

ORIGINAL CIVIL.

Before Lord-Williams J.

UMESHCHANDRA BANERJI

v.

KUNJALAL BISWAS.*

1929

June 25.

Sale—Sale by the Registrar, Original Side, High Court—Setting aside sale on deposit by judgment-debtor—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 89, 93; s. 129.

Under Order XXI, rules 89 and 93, a purchaser is entitled, in addition to the 5 per cent., to be paid by the judgment-debtor any loss of interest and cost which he may have incurred.

Order XXI, rule 89 does not give to the judgment-debtor a special indulgence at the expense of an innocent third party.

Kalyanee Debi v. Hari Mohan Ghosh (1) and *Chundi Charan Mandal v. Banke Behary Lal Mandal* (2) followed.

Virjiban Das Moolji v. Biseswar Lal Hargovind (3) discussed.

APPLICATION.

This was an application on behalf of the defendants for an order that, upon payment by them to the Registrar of the Court the sum of Rs. 290 for commission payable to him and of the sum of Rs. 430, being 5 per cent. of the purchase money payable to Ramchandra Seal, the auction purchaser, of No. 29A, Scott Lane, in the town of Calcutta, the mortgaged premises, the sale be set aside and that satisfaction be entered in the records of this suit and that the Registrar be at liberty to receive his commission and the amount payable to the purchaser and refund to him his deposit money of Rs. 2,150. The auction purchaser over and above the return of his deposit money and 5 per cent. on the purchase price also claimed the costs of and incidental to the application. The point, therefore, arose for determination, whether the auction purchaser was so entitled.

* Original Civil Suit, No. 1319 of 1927.

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

(2) (1899) I. L. R. 26 Calc. 419.

(3) (1920) I. L. R. 48 Calc. 69.

Mr. Laha, for the plaintiff.

Mr. P. C. Basu, for the defendants.

Mr. N. P. Seal, for the purchaser.

Cur. adv. vult.

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LORT-WILLIAMS J. Section 129 of the Civil Procedure Code provides that "Notwithstanding "anything in this Code, any High Court established "under the Indian High Courts Act, 1861, or the "Government of India Act, 1915, may make such "rules not inconsistent with the Letters Patent "establishing it to regulate its own procedure in the "exercise of its original civil jurisdiction as it shall "think fit, and nothing herein contained shall affect "the validity of any such rules in force at the "commencement of this Code."

The object of this section was to provide for elasticity in procedure and to enable defects in the Code to be remedied without the dilatory process of legislation, and the High Court was given power to vary or amend the rules of procedure which appear in the Code: see notes on page 487, "Woodroffe on " 'Civil Procedure', Second Edition "

For this reason the sections dealing with procedure were taken out of the body of the Code and placed in a separate schedule. Therefore, if the matter were *res integra*, I am doubtful whether I should decide that Order XXI, rule 89, applies to the High Court, because it is incompatible and inconsistent with the rules of the High Court on the Original Side. But it was decided in 1920 by Mookerjee A.C.J. and Fletcher J. in *Virjiban Dass Moolji v. Biseswar Lal Hargovind* (1), that the rule does apply, and further they went on to say that the practice on the Original Side was contrary to law. I must confess that it is difficult to see how the rules of the High Court can be held to be contrary to law in view of section 129. It should be observed that there is nothing in the Code to say that those rules must not be inconsistent with the Code. What they must not be is inconsistent with

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

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the Letters Patent establishing the Court. However, this case has been followed consistently and it is not for me to disagree with it,—the question must await final solution hereafter. The difficulty in applying Order XXI, rule 89, to sales on the Original Side was recognised by Rankin C.J. in *Kalyanee Debi v. Hari Mohan Ghosh* (1). In that case the learned C. J. said that, as the rule is a concession to the judgment-debtor, it ought to be applied strictly and 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. It was said by Sir Francis Maclean C.J. in *Chundi Charan Mandal v. Banke Behary Lal Mandal* (2) that the rule affords a special indulgence to the judgment-debtor and that the 5 per cent. was given partly as a *solatium* to the purchaser for the loss of his bargain. 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 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.

Attorneys for the plaintiff: *Mukerjee and Biswas.*

Attorneys for the defendants: *N. C. Bural & Pyne.*

O. U. A.

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

(2) (1899) I. L. R. 26 Calc. 449.