

with the decisions of this Court that the defendant is not released by the section of any portion of his liability, unless he pays the amount which the assignee himself paid for the claim. The decision of course concludes this case, and in accordance with it this appeal will be dismissed with costs (1).

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SEN.

Appeal dismissed.

Attorney for the appellant : Baboo *Grish Chandra Sett.*

Attorneys for the respondent : Messrs. *Swinhoe & Chunder.*

J. V. W.

APPELLATE CIVIL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

GOPI KOBRI AND ANOTHER (JUDGMENT-DEBTORS) v. GOPI LAL (DECREE-HOLDER) AND ANOTHER (AUCTION-PURCHASER).*

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April 27

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June 5.

Second Appeal—Civil Procedure Code, 1882, sections 588, 622—Appeal from order—Order passed in Appeal reversing lower Court's order setting aside a sale in execution of Decree—Sale in execution of Decree—Setting aside sale—Material irregularity—Inadequacy of price—Revisional Power of High Court.

Under the provisions of section 588 of the Code of Civil Procedure no second appeal lies to the High Court from an order passed in appeal by a District Judge on an application by a judgment-debtor to have a sale in execution of a decree set aside on the ground of material irregularity.

A judgment-debtor applied to have a sale in execution of a decree set aside on the ground that the sale proclamation had not been duly published, and that it referred to only 5 *bighas* instead of some 700, the actual amount, and that in consequence thereof a grossly inadequate price had been obtained for the property. The Munsif found these allegations to be proved and set aside the sale. On appeal the District Judge, while agreeing with the Munsif as to these findings, held that there was no proof that the inadequacy of price was due to irregularities alleged and proved and that such could not be presumed. He accordingly reversed the Munsif's order. The judgment-debtor, having appealed to the High Court against the order of the District Judge and failed in such appeal by reason of no second appeal lying from such order,

*Appeal from Order No. 150 of 1893, and Civil Rule No. 806 of 1894, against the order of F. W. Budeock, Esq., District Judge of Bhagnipur, dated the 2nd of May 1893, reversing the order of Babu Bopin Behary Mukerjee, Munsif of Beguserai, dated the 20th of February 1893.

(1) An application for review of this decision was made on the 9th of July 1894, but was refused. Rep. note.

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applied to the High Court under the provisions of section 622 of the Code to have the order set aside.

Held, that the District Judge having full jurisdiction to determine whether the sale was good or bad, it was impossible to say that, in arriving at the decision he did, he either acted without jurisdiction or illegally in the exercise of his jurisdiction, and that the High Court could not therefore interfere with the order under that section.

THIS was an appeal from an order passed by the District Judge of Bhagulpur, reversing an order of the Munsif of Beguserai, setting aside a sale of certain immoveable property held in execution of a decree.

The application was made by the judgment-debtors, and the allegation was that there had been material irregularity in the conduct of the sale, and consequently the price fetched was far below the actual value of the property. The auction-purchaser resisted the application, but the decree-holder did not appear to oppose.

It appeared that the judgment-debtors had a 2-annas odd share in *taluk* Bullubhpur and Singpur, which contained 1,839 acres of land, but in the sale proclamation the area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office, nor was the proclamation at the spot properly proved; that the price fetched was only Rs. 375, which was less than the revenue payable for the share, which was Rs. 385 odd.

The Munsif having found these facts proved held that the presumption was that the inadequate price fetched was due to the irregularities in the publication of the sale, and consequently ordered the sale to be set aside.

The auction-purchaser appealed to the District Judge, who reversed the Munsif's decision and dismissed the application. The following was the judgment:—

“The judgment-debtors applied to have a sale set aside. The Munsif set aside the sale and the auction-purchaser appeals. The Munsif has found that the judgment-debtors had a 2-annas odd share in *taluk* Bullubhpur and Singpur which contains 1,839 acres of land, but in the sale proclamation the area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office; that the proclamation at the village was not properly proved, and that the price realized, Rs. 375, was inadequate.

