

# CALCUTTA HIGH COURT

Maniruddin Ahmed

Vs.

Umapasanna Mukherjee

A.F.O.O. No. 112 of 1953

(B.K. Guha and B.N. Banerjee, JJ.)

21.09.1959

## JUDGMENT

### **B.N. Banerjee, J.**

1. This appeal is directed against an order, made by the learned District Judge of Murshidabad, affirming an order of refusal to set aside an auction sale, passed by a learned Subordinate Judge.
2. Respondents Nos. 9 to 40 are the mortgagors and Respondents Nos. 1 to 5 are the mortgagees. The appellants are transferees of the right of redemption from the mortgagors.
3. Respondents Nos. 1 to 5 obtained a mortgage decree and put the decree in execution, in Mortgage Execution Case No. 42 of 1942. The execution case remained stayed for a considerable time because of a notice issued under Section 34 of the Bengal Agricultural Debtor's Act. The stay was vacated only on 8-6-1949. In the auction sale held on 16-12-1950 Respondents Nos. 6 to 8 auction-purchased the mortgaged property.
4. On 4-4-1951, the present appellants, as petitioners, filed an application, under Order 21 Rule 90 of the Code of Civil Procedure, to have the execution sale set aside. The said application was registered as Misc. Case No. 7 of 1951.
5. In the said Miscellaneous Case it was contended that the notice under Order 21 Rule 66 of the Code of Civil Procedure had been fraudulently suppressed and not served on the petitioners (the present appellants) and that there had been no proper publication of the sale proclamation. The result was it was contended that the mortgaged properties were sold at a grossly inadequate price, to the substantial injury of the judgment-debtors (the appellants herein).
6. The executing Court negatived all the contentions of the judgment-debtors appellants and dismissed the Miscellaneous Case.
7. There was an appeal taken by the judgment-debtors appellants to the Court of appeal below. Apart from the objections taken before the first Court, an additional objection was taken in

appeal to the effect that the mortgaged properties having had been put to sale in disregard of the provisions of Section 35 of Bengal Money-Lenders' Act, the sale was bad and should be set aside.

8. The Court of appeal below agreed with the findings of the first Court on the point of service of notice under Order 21 Rule 66 of the Code of Civil Procedure and publication of the sale proclamation. The Court of appeal below was further satisfied that the judgment-debtors had not sustained any substantial injury as a result of the sale. On the additional point raised in appeal, namely, that the sale was bad because of the non-compliance, by the executing Court, of the provisions of Section 35 of the Bengal Money-Lenders' Act, the Court of appeal below came to the following conclusion :

"Non-compliance with the provisions of Section 35 of the Bengal Money-Lenders' Act by the learned trial court was at most a material irregularity and no evidence was adduced to establish that the applicant judgment-debtors had sustained any substantial injury because of that material irregularity." The propriety of the Order passed in appeal is being disputed in this Second Miscellaneous Appeal.

9. Confronted with the question as to how a Second Miscellaneous appeal would be available to the judgment-debtors appellants, against an appellate Order passed on an application under Order 21 Rule 90 of the Code of Civil Procedure, Mr. Apurbadhan Mukherjee, learned Advocate for the appellants, contended that an objection under Section 35 of the Bengal Money-Lenders' Act was in substance an objection under Section 47 of the Code of Civil Procedure and a Second Miscellaneous appeal would, therefore, lie. In support of his contention Mr. Mukherjee relied on a judgment by Chunder J., in *Abinash Chandra Jana v. Bhushan Chandra Maity*<sup>1</sup>, which is reported in substance in AIR 1955 NUC (Cal) 4279. The relevant passage from the judgment is to the following effect :

