

was residing within the appellate jurisdiction and that the charges of adultery and cruelty were proved. Upon these findings a decree *nisi* was pronounced.]

Attorneys for the petitioner: *Leslie & Hinds*.

Attorney for the respondent: *G. N. Sen*.

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## APPELLATE CIVIL.

*Before Cuming and Chakravarti JJ.*

UMASHASHI DEBI,

v.

AKRUR CHANDRA MAZUMDAR\*

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July 21.

*Title—Civil Procedure Code (Act V of 1908) s. 66—Suit for declaration of title and confirmation of possession against the certified purchaser—Maintainability.*

A declaratory suit equally with a suit to recover possession comes within the purview of section 66 of the Civil Procedure Code. It is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession, in either case the section applies.

*Sasti Charan v. Annapiurna* (1) dissented from. *Hanuman Prosad Thakur v. Jadumandan* (2) and *Bishan Dayal v. Gaziuddin* (3) referred to.

SECOND APPEAL by Umashashi Debi, the plaintiff

This appeal arose out of a suit for declaration of title to and confirmation of possession of certain plots.

\* Appeal from Appellate Decree, No. 282 of 1923, against the decree of Baman Das Mukerji, Subordinate Judge of Hooghly, dated 11th Sep. 1922, modifying the decree of M. Lutfur Rahman, Munsif of Serampur, dated 26th April 1921.

(1) (1896) I. L. R. 23 Calc. 699.

(2) (1915) 21 C. W. N. 147

(3) (1901) I. L. R. 23 All. 175.

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of land and for permanent injunction restraining the defendant No. 1 from obstructing in the realisation of rents, the case for the plaintiff was that her husband who had the proprietary right to the lands to the extent of 3 annas 13½ gandas share had purchased the 16 annas of the *jamai* right at an auction sale in the *benami* of the defendant No. 1, that the defendant No. 1 was seeking to interfere with the plaintiff's possession and hence the suit. The plea taken in defence was that section 66 of the Civil Procedure Code operated as a bar to the suit, and that the defendant No. 1 was in fact the real owner. The Court of first instance decreed the suit, but on appeal by the defendant No. 1 the decree was set aside so far as the *jamai* right was concerned, the plaintiff thereupon appealed to the High Court.

*Sir Provas Chandra Mitter and Babu Hira Lall Chakravarty*, for the appellant. The suit is for confirmation of possession, section 66 of the Civil Procedure Code does not operate as a bar to the suit, the plaintiff bases her title upon recognition by the landlord, this title is independent of the purchase by her husband in the name of the defendant, the finding of dispossession by the appeal Court is erroneous, the purchases of the tenancies by the defendant was made by him as an agent of the plaintiff. *Sasti Charan v. Anna Purna* (1) relied upon.

*Babu Rupendra Kumar Mitter* (for *Dr. Bijon Kumar Mukerjee*) and *Babu Amulya Dhan Mukerjee*, for the respondent. The suit is barred under section 66, mere possession cannot be of any avail in a declaratory suit. The Court below has found as a fact that the plaintiff has been dispossessed, the question of recognition by the landlord or purchase by the

defendant as agent, cannot be raised now for the first time in second appeal.

CUMING J. In the suit out of which this appeal has arisen the plaintiff who is the appellant before this Court sued for a declaration that she had *lakheraj* and *jamai* right purchased at auction sale in respect of some 3 annas odd share left by her husband and that she was entitled to the 16 annas rent of the land in question and the defendant had no right in respect of the land. She also asked for a perpetual injunction to restrain the defendant from obstructing her in the realisation of the rents of this land. If it should be found that the plaintiff was not in possession of the land then she sued to recover possession. Her case, as a perusal of the plaint will make quite clear, is that her husband bought the *lakheraj* right in the land in his own name and with his own money. Subsequent to this he purchased the tenants' right in the land on the 24th of February at a sale in execution of a decree in the name of the defendant No. 1, obtained a certificate of sale and in virtue of this sale certificate obtained possession of the property. Some of the land he kept in his own possession and the rest was let out to tenants. The *kabuliats* were in the name of the defendant No. 1 because the sale certificate stood in his name. Umesh Chandra Mukerjee, the husband of the present plaintiff, died leaving no son and the defendant No. 1 taking advantage of this circumstance has persuaded the tenants not to pay rent to the plaintiff. From this the plaintiff realises that the defendant intends to take possession of the property left by her husband and hence she has brought this suit asking that the Court will declare that she has *akheraj* and *jamai* title purchased at auction sale of the 3 annas odd share left by her husband and also a

