

LETTERS PATENT APPEAL.

Before Mookerjee, Acting C.J., Fletcher and Richardson JJ.

1920

PROMATHA NATH PAL CHOWDHURI

April 27.

v.

MOHINI MOHAN PAL CHOWDHURI.*

Title—Suit for declaration of title—Benami—Purchase at an execution sale—Assignee of purchaser—Civil Procedure Code (Act V of 1908) ss. 66, 317.

In a suit for declaration of title against a purchaser at an execution sale and his assignee, where the sale took place and was confirmed before 1st January 1909, but the sale-certificate was issued later :

Held, that the suit against the assignee was good and the provision of s. 317 of the Civil Procedure Code (Act XIV of 1882), and not of s. 66 of the Civil Procedure Code (Act V of 1908) would apply.

Tantardhari v. Sundar Lal (1), *Brojonath v. Joggeswar* (2), *Dukhada Sundari v. Srimanto Joardar* (3), *Theyyavelan v. Kochan* (4), *Sibta Kunwar v. Bhagoli* (5) referred to.

In the absence of clear words, a statute will not be construed so as to take away a vested right of action acquired before it was passed.

Munjhoori v. Akel (6), *Budhu Koer v. Hafiz* (7), *Gopeshwar v. Jiban Chandra* (8) referred to.

APPEAL under clause 15 of the Letters Patent on difference of opinion between Teunon and Greaves JJ.

This suit was instituted by Promatha Nath Pal Chowdhuri for a declaration of title against his son, Mohini Mohan Pal Chowdhuri, the defendant No. 1, who was the purchaser at an execution sale and the

* Letters Patent Appeal, No. 2 of 1919, in Appeal from Appellate Decree No. 2284 of 1916.

(1) (1907) 7 C. L. J. 384.

(6) (1913) 17 C. L. J. 316, 345.

(2) (1908) 9 C. L. J. 346.

(7) (1913) 18 C. L. J. 274.

(3) (1899) I. L. R. 26 Calc. 950.

(8) (1914) I. L. R. 41 Calc. 1125 ;

(4) (1897) I. L. R. 31 Mad. 7.

19 C. L. J. 549.

(5) (1899) I. L. R. 21 All. 196.

defendant No. 2, who got a decree for specific performance of a contract for sale of the property by the defendant No. 1. The execution sale was held on 11th August 1903 and was confirmed on 30th June 1906; but the sale-certificate was not taken out till the 24th April 1909. The suit was dismissed by the Subordinate Judge on the ground that it was barred under the provisions of section 66 of the Civil Procedure Code (V of 1908). The District Judge, on appeal, upheld that. From that, the plaintiff appealed to the High Court, where there was a difference of opinion between the two Judges, Teunon J. being of opinion that the appeal should be decreed and the case remanded for trial on the merits, while Greaves J. being in favour of dismissing the appeal. Therefore, under the provisions of section 98(2) of the Civil Procedure Code, the appeal was dismissed. Thereupon, the plaintiff preferred this appeal under clause 15 of the Letters Patent.

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Babu Samatul Chandra Dutt and *Babu Manmatha Nath Pal*, for the appellants.

Babu Mahendra Nath Roy and *Babu Rupendra Nath Mitter*, for the respondent.

MOOKERJEE, A. C. J. This is an appeal under clause 15 of the Letters Patent in an appeal from appellate decree, wherein the two Judges of the Division Court have been equally divided in opinion upon an important question of law, namely, whether the rule embodied in section 66 of the Civil Procedure Code, 1908, is applicable to an execution purchaser whose title was perfected when section 317 of the Civil Procedure Code, 1882, was in force.

The plaintiff instituted this suit for a declaration of his title by purchase at an execution sale held on

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the 11th August 1903; his case is that he purchased the property in the name of his son who is the first defendant in this litigation. The sale was confirmed under sections 314 and 316 of the Code of 1882 on the 30th July 1906. The sale-certificate, however, was not taken out till the 24th April 1909; but the title of the purchaser accrued, under section 316, from the date of the confirmation of the sale, that is, from the 30th July 1906, which must be taken to be the date of the sale-certificate. This sale-certificate sets out the name of the recorded purchaser as the purchaser of the property. The first defendant, the recorded purchaser, appears to have subsequently contracted to sell the property to the second defendant, with the consequence that in a litigation between the two defendants, the second defendant obtained a decree for a conveyance by the first defendant, in his favour. As the plaintiff was not made a party to that suit, he now seeks a declaration that the first defendant was not the real purchaser and that the second defendant has not acquired any title to the disputed property under his conveyance. The suit has been dismissed on the ground, that it is barred under the provisions of section 66 of the Civil Procedure Code, 1908.

The plaintiff now contends that section 66 of the Code of 1908 has no application, and that the rights of the parties are governed by section 317 of the Code of 1882, which was in force at the time when the execution sale took place and was confirmed. The sale-certificate, as we have already pointed out, was granted on the 24th April 1909, after the Code of 1908 had come into force, but it has not been contended, and, in our opinion, it could not be seriously contended, that the delay in the issue of the certificate could in any way affect the position of the parties. A sale-certificate, it is well established, does not create

title, but is merely evidence of title: *Tantardhari v. Sundar Lal* (1), *Brojonath v. Joggeswar* (2).

The sale, which is the root of the alleged title of the plaintiff, took place when the Code of 1882 was in force. Section 316 of that Code provides as follows: "When a sale of immovable property has become absolute in manner aforesaid (that is, as provided in section 314), the Court shall grant a certificate stating the property sold and the name of the person who, at the time of the sale, is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before :

"Provided that the decree under which the sale took place was still subsisting at that date."

