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**(1914) 06 AHC CK 0039**  
**In the Allahabad High Court**

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| Maulvi Mohamad Maqbul-ul-Rahman | APPELLANT  |
| Vs                              |            |
| Saiyed Ali Khan and Others      | RESPONDENT |

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**Date of Decision :** 25-06-1914

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

**Citation :** AIR 1914 All 325 : 25 Ind. Cas. 18

**Hon'ble Judges :** Rafique, J;Piggott, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## Judgement

Piggott, J.—This is an appeal by a judgment-debtor against an order dismissing an application made by him under Order XXI, Rule 90," of the CPC - to have the sale at auction of certain villages belonging to him set aside. The fourth paragraph of the memorandum of appeal to this Court gives succinctly the grounds upon which relief is sought. It is there pleaded that the evidence on the record proves that there was both material irregularity and fraud in publishing and conducting the sale, with the result that property worth at least eight lakhs of rupees was sold for less than one lakh.

2. The plea of "fraud", in so far as it can be said to rest on any evidence at all, seems to be, based upon the allegation that the notice of the sale was not duly proclaimed by beat of drum, and by the affixing of a copy of the proclamation on a conspicuous part of the property to be sold, as required by Order XXI, Rule 67, read with Rule 54 of the Code of Civil Procedure. In order to make out a plea of "fraud" it would be necessary to point to some evidence from which the Court could reasonably be asked to infer that these omissions, if they in fact took place, were brought about by the decree-holders, or by some other persons, with intent to prevent intending purchasers from coming forward and thus securing the sale of the property at a low price. I find no such evidence on the record, nor was our attention drawn to any such evidence in the course of arguments. The plea of " fraud" seems to have been left in the memorandum of appeal as matter

of prejudice merely. At any rate I feel no hesitation in finding that no fraud is proved.

3. It may be contended that these allegations as to the proclamation of the sale amount at any rate to allegations of material irregularities. In order to get a sale set aside on the ground of material irregularity, a party applying under Order XXI, Rule 90, must prove, in the first place, that there was some such irregularity in publishing or conducting the sale. He must then show that the sale resulted in substantial injury to him, and finally he must prove some facts from which the Court can reasonably infer that this substantial injury was incurred by reason of the irregularity shown to have been committed. The wording of Order XXI, Rule 90, of the present CPC is perhaps a little more favourable to the applicant than that of Section 311 of the Code of 1882, but the above seems to represent correctly the state of the law as now amended.

4. As regards the publication of the sale the case for the appellants breaks down at the very outset. I have been through the evidence and I find no valid reason for holding that proclamation was not duly made according to law. I entirely concur in the criticism of the learned Subordinate Judge against the evidence produced by the judgment-debtor. I accept his finding that the notice of the sale was duly published as required by law. There is no material defect in the sale-proclamation itself; so there was no material irregularity as regards the publishing of the sale.

5. With reference to the conduct of the sale itself, two points were pressed upon us in argument. The auction-purchaser of one of the lots found that he had not money enough with him to deposit one-fourth of the price in full. He seems to have tried to make arrangements, but as it was getting late the sale officer allowed him to deposit Rs. 2,000, and reported to the Court that the balance would be paid in next day. It was in fact paid in at the earliest possible opportunity. The procedure adopted is not strictly in accordance with the provisions of Order XXI, Rule 84, Civil Procedure Code, but assuming that there was an irregularity vide *Ahmad Bakhsh v. Lalta Prasad* 28 A. 238 : (1905) A.W.N. 263 . I cannot say that it strikes me as a material" one so far as the judgment-debtor is concerned. If any one had good cause for complaint it was the next highest bidder who was there with his 25 per cent of the purchase-money ready in his hand. In any case I find no reason whatever for holding that it was an irregularity which resulted in injury to the judgment-debtor.

6. The other point taken deserves a little more consideration. The decree under execution was one for Rs. 27,678. The Court had divided the property to be sold into nine lots, and had passed an order that so many lots only should be sold as would suffice to pay off the decree. The first four lots put up for sale fetched Rs. 28,200; but the officer in charge of the sale continued until he had disposed of the whole nine. This was not a mere oversight; there was a substantial reason. The judgment-debtor was heavily involved and applications for rateable distribution had been pouring in right up to the date of the sale. The total of the

