

## APPELLATE CIVIL.

*Before Mr. Justice Chandavarkar and Mr. Justice Heaton.*

1909.

July 16.

HARIHAR KANTA BHATTA (ORIGINAL PURCHASER), APPELLANT, *v.* RAMA PANDU SHETTI AND ANOTHER (ORIGINAL JUDGMENT-DEBTOR AND DECREE-HOLDER), RESPONDENTS.\*

*Civil Procedure Code (Act XIV of 1882), sections 244, 310A, 311—Decree—Execution—Sale at Court auction—Application to set aside sale on the ground of fraud—Appeal lies from orders passed under section 310A when they also fall under section 244, Civil Procedure Code, 1882.*

Within a month of the sale at a Court auction, the judgment-debtor applied to the Court to set aside the sale on the ground that owing to conspiracy among the villagers (including the decree-holder) the sale was at an undervalue. A week later, but within the month allowed, he again applied to the Court to set aside the sale under section 310A of the Civil Procedure Code (Act XIV of 1882), depositing the amount as required by the section. The Subordinate Judge rejected the second application on the ground that it did not lie as the judgment-debtor had already applied to set aside the sale on the ground of irregularity under section 311 of the Code. This order was on appeal reversed by the District Judge. On appeal to the High Court, it was contended, first, that the order passed by the Subordinate Judge was not appealable; and, second, that the second application could not be granted because the judgment-debtor had already applied to set aside the sale under section 311 of the Code.

*Held* (1) that the order passed by the Subordinate Judge was appealable.

*Pita v. Chunilal*(1) followed.

(2) that the allegation in the first application being that the sale had been brought about by the fraud of the residents of the village where the lands were situate and where the decree-holder resided, the application must be regarded as an application under section 244 and not under section 311 of the Code of Civil Procedure of 1882.

Decree of the District Judge confirmed.

*Gulam Ahad Chowdhry v. Jadhister Chundra Shaha*(2) followed.

SECOND appeal from the decision of P. J. Talyarkhan, Acting District Judge of Kánara, reversing the decree passed by K. R. Natu, Subordinate Judge at Kumta.

Proceedings in execution.

\* Second Appeal No. 841 of 1908.

(1) (1906) 31 Bom. 207; 9 Pom. L. R. 15. (2) (1902) 30 C.J. 142.

One Vireshwar obtained a decree against Rama Pandu Shetti. In execution of that decree property belonging to the latter was sold at a Court auction and purchased by Harihar Kanta Bhatta on the 17th January 1908.

The judgment-debtor Rama Pandu applied to the Court on the 8th February 1903 for setting aside the sale on the ground that the property was sold at undervalue owing to conspiracy among the villagers who included the decree-holder. That application was rejected.

On the 15th February 1908, he again applied to the Court under section 310A of the Civil Procedure Code, 1882, and deposited the amount required.

The Subordinate Judge rejected the application on the following grounds :—

This application is opposed by both the decree-holder and the Court purchaser (*vide* exhibits 20 and 21). They say that this application is not tenable under the proviso to section 310A, Civil Procedure Code, as the applicant had formerly made an application under section 311, Civil Procedure Code. Such an application under section 311, Civil Procedure Code, was made by this judgment-debtor on 8th February 1903 (*vide* exhibit 16). The sale took place on 17th January 1903. It was rejected. This application under section 310A is not hence tenable under the proviso to section 310A.

From this order there was an appeal to the District Judge, who reversed the order passed by the Subordinate Judge. The reasons for his decision were expressed as follows :—

According to the latest rulings of the Calcutta, Madras and Allahabad High Courts an order under section 310A of the Civil Procedure Code is one under section 244, clause (e) of that Code, and is consequently appealable (*vide* I. L. R. 28 Cal. 73 ; 30 Mad. 507 and 29 All. 275). The Bombay High Court has, without going so far, recently held that a question under section 310 may be one relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof under section 244 (e), and, where that is the case, an appeal will lie from an order passed under section 310A (*vide* I. L. R. 31 Bom., 207). I am bound to follow this last ruling and so proceed to consider whether in the present case there was any question between the decree-holder and the judgment-debtor relating to execution, discharge or satisfaction of the decree or to the stay of execution thereof. On the facts I find that there was. The judgment-debtor's application was opposed by the decree-holder on the grounds (1) that the judgment-debtor had previously applied under section 311 ; (2) that he had not deposited a sum sufficient to satisfy the other decree-holders (who had applied

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for rateable distribution); and (3) that the sum deposited did not appear to be sufficient to satisfy even his decree. The last two grounds clearly raised questions falling under section 244 (c). In the Bombay case above referred to the second of the above three grounds was held to bring the case under section 244 (c). I therefore hold that the order of the lower Court is appealable.

