

Before Sir Francis William Maclean, Knight, Chief Justice, and Mr. Justice Banerjee.

1897
April 26.

KHETTER NATH BISWAS (AUCTION-PURCHASER) v. FAIZUDDIN ALI AND ANOTHER (DECREE-HOLDERS) AND OTHERS (JUDGMENT-DEBTORS).*

Sale in execution of decree—Sale under mortgage decree—Sale in execution of a money decree, effect of, before the sale in execution of mortgage decree confirmed—Code of Civil Procedure (Act XIV of 1882), sections 310A, 311, 312, 314 and 316—Effect of sale not being set aside either under section 310A or 311 of the Code.

A certain property was sold on the 16th August 1895 in execution of a mortgage decree, dated 9th December 1892, and was purchased by A. In the meantime an eight annas share of the said property was sold in execution of a money decree and was purchased by R on the 22nd May 1893. On the 14th September 1895 the judgment-debtor applied to set aside the mortgage sale under section 311 of the Code of Civil Procedure, and on the 14th September 1895 a similar application was made by R. On the 28th March 1896 both these applications came on for hearing before the Subordinate Judge who passed no order; and on the same date R presented a petition, asking the Court to set aside the sale held in execution of the mortgage decree upon payment by him of the mortgage money, with interest and costs, and also to declare that he might be entitled to redeem the property. On the 30th March 1895 the Subordinate Judge allowed the petition and ordered the sale to be set aside upon the aforesaid terms.

Held, that, inasmuch as under section 312 of the Code of Civil Procedure A was entitled to have an order confirming the sale of the 16th August 1895, unless the sale were set aside under section 310A or section 311 of the Code of Civil Procedure, and as the sale was not set aside under either of those sections, the Court below had no jurisdiction to set aside the sale upon payment by the applicant of the mortgage money with interest and costs. *Brij Mohan Thakur v. Uma Nath Chowdhry* (1) referred to.

The facts of the case and the arguments appear sufficiently from the judgment of the High Court.

Babu Karuna Sindhoo Mookerjee for the appellant.

The respondents did not appear.

The judgments of the High Court (MACLEAN, C.J., and BANERJEE, J.) were as follows :—

* Appeal from order No. 208 of 1896 against the order of Babu Bipradas Chatterjee, Subordinate Judge of Moorsshedabad, dated the 30th and 31st of March 1896.

MACLEAN, C.J.—I regret that in this case we have not had the advantage of hearing the case argued on behalf of the principal respondent, who is the purchaser under the sale of the 15th March 1893.

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The facts which are necessary for our decision in this case may be stated shortly as follows: On the 9th December 1892 the plaintiff in the mortgage suit obtained a mortgage decree, and on the 22nd of May 1893 a decree for sale absolute was made in that suit. In the meantime, on the 15th of March of the same year, the respondent, who, in the course of the argument, has been referred to as the principal respondent, purchased an eight annas share of the property which was on mortgage, under a sale in execution of a money decree. On the 16th August 1895 the mortgaged property was put up for sale in pursuance of the decree absolute, to which I have referred, of the 22nd May 1893. Under that sale the present appellant became the purchaser. On the 10th September 1895, that is to say, within a very short period after the sale under which the present appellant bought, the judgment-debtor applied to set aside the sale under section 311 of the Code of Civil Procedure, and on the 14th September of the same year the principal respondent made a similar application under the same section.

These applications came before the Subordinate Judge who heard them out on the merits, and on the 28th March 1896 reserved judgment, but upon that day the principal respondent presented a petition, which was accepted, that the sale of the 16th August 1895 might be set aside, upon payment by him of what was due for principal, interest and costs under the mortgage, and that, on such payment being made, the sale might be set aside and he might be declared entitled to redeem the property. On the 30th March of the same year, the learned Subordinate Judge assented to the view of the principal respondent, granted the prayer of that petition, and ordered the sale to be set aside, upon the footing to which I have here referred. In the view taken by the learned Subordinate Judge, he seems to have considered that he was bound by the decision in the case of *Fremchand Pal v. Purnima Dasi* (1), which, however, does not appear to have commended itself to his mind.

(1) I. L. R., 15 Cal., 546.

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Upon these facts the question we have to decide is whether the learned Judge, whose opinion, as I said before, would appear not to have been in consonance with the case to which I have referred, but by which he considered, and rightly considered, he was bound, was right in point of law. The real question is, whether upon the application of the principal respondent of the 28th of March 1896, the Judge in the Court below ought to have set aside the sale of 16th August 1895 under which the appellants had purchased, I think that, in arriving at the conclusion that he ought, he arrived at a conclusion which was erroneous. The view I take of the position is this : The appellants was the purchaser under the sale of the 16th August 1895. Under the provisions of section 312 of the Code, he was entitled to ask the Court for an order to confirm the sale, unless the sale were set aside under section 310A or section 311 of the Code. No application was made under section 310A, so that we may dismiss that from our minds. Two applications were made to set aside the sale under the provisions of section 311 of the Code, but we must take it, and do take it, for the purposes of this judgment, that those applications were negatived. The applications were made, but no decision was given upon them ; they were practically abandoned. A fresh application on the 28th of March 1896 to set aside the sale on payment of what was due to the judgment-debtor was substituted in their place. What jurisdiction was there to make any such order ? It seems to me that under section 312 of the Code, the purchaser, the appellants, was entitled to have an order confirming the sale unless the sale were set aside under one of the sections to which I have referred.

