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properly said that the proceedings in this case have not been properly instituted.

We may add, with reference to the facts found in this case, that even supposing that the property attached was not the property of the absconders, the rightful owner had no right of private defence of his property, inasmuch as the evidence shows that the police officer was acting in good faith under colour of his office; and even supposing that the order of attachment might not have been properly made, that would in itself be no sufficient ground. The law, as expressed in s. 99, explanation 2, of the Indian Penal Code, is clear on this point. The Rule is therefore discharged.

Rule discharged.

D. S.

APPEAL FROM ORIGINAL CIVIL.

1902
 Feb. 28.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and Mr. Justice Prinsep and Mr. Justice Hill.

ADMINISTRATOR-GENERAL OF BENGAL

v.

AGHORE NATH MOOKERJEE. *

Registrar's sale—Sale notification—Misdescription of property—Remedy of purchaser—Compensation—Annulment of sale.

Where the misdescription of property in the sale notification does not go to the essence of the contract, the remedy which the purchaser can claim is compensation and not annulment of the sale.

The judgment-creditor (the Administrator-General of Bengal) appealed.

In pursuance of a mortgage decree and order made in the suit of the Administrator-General of Bengal and Annoda Prosad Das and others, bearing date respectively the 9th day of December 1896 and the 17th day of January 1897, the Registrar on the 8th day of July 1899 put up to sale by public auction (amongst other properties) the property constituting lot No. 3, which was purchased by the respondent Aghore

* Appeal from Original Civil No. 3 of 1901 in suit 652 of 1894.

Nath, and which consisted of premises No. 8, Ram Comul Mookerji's Street, in Kidderpore in the suburbs of Calcutta, containing by estimation 7 cottahs 1 chittak and 13 square feet, and the western boundary of the said premises was described to be "a lane with privies belonging to the estate of Digambar Das" and the northern boundary "Ram Comul Mookerji's Street." At the same sale lot No. 4, being premises No. 9, Ram Comul Mookerji's Street, was purchased by Nawab Pearsa Saheb also a respondent. The premises No. 8 purchased by the respondent Aghore Nath and the premises No. 9 purchased by Nawab Pearsa Saheb adjoined each other, but were separated by a strip of land or lane, and in the sale notification the western boundary of No. 8 and the eastern boundary of No. 9 were given as "a lane with privies belonging to the estate of Digambar Das," such lane and privies not being included in either of the said lots. The respondent Aghore Nath alleged that the western boundary of his lot was incorrectly stated in the sale notification, and that the same should have been "on the west by the premises No. 9, Ram Comul Mookerji's Street," and claimed the lane abovementioned as forming part of lot No. 3 purchased by him.

He further alleged that under the boundaries, as given in the notification of sale, a cook-room belonging to the premises No. 8 purchased by him was made a part of the premises No. 9. The purchaser of the premises No. 9 (lot No. 4) contended that the cook-room was included in his lot by the boundaries given in the notification and he was entitled to retain the same.

The respondent Aghore Nath in his application asked for one of three reliefs:—(1) the rectification of the boundaries in the certificate of sale of the premises sold to him, or (2) compensation in respect of a certain cook-room as to which he said there was a misdescription in the particulars or otherwise, (3) that the sale to him of the premises might be set aside and the purchase-money refunded with interest.

The conditions of sale contained this condition (No. 12):—
 "If any error or misstatement shall appear to have been made in the particulars or description of the property, such error or misstatement, if capable of compensation, shall not any

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sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the purchaser, as the case may be, and the amount of such compensation shall be settled by a Judge in Chambers."

The case was originally tried on 26th April, 1900 by Mr. Justice SALE, who delivered the following judgment:—

The question on this application is with reference to the purchase of lot No. 3 by the applicant. He claims in the alternative either that the boundaries should be rectified, so as to give him what he thought he was purchasing, or that compensation as far as possible be allowed him for the defect in area, or if he cannot obtain compensation, then that the sale be annulled. The matter is complicated, inasmuch as the questions raised affect to a certain extent the purchaser of the adjoining lot No. 4, and in this way: The boundary between lots Nos. 3 and 4 is described as "*a lane and privies*," so that it would seem that this piece of land or property forming the boundary did not fall within the lot purchased by either party, but then the area of lot No. 3 is not complete, unless the lane be included.

