

(1901) 07 CAL CK 0003

In the Calcutta High Court

Case No : Appeal from Original Order No. 33 of 1900

Bhikari Misra and Others

APPELLANT

Vs

Rani Surja Moni Pat Maha Dai

RESPONDENT

Date of Decision : 11-07-1901

Acts Referred:

Citation : (1901) 07 CAL CK 0003

Final Decision : Dismissed

Judgement

1. This appeal arises out of an application by the judgment-debtor to set aside a sale in execution of a decree held on the 15th April 1899. Various grounds against the validity of the sale were put forward in the petition of the judgment-debtor under sec. 311 of the Civil Procedure Code, praying for setting aside the sale. The Subordinate Judge has held against her on all the points excepting one. He has come to the conclusion that the objection founded upon the non-specification of the hour at which the sale was to be held was a material irregularity owing which the property was sold at a grossly inadequate value ; and he has accordingly set aside the sale. From that order the decree-holders have appealed to this Court and the learned pleader on their behalf has impugned the judgment of the Subordinate Judge principally on four grounds, first, that the non-mention of the hour was not a material irregularity; second, that if it was an irregularity, it was waived by the judgment-debtors ; third, assuming that there was no waiver, the fact that no hour was mentioned at which the sale would take place did not cause any injury, inasmuch as the price was not inadequate; and, fourth, that even if the price was inadequate, there is nothing to show that that inadequacy resulted from the irregularity complained of and found by the Subordinate Judge.

2. The learned pleader for the Respondent, on the other hand, contended that the non-specification of the hour resulted in the inadequacy of price, and that the judgment of the Court below in that respect was well founded. He also contended that the Subordinate Judge's order setting aside the sale was sustainable on a

ground which he had disallowed, but which he (the learned pleader) was prepared to support in this Court upon the facts of the case.

3. Having regard to the objections taken in appeal, it is necessary to state the antecedent circumstances connected with the sale. The sale was originally fixed for the 23rd of February 1899, when upon an application of the judgment-debtor, with the consent of the decree-holders, it was postponed to the 2nd March. It was similarly postponed again to the 15th March. On the 15th March the judgment-debtor applied again for further time. That application was refused by an order, which, in the order-sheet is No. 10. By some peculiar mischance the order No. 11, which is of very great importance in the consideration of the case, has not been printed in the Paper-book. It is in these terms:-- "There being no bidder for the properties, the decree-holder's petition for permission to bid refused." On that it appears the decree-holders consented to a postponement, and the sale was postponed by consent to the 15th April. On the 15th April the judgment-debtor again applied for postponement, which was refused, and upon the decree-holder's petition for permission to bid the following order was recorded :--"The decree-holders petition for permission to bid being taken up, it is ordered that the decree-holders be accorded permission to purchase at the highest bid at sale, provided other intending purchasers are present." The sale then took place on that day, and the 2nd of May was fixed for its confirmation. It is unnecessary to refer to the other proceedings. Subsequently the judgment-debtor came in with the present application to have the sale set aside on the grounds to which we have referred before.

4. The Subordinate Judge holds that under sec. 291 of the CPC it was necessary to mention the hour of sale, and he has therefore considered its non-specification to be a material irregularity. Dr. Rash Behary Ghose contends that the non-mention of the hour is wholly immaterial, because people may be supposed to know the hour at which sales are usually held. This contention appears to us to be unsound, having regard to the provisions of sec. 291, and the cases which have been referred to by the Subordinate Judge, and which have been relied upon by the pleader for the Respondent. Sec. 291 says :---"The Court may in its discretion adjourn any sale under this chapter, other than a sale by the Collector, to a specific day and hour." The adjournment is left to the discretion of the Court, but the fact that the day and hour must be specified is quite clear from the phraseology of the law. The Legislature has given a great many facilities to the decree-holder for the purpose of realizing his dues, but it has also provided a few safeguards for the protection of the interests of judgment-debtors, and among those safeguards is the specification of the day and hour of sale, so that intending purchasers may be able to be present for the purpose of bidding at the sale ; and this Court and the Madras High Court have both held that non-compliance with the provisions of the law by which certain requirements are to be complied with before a sale can be effected, vitiates the sale. In the case of *Surnomoyee Debi v. Dakhina Ranjan Sanyal* I. L. R. 24 Cal. 291 (1896) the learned Judges indicate that a strict compliance with the provisions of the section