“ On the evidence I see no reason to differ from the Munsif’s findings of fact ; but the appellant’s pleader argues that there is no proof that the inadequacy of price was due to the irregularities alleged. He quotes the cases of *Macnaghten v. Mahabir Pershad Singh* (1), *Tripura Sundari v. Durga Churn Pal* (2) and *Arunachellam v. Arunachellam* (3). ”

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“ The effect of these rulings is that there must be proof that the inadequate price was due to the irregularities. In the present case the real area was about 700 *bighas*, but in the sale proclamation the area is put at 5 *bighas*. This no doubt raises a strong presumption that the irregularities were the cause of the inadequate price ; but apparently from the rulings above quoted this is not sufficient. The applicant called three witnesses who speak to the value of the property ; but they do not appear to be men of means, nor do they say what amount they would have bid for the property if they had been aware of the sale. One of them, indeed, Chowdry Roghunath, says that the *maliks* would have bid more, but in this point the *maliks* were the best witnesses.

“ No one has been called to say what he would have bid, nor is there any proof that there was a scarcity of bidders.

“ On the ground that the applicant has failed to prove any connection between the irregularities and the inadequate price I think the decision of the Munsif must be set aside. The appeal is decreed with costs.”

The judgment-debtors appealed to the High Court.

The *Advocate-General* (Sir Charles Paul) and Babu *Saligram Singh* for the appellants.

Mr. *J. T. Woodroffe*, Mr. *C. Gregory* and Babu *Kali Kishen Sen* for the respondent.

At the hearing of the appeal Mr. *Woodroffe* took the preliminary objection that, having regard to the provisions of section 588 of the Code of Civil Procedure, no second appeal lay from the Judge’s order.

The judgment of the High Court (GHOSH and GORDON, JJ.) was as follows :—

(1) I. L. R., 9 Calc., 656.

(2) I. L. R., 11 Calc., 74.

(3) I. L. R., 12 Mad., 19.

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We think that the preliminary objection that has been raised by Mr. Woodroffe on behalf of the respondent ought to prevail, that objection being that no second appeal lies to this Court in this case, because the order of the Court of Appeal below is an order falling within section 588 of the Code of Civil Procedure.

This appeal will accordingly be dismissed with costs.

A rule was then applied for and issued on the application of the Advocate-General on behalf of the judgment-debtors calling on the auction-purchaser to show cause why the order of the District Judge confirming the sale should not be set aside, the application being made under section 622 of the Code of Civil Procedure.

That rule came on to be heard on the 5th June.

The *Advocate-General* (Sir Charles Paul) and Babu *Saligram Singh* in support of the rule.

Sir *Griffith Evans*, Mr. *T. A. Apear*, Mr. *C. Gregory* and Babu *Kali Kishen Sen* for the auction-purchaser.

Sir *Griffith Evans*.—This Court has no power to interfere in this case with the decision of the District Judge under section 622. It can only act under that section in cases where the lower Court has exercised a jurisdiction not vested in it by law, failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally, or with material irregularity. Assuming in this case that the decision of the District Judge is erroneous, all that can be said is that he has come to a wrong decision in the case. He had perfect jurisdiction to decide the question before him, and it cannot be said that, even if he has come to an erroneous legal conclusion, he has exercised his jurisdiction illegally or with material irregularity.

The Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (1) have laid down that a Court having jurisdiction cannot, only on the ground that it has arrived at an erroneous conclusion, be said to have exercised its jurisdiction illegally, or with material irregularity; and the same principle is affirmed in *Muhammad Yusuf Khan v. Abdul Rahman Khan* (2).

The words "material irregularity" do not apply to an erroneous legal conclusion, but only to such matters as an irregularity

(1) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.

