CALCUTTA HIGH COURT

Manohar Mookerjee

Vs

Raja Peary Mohan Mookerjee

(A Mookerjee and Panton, JJ.)

24.07.1919

JUDGMENT

(A Mookerjee, J.)

1. This is an appeal by the plaintiff in a suit for the construction of a Will, for the administration of a trust (private debuttar) created thereby, for the removal of the trustee, for the appointment of a new trustee or receiver, for declaration that an execution sale of a portion of the trust estate held on the 14th January 1913, when it was purchased by the son of the trustee was invalid and inoperative, for proper investment of a sum of Rs. 11,500 alleged to form part of the trust estate, and for other incidental reliefs. The Subordinate Judge has found in favour of the plaintiff upon several of the questions in controversy, but he has dismissed the suit on the ground that the allegations of misconduct have not been established and the plaintiff is not entitled to ask for the removal of the trustee. To appreciate the substantial points in dispute, between the parties (whose relation, ship will appear from the annexed genealogical table), it is necessary to consider briefly the history of the trust which, since its foundation, has formed the subject of many proceedings in Court.

JAGA MOHAN MUKHERJEE.

Wil--11-9-1840. :

Death--18-9-1840.I ! Joy Krishna. Died 19-7-1888, ! Raj Krishna. Died 1880, ! Bejoy Krishna. Died 29-1-1894, ! Nabo Krishna. Died 11-9-1890, ! Nobin Krishna, deceased. Upendra Narain, defendant.

! Hara Mohan, deceased, ! Raja Peary Mohan ,Defendant,! Raj Mohan, deceased, ! :

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Protap Narain, defendant.! Ram Narain, defendant.

! Surja Narain, defendant.

! Raj Narain, defendant.

! Rajendra deceased ! Bhupendra, defendant.

! Narendra, deceased, ! Surendra, deceased, ! Nagendra, deceased, ! Satyendra, defendant.

! Jatindra, defendant.

! Dwijendra, defendant.

! Bhupendra, defendant.

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Kalidas, defendant.

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Debidas, defendant.

! Rash Behary, defendant.

! Sivnarain, defendant.

! Niladri, defendant ! Bindhyadri, defendant ! Himadri, defendant.

! Suresh, defendant.

! Paresh, defendant.

! Probal, defendant.! Kamal Kumar, deceased, ! Lalit Kumar, defendant.

! Barendra Kumar, defendant.

! Hemendra Kumar, defendant, ! :

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 :

Panchugopal, defendant.

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Tapas Kumar, defendant.

! Harihar, deceased, ! Monohar Mukherjee, plaintifE.

! Bisseswar, deceased, ! :

Kassiswar, defendant.

! Rai Jyot Kumar Bahadur, defendant.

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Kalidas, defendant.

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2. Jagomohan Mookerjee, the common ancestor of the parties to this suit, made a testamentary disposition of his properties on the 11th September 1840, and died a week later. By this Will, he

dedicated certain properties to the sheva or worship of two Thakurs, Sridhar and Gopaleswar Siva, established by him, the annual celebration of the Durga Puja, the Sradh of ancestors, and other pious acts, such as the maintenance of childless widows, the construction of roads for public use and the excavation of tanks. The testator also provided for the order of succession to the office of shebait among his own descendants. The first shebaits were his eldest son, Jaykrishna Mookerjee and Haranath Chatterjee (not a member of the family). Haranath died on the 29th January 1862, and thereafter Jaykrishna continued as sole shebait till his death on the 19th July 1888. Rajkrishna who, according to the Will, was to have followed Jaykrishna had died in 1880. Consequently Jaykrishna was succeeded by his step-brother Nabakrishna who died on the 11th September 1890. On his death, the succession opened to his brother Bijaykrishna. Raja Peary Mohan, the second son of Jaykrishna opposed Bijaykrishna and threw every possible difficulty in the way of his obtaining possession of the debuttar estate and collecting the rents. After the usual preliminary contest in the Revenue and Criminal Courts, on the 10th June 1892, Bijaykrishna instituted a suit in the Court of the Subordinate Judge of Hughli to establish his title to the office of shebait under the Will of the founder, The suit was defended by the Raja, who denied the genuineness of the Will and the existence of the debuttar. On the 29th January 1894 the Subordinate Judge decreed the suit : and on that very day Bijaykrishna died. Raja Peary Mohan preferred an appeal to this Court on the 25th January 1895 (as apparently some considerable time was taken up by proceedings for amendment of the decree) and joined as respondents be sons of Bijaykrishna who had been appointed executors to the estate of their father under his Will, In the memorandum of appeal, he challenged the factum and validity of the debuttar and completely repudiated the trust created by his grandfather. The appeal came to be heard before Maclean, C.J, and Banerjee J. on the 24th August 1898 when the Raja took up the position that he had succeeded as shebait upon the death of his uncle Bijaykrishna on the 29th January 1894 and that, consequently many of the questions raised in the suit had caused to be of practical importance. The result was that the decree of the Court below was confirmed subject to modifications. One important variation made was that the then respondents, the executors to the estate of Bijaykrishna, could not proceed with the enquiry into the accounts of the debuttar estate as directed by the Subordinate Judge. But the litigation thus, brought to an end, did not and obviously could not terminate the controversy between Raja Peary Mohan and the representatives of Bijiykrishna. Raja Peary Mohan had successfully kept Bijaykrishna out of the debuttar estate from the 11th September 1890, when Bijaykrishna became entitled to succeed as shebait, up till the 29th January 1894, when Bijaykrishna died. Bijaykrishna had not been able to collect more than Rs. 4,607 during his incumbency : he had, on the other hand, spent considerable sums of money in protesting the debuttar estate and in performing his obligations as shebait during all the time that Raja Peary Mohan was in possession and enjoyment of the income. The consequence was that even before the Raja's appeal in the previous suit was heard in

