

APPELLATE CIVIL.

Before Mr. Justice Batty and Mr. Justice Starling.

BALVANT BABAJI DHONDGE (ORIGINAL PLAINTIFF), APPELLANT,
 v. HIRACHAND GULABCHAND GUJAR (ORIGINAL
 DEFENDANT), RESPONDENT.*

1903.
 February 2.

Execution sale—Certificate of sale not conclusive as to the property sold at execution sale—Civil Procedure Code (Act XIV of 1882), sections 316, 317.

A decree on a mortgage directed that the whole interest of five brothers in the mortgaged house should be sold. The proclamation of sale stated also that the whole interest in the house was to be sold. The sale took place and the plaintiff was the purchaser. By a mistake, however, on the part of the officer in charge of the sale, the memorandum of sale, the certificate of sale and the receipt of possession passed by the plaintiff omitted to mention the names of four of the brothers and erroneously stated that the interest only of one of them had been sold. The defendant subsequently obtained a money decree against some of the other brothers and, in execution, sold their interest in the house, purchased it himself and took possession of a part of the house. The plaintiff, thereupon, brought this suit to eject him. The lower Appellate Court dismissed the suit, holding that in ejectment the plaintiff was bound to give strict proof of his title and that the certificate of sale was conclusive evidence of the property which had been purchased by him. On appeal,

Held, reversing the decree of the lower Court, that the plaintiff was entitled to a decree. The certificate of sale was not conclusive as to the property which had been purchased by the plaintiff. The property offered for sale and bid for by the plaintiff was the property ordered to be sold and proclaimed for sale. What was sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and the sale of that property became absolute by the order which confirmed the sale.

SECOND appeal from the decision of F. C. O. Beaman, District Judge of Poona, reversing the decree of L. G. Fernandez, First Class Subordinate Judge.

Suit by the plaintiff for possession of a house purchased by him at an execution-sale.

The house in question had belonged to one Ramji Mane, who died leaving a widow, Bhagubai, and five sons, viz., Yashvant, Dada, Dhondu, Baburao and Santram, of whom the last three were minors. After Ramji's death, his widow Bhagubai and the

* Second Appeal No. 450 of 1902.

eldest son Yashvant, acting as managers of the family, mortgaged the house with possession to Babaji Ishvar, the plaintiff's father, for Rs. 1,000. Babaji subsequently sued the widow and the five sons on the mortgage and obtained a decree against all of them in the First Class Subordinate Judge's Court at Poona on the 12th April, 1894. The decree directed a sale of the house in default of payment of the mortgage-debt. Default having been made the plaintiff applied for execution of the decree against all the defendants in that suit and a proclamation of sale of the whole house was issued. The *lilāv yād* (memorandum of sale), however, drawn up by the bailiff in charge of the sale, erroneously stated that it was the right, title and interest of Yashvant in the house that was to be sold. At the auction-sale the whole house was purchased by the plaintiff (the son of the mortgagee, then deceased). On the 8th November, 1895, the plaintiff was put into possession. The certificate of sale and the receipt passed by the plaintiff followed the *lilāv yād* (memorandum of sale), and, although describing the whole property, mentioned only the "right, title and interest of Yashvant therein" as the property dealt with.

On the 12th November, 1895, the three younger brothers (Dhondu, Baburao and Santram) applied to be restored to possession, alleging that Yashvant was not the sole owner and that only his right, title and interest had been sold. Their application was rejected on the 14th January, 1896.

Meanwhile, the defendant in this suit obtained a money decree against Bhagubai (the widow) and Dada (the second brother) in the Court of Small Causes at Poona, and in execution of his decree he attached the house in question and at the sale purchased the right, title and interest of his judgment-debtors therein, and took possession on the 19th January, 1897, by removing the lock which had been placed on the door by the plaintiff.

The plaintiff, therefore, brought this suit for possession and damages.

The defendant contended that the plaintiff was entitled only to Yashvant's share (viz. one-fifth) of the house and that his suit should be for partition only.

The Subordinate Judge found that the plaintiff had proved his title to the whole house and passed a decree accordingly.

