

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

.1894.
March 27.

A'BA BIN KHESA'JI (ORIGINAL DEFENDANT No. 2), APPELLANT, v.
DHONDU BA'I (ORIGINAL PLAINTIFF), RESPONDENT.*

Decree—Execution of decree—Death of judgment-debtor after attachment but before sale in execution—Sale without legal representative of judgment-debtor being made a party—Effect of such omission on validity of sale—Civil Procedure Code (Act XIV of 1882), Secs. 311, 316—Practice—Procedure.

Tukárám obtained a decree against one Subhánkhán, and in execution attached certain land which Subhánkhán had previously mortgaged to Krishnáji. On the 11th June, 1877, a warrant for sale was issued followed by the usual proclamation. Subhánkhán died on the 27th September, 1877, and a few days afterwards, *viz.*, on the 3rd October, 1877, the sale took place without any notice being given to Dhondu Báí, who was the heir and legal representative of Subhánkhán, who, however, came to know of it shortly after. Tukárám, the decree-holder, purchased the land at the sale, and in 1883 sold it to A'ba, who redeemed the mortgage from Krishnáji and took possession. In 1891 Dhondu Báí, as heir and legal representative of Subhánkhán, brought this suit claiming to redeem the mortgage. She made Krishnáji (original mortgagee) and A'ba (the purchaser) parties to the suit. She contended that the sale in execution was bad, having taken place after the death of the judgment-debtor and without his legal representative having been placed on the record.

Held, that the plaintiff was not entitled to redeem.

Per JARDINE, J.:—As no "substantial injury" was alleged to have resulted by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on the death of the judgment-debtor and before the sale took place, the purchaser acquired a valid title under section 316 of the Code of Civil Procedure (Act XIV of 1882).

Per RÁNÁDE, J.—The omission to join the name of the representative of the deceased judgment-debtor as a party to the record was a material irregularity and a serious defect in the title of the auction-purchaser. But this irregularity did not vitiate the sale under the special circumstances of the present case, *viz.* that the plaintiff had taken no step to set aside the sale although she came to know of the sale within a few days after it took place; that there was no fraud or *mala fides* on the part of the judgment-creditor; that the sale had not resulted in any substantial injury to the plaintiff, and that the auction-purchaser and his assignee had been in adverse possession for more than twelve years.

SECOND appeal from the decision of Ráo Bahádur C. N. Bhat, First Class Subordinate Judge A. P. at Sátará, in Appeal No. 322 of 1892, reversing the decision of Ráo Sáheb Shivrám Sitárám Wágh, Second Class Subordinate Judge of Karád.

* Appeal No. 40 of 1893 from order.

Suit for redemption. The plaintiff Dhondu Bái was heir and legal representative of one Subhánkhán, deceased.

Subhánkhán had mortgaged the land in dispute to the first defendant (Krishnáji Vyankatesh) in 1871.

Subsequently the land was attached in execution of a decree obtained by one Tukárám Dhanji against Subhánkhán, the mortgagor. The warrant for sale in execution was issued on 11th June, 1877.

Subhánkhán died on 27th September, 1877.

The sale took place on 3rd October, 1877, without any notice being given to Dhondu Bái, the daughter and legal representative of the deceased Subhánkhán, and without her name being placed on the record of the execution proceedings.

Dhondu Bái became aware of the sale fourteen days after it took place, but took no steps to set it aside.

Tukárám Dhanji purchased the property at the auction sale, and afterwards sold it to A'ba bin Khesaji Máné (defendant No. 2) on the 8th November, 1883.

A'ba redeemed the land from Krishnáji on payment of Rs. 947-14-6 in 1886.

In 1891 Dhondu Bái filed the present suit as heir and legal representative of Subhánkhán, deceased, to redeem the land in dispute.

