

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.

June 29.

KRISHNAJI (AUCTION-PURCHASER), APPLICANT, v. MAHADEV
VINAYAK (JUDGMENT-DEBTOR), OPPONENT.*

Civil Procedure Code (Act XIV of 1882), Sec. 310A, as amended by Act V of 1894—Sale in execution of mortgage decree—Transfer of Property Act (IV of 1882), Sec. 89.

The provisions of section 310A of the Civil Procedure Code (Act XIV of 1882) as amended by Act V of 1894 are applicable to sales held in execution of mortgage decrees passed under the Transfer of Property Act (IV of 1882).

Sections 304 to 319 of the Code of Civil Procedure apply to all sales of immoveable property.

APPLICATION under section 622 of the Civil Procedure Code (Act XIV of 1882).

On the 2nd of November, 1897, a mortgagee obtained a decree for sale of certain mortgaged lands.

In execution of the decree the mortgaged property was put up for sale and was purchased by the applicant Krishnaji.

Thereupon the mortgagor applied to the Court to set aside the sale under section 310A of the Civil Procedure Code.

This application was opposed by the auction-purchaser on the ground that section 310A of the Code was not applicable to sales in execution of mortgage decrees passed under section 88 of the Transfer of Property Act (IV of 1882).

The Subordinate Judge of Panvel overruled this objection and set aside the sale.

Against this decision the auction-purchaser applied to the High Court under its Revisional Jurisdiction.

B. N. Bajekar for applicant.

P. P. Khare for opponent.

RANADE, J.:—There has been no decision of this Court on the point of law raised in this application, namely, whether section 310A applied to a sale in execution of a decree on a mortgage-bond, and which was governed by the Transfer of Property Act.

* Application, No. 194 of 1899, under extraordinary jurisdiction

This point, however, has been considered by the High Courts of Allahabad, Madras and Bengal.

The Allahabad High Court in *Raja Ram Singhji v. Churni Lal*⁽¹⁾ remarked that, though, in the particular case before them, they had no occasion to discuss the question of the applicability of section 310A to sales in execution of mortgage decrees, yet the matter was of sufficient importance to justify them in expressing an opinion for the guidance of the Subordinate Judges. The opinion thus expressed was to the effect that section 310A will apply to a sale held in virtue of an order absolute for sale passed under section 89 of the Transfer of Property Act, although no power is given under that Act to postpone the operation of an order under section 89. The provisions of the Civil Procedure Code, section 291 of the old Act X of 1877, as also section 310A, were held to modify the concluding provisions of section 89 of the Transfer of Property Act.

The Madras High Court took the same view first in *Srinivasa Ayyangar v. Ayyathorai Pillai*⁽²⁾, and more expressly in *Tirumal Rao v. Syed Dastaghiri Miyah*⁽³⁾, in which last case it was observed that this application of section 310A was in accordance with the policy which suggested the amendment of the Code.

A Division Bench of the Calcutta High Court also in *Ashruf Ali Chowdhry v. Net Lal Sahu*⁽⁴⁾ gave effect to the same view, but this decision was dissented from by a Full Bench of that Court in *Kedar Nath Raut v. Kali Churn Ram*⁽⁵⁾. The chief ground on which the Full Bench decision was made to rest, appears to have been that the Calcutta High Court had made rules under section 104 of the Transfer of Property Act, subject to which rules alone could the provisions of the Code of Civil Procedure be made to apply to sales under mortgage decrees. These rules have expressly made sections 304 to 319, Civil Procedure Code, to apply to sales of immoveable property. The rules were made in 1892, while section 310A was incorporated in the Code by Act V of 1894. The High Court held that as section 310A was not included in the rules as they stand, that section could

(1) (1897) 19 All., 205.

(3) (1898) 22 Mad., 286.

(2) (1897) 21 Mad., 416.

(4) (1896) 23 Calc., 682.