So far as the lane therefore is concerned, it seems to me it is a question between the applicant and the Administrator-General. The purchaser of lot No. 4 does not claim the lane, but he does claim a certain cook-room, which is on the north of the lane in question.

If the lane is to be taken as the boundary, the cook-room would seem to fall within lot No. 4, and, moreover, the area of No. 4 is defective, unless the cook-room is included. On the other hand, the case made by the purchaser of lot No. 3 is that this cook-room has throughout been regarded as part of No. 3 (lot No. 3) and has always been used as such, and so far as the evidence goes, it would seem that it has never been used as part of the premises No. 4, which fall within lot No. 4.

But then what one has to look at in determining what the property in which is purchased at a Registrar's sale is the sale notification, the description of the property, and the boundaries therein given—and from that sale notification it would appear that the cook-room is treated as part of lot No. 4. That being so there seems to me to be very great force in Mr. Sinha's contention that the question is one which it is impossible to determine on the present application.

On the other hand, I think the objection of the purchaser of Lot No. 3 is well founded, that he was led to believe that the cook-room was included in the lot he was purchasing and also the lane, inasmuch as the area of the lot is defective without it. One of the conditions under which the property is sold is that—"If any error or misstatement shall appear to have been made in the particulars or description of the property, such error or misstatement, if capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the purchaser, as the case may be, and the amount of such compensation shall be settled by a Judge in Chambers."

While the question as regards the lane might admit of compensation, I do not think that, so far as the cook-room is concerned, the question can be dealt with in any other way. On the whole I think the best and fairest course is to annul

the sale. I do not think in a proceeding of this kind, I can entertain any application for rectification of boundaries. Generally speaking, if a dissatisfied purchaser has made out a case for relief, what he is entitled to is either compensation or annulment of the sale.

As to costs, I think that, although the applicant has succeeded in having the sale set aside, he must still bear his own costs.

The Administrator-General must also bear his own costs.

I think as regards Mr. Sinha's costs they must be paid by the applicant.

[*Mr. Garth*: We shall be entitled to a refund of the money we have paid, and with interest.]

Yes, you are entitled to that.

Mr. Pugh and *Mr. Gregory* on behalf of the judgment-creditor, appellant.

Mr. Garth and *Mr. Chakravarti* on behalf of the purchaser of lot No. 3, respondent.

Mr. Sinha on behalf of the purchaser of lot No. 4, respondent.

MACLEAN C.J. The real question in this appeal is whether or not the respondent is entitled to have a certain sale to him set aside; or whether he is bound by it and only entitled to compensation for a certain misdescription in the property sold. The facts are as follows:—The application to the Court below was by one Aghore Nath Mookerjee, who was the purchaser of certain premises comprised in lot No. 3, at a sale held by the Registrar in the mortgage suit on the 8th July 1899. The applicant asked for one of three reliefs: he asked for the rectification of the boundaries in the certificate of sale of the premises sold to him or for compensation in respect of a certain cock-room as to which he says there has been a misdescription in the particulars, or otherwise that the sale to him of the premises might be set aside, and the purchase-money refunded with interest. Nothing turns upon the first head of relief sought: this has been abandoned.

The property, lot 3, is thus described in the notification:—“All that partly three-storied, partly two-storied, and partly one-storied tenanted house and premises No. 8, Ram Comul Mookerjee Street, at Kidderpore in the suburbs of Calcutta, and

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appertaining thereto, and on part whereof the same is built, containing 7 cottahs 1 chittack and 13 square feet, and bounded on the south by Ram Comul Mookerji's Street, on the west by a lane with privies belonging to the estate of Digumbar Dass, deceased, on the east by a blind lane, and on the north by the dwelling house of Prokash Chunder Mookherjee." The conditions of sale contained this condition (No. 12):—"If any error or misstatement shall appear to have been made in the particulars or description of the property, such error or misstatement, if capable of compensation, shall not annul the sale nor entitle the purchaser to be discharged from his purchase, but a compensation shall be made to or by the purchaser, as the case may be, and the amount of such compensation shall be settled by a Judge in Chambers."

