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PULIN CHANDRA ROY v. AKBAR HOSSEIN.

It comes to this, then, that the plaintiff's property was sold under the "certificate proceedings" to a third party, and that the proceeds of the sale have found their way into the defendant's hands. The plaintiff has chosen to affirm that sale, and what he is in our opinion entitled to, is to recover from the defendant the proceeds of the sale which have come into the hands of the latter; that is to say, a sum bearing to the Rs. 250 realized by the sale of the whole property under the certificate the proportion borne by 38 bighas 9½ cottahs to 152 bighas 3 cottahs and ½ chittack, and we decree accordingly. The liability for arrears of road cess was, in our opinion, personal to the defendant alone. Under all the circumstances of the case, we think it unnecessary to make any order as to costs.

J. V. W. *Decree varied.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

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June 22.

MAHOMED AZHAR (PLAINTIFF) *v.* RAJ CHUNDER ROY AND OTHERS (DEFENDANTS).*

Sale for arrears of revenue—Suit to set aside sale—Notice of sale, publication of—Act XI of 1859, *ss.* 5 *and* 7.

Where it was contended that a sale under Act XI of 1859 was bad on the ground that the notices prescribed by sections 5 and 7 of that Act were not published, *held*, that there being no subsisting attachment on the property at the time it was sold, omission to issue notice under section 5 did not vitiate the sale.

Held that, in the absence of proof that the plaintiff had sustained substantial injury on account of the omission to issue notice under section 7, such omission did not invalidate the sale.

THE plaintiff in this case sued to set aside a revenue sale, and recover possession of a share in a *khariji* taluk. The taluk was divided into two shares, one of 13 annas 8 gundas 3 cowries, and the other of 2 annas 11 gundas 1 cowri, and of these separate shares separate accounts were kept in the Collector's *towji*. The plaintiff was owner of 5 annas of the 13 annas 8 gundas 3 cowries share in the payment of the revenue of which default was made in January 1889, and the estate was sold by the Collector on 21st March 1889 under Act XI of 1859.

* Appeal from Original Decree No. 261 of 1891, against the decree of Babu Kali Churn Ghosal, Subordinate Judge of Mymensingh, dated the 24th of June 1891.

The defendants were the owners of the remaining 8 annas 8 gundas 3 cowries of the share of 13 annas 8 gundas 3 cowries sold. The Secretary of State was also made a party defendant to the suit.

The plaintiff applied to the Commissioner of Dacca to set aside the sale under section 33 of Act XI of 1859, but the application was refused.

The plaintiff sought by suit to set aside the sale on various grounds, those material to this report being that the notices required by the law (ss. 5 and 7 of Act XI of 1859) were not duly published, and that the estate was under attachment by order of a civil court at the time of the sale; that there was fraud by the defendants in the matter of the sale; and that consequently the property fetched an inadequate price by which the plaintiff sustained substantial injury.

The facts relating to the attachment which it was alleged subsisted on the estate at the time of sale are stated in the judgment of the High Court.

The Subordinate Judge held that the sale notices were duly served; that there was no subsisting attachment at the time of sale; and that no fraud had been established, and refused to set aside the sale.

From this decision the plaintiff appealed to the High Court.

Dr. *Troylukya Nath Mitter*, Moulvi *Serajul Islam*, Babu *Joy Gopal Ghose*, and Moulvi *Shamsul Huda* for the appellant.

Dr. *Rash Behari Ghose* and Babu *Jogesh Chunder Roy* for the respondents.

Dr. *Troylukya Nath Mitter*:—In this case the property sold was under attachment, and it is admitted that the provisions of section 5, Act XI of 1859, were not complied with. That by itself makes the sale bad. The ruling in *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1) is very clear on the point, that non-compliance with the provisions of section 5, Act XI of 1859, is an irregularity—*Gobind Lall Roy* v. *Biprodas Roy* (2). The effect of the order striking off the execution proceedings was not to remove the attachment. The Appellate Court could not, and did not, set aside the decree so far as it affected the debtor, who did not apply

(1) 12 B. L. R., 297; L. R., 1 I. A., 89.

(2) I. L. R., 17 Calc., 398.

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to have the decree set aside. Notices were not served under section 7 of the Act, which also makes the sale bad, and also taking into consideration that the price fetched was wholly inadequate, the sale should be set aside.

