ORIGINAL CIVIL.

Before Remfry J.

1930

May 26; *June* 16.

ASHUTOSH BASU

v.

SUDHANGSHUBHUSHAN MUKHERJI.*

Mortgage—Sale—Setting aside sale by mortgagor—Amount to be paid—Powers of High Court to make rules—Construction of statutes—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 89, 93—Rules and Orders of the Original Side, High Court, Ch. XXVII, r. 37.

Under the Letters Patent, the High Court may frame rules inconsistent with the rules in the Civil Procedure Code. But in the absence of any such rule, the rules and orders of the Civil Procedure Code apply to the Original Side of the High Court, save as provided in Order XLIX of the Code.

Order XXI, rule 89, of the Civil Procedure Code applies to a sale under a mortgage and to the Original Side of the High Court and so far as possible the rule should be strictly applied.

Virjiban Dass Moolji v. *Biseswar Lal Hargovind* (1) followed.

Kalyanee Debi v. *Hari Mohan Ghosh* (2) and *Robinson* v. *Canadian Pacific Railway Co.* (3) relied on.

Therefore a mortgagor, in order to have a sale set aside, is liable to deposit 5 *per cent.* of the purchase money and nothing more. Neither rule 93 of Order XXI of the Civil Procedure Code nor rule 37 of Chapter XXVII of Rules and Orders of the Original Side of the High Court, applies to the case of a mortgagor applying to have a mortgage sale set aside.

Umeshchandra Banerji v. *Kunjalal Biswas* (4) dissented from.

Kalyanee Debi v. *Hari Mohan Ghosh* (2) referred to.

The mere fact that the literal meaning of the words used in a statute leads to an injustice does not constitute good ground for disregarding such meaning.

Vacher and Sons, Limited v. *London Society of Compositors* (5) relied on.

RULE, obtained by the mortgagor.

The relevant facts appear from the judgment.

N. N. Bose (with him *H. K. Mitra*) for the mortgagor. Order XXI applies to the Original Side of the High Court and rule 89 of the Order applies to this case. The rule contains no ambiguity and should be applied strictly. It establishes a uniform practice with regard to sales and no conditions other than those specified in the Code

*Rule in Original Suit No. 1798 of 1924.

(1) (1920) I. L. R. 48 Calc. 69.
(2) (1928) I. L. R. 56 Calc. 477.
(3) [1892] A. C. 481.
(4) (1929) I. L. R. 57 Calc. 676.
(5) [1913] A. C. 107.

should be imposed. The new rule 5 (*2*) of Order XXXIV makes it quite clear.

Nogen Bose for the purchasers, Chandanmull Indrakumar, cited *Umeshchandra Banerji* v. *Kunjalal Biswas* (1).

S. B. Dutt for the purchaser, Jumnadas Bagree. When the mortgagor comes in at this late stage to have the sale set aside, he should pay all costs thrown away. It has been held that the 5 *per cent.* of the purchase money is a *solatium* to the purchaser for the loss of his bargain. If he does not get his costs, he gets nothing for the loss of his bargain. *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (2), *Munshi Rai* v. *Rup Narain* (3).

The High Court has right to make rules inconsistent with rules of the Civil Procedure Code. It has made rules for sales held by the Registrar and rule 37 of Chapter XXVII of the Rules of the Original Side clearly shows that the costs should be paid by the mortgagor who gets a benefit, as of right.

N. N. Bose in reply. Rules 34, 35 and 36 of Chapter XXVII clearly show that rule 37 applies to sales which are set aside on the application of the purchaser. It has no application to the case of a mortgagor exercising his right under Order XXI, rule 89.

Cur. adv. vult.

REMFRY J. In this matter Sudhangshubhushan Mukherji, one of the mortgagors, applies for liberty to pay to the Registrar Rs. 1,365-0-0, being 5 *per cent.* of the purchase money, in respect of a sale held by the Registrar of this Court under a mortgage decree on the 11th of April, 1930, and that, thereupon, the sale be set aside.

It appears that the mortgagees have been paid and that a sum equivalent to 5 *per cent.* of the purchase money was paid in on the last possible day. There were three purchasers of four lots sold.

(1) (1929) I. L. R. 57 Calc. 676. (2) (1899) I. L. R. 26 Calc. 449, 451-52.
(3) (1927) I. L. R. 6 Pat. 386.

