

validate them, and yet at the same time to vary and contradict their terms. For these reasons we consider the oral evidence admitted by the lower Courts is inadmissible. We accordingly set aside the decree of the District Judge and remand the case to him for a fresh decision after excluding the oral evidence adduced by the defendant to show that the deeds of sale were deeds of gift.

Costs to abide the result.

B. D. B.

Case remanded.

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RAHIMAN
v.
ELAHI
BAKSH.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

PHUL CHAND RAM (DECREE-HOLDER) v. NUBSINGH PERSHAD
MISSER (JUDGMENT-DEBTOR).

1899
Dec. 8.

*Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 310A, 311—
Order setting aside sale in execution of decree—Mortgage decree—Sale of
mortgaged property—Transfer of Property Act (IV of 1882), s. 89—
Order absolute for sale.*

An order under s. 310A. of the Civil Procedure Code is one under s. 244 clause (c), of that Code and therefore an appeal lies from that order at the instance of the decree holder who is also the auction purchaser, *Kripa Nath Pal v. Ram Laksmi Dasya* (1) followed.

It is not open to an applicant under s. 310A. of the Civil Procedure Code to impugn the sale on the ground of irregularity in publishing and conducting it, a question which properly arises in an application under s. 311 of the Code.

An order absolute for sale under the provisions of the Transfer of Property Act is not indispensably necessary as a condition precedent for the sale of a mortgaged property in execution of a mortgage decree; it is sufficient that there is an order for sale passed on the application of the decree-holder. *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (2) and *Tara Prosad Roy v. Bhubodeb Roy* (3) referred to.

A MORTGAGE-DECREE was obtained on the 23rd December 1897 against the minor defendant Nursingh Pershad Misser for

° Appeal from order No. 151 of 1899, against the order of C. M. W. Brett, Esq., District Judge of Bhagalpur, dated the 7th March 1899, reversing the order of Babu Hem Chunder Mitter, Munsif of Banka, dated the 5th of December 1898.

(1) (1897) 1 C. W. N., 703.

(2) (1890) I. L. R., 18 Calc. 139.

(3) (1895) I. L. B., 22 Calc., 931.

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Rs. 500, and three months were allowed for the payment of the money. A petition for execution was put in by the decree-holder, Phulchand Ram Marwari, on the 17th March 1898, and on that petition, the 23rd May 1898 was fixed for the sale of the mortgaged property. On that date, the guardian of the minor judgment-debtor put in a petition depositing Rs. 50 and praying for a postponement for two months, up to the 20th July, 1898. An order was passed, however, postponing the sale to the 20th June, 1898. The property was sold on the 20th June, 1898, for Rs. 600, and purchased by the decree-holder.

It appears that the pleader employed in the case for the minor having fallen ill soon after the presentation of the petition for adjournment, and having subsequently died, the guardian wrote to the pleader for the decree-holder in the first week of July inquiring what date had been fixed for the sale of the property, and received reply that the sale had been held on the 27th June. On the 26th July, the judgment-debtor applied to pay in the decretal amount, &c., and to have the sale set aside, but the application was refused by the Munsif. On the next day, *i.e.*, the 27th July, there was another application made by the judgment-debtor explaining the reason for the delay, and he was thereupon allowed to pay the money into Court subject to a decision of the question as to the delay and other incidental matters. On the 5th December 1898, however, the Munsif on a consideration of the Full Bench case of *Kedar Nath Raut v. Kali Churn Ram* (1) held that s. 310A of the Code of Civil Procedure did not apply to mortgage decrees, and accordingly dismissed the application and confirmed the sale. The minor judgment-debtor appealed against this order to the District Judge.

The District Judge, for the reasons set out in the judgment of the High Court, held that the sale was illegal, and directed the same to be set aside.

The decree-holder appealed to the High Court.

Dr. *Rash Behari Ghose* and Babu *Umakali Mukerjee* for the appellant.

(1) (1898) I. L. R. 25 Cal. 703.

Babu *Amarendra Nath Chatterjee*, for the respondent.

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1899. DEC. 2 : The judgment of the High Court (RAMPINI and PHUL CHAND WILKINS, JJ.) was as follows :—

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v.
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MISSER.

This is an appeal from the decision of the District Judge of Bhagalpore, dated the 7th March, 1899.

The facts of the case are that a certain property, belonging to a minor, was sold on the 20th of June last in execution of a decree, and that, on the 25th or 26th of July (probably the latter date is the more correct one) the judgment-debtor made an application under s. 310A of the Code of Civil Procedure to be allowed to pay in the decretal amount and to have the sale of the property set aside. The Munsif disallowed the application. The District Judge, although he held that the decree in execution of which the sale took place was a mortgage decree, and that, according to the case of *Kedar Nath Raut v. Kali Churn Ram* (1) s. 310A does not apply to sales held in execution of mortgage decrees, nevertheless reversed the Munsif's order, allowed the application, and set aside the sale.

The decree-holder, who was the purchaser of the property at the sale, now appeals, and he contends that the order of the District Judge is wrong.

The grounds upon which the District Judge held that, notwithstanding the ruling above referred to, the sale should be set aside under s. 310A are: *first*, that the guardian of the minor applied on the 23rd May, 1898, for a postponement for two months, waiving his right to the issue of a fresh sale proclamation, and he holds that the guardian of the minor only waived this right to the issue of a fresh sale proclamation on condition that the sale should be postponed for two months, whereas it was only postponed for one month; *secondly*, the Judge says there was no upset price fixed for the property at the sale; *thirdly*, that the property was sold for an inadequate price which seems to him "to raise grave suspicion of trickery or fraud;" and *fourthly*, that no order absolute for sale was passed upon the petition of the decree-holder, dated the 17th March 1898.