claims thus put in comes to more than double the sum for which execution was originally taken out. It has not been made to appear to us that when those further claims are taken into consideration, the amount realized by the sale of the whole nine lots was more than sufficient to ensure the payment of the entire judgment-debt to the original decree-holders. Under these circumstances it cannot be said that the officer conducting the sale was without justification in proceeding with it until he had disposed of the whole nine lots. I must concede to the appellant that it is a peculiar and unfortunate feature of the case that we cannot find on the record any formal communication, from the Court executing the decree to the Collector or to the officer conducting the sale, of the fact that these applications for rateable distribution had come in. There was another decree under execution against the same judgment-debtor, on which certain other property of his had been attached and put up for sale; in connection with that decree an intimation of a number of applications for rateable distribution had been sent to the sale officer. It may be that the Court remained under a mistaken impression that it had sent such intimation in both cases, or that it merely overlooked the fact that the orders issued in the present case required modification in view of the fact that numerous applications for rateable distribution had come in. The sale officer may have misunderstood the intimation he had received in the other execution case as applying to this one also; or he may have acted upon knowledge of the judgment-debtor's circumstances acquired in some manner not apparent from this record. I find no room for any suggestion that he acted otherwise than in good faith. His position is in fact intelligible enough. He was under orders to sell as many lots as might be necessary in order to ensure that these particular decree-holders should receive the whole of the Rs. 27,678 due to them. He did not feel sure that this could be secured even by the sale of the whole nine lots. He accordingly put all of them successively up to sale: the Court executing the decree was not bound to confirm the sale of any one of them which it might find to be in excess of what was necessary. On these facts I am of opinion that there was an irregularity committed by the Court executing the decree in not sending formal intimation to the Collector, or to the sale officer, of the filing of the application for rateable distribution, and in not modifying accordingly its original order directing the sale in nine lots. There was also an irregularity in the conduct of the sale-officer in not referring to the Court for orders instead of proceeding with the sale of the nine lots on his own authority. Such irregularities might in some sense be described as "material." The question, however, is whether in this particular case they resulted in substantial injury to the judgment-debtor appellant.

7. The first point to be considered under this head is whether the five lots sold after the sum of Rs. 28,200 had been realized did in fact sell for less than their market value. The evidence relating to any of the first four lots is immaterial in view of my finding that there was no material irregularity in publishing the sale, and none in conducting it, so far as these four lots were concerned. The learned Subordinate Judge says that almost all the villages sold for much more than the

estimated value given in the sale-proclamation; that the report of the sale shows that there was very fair competition, and that on many of the villages there are incumbrances which will have to be paid off by the purchasers. He finds that the judgment-debtor's evidence fails to satisfy him that " the properties have been sold at a low price". I have been through the record to see what the objector's evidence really comes to. Chhote Lal Patwari gives certain figures for Bahlolpur (Lot No. 5) and Nover (Lot No. 7). Assuming twenty years' purchase to be a fair price, the figures given by this witness would make Bahlolpur worth something over Rs. 10,000 and Nover worth over Rs. 22,000. The witness also says that there are palm and dhak trees on the waste land in both villages, especially in Bahlolpur. A witness named Bansidhar says he once offered Rs. 75,000 for village Chaubara (Lot No. 6) and would be ready to pay the same even now. He admits he has never seen the place, and could give no reason for the valuation he puts upon the village. A witness named Ram Sarup deposed that he thought village Chakkanwala (Lot No. 9) worth Rs. 80,000, and would pay Rs. 70,000 for it even now. He knew the land revenue was close on Rs. 1,000 a year, and for the rest relied on certain papers shown him by Intizam Ali, a servant of the judgment-debtor. A witness named Abdul Qayyum gave certain evidence not relevant for present purposes as relating to villages which formed lots Nos. 2 and 3; he also deposed to an attempt to purchase lot No. 8 for Rs. 30,000. He did not profess to have wanted to buy on his own account, or to have made any reasonable inquiries; he seems to me, in fact, to have conclusively broken down under cross-examination. A witness named Abdul Majid says he was ready to buy lot No. 7 for Rs. 30,000 and lot No. 5 (Bahlolpur) for Rs. 39,000. He could give no sensible reasons for believing these villages to offer a remunerative investment of these prices, and made no attempt to explain why he, did not turn up and bid at the auction. Wahid-ul-haq Patwari deposed in general terms that the value of lot No. 9 must be about one lakh of rupees. Finally there is the report of a Commissioner who made an attempt, on his own showing a very rough one, to estimate the value of the standing timber in the villages in question. He says there is standing timber in Bahlolpur worth Rs. 37,000, in Nover worth close on Rs. 6,000 and in Chakkanwala worth close on Rs. 16,000. A great deal of this evidence is worthless on the face of it. The report of the Commissioner looks at first sight a fairly substantial piece of evidence, but it quite fails to impress me. We have this judgment-debtor heavily indebted, pressed. by his creditors and submitting to the attachment and sale of his landed property; yet we are asked to believe that over sixty thousand rupees were lying to the man's hand, to be had for the asking. In the course of my work under the Bundelkhand Encumbered Estates Act, I constantly came across similar allegations as to the extraordinary value of forest timber standing on estates the proprietors of which had practically gone bankrupt without attempting to avail themselves of the alleged assets. The truth I take to be that these estimates of the value of such timber, even when prepared in good faith, are always delusive. To cut quantities of such timber and convey it to the nearest available market, either in the form of fire-wood or of building timber, is a pure speculation, as likely to result in loss as in gain. The

sale of huge quantities (such as is postulated by these estimates) is practically impossible, because of the danger of glutting the market and bringing the price down below the cost of felling and cartage. I am unable to place any reliance on this part of the appellant's case.