1903.

BALVANT
v.
HIRACHAND.

1903.

BALVANT
v.
HIRACHAND.

On appeal by the defendant, the Judge reversed the decree. He held that in an ejectment suit the plaintiff must be held to strict proof of his title: that in this case the proof of his title rested on the sale certificate, and that inasmuch as that certificate showed a purchase only of Yashvant's interest in the house, the plaintiff was not entitled to eject the defendant. He, therefore, dismissed the suit.

In his judgment the Judge said:

The defendant appeals on the ground that the plaintiff must be strictly limited to the title he is able to prove. That title, he contends, is the sale certificate, and nothing else. He relies on section 316 of the Civil Procedure Code and cites two cases (22 W. R. 408; 15 Cal. 546) which, though not directly in point, do emphasize the importance of the sale certificate as the primary source of a purchaser's title. Now, although I think that the judgment of the lower Court gave effect to what is probably the justice of the case, yet I feel obliged to admit that the point taken by the appellant is good and must prevail. It may be a hard case for the plaintiff, but hard cases make bad law. It appears to me indisputable that in a suit for ejectment, the plaintiff must rely upon what title he can prove, and that where the suit is of this nature, his title is his sale certificate. If that sale certificate contains a misdescription, the plaintiff ought to have seen to getting it corrected in time. But can it be said that the sale certificate here does contain a misdescription? It is in agreement with the sale *yād*, and whether or not the bailiff misunderstood his instructions and failed to sell all that he ought to have sold, the sale *yād* which he makes at the time on the spot probably does record accurately what he in fact did.

In this view of the case although I think that the plaintiff was entitled to have had the entire interest sold, that he intended to have had the entire interest sold, and that the Court would have supported him in that intention had it been disputed, yet now he has only his sale certificate by which to prove his title, and that sale certificate does not prove the title upon which alone the decree of the lower Court could be sustained. I must, therefore, allow this appeal and dismiss the suit of the plaintiff. But feeling as I do that while he is technically wrong he has substantial justice on his side, I direct that each party bear his own costs throughout.

The plaintiff preferred a second appeal.

Mahadev B. Chaubal (and *Narayan M. Samarth*) for the appellant (plaintiff):—The Court below was wrong in holding that the certificate of sale was the plaintiff's sole and conclusive title-deed. We contend that in order to determine his title, that is, the interest he purchased, the other documents in the case, viz., the decree, the order upon his application for execution and the pro-

1903.

BALVANT
v.
HIRACHAND.

clamation of sale, must be taken into consideration. The decree obtained by the plaintiff directed that the whole house, that is, the interest of all the defendants in that suit, viz., Bhagubai, Yashvant and his four brothers, should be sold. The order on plaintiff's application for execution was to the same effect. The proclamation of sale also stated that the whole house was to be put up for sale. Therefore the understanding was that the whole house was to be sold. It was sold and plaintiff bought it, and having done so and having paid for the entire interest in the house, he is now entitled to possession of the whole: *Mahabir Pershad v. Moheshwar Nath*⁽¹⁾; *Nanomi v. Modhun Mohun*⁽²⁾; *Bhagbut Pershad v. Girja Koer*.⁽³⁾ The certificate of sale merely shows that the sale proceedings had come to an end on the date mentioned therein; that the transaction had become complete and the property had vested in the purchaser: section 316 of the Civil Procedure Code (Act XIV of 1882). It is a ministerial act of the Court, and not a judicial determination of title: *Vithal Janardan v. Vithojirav Putlajirav*.⁽⁴⁾ A mistake committed by an officer of the Court conducting an execution sale cannot alter or nullify the effect of the decree and the contractual relation created by the proclamation of sale framed in terms of the decree and the order for sale.

After the plaintiff purchased the house, Yashvant's three brothers, whose names were not mentioned in the memorandum of sale or the certificate of sale, applied to the Court to be restored to possession of the house on the ground that their interest therein was not affected by the sale, but their application was rejected. This shows that what was intended to be sold and was actually sold and purchased by the plaintiff was the interest of all the defendants and not of Yashvant only.

