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**(1912) 05 CAL CK 0045**

**Calcutta High Court**

**Case No:** None

Manasaram Paria and Others

APPELLANT

Vs

Raja Nagendra Nath Sahu Roy

RESPONDENT

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**Date of Decision:** May 6, 1912

**Citation:** 16 Ind. Cas. 235

**Hon'ble Judges:** Beachcroft, J; Asutosh Mookerjee, J

**Bench:** Division Bench

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### **Judgement**

1. We are invited in this Rule to set aside an order by which the Court of first instance refused to set aside an execution sale. The order of the primary Court was affirmed on appeal and a second appeal is not allowed by the law. The validity of the sale is assailed on the ground that it was held in contravention of an express direction in the decree, and must, consequently, be treated as held without jurisdiction. The respondent obtained a mortgage-decree against the petitioners, which directed that for the recovery of the sum due on the first mortgage bond, the properties in schedules kha and ga be first sold and that for the recovery of the balance as also of the sum due on the second mortgage, properties in schedule ka be brought to sale. At the sale which took place, properties in schedule ka were first brought to sale and were purchased by the decree-holder, who had obtained leave to bid at the sale and was in fact the solitary bidder for Rs. 2,954. The properties in schedules kha and ga were subsequently brought to sale, and were similarly purchased by the decree holder without competition.

2. In so far as the first sale is concerned, its validity is challenged on the ground that the Court had no authority to hold it till the properties in schedules kha and ga had been brought to sale. In our opinion, upon a true construction of the decree, there is no room for controversy that there was an express direction that the properties in schedules kha and ga be sold first and that the properties in schedule ka be sold thereafter. It is manifest, therefore, that the first sale was held at a stage when the Court had no authority under the terms of the decree to bring those properties to

sale. Consequently, the sale must be treated as held, if not without jurisdiction, at any rate, with material irregularity in the exercise of the jurisdiction of the Court. The case before us falls within the principle of the decision of the Judicial Committee in *Khairajmal v. Daim* 32 C. 296 : 2 A.L.J. 71 : 1 C.L.J. 584 : 7 Bom. L.R. 1 : 9 C.W.N. 201 : 32 I.A. 23, rather than in *Malikarjun v. Narhari* 25 B. 337 : 27 I.A. 216 : 5 C.W.N. 10 : 10 M.L.J. 368 : 2 Bom. L.R. 927. On behalf of decree-holder auction purchaser, much reliance, however, has been placed upon the case of *Nundeeput Mahta v. A.S. Urquhart* 13 W.R. 209 to show that the sale at least was irregular. But that case is clearly distinguishable, as there the sale was not held in contravention of an express direction in the decree.

3. We may add that it was argued on behalf of the petitioner that the sale was bad because the sale proclamation itself had not been properly drawn up. This, however is a ground upon which the Court cannot properly be invited to interfere in the exercise of its revisional jurisdiction. Besides, there is no substance in the objection, because on an examination of the record, it transpires that the sale proclamation was settled in the presence of the decree-holder and the judgment-debtors; the latter, at any rate, had notice of the proceedings under Rule 66 of Order XXI of the Code of 1908 and they had opportunity afforded to them to take exception to the entries in the sale proclamation. If they did not take advantage of the opportunity afforded to them, they cannot afterwards turn round and contend that the sale is not valid, because the sale proclamation is defective or erroneous. This is clear from the decisions in *Olpherts v. Mahabir Pershad Singh* 10 I.A. 25 : 11 C.L.R. 494 : 9 C. 656 and *Arunachellam. v. Arunachellam Chetti* 15 I.A. 171 : 12 M. 19.

4. The result is that the Rule is made absolute in part, and the sale of the properties in schedule ka set aside. The decree-holder will be at liberty to sell these properties again, but before he does so, he must allow credit for the sum realized by the sale of the properties in schedules kha and ga and take out execution for the balance of the judgment-debt.

5. There will be no order for costs in this Court.