"In the present case, therefore, the Court had absolutely no jurisdiction to hold the sale because of non-compliance with Section 35 of the Bengal Money-Lenders' Act. That Act says that the provisions of that section are to be followed notwithstanding anything contained in any other law for the time being in force, which will also include the Civil Procedure Code. When the sale is held without jurisdiction the question of limitation will not arise as the period of limitation in this case will be three years under Section 47 of the Code of Civil Procedure read with Article 181 of the Limitation Act. \* \* \* " It has also come to our notice that in the judgment reported in *Gaya Prosad v. Seth Dhanrupmal*<sup>2</sup>, there is an obiter dictum by P. N. Mookerjee J. (Guha Ray J. concurring) to the effect that an appeal lies against an order dismissing an objection as to non-compliance with the provision under Section 35 of the Bengal Money-Lenders' Act, being an objection of the nature as in Section 47 of the Code of Civil Procedure . We need not dissent from the aforesaid observations for the purposes of the present appeal and need not dismiss the same on the preliminary ground, indicated above.

10. On the merits of the case, Mr. Mukherjee contended that the value of the properties

<sup>1</sup> Civil Revn. Case No. 2925 of 1952, dated 22-1-1954

<sup>2</sup> 58 Cal WN 503 : AIR 1954 Cal 492

sold would be between Rs. 44,000/- to Rs. 50,000/-The properties were sold for Rs. 7776/-. The decretal debt was only Rs. 4698. Mr. Mukherjee argued that the executing court should have specified only so much of the property of the judgment-debtor, as the Court considered to be saleable at a price sufficient to satisfy the decree and should have directed sale only of the specified portion and should have caused publication of the sale Proclamation accordingly. This duty, according to Mr. Mukherjee, was incumbent upon the Court and failure to observe the procedure in Section 35 of the Bengal Money-Lenders' Act rendered the sale liable to be set aside on account of a defect, which went to the root of the execution proceeding. Mr. Mukherjee placed very strong reliance on the following observations by Mukherjee and Pal JJ., in a case reported in *Asharam Thikadar v. Dan Chand Chapra* <sup>3</sup>:

"In the first place, the learned Subordinate Judge was not right in saying that Section 35 of the Bengal Money-Lenders' Act is not applicable to mortgage decrees. There is nothing in the Section which excludes mortgage decrees from its operation. In the second place, we think that in carrying out the directions of that Section, it is incumbent upon the Court not only to specify so much of the property of the judgment-debtor which it considers saleable at a price sufficient to satisfy the decree, it must also specify the price of the property below which it cannot be sold. In our opinion, in cases coming under Section 35 of the Bengal Money-Lenders' Act the Court has to determine the price of the property which is to be put up for sale on proper evidence and one and only one valuation can be given in the sale proclamation. The direction of Section 35 of the Bengal Money-Lenders' Act cannot be complied with by mere insertion of the two valuations given by the decree-holder and the judgment-debtor respectively."

Mr. Mukherjee also invited our attention to an unreported judgment by Das Gupta and Debabrata Mookerjee JJ., in *Satya Narayan v. Karnadhar Das*<sup>4</sup>, in which the following observations appear :

"The learned Judge ordered that the sale would not be stayed but would be held but its confirmation would be stayed till the disposal of the judgment-debtors' application under Section 35 of the Bengal Money-Lenders' Act. Quite clearly the learned Judge wholly misconceived the position. It was his own duty to follow the provisions of Section 35 of the Bengal Money-Lenders' Act even though neither party had drawn his attention to it by any application. When such an application was filed, it was his bounded duty to pass a proper order thereupon as early as possible. There could be no objection to his giving time to other party to file objection to the application but it is impossible to understand his view that the sale would be held in spite of the judgment-debtors' application under Section 35 without the provisions thereof being followed. Such a curious view has only to be stated to be rejected." As against the contention raised by Mr. Mukherjee there are several judgments of this Court to which we need refer.

