

PRIVY COUNCIL.

KRISHNA PERSHAD SINGH

v.

MOTI CHAND.

P.C.^o
1913

Feb. 12, 13 ;
March 6.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Appeal to Privy Council—Orders under ss. 311, 312 of the Civil Procedure Code, 1882, confirming or setting aside sales—Civil Procedure Code, 1882, ss. 588 (16), 594, 595, 596—Orders declared final by s. 588—Setting aside sale in execution of decree—Non-representation of minor—Irregularities in proclamation of sale—Civil Procedure Code, 1882, s. 287—Under-estimation of value of property—Rights of mother of minor as his natural guardian.

An appeal lies to His Majesty in Council from an order under sections 311 and 312 setting aside or confirming a sale, notwithstanding the provisions as to such orders being final contained in section 588 (16) of the Code.

The definition of "decree" in section 2 of the Code is not applicable to Chapter XLV (relating to appeals to His Majesty in Council). For the purposes of that Chapter a definition of "decree" has been therein adopted, which is special, and differs from the meaning it bears elsewhere in the Code. The word decree in that Chapter must be read as being equivalent to "decree, judgment or order." So read final orders may be appealed against to His Majesty in Council under section 595, and that provision cannot be restricted by the provisions of section 588 (16) that such orders passed in appeal "shall be final."

In this case, which was an appeal from an order of the High Court confirming a sale in execution of decree, and reversing an order of a Deputy Commissioner which set the sale aside, it appeared that the judgment-debtor had died pending the proceedings for attachment and sale, leaving a widow and a minor son, and that the whole of the proceedings subsequent to his death were without notice to any one representing the minor; that the sale proclamation had not been properly made, and did

^o *Present* : LORD ATKINSON, LORD MOULTON, SIR JOHN EDGE AND MR. AMEER ALI.

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not contain the particulars required by section 287 of the Code of Civil Procedure, 1882, especially those as to the value of the property which was grossly under-estimated ; that the property was sold for a very inadequate price ; and that there was abundant evidence that the appellant had suffered substantial injury therefrom :—

Held (reversing the decision of the High Court), that there had been no proper representation of the minor, and that the above matters constituted material irregularities in publishing and conducting the sale within the meaning of section 311 of the Code, which justified the setting aside of the sale.

There were concurrent decisions of the Courts in India that the Court of Wards never took charge of the property of the minor, and their Lordships came to the same conclusion.

Held, that inasmuch as the interests of the minor with regard to the property were not in fact represented by the Court of Wards, it was open to his mother as his natural guardian to appear (as she had done) and represent him in the proceedings, and his appeal was not rendered incompetent thereby.

APPEAL from an order (18th May, 1908) of the High Court at Calcutta, which reversed an order (16th February, 1906) of the Deputy Commissioner of Hazaribagh.

The judgment-debtor was the appellant to His Majesty in Council.

The facts of the case are sufficiently stated in the judgment of their Lordships of the Judicial Committee.

The order of the Deputy Commissioner was one setting aside a sale, because the proclamation was not accompanied by beat of drum.

On appeal, the High Court (RAMPINI and SHARFUDDIN JJ.) set aside the order of the Deputy Commissioner, saying "there is nothing to show that there was substantial injury to the judgment-debtor by the sale taking place without the beating of the drum, which after all is a very minor formality." The High Court also found that the judgment-debtor (who was a minor represented by his mother) was

properly represented at the time of the sale, and that the Court of Wards was not his proper representative. They made an order confirming the sale.

On this appeal,

De Gruyther, K. C., and *E. U. Eddis*, for the appellant, contended that he was not properly represented in the execution proceedings, and that notice of those proceedings should have been given to the Court of Wards, who ought to have been the appellant's proper representative. The Court of Wards did not in fact represent the minor, as it had not taken charge of the estate, or at any rate, not of Gadi Gandey, the portion which was sold; and the Nazir of the Court at Benares was not either in fact or in law the representative of the appellant in the proceedings in execution of the decree; he had refused to accept notice. The proclamation of sale was not properly made: there were many mouzahs, and the proclamation, instead of in accordance with the directions being served in each mouzah, was only served in one mouzah and without beat of drum. The proclamation also did not contain the particulars directed by section 287 of the Civil Procedure Code, 1882; the proper value of the property did not appear from it. The property was greatly under-valued by the respondent in his application for execution; and the evidence showed that it was sold at a very inadequate price: and the respondent had failed to rebut the presumption that arose from that being the case. Reference was made to sections 284 and 287 of the Civil Procedure Code, 1882; O. XLVIII, rule 5 of the Civil Procedure Code (Act V of 1908), and *Saadatmand Khan v. Phul Kuar* (1). Its value was more than a lakh of rupees, and it was sold for Rs. 2,020. On the authority of

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(1) (1898) I. L. R. 20 All. 412; L. R. 25 I. A. 146.

