APPELLATE CIVIL.

Before Mukerji and Guha JJ.

1931

Aug. 25, 26, 31.

JITESWARI DASI

v.

SUDHAKRISHNA MUKHERJI.*

Receiver—Right of, to purchase at auction—Decree-holder—Court auction—Leave of court to purchase—Persons in fiduciary position as purchasers—Law in England, U. S. of N. America and British India (Calcutta)—Code of Civil Procedure (Act V of 1908), ss. 47, 115, 151; O. XXI, rr. 72, 73; O. XL, r. 1.

Whether Order XXI, rule 73 of the Code of Civil Procedure should be held to include a receiver or not, the rule enunicated in *Nugent v. Nugent* (1) —that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or bid for property without the leave of the court—is a sound and salutary rule; and there is no reason why it should not be followed in British India.

The doctrine, enunciated in *Nugent v. Nugent* (1) prohibiting such a purchase, does not depend on the *fact* of undue knowledge but merely on its *probability*.

Nugent v. *Nugent* (1), *Allen* v. *Bond* (2) and *Boddington* v. *Langford* (3) referred to.

The disability of a receiver in this respect is well recognised in England and in the United States of North America.

On the Original Side of the Calcutta High Court the practice is for a receiver to take special leave of the court, if he intends to bid at the sale.

Radha Krishna v. Bisheshar Sahay (4) referred to.

Kanhaya Lal v. National Bank of India (5) explained and distinguished.

APPEAL FROM APPELLATE ORDER by the judgment-debtor.

The facts of the case and relevant portions of arguments of counsel appear fully in the judgment under report herein.

*Appeal from Appellate Order, No. 521 of 1930, against the order of B. K. Basu, District Judge of Burdwan, dated Aug. 23, 1930, reversing the order of Kunjabihari Ballabh, Subordinate Judge of Burdwan, dated Dec. 19, 1929.

(1) [1908] 1 Ch. 546.
(2) (1841) Fl. & K. 196; 3 Ir. Eq. Rep. 365.
(3) (1845) 15 Ir. Ch. Rep. 558.
(4) (1922) I. L. R. 1 Pat 733; L. R. 49 I. A. 312.
(5) (1923) I. L. R. 4 Lah. 284; L. R. 50 I. A. 162.

Bijankumar Mukherji for the appellant.

Rupendrakumar Mitra for the respondent.

Cur. adv. vult.

MUKERJI AND GUHA JJ. The question, which has to be considered in this appeal, is whether an execution sale, at which a decree-holder (who was also the receiver in respect of the property sold) made a purchase of the properties, should be set aside. The receiver was appointed under Order XL, rule 1 of the Code. He took the permission of the court to bid for and purchase the properties, as required by Order XXI, rule 72 of the Code. But it is not disputed that he did not apply for or obtain any leave from the court, informing the court that he was a receiver appointed in respect of the property. It may be conceded that the fact that he was a receiver was not unknown to the court, as he appears to have previously made an application in that capacity for an order for sale, and the said order had been made expressly stating that the application which he had made as receiver was granted. It, however, does not appear that the court ever felt called upon to consider the question, whether although he was a receiver he should be permitted to purchase the property, which was under his management and in his possession as such receiver.

The District Judge in reversing the order of the Subordinate Judge, who had set aside the sale, observed thus :

> The gist of the matter is that a trustee for sale is absolutely debarred from purchasing the property himself, because, as seller, his interest or rather his duty would be to get the highest price and as buyer his interest would be to get the lowest price, and the merging of the two positions is prohibited. The question is whether, in this case, the decree-holder, as receiver, was in the position of the seller. The learned Subordinate Judge has held that, as receiver, his duty is to pay off the decree money or to get as high a price as possible for the property. It is argued, however, that the receiver had really no duties in connection with the sale. He was appointed merely to keep the property intact, and to preserve it for sale in execution of his own decree. The sale was held in the usual way by the court itself and the receiver had no duties in connection therewith. He was not a trustee for sale. At the sale, therefore, he had no duties to see that the property fetched the highest possible price. There was, therefore, no conflict between

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duty and interest at the sale itself. This seems to me to be the correct view of the matter. I do not think it would be right to vacate the sale merely on the ground that the property was purchased by the decree-holder, who was already in possession as receiver, though of course, being in the position of a trustee, he has to show that the transaction was strictly fair and that he did not use his position as trustee to the disadvantage of the judgment-debtor.

The learned District Judge went into the question of adequacy of the price fetched at the sale, and, being of opinion that the price fetched was not inadequate and that there was no substantial loss, he upheld the sale.