(2) L. L. R., 16 Calc., 749; L. R., 16 I. A., 104.

in the procedure materially affecting the merits of the case—*Sew Bux Boyla v. Shib Chunder Sen* (1). In this Court it has been held [see *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (2)], that the erroneous application of the wrong statute to a case resulting in a decision that a suit will not lie, constitutes a material irregularity within the section. The provisions of the section are very fully discussed in a case before the Full Bench of the Madras High Court—*Manisha Eradi v. Siyali Koya* (3)—where it was held that a Court, by erroneously determining a preliminary question, cannot assume jurisdiction which it would not otherwise have, and that the section applied in such a case; but that in a case in which upon the facts found by the Subordinate Court, that Court has jurisdiction according to law, and there is no material irregularity in its procedure affecting the question of jurisdiction, the High Court cannot interfere under the section, though the decision of the lower Court on the merits or on any preliminary question is erroneous in law. See also *Bhashyam v. Jayaram* (4).

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The Bombay Court has held that the decision of a question of *res judicata* though wrong did not warrant the interference of the High Court under section 622—*Amritrav Krishna Deshpande v. Balkrishna Ganesh Amrapurkar* (5). In *Venkubai v. Lakshman Venkoba Khot* (6) Birdwood, J., discusses the case of *Amir Hassan Khan v. Sheo Baksh Singh* (7), and points out what he considers to amount to a material irregularity, but I submit his view is erroneous, and even that case does not cover this one.

In this case the most that can be said is that the lower Court has come to an erroneous conclusion on a question of law, even if it be assumed that the decision is erroneous, and as it had full jurisdiction to decide that question it follows, having regard to the decision in the Privy Council cases cited above, that this Court cannot interfere under section 622, and this rule should therefore be discharged.

The *Advocate-General* in support of the rule.—I shall contend (1st) that there was want of jurisdiction in the District Judge to

(1) I. L. R., 13 Calc., 225.

(4) I. L. R., 11 Mad., 303.

(2) I. L. R., 15 Calc., 47.

(5) I. L. R., 11 Bom., 488.

(3) I. L. R., 11 Mad., 220.

(6) I. L. R., 12 Bom., 617.

(7) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237.

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confirm the sale ; and (2nd) that if he had jurisdiction he acted illegally in the exercise of his jurisdiction.

As soon as the Judge found, as he practically did, that the sale proclamation had not been duly published, he was bound to refuse to confirm the sale. One cannot confirm that which does not exist. A Judge who records a judgment in ignorance, misconception or contravention of a plain rule of law well established acts "illegally." In this case the Judge, citing certain cases, considered that he could not give effect to a presumption naturally and reasonably arising in the case to the effect that the inadequacy of price was due to the irregularities alleged—amongst others to the mistake in the sale proclamation of 5 *bighas* instead of about 700 *bighas*—on the authority of those cases. He considered that according to those cases there must be specific oral evidence connecting the irregularities (the cause) with the inadequacy of price (the effect.)

I submit that the cases cited do not lay down the broad proposition indicated, and even if they do those decisions have been explained in a decision of a more recent date not cited by the District Judge, *viz*, *Gur Buksh Lall v. Jawahir Singh* (1), in which it was held that the relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence or be inferred, where such inference is reasonable, from the nature of the irregularity and the extent of the inadequacy of price. That case clearly applies to this, and I therefore submit that the District Judge acted illegally as above described.

In *Jugobundhu Pattuck v. Jadu Ghose Alkushi* (2) it was held that a Judge who misconstrued a provision of an Act in such a way as to decline jurisdiction committed an error within the meaning of section 622, and the High Court (Petheram, C.J., and Ghose J.) set aside his judgment ; and I contend that there is no real difference between misconstruction of a statutory law and a rule of law well established, and therefore I further submit that the present case is governed by the case last cited.

In *Lakshmana v. Najimudin* (3) the Madras High Court set aside an erroneous order of a Judge in a case under section 311 by virtue of the powers conferred by section 622.