On the 8th of July, the applicant paid a portion of the purchase-money and by an order dated the 19th August 1899 it was ordered that the applicant should be at liberty to pay into Court the balance of the purchase-money with interest, "but without prejudice to his right to raise any question as to title or compensation, with liberty to the petitioners to apply with regard to the boundaries of the property, if so advised, and that thereupon the sale be confirmed and a certificate of sale should be granted to the petitioner as the purchaser of the property as aforesaid." The balance of the purchase-money was paid in. The applicant complains that there has been an error or misstatement in the particulars, or misdescription of the property in two respects. He says that he will not get the area, which was sold to him, seven cottahs odd, unless a certain lane with certain privies shown on the plan (Exhibit A) are included. He is right in this contention, and it has been conceded by Mr. Pugh, who appears for the Administrator-General of Bengal, the vendor, that the lane and privies must be given to the applicant. I need then say nothing more about this.

Then he says that a certain cook-room shown on the plan as the building on the north-west corner just above the words "open space covered" was intended to be included in his purchase; it is not included, and consequently there is an error or misstatement in the particulars in regard to this cook-room—an

error or misstatement of sufficient importance to warrant him asking to have the whole sale annulled. This cook-room has been sold to the purchaser of lot No. 4, and he will not give it up. It has been conceded by Mr. Pugh that there has been an error or misstatement in the particulars as to this cook-room, and we are, therefore, relieved from going into that question.

Then arises the question. What is the relief to which under those circumstances the appellants are entitled?

Is he entitled to have the sale annulled, or only to compensation for the error or misdescription in question?

The learned Judge in the Court below, without giving his reasons for his conclusions, only said that he thinks "the best and the fairest course was to annul the sale," and has accordingly done so.

The Administrator-General appeals against that decision, and his contention is that, having regard to the circumstances of the case, it is not one of those cases in which the misdescription goes to the very essence of the contract and materially alters the substance of it, but that it is a case in which an adequate compensation can be given, and he relies upon the 12th condition.

The applicant himself puts compensation in the forefront of his claim, and only asks that the sale may be set aside, if he is not entitled to that. This is how I read the expression "otherwise" in the prayer of his application. And the reservation in the order of the 19th August 1899 points to compensation, and not to an annulment of the sale.

The purchaser says, however, that the house is valueless without the cook-room, and he says in paragraph 19 of his petition that the lot so purchased by him will not be habitable, inasmuch as there is no other place in the said premises which can be used for a kitchen, and a house without a kitchen is of no use. And that view is supported, though not so strongly, by Mr. Cotton, who says that there does not appear to be any other suitable place in premises No. 8, Ram Comul Mookerji's Street, to erect a cook-room.

The question then resolves itself into this: whether the misdescription goes to the essence of the contract and materially alters the substance of it, so that the purchase cannot be en-

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upon the purchaser. I may refer to the case of *Fawcett and Holmes* (1), where the Court lays down that in each case "the question depends on the view of the Court as to the importance of the misdescription."

Looking at the plan, and giving all due weight to the applicant's evidence, I think it is difficult to say that this misdescription goes to the very essence of the contract. No doubt a house without a cook-room is not of much use for purposes of habitation; but looking at the plan and the nature of the property sold, I am not disposed to say that there is no place on the premises where a cook-room cannot be built, and if so, the error in the particulars is one which to my mind is capable of compensation, and condition 12 applies.

The misdescription does not appear to me to be of such importance as to warrant the Court in saying that the sale ought to be annulled; on the contrary, I think the case is covered by the 12th condition. It has not been disputed that the purchaser is entitled to an enquiry as to what the amount of compensation ought to be.

There is one other point which was taken as a preliminary objection, though rather late, that the appellant is out of time as regards his appeal. Without going in detail into the dates, I think that in the present case the time for appealing must be taken to run from the time when the order appealed against was signed.