the High Court, the representatives of Bijaykrishna had, on the 25th January 1897 instituted a suit in the Court of the Subordinate Judge of Hughli to recover the sum of Rs. 77,964 from the debuttar estate to which Raja Peary Mohan had succeeded as shebait, or in the alternative, from him personally. The Sabordinate Judge made a preliminary decree for accounts on the 17th February 1899. The defendant appealed to this Court, and on the 28th November 1900 Banerjee and Brett, JJ., directed the plaint to be amended, and remanded the case to the Court below for a fresh trial Peary Mohan *Mukherjee v. Narendra Krishna*[1].J. The suit was re tried, with the result that a preliminary decree for accounts was again made on the 10th February 1902, This was followed on the 30th June 1903 by a final decree for Rs. 45,960 against the debtor estate. Raja Peary Mohan appealed to the High Court, with the result that the decree of the Subordinate Judge was confirmed on the 24th February 905 by Ghose and Pargiter, JJ.: *Peary Mohan Mukerjee v. Narendra Nath Mukerjee*[2]. The Raja was not satisfied and appealed to the Privy Council. On the 16th December 1909 the Judicial Committee dismissed the appeal and the judgment delivered by Lord Macnaghten commented upon his wrongful acts: *Peary Mohun Mukerjee v. Narendra Nath Mukerjee*[3] M. The decree-holders promptly applied for execution on the 1st May 1910 to realise a sum of Rs. 83,543 inclusive of interest and costs in all the Courts They claimed that the costs of the Court of first instance were realisable out of the debuttar estate, while the costs of the appeals to the High Court : and the Privy Council were realisable from the judgment debtor personally. Raja Peary Mohan took various objections to the execution on the 27th July 1910, including an objection that he was not personally liable to pay the costs of the High Court and the Privy Council. These objections were overruled by the Subordinate Judge on the 3rd December 1910. Raja Peary Mohan appealed to the High Court against the decision imposing a personal liability on him, and obtained an order for stay of proceedings during the pendency of the appeal. No appeal was preferred against the order overruling his objections to execution against the debuttar estate. The result was that while execution against him personally was held up by order of the High Court, it proceeded against the debuttar estate, and an order for the sale was made by the Subordinate Judge on the 10th January 1918 Farther objections were taken to the execution on the 15th January 1913, with a view to vary the order in which the attached properties were to be sold, but they proved infructuous. On the 14th January 1913, the most valuable of the properties comprised in the debuttar estate, namely, a four fifth share of lot Bahirgora was put up to auction and was purchased by Bhupendrarath, one of the Raja's sons, for a sum of Rs. 1,56,600. The appeal preferred by Raja Peary Mohan against the order for personal execution was heard in this Court by Jenkins, C.J. and Ray, J. on the 28th Marsh 1913, and was dismissed on the ground that, under the terms of the decree of the High Court and of the Privy Council, he was personally liable for the costs awarded thereby. The Court pointed out that there was nothing inconsistent in the fact that the claim sought to be enforced had been decreed against the debuttar estate with the direction that the shebait should be personally liable for the costs of the litigation conducted by

him on behalf of the Thakurs.

3. Meanwhile, on the 17th February 1913, that is, about a month after the sale of Bahirgora in execution and its purchase by the son of the shebait, Monohar Mookerjee, a grandson of the founder and the eldest surviving son of Rajkrishna, had instituted the present suit for administration of the trust estate. The principal defendants were Raja Peary Mohan in his capacity as shebait as also in his personal capacity, and Bhupendranath his son who had purchased Bahirgora. The plaintiff further joined as proforma defendants members of the various branches of the family, all descendants of the founder Jagamohan Mookerjee The suit was defended by the Raja and Bhupendranath. The former challenged all the material allegations in the plaint, while the latter alleged that as he had purchased Bahirgora for himself with his own money, the property in his hands could not be declared to be trust property. The fourth defendant, Pratapnarain, the eldest son of Nabakrishna, also filed a written statement, which does not require further consideration : no relief is claimed against him and be has died during the pendency of this litigation : The following thirteen issues were raised on these pleadings :

1. Has the plaintiff right of suit and cause of action ?

20 Has this Court jurisdiction to try this suit ? Is the suit maintainable in the way in which it has been framed ?

3 Has the plaintiff the right to maintain this suit under Section 66 of the Civil Procedure Code ?

4. Is the plaint sufficiently stamped?

5. Is the suit barred by limitation estoppel and acquiescence ?

6. Is the plaintiff as the next presumptive shebait for the time being entitled to the declaration sought for by him, and was Bhupendranath Mookerjee (defendant No. 3) colluding with Raja Peary Mohan Mookerjee (defendants Nos. 1 and 2) in the purchase of the debuttar property or was he an innocent purchaser for value without the knowledge of the Raja's wrongdoings ?

7. Are the allegations of misconduct made by the plaintiff against defendant No. 1 true? If so, are they sufficient to justify the latter's removal from the shebaitship?

8. Is the plaintiff entitled under the terms of the Will of the late Babu Jagomohan Mookerjee to ask for the removal of the defendant No. 1 from the shebaitship and for the appointment of another trustee in his place, and to have a scheme for the execution of the trust prepared by the Court ?