(5) (1898) 25 Calc., 703.

1900.

KRISHNAJI

v.

MAHADEV
VINAYAK.

not apply to sales under mortgage decrees governed by the Transfer of Property Act. It is clear that this reasoning does not apply to the other provinces the High Courts of which have made no rules under section 104. This is the case in the Bombay Presidency, and as the Calcutta ruling has, therefore, no application outside the jurisdiction of the Bengal High Court, the Madras and Allahabad rulings seem to be more appropriate. It is true that Maclean, Chief Justice, also referred to more general considerations, such as that section 310A would, if incorporated in the rules made under section 104, be inconsistent with the provisions of the Transfer of Property Act, and that it would lead to mischievous results. There can be no room for doubt, however, that if section 310A had been in existence before the Calcutta Rules were made in 1892, this section would have been included with the other sections 304 to 319 and sections 284 to 294. There is no more inconsistency of section 310A with the provisions of section 89 than there is of section 310 or 311, or better still section 291, which last gives great discretionary powers to the Courts to stop or adjourn sales. As regards the alleged mischief, it is to be noted that the Madras and Allahabad High Courts appear satisfied that section 310A is in keeping with the general policy which has suggested this and other methods of relief modifying the rigidity of execution sales. The evil sought to be remedied was, (in the words of Dr. Rash Behari Ghose, who introduced the Bill in the Supreme Council, which became law as Act V of 1894), that lands sold in execution seldom realized a fair price, and the sales were hurtful both to honest creditors and debtors, and benefited nobody but the speculative purchasers. The power of redeeming the land even after its formal sale, but before confirmation, was, therefore, conferred on the judgment-debtor. The section was drafted on the lines of section 174 of Bengal Act VIII of 1885 which was passed in the interests of another unfortunate class, the poor tenure holders whose lands were liable to be sold for arrears of rent. There is, therefore, nothing inconsistent or mischievous in the application of section 310A with a view to modify the rigours of the law of land sales in execution of mortgage decrees, any more than there is in the case of ordinary money decrees. In the absence of any

rules, the provisions of sections 304 to 319 of the Code of Civil Procedure expressly apply to all sales of immoveable property. The mortgagors and persons claiming under them are the very persons who need most the relief intended to be conferred on judgment-debtors, and any other construction will defeat the main object of the legislation, which permits redemption even after sale in the case of those who are prepared to make full compensation to the creditor.

Agreeing, therefore, with the rulings of the Madras and Allahabad High Courts, we are of opinion that the Court of first instance was right in the view it took of the applicability of section 310A to sales in execution of mortgage decrees. We, therefore, discharge the rule with costs.

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Russell.

ESSA JACOB HAJI JAMAL (ORIGINAL PLAINTIFF), APPELLANT, *v.* THE MUNICIPAL COMMISSIONER OF BOMBAY AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Municipality—City of Bombay Municipal Act (Bom. Act III of 1888), Sec. 297—Provision to make public street—Regular line of street.

In 1888 the Municipal Commissioner of Bombay prescribed the regular line of a certain public street in Bombay, in accordance with the provisions of section 297 of the Municipal Act (Bom. Act III of 1888).

Held, that it was not open to the Municipal Commissioner in 1893 to prescribe a different line setting back the line prescribed by his predecessor.

THE plaintiff was the owner of a house in Chunam Kiln road near the Bhendy Bazar outside the Fort of Bombay. He sued for a declaration that the regular line of the said street was the line prescribed in 1888 by the then Municipal Commissioner, and that the present Municipal Commissioner had no power to alter this line, and he prayed for an injunction restraining the defendants from compelling him to set back his house beyond the said line.

The plaintiff complained that, in obedience to notices served on him on various occasions in 1899, he had been obliged to pull

* Suit No. 694 of 1899; Appeal No. 1100.

1900.

KRISHNAJI
v.
MAHADEV
VINAYAK.

1900.

August 22, 31