11. In the first place, there is the judgment reported in *Manindra Chandra v. Tagadish Chandra*<sup>5</sup>,

decided by Akram and Chakravarti JJ. In his separate judgment Chakravarti

<sup>3</sup>47 Cal WN 666 : AIR 1945 Cal 61

<sup>5</sup>50 Cal WN 266

<sup>4</sup>F. M. A. No. 6 of 1954, delivered on 24-8-1954

J. made the following observations :

"Before taking up the objection under Section 35 of the Bengal Money-Lenders' Act, I may refer to one matter which arises out of proviso (2) of Order 21, Rule 90, Civil Procedure Code, added by the Calcutta High Court. It is provided there that no sale shall be set aside on the ground of any defect in the proclamation of sale at the instance of any person who after notice did not attend at the drawing up of the proclamation or of any person in whose presence the proclamation was drawn up, unless objection was made by him at that time in respect of the defect relied upon.

Now, Section 35 of the Bengal Money-Lenders' Act provides that the Court shall specify in the proclamation so much of the property as it considers saleable at a price sufficient to satisfy the decree. It is a provision relating to the contents of the sale proclamation and its effect, to my mind, is to amend or supplement Order 21 Rule 66(2)(a) which directs the Court to specify in the sale proclamation 'the property to be sold'. Any objection regarding non-compliance with Section 35 in specifying the property to be sold is, in my view, a defect in the sale proclamation within the meaning of the second proviso to Order 21 Rule 90, Civil Procedure Code. It follows that an objection that the sale proclamation did not conform to Section 35 of the Bengal Money-Lenders' Act cannot avail a judgment debtor in an application under Order 21 Rule 90, if he was present at the drawing up of the sale proclamation and did not raise any such objection at the time, nor can it avail a judgment debtor who, after receiving notice did not attend at the drawing up of the sale proclamation at all."

12. In the next place there is the judgment by Das and Guha JJ., reported in *Jamini Mohan Banerjee v. M/s Ram Kissen Das Bagree*<sup>6</sup>, in which their Lordships made the following observations :

"(i) Section 35 merely limits the extent of the property to be sold and is a qualification on Order 21 rule 66(2)(a), which requires the proclamation of sale to specify the property to be sold."

"(ii) The Bengal Money-Lenders' Act gives protection and relief to the borrowers and aims at control of money lending. Some of its provisions are no doubt based on public policy but other provisions are solely intended for the benefit of the debtors. Section 35 is intended for the benefit of the debtor and is merely directory and can be waived."

Lastly there is the judgment by P. N. Mookerjee and Guha Ray JJ., reported in 58 Cal WN 503 : AIR 1954 Calcutta 492, in which the following passage appears :

"It has been argued before us that Section 35 of the Bengal Money-Lenders' Act is a mandatory provision to which the law of waiver does not apply and it has been strenuously contended that, whatever the laches on the part of the judgment-debtor, the

Court's failure to observe the terms of this statutory provision, whatever the reason therefor, vitiates the entire proceeding and is fatal to its validity\*\*\* In our opinion, the appellant's arguments are misconceived and they

<sup>6</sup>ILR (1951) 1 Cal 139

really over-step the mark. It is true that Section 35 of the Bengal Money-Lenders' Act casts a duty upon the Court but such duty is solely for the benefit - the private benefit-- of the judgment-debtor. It is, therefore, open to him to waive this benefit, or, in other words, to waive his objection of non-observance of that statutory provision by the Court (Vide *Ashutosh Sikdar v. Beharilal Kirtania*<sup>7</sup>, and, that being the position, we are inclined to hold, in the facts and circumstances of the case, that this objection of the appellant (judgment-debtor No, 1), is clearly barred by waiver."