9. Whether the defendant No. 3 purchased the debuttar property at the auction sale as a mere benamdar for Raja Peary Mohan Mookerjee?

10. Whether the plaintiff is entitled to the declaration that 12-annas, 16 gandas of Bahirgora with Chakran purchased by defendant No. 3 at auction is debuttar property still?

11. Whether the defendant No. 1 can be restrained from withdrawing the surplus Bale-proceeds deposited in Court in execution case No. 52 of 1910 ?

12. What relief, if any, is the plaintiff entitled to?

13. Which of the parties has under the terms of the Will of late Jagomohan Mookerjee the best claim to the shebaitship of the Thakurs and the debuttar estate? Is defendant No. 4 the best entitled to claim them as Jaishta Putra of the Bansha? The Subordinate Judge has found against the plaintiff on the second part of issue No. 1, on the first part of issue No. 6, and on issues Nos. 7, 8 and 10, but in his favour on the first part of issue No. 1, issues Nos. 2, 3, 5, second part of issue No. 6, issues Nos. 9 and 13. On these findings, the Subordinate Judge has dismissed the suit with costs.

5. In support of the present appeal, preferred by the plaintiff, two substantial grounds have been urged, namely, first, that in the circumstances disclosed in the evidence, not withstanding the sale of the Bahirgora in execution and its purchase by the son of the shebait with funds supplied by his father, the property should in law be still regarded as part of the trust estate, and, secondly, that in view of the past conduct of the shebait in relation to the debuttar estate and his present position which involves a clear conflict of duty and self-interest, he should be removed from the office of shebait. On behalf of the respondent shebait the validity of these contentions has been questioned, and it has been urged in addition that the plaintiff is not competent to maintain the present suit. On behalf of Bhupendra, the son of the shebait, the finding of the Subordinate Judge that he was not the real purchaser has been assailed, and an endeavour has been made to support the decree on the ground that he is entitled to the protection enjoyed by a bona fide purchaser for value. The reasons assigned by the shebait to justify the decree made by the Subordinate Judge have also been reiterated on behalf of Bhupendranath, though as purchaser he is not directly concerned with the matters raised therein. The questions which emerge from the elaborate arguments addressed to us by the several parties may be conveniently examined in the following order :

(i) Is the plaintiff competent to maintain the present suit ?

(ii) What is the true nature of the purchase of Bahirgora in execution by Bhupendra and what is

the legal effect thereof on the debuttar estate ?

(iii) Have sufficient grounds been established for the removal of the shebait ?

6. As regards the first question, the defendants have contended that as the plaintiff has no present interest in the debuttar estate, he is not competent to maintain this action. No authority has been cited in support of this argument, but reference has been made to Section 92 of the Civil Procedure Code. That section, it is conceded, is applicable only to trusts created for public purposes of a charitable or religious nature : suits in respect of alleged breaches of such public charities may be instituted, either by the Advocate General or by two or more persons having an interest in the trust who have obtained the consent in writing of the Advocate General,. The defendants respondents have laid stress on the fact that the object of this restriction was to prevent the institution of an indefinite number of reckless and harassing suits against the trustees of a public charity by individuals interested in the trust: *Sajedur Raja Chowdhuri v. Gour Mohun Das*[4] *Budree Das v. Chooni Lal*[5]*; D'Cruz v. D'Silva*[6] and they have pressed us to extend, to private trusts by way of analogy, the rule embodied in Section 92, and to hold that, as in the ease of public trusts so also in the case of private trusts, the interest of the plaintiff in the trust, sufficient to qualify him to maintain his suit, must be an existing interest, not a mere contingency nor the mere possibility of succession to the managership of the trust properties. *Mohiuddin v. Sayiduddtn*[7] *Budh Singh Dudhuria v. Niradbaran Roy*[8]. But we cannot accept the contention of the respondents as well-founded either on authority or on principle. In the case before us, according to the Will of the founder, the plaintiff stands, after Raja Peary Mohan, the next in order among persons entitled to succeed to the office of shebait, as (Bansher Jaishta Putra) the eldest male member among the descendants of Jagomohan Mookerjee : as such, he is clearly competent to maintain this suit. It is not necessary for our present purpose to recapitulate all the rights of the founder of a charitable trust or of his heirs in relation to the trust. The authorities are clear upon the point that, in certain events, for instance, where the line originally indicated by the founder fails, the founder or his heir has the right to nominate the shebait or have vested in him the shebaitship, and this principle is applicable equally to private and public trusts: *Sital Das Babaji v. Pertap Chunder Sarma*[9] *Raj Krishna Dey v. Bipin Behari Dey*[10] *Boidyo Gauranga Sahu v. Sudevi Mata*[11] Analogous to this doctrine is the principle that the founder or his heirs may sue for the enforcement of the trust, for the removal of the old trustee, for the appointment of a new one and may thereby secure the' proper administration of the trust and its properties. Whatever restrictions may have been prescribed by the Legislature as to the mode of institution of such suits in respect of public trusts, the rights of the founder of a private trust or of his heirs remain unimpaired. Such right of suit by the founder or his heirs is recognized in a long series of decisions: *Bhurruck Chunder Sahoo v. Golam Shuruff*[12] *Mohesh Chunder v. Koylash Chunder*[13]