The Subordinate Judge dismissed the suit, holding that the mere omission to make the legal representative of the deceased judgment-debtor (Subhánkhán) a party to the record of the execution proceedings did not vitiate the auction sale of the 3rd October, 1877, and that as the plaintiff had not taken any steps to set aside the sale, it was binding on her.

On appeal the Subordinate Judge with appellate powers was of opinion that the sale in execution which took place after Subhánkhán's death, without bringing Subhánkhán's heir on the record, was illegal and invalid ; that it was not necessary to set it aside ; and that as the plaintiff was not bound by the sale she was entitled to redeem the property in dispute. The decree of the first Court was, therefore, reversed, and the case remanded for the

1894.

A'BA
v.
DHONDU
BA'I.

1894.

ÁBA
v.
DHONDU
BÁI.

purpose of determining the amount of the mortgage-debt due to Krishnáji (defendant No. 1).

Against this decision A'ba (defendant No. 2) appealed to the High Court.

Shámráo Vithál for appellant:—The judgment-debtor was the mortgagor of the land. In execution of the decree his interest was attached during his life-time, but the sale took place after his death, and the question is whether the sale is vitiated by the fact that before it took place his legal representative was not placed upon the record. On this point there is a conflict of authorities. The Madras High Court decides that a sale held under such circumstances is invalid—*Rámasámi v. Bágirthi*⁽¹⁾ and *Krishnayya v. Unnissa Begam*⁽²⁾. But the Allahabad High Court decides the other way—*Dulari v. Mohan Singh*⁽³⁾; *Stowell v. Ajudhia Nath*⁽⁴⁾; *Sheo Prasad v. Hira Lal*⁽⁵⁾. These rulings of the Allahabad High Court are completely in our favour. It does not appear that the latest of these rulings, which is a Full Bench ruling, was brought to the notice of the Madras High Court in *Krishnayya's* case. Even assuming that it was necessary to bring the representative of the judgment-debtor on the record, still I submit that under the circumstances of the present case it is not open to the plaintiff to impeach the validity of the sale. She came to know of the sale within a few days after it took place, and yet she did not apply under section 311 of the Civil Procedure Code (XIV of 1892) to set it aside. It is, therefore, binding on her.

Vishnu K. Bhatavdekar for respondent:—The provisions of the Code of Civil Procedure (XIV of 1882) relating to abatement of suits do not apply to execution proceedings. See section 647 of the Code as amended by Act VI of 1892—*Hajrat Akramnissa Begam v. Valiunnissa Begam*⁽⁶⁾; *Gulábdás v. Lakshman*⁽⁷⁾. The policy of the Code is to give the defendant the fullest opportunity of being heard. No step is allowed to be taken by any party to a suit or other proceeding behind the back of his opponent. Otherwise the greatest injustice would result from *ex-parte* proceedings.

(1) I. L. R., 6 Mad., 180.

(2) I. L. R., 15 Mad., 399.

(3) I. L. R., 3 All., 759.

(4) I. L. R., 6 All., 255.

(5) I. L. R., 12 All., 440.

(6) I. L. R., 18 Bom., 429.

(7) I. L. R., 3 Bom., 221.

The Code contemplates the presence of the judgment-debtor at every stage of the execution proceedings. The interest of his representatives would suffer if they were not brought on the record immediately after his death. They can save the property from attachment and sale by payment of the judgment-debt or by adjustment of the decree to the satisfaction of the decree-holder. See sections 257, 257A, 290, &c., of the Code. This opportunity would be lost if they were not brought on the record. If all questions relating to the execution of decrees between the parties to the suit and their representatives are to be determined under section 244 during the course of the execution proceedings, and not by a separate suit, then the representatives of the judgment-debtor must be brought on the record—*Punchannun v. Rabia Bibi* ⁽¹⁾; *Abrahamji v. Nathwa Kallya* ⁽²⁾; *Rámchandra Bápuji v. Vináyak Anant* ⁽³⁾.

1894.

 A'BA
 v.
 DHONDU
 BÁI.