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The learned pleader for the appellant contends that the District Judge was not competent to allow the application under s. 310A on these grounds.

The learned pleader for the respondent argues, in the first place, that no appeal lies in this case, and, *secondly*, that the Judge was right in the view he has taken.

With regard to the question of appeal in this case we think we are concluded by the case of *Kripa Nath Pal v. Ram Lakshmi Dasya* (1) in which it has been held that an order under s. 310A of the Civil Procedure Code is one under s. 244, clause (c) and that being so, an appeal lies to us in this case.

But we are unable to agree that the District Judge was right in allowing the application of the judgment-debtor in this case for the reasons assigned by him. It is clear to us that the reasons he gives for setting aside the sale are reasons which might have influenced him, had the application been made under s. 311 of the Civil Procedure Code, because the objections he raises to the sale are questions of irregularity in publishing or conducting the sale. We do not think that when an application has been made under s. 310A, which admits the sale to have taken place, and only asks to be allowed to pay in the decretal amount and have the sale set aside, it is open to the applicant to raise pleas which properly should be raised in an application under s. 311. To do so would be to act contrary to the spirit of the proviso to s. 310A, and it would not, we think, be just that an applicant under s. 310A should be entitled to impugn the sale on the ground of irregularity in publishing and conducting it, and at the same time carry on an application under s. 310A, as it were, simultaneously.

But however this may be, we do not think that there are grounds for holding that the sale in this case was irregular. It seems to us rather that the sale was brought about by the gross laches of the guardian of the minor himself. He made an application for postponement for two months, waiving his right to a fresh sale proclamation, but he made no attempt to

find out for himself what orders were passed upon his application, and seeing that a postponement was granted for one month, it does not lie in his mouth to turn round and urge that the sale was irregular for the want of a fresh proclamation.

In the second place it does not appear to us that it is necessary that an upset price should be fixed in the sale proclamation.

Thirdly, there is no evidence in this case that the property has been sold for an inadequate price, and furthermore there is no evidence whatever that, if the price realized was inadequate, this was the result of any irregularity in the sale proclamation.

Then, as to there having been no order absolute for sale under the provisions of the Transfer of Property Act, we think that question is concluded by the cases of *Siva Pershad Maity v. Nundo Lall Kar Mahapatra* (1) and *Tara Prosad Roy v. Bhobodeb Roy* (2), and these rulings show that an order absolute is not indispensably necessary, and it is sufficient that there is an order for sale passed on the application of the decree-holder, as was done in this case.

Finally, we may say that there is not the slightest reason for supposing that there was any fraud or trickery on the part of the decree-holder. The guardian never attempted to watch the proceedings in the execution case himself. He was apparently indifferent as to whether the postponement for two months was granted on his application or not; and, then, instead of finding out for himself what had been done in the case, he applied to the decree-holder's pleader, who at once told him when the sale had taken place. This information was given in the first week of July; so that if s. 310A had been applicable to this case, the guardian might easily have paid the money within the thirty days allowed by law. But when he got this information he did not put the money in within the prescribed period. It is true that the decree-holder's pleader informed him incorrectly as to the date of the sale. But this does not appear to have been done

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(1) (1890) I. L. R., 18 Calc., 139.

(2) (1895) I. L. R., 22 Calc., 931.

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purposely, and was probably a clerical error on the part of the pleader. However this may be, there is no doubt that the provisions of s. 310A do not apply to mortgage decrees, and that the order by the District Judge is entirely wrong and must be set aside.

We accordingly decree this appeal, with costs.

M. N. R.

Appeal decreed.

Before Mr. Justice Rampini and Mr. Justice Pratt.

1900
 June 18 &
 21.

BHUGWANBUTTI CHOWDHIRANI (PLAINTIFF) v. A. H. FORBES,
 EXECUTOR TO THE ESTATE OF THE LATE A. J. FORBES (DEFENDANT).^o

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13—Competency of Court to try subsequent suit—Pecuniary jurisdiction—Suit of a Small Cause Court nature—Issue decided in a previous suit not subject to second appeal.

In order to make a matter *res judicata*, it is not necessary that the two suits must be open to appeal in the same way. *Rai Charan Ghose v. Kumud Mohan Dutt* (1) followed.

A plaintiff cannot evade the provisions of s. 13 of the Code of Civil Procedure by joining several causes of action against the same defendant in the subsequent suit and instituting it in a Court of superior jurisdiction.

IN a suit instituted by one A. H. Forbes, the present defendant, against one Bhugwanbutti Chowdhirani, the present plaintiff, it was sought to obtain a refund of Rs. 124 annas 13 being the excess amount of road and public works cesses wrongfully recovered from him in respect of a *putni* taluk which he held under the said Bhugwanbutti Chowdhirani. The suit was instituted in 1894 in the Court of the Munsif of Purnea. The Munsif decreed the suit, holding that the plaintiff in that suit was not liable to pay road and public works cesses at the enhanced rate claimed. This decision was confirmed on appeal by the District

^o Appeal from Appellate Decree No. 1030 of 1898, against the decree of D. Cameron, Esq., District Judge of Purnea, dated the 10th of February 1898, affirming the decree of Babu Chakradhar Prasad, Subordinate Judge of that District, dated the 11th of August 1897.