Biddia Soonduree v. Doorganund [14]*Sheoratan Kunwari v. Ram Pargash*[15] *Giyana Sambandha Pandara Sannadhi v. Kandasami Tumbiran*[16] *Sathappayyar v. Periasami*[17] *Gajapati v. Bhagavan Dots* [18]*Ganapati Ayyan v. Savithri Ammal*[19] *As Lord Mansfield, observed in St. John's College v. Toligton*[20] a charitable foundation, so far as it is charitable, that is, so far as it is formed to give effect to a charitable purpose in reference to property provided by the founder, is the creature of the founder. He has the right to determine, when the charitable foundation is established, the mode in which the foundation shall be governed and its revenues applied, and the law reserves to him and his heirs or appointees certain permanent functions with a view to prevent what is called by Holt, C.J., all perverting of the charity": *Phillips v. Bury* [21] This right, according to Lord Hardwicke, has its origin in "the property of the donor and the power which, every one has to dispose, direct and regulate his own property*": Green v. Rutherforth*[22] Under the Law of England it is well-settled that if a private person is the founder of a charitable corporation, then he and his heirs are the visitors, and it is only where the line of heirs of a private founder has become extinct, or where they cannot be found or are incompetent to act, that the visitatorial power devolves on the Crown. *Attorney General v. Gaunt*[23] *Attorney General v. Bedham School*[24] We are of opinion that on the analogy of this well recognised principle, the view may be maintained that in respect of a debuttar in this country, the founder or his heirs may invoke the assistance of a judicial tribunal for the proper administration thereof on the allegation that the trusts are not properly performed : and the case is strengthened when the management would, under the terms of the trust, vest in the plaintiff as the founder's heir, on a vacancy caused by the removal of the actual incumbent for misconduct: *Biddia Soonduree v. Doorganund (sic) : Kazi Hasan v. Sagun*[25] *Prosunno Moyee Dosse v. Koonjo Beharee*[26] *Sam Narain Singh v. Ramoon Paurey*[27] We hold accordingly that the plaintiff is entitled to maintain the present suit.

7. As regards the second question, three points require examination, namely, first, who supplied the purchase money : secondly, if the purchase money was supplied by Raja Peary Mohan, can the validity of the sale be successfully impeached, as between the debuitar estate on the one hand and the nominal purchaser on the other : and thirdly, if the sale can be impeached, on what terms should the property be restored to the debuttar estate.

8. As regards the first of these points, it has, in our opinion, been conclusively established that the purchase-money was supplied by the Raja. The property was knocked down to Bhupendra on his bid of Rs. 1,56,600. Rs. 40,000 which was slightly in excess of one-fourth of the purchase money, was deposited on his behalf forthwith. The chalan shows that the deposit was made by Kanti Chandra Rarhi the Raja's Am Moktear. Bhupendra admits that he received on the date of sale Rs, 37,400 from his father. Raja Peary Mohan confirms this statement and adds that this was part of money which had been received by him about that date from his Zemindari is Sagar

Islands. Bhupendra states that, in order to make up the sum of Rs. 40,000, he borrowed Rs. 2,600 from an: officer of his cousin Prabal Chandra Mookerjee, who confirms the allegation and adds that he was. re-paid the loan two or three days later. The balance of the purchase-money Rs, 1,16,60 was deposited on the 28th January 1913 with a chalan, which sets out the numbers of the currency notes. There were ten notes of Rs. 10,000 each and sixteen notes of Rs. 1,000 each, besides sixty notes of Rs. 10 each. The whole of this money has been traced to the Raja. It is proved that Bhupendra obtained Rs. 1,16,000 from the Bank of Bengal on a deposit of Government securities for Rs. 1,80,000. These securities stood in the name of Raja Peary Mohan up to the 9th January 1913, and were thereafter endorsed by him in favour of Bhupendra who pledged them with the Bank on the 25th January 1913. An account was opened by the Bank with Bhupendra on that date : this was closed on the 3rd February 1914. There is thus no escape from the position that the whole of the purchase-money was supplied by the Raja to Bhupendra. Bhupendra states, in the course of his deposition, that he had in his possession Rs. 55,000 which he had kept concealed from his father. If this be true, his position is certainly not improved : if he applied money, which belonged to his father, to make the purchase, the property would clearly belong to his father. There is also the significant circumstance that Bhupendra had no separate funds of his own and that father and son lived as members of a joint family. On these facts, it is not very material to discuss the motive which actuated Raja Peary Mohan when he made over to his son Bhupendra the sum of money with a view to purchase the property Bahirgora. An elaborate story has been developed to the effect that this payment was made in pursuance of a scheme for a special testamentary gift in favour of Bhupendra contained in a Will executed by Raja Peary Mohan on the 5sh June 1912. But this Will has been superseded, and after the institution of the present suit, Raja Peary Mohan has executed a deed of settlement, on the 27th October, 1913. We cannot also overlook the fact that the theory of a special gift in favour of Bhupendra who was to receive the Zemindari of Sagar Islands (a property which, it is alleged, might, for its preservation, entail heavy and unexpected expenditure on the owner) does not fit in exactly with the gift of a large sum of money for investment in the way of purchase of a property for more than its full value. But whatever motive may have inspired the Raja, the facts remain incontestable that he was the shebait of this property, that it was brought to sale in execution of a decree liable to be satisfied partly from the debuttar estate and partly from himself, and that at the execution sale which took place it was purchased by his son Bhupendra with funds entirely supplied by him.