is necessary. After stating the facts they say as follows:--"On these facts which are fully established by the evidence, the Subordinate Judge has held, and we think rightly held, that there were material irregularities in connection with the sale. Both on the 20th November, when the sale was postponed to the 25th, and on the 25th when it was again postponed to the 27th no hour was fixed for the sale as required by sec. 291 of the Civil Procedure Code, and the order passed on each date that the sale would take place after the disposal of the claim case was of such a vague and indefinite character that intending bidders could not possibly have known where and at what time the sale would actually take place, and consequently there were no bidders present on the 25th November, and there were only three bidders on the 27th." In attempting to distinguish that case from the present case, the learned pleader for the Appellant overlooked that in the passage which we have just quoted, the learned Judges were dealing with two separate irregularities which, in their opinion, vitiated the sale, namely, the fact that no hour was specified, and secondly the fact that the order itself, which was made, was of a vague and indefinite character. In the present case also, on both the occasions on which the order for postponement was made there was no hour mentioned. In appeals from orders Nos. 165 and 182 of 1900 [Jamini Mohan v. Chandra Kumar Roy 5 C. W. N. ccxlvii ; since reported, 6 C. W. N. 44 (1901)] which was disposed of on the 25th June last by Hill and Brett, JJ., passage which we have quoted from Mr. Justice Ghose's judgment was referred to and accepted as correctly laying down the law. It is obvious that the specification of the hour is a circumstance of the greatest importance for the information of intending bidders; for it is inconceivable to suppose that purchasers would come in on the day to which a sale is postponed at the earliest moment the Court sits and wait till the end of the day on the chance that the sale may take place some time in the course of the day; and it is for this reason, as we apprehend, the law provides that adjournment must be to a specified day and hour. In the case of Venkata Subbaraya Chetti v. The Zemindar of Karvetinagar I. L. R. 20 Mad. 159 (1896) the omission to have the sale tom-tomed was held to be a material irregularity. The learned Judges in that case, referring to the provisions of sec. 291, observed as follows :-- "We observe that the orders of the District Judge adjourning the sale did not comply with the provisions of sec. 291, Civil Procedure Code, which require that adjournments shall be to a specified day and hour. It is of the utmost importance that in these matters the exact provisions of the Code should be followed ;" and we desire to express our entire concurrence in the view there in pronounced ; for we consider that the non-specification of the hour is of material importance in giving notice to intending purchasers of the sale which is going to take place.

5. Dealing next with the question raised on behalf of the Appellants that the irregularity was waived by the judgment-debtor, we heard to bear in mind that although the judgment-debtor applied for postponement of the sale, she had no control over the form of the order made by the Subordinate Judge. She could not control, so to speak, his action with regard to the wording of his order. The

specification of the day and the hour is a matter for the Judge alone, and if he fails to specify them the judgment-debtor cannot be held responsible for the omission.

6. An ingenious argument was based upon the remarks of the Judicial Committee of the Privy Council in the case of *T. R. Arunachellam Chetti v. V. R. R. M. A. R. Arunachellam Chetti* L. R. 15 I. A. 171 (1888). It will be noticed that the circumstances of that case were extremely peculiar. In the sale proclamation the decree-holder did not specify the full rights of the judgment-debtors. The sale was postponed at the instance of the judgment-debtors, and they came in afterwards to object to the sale on the ground of insufficient description. At the time when the petition was presented to the High Court against the sale, the learned Chief Justice observed. "I see no irregularity. The judgment-debtor might have applied that the sale should be made in lots." But subsequently, after an inquiry directed by the High Court as to various matters regarding which there were not sufficient facts on the record, the High Court set aside the sale. The Judicial Committee of the Privy Council considered that the judgment-debtors must have known what the description in the sale proclamation was ; and that therefore, having regard to the peculiar circumstances of the case, the sale should not be set aside on that ground.