Ganpat S. Rao for the respondent (defendant):—Although it may have been the intention to sell the interest of all the defendants, yet what was actually sold at the auction sale was the interest of Yashvant only. The sale of that interest only having been confirmed and a certificate to that effect having been issued

(1) (1889) 17 Cal. 584.

(3) (1888) L. B. 15 I. A. 97; 15 Cal. 717.

(2) (1885) L. R. 13 I. A. 1; 13 Cal. 21.

(4) (1882) 6 Bom. 586.

1903.

BALVANT
v.
HIRACHAND.

by the Court, the plaintiff cannot now contend that he purchased the right, title and interest of Bhagubai, Yashvant and his four brothers. It is the certificate of sale that is the muniment of plaintiff's title. If there was any mistake in the memorandum of sale and the certificate of sale, the plaintiff ought to have got it corrected. Until that is done the plaintiff has no remedy. Even the receipt for possession passed by the plaintiff shows that he acquired the interest of Yashvant only. When the defendant purchased the house in execution of his Small Cause Court decree, the right, title and interest of his judgment-debtors, namely, Bhagubai and Dada, were not affected by the plaintiff's purchase. The fact that the application of Yashvant's three brothers for restoration of the house was rejected cannot affect the defendant, because he was not a party to that proceeding.

The plaintiff's certificate of sale is conclusive against him: *Mookhya Huruckraj v. Ram Lall* ⁽¹⁾; *Lalla Bissessur v. Doolar Chand* ⁽²⁾; *General Manager of the Raj Durbungah v. Maharaja Kumar Ramaput Singh*. ⁽³⁾

BATTY, J.:—The lower Appellate Court has stated the facts of this case as follows :

The plaintiff in this case had obtained a decree against all the five brothers: his *darakhást* was against all five brothers. The proclamation of sale announced that the complete interest in the house, subject to the mortgage, was to be sold, but that, when the bailiff made the sale *yád*, he recorded that only the right, title and interest of Yashvant (the eldest brother) was being sold. The confirmation order repeats the terms of the sale *yád*; so does the sale *yád* and the *tábé* (possession) *yád*. The plaintiff was put in possession of the whole house. There was a miscellaneous application by three of the brothers objecting to the result of the sale, but this was rejected. The defendant then sold (*sic*) the right, title and interest of his debtors (the mother and one brother) and took possession of the house.

On these facts the lower Appellate Court held that the plaintiff was bound by the misdescription in the sale certificate, and reversed the decree of the Court of first instance. In effect the lower Appellate Court has held the certificate of sale the sole and conclusive evidence of the plaintiff's title as auction purchaser,

(1) (1870) 14 Cal. W. R. 435.

(2) (1874) 22 Cal. W. R. 181.

(3) (1872) 10 Beng. L. R. 294.

notwithstanding that it is in conflict with the decretal order, the order on the *darkhást* for the sale and the proclamation of sale. The plaintiff has appealed against this decision.

There is nothing in section 316 (and nothing has been pointed out in any other part of the Code) which makes a certificate of sale conclusive as to the property sold. It is a significant fact that the words in section 259 of the Code of 1859 (Act VIII of 1859), which gave a certificate of sale such effect, have been omitted in the present Code. That section required the Court to grant a certificate to the person who may have been declared to be the purchaser, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and declared that such certificate shall be taken and deemed to be a valid transfer of such right, title and interest. The Legislature, in advisedly abstaining from reproducing these words, has apparently deprived the certificate of sale of the effect formerly given to it, and has left the question of what property has passed to be determined by the actual sale itself or, in the words of the Privy Council, by what the purchaser has "bargained and paid for." The certificate is, so far as regards the parties to the suit and those claiming through or under them, determinative as to the date from which the property actually sold vests in the purchaser, and section 317 renders it also practically determinative, in the absence of fraud or the like, as to the identity of the purchaser. Neither section gives it operation to determine what has been sold. Section 316 requires that a certificate shall be granted stating the property sold. That is to say, it is the duty of the Court, not to determine what property is to pass by the sale, but merely to record the already accomplished fact of a transaction that has taken place and to state what has been sold. The Court has no power to do more or to alter the fact of the sale which has actually taken place. Its action in granting the certificate is ministerial and not judicial: *Vithal Janardan v. Vithojirav Pulajirav*.⁽¹⁾

The sale is a transaction, and consists, as all contracts do, of an offer and acceptance. The offer is made by the Court exercising, in the place of the judgment-debtor and on behalf of his creditor,

1903.

