

the judgment of Jenkins, C. J., nearly the whole of whose judgment is applicable to the present case.

If we are right in this opinion, it follows that the decree in the lower Court must be reversed and the decree we would pass is:—Declare the plaintiff entitled to the strip of land measuring two feet north and south and thirty-three feet east and west, and grant an injunction restraining the defendant, his servants and agents, from interfering with his possession thereof, dismiss the plaintiff's suit in so far as he claims any relief in respect of the remaining six feet of the said southern strip and direct each party to bear his own costs throughout.

Decree reversed.

R. R.

1911.

MALKAJEPPA
v.
SECRETARY
OF
STATE
FOR
INDIA.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

GANGADAS DAYABHAI (ORIGINAL OPPONENT), APPELLANT, v. BAI SURAJ (ORIGINAL APPLICANT), RESPONDENT.*

1911.

November 23.

Civil Procedure Code (Act XIV of 1882), sections 287 and 293—Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default in payment of price by auction purchaser—Proclamation of re-sale—Errors in the proclamation of re-sale—Application by plaintiff's widow to recover from the defaulting purchaser the deficiency of price in the re-sale—Liability creature of statute relating to procedure—At the re-sale statute not complied with.

One Shivalal brought a suit against Bai Samrath. The suit was dismissed and a decree for defendant's costs, namely Rs. 96-2-10, was passed against the plaintiff. The defendant sold the decree to one Nathu, who, in execution attached Shivalal's house. A proclamation of sale was published and at the auction sale one Gangadas Dayabhai purchased the house for Rs. 1,325 and deposited one-fourth of the purchase money. The purchaser, however, made a default in the payment of the balance in time and the house was again put up to sale. A second proclamation of sale was issued, but the descriptions contained in this proclamation were discrepant and did not tally with those in the previous one. At the re-sale only Rs. 260 were realized. Subsequently Shivalal's widow Bai Suraj having applied to recover from the defaulting purchaser the loss on the re-sale,

Held, that the liability of the defaulting purchaser was the creature of a statute relating to procedure and that statute laid down in very clear terms that

* Second Appeal No. 299 of 1910.

1911.

GANGADAS
DAYABHAI
v.
BAI SURAJ.

in the proclamation of sale the proclamation should specify as fairly and accurately as possible the property to be sold. The first proclamation did not state either fairly or accurately the property to be sold and as it was sought to fix the liability upon the appellant by reason of the words of the statute, he was entitled to appeal to the words of section 287 of the Civil Procedure Code (Act XIV of 1882) to show that the statute had not been complied with and that it could not be said that there was a re-sale of the property which was put up in the first instance.

SECOND appeal against the decision of G. D. Madgavkar, District Judge of Surat, reversing the order of J. E. Modi, First Class Subordinate Judge, in an execution proceeding.

One Shivlal brought a suit against Bai Samrath.

The suit was dismissed and a decree was passed against the plaintiff for payment of the defendant's costs, namely Rs. 96-2-10. Bai Samrath sold the said decree to one Nathu, who in execution proceedings attached Shivlal's house worth about Rs. 700. A proclamation of sale was published and at the auction sale one Gangadas Dayabhai purchased the house for Rs. 1,325. He paid one-fourth deposit on the spot and the remaining three-fourths were to be paid within fifteen days after the sale. Gangadas did not pay up the balance but made unsuccessful attempts to get the sale set aside on various grounds. Finally the Court issued a second proclamation of sale and ordered a re-sale and the house was re-sold at auction for Rs. 260 only. Thereupon Shivlal's widow Bai Suraj applied under the second para. of section 293 of the Civil Procedure Code (Act XIV of 1882) to recover from the defaulting purchaser the loss occasioned on the re-sale.

The opponent, the defaulting purchaser, contended *inter alia* that the description of the property given in the first proclamation of sale at which he bid for the property did not tally with the description given in the second proclamation of sale, therefore no order under section 293 of the Civil Procedure Code could be passed.

The Subordinate Judge found that there was no re-sale and he rejected the application of Bai Suraj for the following reasons:—

The section 293 is imperative in requiring that the Court should take action against the defaulting purchaser in case there has been a deficiency on a re-sale.

The word re-sale implies that there is a second sale; but the second sale must be of the same property; for if the property differs in ever so slight a detail, then it is not a second sale but a first sale of some property different from that first sold. The decision in I. L. R. 16 Cal. 535 and 538 is intended to mean that only and nothing more.* The main proposition laid down is that, the property must be the same in the two sales: and the other arguments advanced are merely reasons why the rule has been so enacted in the section. But if the property be the same, then, I do not see how the Court can refuse to act under the section.

In the present case the defaulting purchaser draws my attention to the two sale proclamations. The proclamation Exhibit 18 is for the first sale. In the body of the process the property is described as belonging to "the plaintiff" that is Shivilal Bhagwan. And yet in the title this Shivilal is entered as the defendant. Then in the tabular statement, the property is again mentioned as belonging to the plaintiff. In the second note below this statement, the property is called the plaintiff's.