The case of *Nugent* v. *Nugent* (1) is one which directly covers the question. In that case the rule of the Court was affirmed, that a person in a fiduciary position, having special means of knowledge, ought not to be allowed to buy or bid for the property without the leave of the court, and it was further held that this doctrine of the court does not depend on the *fact* of undue knowledge, but merely on the *probablity* of it. It was also said in that case that the general principle which actuates the court in deciding its procedure in matters of this kind is that nobody must allow himself to get into a position where his interest conflicts with his duty, and that the court carries out this principle, not by examining each particular case and weighing the details of the conflict between interest and duty, but by certain prohibitions with regard to persons, who hold positions in which a conflict might arise. The receiver in that case was not a trustee for sale but he was a defendant in a partition action and was in possession when the sale was held at the instance of a mortgagee outside the action. Two earlier decisions to the same effect were referred to and approved. *Allen* v. *Bond* (2) and *Boddington* v. *Langford* (3). The disability of a receiver in this respect is well recognized in England (Kerr on Receivers, 9th Edition, page 264 and page 285) as well as in the United States of North America

(1) [1908] 1 Ch. 546. (2) (1841) Fl. & K. 196 ; 3 Ir. Eq. Rep. 365.
(3) (1845) 15 Ir. Ch. Rep. 558.

(High on Receivers, 4th Edition, paragraph 193). In Woodroffe on Receivers, 4th Edition, pages 211-213, is given the report of two cases, from which it would appear that, on the Original Side of this Court, the practice is for a receiver to take the special leave of the Court, if he intends to bid at the sale. It is quite clear that, if special leave has to be given or refused, the facts of each particular case have to be considered with care and the expediency or inexpediency of the course to be adopted would have to be carefully weighed.

The question that next arises is whether the absence of the leave makes the sale void. Now, if a decree-holder purchases without taking the permission contemplated by the Code, the words of sub-section (*3*) of section 294 of the Code of 1882 and of rule 72 of Order XXI of the present Code themselves show that the sale is not void, nor a nullity, but is only to be avoided on the application of the judgment-debtor or some other person interested. This is so even if permission was asked for and refused, and, considering the question, whether the sale should be set aside or not, it will have to be seen whether the property has been realised to the best advantage [See *Radha Krishna* v. *Bisheshar Sahay* (1)]. The case of *Kanhaya Lal* v. *National Bank of India* (2), upon which the respondent has relied, does not touch the present question, because their Lordships, while affirming the proposition that when any one is in a fiduciary position he cannot sell to himself, held that as a matter of fact no such position arose in the case. If *Nugent* v. *Nugent* (3) should be held to apply to this country, there can be no question of upholding the sale on the ground that the omission to take the special leave of the Court was merely an irregularity and that such irregularity would not vitiate the sale unless there was substantial injury.

(1) (1922) I. L. R. 1 Pat. 733; L. R. 49 I. A. 312.

(2) (1923) I. L. R. 4 Lah. 284; L. R. 50 I. A. 162.

(3) [1908] 1 Ch. 546.

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It is not necessary to go into the question whether Order XXI, rule 73 of the Code should be held to include a receiver. Even apart from that rule, the rule in *Nugent* v. *Nugent* (1) is a sound and salutary rule, and there is no reason why it should not be followed in this country.

We are of opinion that the sale cannot be upheld. We allow the appeal and, reversing the order of the District Judge, direct that the order of the Subordinate Judge setting aside the sale be restored.

A question has been raised as regards the competency of the appeal. It is unnecessary to deal with the question because the appellant has taken the precaution of applying in revision as well. But we may point out that the appellant's application for setting aside the sale was made under section 47, Order XXI, rule 90 and section 151 of the Code, and that, in our opinion, section 47 was applicable and a Second Appeal to this court is competent. We allow the appeal with costs to the respondent in this Court and in the court below; hearing fee in this Court is assessed at 3 gold mohurs.

The application under section 115 of the Code is dismissed, but without costs.

We have not dealt with any of the other objections urged in the appeal, but we desire to invite the attention of the court below, which may have to issue a sale-proclamation afresh, to the observations made in *Debendra Nath Sadhukhan* v. *Radhakissen Chamaria* (2) and *Pashupati Nath Malliah* v. *The Bank of Behar* (3).

Appeal allowed; case remanded.

G. S.

(1) [1908] 1 Ch. 546. (2) (1930) I. L. R. 58 Calc. 577.
(3) (1931) 35 C. W. N. 907.