Babu *Jagesh Chunder Roy*, for the respondents:—Omission to serve notices under section 5 was an irregularity, and under section 33 of Act XI of 1859, it ought to have been made a ground of appeal before the Commissioner. When the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1) was before the High Court, it was remanded for the trial of the issue "whether there was substantial injury owing to the non-compliance of the provisions of section 5," and the Judges would not have remanded the case if they considered the non-compliance of the provisions of section 5 was in itself an illegality which vitiated the sale. The case of *Govind Lall Roy* v. *Biprodas Roy* (2) is based on the Full Bench case *Lala Mobaruk Lal* v. *the Secretary of State for India in Council* (3). But the Full Bench case is only an authority so far as non-compliance with the provisions of section 6, Act XI of 1859, is concerned. It does not lay down that non-compliance with the provisions of section 5 is an irregularity. It would be difficult to say what is an irregularity and what is an illegality. The effect of the orders striking off the execution proceedings was to remove the attachment, inasmuch as the entire decree was set aside, and there being no subsisting decree, the attachment was at an end—*Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (4). The omission to serve notices under section 7 is not an irregularity for which a sale could be set aside; the object of such notice was merely to prevent the ryots from paying rent to the defaulter, and it could not be possibly urged that there was substantial injury owing to the tenants not receiving the notice, see *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (5).

The judgment of the Court (MACPHERSON and BANERJEE JJ.) was as follows:—

The plaintiff is the proprietor of a five-annas share of the estate referred to in the plaint. On the 21st March 1889, a 13 annas

(1) 12 B. L. R., 297; L. R., 1 I. A., 89.
(2) I. L. R., 17 Calc., 398.
(3) I. L. R., 11 Calc., 200.
(4) 12 B. L. R., 411; 20 W. R., 133.
(5) 13 C. L. R., 1.

8 gundas 3 cowris share of that estate, including the plaintiff's five-anna share, was sold by the Collector for arrears of revenue under the provisions of Act XI of 1859. This suit is brought to set aside that sale on the ground of the various illegalities or irregularities set out in the plaint.

The Subordinate Judge has dismissed the suit, holding that no illegality or irregularity has been proved.

It is now contended that the sale is bad on the ground that the notices prescribed by sections 5 and 7 of Act XI of 1859 were not published, and this is the only ground which we need consider. Section 5 of Act XI of 1859 provides that no estate and no share or interest in any estate shall be sold for the recovery of arrears if such estate is under attachment by order of any judicial authority or managed by the Collector in accordance with such order, unless the special notification provided by that section has been published.

Section 7 provides for a prohibitory notice on the ryots and tenants of the estate in default, forbidding them to pay rent to the defaulting proprietor after the day fixed for the last day of payment. It is conceded that no notice under section 5 was published, and that the estate had been attached; but it is contended that the attachment was not subsisting at the time when the arrear became due and when the estate was sold; and that it is necessary, as it undoubtedly is, in order to bring that section into operation, that the attachment should be a subsisting one.

The facts in connection with the attachment, which was effected in November 1886, are these:—On the 14th December 1881, Ram Ganga Saha obtained a decree for a sum of money due on a mortgage bond against some of the defaulting proprietors. That decree was *ex parte* as regards some only of the defendants in the suit, and it declared that the money was a charge on the mortgaged property. In August 1886, the decree-holder took out execution of the decree, and in October of the same year, while the execution proceedings were pending, Mahomed Mazahar, one of the judgment-debtors, objected to the execution on the ground that the decree against him was *ex-parte*, and that he was not bound by it. The Judge on his appeal set aside the *ex-parte* decree as against him at least, and directed a new trial. The case was re-heard, but it is not clear whether the re-hearing was intended to

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affect Mahomed Mazahar only, or all the defendants in the suit. But, however that may be, on the 17th December 1887, the Munsif made a fresh decree as against all the defendants; and this decree practically superseded the decree which had been originally made. It was a decree for a different sum of money, and it directed that the mortgaged property should be sold in satisfaction of the decree if the amount was not paid within two months from the date on which the decree was signed. In January 1887, the Munsif before whom the execution proceedings were pending, made this order: "The Appellate Court has reversed the Lower Court's decree and has ordered the trial of the case. The execution proceedings may therefore be stopped. Case struck off."

