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and some puzzling circumstances in it. But it has been the subject of an extremely elaborate and careful judgment by the first Court below, and that judgment has been examined by the Court of Appeal, who have agreed with the first Court. Although acute criticisms have been made upon some points in the case, there has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below. This case is one which very decidedly falls within the valuable principle recognised here, and commonly observed in second Courts of Appeal, that it will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned. In all probability their Lordships would be doing a great deal more harm than good if they were induced to disturb judgments arrived at by the local Judges on such criticisms as have been assigned in this argument.

Their Lordships will humbly recommend Her Majesty to dismiss the appeal; and the appellant must pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *A. H. Arnold & Son.*

Solicitors for the respondent: Messrs. *Richardson & Co.*

C. B.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Pratt.

1900
 June 21 &
 26.

UMAKANTA ROY (OPPOSITE PARTY) v. DINO NATH SANYAL (PETITIONER.) *

Second Appeal—Civil Procedure Code (Act XIV of 1882), ss. 244 (c), 311, 312, 588—Decree—Order setting aside a sale in execution of decree—Fraud, allegation of.

No second appeal lies from an order setting aside a sale under section 312 of the Code of Civil Procedure, although an allegation of fraud

* Appeals from Orders Nos. 22 and 23 of 1900, against the order of W. H. Vincent, Esq., District Judge of Burdwan, dated the 5th of June 1899, affirming the order of Babu Basanta Kumar Ghose, Munsif of Katwa, dated the 22nd of December 1898.

is made in the application for setting aside the sale, when no attempt is made to substantiate the allegation.

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Rajoni Kant Bagchi v. Hossain Uddin Ahmed (1) discussed and explained.

THESE appeals arose out of two applications to set aside the sale of immoveable property under a mortgage decree, made by one Taraprasad Rai, the mortgagor, and one Dinonath Sanyal, a puisne incumbrancer, who had before the sale purchased some properties including the mortgaged property. The sale was sought to be set aside on the grounds of irregularity and fraud. The irregularities complained of against the decree-holder, Umakanta Roy, were that no sale proclamation had been published; that the proclamation did not state any price of the property sold; that it did not specify the incumbrances on it; that the sale was held on an adjourned date without a fresh sale proclamation; and that in consequence of these irregularities, the property which was worth Rs. 40,000 was sold for Rs. 1,525 only.

The Munsif held that there was material irregularity in publishing and conducting the sale, resulting in substantial injury to the applicants, and set aside the sale. As to fraud, he observed "no attempt has been made to establish the fraud." The decision of the Munsif was confirmed by the District Judge on appeal.

Umakanta Roy appealed to the High Court.

Babu Hara Kumar Mitter for the appellant.

Dr. Ashutosh Mukerjee, and Babu Mahendra Nath Ray, for the respondents.

1900, JUNE 21. Dr. Ashutosh Mukerjee took a preliminary objection that under section 588 of the Civil Procedure Code, no second appeal lay.

Cur. adv. vult.

1900, JUNE 26. The judgment of the High Court (RAMPINI and PRATT, JJ.) was as follows:—

This is a second appeal against an order under section 312, Code of Civil Procedure, setting aside a sale.

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A preliminary objection has been taken that no second appeal lies.

From the final clause of section 588 this would appear to be correct, and the cases of *Nana Kumar Roy v. Golam Chunder Dey* (1), *Aubhoya Dassi v. Pudmo Lochun Mondol* (2), and *Daivanayagam Pillai v. Rangasami Ayyar* (3), support this view.

On the other hand, on behalf of the appellant, it has been contended, with the view of bringing this case within the rulings of this Court in the cases of *Bhubon Mohun Pal v. Nunda Lal Dey* (4), *Nemai Chand Kanji v. Deno Nath Kanji* (5), and *Rojoni Kant Bagchi v. Hossain Uddin Ahmed* (6), that the respondent judgment-debtor made an allegation of fraud against the decree-holder in his petition for the setting aside of the sale, and, therefore, that the order passed was one under section 244, and a decree, and accordingly a second appeal does lie.

It appears that an allegation of fraud was made in the judgment-debtor's application for the setting aside of the sale; but, as the Munsif says, no attempt was made to prove it. The application was, therefore, dealt with both before the Munsif and the Judge as one under section 311. In these circumstances we consider that no second appeal lies. The order of neither of the Lower Courts disposes of any other question than questions of irregularity in the publishing or conducting of the sale. Hence, it cannot be an order under section 244 (c), or a decree, and so there can be no second appeal. It cannot be, we think, that an applicant under section 311, by making a mere allegation of fraud in his petition without attempting in any way to substantiate his allegation can give a right of second appeal in the case, which would not otherwise have arisen.

The learned pleader for the appellant, however, relies on a passage in the judgment in *Rojoni Kant Bagchi v. Hossain Uddin*

(1) (1891) I. L. R., 18 Calc., 422.

(2) (1895) I. L. R., 22 Calc., 802.

(3) (1894) I. L. R., 19 Mad., 29.

(4) (1899) I. L. R., 26 Calc., 324.

(5) (1898) 2 C. W. N., 691.

(6) (1899) 4 C. W. N., 538.

Ahmed (1) in which it is said: "We think it may be gathered from these decisions that where a judgment-debtor applies to have an execution sale set aside, alleging circumstances which, if found in his favour, would amount to fraud on the part of the decree-holder or the auction-purchaser, the case comes within section 244." As to this we would say, *firstly*, that we do not think the learned Judges who decided that case meant to lay down that a mere allegation of fraud without an attempt to prove it would be sufficient to bring the case under section 244. They must have meant that allegations of fraud supported by evidence of some sort would do so. *Secondly*, if this be what they meant, then it is not supported by the cases referred to by them, in all of which an endeavour was made to prove the acts of fraud alleged. *Thirdly*, the observation is at the best but an *obiter dictum*, for, in the case in which it occurs, it was held that the act alleged to be fraudulent did not amount to fraud, and that consequently no second appeal lay.

This appeal is accordingly dismissed with costs. The order in this case also governs appeal from Order No. 23 of 1900.

M. N. R.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Prinscp and Mr. Justice Handley.

KALI PROSAD MAHSAL AND ANOTHER (PETITIONERS), v. QUEEN-EMPRESS (OPPOSITE PARTY.)^a

1900
July 2.

Criminal Proceedings—Irregularity in Proceedings—Misjoinder of parties—Joint-trial on charges of Criminal breach of trust by carrier and Receiving stolen property—Objection taken for first time in Revision—Code of Criminal Procedure (Act V of 1908) ss. 233 and 537—Penal Code, ss. 407 and 411.

K S, K P, and K M were tried jointly and convicted: *K S* under s. 407 of the Penal Code, *K P* and *K M* under s. 411 of that Code. No

^a Criminal Revision No. 531 of 1900, made against the order passed by E. G. Drake-Brockman, Esquire, Sessions Judge of Midnapur, dated the 18th of June 1900.