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declaration that she is entitled to the 16 annas share of the rent that the defendant has no title to the property and that her possession may be confirmed. If by any circumstance it be found that she is not in possession then she may recover possession. She also asked for an account from the defendant of any rent that the defendant might have realised from the tenants. The case of the defendant No. 1 who alone has contested this case is that he is the real owner of the property and that section 65 (old section 317 of the Civil Procedure Code) is a bar to the suit.

The trial Court found that defendant No. 1 was the *benamdar* of the husband of the plaintiff, that the plaintiff had been in possession from the date of purchase up to the institution of the suit, and that the defendant was liable to render accounts to the plaintiff. He found that the plaintiff's suit was not barred by the provisions of section 66 and ordered that her *jamai* title and *nishkar* title to the lands in suit should be declared. The defendant was restrained from interfering with her possession. He was also to render her accounts. Defendant No. 1 appealed to the District Court. The learned Subordinate Judge held that the plaintiff had been dispossessed from the land before the suit and was not now in possession, that the defendant was the *benamidar* of the plaintiff's husband, that section 66 was a bar to the suit and ordered that the suit of the plaintiff so far as it related to the *jamai* right of the plaintiff would be dismissed.

The plaintiff has appealed to this Court.

Her case is, if I have understood it rightly, as follows:—

(i) That the lower Court has wrongly found that she is not in possession and as she is in possession she is entitled to maintain a suit for confirmation

of possession. In support of this contention she relies on the case of *Sasti Charan v. Annapurna* (1).

(ii) That by payment of rent to the landlord a new tenancy has been created in her favour and that she has a title independent of the purchase by her husband in the name of the defendant and to this title the provisions of section 66 are not a bar.

(iii) That the purchases made by the defendant of the tenancy rights in 1915-16 were made by the defendant as her agent and hence she is entitled to a declaration of her tenancy under these purchases.

Now it seems to me on the facts as found by the learned Subordinate Judge the plaintiff's case must fail and that section 66 is a bar to her suit.

This suit is governed by the old Code and section 317 of that Code which corresponds to section 66 of the present Code is 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 someone through whom such other person claims.”

Now the case of the plaintiff as made in her plaint is clearly this, that the property was purchased by her husband in the *benami* of the defendant No. 1. It is nothing else although the learned Advocate for the appellant has spent a day and a half in trying to persuade us that the case of the plaintiff was an independent title by paying rent to the zemindar.

Reading the section as it stands it is quite immaterial whether the plaintiff was or was not in possession at the time of the suit. It seems to me that a declaratory suit equally with a suit to recover possession comes within the meaning of the section.

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The plaintiff has relied on the case of *Sasti Charan v. Annapurna* (1) and asks us to hold that if she is in possession then section 66 (317) is no bar to her suit. With due respect to the learned Judges it is very difficult to reconcile this decision with the plain words of the Statute. The learned Judges remark, "Section 317 does not make all *benami* transaction "invalid; nor read with section 316 does it confer "upon the ostensible purchaser a title as against the "real purchaser. It merely declares that a suit shall "not be maintained against the certified purchaser on "the ground that he was only the ostensible purchaser. "The ostensible purchaser could not insist on his "certified title to recover from the real owner in "possession. If therefore the defendant sets up the "sale certificate as an answer to the plaintiff's case, "there is nothing to prevent the Court from going "into the question whether that sale certificate did "or did not confer a valid title upon the defendant as "against the plaintiff. It is not a case in which the "plaintiff relying on a sale certificate seeks to obtain a "decree for possession against the ostensible purchaser. "Resting as it does on an existing possession, we do "not think that it is a suit of the nature prohibited by "section 317 (present section 66)".

