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Court : Kolkata

Decided On : May-14-1891

Reported in : (1891)ILR18Cal496

Judge : Tottenham: and ;Trevelyan, JJ.

Appellant : Rameshur Mundul and ors.

Respondent : Bagal Chunder Mookerjee

Judgement :

Tottenham and Trevelyan, JJ.

1. This is a rule obtained by one of two judgment-debtors to show cause why a sale held in execution of a decree against him should not be set aside, as being null and void for default in the issue of a fresh proclamation under a. 291 of the Code of Civil Procedure, upon an adjournment being granted at the instance of the other judgment-debtor, who had waived any fresh proclamation.
2. The present petitioner was no party to the petition for adjournment.
3. The Courts below held, that the omission to issue a fresh proclamation amounted only to an irregularity, and that no substantial injury had thereby been caused to the petitioner.

4. Another ground, urged for setting aside the decree of the Lower Appellate Court, is that that Court had no jurisdiction to hear the appeal, inasmuch as the execution proceedings were commenced before the 1st of July 1888, and when an appeal from the Munsif's order confirming the sale would lie to the High Court and not the District Judge.

5. It is not contended that there was any irregularity or defect in the original sale proclamation. And so far as the proclamation that was published is concerned, there has been no transgression of the provisions of Section 290.

6. It has been argued by the vakeel for the petitioner, that Section 290 must be equally followed when under Section 291 an adjournment has been allowed, unless all the judgment-debtors waive the issue of a fresh proclamation. But we think it clear that this is not so.

7. For supposing that under Section 291 a sale has been, in the discretion of the Court, and not upon application, adjourned for 15 days, and a fresh proclamation has to be published, it would be impossible to hold, that under Section 290 it would be illegal to hold such adjourned sale, until after the expiration of at least thirty days from the date of the fixing up of the fresh proclamation in the Court of the Judge.

8. The High Court at Allahabad has held in *Rameshur Singh v. Sheodin Singh* I.L.R. 12 All 510 that whereas the doing of a thing by the Court which is prohibited by law is an illegality, which renders the thing done null and void, the omission to do something which is prescribed may be only an irregularity. And in a case very similar to the one before us, this Court has held in *Satish Chunder Rai Chowdhuri v. Thomas* I.L.R. 11 Cal. 658 that the omission to publish a fresh proclamation was only an irregularity. We see no reason for dissenting from this opinion: and we find that the cases cited on behalf of the petitioner are not on all fours with this one.

9. As regards the objection taken to the jurisdiction of the District Judge to hear the appeal, it was not seriously pressed before us; and we are not disposed to attach any weight to it. The amendment of the Procedure Code did not repeal the previous law, but merely altered the forum of appeal in such cases, and we think

the District Judge had jurisdiction.

10. The rule must be discharged with costs.

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