Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

1896 *August* 18.

RAJENDRA NATH HALDAR AND OTHERS (PETITIONERS) *v.* NILRATAN MITTER AND OTHERS (OPPOSITE PARTY.) *

Civil Procedure Amendment Act (V of 1894), section 310A—Code of Civil Procedure (Act XIV of 1882), section 311—Meaning of the words "he shall not be entitled to make an application under this section" in the proviso of section 310A.

The words "he shall not be entitled to *make* an application under this section" in the proviso of section 310*A* do not mean merely "he shall not be able to *present* an application" under the section, but the word *make* means "carry on" or "prosecute."

In a case where, after an application under section 310*A* of the Code of Civil Procedure, another application was made under section 311 of the Code, the applicant was not entitled to have the benefit of the former section.

THE facts of this rule, so far as they are necessary for the purposes of this report, are shortly as follow: On the 11th of June 1894 one Nilratan Mitter and another, in execution of an *ex parte* decree for arrears of rent against one Bhairabi Dasi, brought to sale the defaulting tenure which was purchased by one of the opposite parties. On the 29th of April 1896 the purchaser obtained possession through the Court. Thereupon the judgment-debtor and certain other persons, who claimed to have acquired an interest in the property by a private purchase before the execution sale, made an application under section 310*A* of the Civil Procedure Code on the 26th of May 1896. They alleged that the decree-holder and the auction-purchaser had by fraud concealed from them the fact of the sale and of their right to make an application under section 310*A* of the Code of Civil Procedure. They therefore claimed the benefit of section 18 of the Limitation Act, and contended that they were entitled to count the period of limitation from the 29th of April 1896 when they first became aware of the fraud.

The application under section 310*A* of the Civil Procedure Code, which was presented on the 26th of May 1896, was not disposed of on that date, and on the next day the petitioners filed another application under section 311 of the Civil Procedure Code. On the 1st of June 1896 the Munsif rejected the application

* Civil Rule No. 1378 of 1896.

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under section 310*A*, on the ground that it had been invalidated by the subsequent application under section 311.

The applicants then moved the High Court and obtained this rule.

Dr. *Asutosh Mookerjee* (with him Babu *Janendra Nath Bose*) for the petitioners.

Babu *Nilmadhub Bose* (with him Babu *Sib Chandra Palit*) for the opposite party.

Babu *Nilmadhub Bose*.—The rule ought to be discharged on two grounds: (1) Section 622 of the Civil Procedure Code has no application, inasmuch as an appeal lay to the District Judge from the order of the Munsif, which is clearly one within the scope of section 244 of the Civil Procedure Code. [RAMPINI, J.—I think the point has been decided against your contention in a recent case.] The fact that the auction-purchaser, who is a third party, is interested does not take the case out of the operation of section 244 of the Civil Procedure Code—*Prosunno Coomar Sanyal* v. *Kalidas Sanyal* (1). (2) The order of the Munsif is right under the last clause of section 310*A*. Although the application under section 310*A* was nominally made before the one under section 311, it was not perfected by the payment of the money till after the second application.

Dr. *Asutosh Mookerjee*.—Section 622 of the Civil Procedure Code applies to this case, as the order of the Munsif was not appealable; the point is concluded by authority. See *Bungshidhar Haldar* v. *Kedar Nath Mandal* (2). As to the second contention of the opposite party, I submit that the Munsif's view of the scope of section 310*A* is erroneous; all that the section lays down is, that if an application *has been made* under section 311, an application under section 310*A* cannot be *made*; it does not say that an application under section 310*A* is invalidated by a subsequent application under section 311, and cannot be *prosecuted*. The language of the law is clear; its scope ought not to be limited or extended by interpreting it with reference to any supposed intention of the Legislature.

(1) I. L. R., 19 Calc., 683; L. R., 19 I. A., 166.

(2) Civil Rule No. 2166 of 1895, *unreported*.

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If any question of interpretation arises in this case, the provisions ought to be interpreted strictly, inasmuch as it takes away the right of a litigant to have recourse to two concurrent remedies in respect of the same subject-matter. The construction I am contending for was accepted by Prinsep and Ghose, JJ., in an unreported case—Civil Rule No. 2028 of 1894.

The judgment of the High Court (PETHERAM, C.J., and RAMPINI, J.) was delivered by

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 under section 310*A* of the Civil Procedure Code 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.

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 under section 310*A* the petitioners made an application under section 311 of the Civil Procedure Code for the setting aside of the sale on the ground of irregularities in publishing or conducting it, and hence, under the proviso to section 310*A*, he considered they were not entitled to make an application under section 310*A*.

The learned pleader for the applicants has contended that the Munsif is wrong, and that there is nothing in the proviso to section 310*A* to prevent an applicant applying under section 310*A*, and immediately afterwards applying to the same Court under section 311 of the Civil Procedure Code. This appears to have been what was done by the petitioners in this case. Their application under section 310*A* 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 310*A*. The Legislature can never have intended that an applicant should be prohibited from making an application under section 310*A*, if he had applied under section 311, but

that he should be at perfect liberty to present a petition under section 311 immediately after having presented one under section 310*A*. 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."

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 310*A*, although, as in this case, an application had been made the following day under section 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 310*A*.

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.

Rule discharged.

S. C. G.