

(1896) 08 CAL CK 0004
In the Calcutta High Court

Rajendra Nath Haldar and Others

APPELLANT

Vs

Nilratan Mitter and Others

RESPONDENT

Date of Decision : 18-08-1896

Acts Referred:

Citation : (1896) ILR (Cal) 958

Hon'ble Judges : W. Comer Petheram, C.J; Rampini, J

Bench : Division Bench

Judgement

Rampini, J.—This is a rule obtained to show cause why an order of the Munsif of Diamond Harbour, dated 1st June last, refusing an application u/s 310A of the CPC for the cancelling of an execution sale held on the 11th June 1894 (not 1893, as erroneously stated by the Munsif) should not be set aside.

2. The reason given by the Munsif for refusing to allow the petitioners the benefit of the provisions of Section 310 A is that immediately after presenting their application u/s 310A the petitioners made an application u/s 311 of the CPC for the setting aside of the sale on the ground of irregularities in publishing or conducting it, and hence, under the proviso to Section 310A, he considered they were not entitled to make an application u/s 310A.

3. The learned pleader for the applicants has contended that the Munsif is wrong, and that there is nothing in the proviso to Section 310A to prevent an applicant applying u/s 310A, and immediately afterwards applying to the same Court u/s 311 of the Civil Procedure Code. This appears to have been what was done by the petitioners in this case. Their application u/s 310A was filed before the Munsif on the 26th May 1896, and that under Section 311 is said to have been presented the following day. We have, however, been told it was also filed before the Munsif on the 26th May 1896. Now, we are certainly of opinion that such a proceeding on the part of the applicants is contrary to the intention of the Legislature in adding the proviso to Section 310A. The Legislature can never have intended that an applicant should be prohibited from making an application u/s 310A, if he had applied u/s 311, but that he should be at perfect liberty to

present a petition u/s 311 immediately after having presented one u/s 310A. We consider that the words "he shall not be entitled to make an application under this section" in the proviso cannot mean merely "he shall not be entitled to present an application" under the section, but that the word "make" here must mean "carry on" or "prosecute."

4. A person makes an application, not only when he "presents" it, but also when he "carries it on," or "continues to make it." We, therefore, are of opinion that the Munsif's order in this case is right. We are, however, pressed by the learned pleader for the applicants with an order of this Court dated 20th May 1895, discharging a rule No. 2028 of 1894, obtained against an order of the Subordinate Judge of Gya, allowing an applicant the benefit of the provisions of 310A, although, as in this case, an application had been made the following day u/s 311 of the Civil Procedure Code. But the learned Judges who discharged that rule gave no reasons for doing so. They expressed no opinion on the question now before us. The order of the Munsif, against which the rule they discharged had been obtained, proceeded on several grounds; and, as the jurisdiction the learned Judges were exercising was a discretional one, we cannot tell whether they discharged the rule on the merits, or because they agreed with the Munsif in his view of the meaning of the proviso to Section 310A.

5. For these reasons we do not consider that the rule referred to by the learned pleader for the applicant constitutes any precedent Which we are bound to follow in this case. We accordingly discharge this rule with costs.