Under this provision, the title of the purchaser became absolute on the date of the confirmation of the sale, that is, on the 30th July 1906. That title, however, was subject to the limitation embodied in section 317 which provides as follows :

"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims" Consequently, the title acquired could not be enforced against the certified purchaser on the ground that he was not the real purchaser. We must bear in mind, in this connection, that it had been held by this Court in the case of *Dukhada Sundari v. Srimanto Joardar*(3), that section 317 which imposes a restriction upon the right of the owner to enforce his title,

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should be strictly construed, and that, consequently, such title could be enforced against an assignee of the certified purchaser, though not against the certified purchaser himself. The same view was adopted in the cases of *Theyyavelan v. Kochan* (1) and *Sibta Kunwar v. Bhagoli* (2). The position then is clear that at the time when the plaintiff acquired his title by purchase at the execution sale, he was subject to the restriction embodied in section 317, that is, he had a title enforceable against the whole world, except the certified purchaser. When, however, the Code of 1908 came into force on the 1st January 1909, section 317 of the Code of 1882 was replaced by section 66 of the new Code which introduced a restriction of a much wider scope. Sub-section (1) of section 66 is in these terms:—"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." Consequently, under the new Code, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. The question thus arises, whether in these circumstances, the wider restriction embodied by the Legislature in section 66 of the Code of 1908 can be applied to cases where the title accrued under the Code of 1882 and was, at the time of its inception, subject only to the restriction contained in section 317 of that Code. In our opinion, the answer must be in the negative.

It is manifest that the respondent seeks to read into the Code of 1882, section 66 of the Code of 1908, or, in other words, to give retrospective operation

(1) (1897) I. L. R. 21 Mad. 7.

(2) (1899) I. L. R. 21 All. 196.

to the latter provision of the law. This contention is opposed to well recognised canons for the interpretation of statutes. As was observed in *Munjhoor v. Akel* (1), every statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed, must be deemed retrospective in its operation. The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice; and it has been repeatedly laid down that in the absence of clear words to that effect, a statute will not be construed so as to take away a vested right of action acquired before it was passed: *Budhu Koer v. Hafiz* (2), *Gopeshwar v. Jiban Chandra* (3). But the respondent has argued that section 66 of the Code of 1908, like section 317 of the Code of 1882, embodies merely a rule of procedure and that as no litigant has a vested interest in the course of procedure, the new statute does not in fact take away a vested right. In our opinion, this contention is based upon a narrow and superficial view of the true effect of section 66 of the Code of 1908 and section 317 of the Code of 1882. Each of these provisions no doubt finds a place in a Code of Procedure, but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale. As has been well observed, of things that do not appear and things that do not exist, the reckoning in a Court of Law is the same; a title which cannot be proved against an opponent in the eye of law, has in point of fact no existence in relation to that individual. It is

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consequently indisputable that both section 317 of the Code of 1882 and section 66 of the Code of 1903, operate to place a limitation upon the title of the purchaser, with this difference that the effect of section 66 is to widen the fetter placed upon the title of the purchaser by section 317. If we look at the matter from a different stand-point, the effect of section 66 is to improve the position of the certified purchaser, and in effect to confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result, notwithstanding section 317, would be that the title of the alienee could be forthwith defeated by the real owner. Under section 66, on the other hand, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title, not only of the certified purchaser, but also of the person who has derived title from him. In our opinion, there can be no doubt that the view taken by Mr. Justice Teunon is correct and that the decree made by the District Judge cannot be upheld.

The result is that this appeal is allowed, the decree made by the District Judge set aside and the case remitted to the Court of first instance to be tried on the merits on fresh evidence to be adduced by both parties.

A question has been raised as to whether the person who obtained leave to prosecute the appeal after the death of the original plaintiff is really competent to do so. That question will be left open for consideration by the trial Court. The counter-affidavit which has been filed here will be transmitted to the Court below as part of the record.

The appellant is entitled to his costs of this appeal, of the appeal before the Division Bench and also

before the District Judge. The costs in the Court of first instance will abide the result of the retrial.

FLETCHER J. I agree.

RICHARDSON J. I also agree.

N. G.

*Appeal allowed ;
case remanded.*

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CIVIL REFERENCE.

Before Mookerjee, Acting C.J., and Fletcher J.

CHANDI CHARAN MITTER, A PLEADER,

*In re**

1920 -

April 29.

Pleader—Professional misconduct—Disciplinary action—Legal Practitioners Act (XVIII of 1879) s. 14—Criminal offence—Suspicion.

The District Judge of Rangpur made a Reference under s. 14 of the Legal Practitioners Act against C., a pleader, on three charges formulating strong suspicion that he offered to bribe the record-room keeper and attempted to have certain words removed from a document :

Held, where the misconduct alleged has no direct connection with the conduct of the pleader in his practical and immediate relation to the Court, ordinarily, there should be a trial and conviction for criminal misconduct before disbarment will be ordered.

In the matter of an Attorney (1), *In the matter of Nil Kunt Biswas* (2), *In the matter of the Second Grade Pleaders* (3), *In the matter of—*(4), *In re—*(5), *Ex-parte—*(6), *Stephens v. Hill* (7), *Ex-parte Wall* (8) referred to.

Babu Chandi Charan Mitter, B.L., a pleader of Rangpur Sadar Court, was the plaintiff in a title-suit against

* Reference No. 1 of 1920 under the Legal Practitioners Act.

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| (1) (1913) I. L. R. 41 Calc. 113. | (5) (1838) 3 Nev. & Per. 389. |
| (2) (1868) 9 W. R. Cr. 29. | (6) (1833) 2 Dowl. P. C. 110. |
| (3) (1910) I. L. R. 34 Mad. 29. | (7) (1842) 10 M. & W. 28. |
| (4) (1834) 5 B. & Ad. 1088. | (8) (1882) 107 U. S. 265. |