7. Reference was also made to the case of *Girdhari Singh v. Hurdeo Narain Singh* L. R. 3 I. A. 230 (1876), which again was a case of a very special character. Then the decree-holder applied for execution of her decree ; the sale was postponed several times, and afterwards the property was put up for sale and knocked down to the Respondent, who was not the decree-holder. An application was made to the Subordinate Judge to set aside the sale. That application was refused but the sale was not confirmed subsequently the judgment-debtor came in and made an application to the Subordinate Judge to review his decision and upon that application the Subordinate Judge made an order setting aside the sale. On appeal the High Court was of opinion that the Subordinate Judge had no jurisdiction to reverse the sale on precisely the same objections which he had previously overruled, and which, in the opinion of the Judges of the High Court, were not material and did not substantially injure the judgment-debtor. They accordingly set aside the order of the Subordinate Judge and confirmed the sale. On appeal by the judgment-debtor to Her Majesty in Council, the Judicial Committee held that the action of the Subordinate Judge was irregular. They did not approve of the dictum of the High Court that a mistake in the Government jama was not a material irregularity. They were of opinion that the non-specification of the amount of the revenue correctly was an irregularity for which the sale might have been set aside provided the judgment-debtor had satisfied the Court that he had in consequence of it sustained injury. They pointed out that purchasers were not in the habit of referring to the towji and acquainting themselves with the jama, and so forth ; and therefore it was material that the Government jama should be correctly mentioned. But they thought that as the sale had been postponed at the instance of the judgment-debtor, and there was

nothing to show that he was not aware of its terms, they might presume that he had waived the objection relating to the inaccuracy of the Government jama. They also referred to the mistake in the proceedings of the first Court and on that ground upheld judgment of the High Court although, in their opinion, it was not absolutely correct. The remarks of their Lordships must be read, as we apprehend in connection with the facts of the case, and that has been the view which has been taken recently in a case which came before the Chief Justice and Mr. Justice Hill, appeal from order No. 210 of 1900, decided on the "21st June 1901, See supra, p. 49 where the learned Chief Justice, after giving the facts of the case and the adjournments which had been granted at the instance of the judgment-debtor, says as follows ;--"In his petition of the 7th April 1900 the applicant asked for an adjournment of the sale until the next 12th May "without issue of fresh proclamation and beat of drum," and this application was acceded to. The Subordinate Judge has relied upon the decision of the Judicial Committee in the case of Girdhari Singh, v. Hurdeo Narain Singh L. R. 3 I. A. 230 (1876), which is a binding authority upon us, to the effect that the applicant must be taken to have waived any misdescription or misstatements apparent on the face of the proclamation itself. The same view was taken later on by the Judicial Committee in the case of T. R. Arunachellam Chetti v. V. R. R. M. A. R. Arunachellam Chetti L. R. 15 I. A. 171 (1888). That must be taken to be so ; but in the present case the Appellant complains of something more than the mere misstatements and misdescriptions in the proclamation itself. It has been admitted that the property to be sold consisted of separate zemindaries situated apart, and in paragraph 3 of his petition, a petition which, like so many mofussil pleadings, is not very artistically drawn, and for which some allowance may reasonably be made, he says:--"As proclamation of sale was not served on each of the properties in the mofussil, no purchaser of the locality was present, and, as purchasers were not present, properties of the value of rupees one lakh have been sold for Rupees 29,000, and the judgment-debtor has-been totally ruined." The Appellant contends that he ought not to have been shut out from giving evidence on this issue, and that his waiver does not prevent him from going into this question, assuming, for no evidence has been taken on the point, that when he presented his petition of the 7th April 1900 he was ignorant of the fact, if such it were, that the proclamation had not been posted up on the various properties according to law. Under such circumstances he says that there would have been a material irregularity in the publishing of the proclamation, which he could not be taken to have waived, as he was ignorant of the fact at the date of the alleged waiver. In my opinion the Appellant ought to have at least an opportunity of going into evidence on this point, and that he ought not, to cite the language of the Court below, to be gagged at the very threshold." It seems to us that the view taken by the Court of the enunciations of the Judicial Committee in the two cases to which we have referred is opposite to the present case. The fact that the judgment-debtor consented that the sale should be held without the issue of a fresh proclamation does not indicate that she waived the non-specification also of the day and the hour. It is essential for the purpose of