8. As a matter of fact the five lots with which I am now concerned sold for Rs. 71,650 in all. Their estimated value, according to the rough estimate prepared in the Collector's office, comes to only Rs. 45,000, and there are heavy encumbrances, especially on village Chakkanwala. The total land revenue on the five villages comes to only Rs. 2,525. It is true that two of these, Chaubara and Chauharpur, are revenue-free villages; but the nominal assessment which is prepared for the purpose of calculating ceases, etc., is given in the sale-proclamation and is included in the above total. If it be assumed that the two revenue-free villages would bring in an income equal to twice their nominal assessment and the remaining three villages one equivalent to their assessment, the annual income would come to Rs. 3,725. On this basis the five lots appear to have sold for first over nineteen years' purchase; and this is at a forced sale, and without taking into account the encumbrances.

9. The amount of these encumbrances cannot be estimated with certainty, because we are not in a position to make up the interest account; but the principal of the debts due on villages Chaubara, Chauharpur and Chakkanwala alone comes to Rs. 35,843 while there are Rs. 24,000 more secured on mortgages which affect Chakkanwala jointly with Koli, the latter being lot No. 1 at the auction-sale, and, therefore, outside the scope of the present inquiry. It is quite possible that the assessment is a somewhat light one; but I should require very strong evidence before I could consent to increase the rough estimate of Rs. 3,725 (arrived at upon a consideration of the assessment figures) by more than Rs. 50 per cent., seeing that these villages are in the Moradabad District, recently under Settlement. If the annual income could be taken as high as Rs. 5,600 the price at twenty years' purchase would be Rs. 1,12,000; and the sale price plus the encumbrances comes to Rs. 1,07,496 without counting possible accumulations of interest, or the Rs. 24,000 secured on Koli and Chakkanwala jointly. In the arguments addressed to us on this point we were in effect invited to concentrate our attention on the single village of Bahlolpur: that is not a fair way of dealing with the issue. The question of the alleged substantial injury must be considered with reference to the auction-sale as a whole. After thus considering "the evidence I concur with the learned Subordinate Judge in holding that the judgment-debtor has not proved substantial injury in connection with the sale of the five villages which constituted lots Nos. 5 to 9 inclusive at the auction-sale.

10. Still less has been proved that substantial injury resulted from the irregularities in the conduct of the sale which I have found to exist. In order to connect the two things the appellant should be able to point some facts from which the Court could reasonably infer that there were intending, or possible,

purchasers who after studying the sale-proclamation came to the conclusion that the decree was certain to be satisfied by the sale of the first three or four lots and so remained absent, whereas they would have attended the sale if they had thought that lots Nos. 5 to 9 would be put up to sale. I am quite unable to draw any such inference from the facts on the record. I do not believe that anything of the kind occurred.

11. The appellant has, therefore, entirely failed to make out any case for relief under the provisions of Order XXI, Rule 90, of the Civil Procedure Code. An attempt was made on his behalf to get the case outside the limits of that rule. The contention if I rightly appreciate it, was that the officer conducting the sale had no authority from the Civil Court to put up any lot for sale when once the first four lots had realized more than the amount of the decree. His subsequent proceedings, we were asked to hold, amounted to something more than a mere irregularity: they were without jurisdiction"--it was even suggested that the sale of lots Nos. 5 to 9 was a mere nullity and passed no title to the purchasers.

12. Now, in the first place, I take it to be settled law, it is certainly settled law so far as this Court is concerned that no such line of argument as this is open to an applicant for an order to set aside a sale under Order XXI, Rule 90, of the Civil Procedure Code. Put aside for a moment the question of fraud, which has no real bearing on the present case, and consider the position. An applicant asks to have a sale set aside, alleging material irregularity in publishing or conducting the same. It is pointed out to him that the rule requires him to prove that he has suffered substantial injury by reason of the alleged irregularity. He replies, in effect, that the irregularity alleged by him is so serious that it must vitiate the sale, apart from any question of resulting injury. The obvious answer is that he cannot both apply to the Court under Order XXI, Rule 90, and seek to evade its provisions in this fashion. This was the view of the law taken by this Court in *Shirin Begam v. Agha Ali Khan* 18 A. 141 : (1896) A.W.N. 9 and in *Marians Lal v. Kundan Lal* 21 A. 140 : (1898) A.W.N. 212.

13. Personally I find no force in the contention from any point of view. I have set forth in detail the circumstances of the sale and have shown that the proceedings were irregular; but the sale took place under the orders of a competent Court, which had properly taken all the villages in question in execution and had jurisdiction to sell them and has duly confirmed the sale. The order issued to the sale officer, reasonably interpreted, was an order to sell as many lots as he might find necessary in order to secure to these particular decree-holders the sum of Rs. 27,768. It is not shown that he actually sold a single lot more than was really "necessary for this purpose. I think the learned Subordinate Judge was quite right in confirming the sale.

14. For these reasons I would dismiss this appeal with costs, including fees on the higher scale.

Rafique, J.

15. I concur.

16. By the Court.--The order of the Court is that the appeal is dismissed with costs, including fees on the higher scale.