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The only question for decision is whether these purchasers are entitled to anything over and above 5 *per cent.* in their purchase money and of course the return of their deposits. The firm of Chandanmull Indrakumar, purchasers of lots III and IV for Rs. 3,050 and Rs. 2,000, respectively, claim, in addition to the 5 *per cent.*, Rs. 604-13 as costs alleged to have been incurred in investigating the title and preparing for the completion of the sale, before notice that the mortgagor was applying to set aside the sale.

Jumnadas Bagree, the purchaser of lot No. I for Rs. 17,200, claims an unspecified sum for similar costs. The third purchaser did not appear.

For the mortgagor it is argued that, under Order XXI, rule 89, and Order XXXIV, rule 5 (*2*)—that is the amended rule under Act XXI of 1929 of the Code of Civil Procedure—the liability of the mortgagor is limited to 5 *per cent.*

Counsel for the purchasers relied on Chapter XXVII, rule 37 of the Rules and Orders, and said that the matter had been considered recently by this Court, but could not give the reference. I have at last, thanks to the exertions of the Deputy Registrar, obtained a copy of the judgment referred to.

In my opinion, the rights of the parties to this suit do not come within the provisions of Act XXI of 1929 by which Order XXXIV was amended, for although that Act came into force on the 1st of April, 1930, by section 15 (*E*) of the Act, nothing in the Act shall be deemed to affect anything done in the course of any proceeding pending in any court on the aforesaid date. The sale was held on the 11th of April, 1930, pursuant to a decree, dated the 18th of February, 1929.

I regret that, according to the decision of the Court of appeal in *Virjiban Dass Moolji* v. *Biseswar Lal Hargovind* (1), although the point was decided by Lort-Williams J. I must consider it. For although I

(1) (1920) I. L. R. 48 Calc. 69, 75.

have the greatest respect for the learned Judge, in my opinion, it is clear that his decision is erroneous.

I must, therefore, consider the matter.

In the case just cited, the Court of appeal laid down the following propositions:—

(1) That Order XXI, rule 89, applied to a sale under a mortgage decree and to the Original Side of a Chartered High Court, because it is not one of the rules referred to in Order XLIX, rule 3, and because there is no specific provision in the rules framed by this Court under clause 37 of the Letters Patent, which justifies the inference that it does not so apply.

(2) That Order XXI, rule 89, lays down that * * * any person * * * may apply * * * on his depositing in Court certain prescribed sums.

In the recent decision in *Kalyanee Debi* v. *Hari Mohan Ghosh* (1), the learned Chief Justice had to consider the question of the amount which a mortgagor must deposit under Order XXI, rule 89, in respect of the sums due to the mortgagee, and as there is no "amount specified in the proclamation of sale" within Order XXI, rule 89 (1)(*b*), under the practice of this Court, laid down that where a rule cannot be applied exactly, it must be applied fairly and reasonably.

In *Umeshchandra Banerji* v. *Kunjalal Biswas* (2), Lort-Williams J. considered whether a purchaser must pay, in addition to this 5 *per cent.*, loss of interest and costs which he may have incurred. That learned Judge held that he was bound to pay these sums. As I am unable to follow the learned Judge, I must give my reasons. I have no wish to attribute to the learned Judge any reasoning which he did not intend and will, therefore, only consider what he said.

The judgment begins with a discussion about the power of a High Court to make rules. Then the

(1) (1928) I. L. R. 56 Calc. 477. (2) (1929) I. L. R. 57 Calc. 676.

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learned Judge says that Order XXI, rule 89, is incompatible and inconsistent with the rules of the High Court on the Original Side, but immediately cites a decision of the Court of appeal, where it was held that it is not and states that he is bound by that decision.

Then he states that "the difficulty in applying Order "XXI, rule 89, to sales on the Original Side was "recognised by the Chief Justice" in *Kalyanee Debi* v. *Hari Mohan Ghosh* (1).

A reference to that decision, however, shows that any difficulty was with reference, not to the rule, but to one provision in that rule, with which this case has no concern. The learned Judge then quotes from the judgment of the learned Chief Justice: "where "owing to the difference between our Original Side "practice and the *mofussil* practice, which is "contemplated in the rule, it is impossible to apply "the rule strictly, the Court must apply it as fairly "as possible to the circumstances of a sale on the "Original Side."

That is a decision of the Court of appeal and binding; but I find nothing in it to justify any idea that where it is not impossible to apply the rule, it is legitimate not to apply it strictly.

The learned Judge quotes another decision to the effect that the 5 *per cent.* was given "partly" as a *solatium* to the purchaser for the loss of his bargain. The emphasis on the "partly" is mine.