Shámráo Vítthal in reply :—It is not alleged that any substantial injury has resulted from the omission to make the representative of the judgment-debtor a party to the record. That being the case, even if the omission be treated as a material irregularity, it would not be a ground for setting aside the sale—*Tasad-duk Rusul Khán v. Ahmad Husain* ⁽⁴⁾.

JARDINE, J. :—Subhánkhán mortgaged the land in suit to Krishnáji, defendant No. 1. One Tukárám Dhanji Guzar, a creditor of Subhánkhán, obtained a decree against him, and during Subhánkhán's life-time a warrant for sale was issued and the proclamation published for the sale of the land. It is found as a fact that Subhánkhán died on the 27th September, 1877; the sale took place on the 3rd October, 1877, without any notice being given to Dhondu Bái, the present plaintiff, daughter of Subhánkhán and his legal representative, or her name being placed on the record. Tukárám became the purchaser. Dhondu Bái became aware of the sale some days after it took place. She took no steps to set it aside. The second defendant A'ba is in possession, claiming as purchaser from Tukárám by a sale-deed dated the 8th November, 1883.

(1) I. L. R., 17 Calc., 711.

(2) P. J. for 1879, p. 21.

(3) P. J. for 1878, p. 190.

(4) I. L. R., 21 Calc., 66.

1894.

A'BA
v.
DHONDU
BA'I.

The defendants allege that A'ba redeemed the land from Krishnáji by means of a redemption suit, No. 982 of 1882. No *mala fides* or fraud on the part of Tukárám or A'ba is alleged or found: and there is no finding that at the time of the auction sale in 1877 Tukárám was aware of Subhánkhán having died.

The lower Court of appeal has held that the plaintiff may redeem the property on payment of the mortgage-money due to the second defendant, as in its opinion the purchaser at the Court sale acquired no title as against the plaintiff Dhondu Báí, her name not having been put on the record upon her father's death.

Whether this substitution is required by the Code of Civil Procedure (Act XIV of 1882) and whether the omission makes the sale invalid, are questions on which no direct authorities have been found in the decisions of this High Court. *Baswantápa v. Ránu*⁽¹⁾ and *Akoba v. Sakhárám*⁽²⁾ must be distinguished, as they relate to the constitution of suits, and not to matters in execution. As pointed out in *Gulábdás v. Lakshmun*⁽³⁾ before execution can be had at all, a right must have been fully established; and section 647 of the Code does not apply the provisions about abatement to these proceedings—*Krishna v. Bháu*⁽⁴⁾; *Dhonkal v. Phakkar*⁽⁵⁾. *Hub Lal v. Kanhia Lal*⁽⁶⁾ is a case of a sale being upheld as against an objector who had not been a party to the suit.

The views expressed in *Gulábdás v. Lakshman* have been approved by the High Court at Allahabad in *Dulari v. Mohan Singh*⁽⁷⁾ by Oldfield and Straight, JJ. (where the question was whether the Court sale was invalid by reason of the prior death of the decree-holder), in *Stowell v. Ajudhia Nath*⁽⁸⁾ by the same learned Judges (where the death of the judgment-debtor was prior to the sale), and in *Sheo Prasad v. Hira Lal*⁽⁹⁾ by Edge, C. J., and Straight, Brodhurst, Tyrrell, JJ. (Mahmood, J., dissenting) where the judgment-debtor had died after the attachment and before the sale.

(1) I. L. R., 9 Bom., 86.

(2) *Idem.*, 429.

(3) I. L. R., 3 Bom., 221.

(4) I. L. R., 18 Bom., 61.

(5) I. L. R., 15 All., 84.

(6) I. L. R., 7 All., 365.

(7) I. L. R., 3 All., 759, at p. 764.

(8) 6 *Ibid.*, 255.

(9) I. L. R., 12 All., 440.