BALVANT
v.
HIRACHAND.

(1) (1882) 6 Bom, 586.

1903.

BALVANT
vs.
HIRACHAND.

the disposing power which the judgment-debtor had over the property. This offer is advertised or published by means of the proclamation of sale, which section 287 requires to specify the property intended to be sold. An advertisement of this nature is an offer to such person as shall fulfil the required conditions as to the highest bid, deposit of 25 per cent. of purchase-money and punctual payment at the prescribed date and other prescribed conditions: and so far as concerns the identification of the property to be offered for sale, it is the only declaration which is authorized or required. The provisions of sections 287, 289 and 290 lay considerable stress on the importance of due publicity being given to this notice of the intention as to what is to be sold, and the Code recognizes no other intimation on the subject.

It is urged that the *libāv yād*, said in this case to have been prepared by the bailiff, was a document required by rules framed under section 287 of the Code. But such rules are at most directory for the guidance of the Courts in exercise of their duties, and could not either supersede the provisions of the Code or impose duties of enquiry upon, or otherwise affect, the rights or responsibilities of the outside public.

The case of *Gowree Kumul v. Surut Chunder*,⁽¹⁾ relied on by the lower Appellate Court, was one relating to a sale held in 1859 and apparently subject to the Code of that year. Its effect, moreover, is to declare that a purchaser, receiving a certificate going beyond the order for sale, cannot avail himself of anything in the certificate beyond the order. The case of *Prem Chand Pal v. Purnima Dasi*,⁽²⁾ also cited by the lower Appellate Court, appears to have turned upon the construction of section 54 of a Bengal Act (XI of 1859), except so far as it held section 316 of the Code conclusive as to the date from which the title vested. For the respondents, the case of *Mookhya Huruckraj v. Ram Lall*,⁽³⁾ which appears to have been decided under the Code of 1859, and which dealt only with the misconstruction of the certificate based on inferences from irrelevant documents, was relied on. The case of *Lalla Bissessur v. Doolar Chand*,⁽⁴⁾ also relied on by the respondent, appears to be another decision under the Code of

(1) (1874) 22 Cal. W. R. 408.

(3) (1870) 14 Cal. W. R. 435.

(2) (1888) 15 Cal. 546.

(4) (1874) 22 Cal. W. R. 181.

1859, and therefore ruled that the Court, according to its sale certificate, had expressly sold the rights and interest of the judgment-debtor alone.

Again, it is urged for the respondent that even supposing the actual sale was, by the order of the Court directing it and according to the proclamation, a sale extending to the interest of all the five brothers, yet the Court confirmed only the sale of Yashvant's interest. A reference, however, to sections 312 and 314 shows that it is the actual sale which the Court confirms, and not any transaction which by inadvertence, fraud or collusion may have been described in any reference to the sale made in a document subsequent thereto. For section 312 requires that if no application be made under section 311, or if any such be made and disallowed, the Court *shall* pass an order confirming the sale as between the parties to the suit and the purchaser. A subsequent purchaser of the interest of one of the parties is therefore bound by the sale confirmed, and, if the sale of that interest has been confirmed, cannot avail himself of any misstatement in a subsequent document which purports to vary the transaction confirmed. The real question in such case, under the present Code of Civil Procedure, seems therefore to be what was the sale, *i. e.*, what was bargained and paid for, and that must depend not on erroneous statements of what was offered for sale, but on what was actually offered for sale and bid for. What was offered for sale was determined by the order of the Court and the proclamation, and if the order has been carried out and the property sold accordingly, that sale and nothing else must be taken to have been confirmed, whatever words of description referring to the transaction may have been inserted in the order confirming it or in the certificate stating it. There is no allegation that there is evidence, nor is there any finding, in this case that the property offered and bid for was anything but the property ordered to be sold and proclaimed for sale; and I therefore think that the property sold to the plaintiff was the interest mentioned in the Court's order and proclamation, and that the sale of that property became absolute by the order which confirmed the sale. The result will be that the decree of the lower Appellate Court must be reversed and that of the Court

1903.