Then the learned Judge says "In many cases, if the "5 *per cent.* is all that the purchaser is entitled to, it "would mean that he would not get anything for the "loss of his bargain and might be actually out of "pocket on account of loss of interest on his money and "for costs incurred. It cannot have been intended "to give the judgment-debtor a special indulgence at "the expense of an innocent third party. I am of "opinion, therefore, that the purchaser in addition to

(1) (1928) I. L. R. 56 Calc. 477.

"the 5 *per cent.* is entitled to be paid by the judgment-"debtor any loss of interest and costs which he may "have incurred. This conclusion in my opinion is "indicated by Order XXI, rule 89 (*3*), and Order "XXI, rule 93."

One reason for disagreeing with the conclusion of the learned Judge is that, with the greatest respect for the learned Judge, his judgment, in my opinion, conflicts with, among other decisions, the decision of the House of Lords in *Vacher & Sons, Limited* v. *London Society of Compositors* (1).

There the House of Lords considered the proper method of interpreting and applying a statute. In this case, the rule under consideration is part of an Act, and must be read with the Rules framed by this Court. As I read the speeches, it was unanimously held that the mere fact that the literal meaning of the words used led to an injustice was no ground for disregarding the meaning. Haldane L. C. said "In "endeavouring to place the proper interpretaion on "the sections of the statute * * * I propose "* * * to exclude consideration of everything "excepting the state of the law as it was when the "statute was passed, and the light to be got from read-"ing it as a whole * * *. Subject to this considera-"tion, I think that the only safe course is to read the "language of the statute in what seems to be its "natural sense."

Lord MacNaghten said "in the absence of a "preamble there can, I think, be only two cases in "what it is permissible to depart from the ordinary "and natural sense of the words of an enactment. It "must be shown either that the words taken in their "natural sense lead to some absurdity" or that in the Act there is something repugnant to or inconsistent with the ordinary meaning of the words used.

Lord Atkinson says "a Court of law has nothing "to do with the reasonableness or unreasonableness of

(1) [1913] A. C. 107, 113, 118, 121.

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"a provision of a statute, except so far as it may help "it in interpreting what the legislature has said. If "the language of a statute be plain, admitting of only "one meaning, the legislature must be taken to have "meant and intended what it has plainly expressed, "and whatever it has in clear terms enacted must be "enforced though it should lead to absurd or "mischievous results."

Lord Shaw says a Court must loyally accept and "plainly expound the simple words employed—and "must not 'vaporize' them.

Lord Moulton says that the consideration of the result of a provision is only relevant when there are two rival interpretations of the words used.

Lord MacNaghten alone supports the theory that absurdity of itself is a sufficient ground for disregarding the natural meaning of the words. But he does not suggest that in the case of an absurdity, the Court can disregard the words used altogether and redraft the provision. Interpretation cannot go beyond the possible meaning of the words used.

In extreme cases, where the words conflict with the obvious intention of the enactment, they may be disregarded, but it must be an extreme case and the words are then construed as meaning nothing.

Now turning to the words of the rule—nothing could be plainer; there are no rival interpretations of these words. I do not suggest that the learned Judge said that there were or that the result was absurd * * * if the literal meaning were accepted. But, in my opinion, the rule first provides for the amount of compensation to be deposited by the mortgagor for payment to the purchaser. Obviously, it was desirable to fix the amount precisely; nothing could have been more unreasonable than to include costs which the purchaser might have incurred, for only 30 days are allowed for the deposit. In my opinion, the language is plain and unambiguous and Order XXX, rule 92, shows that this deposit made within a fixed date is the only condition precedent, if the application be granted,

which can be exacted before the sale is set aside, as far as the purchaser is concerned.

It is immaterial to consider whether the learned Judge regarded the meaning of the rule as a question of interpretation; he was dealing with the provisions of an Act and, in my opinion, dealt with these provisions in a way which is certainly inconsistent with the decision of the House of Lords.

The rule is the same as in the previous Code. It occurs in a code and in an order which deals with costs and interest. Had the legislature been so minded it could have provided for costs and interest. The context of the rule does not support any suggestion that these were overlooked. It is impossible to say that the legislature did not fix the compensation and irrelevant to say that it was fixed at too low a figure. I have considered whether there is any rule which throws any light on the meaning of this rule. The Court of appeal decided that point in 1920 and, as the learned Chief Justice followed the decision recently, there was no new rule modifying this rule at the time of his decision. Since then, there has been no new rule framed under the Letters Patent.