In the last named case the fully considered judgment of Sir John Edge discusses and dissents from *Rámásámi v. Bágirathi*⁽¹⁾ (followed in *Krishnayya v. Unnissa Begam*⁽²⁾), the authority followed in the present case by the lower Court of appeal. Sir John Edge's reasoning supports the Bombay decision, when after considering sections 234, 275, 276, 280 and 284 of the Code of Civil Procedure he observes that he does not find in that Code any provision requiring notice to be given personally to a judgment-debtor or his legal representative of a sale of property under attachment. The view that the abatement sections do not apply to execution proceedings has been adopted by the Legislature in Act VI of 1892 amending section 647. The learned Chief Justice then goes on to consider section 311, about which, in the last of the two Madras cases, the learned Judges of Madras say that the sale without notice to the legal representative of a deceased party was a material irregularity and must necessarily cause him substantial injury. The Act of 1892, however, shows that this procedure by notice is not obligatory. It would appear from the Madras Report that the Allahabad Full Bench decision was not brought to the notice of the Court in that case.

The present case resembles the two last Allahabad cases in that there is no question raised that the sale might have been voidable by reason of valid objections which the plaintiff had no opportunity of preferring at or soon after the time of sale, or on other equitable grounds. The contention is that the sale is absolutely void by reason of the plaintiff not having been brought on the record of the execution proceedings immediately on her father's death. Sir John Edge treats this as mere technical pleading and as not touching the merits, and at p. 446 points out the uncertainty and risk which such a doctrine would impose on the purchaser at the execution sale. On this point, the construction of section 311, Mr. Justice Mahmood concurs, and at p. 459 notices the important decisions of the Judicial Committee of the Privy Council, which show that for the purpose of setting aside a sale on the ground of irregularity, "substantial injury by reason of such irregularity" must be proved. In the present case, none such is averred.

(1) I. L. R., 6 Mad., 180.

(2) I. L. R., 15 Mad., 399.

1894.

A'BA
v.
DHONDU
BA'.

1894.

A'BA
v.
DHONDU
BA'I.

It follows that under such circumstances the purchaser acquires a valid title under section 316 even if the doctrine of *Gulábdás v. Lakshman*, distinguishing execution proceedings from suits, had not been followed by the Legislature.

It appears unnecessary to discuss the effect of section 244 on the present litigation.

For the above reasons my opinion is that the decree of the District Court should be reversed, and that of the original Court restored, and that the respondent here should pay the costs of both appeals.

RA'NADE, J.:—The only point of law which has to be considered in this case relates to the question whether an auction sale in execution of a decree is invalidated by reason of the death of the judgment-debtor after attachment, but before sale, and the failure of the attaching creditor to join the heir or representative of the deceased debtor as party to the record of the execution proceedings. There has been no authoritative ruling of this Court on the points, while there has been a conflict of rulings in the decisions of the Madras and Allahabad High Courts.

The Madras High Court held in *Rámásámi v. Bagirathi*⁽¹⁾ that the representatives of the deceased judgment-debtor ought to have been brought in, and that the further process of sale could not legally issue without some person being on the record to represent the deceased judgment-debtor, and that the sale held under such circumstances must be set aside. This same view was re-affirmed by the Madras High Court in *Krishnayyá v. Unnissa Begam*⁽²⁾, although its attention was specially drawn to the ruling of the Allahabad High Court in *Stowell v. Ajudhia Nath*⁽³⁾. In this last case the Allahabad High Court held that as the sale was held on the authority of the order of the Court which had jurisdiction to make it, it was not affected by the prior death of the judgment-debtor. The Madras High Court distinguished this Allahabad case, as being one in which the contest was between two mortgagees. The second mortgagee was the first purchaser and purchased the judgment-debtor's

(1) I. L. R., 6 Mad., 180.

(2) I. L. R., 15 Mad., 399.