9. As regards the second point, the plaintiff-appellant has contended that, as between the debuttar estate and the shebait, the sale of Bahirgora is inoperative in law, on well-recognised principles of Equity Jurisprudence. In support of this position, reliance has been placed upon the cases of *Campbell v. Walker*[28] *Lacy, Ex pate* [29]*James; Ex parte*[30] *Bennett; Ex parte*[31] *Randall v.*

Errirgton[32] *Sanderson v. Walker*[33] *Downes v. Gravebrook*[34] *Farrar v. Farrar* [35] *and Baroda Presad Banerji v. Gajendra Nath Banerji*[36] These cases, it has been argued, recognise what must now be regarded as an elementary rule, namely, that a trustee Cannot purchase trust property from himself or at his own sale. The law does not stop to enquire into the fairness of the sale or the adequacy of the price, but stamps its disapproval upon a transaction which creates a conflict between the self interest and the integrity of the trustee. The respondents have not disputed the correctness of this rule, but have urged that a trustee for the sale of property cannot himself be the purchaser of it, because no person can at the same time fill the two opposite characters of vendor and purchaser and that consequently the disability, does not apply to a case where, as here, the property is publicly sold by a Court in execution of a decree. The respondents have further contended that in cases of purchase at execution sales, the same principle should be applied as governs a purchase of trust property by a trustee from his cestrum queue trust: *Denton v. Banner*[37] *Bluff v. Lord*[38]in other words, such a transaction should not be pronounced inoperative, but should only be jealously scrutinised, so that if it is impeached by the cestui que trust, the trustee must show that there has been no fraud or concealment or advantage taken by him of information acquired by him in the character of trustee and that the consideration paid was adequate *Dougan v. Macpherson*[39] The question thus raised is of great importance and requires careful examination.

10. It is regarded as a principle of fundamental importance in English Equity Jurisprudence that a trustee for sale is absolutely and entirely, disabled from purchasing the trust property, directly or indirectly. The rule is universal that, however fair the transaction, the cestui que trust is at liberty to set aside the sale and take back the property. Weighty reasons have been assigned by eminent Judges in support of this rule. If a trustee were permitted to buy in an honest case, he might buy in a case having that appearance, but which, from the infirmity of hum-in testimony, might remain undetected: 1 : 32 E.R.(Eldon, L.C.); in other words, the ground of the rule is that though you may see in a particular case that the trustee has not made an advantage, it is impossible to examine sufficiently in ninety nine cases out of a hundred whether he has made an advantage or not *Williams v. Scott*[40] It is equally well settled that a trustee for other purposes than for sale cannot purchase the property where the purchase would conflict with his duty respecting it or his position in regard to it : but in this class of cases, there is no absolute rule against his purchasing the trust property from his cestuique trust, although Courts of Equity always regard such transactions with the utmost jealousy and will not hesitate to set them aside if their fairness is not conclusively established. The controversy before us has centered round the question, which of these principles governs the present case. Now, it is perfectly plain that the sale in this case was not by a cestui que trust to the trustee. As Sir Arthur Wilson pointed out in delivering the opinion of the Judicial Committee in the case of *Jagidindra Nath Roy v. Hemanta Kumari Debi* [41]though

there is no doubt that an idol may be regarded as a juridical person, capable as such of holding property, it is only in an ideal sense that property is so held, for the possession and management : of the dedicated property must, in the nature of things, belong to the shebait, whether the religious dedication is of the completes kind known to the law or is of a less strict character. Consequently, when a shebait purchases debuttar property it is a purchase by a person who is the custodian of the property and who is charged with the duty to preserve it for the benefit of the endowment. In a case of this description, if the purchase were allowed, precisely the same mischief's would result as have been apprehended by eminent Judges in cases of purchases of trust properties by trustees for sale. Indeed, the mischief might be of a more aggravated character, less likely to be discovered and rectified, as, unless the shebait was removed, it might be impossible to determine the impropriety of the transaction and the injury inflicted thereby on the debuttar estate. If the contrary view prevailed, it is not inconceivable that an unscrupulous shebait, anxious to seize a particular portion of the debuttar estate for his personal use, might, notwithstanding ample funds at his disposal, be encouraged to borrow money in the character of shebait, allow a decree to be passed against him, acquiesece in the consequent execution sale, and ultimately purchase the property in his private capacity. The true nature of a scheme of this character, elaborately planned and carefully carried out, would never be unraveled, except probably by a person intimately acquainted with the minutest details of the administration of the debuttar estate. On the other hand, if the shebait were allowed to bid, his interest would be to secure the property at the lowest price, and if he became the purchaser, an application to set aside the sale on the ground of irregularities in the proceedings would obviously be out of the question. In our opinion, no difference should, in this class of cases, be made in the application of this principle, by reason of the fact that the purchase is made at a sale publicly held or held at the instance of a Court in execution of a decree against the debuttar estate. This view is supported by principles adopted in cases of the highest authority.

11. Reference may be made, for instance, to the decision of the House of Lords in York Buildings Co. v. Mackenzie (1793) 8 Brown P.C. 42 : 3 Paton 378 : 3 E.R. 432. The appellants in that case were an insolvent company and their estates were sold by order of the Court of Session at a public judicial sale to satisfy creditors. The procedure are at such sales was to set up the property at a value fixed upon by the Court, which is called the upset price and which is founded on information procured by the common agent of the Court, who has the management of all the outdoor business of a cause. The respondent was the common agent in that cause, and he purchased for himself, at the upset prise, no person appearing to bid more, and the sale was confirmed by the Court. In the course of eleven years, the purchaser in possession expended large sums for building and improvements. There was no question as to the fairness and integrity of the purchase, but the appellants sought to set aside the sale and to have the estate sold anew on

