

Privy Council Appeal No. 3 of 1937

Patna Appeal No. 35 of 1935

Raja Shyam Sunder Singh and others - - - *Appellants*

v.

Kaluram Agarwala and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1938

Present at the Hearing :

LORD THANKERTON

LORD ROMER

SIR SHADI LAL

[*Delivered by* LORD THANKERTON]

Appellant No. 1, whose property has been sold in execution, and the other two appellants, who are receivers in charge of his properties, appeal, in an application by them under order XXI, rule 90, of the Code of Civil Procedure, to have the execution sale set aside, against the decree of the High Court of Judicature at Patna dated the 27th November, 1935, which confirmed the sale, setting aside the order of the Subordinate Judge of Dhanbad dated the 18th September, 1933, which had set the sale aside.

Under rule 90 it is necessary, in order to have the sale set aside, to prove (*a*) material irregularity or fraud in publishing or conducting the sale, and (*b*) that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Respondent No. 3 is the representative of his father, who obtained an *ex parte* decree dated the 31st July, 1931, in the High Court of Judicature at Fort William in Bengal against appellant No. 1 for the payment of Rs.38,392-4-8, which was transferred to the Court of the Subordinate Judge of Dhanbad for execution, application being there made by the decree-holder on the 23rd September, 1931, for execution by attachment and sale of two of the said appellant's properties. The Subordinate Judge states the subsequent proceedings as follows:—

“ The first property as described in the execution petition is Pandra 1st Kismat, Touzi No. 21 of Manbhumi Collectorate, pargana Pandra—the total land revenue payable being Rs.107-2-6½ and the local cess payable for the property being Rs.4,184-10-0. The other property is Pandra 3rd Kismat, Touzi No. 23 of Manbhumi Collectorate, pargana Pandra, and the total land revenue payable in respect of it was Rs.53-10-8 and the total cess payable was

Rs.1,621-14-6. The decree-holder did not give any value of the properties in his execution petition. The first process issued in the case was the process of attachment in respect of both the Touzi which purports to have been served on 28-11-1931. Thereafter a notice under Order 21, Rule 66, of the C.P. Code was issued and served on the judgment-debtor. The judgment-debtor appeared on the 8th January, 1932, and took time to file objection regarding valuation. On the 15th January, 1932, he filed an objection alleging the value of Touzi No. 21 to be 15 lacs and that of Touzi No. 23 to be 10 lacs; on the 23rd January, 1932, when the Court proceeded to enquire about the valuation of the property the decree-holders' pleader stated that he had no objection to the judgment-debtor's valuation being accepted without prejudice. The Court ordered the sale proclamation to be issued inserting the judgment-debtor's valuation. There was a miscellaneous appeal against that judgment by the judgment-debtor, and the sale of the property, which was to take place on the 15th March, 1932, was stayed by order of the Honourable High Court. On the 16th March, 1932, the aforesaid Civil Revision case was disposed of, and the order of this Court regarding valuation was set aside and the Court was directed to decide the question of valuation on the evidence. Thereafter on the 2nd May, 1932, there was an enquiry by this Court, and the Court valued Touzi No. 23, which the decree-holder wanted to sell, at 2 lacs, and the sale proclamation in respect of that Touzi was issued, fixing 15th June, 1932, for sale. That sale proclamation was not served for want of identifier, and on decree-holder's petition filed on the 25th May, 1932, a fresh sale proclamation was issued in respect of Touzi No. 23 fixing 15th July, 1932, for sale at noon. On that date the judgment-debtor applied for one month's time to pay up the decretal amount waiving the right to issue a fresh sale proclamation. Time was allowed and the sale was adjourned to 15th August, 1932, at noon."

It is unnecessary to detail the subsequent proceedings, as the appellants now raise no separate point as to them; it is sufficient to state that the judgment-debtor obtained three further adjournments of the sale date on petitions in similar terms to that of the 15th July, 1932, the date of sale being ultimately fixed for the 27th September, 1932. A similar petition by the judgment-debtor on this last date was rejected, and the sale took place on the 27th September, and the property was purchased by respondents Nos. 1 and 2 for Rs.60,000. It may be added that on the 20th August, 1932, the judgment-debtor had paid Rs.5,000 towards the decretal amount.