In the instant case, according to the concurrent finding of both the Courts below, notice under Order 21, Rule 66 of the Code of Civil Procedure was duly served on the judgment-debtors. They did not ask for the compliance of the provisions of Section 35 of the Bengal Money-Lenders' Act, at the time when the sale proclamation was drawn up. The point was not even taken in their application under Order 21 Rule 90 Civil Procedure Code. It was only before the lower appellate Court, that the judgment-debtors appellants conceived of the idea that the auction sale was bad On account of non-compliance with the provisions of Section 35 of the Bengal Money-Lenders' Act. That being the position, the judgment-debtors appellants should not be allowed to raise the point under Section 35 of the Bengal Money-Lenders' Act at so late a stage.

13. Mr. Mukherjee, however, tried to get out of the difficulty created by the three decisions of this Court, reported in 50 Cal WN 266, ILR (1951) 1 Cal 139 and 58 Cal WN 503 : AIR 1954 Calcutta 492, by relying on an unreported judgment by S. R. Das Gupta and Mallick JJ. in *Sudhir Chandra Ghosh v. Suresh Chandra Mukherjee*<sup>8</sup>. In the aforesaid decision both the judgments reported in 50 Cal WN 266 and 58 Cal WN 503 : AIR 1954 Calcutta 492, were criticised and expressly dissented from. We quote hereinbelow the relevant passages from aforesaid judgment :

"(1) The first case on which reliance was placed by the Respondents is 50 Cal WN 266, decided by Akram J. and Chakravarti J. In that case Chakravarti J., took the view that any objection regarding non-compliance with Section 35 in specifying the property to be sold is a defect in sale proclamation within the meaning of the Second proviso to Order 21 Rule 90 of the Code of Civil Procedure. His Lordship held that it follows therefrom that an objection that the sale proclamation did not conform to Section 35 of the Bengal Money-Lenders' Act cannot avail a judgment-debtor in an application under Order 21, Rule 90, if he was present at the drawing up of the Sale Proclamation and did not raise any such objection at the time, nor it can avail a judgment-debtor who, after receiving notice, did not attend at the drawing up of the Sale proclamation at all. His Lordship further held that Section 35 is, only supplementary to Order 21 Rule 66 of the Code of Civil Procedure and it affects one of the provisions of that Rule. It appears that the decision of Mukherjee and Pal JJ., in the case of 47 Cal WN 666 : AIR 1945 Calcutta 61 was not cited before their Lordships in the case of 50 Cal WN 266 and the point of view

which is now placed before us and which was accepted in the case reported in 47 Cal WN 666 : AIR 1945 Calcutta 61 was not placed before their Lordships Akram and Chakravartti JJ. If the said decision had been placed, it is difficult to

<sup>7</sup> ILR 35 Cal 61 (FB))

<sup>8</sup> F. M. A. No. 83 of 1952

say what view their Lordships would have taken about this matter. In any event, we are unable to agree with the proposition that an objection regarding non-compliance with Section 35 in specifying the property to be sold is a defect in the sale proclamation within the meaning of Second proviso to Order 21 rule 90 of the Code of Civil Procedure. In our opinion, Section 35 contemplates a stage prior to the settlement of sale proclamation. In other words, the Court has to decide judicially and on proper evidence what are the properties which would be sufficient to cover the decretal claim and what is the value of these properties. That would be a judicial act on the part of the Court. After having done that the Court has to settle the sale proclamation. It is true that in Order 21 Rule 66 of the Code of Civil Procedure it has been inter alia laid down that such proclamation shall specify the property to be sold but that does not mean that in settling the sale proclamation under Order 21 rule 66 the question as to which of the properties are to be sold can be gone into. This question in our opinion does not come within the purview of Order 21 rule 66 and we are unable to agree with the view taken in the case of 50 Cal WN 266 that Section 35 is only supplementary to Order 21 rule 66 of the Code of Civil Procedure."