the ground that the respondent (the common agent in Court, on behalf of all parties, to procure information and attend the sale) was in the nature of a trustee and so disabled to purchase. The case was argued before the House of Lords for sixteen days, by Counsel of the highest eminence, with exceptional ability and learning. The appellants contended that the common agent was under a disability to purchase, arising from his office : that the rule was founded on reason and nature and prevailed wherever any well-regulated administration of justice was known : that the disability rested on the same principle which dictates that a person cannot be both Judge and party and serve two masters : that he who is entrusted with the interest of another cannot be allowed to make the business an object to himself, because, from the frailty of human nature, one who has power will be too readily seized with the inclination to serve his own interest at the expense of those for whom he is entrusted : that the danger of temptation does, out of the mere necessity of the case, work a disqualification, because nothing less than incapacity is able to shut the door against temptation where the danger is imminent and the security against discovery great : "that the wise policy of the law had, therefore, put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation :" that the parts which the buyer and seller have to act stand in direct opposition to each other is point of interest, and this conflict of interest is the rook for shunning which the disability has obtained its force, by making that person who has the one part entrusted to him incapable of acting on the other side. This argument was fortified by references to the Roman Law, showing clearly that the same principle had a deep and firm foundation in that system and was most extensively applied, as for instance, to guardians, tutors, curators procurature, judicial officers and all other parsons who had a concern in the disposition and sale of the property of others, whether the sale was public or private, judicial or otherwise (Dig, Lib. 18 tit, 1, Ch. 34, lib. 18, tit. 1, Ch. 46 and lib. 26, tit. 8, Ch. 5). The respondent admitted the general principle, but denied its application. The House of Lords set aside the sale and ordered the purchaser to account for the rents and profits, with a liberal allowance to him for his permanent improvements. The judgments delivered by the House of Lords are not set out in the report by Brown but the opinions of Lord Thurlow and Lord Loughborough, L.C. as also the interlocutors of the Scotch Judges whom they reversed will be found in the report by Paton. This decision carried the doctrine to its full extent and later decisions, as will presently appear do no depart therefrom.

12. In *Grover v. Hugell (1827) : 3 Russell 428 : 27 R.R. 103 : 38 E.R. 636(Supra)* Sir John Leach, M.R. had to deal with a case where, on the sale for redemption of land tax of the glebe of a rectory, the rector himself had become the actual purchaser in the name of his curate. He held that the sale could not be sustained in a Court of Equity and observed as follows: The general rule in Equity is that a man cannot place himself in a situation in which his interest conflicts with his duty. The duty of the rector was, to obtain the best possible price for the land sold : and his

interest as purchaser was, to pay the least possible price, It is no answer to say, that the superintendence of the Commissioners would secure a full price. The sale is to be by public auction and Before two of the Commissioners or some person appointed by them : and their approbation of the sale is required by the Act : but still the duty of the rector was to give his aid to the procuring of the best possible price." The same principle had been enunciated by Sir Thomas Plumer, M.R in Stratford v. Twynan (1822) Jacob 418 : 23 R.B. 107 : 37 H.R. 908(supra) though he held that an execution creditor was not a trustee within the meaning of the rule and was not incompetent to purchase at the sale held by the Sheriff of the property seized in execution. The decision in Quest v. Smythe (1870) 6 Ch. App. 551 : 39 L.J. Ch. 536 : 22 L.T. 563 : 18 W.R. 742(Supra) recognises the same rule, though the Court of Appeal did not adopt the view of the Master of the Rolls (Lard Romilly) that the purchaser in that case (the Solicitor, not of a party to the suit but of some creditors of the mortgagee, one of whom had obtained a decree for administration of the mortgagee's estate) stood in a fiduciary relation and was disqualified in the same way as a trustee would have been. An instructive case same before the Court of Appeal in Nugent v. Nugent (1908) 1 Ch. 518 at p. 517 : 77 Ch. J. Ch. 271 : 98 L.T. 354 : 24 T.L.R. 493(Supra). The Court of Appeal unanimously affirmed the decision of the primary Court, Nugent v. Nugent (1907) 2 Ch. 292 : 76 L.J. Ch. 614; 97 L.T. 279 : 23 T.L.R. 660(Supra) that a Receiver appointed by the Court cannot purchase the property of which he is Receiver, without leave of the Court, even where the sale is made, not in the action in which he was appointed, but by a mortgagee selling with leave outside the action. Cozans Hardy, M.R. observed that the Reciver was in a fiduciary position and held that, in dealing with this class of case, the Court does not proceed upon the footing that there has been fraud or improper concealment or any special advantage taken by the Beheiver : it proceeds upon the general rule that, in cases of this kind, the purchase ought not to be allowed at all, because it is a dangerous thing to allow, as in most cases it is impossible to ascertain whether the Receiver has or has not taken undue advantage of his position. The Master of the Bolls declined to go into the question whether, under the special circumstances of the case, there was any great probability of fraud. Fletcher Moulton, L.J. observed 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. 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 wish regard to persons who hold positions in which such a conflict might arise, and the Court has been very severe in past times in the rules which it has made for this purpose. Buckley, L.J. adopted the same view and observed that a person standing in a fiduciary relation cannot be allowed to put himself in a position in which his interest and his duty may conflict : if he does so, it is not necessary to show that he acted contrary to his duty : the Court will not allow him to buy, if the position is such that he might be guilty of a breach of his duty Reference Was made in