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that case there had been material irregularity in publishing and conducting the sale for which it should be set aside under section 311 of the Civil Procedure Code.

Sir Erle Richards, K. C., and Arthur Grey, for the respondents, contended that neither on the merits nor in law ought the sale to be set aside. There had been no material irregularity, and no substantial injury to the appellant had been proved. On the death of a judgment-debtor, his legal representative was not entitled to notice of sale of property which had been attached in the judgment-debtor's lifetime. Reference was made to *Sheo Prosad v. Hiralal* (1); section 234 of the Civil Procedure Code, 1882. The Court of Wards took over charge of the property: it was shown that the Court of Wards had been in charge of it and had withdrawn from it as being too much encumbered. Under the Court of Wards Act (Ben. Act IX of 1879) the Manager of the Court of Wards had jurisdiction to act in regard to Gadi Gandey, the partition that was sold, as it had absolute power over the property of the minor: see sections 6, 7, 14 and 18. The proposal for compromise was sent to the Court of Wards, who refused to sanction it as the estate was greatly encumbered: the Chota Nagpur Encumbered Estates Act (Ben. Acts VI of 1876 and V of 1884), section 2, was referred to. The Court of Wards, the minor's statutory guardian, having received notice of the sale, did not appear: that is, the Court of Wards offered no objection to the sale, which was consequently confirmed. A petition was filed under section 311 of the Civil Procedure Code to set aside the sale, but it was not proceeded with, and the opposition to the sale was withdrawn. The inquiry by the Court of Wards into the value of the property showed

(1) (1889) I. L. R. 12 ALL. 440, 444, 446.

it to be hopelessly encumbered, and the Court of Wards exercised a wise discretion in allowing it to be sold. The Court of Wards, after inquiry, having allowed the sale to be confirmed without objection, it was not open to any other person to institute proceedings to set it aside on behalf of the minor.

It was also contended that this appeal was not properly before the Board. Section 51 of the Code of Civil Procedure made it clear that the only person who could represent the minor was the Manager of the Court of Wards. The order of the Deputy Commissioner of 5th December, 1904, confirming the sale was not appealed from by the Court of Wards, and was therefore final and conclusive as against the appellant. It was submitted that the Court below was not competent to hear any appeal on behalf of the minor, unless preferred by the Court of Wards. His mother had no *locus standi* to present it: section 460 of the Civil Procedure Code, 1882, was referred to. Besides, no appeal lay, it was submitted, from the order confirming the sale. Orders under sections 311 and 312 of the Code setting aside or confirming a sale are specified in section 588 as not being subject to a further appeal; that is, the definition of "decree" in section 2 does not include them, and they are final. Section 594, in the portion of the Code relating to appeals to the King in Council, enacts that "decree" includes "judgment" or "order," unless there is "something repugnant in the subject or context." It was submitted that it would be repugnant to put a construction on the word "decree" in section 594 which would include orders made final under section 588. There was no appeal to this Board from anything except what is a "decree" under the Code. There is an appeal to the High Court, but not to the Privy Council. Reference was made to a recent

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decision on the Land Acquisition Act in *Rangoon Botatoung Company v. Collector of Rangoon* (1) where it was held that no appeal lay to the King in Council because it was not expressly given by the Act (I of 1894): and the Civil Procedure Code, 1882, sections 586, 595, 596 and 598 were also referred to.

De Gruyther, K. C., in reply, contended that section 2 of the Civil Procedure Code, 1882, defined "decree" and "order" for the general purposes of the Code. The word "final" in section 595 means any decision which disposes finally of the rights of parties. Orders made in the course of proceedings in a suit are, some of them, appealable under section 588: other orders, though not made in a suit but by an authorized person in an administrative capacity, were subject to an appeal. The definition of "decree" in section 2 of the Code did not control the interpretation of the word in section 594 in the portion of the Code dealing with appeals to the King in Council: the word "decree" there must be taken as meaning or including "judgment" or "order." The latter interpretation has been expressly introduced in the corresponding section of the latest Civil Procedure Code (Act V of 1908).

