

## CALCUTTA HIGH COURT

Bhim Singh

Vs

Sarwan Singh

(Norris and Beverley, JJ.)

04.08.1888

### JUDGMENT

#### **Norris, J.**

1. The defendant and one Kashi Nath Parley had each obtained a money-decree against the plaintiff; either one or both of the judgment-creditors attached 8 annas of mouzah Manamath, the property of the plaintiff, the judgment-debtor. After the attachment, the Court executing the decree made an order under Section 295 of the Code of Civil Procedure for the rateable distribution of the sale proceeds between the two decree-holders. The attached property was sold and purchased by the defendant, who however did not make the deposit required by Section 306 of the Code.
2. The plaintiff and Kashi Nath each brought a suit to have the sale set aside. The two suits were tried together by the Munsif, who set aside the sale.
3. The defendant appealed to the Judicial Commissioner against the decree setting aside the sale passed in the suit brought against him by the plaintiff. The plaintiff-respondent did not appear at the hearing of the appeal, and the Judicial Commissioner decided the case *ex parte*; he reversed the Munsif's decree, and dismissed the suit with costs.
4. The issues framed by the Munsif were applicable to both suits; the only one which it is material to consider is the first, which ran thus: "Whether the suit for setting aside the sale will lie, or ought the plaintiff to have given petition for setting aside the sale under Section 312 of the Civil Procedure Code? "
5. Upon this issue the Munsif's judgment was as follows: "As regards the issue No. 1, I am of opinion that neither Kashi Nath Pandey nor Bhim Singh (the plaintiff) were precluded from bringing a suit, as the facts of the case show that in consequence of the earnest money and the purchase money not being paid in time, there was in fact no sale-see *Intizam Ali Khan v. Narain Singh* <sup>1</sup>" On appeal to the Judicial Commissioner only one ground of appeal apparently was argued, which in effect ran thus: "The Munsif in deciding issue No. 1 has held that plaintiff was entitled to sue to set aside the sale of 8 annas of Manamath, but this is wrong, because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." Upon this

point the Judicial Commissioner said: "It seems to me that this plea is good under Clause (c) of Section 244 of the Code of Civil Procedure. The question whether there had in law been a sale of Bhim Singh's property in execution of the decree held by Sarwan Singh against Bhim Singh was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was consequently one to be determined by order of the Court executing the decree and not by separate suit. I set aside the Munsif's decree in this suit in which Bhim Singh was plaintiff and Sarwan Singh defendant, and direct that this suit be dismissed."

6. In special appeal two points were raised: First, that the Lower Appellate Court was in error in holding that the suit would not lie, and that it was barred under Clause (c) of Section 244 of the Civil Procedure Code; second, that no issue having been raised as to the suit being barred under Clause (c), Section 244 of the Civil Procedure Code, and no such grounds having been taken in the petition of appeal, the Lower Appellate Court ought not to have allowed the defendant to urge that point.

7. I do not think that there is anything in the second objection.

8. It is true that no issue was raised as to the suit being barred under Clause (c) of Section 244 of the Code of Civil Procedure; but the determination of the point did not depend upon evidence; it was a pure point of law, and I think the Judicial Commissioner was justified in dealing with it if it was properly raised before him by the grounds of appeal.

9. It is not I think correct to say "that no such grounds were taken in the petition of appeal," for, though there is no distinct reference to Clause (c) of Section 244, there is in the petition of appeal a distinct allegation that the Munsif was wrong in decreeing the suit, "because the plaintiff was the judgment-debtor in the suit in execution of which the sale took place." This I think meant "the question raised is one between the parties to the suit and no separate suit will lie."

10. The decision of the first point taken before us is not free from difficulty and involves a careful consideration of Sections 244, 311, and 312 of the Code.

11. Two questions seem to arise upon a consideration of these sections with "reference to the facts of this case; first, does a decree-holder cease to be" a party to the suit in which the decree was passed" if he becomes an auction-purchaser? and second, when do "questions relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof" cease to arise for determination?

12. Upon the first question there is a conflict of authority-see *Viraraghava Ayyangar v. Venkatacharyar and Hera Lal Chatterjee v. Gourmom Debt*<sup>3</sup>

13. The second question has lately been discussed by Mahmood, J., at great length in *Ramchhaibar Misr v. Bcchu Bhagat*<sup>4</sup>

14. I have carefully considered both these questions; and had it been necessary to decide them, I should have thought it well to refer them to a Full Bench; but in the view I take of the applicability of Sections 311 and 312 to this case, I do not think it is necessary.