support of this view to the decision of Sir Michael O'Loghlen, M.R. in Alven v. Bond (1841) 3 Ir. Eq. Rep, 365 : Fl. & K. 198(Supra). It was ruled, in that case that a purchase by a trustee at a sale, under the decree of the Court, of property with which he is Connected by virtue of his office, cannot be sustained, if made without the sanction of the Court or the assent of the parties interested, but concealed from both. In answer to the argument that the proposed order for cancellation was one which no other Judge had ever ventured to make, the Mastar of the Rolls replied that it was not the introduction of a new doctrine into a Court of Equity and referred to James, Ex parte (30), where Lard Eldon, L.C. had pronounced against the validity of such a transaction on the ground "that no Court is equal to the examination and ascertainment of the truth in much the, greater number of cases." Precisely the aims view had been taken by Sir William McMahon, M.R., in *White v. Tommy (sic) Fl. & K.*[42] *and* by Sir Edward Sugden when Lord Chancellor of Ireland, in Boddington v. Langford (1845) 15 Ir. Ch. Rep. 553 (supra): See also Hamilton v. Young (1881) 7 L.R. Ir. 289 at p. 299(Supra).

13. It will be observed chat reference is made in some of these judicial decisions to purchases by persons in a fiduciary relation with the leave of the Court. It is important to bear in mind that even in cases where the transaction is not absolutely prohibited, this leave of the Court must be obtained before the sale takes place. In Lewis v. Hillman (1852) 3 H.L.C. 607 at p. 630 : 10 E.R. 239 : 88 R.R. 233(supra); Lord St. Leonards said : I should lay it down as a rule that ought never to be departed from, that if an Attorney or agent can show that he is entitled to purchase, yet, if instead of openly purchasing, he purchases in the name of a trustee or agent, without disclosing the fast, no such purchase as that can stand for a single moment. Such a transaction, to stand, must be open und fair, and free from all objections." These observations were referred to with approval by Lord Cairns in McPherson v. Watt (1877) 3 App Cas. 254 at p. 266(Supra) "an Attorney is not affected by the absolute disability to purchase which attaches to a trustee. But, for manifest reasons, if he becomes the buyer of his client's property, he does so at his peril. Ha must be prepared to show that he has acted with the completes faithfulness and fairness : that his advice has been free from all taint of self interest : that he has not misrepresented anything, or concealed anything, that he has given an adequate price and that his client has had the advantage of the best professional assistance, which, if he had been engaged in a transaction with a third party, he could possibly have afforded. And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested Counsel, and the fairest price, if the purchase be made covertly in the name of another, without communication of the fact to the vendor, the law condemns and invalidates it utterly." See also Luddys Trustee v. Pearl (1866) 33 Ch. D. 500 at p. 519 : 55 L.J. Ch. 884 : 55 L.T. 137 : 35 W.R. 44(supra); Farmer v. Dean (1863) 32 Beav. 347 : 55 E.E. 128 : 138 B E. 755(Supra).

14. The principles thus recognised by English Equity Jurisprudence have been adopted by the Courts of the United States as founded on manifest reasons of justice and good conscience, and one of the most familiar doctrines of the law of trusts recognised there is stated to be that a trustee cannot in his private capacity purchase trust property at a sale held in execution of a decree made against himself as trustee. The leading decision on the subject is the classical judgment of Chancellor Kent in Devoue v. Fanning (1816) 2 Johnson Ch. 252 where he held that a trustee cannot become the purchaser at a judicial foreclosure sale of the trust property, unless he is expressly allowed to do so by the Court : it makes no difference in the application of the rule that the sale is at public auction, bona fide and for a fair price. This was emphasised by Chancellor Walworth in DeCaters v. DeChaumand (1832) 3 Paige Ch. 178 where, in answer to the contention that if the trustee had not bid, the price would not have been enhanced, he quoted the language of Lord

15. Eldon in James, Ex parte (30), "it is better for the general interests of justice that in some cases a loss should be sustained by the cestui que trust than a rule should be established, which would occasion loss in much more numerous cases." The same rule was affirmed in Chapin v. Weed (1841) Clarke Ch. 464 where the principle was stated to be that a trustee cannot become the purchaser, for his own benefit, of the property assigned to him in trust, and he cannot become such purchaser, even though the sale is a judicial one, made without the contrivance or procurement of the trustee, unless by the order of sale he is expressly allowed so to purchase. The question was elaborately examined by the Supreme Court of the United States in Michoud v. Girod (1816) 4 Howard 503 : 11 L. Ed. U.S. 1076 : 16 Cur. Dec. 188 and the rule was affirmed that a purchase by an executor, through a third person, of property of the testator is void, though the sale was held at a public auction, judicially ordered, and the evidence showed that fair price was paid. The Court has approved of this doctrine in later cases: Magruder v. Drury (1914) 253 U.S. 120 U.S. v. darter (1909) 217 U.S. 308. But, in one jurisdiction (Texas), the view has been maintained that the trustee may purchase the trust property at a judicial sale, which has been brought about by a third party, which he has taken no part in procuring and which he could not have controlled: Allen v. Gillette (1887) 127 U.S. 589 : 32 L. Ed. U.S. 271; Starkweather v. Jenner (1909) 216 U.S. 528. This, however, is regarded as in the nature of a deviation from the well settled rule : it has been restricted to cases of quasi trustees and has not been applied to trustees proper (Story on Equity Jurisprudence, 1918, 446, and Pomeroy on Equity Jurisprudence, 1918, Sections 958, (sic), 1078). We hold accordingly that where a decree has been obtained against a shebait as representative of the debuttar estate, he is not competent, without the leave of the Court, to purchase the debuttar property in his personal capacity.