giving notice to intending purchasers that it should be stated that the sale will take place on a particular day at a particular hour. As we have already pointed out, that was a matter not within the judgment-debtors control, nor was it within the control of the decree-holder, It was a matter entirely for the Court to deal with; It has been suggested that people generally know that sales take place at noon, we know that by a legal fiction every body is suffered to know the law ; but we know of no authority that people are expected to know the hour at which auction sales take place. It would obviously be absurd to give effect to such a contention. We are therefore of opinion that there was no waiver on the part of the judgment-debtor regarding the irregularity concerning the non-specification of the hour.

8. The next question is whether the sale was for an undervalue. Evidence has been given on behalf of the judgment-debtor to show that the land sold consists of several plots lying in a number of mouzahs and held at a very low quit rent fixed in perpetuity, which must necessarily be extremely valuable. This evidence is un rebutted, the oral testimony being supported by documents produced by the witnesses. In our opinion the Subordinate Judge was right in thinking that the value of the property would be somewhere about 70,000 rupees; but in view of the objection of the decree-holder that the evidence which had been given related only to 1 or 5 mouzahs, he made what he calls "every possible allowance" in favour of the Appellant, and thought that the value could not be below 35 or 40,000 rupees. It is suggested that because the lady in her petition had put down that her properties were worth more than Rs. 30,000 she should be limited to that amount.

9. That is an agreement which does not commend itself to us. In the first place the judgment-debtor is a purdanashin woman, and there is nothing to show that she was acquainted with the exact value of the land; and, in the second place, she does not fix herself to the value. She says that the properties were worth more than 30,000 rupees. We did not ask the learned pleader for the Respondent to address us on the subject of the value of the property, because we considered that to have been conclusively established ; and nothing has been shown by the other side to induce us to take a different view from the Subordinate Judge, There can be no doubt then that the judgment-debtor has suffered substantial injury by the sale ; and the only question is whether such injury is in consequence of the material irregularity to which we have referred, and which we have discussed before.

10. It has been contended by the learned pleader for the Appellants that there must be direct evidence or substantial data to connect cause and effect. It appears to us that that argument is not only far-fetched but also not supported by any authority. The case to which reference was made in support of that proposition does not go to that extent; and the learned Judges who decided the case of *Surnomoyee Debi v. Dakhina Ranjan Sanyal* I. L. R. 24 Cal. 291 (1896) pointed out the circumstances under which their Lordships made those