15. There remains one more question for consideration, viz., does a non-compliance with the provisions of Section 306 of the Code constitute "a material irregularity in conducting the sale" which must be inquired into upon an application under Section 311, or does it furnish ground for a suit to set aside the sale? I am of opinion that such non-compliance is "a material irregularity" in conducting the sale which must be inquired into upon an application under Section 311.

16. It is to be observed that Section 306 deals with two persons present at a sale of immoveable property under Chapter XIX of the Code, viz., "the person declared to be the purchaser" and "the officer conducting the sale." The duty of "the person declared to be the purchaser" is "to pay immediately after such declaration a deposit of twenty-five per centum on the amount of his purchase-money to the officer conducting the sale."

17. The duties of "the officer conducting the sale" are of a twofold character. In the first place there are the duties which are inherent to his position as an auctioneer; and, in the second place, there are the duties prescribed to him by the Code. Amongst the duties inherent to his position as an auctioneer are- (a) the duty of knocking down the property to the highest bidder, and (b) the duty of demanding the deposit of twenty-five per centum. Amongst the duties prescribed to him by the Code is that of "forthwith putting up the property again and selling it" if default is made in making the deposit. The word forthwith is worthy of special attention. The sale is not to be adjourned; the putting up of the property again and soliciting fresh bids is a continuation of the original sale, a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser and that purchaser has made the statutory deposit.

18. This I think is the clear meaning of Section 306.

19. And this view is strengthened by a reference to Section 308, which regulates the procedure upon default being made in payment of the balance of the purchase-money. In that case the property is to be re-sold, and such re-sale cannot take place without the issue of a fresh sale-proclamation and the performance of all the other conditions precedent to a sale prescribed by the Code.

20. It may be if the Legislature had been silent as to the duty of the officer conducting the sale upon default being made in making the deposit, that the failure of the person declared to be the purchaser to make the deposit would not have been an irregularity in conducting the sale; but it seems to me impossible to conceive of a greater irregularity in the conduct of a sale than the failure of the officer conducting it to do what the Legislature has in express terms told him to do on a default being made in the making of the deposit.

21. I am aware that this view is opposed to that taken by the Allahabad High Court in *Intizam Ali Khan v. Narain Singh I.L.R. 5 All. 316(supra)*, but I venture respectfully to think that an examination of the facts of that case will show that the judgment cannot be treated as an authority.

22. In that case Intizam Ali Khan, the judgment-debtor, had applied to have a sale of his property, which had been sold in execution of a decree, set aside, inter alia, on the ground of a

non-compliance with the provisions of Section 306. The application was made and could only have been made under Section 311; and although the Court held that, "inasmuch as the indispensable conditions of the law as contained in Section 306 of the Civil Procedure Code were not fulfilled by the person declared to be the purchaser, the sale was not bad by reason of an irregularity in publishing or conducting it, but was no sale at all," it yet set aside the sale under Section 312, which only authorizes the setting aside of a sale on the ground of a material irregularity in publishing and conducting it.

23. In the result, therefore, I am of opinion that the plaintiff's suit and this appeal should be dismissed, but under the circumstances of the case without costs.

**Beverley, J.**

24. I concur in holding that the present suit will not lie for the following reason: The ground upon which it is sought to set aside the sale is the non-compliance with the provisions of Section 306 of the Code. I concur with my learned colleague in holding that such a non-compliance, if substantiated, would amount to an irregularity in conducting the sale such as is referred to in Section 311. It should, therefore, in my opinion have been made the subject of objection under that section before the sale was confirmed. Sections 311 and 312 provide a special procedure, open to both the decree-holder and the judgment-debtor, for the determination of disputes arising out of irregularities in publishing and conducting sales, and I am of opinion that it was the intention of the Legislature that all such disputes should be determined under the provisions of those sections in the course of the execution proceedings, and not by way of a regular suit after the sale has been confirmed, Section 312 distinctly bars a suit to set aside, on the ground of irregularity, an order made under that section, and that includes an order confirming the sale, even when no application has been made under Section 311 to have it set aside. That being so, I am of opinion that the present suit cannot be maintained, and I agree in dismissing the appeal without costs.

Cases Referred.

- 1 I.L.R. 5 All. 316
- 2 I.L.R. 5 Mad. 217
- 3 I.L.R. 13 Cal. 326
- 4 I.L.R. 7 All. 641