

(1910) 01 CAL CK 0061
In the Calcutta High Court

Enamuddin Jamadar

APPELLANT

Vs

Abdul Jabbar Duftri

RESPONDENT

Date of Decision : 18-01-1910

Acts Referred:

Citation : 5 Ind. Cas. 489

Hon'ble Judges : Teunon, J;Mookerjee, J

Bench : Division Bench

Judgement

1. The sole point in controversy between the parties to this appeal is, whether an execution sale held on the 14th September 1907, is vitiated by fraud and irregularity? The Court of first instance found on the evidence that the judgment-debtor had satisfactorily established grounds under Sections 244 and 311 of the Code of 1882, which justified a reversal of the sale. Upon appeal, the learned District Judge did not go into the merits but held that as the judgment-debtor had, in an application made on the 9th September 1907 u/s 305, Civil Procedure Code, admitted that the sale proclamation had been published, he could not now go behind such admission and contend that the sale-proclamation had been suppressed. In this view the District Judge allowed the appeal and directed the sale to be confirmed. In our opinion, there is no doubt that the order of the District Judge cannot be supported. The application of the 9th September has been placed before us. The judgment-debtor merely stated therein that it was necessary for him to satisfy the decree, as, for the enforcement of it, a sale proclamation had been issued. He offered to have the sale held without the service of a fresh sale proclamation if time was given to him to enable him to raise money to pay the judgment-debt. The application, however, was refused and the result was that the sale took place, on the 14th September. The learned Vakil, for the respondent under these circumstances contended on the authority of the decisions of this Court in Raja Thakur Barham v. Anantaram Marwari 2 C.L.J. 584 and Noorul Hossein v. Omatool Fatima 25 W.R. 34 that the judgment-debtor was precluded from questioning the validity of the sale. The cases relied upon, however, are clearly distinguishable. There the judgment-debtor had

actually obtained an adjournment of the execution proceedings on condition that he would allow the sale to take place without a fresh sale-proclamation and raise no question as to the validity of the sale proclamation previously issued. In the present case there is clearly no waiver because the application of the judgment-debtor was refused by the execution Court. There was no relinquishment of his right to question the validity of the sale, because the terms on which he offered to do so were accepted neither by the Court nor by his opponent *Dhanukdhari Singh v. Nathuni Sahu* 6 C.L.J. 62, *Chandanbala v. Probodh Chandra* 9 C.L.J. 251 : 2 Ind. Cas. 338 : 36 C. 422. It may, further, be pointed out that there is not even an admission by the judgment-debtor that the sale-proclamation had been duly served. Much less is there any waiver of the fraud which is now made the foundation of the present application, *Preo Lal Paul Chowdhry v. Radhica Prosad Paul Chowdhry* 6 C.W.N. 42.

2. The result, therefore, is that this appeal must be allowed, the order of the Court below set aside and the case remanded in order that it may be disposed of upon the whole evidence on the record. The costs of this appeal will abide the result. We assess the hearing fee at 2 gold mohurs.