The rule has been amended by Act XXI of 1929, which provides that, in the case of a sale under a decree in a mortgage suit, the purchaser is to receive as compensation, if the sale be set aside in circumstances such as are contemplated in Order XXI, rule 89, one-fourth of the amount prescribed by that rule.

As regards the provisions of Order XXI, rule 89 (*3*), on which the learned Judge relied, they refer to sums due to the mortgagee. There could be no purchaser at the time when a proclamation of sale was made. Order XXI, rule 93, refers to interest payable by persons to whom the purchase money has been paid, and has nothing to do with a judgment-debtor.

Having regard to this amendment, if it was absurd or unjust to fix a sum equivalent to 5 *per cent.* of the purchase money, the legislature has clearly shown that

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it was intentional. I must confess that, having regard to the fact that the rule extends to all courts, I see no absurdity in it or in the amended rule.

The argument before me that Chapter XXVII, rule 37 of the Rules and Orders applied is not well founded. That rule clearly refers to the case of a sale set aside at the instance of the purchaser for defect in the title of the mortgagor, and entirely different considerations apply to such a case.

Further, in my opinion, the conclusion arrived at is contrary to the decision of the Chief Justice. The learned Chief Justice says that the auction-purchaser in the appeal before him thought so highly of his bargain that he was not content with the 5 *per cent.* That does not suggest that the 5 *per cent.* was obviously so inadequate that it could not have been intended. Then the Chief Justice says that the rule is a concession to the judgment-debtor and is to be applied strictly in cases to which the rule can be applied strictly. There is nothing to show that this was meant to mean strictly only as against the judgment-debtor, and in fact the Chief Justice applied the rule in favour of the judgment-debtor.

I am entirely unable to persuade myself that it is legitimate to read a rule which expressly prescribes a fixed sum as meaning that to that sum may be added an unascertained amount or that that result can be arrived at by any other method. As I read the judgment of Lord Hobhouse in *Robinson* v. *Canadian Pacific Railway Co.* (1), it may be cited for the proposition that where the conditions are specified it must be taken that they were inserted in the rule for the purpose of showing that no other conditions other than those specified are to stand in the way of the statutory right conferred.

In my opinion, the High Court has power to make rules inconsistent, if that be necessary, with the rules in the schedule to the Code of Civil Procedure. That power it derives from the Letters Patent. Unless the

(1) [1892] A. C. 481, 488.

High Court frames a rule on the same point, the orders and rules of the Civil Procedure Code apply to the Original Side save as provided in Order XLIX. Any "practice" of the Original Side inconsistent with the rules of the Civil Procedure Code which apply, is contrary to law. Where a rule of the Code, owing to the operation of rules framed by this Court, cannot be applied exactly, it must be applied as reasonably as possible. Where it can be applied strictly, it must be so applied, and if the result is unsatisfactory, the Court can frame a different rule, but unless and until it does so, the rule must be followed, and cannot be enlarged or altered in any way by any judicial decision of this Court.

Now, turning once more to the rule. The words 5 *per cent.* only occur once. It would be extraordinary if the identical words meant two very different things —one at the time of the deposit and much more, assessed on a different principle, at the time of payment to the purchaser.

To justify any such method of construction, there must be something in the rules necessitating so radical a departure from the ordinary way of interpreting the same words in the same Act as meaning the same thing—which rule applies nonetheless where there is only one sentence referred to as a sentence again in an Act.

I cannot persuade myself that the words could mean or could be intended to mean that the mortgagor must deposit one anna more than the prescribed 5 *per cent.* Nothing but the intractability of the words used in this or some other rule would induce me to interpret them as meaning more than 5 *per cent.* as far as the amount of the deposit is concerned. To my mind, the words clearly express that intention, and negative any other. It follows that it is not legitimate to construe them as meaning something more at the time of payment to the purchaser, for there is nothing in the rule or any rule of this Court that supports any such inference.

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With the greatest respect for the learned Judge, I am unable to follow his ruling, and in my opinion the purchasers in this case are entitled to the 5 *per cent.* deposited and to nothing more.

The mortgagor must pay the costs of the parties who appeared on this motion—that is conceded by counsel for the mortgagor.

Rule absolute.

Attorney for applicant: *I. C. Ghose.*

Attorney for Chandanmull Indrakumar: *H. C. Banerji.*

Attorneys for Jumnadas Bagree: *Mukherji & Biswas.*

Attorneys for Harsookdas Balkissendas: *K. K. Dutt & Co.*

S. M.