(1) I. L. R., 20 Cal., 599.

(2) I. L. R., 15 Cal., 47.

(3) I. L. R., 9. Mad., 145.

In *Dagdusa Tilakchand v. Bhukan Govind Shet* (1) the Bombay Court pointed out that in any case where there is a disregard of the law amounting to an excess of jurisdiction, or a perversion of the purposes of the Legislature, the High Court will interfere under its extraordinary jurisdiction where no other remedy is available.

The Privy Council cases cited on the subject of section 622 laid down that where there is no appeal, section 622 shall not be used in the same way as an appeal to set aside a decision erroneous in law. The decisions go no further, and do not apply to erroneous decisions within section 622 with which the High Court can interfere. The cases above cited—*Gur Buksh Lall v. Jawahir Singh* (2) and *Lakshmana v. Najimudin* (3) clearly show when the High Court can interfere with erroneous decisions under section 622.

Finally, I submit that when the District Judge found that there was no actual sale he had no jurisdiction to confirm it. In confirming the sale he acted without jurisdiction. He also acted illegally, having jurisdiction, in deciding that cause and effect could not be presumed under the admitted circumstances such as existed here, namely, clear mistake of 5 *bighas* sold instead of about 700 *bighas* and the price being clearly grossly inadequate. Under these circumstances I submit that the judgment should be set aside.

The judgment of the High Court (GHOSE and GORDON, JJ.) was as follows :—

This was a rule calling upon the opposite side, the purchaser at an execution sale, to shew cause why the order of the District Judge of Bhagalpur confirming the sale should not be set aside.

The Judge has found, in concurrence with the Munsif, that the judgment-debtor had a 2-annas and odd *gundas* share in *taluk* Bullubhpur and Singpur, which contains an area of 1,839 acres of land, but that in the sale proclamation the area was put down as 5 *bighas*; that the sale proclamation was not stuck up at the Collector's Office; that the proclamation of sale at the village has not been properly proved, and that the price realized at the sale (Rs. 375) is inadequate. But he is of opinion that there is no direct proof

(3) I. L. R., 9 Bom., 82.

(4) I. L. R., 20 Calc., 599.

(3) I. L. R., 9 Mad., 145.

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(for that is how we understand his judgment) that the inadequacy of price was due to the irregularities ; and in this view he has held that the sale should be affirmed, relying, upon among others, the well-known case of *Macnaughten v. Mahabir Pershad Singh* (1).

The learned Advocate General in support of the rule has contended that the District Judge has fallen into a serious mistake in holding that there must be direct proof of the inadequacy of price being occasioned by the irregularities, and that, as held in the case of *Gur Bulsh Lall v. Juvahir Singh* (2) the relative cause and effect between a proved material irregularity and inadequacy of price may either be established by direct evidence, or may be inferred from circumstances. He has further contended that the Judge has not considered whether the sale was not altogether bad by reason of the sale notifications having not been published or proved to have been published.

If the case had come up before us in appeal we should have perhaps been prepared to say that the contention of the Advocate-General was correct.

But then the question is, whether it is competent to us to interfere with the order of the District Judge under section 622 of the Code of Civil Procedure.

What the Judge was called upon to determine on the appeal before him was, whether the sale was a good or bad sale. He has held the sale to be good. He had full jurisdiction to determine this question, one way or the other ; and we are unable to say that, in the decision he has arrived at, he has in any way acted without jurisdiction, or, in the exercise of his jurisdiction, he has acted illegally. All that can possibly be said is, that the Judge has committed errors in law, but we cannot say that in that respect he has acted illegally in the exercise of his jurisdiction. .

Upon this ground we are unable to interfere with the order of the District Judge ; the result being that this rule will be discharged, but without costs.

Appeal dismissed and rule discharged.

H. T. H.

(1) I. L. R., 9 Cal., 656.

(2) I. L. R., 20 Cal., 599.