This view seems to me to be consistent with the decision of the Privy Council in the case of *Brij Mohun Thakur v. Rai Uma Nath Chowdhry* (1) in which Lord Hannen (at page 10 of the report) says this : " Here there was an order for sale, and the property was put up for sale, but there was no order confirming the sale. Under section 312, if no such application, as is mentioned in section 311, is made, there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. The Subordinate Judge

(1) I. L. R., 20 Cal., 8.

refused to do that, and set aside the sale, and directed the purchase money to be refunded on certain terms." It seems to me that the present case is in accordance with the principle laid down in that case. No doubt section 314 says that no sale of immoveable property in execution of a decree shall become absolute until it has been confirmed by the Court, and section 316 says that the title to the property sold shall vest in the purchaser from the date of such certificate and not before; but if the purchaser under the sale of 16th August 1895, there having been no application under section 310A and no successful application under section 311, did become, as I think he did become, entitled to an order confirming the sale, I fail to see what power there was in the Court below to set aside that sale upon the terms upon which it did set it aside. I may point out here that this is not a question between the mortgagor and mortgagee, but it is a question between two third parties, two outside purchasers. The learned Vakil for the appellant has drawn our attention to the case by which the learned Judge in the Court below thought he was bound, the case of *Premchand Pal v. Purnima Dasi* (1). In the head note it is stated that the right to redeem property exists until the sale has been actually confirmed; but the point was not necessary for the decision of that case, and did not arise in that case. The date of sale there was the 17th August and the date of confirmation of the sale was the 18th of December 1883, but there was no offer to redeem before the date of confirmation. The question which now arises did not arise in that case, nor was it necessary for the purposes of the decision. No doubt there are *obiter dicta* to the effect which I have mentioned, namely, that the right to redeem subsists until the sale has been confirmed, though even that proposition is put in a very qualified manner by Mr. Justice Beverley at page 554, where he says this: "If the judgment-debtor deposit the amount of the decree between the date of purchase and the date of confirmation of sale, it is possible that the sale might be set aside." That is very cautious language: I do not think there is anything in this judgment which conflicts with the actual decision in the case by which the learned Judge in the

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Court below thinks he was bound. I regret, as I said before, that we have not had the advantage of hearing the opposite view urged before us on the part of the respondent, but in the view I take, I think the Subordinate Judge was wrong. The appeal will be allowed, and the appellant will have the costs of the appeal.

BANERJEE, J.—I concur.

S. C. G.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Ghose and Mr. Justice Gordon.

1897
 March 16.

PACHKAURI AND ANOTHER (APPELLANTS) v. QUEEN-EMPRESS
 (RESPONDENT).^a

Rioting—Unlawful assembly—Right of private defence of property—Causing grievous hurt in furtherance of common object—Penal Code (Act XLV of 1860), sections 97, 99, 147, 149, 325.

The accused, receiving information that the complainant's party were about to take forcible possession of a plot of land, which was found by the Court to be in the possession of the accused, collected a large number of men, some of whom were armed, and went through the village to the land in question. While they were engaged in ploughing, the complainant's party came up (some of them being armed) and interfered with the ploughing. A fight ensued, in the course of which one of the complainant's party was grievously wounded and subsequently died, and two of the accused's party were hurt.

Held, that if the accused were rightfully in possession of the land and found it necessary to protect themselves from aggression on the part of another body of men, they were justified in taking such precautions as they thought were required and using such force or violence as was necessary to prevent the aggression.

Held, also, that under such circumstances they could not rightly be held to be members of an unlawful assembly.

Queen-Empress v. Narsang Pathabhai (1), *Birjoo Singh v. Khub Lall* (2), *Shankur Singh v. Burmah Mahto* (3), followed; *Ganouri Lal Dass v. Queen-Empress* (4), distinguished.

THE appellants were convicted by the Sessions Judge of Gya

^a Criminal Appeal No. 37 of 1897, made against order passed by H. Hohnwood, Esq., Sessions Judge of Gya, dated the 23rd of November 1896.

(1) I. L. R., 14 Bom., 441.

(2) 19 W. R., Cr., 66.

(3) 23 W. R., Cr., 25.

(4) I. L. R., 16 Calc., 206.