As to the right of the widow to appeal, in section 9 of the Court of Wards Act (Ben. Act IX of 1879) "taking charge of the property" were the governing words, and it was clear on the evidence that the Court of Wards did not take actual charge of the property. The order of December, 1903, was not sufficient to vest the property in the Court of Wards. The Act did not apply until the Court of Wards actually took over charge of the minor's property. No objection was taken that the widow had no right to present the petition that the case should be restored to the Court

(1) (1912) I. L. R. 40 Calc. 21; L. R. 39 I. A. 197.

for rehearing. The widow, it was submitted, had full power to act as she did. To show that the omission to put the representative of the judgment-debtor on the record, or to give him notice of the execution proceedings, was a material irregularity vitiating the validity of the sale, the cases of *Aba v. Dhonda Bai* (1) and *Erava v. Sidramappa* (2) were referred to.

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The judgment of their Lordships was delivered by

LORD MOULTON. This is an appeal from an order of the High Court of Judicature at Fort William in Bengal, dated the 18th May, 1908, reversing an order of the Deputy Commissioner of Hazaribagh, dated the 16th February, 1906, which set aside the sale of a property known as Gadi Gandey, which is an impartible zamindari descending by primogeniture situated in that district.

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The prolonged legal proceedings in relation to this matter give rise to many important questions of law, but, in the view taken by their Lordships as to the rights of the parties, it will not be necessary to decide more than one or two of such questions. To appreciate the points necessary to be so decided, it will be convenient to state first the facts of the case so far as they relate to the sale, and then to deal with the legal proceedings that have been taken with regard to it.

The property originally belonged to the father of the infant appellant, against whom the respondent on the 27th November, 1900, obtained a decree in the Court of the Subordinate Judge of Benares for Rs. 6,599-9-6 and costs. Two years later this decree was transferred for execution to the Court of the Deputy Commissioner of Hazaribagh, and the respondent applied to that Court for execution of the same by attachment and sale of the property. While

(1) (1894) I. L. R. 19 Bom. 276, 283, 284. (2) (1895) I. L. R. 21 Bom. 424.

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these proceedings were going on, the appellant's father died. The respondent continued the attachment proceedings, and on the 28th October, 1903, applied for and obtained the issue of a sale proclamation fixing the sale for the 2nd January, 1904. It does not appear that notice of any of the proceedings in the attachment was served on any person representing the infant.

The property consisted of 109 mouzahs or villages, and the order for the proclamation of sale directed that the sale proclamation should be served on each of the mouzahs by announcement to the public with beat of drum, and that a copy of the sale proclamation should be fixed at a conspicuous place on each property. What was actually done was as follows. The proclamation was read out without beat of drum in one only of the mouzahs, and the proclamation affixed to a tree in that village alone. The evidence as to this is perfectly clear, and it shows not only that no drum was beaten, but that in the record of the proclamation it was originally so stated. That record has subsequently been altered—evidently fraudulently—to make it appear that it was done with beat of drum.

In addition to these serious irregularities, there is another, which, as it appears on the documents, their Lordships consider that they are entitled and bound to notice. The schedule of the property attached to the proclamation ought to have contained the particulars set out in section 287 of the Code of Civil Procedure, 1882. As a matter of fact, it contained no statement of the encumbrances to which the property was liable. It stated the annual profit income to be Rs. 4,953-7-3, and then stated the value as being Rs. 2,000. To this last matter their Lordships attach importance, because the permission

to bid which the decree-holder obtained from the Court was subject to the condition that the sale should not take place below the estimated value, and inasmuch as their Lordships are of opinion on the evidence that this was a gross under-valuation, their Lordships cannot doubt but that the decree-holder had procured the insertion of this valuation (which corresponded to the amount due to the Government in respect of unpaid taxes, etc.) for the purpose of making possible a purchase by him at this low figure.

What happened on the occasion of the sale is what might have been expected. With the exception of the Collector and the decree-holder, no bidder was present. The Government bidding was Rs. 2,000, the amount due for taxes, etc., from the property. The decree-holder then bid Rs. 2,020, and the property was of course knocked down to him.