(3) I. L. R., 6 All., 255.

interest subject to the first mortgagee's claim, and the death of the original owner could not affect the proceedings in any way. It was further observed that Mr. Justice Straight did not concur with the remark of Mr. Justice Oldfield on this point, and that both Judges agreed that the question whether the sale might be voidable at the instance of the representative of the judgment-debtor did not arise for decision in that case. The Madras High Court held that the sale which took place under such circumstances without notice to the representative, was vitiated by a material irregularity, and must necessarily cause the debtor substantial injury.

Although the decision in *Stowell v. Ajudhia Nath*⁽¹⁾ was thus distinguished, the point now in dispute came again directly before the Allahabad High Court, and a Full Bench of that Court held in *Sheo Prasad v. Hira Lal*⁽²⁾, (Justice Mahmood dissenting), that the sale was regular and valid, notwithstanding the failure of the judgment-creditor in the matter of joining the name of the representative of the deceased judgment-debtor as a party to the sale proceedings. The Judges of the Allahabad High Court remarked that the Judges who decided *Rámásami v. Bágirathi*⁽³⁾ gave no reasons for their opinion that section 234 applied to such cases. It may also be observed that although this Full Bench decision was passed in 1889, it does not appear to have been noticed by the Madras High Court in their second decision quoted above, though that Court referred to the earlier ruling in *Stowell v. Ajudhia Nath*⁽¹⁾.

In this state of the law, it becomes necessary to consider the grounds on which the decision of the Allahabad High Court rests. The chief grounds appear to be, (1) that execution proceedings, such as attachment, &c., do not abate by reason of the death of the judgment-debtor, (2) that property under attachment must be considered as being in the custody of the law, (3) that it is not necessary to give notice of the sale to the judgment-debtor after his property has been duly attached, (4) that the interest of the representative of the judgment-debtor cannot in any way be damaged by the sale, and (5) that he has his remedy, if the

(1) I. L. R., 6 All., 255.

(2) I. L. R., 12 All., 440.

(3) I. L. R., 6 Mad., 180.

1894.

AB'A
v.
DHONDU
BA'I.

1894.

A'BA
v.
DHONDU
BA'T.

sale was irregularly conducted and resulted in actual injury, under section 311 of the Code (Act XIV of 1882). The Chief Justice of the Allahabad High Court noticed in detail sections 234, 275, 276, 280, 284 and 311 of the Code, and as the result of this review he held that there was nothing in the Code of Civil Procedure which warranted the suggestion that an attachment would abate on the death of the judgment-debtor, or that his death would render it necessary for the judgment-creditor to take steps to issue notice to the representatives of the deceased judgment-debtor. There are, however, other sections of the Code which were not noticed in that judgment, and which appear to me to show clearly that the Code does contemplate the necessity of the judgment-debtor or his representative being a party to the sale proceedings. Sections 286—295 lay down general rules for the sale of immoveable and moveable property. Section 290 provides that no sale shall take place without the consent in writing of the judgment-debtor, until after the expiration of thirty days from the fixing of the proclamation. Section 291 similarly requires a fresh proclamation of an adjourned sale, unless the judgment-debtor consents to waive it. The same section provides that, even after proceedings in auction-sale have commenced, they shall be stopped, if, before the lot is knocked down, the debt and costs are paid or tendered. This indulgence clearly presupposes the active presence of the judgment-debtor or his representative as the person paying or offering to pay the sum due. Section 293 gives the judgment-debtor a right to recover loss caused by the resale of property in consequence of the default of the first purchaser. Section 294 permits the judgment-debtor to apply to the Court for setting aside a sale, if the attaching creditor purchases without previously obtaining the permission of the Court. Sections 304—325 lay down special rules for the sale of immoveable property. Section 305 empowers the Court to grant time to the judgment-debtor to raise money even after an order for sale has been made. The judgment-debtor can of course apply under section 311 to set aside a sale on the ground of irregularity. Section 322 specially contemplates that the Collector shall make an inquiry into the liabilities of the judgment-debtor, and on the basis of that inquiry he may even stop the sale, in whole or in part, if any of

the expedients suggested in section 323 can be adopted with advantage.