BALVANT
v.
HIRACHAND.

1903.

BALVANT
v.
HIRACHAND.

of first instance must be restored with costs on the defendant throughout.

STARLING, J.:—In this case, under a mortgage dated 28th July, 1901, one Yashvant and his mother Bhagu mortgaged the house in suit, which belonged to the family of which they were members, consisting of Yashvant, his mother and four brothers. Plaintiff's father sued the whole family and got a decree against them for the sale of the whole house. Plaintiff applied for execution of the decree against all the defendants in that suit, which was granted, and a proclamation was issued for the sale of the whole property against all the defendants. The plaintiff purchased the property. Although the order for sale and the proclamation were in respect of the whole house, yet the *lilāv yād* prepared by the bailiff mentioned the name of Yashvant only, and in the order for the confirmation of the sale and the certificate of sale, although the whole property was described, yet at the end thereof appeared the words "right, title and interest of Yashvant therein." On the strength of this, three of the brothers applied that the plaintiff might not be put in possession of their shares, but the application was refused and the plaintiff was put in possession of the house, which he locked up. Subsequently the defendant brought a suit against the mother and one of the sons other than the three last mentioned, and obtained a money decree against them, on which he attached and sold their right, title and interest in the said house, which he purchased himself. In execution he was put in sole possession, the plaintiff's lock being taken off. On this the plaintiff brought this suit.

The sole question in this appeal is the interest which the plaintiff took in the house by his purchase thereof under the mortgage decree. There is no doubt that the decree gave him the right to have the whole house sold; the proclamation announced to the world that the Court was about to sell the whole house, and what the Court offered for sale the plaintiff purchased. That the Court thought it had sold the whole house is evident from the fact that it disallowed the application of the three brothers to prevent possession being given to the plaintiff. The question to be considered is whether the insertion of the words

“right, title and interest of Yashvant” in the confirmation of sale and the sale certificate necessarily limits the interest actually purchased to that possessed by Yashvant in his own right. It seems to me that there was gross carelessness, at the least, in the bailiff who made out the *bilāv yād*, and in the clerk or clerks who prepared for the signature of the Judge the order confirming the sale and the certificate of sale, in not following the terms of the proclamation of sale; and I might suggest that it would be well if the Judge himself, when signing such important documents as these, were to take the trouble to see that the property described in the documents he signs corresponds with that proclaimed for sale. On the Original Side I have never signed a confirmation of sale without seeing that the description of the property therein corresponded with that actually put up for sale.

Can, then, the words “right, title and interest of Yashvant” be held to include the whole of the property? Following the principles of the rulings in the Privy Council, I am of opinion that they can. Those words convey nothing in themselves: surrounding circumstances must be looked at to see what their extent is. In the present case the mortgage was by Yashvant and Bhagu only, the former being the eldest member of the family, yet the Court held that they had the right and were entitled to bind the whole family. Of course it was Yashvant's act, as the eldest male member of the family, which bound them. Further, looking to the fact that the Court evidently intended to sell the interest of the whole family and the plaintiff to purchase the same, I am of opinion that what was described under the terms “right, title and interest of Yashvant” was what the Court had already determined had been validly mortgaged by his act, and consequently what the plaintiff purchased and that to which he was entitled under the certificate of sale is the whole house and nothing else. Under these circumstances, the defendant purchased nothing by the sale under his decree, as the defendant in this suit had nothing left in them to sell.

The appeal must therefore be allowed, the decree of the lower Appellate Court reversed and that of the Subordinate Judge restored with costs.

Decree reversed.

1903.

BALVANT
v.
HIRACHAND.