Their Lordships have no doubt whatever that the matters above referred to constitute material irregularities in the publishing and conducting of the sale within the meaning of section 311 of the Code of Civil Procedure, 1882. There is abundant evidence that the infant appellant sustained substantial injury through such irregularities. The evidence of Maulvi Syed Ejabat Hossain, who was a Manager under the Court of Wards, and who had occasion to examine into the property shortly subsequent to the sale shows that in his opinion the property was sufficiently valuable to pay all the debts due to the judgment-creditors. At a later stage of the proceedings it became necessary to ascertain the value of the property and the amount of the encumbrances thereon, and the Court referred the matter to a special referee. He heard evidence on both sides, and reported that the property was worth more than two

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lakhs of rupees after allowing for all the encumbrances. Against this evidence nothing has been cited to show that the valuation on the sale proclamation was a fair one, or that the price obtained was adequate. It is true that counsel for the respondent called their Lordships' attention to a letter written in the course of certain negotiations for a compromise, in which it would appear that some official of the Court of Wards was not prepared to advise that a sum of Rs. 9,000 should be paid to get rid of the sale, unless the estate (which was no doubt heavily encumbered) could be wound up with the assistance of the Encumbered Estates Act. But the statements in such letter, even if they supported the contention of the respondent, would not be evidence, unless the writer were called and his source of information disclosed. As it stands it is merely an expression of opinion by a person who, presumably, had no personal knowledge of the matter, and this can have no evidential value. Even if accepted, it would point to the property being of a value of more than four times the sum which the decree-holder paid for it under the sale in question.

The above facts establish a clear case for setting aside the sale. The sole question, therefore, is whether the legal proceedings for setting aside the sale have been regular, so that their Lordships have jurisdiction to give the relief prayed for in this appeal.

For the purposes of this part of the case it will be necessary to give in some detail an account of the legal proceedings that have taken place in the matter. The original action was in the Court of the Subordinate Judge of Benares. In 1903 the suit was remitted to the Court of the Deputy Commissioner at Hazaribagh for the purpose of execution, and on the

11th June, 1903, he issued an attachment order against the property. The decree-holder applied for the issue of a sale proclamation, which for some reason was ineffective. A fresh sale proclamation was then applied for, which was directed to issue, fixing the 1st September for the sale. The report relating to the service of this sale proclamation was submitted on the 6th August. In the meantime the judgment-debtor had died on the 27th July, 1903. At that date an order had been made for the issue of a sale proclamation for sale on the 1st September, but the sale proclamation had not been served. On the 30th July the decree-holder applied for the issue of notice on the heir of the deceased judgment-debtor, and the record states that an order was made for that issue, but there is nothing to show that anything was done under it. It is probable that the decree-holder tried to effect service on the Nazir of the Court of Benares, but that the latter refused to accept it. The sale could not be held under the sale proclamation of the 27th July 1903, and the decree-holder applied for the issue of a fresh one on the 7th September and obtained the issue of a sale proclamation, fixing the sale for the 2nd November. The service of this sale proclamation was, however, irregular, and on the 28th October he applied for and obtained one, fixing the sale for the 2nd January, 1904. Subsequently he obtained permission to bid at the sale, but such permission was coupled with the condition that the sale should not take place below the estimated price. This permission was only obtained on the day of the sale, and on that day he purchased the property for Rs. 2,020.

It would appear that the whole of the proceedings subsequent to the death of the original judgment-debtor were without notice to anyone representing the infant. It is true that, in the original proceedings

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in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the Nazir of that Court was appointed *pro formâ* guardian to them for the purposes of the suit. When, however, the proceedings were transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir. On the day of the sale Narayan Kumari, the mother of the infant, applied for a postponement, but it was refused, and on the 26th January, 1904, she, as the natural guardian of the infant and on his behalf, presented a petition for setting aside the sale, alleging adequate grounds for so doing. The proceedings on this petition continued for some months. At this date the Court of Wards had taken possession of some portion of the infant's property (but not of Gadi Gandey), and the mother of the infant tried to induce them to intervene with regard to the sale. This led to proceedings in the Court which are difficult to understand. The Deputy Commissioner appears to have provisionally invited the Manager of another portion of the infant's property to appear and file objections to the sale of Gadi Gandey, and for some time it was doubtful whether or not the Court of Wards would take charge of that property, and, if so, whether they would intervene in the legal proceedings, or would take steps to bring about a compromise with the decree-holder. But all this ultimately came to nothing, and on the 5th December 1904, finding that the Court of Wards did not appear at the hearing fixed for that date, the Deputy Commissioner made an order confirming the sale.