"(2) The next case which has been cited before us is the case of 58 Cal WN 503 : AIR 1954 Calcutta 492. In this case the question which was raised before their Lordships P. N. Mookerjee and Guha Ray JJ., was whether or not Section 35 of the Bengal Money-Lenders Act is a mandatory provision to which the law of Waiver does not apply. It was also argued before their Lordships that whatever the laches on the part of the judgment-debtor the Court's failure to observe the terms of the statutory provisions, whatever the reason thereof, vitiates the proceeding and is fatal to its validity. Their Lordships did not accept that contention. The view taken in the said case of 58 Cal WN 503 : AIR 1954 Calcutta 492 was that although the Bengal Money-Lenders Act casts a duty upon the Court, yet such a duty is solely for the benefit of the judgment-debtor and it is therefore, open to him to waive this benefit; or, in other words, to waive his objection to non-observance of that statutory provision by the Court.

\* \* \* \* \*

With the highest respect to their Lordships we are unable to agree with the view taken in Gaya Prosad's case. 58 Cal WN 503 : AIR 1954 Calcutta 492 and we agree with the view expressed by Mukherjee and Pal JJ., in Asharam Thikadari's case, 47 Cal WN 666 : ( AIR 1945 Calcutta 61.)"

"(3) The object of Section 35 of the Bengal Money-Lenders Act was certainly to protect the borrowers from unscrupulous lenders. That object, in our opinion, is based on public policy. The object of Section 35 is that although a number of properties may have been

made the subject matter of the mortgage sale, the decree holder will not be permitted to put up all the properties to sale but only some portions thereof and he must rest content with these portions. The proviso to Section 35 also makes that object quite clear. \* \* \* We are unable to accept the view that the provisions of Section 35 were not based upon public policy and did not cast a duty upon the Court on such consideration but was merely for the protection or benefit of the individual litigant. In our opinion the entire Money-Lenders Act and particularly Section 35 are based upon public policy and cast a duty upon the Court which it is bound to carry out. In our opinion, the true effect of Section 35 has been laid down clearly in the case of 47 Cal WN 666: AIR 1945 Calcutta 61 and it appears from the said decision that the provisions of Section 35 are mandatory and must be followed."

14. We have extensively quoted from the un-reported decision of S. R. Das Gupta and Mullick JJ. with a purpose. The decision, though unreported as yet, appears to be well known to the bar. The reasoning's given by their Lordships in coming to their conclusions are frequently used on behalf of judgment-debtors in arguing objections under Section 35 of Bengal Money-Lenders Act. It is necessary for us, therefore, to examine the reasoning's given by their Lordships in the aforesaid unreported judgment.

15. Their Lordships S. R. Das Gupta and Mullick JJ. very strongly relied on the judgment of Mukherjea and" Pal JJ., reported in 47 Cal WN 666 : AIR 1945 Calcutta 61. We have already quoted the material portion from the judgment of Mukherjea and Pal JJ., in 47 Cal WN 666 : AIR 1945 Calcutta 61 and we respectfully agree with the view expressed by their Lordships that in carrying out the directions in Section 35 of the Bengal Money-Lenders Act,

"it is incumbent upon the Court not only to specify so much of the property of the judgment-debtor which it considers saleable at a price sufficient to satisfy the decree, but it must also specify the price of the property below which it cannot be sold".

Mukherjea and Pal JJ., however, did not indicate in the aforesaid judgment when, in the course of the execution proceeding, is this incumbent duty to be performed by the Court. Nor did their Lordships indicate as to what would be the fate of a sale held without complying with the provisions of Section 35 of the Bengal Money-Lenders Act. Also their Lordships were not called upon to decide whether a judgment-debtor can waive the benefit conferred on him by Section 35 of the Bengal Money-Lenders Act. There is nothing contained in Asharam Thikadar's case, 47 Cal WN 666 : AIR 1945 Calcutta 61 from which the view expressed by S. R. Das Gupta and Mullick JJ., on any of the aforesaid three matters, can find support.