We think that the Subordinate Judge was quite right in holding that the attachment ceased to have effect. Whether the Court was right or wrong in making a fresh decree as against all the defendants, the fact remains that it did do so, and no further proceedings were taken by the decree-holder in connection with the execution case which was struck off in January 1887. In the case of *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry* (1) the Judicial Committee of Her Majesty's Privy Council considered the effect upon an attachment of the striking off of the execution case in which that attachment had been made, and came to the conclusion that no hard-and-fast rule could be laid down, and that each case must be dealt with by itself. Here we have no doubt that it was the intention of the Court that the execution proceedings should cease altogether pending the retrial of the case, and that also from the circumstances must have been the impression of the decree-holder. Taking into consideration, then, the circumstance that the case was struck off on the ground that the execution could not proceed, that a new decree which practically superseded the old decree was made, and that *that* decree contained a direction for the sale of the property, a direction which rendered any further proceedings under the attachment unnecessary, we think it is clear that the Subordinate Judge has come to a right conclusion in holding that there was no subsisting attachment on this property. In this view it is unnecessary for us to consider whether the omission to comply with provisions of section 5 of Act XI of 1859 was an

(1) 12 B. L. R. 411; 20 W. R. 133.

illegality or irregularity. In the case of *Gobind Lal Roy* v. *Biprodas Roy* (1) decided by a Division Bench of this Court, it was held to be an illegality. In the earlier case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (2), which eventually went before the Judicial Committee of Her Majesty's Privy Council, the omission to serve a notice under section 5 was treated as an irregularity only. The question whether it was an irregularity or illegality does not appear to have been raised before the Judicial Committee, whose decision turned upon the construction to be put upon the following words of section 5: "arrears of estates under attachment by order of any judicial authority or managed by the Collector in accordance with such order."

As regards the notice under section 7, there is a conflict of evidence as to whether this notice was or was not issued. We think that the question is immaterial, because the plaintiff has failed to prove what he was bound to prove under section 33 of the Act, namely, that in consequence of the irregularity he has sustained substantial injury. Some evidence has been given and is unrebutted, that the property was sold for less than its real value; and there is no evidence to connect the inadequacy of price with the irregularity complained of under section 7, and, as observed in the case of *Gobind Chundra Gangopadhya* v. *Sherajunnissa Bibi* (3), no injury could have resulted to the judgment-debtor from the omission to serve the notice prescribed by that section; the only object and effect of such a notice being to prevent the tenants from paying rent to the defaulting proprietors. We think, therefore, that the appeal fails on the only grounds advanced before us.

We would say a word in connection with the inadequacy of price complained of by the appellant. We are not at all satisfied that this inadequacy was in any way attributable to any irregularity in publishing or conducting the sale. It appears that in February 1887, Omda Bewa Bibi obtained a decree against the present appellant and some of the co-sharers for possession of an eight-anna share in this estate after foreclosure of a mortgage. It is

(1) I. L. R., 17 Calc., 398.
(2) 12 B. L. R. 297; L. R. 1 I. A., 89.
(3) 13 C. L. R., 1.

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quite possible that this decree was a collusive one obtained in order to put the property beyond the reach of creditors; but whether it was collusive or otherwise, the effect on intending purchasers might very well be to prevent them from bidding anything approaching the real value of the property. The estate was sold subject to all existing encumbrances, and even if the purchaser considered that he was in a position to get that decree set aside, he purchased the property knowing almost to a certainty that he purchased it subject to a law suit.

There is one other point, and that is as to the costs which the Lower Court allowed to the defendants. Five sets of costs were allowed. One of them was in favour of the Secretary of State, and with that we think there is no ground for our interference. The remaining four sets have been allowed to different defendants who had put in an appearance by different pleaders, but their defence was substantially the same. We think that there was no occasion for the Court to allow these defendants separate costs amounting in all to a very considerable sum. The amount awarded in the Lower Court as the costs of the Secretary of State will stand, but the decree, in so far as it allows the sum of Rs. 300 to costs of the remaining four sets of defendants as pleaders' fees, will be set aside, and in substitution of that sum we allow a total sum of Rs. 600 for pleaders' fees, which will be divided equally between them.

As regards the costs in this Court, the respondents who have appeared will get one set of costs.

C. S. *Appeal dismissed.*

Before Mr. Justice Macpherson and Mr. Justice Banerjee.

1893 *July* 13.

AZIMUDDIN PATWARI (PLAINTIFF) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).*

Sale for arrears of revenue—Sunset Law—Bengal Act VII of 1868, *s.* 11—*Revenue Sale Law* (*Act XI of* 1859), *s.* 6.

Section 11 of Bengal Act VII of 1868 makes the Sunset Law as enacted in s. 6 of Act XI of 1859 applicable to sales of tenures under the former

* Appeal from Original Decree, No. 158 of 1892, against the decree of W. H. M. Gun, Esq., District Judge of Noakhali, dated the 30th of March 1892.