16. In view of this conclusion it is not necessary for us to investigate whether the debuttar estate

has suffered a pecuniary loss by the sale of the property in question : but we may state that there is no reason to apprehend that the property has not been sold for its fall value. The assertion of the defendants that the property has been sold for about double its real value is, however, not so clear. Reference has been made to the annual income of the property, stated to be about Rs. 4,500 a year, and on this basis the contention has been put forward that the price paid at the sale is much in excess of its market value : but it must be remembered that the bid sheet makes it abundantly clear that the competition was keen and more than one bidder, including the representative of the Mahanta of Tarakeswar, offered sums in excess of a lakh and a quarter. Indeed, a nephew of the defendant offered Rs. 1,29,400, It thus seems probable that we do not know enough about the property and that its potential value is much higher than what is indicated by its present income.

17. The question next arises as to the terms on which the property should be directed to be held as part of the debuttar estate, notwithstanding the sale. It is manifest that the sale cannot be set aside in so far as the execution creditor is concerned. His decree has been satisfied and there was no misconduct on his part which could prejudice his position. When the property reverts to the debuttar estate, the surplus sale-proceeds must plainly be returned to the shebait. The consequence will be that the shebait will be deemed to have satisfied the decree obtained by the representative of Bijay Krishna and will be entitled to be reimbursed out of the debuttar estate on this basis. The materials on the record are, however, not sufficient to enable us to determine this matter finally, and the question of the precise amount which the shebait is entitled to realise out of the debuttar estate, on the footing that he has satisfied the claim of the execution creditor, must be investigated in a supplementary proceeding : when such enquiry is held, is must be borne in mind that the decree for costs of the High Court and the Privy Council was realisable from the shebait personally.

18. We have finally to deal with the third question, namely, whether sufficient grounds have been established for the removal of the shebait. No useful purpose would be served by an examination of decided cases to determine what constitutes a sufficient reason for removing a trustee. The matter is peculiarly within what is called the sound judicial discretion of the Court. The Court is guided by considerations of the welfare of the beneficiaries and of the trust estate : and there must be a clear necessity for interference to save trust property. In the case before us, the plaintiff-appellant has urged that the conduct of the shebait, during many years past, has been detrimental to the best interests of the debuttor estate. Stress has been laid on the circumstance that upon the death of Nabakrishna on the 11th September 1890, Raja Peary Mohan seized the debuttar estate in assertion of a hostile title and successfully kept Bijay Krishna, the lawful shebaii, out of possession. The result was that the debuttar estate became involved in ruinous

litigation. The suit instituted by Bijay Krishna on the 10th June 1892 did not terminate in the trial Court till the very date of his death : and though thereupon Raja Peary Mohan himself became entitled to succeed as shebait, he still persisted in his repudiation of the Will of his grandfather and of the debuttar created thereby, and preferred and prosecuted an appeal in the High Court on that basis. Good sense prevailed, however, in the end, and the decree of this Court made on the 24th August 1898 recognised the validity of the debuttar. But it was impossible that the debuttar estate could be freed from the risks of litigation by this belated repentance on the part of the Raja. The representatives of Bijay Krishna instituted their suit on the 25th January 1897, for enforcement of their claim against him and the debuttar estate in his hands. This was inevitable and their claim had to be resisted. This expensive litigation lasted, as we have seen, for very nearly thirteen years, till it was terminated by the decree of the Privy Council on the 10th January 1910. Then followed as a corollary the equally inevitable execution proceedings, which ended in the sale of the most valuable property included in the debuttar estate on the 14th January 1913, and we cannot overlook the fact that the sale was precipitated, as the execution against the Raja personally was held up. It is indisputable that this misfortune is ultimately traceable to his inveterate hatred of Bijay Krishna, the result, we were told, of an old family feud. But whatever motives might have actuated him, we are concerned only with the result of his acts. The consequence has been that, while daring the time of his father, oat of the receipts of the debut-tar estate, savings were steadily effected and were invested in Government securities and landed properties, so as to raise the annual income from Rs. 4,000 to Rs. 10,000, during his time, by reason of his unwise acts, the debuttar estate has been involved in successive protracted litigations, is now burdened with heavy debts, and has lost the most valuable portion of its assets. We are thus driven to the conclusion that his connection with the debuttar estate has been singularly unfortunate and has led to the most unhappy results. But this is not all. Events have so shaped themselves that a situation has arisen which involves him in clear conflict of duty and self-interest. In the view we have taken, the property sold in execution must be restored to the debuttar estate, while the shebait must be reimbursed to an extent which requires judicial determination. Further, the evidence shows that the shebait has set up a. claim to realise from the debuttar estate considerable sums of money on account of litigation expenses. On the other hand, the dealings of the shebait with the Government securities for Rs. 11,500 which, in the litigation of 1892 were found to form part of the debuttar estate, must be forthwith investigated. It is plain that a person in this position cannot be allowed to hold the office of shebait in the best interests of the debuttar estate. We hold accordingly that the first defendant should cease to be shebait from a date to be fixed hereafter and the management of the debuttar estate should be vested in a Receiver to be appointed by this Court.

19. The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. It is

declared that the sale of Bahirgora held on the 14th January 1913 is not operative against the debuttar estate, but the first defendant is entitled to be reimbursed, the precise amount recoverable by him to be investigated by the Court below. Steps will be taken forthwith to place the debuttar estate in the hands of a Receiver to be appointed by this Court and the first defendant will cease to be shebait from the data when the Receiver takes possession. Liberty is reserved to both parties to apply. The first defendant must pay the plaintiff his costs both here and in the Court below.

20. The cross-appeal has not been pressed as such and will, therefore, stand dismissed.

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