16. Mukherjea J., who delivered the judgment in the case reported in 47 Cal WN 666 : AIR 1945 Calcutta 61 was also one of the members of the Division Bench which decided the case reported in *Girish Chandra Das v. Siba Prosad Jana*<sup>9</sup>. In the last mentioned case Sen J. (Mukherjea J. concurring) made the following observations :

"In my opinion, there would have been no difficulty in the way of the judgment-debtor

getting the proclamation framed and the sale held in accordance with the provisions of Section 35, were it not for the fact that there has already been a proclamation issued. The section must be construed strictly. It lays down what should be done at the time of drawing up of the sale proclamation and at a sale held pursuant to such proclamation. When the present sale proclamation was drawn up the Bengal Money-Lenders Act was not in force and Section 35 could not therefore, affect such a proclamation.

<sup>946</sup> Cal WN 275 : AIR 1942 Cal 472

The Section nowhere says that a sale proclamation validly issued before the Act would cease to have effect after the Act nor does it say that such a sale proclamation should be amended in accordance with its provisions. It merely directs what should be done when a sale proclamation is about to be drawn up and at a sale held pursuant to such proclamation." It will not be out of place to notice in this connection that Mukerjea J., sitting with Blank J., reaffirmed the view expressed in 46 Cal WN 275 : AIR 1942 Calcutta 472 in an unreported decision in F. M. A. No. 30 of 1941, dated 19-2-1942.

17. To the decisions reported in 46 Cal WN 275: AIR 1942 Calcutta 472 and ILR (1951) 1 Cal 139 the attention of S. R. Das Gupta and Mallick JJ., was not drawn when their Lordships decided F. M. A. No. 83 of 1952. Had their Lordships taken into consideration the aforesaid two decisions, we doubt whether their Lordships would have come to the conclusion that Section 35 contemplated a stage prior to the settlement of the sale proclamation.

18. Be that as it may, the language of Section 35 of the Bengal Money-Lenders Act itself says that

"the proclamation of the intended sale of property \* \* shall specify only so much of the property of the judgment-debtor, as the Court considers to be saleable at a price sufficient to satisfy the decree".

This is itself an indication that the Court is called upon to perform the duty under Section 35 of the Bengal Money-Lenders Act only when the sale proclamation is to be drawn up.

19. Turning now to the effect of non-compliance with the provisions of Section 35 of the Bengal Money-Lenders Act on sales held in execution of decrees, we are of the opinion that in spite of the mandatory form of the provisions of Section 35, non-compliance has not the effect of rendering the sale without jurisdiction. Such a defect is not one which goes to the root of the Court's jurisdiction to sell and is merely an irregularity and the judgment-debtor may waive the defect.

20. We have already referred to the decisions of this Court in support of the view that we take. Any other interpretation of the provisions of Section 35 of the Bengal Money-Lenders Act will be opposed to established canons of construction of statutes as will appear from the extracts quoted below from authoritative text books on interpretation of statutes.

21. In Craies on Statute Law (5th Edition) the following passage appears, at pages 248-49:

"If the object of a statute is not one of general policy, or if the thing which is being done will benefit only a particular person or a class of persons, then the conditions prescribed by the statute are not considered as being indispensable.

\* \* \* \* \*

if it appears that the statutory conditions were inserted by the Legislature simply for the security or benefit of the parties to the action themselves and that no public interests are involved, such conditions will not be considered as indispensable and either party may waive them without affecting the jurisdiction of the Court. \* \* \* \* It is evident', said Alderson, B, that a party who has a benefit given him by the statute may waive it if he thinks fit' : *Graham v. Ingleby*<sup>10</sup>, Then again in Maxwell on The Interpretation of Statutes (9th Edition) this question has been dealt with in the following language, at pages 389-390 :

"Another maxim which sanctions the non-observance of a statutory provision is that, cuilibet licet renuntiare juri pro se introducto. Every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual : in his private capacity, which may be dispensed with without infringing any public right or public policy.