The only case of fraud alleged in the plaint was found to be untrue by the Subordinate Judge, and the appellants acquiesced in that decision. The case now rests solely on irregularities in publishing and conducting the sale. The Subordinate Judge found that certain material irregularities had occurred in publishing and conducting the sale, with the result that the property was sold for the small sum of Rs.60,000, though it was valued at over three lacs of rupees, and that appellant No. 1 had thereby suffered substantial loss. The learned Judge rejected the respondents' contention, referred to later, that the said appellant had waived any objection to these irregularities, and, as already stated, he set aside the sale. On appeal by the present respondents, the High Court reversed this decision and confirmed the sale, on the ground that in his petition of the 15th July, 1932,

the judgment-debtor had stated that the sale proclamation had been properly served and that if time were granted he would not insist on the issue of a fresh proclamation, that time was granted on that and three subsequent occasions, always on the same condition and that, apart from fraud, his only case on which had been rejected by the Subordinate Judge, the judgment-debtor had waived any right to object to the irregularities found by the Subordinate Judge. The learned Judges, holding this view, did not discuss the correctness of the Subordinate Judge's findings as to the irregularities, but, on the question of substantial injury to the applicant, they stated:

"The many opportunities which the judgment-debtor has had prior to the sale, for the purpose of enabling him to avert the sale by raising on the property the money necessary to meet his decretal debt, indicate that the price realised is not so grossly inadequate in the present circumstances as to enable it to be held that the property has been sold for a grossly inadequate price due to irregularities in the proceedings."

While their Lordships find great force in this observation, they find it unnecessary to form a concluded opinion on this point, as they agree with the conclusion otherwise arrived at by the learned Judges.

The material part of the judgment-debtor's petition of the 15th July, 1932, which is repeated in almost identical language in the three subsequent petitions, is as follows:—

"Another date may be fixed by allowing one-month's time for payment to the decree-holder after securing money. The sale proclamation has been properly served. If the money is not paid on the next date fixed the sale will take place on the strength of this proclamation. No fresh proclamation will have to be issued."

The judgment-debtor obtained, on the strength of these representations, an extension of time for payment of the decretal amount on four occasions. In the first place, he waived the necessity for a fresh sale proclamation, as is provided in order XXI, rule 69 (2). In the second place, he represented and thereby admitted that the sale proclamation had been properly served. There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error.

The irregularities found by the Subordinate Judge on which the appellants now rely are as follows:—

I. As to the attachment:—

(a) the Subordinate Judge had grave doubt of the truth of the service report of the peon,

(b) that the copy of the attachment order was affixed at Poddardih, which is on Touzi No. 21, and on no part of Touzi No. 23, and