observations. Before them also great stress was laid upon the words "direct evidence" used by their Lordships in their judgment ; and with reference to that the learned Judges who delivered the judgment of this Court says as follows:--"We have given the matter our careful consideration, and we think that it is very doubtful whether their Lordships by using these words intended to restrict the mode of proof connecting a material irregularity with substantial injury to evidence of a particular description or to vary the rule laid down in the case of *Macnaghten v. Mahabir Pershad Singh* L. R. 16 I. A. 107 (1889) and *Arunachellam Chetti v. Arunachellam. Chetti* L. R. 15 I. A. 171 (1888) that in all cases of irregularity under sec. 311 evidence must be given of substantial injury having resulted from the irregularity. We are rather inclined to think that what their Lordships intended to say by using the words "direct evidence" was that there must be evidence showing that substantial injury was the necessary result of the irregularity complained of." That view has been adopted by Mr. Justice Hill and Mr. Justice Brett in the case to which we have already referred ; and we are of opinion that although their Lordships of the Judicial Committee used the words "direct evidence" in the case upon which reliance has been placed by the learned pleader for the Appellant, the meaning of their Lordships was that it was upon the judgment-debtor to show that there was reason for inferring that the substantial injury was due to and resulted from the material irregularity complained of. We think that the learned Subordinate Judge was right in his conclusion that the non-specification of hour would have a material effect in deterring intending bidders from attending the sale, and in deriving from that the inference that the gross under value at which the property was sold was the direct result of that irregularity. But further than that, it appears to us, upon the special facts of the case, that there are abundant materials for holding that the inadequacy of price was a direct resultant from the non-specification of the hour. We find that on the 18th March there were no bidders present. It is impossible to suppose that this valuable property, which was going to be sold in small lots, would not have attracted purchasers if the sale had been properly notified, and if the hour of sale had been mentioned in the sale proclamation. The sale was postponed wholly on that ground from the 15th March to 15th April. On that day the Subordinate Judge makes this peculiar order of a conditional character giving permission to the decree-holder to bid "provided other intending purchasers are present;" and as a consequence of that condition purchasers were produced. The character of these purchasers can be judged from the fact that although these plots of land held at a low quit rent were being sold they would not buy them at the low price they fetched but allowed them to be knocked down to the decree-holder's pleader for the decree-holder. The inference is irresistible.

11. Upon these grounds we are of opinion that it has been sufficiently made out that there was a material irregularity ; that there was no waiver ; that the property was sold at a grossly inadequate value; and that that was the direct result of the non-specification of the hour of sale. In this view it is unnecessary to consider the question raised by the learned pleader for the Respondent,

namely, that the value of the property inserted in the sale proclamation was grossly inadequate. Having regard to what has been found by the Subordinate Judge and affirmed by us with respect to the value of the property, it is quite clear that the sum of Rs. 10,620, the price stated in the sale proclamation, was grossly inadequate. There is nothing to show upon what basis the decree-holders had appraised the value they put in that explicit manner. They are themselves residents of Puri, where the judgment-debtor also resides. It is difficult to suppose that they were not aware of the nature of these lands and did not know that they were of considerable value. Their Lordships of the Privy-Council in the case of Saadatmand Khan v. Phul Kuar L. R. 25 I. A. 146 (1898) considered the incorrect mention of the value of the property to be sold a material irregularity. The Munsif in that case had considered that a misrepresentation as to value was not a material irregularity for which a sale could be set aside, his opinion being that no rule required that the value of the property should be mentioned in the proclamation, and that as the entry was uncalled for and not legally obligatory, to give a wrong value was no reason for setting aside a sale ; their Lordships dealing with that matter observed as follows:-- "This is a very mistaken view. It is true, as before observed, that the misstatement is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the Court does not prevent it from being "a material irregularity in publishing or conducting the sale," such as to bring the case within the special remedy provided by sec. 311. Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things, "which the Court considers material for the purchaser to know," and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible. It must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation." The decree-holders were inhabitants of the same place, and it was possible certainly for them to state the value of the property with "greater accuracy," to use the expression of the Judicial Committee ; and in our opinion the low valuation set upon the property must undoubtedly have had some effect on the price it fetched at the sale.

12. But it is said that as the value was mentioned in the sale proclamation, it must be taken as waived ; and reliance is placed on the Privy Council case to which we have already referred. We may point out that the circumstances of this case are different from the facts of that case. There is nothing to show that the lady, the judgment-debtor, had any knowledge of the sale proclamation, and that with that knowledge she waived all objections to the sale proclamation. All that she consented to do was that the sale might be held without the publication of any further sale proclamation. She did not admit it that if the sale proclamation was not correct in material and substantial particulars, she waived all objections to it. But however that may be, we hold that the ground upon which the Subordinate Judge has decided the case is well founded. We accordingly dismiss

this appeal with costs. We assess the hearing-fee at five gold mohurs.