\* \* \* \* \*

When a person does waive the benefit of any such law he cannot recall the concession after it has been acted on. A tenant, for instance, whose goods had been distrained, might waive the enactment (S. 1, 2 W and M. C 5) which required an appraisalment before the sale of the goods and he could not, after the sale, be heard to complain that no appraisalment had been made." Bengal Money-Lenders Act, 1940, enacted for the purpose of making better provision for the control of Money-Lenders and for the regulation and control of money-lending, has certainly a public policy behind it. But some of its provisions and Section 35 one of them, are intended for the benefit of individual judgment debtors and have no public policy behind them. Such provisions may be waived by the person for whose benefit the same were enacted.

22. If this right of waiver be not conceded to judgment-debtor, the provision of Section 35, instead of benefiting him, may operate also to his detriment. A judgment-debtor may like to save a portion of his property by allowing sale of such portion only of his property as may be sufficient to satisfy the decree. But sale of a portion of a unit of property may render the remaining portion burdensome and uneconomic, or of lesser value than it otherwise would have been. A judgment-debtor may not like this to happen and may like to make the best of a bargain by allowing the entire unit to be sold at the highest bid. To deny him this right of election may not be always doing him good.

23. We therefore, are of the opinion that a judgment-debtor has the right expressly or impliedly to waive the benefit under Section 35 of the Bengal-Money Lenders Act, at the time of settlement of the sale proclamation, which is the proper stage for a Court to discharge the duty under Section 35. We are further of the opinion that if a Court fails to discharge it : duly because of such waiver, its jurisdiction to sell the property is not affected. Where, however, there is no such waiver and a judgment-debtor wants sufficient portion only to the attached property to be sold, a

Court must perform its duty under Section 35 of the Bengali Money-Lenders Act and must specify only a sufficient portion of the attached property for inclusion in the sale proclamation. Failure to do so will amount to material irregularity in the exercise of jurisdiction or failure to exercise a jurisdiction vested in it. This may be a circumstance under which a sale may be set aside or avoided. This seems to us to be the effect of the unreported judgment by Das Gupta and Debabrata Mookerjee, JJ., in F. M. A. No. 6 of 1954. In our opinion, the aforesaid

<sup>10</sup>(1848) 1 Ex 651 at p. 657

judgment does not support the extreme view taken by their Lordships S. R. Das Gupta and Mullick JJ.

24. We are also of the opinion that under the provisions of the proviso to Order 21 Rule 90 of the Code of Civil Procedure, as amended by this Court a sale should not be set aside for a defect in the Sale proclamation, namely, non-compliance of the provisions of Section 35 of the Bengal Money-Lenders Act, at the instance of any person, who after notice did not attend at the drawing up of the proclamation or did not object thereto. We are satisfied on the finding arrived at by the Court of appeal below, that the judgment-debtor appellants had notice of the drawing up of the sale proclamation. They did not, however, object to the non-compliance of the provisions of Section 35 of the Bengal Money-Lenders Act at the proper time.

25. The views that we have expressed hereinbefore on the interpretation of Section 35 of the Bengal Money-Lenders Act, appear to be supported by a number of decisions by this High Court and must be taken to be the considered view of this Court. We do not feel ourselves compelled to differ from that view because of the forlorn protest contained in the judgment by S. R. Das Gupta and Mallick JJ. in F. M. A. 83 of 1952. The view expressed by Chunder J. in *Abinash Chandra Jana v. Rama Chandra Matty*<sup>11</sup>, in so far as it is contrary to what is herein stated must be taken to be erroneous and we respectfully dissent therefrom.

26. In the view that we take, there is no substance in the appeal. We, therefore, dismiss the appeal with costs.

27. In view of our order passed in the appeal the alternative application under Section 115 of the Code of Civil Procedure stands dismissed without costs.

**Guha, J.**

28. I agree.

Appeal dismissed.

<sup>11</sup> AIR 1955 N. U. C. (Cal) 4279