The lower Court had refused to set aside the sale on the ground that the judgment-debtor had previously applied under section 311, Civil Procedure Code. Exhibit 16 is the previous application. That application does not at all show that it was made under section 311. That section is confined to applications made for setting aside a sale on the ground of an alleged irregularity in publishing or conducting it. No such irregularity was, however, alleged in the application in question. What the applicant had alleged was that his enemies had combined with the village people and told them not to bid at the sale. It was not alleged that any intending purchasers were dissuaded from bidding while the sale was taking place, though even if this had been done, I do not think that it could be called an irregularity in conducting the sale. It is thus clear that the sale was sought to be set aside on the ground of fraud and not on the ground that any irregularity in publishing or conducting the sale had been committed. That the Subordinate Judge himself had not treated the application as one falling under section 311 at the time it was presented is clear from the fact that he had summarily rejected it on the very day it was presented. For these reasons, I hold that lower Court was wrong in refusing to set aside the sale on the ground that the judgment-debtor had previously applied under section 311. I hold that there was no such application.

The auction-purchaser appealed to the High Court.

*Nilkanth Atmaram*, for the appellant:—We submit, first, that the order passed by the Subordinate Judge is not appealable. The auction-purchaser here is a stranger: he is not the decree-holder. In such a case no appeal is provided for by section 88 of the Civil Procedure Code of 1882. See *Chundi Charan Mandal v. Banke Behary Lal Mandal*<sup>(1)</sup>; *Jogodanund Singh v. Amrita Lal Sircar*<sup>(2)</sup>; *Bungshidhar Haldar v. Kedar Nath Mondal*<sup>(3)</sup>; *Kedar Nath Sen v. Uma Charan*<sup>(4)</sup>.

The decision in *Pita v. Chunilal*<sup>(5)</sup> turned upon the particular facts of the case.

Secondly, the judgment-debtor having once applied to the Court under section 311 of the Civil Procedure Code of 1882 for

(1) (1899) 26 Cal. 419.

(3) (1896) 1 C. W. N. 114.

(2) (1895) 22 Cal. 767.

(4) (1900) 6 C. W. N. 57.

(5) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

setting aside the sale, no subsequent application under section 310A of the Code could be entertained. The very terms of section 310 forbid it. Where a sale has taken place, it can only be set aside under section 311 of the Civil Procedure Code of 1882. See *Malkarjun v. Narhari*<sup>(1)</sup>.

*K. H. Kelkar*, for the judgment-debtor:—The case of *Pita v. Chunilal*<sup>(2)</sup> applies, and therefore an appeal lay to the District Court. The first application was not an application under section 311 at all. The District Judge was also of that opinion. The second application under section 310A was therefore competent: and under the mandatory provisions of section 310A the Court was bound to entertain it.

CHANDAVARKAR, J.:—Two points of law have been urged in support of this second appeal. The facts, stated shortly, are these:—The property had been sold by the Court on the 17th of January 1908, in execution of a decree against the respondent. On the 8th of February 1908, he applied to the Court to set aside the sale. That application was made upon the ground that the people of the village, where he resided and where the property was situate, had so conspired as to bring about the sale for under-value. The application (exhibit 16) was rejected. On the 15th of February 1908, the respondent applied to the Court under section 310A and deposited the amount required by that section. The appellant objected upon the ground that the application could not be entertained, because the judgment-debtor, (respondent) having made an application under section 311, was debarred by the provisions of section 310A from claiming any relief under the latter section.

