

ORIGINAL CIVIL.

Before Chaudhuri J.

BASIR ALI

v.

HAFIZ NAZIR ALI.*

1910
April 30.

Receiver—Sale by Receiver—Civil Procedure Code (Act V of 1908) O. XL, r. 1—Receiver. authority of, to sell property and execute the conveyance including share of infant defendant—Practice—Trustees Act (XV of 1866) ss. 8, 20 and 32.

In a partition suit in which a Receiver is authorized to sell properties, there can be no difficulty in directing him to convey the properties. Under O. XL, r. 1 cl. (d) of the Code the Court may confer on a Receiver all such powers for the realisation of properties and the execution of documents as the owner has. The Receiver may be, therefore, directed to execute a conveyance including the share of an infant defendant.

In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under a private contract. The sale certificate does not transfer the title; it is evidence of the transfer.

Minatomnessa Bibee v. Khatomnessa Bibee (1), *Golan Hossein Cassim Ariff v. Fatima Bejum* (2) and *Davis v. Ingram* (3) referred to.

THIS was a suit for partition in which some of the parties were minors. By the decree in appeal dated the 11th May 1911, it was ordered, *inter alia*, that a Receiver should be appointed of certain properties, and the Receiver was directed to sell one of the properties by private treaty or public auction, while liberty was given to the parties with one exception to

* Original Civil Suit No. 288 of 1908.

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bid at the auction. The Receiver had the property valued as directed, and on the 2nd May 1913 accepted the offer of the plaintiff. Subsequently an agreement for sale was executed and a draft conveyance was prepared, but as some of the parties to the suit were infants, the question arose as to who should approve and execute the conveyance on their behalf.

On the application of the plaintiff, an order was made by Chaudhuri J. that the Registrar of the Court should approve and execute the conveyance on behalf of the infant defendant. But when the order came before the Registrar for settlement, the question was raised whether a conveyance executed by him on behalf of the infant defendant would give a good title to the purchaser. In these circumstances, a note was prepared by the Registrar and submitted to Chaudhuri J. who passed the following order.

CHAUDHURI J. Formerly it was the practice of this Court to grant sale certificates in respect of sales by Receivers under orders of the Court. In the case of *Minatoonnessa Bibee v. Khatoonnessa Bibee* (1), Sale J. held, after a careful consideration of the earlier cases, that a sale by the Receiver was a sale by the Court. In *Golam Hossein Cassim Ariff v. Fatima Begum* (2), Fletcher J. disallowed an application for confirmation of such a sale and for sale certificate, drawing a distinction between "sales by the Court" and "sales under the Court." Owing to this decision great difficulties have arisen and sales effected by Receivers, or Commissioners of Partition under orders of the Court have, in many instances, not yet been completed. The difficulty has been in purchasers obtaining proper conveyances. In this particular case by the decree in Appeal No. 56

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of 1910, dated 11th May 1911, it was amongst other things ordered that one Sheikh Mahboob Ali should be appointed Receiver of certain properties which included the premises No. 2, Royd Street, and he was directed as such Receiver to sell the said premises by private treaty, or public auction, at a price not less than the valuation which was directed to be made by a well-known firm of Engineers in Calcutta. Liberty was given to the parties to the suit other than Hafiz Nazir Ali to buy the said property. The Receiver had the property valued as directed and, on the 2nd May 1913 at a meeting of the parties, accepted the offer of the petitioner, who is the plaintiff in this case, to purchase the premises for Rs. 95,000. An agreement for sale was executed and a draft conveyance was prepared. Some of the parties to the suit being infants, a question arose as to who was to approve the draft conveyance on their behalf and execute the conveyance. An application was made to me on the 8th January last, praying for an order that the Registrar of this Court do settle the draft conveyance and execute same on behalf of the infant defendants. Following what I thought was the established practice of this Court, I made the order. This was a partition action. An enquiry as to the parties interested was unnecessary in view of the fact that the order for sale was made in their presence and there was no contest as to the share of the infant, in respect of which there was a decree passed. The only question was who was to execute the conveyance on behalf of the infant. When the order came before the Registrar for settlement, a question was raised about the effect of a conveyance if executed by him on behalf of the infant, as to whether it would pass a good title to the purchaser. The Registrar thereupon submitted a note to me. The

following passage occurs in Trevelyan's book on Minority, 3rd Edition p. 294 "when a sale is ordered by the Court, the Court may itself execute or may direct one of its officers to execute a transfer in the name of the minor." The authority for this is given as sections 261-262 of the Civil Procedure Code, 1882, (O. XXI, r. 34 of the present Code). The Registrar correctly points out that that rule refers to a judgment-debtor who has been ordered to execute a document, but has refused or neglected to do so. It was held by Kennedy J., that the corresponding section (section 202) of the Code of 1859 did not apply to minors, and our present rule 28 Chap. 17, does not appear to be applicable. The Registrar also correctly points out that there is difficulty in applying the provisions of Chap. 28 r. 51, of our new Rules. They refer to sales by the Registrar and not to sales by Receivers. In England when a sale is ordered in a partition action for the purpose of effecting the sale, infants who are interested, are declared trustees of their shares, for the purchaser, within the meaning of the Trustees Act, 1893, and persons are appointed by the Court to convey their shares to the purchaser [see Halsbury's Laws of England Vol. 17, p. 82, and *Davis v. Ingram* (1)] where the next friend of the infant was appointed to convey. Under the Indian Trustees Act, by virtue of section 8, the High Court may make a vesting order having the effect of a conveyance with regard to property held by a minor trustee or mortgagee, and sections 20 and 32 may be used in the same way as similar sections in the English Act. The Indian Act, however, is only applicable to cases governed by the English Law. There may be certainly cases as between Hindus or Mahommedans where the