The result is that the order of the Court below will be discharged, and a declaration made that the petitioner is entitled to compensation in respect of the misdescription in relation to the cook-room, the amount to be determined by the Judge in Chambers; and there will also be a declaration that he is entitled to the lane and the privies to the west of the premises.

We allow no costs of this appeal as between Mr. Pugh's and Mr. Garth's clients. Mr. Sinha's client will have his costs of this appeal from Mr. Pugh's client. We do not interfere with the order as to costs in the Court below.

PRINSEP J. The only difficulty that I have felt in this case is whether the compensation which the auction-purchaser might claim under No. 12 of the conditions of sale is such as is contemplated by that rule of sale, or whether relief cannot be more properly and more easily granted by a resale. This was apparently the opinion held by Mr. Justice Sale. Ordinarily it would be easy in a case within this condition of sale to ascertain the amount of compensation due to an auction-purchaser by reason of any error or misstatement in the particulars or description of the property sold. In the present case the compensation will be determined not only by a deduction of the value of the land which he has not obtained, but in addition to that it must be ascertained what is the depreciation in the value of the premises actually purchased by the loss of this land, and the out-houses standing thereon. This cannot be readily ascertained. The inquiry will involve some expense and delay, whereas a resale would give the same result to the parties without such inconvenience. The amount is no doubt, however, capable of compensation, and on this ground I agree with the order which it is proposed to give.

HILL J. I also agree with the learned Chief Justice, and for the reasons stated by him, in thinking that this appeal should be allowed, as well as with respect to the enquiry directed regarding the amount of compensation to which the applicant is entitled.

No question has been raised as to the authority of the Court in a proceeding such as the present to go into that question. And what we have to determine is whether, upon the proper interpretation of the 12th condition of sale, the error which has admittedly arisen in regard to the property sold comes within the condition and may be made the subject of compensation.

It appears to me that it would be difficult, in view of the form in which the applicant sought the assistance of the Court, to say that this question ought to be answered otherwise than affirmatively. What he asked for was that the western boundary of the premises sold might be rectified, or that such compensation should be allowed him in respect of the cook-room as to the Court might seem proper, or "otherwise," that is, failing redress in either of these forms, that the sale might be rescinded. He asks

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compensation as an alternative to a rectification of boundaries, which latter it was not in the power of the Court to grant. It is difficult to see how he can now say that the case was not a fitting one for compensation.

Attorneys for the appellant: *Carruthers and Co.*

Attorney for Aghore Nath Mookerjee, respondent: *Bepin Behari Bonnerjee.*

Attorneys for Koomeer Kadir, purchaser of lot No. 4, respondent: *Rutter and Co.*

FULL BENCH.

Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, Mr. Justice Prinsep, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Henderson.

FREDERICK PEACOCK

v.

MADAN GOPAL AND OTHERS.*

1902
 May 2.

Insolvency—Vesting order—Attachment by creditor previous to vesting order—Priority of Official Assignee over attaching creditor.

A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the vesting order.

Soobul Chunder Law v. Russick Lall Mitter (1) followed; *A. B. Miller v. Lakhmani Debi* (2) overruled.

REFERENCE by the Chief Judge of the Small Cause Court, Calcutta, for the opinion of the High Court under s. 69 of the Presidency Small Cause Court Act (XV of 1882) and s. 617 of the Code of Civil Procedure (Act XIV of 1882).

The facts of the case appear fully from the letter of reference, the material portion of which is as follows:—

“In this case the plaintiff, the Official Assignee, claimed property to the value of Rs. 600 attached by the first defendant on the 9th of July 1901 under an order of this Court of the same date, and by the second and third defendants on the 15th July 1901 by prohibitory orders of the same date. The facts of the case are as follows:—Madan Gopal, the first defendant, obtained a decree in this Court against Nabin Chunder Dutt and Motilal Burdhan, and on the 9th of July 1901 he attached the property claimed by the plaintiff, the Official Assignee. On the

* Reference to the Full Bench in reference from the Presidency Small Cause Court, No. 1 of 1901.