The Subordinate Judge allowed the objection and rejected the respondent's application under section 310A. The District Court, on appeal by the respondent, has reversed the order of the Subordinate Judge. It was argued before the District Judge that no appeal lay against the order of the Subordinate Judge. The District Judge, relying upon the decision of this Court in *Pita v. Chunilal*<sup>(2)</sup>, held an appeal lay.

(1) (1900) 25 Bom. 337, at p. 352.

(2) (1906) 31 Bom. 207; 9 Ecm. L. R. 15.

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Before us it has been argued that the District Judge was wrong in holding that an appeal lay to his Court against the Subordinate Judge's order under section 310A. We agree with the District Judge. The case is similar to that of *Pita v. Chunilal*<sup>(1)</sup>.

Then it is argued that the judgment-debtor's application under section 310A could not be granted, because he had applied to set aside the sale under section 311. But was it an application under that section? It may be that, when the respondent presented the application, he presented it as one falling under that section, but the question is, not what he thought or what section he had mentioned in his application, assuming that as a matter of fact he had mentioned section 311 and none else. The substance of the grounds upon which he had made the application to set aside the sale must be looked to. If the allegations, on the strength of which the respondent asked the Court to set aside the sale, did not bring it within the grounds specified in section 311, the mere mention of the section could not in law make it an application under it. So looked at, it did not fall within the provisions of section 311, but it must be regarded as an application under section 244. The allegation was that the sale had been brought about by the fraud of the residents of the village where the lands were situate. It is admitted that the decree-holder and the judgment-debtor were residents of the same village, so that the fraud was one imputed to them as it was to other villagers. If that is so, the application was not under section 311 but in reality was one to set aside the sale for fraud under section 244. That such an application could be made so as to attract to it the provisions of section 244 was decided by the High Court of Calcutta in *Golam Ahad Chowdhry v. Judhister Chundra Shaha*<sup>(2)</sup>, with the principle of which we concur. Therefore this ground argued before us must fail. We confirm the decree with costs.

HEATON, J.—I agree with the order proposed. I wish to add a few words about one argument. It is contended that every application to set aside a sale must be an application under section 311 of the Code; in other words whatever its nature and

(1) (1906) 31 Bom. 207; 9 Bom. L. R. 15.

(2) (1902) 30 Cal. 142.

whatever the grounds on which it proceeds it must come under that section. The argument so stated I think refutes itself; but if further refutation is needed, it will be found in two specific cases which dealt with applications to set aside sales which were held not to be made under section 311. These are *Golam Ahad Chowdhry v. Judhister Chundra Shaha*<sup>(1)</sup> and *Parashram v. Balmukund*<sup>(2)</sup>. I wish only to add that I consider that the District Judge has given ample reasons for the conclusion at which he has arrived and his decree should be confirmed.

*Decree confirmed.*

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*Before Sir Basil Scott, Rt., Chief Justice, and Mr. Justice Batchelor.*

PUNDALIK UDAJI JADHAV, PLAINTIFF, v. THE AGENT, S. M. RAILWAY COMPANY.\*

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*The Indian Railways Act (IX of 1890), section 75, Schedule II, clause (1)—Parcel containing articles liable to be insured and also not liable to be insured—Loss of the parcel in transit on Railway line—Suit against Railway Company to recover damages with respect to goods not liable to be insured—Railway Company not liable—Articles—Package.*

Plaintiff's agent at Poona consigned a parcel to plaintiff at Dhárwár. The parcel contained goods which, according to section 75 and Schedule II of the Indian Railways Act (IX of 1890), were liable to be insured as well as those not so liable. The parcel was lost in transit on the Southern Marátha Railway Line. The plaintiff thereupon sued the Railway Company to recover damages for the loss of the goods which were not liable to be insured. The defendant Company denied liability.

*Held* that the Railway Company was not liable. The words of section 75 of the Railway Act (IX of 1890) draw a distinction between articles mentioned in Schedule II of the Act and the parcel or package in which they are contained and provides that the Railway Administration shall not be responsible for the loss, destruction or deterioration of the parcel or package.

\* Civil Reference No. 4 of 1909.

(1) (1902) 30 Cal. 142.

(2) (1908) 32 Bom. 572; 10 Bom. L. R. 753.