Then comes Exhibit 54 the proclamation relating to the second sale or re-sale. Here Nathu is described as both "defendant" and "plaintiff" and Shivilal's widow Suraj is described as the "defendant" in the heading. Then in the body of the proclamation it is said that the property of the "defendant" is going to be sold; while in the tabular statement it is said that the property of the "plaintiff" is going to be sold. This sale proclamation even taken by itself is absurd. In the body of it, the property is said to be the "defendant's" while in the tabular statement it is said to be the plaintiff's property that is going to be sold. Then again, it is difficult to understand who is the plaintiff and who the defendant. The proclamation is unintelligible and we cannot say whose property has been sold.

Further on, this proclamation differs from the previous one Exhibit 24 (18?) in that it sells the "defendant's" whilst Exhibit 24 (54?) sells the "plaintiff's" property. In Exhibit 24 (18?) too one cannot understand who the plaintiff is, and who the defendant is.

The tabular statements in both the proclamations tally well together; but it is in the body or main writing that they differ. But I do not see why the tabular statements alone should be looked to and not the main portions in which the Court tells the public whose property is going to be sold.

The same property has not been sold; that is, there has been no re-sale and I think section 293 cannot apply.

On appeal by the applicant the District Judge reversed the said order and directed the opponent to make good to the applicant the deficiency of price in the re-sale. He made the following observations:—

Upon the merits it appears to me that the learned Subordinate Judge has perhaps attached excessive importance to a mere clerical error in the re-sale proclamation Exhibit 54. It is undoubted that under section 293, Civil Procedure Code, the re-sale must be of the same property and that there must be no substantial difference such as to make any appreciable difference in the apparent value: *Bajinath Sahai*

1911.

GANGADAS
DAYABHAI
v.
BAI SURAJ.

v. *Moheep Narain Singh*⁽¹⁾. But the question in this case is not whether there is any literal difference between Exhibit 18 and Exhibit 54 but whether the description in the proclamation Exhibit 54, either upon its own internal evidence or upon other external evidence was such as to make intending purchasers think that the subject of the sale was something else than the subject of the first sale, viz., Shival's interest in the property.

The opponent preferred a second appeal.

L. A. Shah for the appellant (opponent).

D. A. Khare for the respondent (applicant).

SCOTT, C. J. :—This was an application by the applicant under section 293 of the Civil Procedure Code of 1882, to recover from the opponent the deficiency of price on a re-sale of the applicant's interest in a house purchased at the first sale by the opponent.

The lower Court rejected the application on the ground that owing to an error in the proclamation of the re-sale, the property re-sold was not the same as the property sold.

The applicant who was the judgment-debtor appealed.

The learned Judge of the lower appellate Court held that the learned Subordinate Judge had attached excessive importance to a mere clerical error in the re-sale proclamation.

The errors in the proclamation are stated by the Subordinate Judge as follows :—

“The proclamation Exhibit 18 is for the first sale. In the body of the process the property is described as belonging to the plaintiff, that is, to Shival Bhagwan. And yet in the title this Shival is entered as the defendant. Then in the tabular statement, the property is again mentioned as belonging to the plaintiff. In the second note below this statement, the property is called the plaintiff's. Then comes Exhibit 54 the proclamation relating to the second sale or re-sale. Here Nathu is described as both ‘defendant and plaintiff’ and Shival's widow Suraj is described as the ‘defendant’ in the heading. Then in the body of the proclamation it is said that the property of the ‘defendant’ is going to be sold; whilst in the tabular statement it is said that the property of the ‘plaintiff’ is going to be sold. This sale proclamation even taken by itself is absurd. In the body of it, the property is said to be the ‘defendant's’ whilst in the tabular statement it is said to be the ‘plaintiff's’ property that is going to be sold. Then again, it is difficult to understand who is the plaintiff and who the defendant. The proclamation is unintelligible and we cannot say whose property has been sold.”

(1) (1889) 16 Cal. 535.

1911.

GANGADAS
DAYABHAI
v.
BAI SURAJ.

Now the property to be sold was the right, title and interest of one Shivilal, who, though the plaintiff in the suit, was judgment-debtor, because a decree had been passed under which he was liable for costs. It may be that the fact that the plaintiff was the judgment-debtor was the cause of the inconsistencies between the two proclamations to which the learned Subordinate Judge has called attention. The fact, however, remains that in Exhibit 18 the property to be sold is the right, title and interest of the plaintiff. And if reference is made to the title of that proclamation, it will be seen that the plaintiff is Samrath. In the second case the property to be sold is the right, title and interest of the defendant and, if the title of the proclamation is referred to, it is seen that the defendant is Shivilal. Under these circumstances the learned Subordinate Judge had ground for saying that the property sold was not the same in each case. Should we then accede to the view of the lower appellate Court that excessive importance has been attached to a mere clerical error? It must be remembered that this is an attempt to make the auction purchaser at the first sale liable for a difference in the result of the two sales. That liability is the creature of a statute relating to procedure and that statute lays down in very clear terms that in the proclamation of sale the proclamation shall specify as fairly and accurately as possible the property to be sold. It is admitted that the first proclamation did not state either fairly or accurately the property to be sold, and as it is sought to fix liability upon the present appellant by reason of the words of the statute, we think that he is entitled to appeal to the words of section 287 to show that the statute has not been complied with and that it cannot be said that there was a re-sale of the property which was put up in the first instance.

For these reasons we reverse the decree of the lower appellate Court and dismiss the application with costs throughout upon the applicant.

Decree reversed.

G. B. R.