I do not, therefore, think that it can justly be laid down that the Code contemplates *ex parte* sale proceedings in execution, and dispenses with the necessity of having the judgment-debtor or his representative before the Court at all stages of these proceedings. It may be conceded that section 234 is not mandatory, but permissive, and that under the amended section 647, execution proceedings do not necessarily abate by reason of the death of the judgment-debtor; but it does not follow from this that the sale, when it takes place under such circumstances, cannot be challenged by the representative of the judgment-debtor, whose rights were ignored by the judgment-creditor, either by an application under section 311, or by a regular suit. There have been decisions of this Court where the judgment-creditor joined the names of other than the true heir of the deceased judgment-debtor, and it was held that the sales which took place in such proceedings did not affect the right of the true heir, in one case a minor son, and in the other a widow, to sue for redemption, which they could only do by first suing to set aside the sales—*Baswantápa v. Ránu*⁽¹⁾ and *Akoba v. Sakháram*⁽²⁾. This analogy appears to me to suggest that, on the point of law now in issue, the decisions of the Madras High Court are entitled to greater consideration than those of the Allahabad High Court, and that the omission to join the name of the representative of the deceased judgment-debtor was a material irregularity, and a serious defect in the title of the purchaser.

The next question for consideration is, whether this irregularity and defect vitiated the sale. In this connection, it must be noted that the plaintiff in this case could have applied under section 311 to have the sale set aside. It is in evidence that she came to know of the sale within the period allowed by law for applications to set the sale aside. She remained quiet, and allowed the sale to be confirmed. No fraud or *mala fides* on the part of the judgment-creditor is alleged in this case. He was not aware of the death of the judgment-debtor. It is not contended that

(1) I. L. R., 9 Bom., 86.

(2) I. L. R., 9 Bom., 429.

1894.

A'BA
v.
DHONDU
BAR

the sale has resulted in any substantial damage. More than twelve years have elapsed since the date of the confirmation of the sale. Since then the purchaser became adverse owner of the property, and his long possession must be held to have operated as a bar to the legal remedy of the present plaintiff. Moreover, a third person, who had no notice of the plaintiff's right and the defect in the sale proceedings, purchased the property for valuable consideration so far back as 1883. In the Madras cases, this question of limitation did not arise, and was not raised. Under all these special circumstances, I think that the present plaintiff cannot maintain her suit for redemption, and that, notwithstanding the legal defect in the sale proceedings, the defendant's title cannot now be questioned after more than twelve years.

I would, therefore, reverse the order of remand of the lower Court of appeal, and restore the decree of the original Court. Respondent should pay the costs of both appeals.

Order reversed.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.

1894.
March 27.

GURUBASAYA (ORIGINAL DEFENDANT), APPLICANT, v. CHANMALA'PPA'
(ORIGINAL PLAINTIFF), OPPONENT.*

The Dekkhan Agriculturists' Relief Act (Act XVII of 1879), Sec. 53†—Revisionary power of the Special Judge—Cases in which failure of justice appears to have taken place—Jurisdiction—Civil Procedure Code (Act XIV of 1882), Sec. 622.

Section 622 of the Civil Procedure Code (Act XIV of 1882) gives to the High Court jurisdiction to interfere only where the lower Court acts without jurisdiction or has exercised its jurisdiction "illegally or with material irregularity."

* Application No. 140 of 1893 under the extraordinary jurisdiction.

† Section 53 of the Dekkhan Agriculturists' Relief Act (Act XVII of 1879) :—

53. The District Judge may, for the purpose of satisfying himself of the legality or propriety of any decree or order passed by a Subordinate Judge in any suit or other matter under Chapter II, Chapter IV, or Chapter VI of this Act, and as to the regularity of the proceedings therein, call for and examine the record of such suit or matter, and pass such decree or order thereon as he thinks fit ;