the omission to fix up the notice is an irregularity of procedure only, and that is not sufficient alone to set aside a sale—see *Joy Tara Dossee* v. *Mahomed Hossein* (8), *Nilmonee Shaha* v. *Ram Churn Deb* (9), *Sheo Prokash Misser* v. *Hurdai Narain* (10). As to the question whether an appeal lies, the definition of the word "decree" in section 2 of the Code shows that an order determining a question referred to in section 244 not specified in section 588 is a "decree." Here the matter is specified in section 588.

(1) I. L. R., 14 Calc., 1.
(2) I. L. R., 7 All., 289.
(3) I. L. R., 11 All., 333.
(4) I. L. R., 17 Calc., 782.
(5) 10 W. R., 264.
(6) Mis. App. No. 324 of 1888.
(7) I. L. R., 12 All., 510.
(8) 2 W. R. Mis., 2.
(9) 6 W. R. Mis., 45.
(10) 22 W. R., 550.

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The opinion of the Court (PETHERAM, C.J., PIGOT, O'KINEALY, MACPHERSON and GHOSE, JJ.) was as follows:—

The answer to both questions put to us on this reference depends, in truth, upon one point alone, namely, whether the sale of revenue-paying land is *ipso facto* void by reason of a copy of the sale proclamation not having been fixed up in the Collector's office as required by section 289 of the Code of Civil Procedure. That question, we think, must be answered in the negative. There is nothing in the Code of Civil Procedure which renders that formality a necessary preliminary to the validity of the sale. We express no opinion in answering the questions now before us upon the question which has been decided by the Allahabad Court in *Jasoda* v. *Mathura Das* (1), and *Ganga Prasad* v. *Jag Lal Rai* (2), namely, whether non-compliance with the requirements of section 290 of the Code of Civil Procedure does or does not invalidate a sale held, or purporting to be held, under Chapter XIX. That question is not before us, and we do not deal with it. In the present case we are of opinion that the omission to fix up a copy of the sale proclamation in the Collector's office, in neglect of the provisions of section 289 of the Code, was an irregularity the remedy for which can only be by an application under section 311.

Being of opinion that the sale in question is not invalidated by the omission referred to, we think that the first question must be answered in the negative, inasmuch as an appeal from an order dismissing an application under section 311 of the Code cannot be the subject-matter of a second appeal. Both questions submitted to us by the referring Bench must therefore be answered in the negative.

T. A. P.

(1) I. L. R., 9 All., 511.

(2) I. L. R., 11 All., 333.