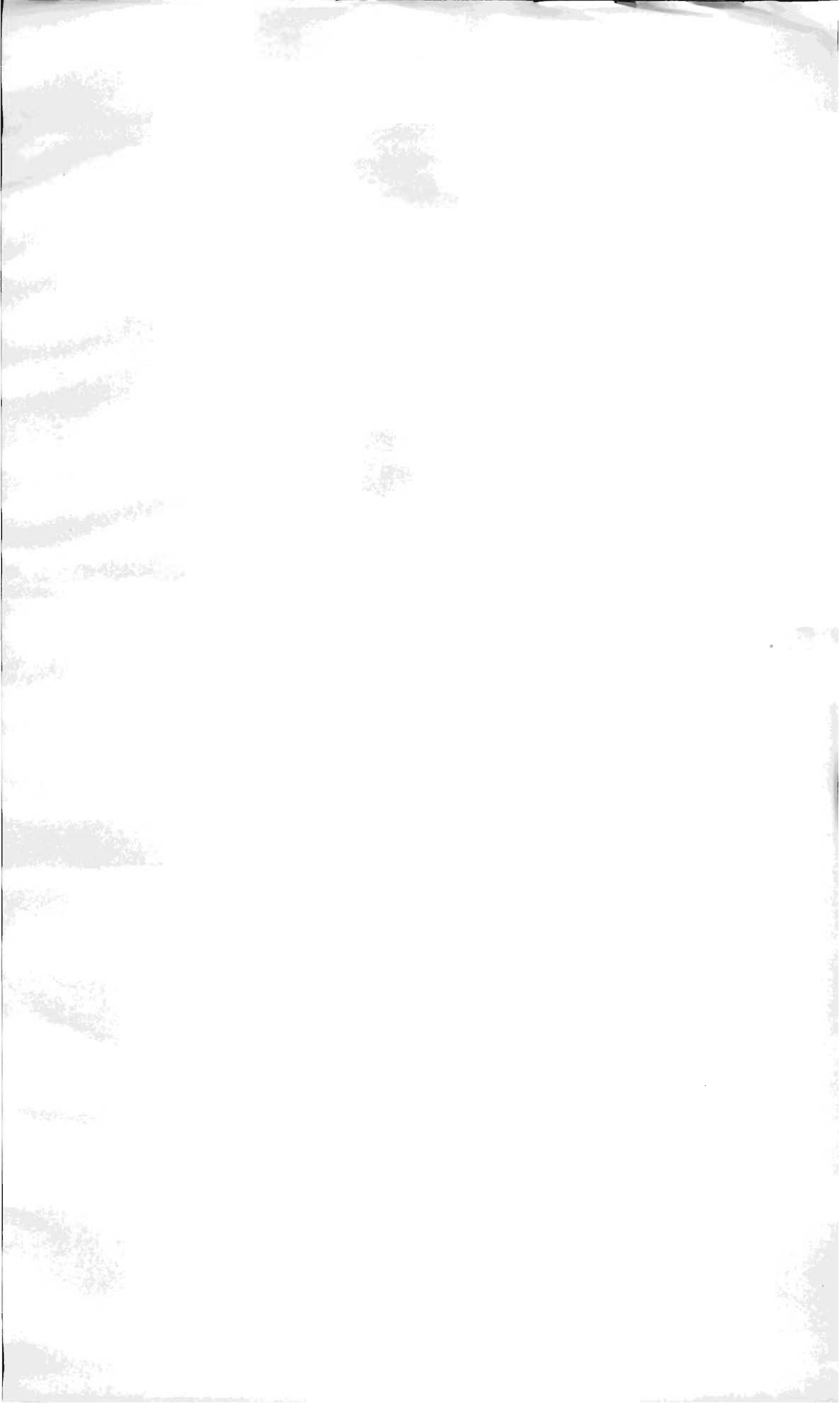
(c) that no copy was sent to the Collector of Burdwan, in which district parts of Touzi No. 23 are situate.

II. As to the sale proclamation:—that the contents were defective, in that the description of the property was insufficient.

As regards the appellants' objection to the sale proclamation, their Lordships consider that the waiver of the necessity for a fresh proclamation necessarily implied a waiver of objection to any defect appearing on the face of the sale proclamation, as the appellant No. 1 must have been fully aware of its terms in view of his miscellaneous appeal to the High Court. The facts in this case are stronger against the said appellant than those in *Girdhari Singh v. Hurdeo Narain Singh*, (1875) 3 I.A. 230, in which this Board held that the waiver covered any objection to an error in the statement of the Government Revenue, as the judgment-debtor must have had the opportunity of seeing the copy affixed in the Court House. This objection of the appellants accordingly fails.

As regards the appellants' three objections to the attachment, their Lordships find it unnecessary to consider the correctness of the findings of the Subordinate Judge, and they have not heard the respondents on this question. Their Lordships do not consider that the waiver of any necessity for a fresh sale proclamation would imply a waiver of the right to object to any of the three irregularities in the attachment found by the Subordinate Judge. While much might be said for the view that the repeated admissions by the judgment-debtor in this case, on the faith of which he secured delay, excluded any objection by him, in the absence of fraud, to irregularities in the attachment, their Lordships find it sufficient for disposal of this appeal to hold that, assuming the findings of the Subordinate Judge to be correct, these irregularities did not so materially affect the proceedings on the sale day as to justify the setting aside of the sale. It must be remembered that the main purpose of attachment is to prevent the transfer or charging of the property attached by the judgment-debtor. No date of sale is fixed until the sale proclamation, and, in view of their Lordships' decision, it must be taken that the sale proclamation and the subsequent proceedings were regular. In this case these proceedings extended over several months, and any effect of the irregularities in the attachment on the actual sale is highly problematical and remote and is insufficient to form the basis of the substantial injury which the appellants require to prove. Their Lordships are therefore of opinion that the appellants' objections to the attachment do not avail them in the present application to have the sale set aside.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs, and that the decree of the High Court should be affirmed.



In the Privy Council

RAJA SHYAM SUNDER SINGH
AND OTHERS

vs.

KALURAM AGARWALA
AND OTHERS

DELIVERED BY LORD THANKERTON

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