

Privy Council Appeal No. 8 of 1911.—Bengal Appeal No. 1 of 1907.

**Raja Thakur Barmha, since deceased (now
represented by Jai Barmha and others),
and others - - - - -** *Appellants.*

v.

Jiban Ram Marwari and others - - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 25TH NOVEMBER 1913.

Present at the Hearing :

LORD MOULTON.
SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* LORD MOULTON.]

This is an Appeal against a Judgment and Decree of the High Court of Judicature at Fort William in Bengal, dated 26th June 1906, affirming an Order of the Court of the Subordinate Judge of Godda in the Sonthal Pergunnahs, dated 20th December 1904, granting a certain sale certificate to the second set of Respondents hereto, described as auction-purchasers. The facts of the case so far as is necessary for the decision of this Appeal are as follows :—

On the 23rd October 1903 the Respondents Jiban Ram Marwari and Ishwar Das Marwari (described as the decree holders), obtained judgment against the original Appellant Rajah Thakur Barmha (now represented by his heirs and legal representatives), for a sum of 42,562 rupees and interest, and on the 31st October

1903 the decree holders applied for execution of the decree by attaching and selling the property mentioned in the application. It is only material to refer to the first item in the Schedule specifying that property which reads as follows :—

“The Defendants Zamindari and Milkiat right in the
 “ six annas out of 16 annas of Mahal Tappa Patsanda
 “ bearing towzi No. 462 and sudder-jumma of Rs. 2,402. 9. 0
 “ (for the 16 annas) payable in Dumka Collectorate. This
 “ property is mortgaged in the bond of Babu Anant Ram
 “ Marwari and others, decree holders, inhabitants of Bazar
 “ Shujaganj, in the Town of Bhagalpur, and also a two
 “ annas share of the said Mahal, which has been hypothe-
 “ cated as security on behalf of the Defendant in the case of
 “ execution of a mortgage decree of the said Babu Anant
 “ Ram Marwari and others, decree holders, against the
 “ judgment debtor, in the First Court of the Subordinate
 “ Judge of Bhagalpur, in all, eight annas share of the said
 “ Mahal, together with all rights and interests of the
 “ judgment debtor and the Kamat land, *nami* and *benami*
 “ jalkar, phalkar, bankar, &c., and Kachari House apper-
 “ taining to the Estate. The estimated value is Rs. 50,000.”

In the ordinary course an order was made for the sale of the attached property mentioned in the above schedule by public auction, and proclamation of the sale was made in the required manner. The sale commenced on the 16th June 1904, but for a long time the bids were insufficient and the sale was not finally concluded until the 28th day of July 1904.

On the 20th day of December 1904 an application was made on behalf of the auction purchasers to obtain a sale certificate for the six annas share of Tappa Patsanda purchased by them at the auction sale. In making this application they alleged that a mistake had been made in the schedule of the property to be sold in that the word “not” had been omitted from the description of the six annas in question and that the property should have been described as being six annas not mortgaged under the bond of Babu Anant Ram Marwari. At that date

10 annas of the property were so mortgaged while the remaining six annas were free from any mortgage. They claimed that their certificate should be made out as being a certificate of the purchase by them of the six unencumbered annas instead of (as described in the schedule) six annas subject to the existing mortgage. The Subordinate Judge granted them a certificate in the form which they desired and the High Court sustained his Order. It is from this Order that the present appeal is brought.

Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached, and that property is conclusively described in and by the schedule to which the attachment refers. In the present case that property was six annas subject to an existing mortgage. The effect of the certificate of sale granted by the Order of the Subordinate Judge is to make the sale that of a property not attached, namely the six unencumbered annas,--- a property which could not be sold in such proceedings inasmuch as it was not the property attached.

An attempt was made to treat the matter as a case of misdescription, which could be treated as a mere irregularity. But in this case we have to deal with identity and not description. A property fully identified in the schedule may be in some respects misdescribed, but that is not the present case. Here we find an existing property accurately described in the schedule, and the Order of the Subordinate Judge grants a Sale Certificate which states that another and a different property has been purchased at the judicial sale. It was beyond the powers of the Court to make such an Order, inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased.

Counsel for the Respondents sought to support his case by referring to documents in other judicial proceedings tending to support the view that a mistake had been made in drawing up the schedule, and that the property intended to be inserted therein was the unencumbered 6 annas. Their Lordships are of opinion that all such matters are irrelevant. If by a mistake the wrong property was attached and an Order made to sell it, the only course open to the decree holders on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into an authority to sell another and a different one. Moreover it is impossible to attribute to the public to whom the attached property is offered in sale a knowledge of proceedings in other suits which might have led them to suspect that an error had been made. The only relevant document brought to their Lordships' notice in this respect was an advertisement in the "Calcutta Gazette" which, though purporting to be a description of the attached property, differed from the description in the schedule by representing that the property to be sold was free from the mortgage. This want of correspondence between the advertisement in the "Calcutta Gazette" and the schedule of the attached property in the Proclamation of Sale constitutes an additional irregularity which it might need the assistance of the Court to cure if the sale were regular in other respects, but it cannot validate a sale of property which was not the property to which the attachment related.

Their Lordships therefore will humbly advise His Majesty that this Appeal should be allowed, and that the Order of the Subordinate Judge confirming the sale together with the certificate granted thereunder dated the 20th December 1904 should be set aside. This will of course have the effect of setting aside all subsequent

proceedings on the part of the auction purchasers based thereon.

The Respondents will pay the costs of the application to the Subordinate Judge of the 20th December 1904 and of the Appeal to the High Court of Judicature at Fort William in Bengal, and also the costs of this Appeal.

In the Privy Council.

RAJA THAKUR BARMHA, SINCE DE-
CEASED (NOW REPRESENTED BY
JAI BARMHA AND OTHERS), AND
OTHERS

v.

JIBAN RAM MARWARI AND OTHERS.

DELIVERED BY LORD MULLTON.

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