If I understand the learned Judge aright ~~they~~ would seem to hold that in a suit for confirmation of possession the plaintiff has not to prove his title for obviously section 66 would be a bar to his maintaining a title based on a *benami* purchase. Neither do I understand what is meant by a title resting on existing possession. Surely it is not sufficient for a person asking for confirmation of possession to say, "I am in possession. Prove that I have no title". As far as I am aware this case stands alone. It has

never been followed but has been dissented from. See the case of *Hanuman Prosad Thakur v. Jadunandan*, (1) where Cox J. points out that if accepted as good law it would practically repeal the whole section. See also the case of *Bishan Dayal v. Ghaziuddin*, (2). The learned Judge, Strachey C. J., in considering the case of *Sasti Charan v. Annapurna* (3) remarks that if that case holds that section 317 only applies when the plaintiff being out of possession seeks to recover possession and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession is not the real purchaser he cannot agree with them. I am myself of opinion that it is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover possession. In either case section 66 applies.

The appellant seems also to have attempted somewhat faintly to make out that the property was conveyed to her husband by his being put in possession after the purchase. How this could give the plaintiff any title in the absence of a conveyance as required by the Transfer of Property Act, I admit I do not understand. The next argument advanced by the appellant is that she or rather her husband acquired a title independent of her purchase by paying rent to the zemindar. I must admit that this argument was put forward in a somewhat shadowy form. I presume that the learned Advocate meant that she or rather her husband had been recognised by the zemindar. Otherwise I do not understand how any title could be acquired by the mere payment of rent. In order to establish or to attempt to establish this part of his

(1) (1915) 20 C. W. N. 147.

(2) (1901) I. L. R. 23 All. 175.

(3) (1896) I. L. R. 23 Calc. 699.

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case the learned Advocate was obliged to take us through a large portion of the evidence of the case. The mere necessity for doing this made it at once evident that this had never formed any part of the case of the appellant in either of the Courts below.

It was perfectly obvious that this had never formed any part of the case of the appellant in the lower Courts and it is somewhat difficult to imagine how the learned Advocate for the appellant could have thought that he would be allowed for the first time in second appeal to make out a case which depended on findings of facts which had never been even suggested in the lower Courts.

The appellant lastly attempted to argue that the purchases made by the defendant of certain tenancies as the result of certain decrees obtained in 1915 and 1916 were made by the defendant as the agent of the plaintiff.

Here again the same difficulty confronts us, viz., that this case that these purchases were made by the defendant as the agent of the plaintiff finds no place in the case of the plaintiff either in her plaint or in the case as presented to the lower Courts. It is obviously a question of fact and cannot be raised for the first time in second appeal. In paragraph 7 of the plaint the plaintiff distinctly sets out that after the death of her husband her son-in-law managed her properties. It is not sufficient to say that a person is an agent. It is necessary to set out what is the scope of the agency in order to determine whether any particular act was done by the person as an agent or not and for this purpose a definite case would have to be made out. The only suggestion in the plaint is that the defendant looked after the suits of the plaintiff. There is no suggestion that it was any part of his duty to purchase properties on behalf of the



plaintiff. The case of *Ganga Buksh v. Rudar Singh* (1) may be referred to in this connection.

The result is that the appeal must fail and is dismissed with costs.

CHAKRAVARTI J. I agree with the order proposed by my learned brother.

The plaint in this case was framed in open disregard of the provisions of section 66 of the Civil Procedure Code. The only ground upon which the bar might have been avoided was not taken in either of the Courts below and in the result the defendant retains and enjoys the fruits of his fraud which has been so clearly established. It is only to be hoped that this case will serve as an example for dissuading people from indulgence in the pernicious habit of creating benami title and in some measure further the object with which section 66, Civil Procedure Code, was enacted.

A. S. M. A.

*Appeal dismissed.*

(1) (1900) I. L. R. 22 All. 434, 437.

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