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provisions of the Indian Act may not be held inapplicable, but a general order following the English practice in the case of Hindus and Mahommedans may lead to complications. Having regard to the decision of Mr. Justice Fletcher and a break in the practice in consequence, I have carefully considered the matter. I have also had the advantage of discussing the question with the learned Chief Justice with the assistance of the Registrar's note. I think that in a partition action in which a Receiver is authorised to sell properties, there can be no difficulty in directing him to convey the properties. Under O. XL, r. 1 cl. (d) of the Code, the Court may confer on a Receiver all such powers for the realisation of properties and the execution of documents as the owner has.

In England a sale under an order of Court includes a sale "with the approbation of the Judge" where it proceeds throughout under the directions of the Court, and also a sale "out of Court" in which case O. XLI, r. 1, cl. (a) applies. Careful provision has been made in the English Judicature Act, and in the Orders and rules thereunder relating to sales, conveyances and sale certificates, but our Code is silent except as to execution and mortgage sales. In the High Court, mortgage sales are held by the Registrar, and sale certificates are granted. I have compared the form of such certificate with that which was used in respect of sales by Receivers under orders of Court. It is practically the same form. I do not see why a certificate reciting the order of the Court authorising the Receiver to sell and stating that the sale has been effected thereunder and also reciting that the sale has subsequently been confirmed by the Court when so confirmed, cannot be granted when the purchaser applies for it and is content to take it as evidence of his title without asking for a conveyance.

It saves considerable costs and trouble, and I feel disposed to encourage granting such certificates. One of the grounds for refusal in *Golam Hossein Cassim Ariff's Case* (1) was, that in sales "under the Court" the Court does not make any title to the purchaser. But a sale certificate merely records an already accomplished fact, and states what has been sold. In execution sales there is no warranty by the Court that the title is good. The quantity and nature of the right and interest existing in the debtor at the time of attachment and advertisement of sale, alone pass by the sale. In mortgage suits, the right, title and interest both of the mortgagor and the mortgagee pass. In all sales whether by the Court or under the Court or by direction of the Court out of Court, the purchaser is bound to satisfy himself of the value, quantity and title of the thing sold, just as much as if he were purchasing the same under private contract. I do not see what the difference is. The sale certificate does not transfer the title. It is evidence of the transfer. But since the question is of some considerable importance, it is desirable to adopt a course which seems to me to be sanctioned by statute, and not merely to follow a practice in which there has been a break, as above stated, however recent. In this case I authorise the Receiver and direct him to execute the conveyance. I think that if this course is followed, the difficulty which I have mentioned will be avoided. Cases may arise where it may be considered expedient to follow the English procedure and apply the Indian Trustees Act where it may not be inapplicable, but it is unnecessary to deal with that question on this application. I have referred to it as the point has been raised in the Registrar's note. Sales by Commissioners of Partition

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are eventually confirmed by the Court when the final decree is made and formal conveyances may not be at all necessary. To get a guardian of an infant's property first appointed, authorising him to sell, in order to effectuate a sale in a partition action, is a dilatory and expensive procedure and should in my opinion be discouraged unless imperatively necessary.

W. M. C.

Attorney for the plaintiff: *M. M. Chatterjee.*

APPELLATE CIVIL.

Before Fletcher and Richardson JJ.

1915
 May 10.

CHAIRMAN, HOWRAH MUNICIPALITY

v.

HARIDAS DATTA.*

Municipality—Roads which vest in the Municipality—Public, when they have a right to go over private pathway—Difference between roads vested in the Municipality and others as regards Municipality's rights—Bengal Municipal Act (Beng. III. of 1884), ss. 30, 31.

Under s. 30 of the Bengal Municipal Act as amended by recent legislation, private pathways do not vest in the Municipality.

Chairman of the Howrah Municipality v. Khetra Krishna Mitter (1) followed.

Kumud Bandhu Das Gupta v. Kishori Lal Goswami (2), and *Kamal Kamini Debi v. Chairman, Howrah Municipality* (3) dissented from.

*Appeal from Appellate Decree, No. 2699 of 1913, against the decree of B. C. Mitra, District Judge of Hughly, dated May 10, 1913, modifying the decree of Baroda Kinkar Mukerjee, Munsif of Howrah, dated March 29, 1912.

(1) (1906) I. L. R. 33 Calc. 1290, (2) (1911) S. A. Nos. 488 and 838
 1304. of 1909 (unrep.).

(3) (1909) S. A. No. 2154 of 1907 (unrep.).