The mother of the infant who had presented the petition only learnt of the making of this order after the event. She was in ignorance that the Court of Wards had declined to interfere in the matter. On learning what had happened she presented a petition for a review of the order confirming the sale and praying to have it set aside. After protracted proceedings, for the purpose chiefly of taking the necessary evidence, the Deputy Commissioner, on the 16th February, 1906, allowed the prayer of the petition, having previously decided that sufficient cause had been shown to justify the delay in presenting it. From this decision an appeal was brought to the High Court of Judicature at Fort William. That Court set aside the decision of the Deputy Commissioner, and from that decision the present appeal is brought.

The first contention against the competency of this appeal is based on the provisions of Ch. 45 of the Code of Civil Procedure, 1882, which was in force at the date of the appeal. This Chapter regulates appeals to the King in Council. Section 594 provides that in that Chapter the expression "decree" includes also "judgment" and "order," unless there be something repugnant in the subject or context. But it is argued that orders for confirming or setting aside a sale made under sections 311 and 312 are nevertheless excluded from the expression "decree" in this Chapter, because they are included in the orders mentioned in section 588. The reasoning is as follows:— In the definition of "decree" in section 2 "orders" specified in section 588 are not included in the word "decree." Moreover section 588 provides that "the orders passed in appeal under this section shall be final." It is therefore contended that it would be repugnant to give to the word "decree" in Ch. 45 a meaning which would include "orders" under section

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588. "Orders" setting aside or refusing to set aside sales of immovable property are therefore not appealable to the King in Council.

Their Lordships are unable to accept this contention. The Code in express terms adopts for the purposes of Ch. 45 a definition of "decree," which is special and differs from the meaning that it bears elsewhere in the Act. The definition of "decree" in section 2 is therefore not applicable, and the word "decree" in this Chapter must be read as equivalent to "decree, judgment or order." As so read there is no difficulty in construing section 595, which determines when an appeal lies to the King in Council. If this substitution be made, it is evident that final orders may be appealed against, and therefore the provision at the end of section 588, providing that orders passed in appeal under that section shall be final, cannot restrict the provision that appeals may be brought to the King in Council from them. It should be added that appeals of this nature have frequently been heard by this Board in times past, so that the consistent practice of the Board is at variance with this contention of the respondent. Moreover, no reason can be given why orders of so important a character as those made under sections 311 and 312, which deal finally with the rights of parties, should be excluded from the privilege of an appeal.

But the main contention of the respondent was to the effect that the mother of the infant could not represent him in these proceedings. It is so obvious that the Nazir of the local Court of Benares did not in fact represent the infant during any portion of the proceedings in the Court of Hazaribagh, that neither before their Lordships nor in the Courts below was there any substantial contention that he continued to represent the infant after the removal of the

proceedings to that Court. But it was contended that the only representative of the infant at the time of the sale and subsequently was the Court of Wards. It appears that on the 23rd December, 1903, the Court of Wards made an order taking over the management of some part of the property of the infant. That order was not in evidence, and there is nothing in the record which enables their Lordships to ascertain its terms, but it is clear that the Court of Wards did not in fact take over Gadi Gandey at any time. There are concurrent findings to this effect in the Courts below, and their Lordships have independently arrived at the same conclusion. Their Lordships are therefore of opinion that inasmuch as the interests of the infant with regard to this property were not in fact represented by the Court of Wards, it was open to the mother as natural guardian to appear in the name of the infant to protect this property from sale, and that it was the only way of preventing his interests with regard thereto being sacrificed. The proceedings taken by her were therefore in order, and the appeal from them is properly before their Lordships.

Their Lordships will therefore humbly advise His Majesty that the appeal be allowed and the order of the High Court be discharged with costs and the order of the Deputy Commissioner restored, and that the respondent be ordered to pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Dallimore, Pilbrow & Co.*

Solicitors for the respondent: *Watkins & Hunter.*

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