APPELLATE CIVIL.

Before Mitter J.

1931

Feb. 11, 12, 23.

BINDUBASHINEE DEBI

v.

KASHINATH BHATTACHARYA.*

Estoppel—Acts of benâmdâr, *when binding on real owner.*

Estoppel alone can prevent the true owner from disputing the acts of his *benâmdâr.*

Annada Pershad Panja v. *Prasannamoyi Dasi* (1) relied on.

A *benâmdâr* is a trustee for the beneficial owner and the latter is bound by even fraudulent acts of the *benâmdâr*, unless it be proved that the third party concerned was privy to the fraud, or had direct or constructive notice or that circumstances existed which ought to have put such third party on an enquiry which, if prosecuted, would have led to the discovery of the true title.

Ramcoomar Koondoo v. *John and Maria McQueen* (2), *Gur Narayan* v. *Sheolal Singh* (3), *Henderson & Co.* v. *Williams* (4) and *Chandler* v. *Bradley* (5) relied on.

Farquharson Brothers & Co. v. *King & Co* (6) and *R. E. Jones Ld.* v. *Waring and Gillow Ld.* (7) referred to.

SECOND APPEAL by the plaintiffs.

The facts appear sufficiently from the judgment.

Brajendranath Chatterji (with him *Ramgati Sarkar*) for the appellants. The plaintiffs are entitled to the land unless it is established that they are estopped from asserting their title. Section 41 of the Transfer of Property Act applies to this case and it is clear that the transferee must act in good faith and take reasonable care in finding out who the real owner is. In this case, they knew that Jogesh was a *benâmdâr* and they should have made

*Appeal from Appellate Decree, No. 1089 of 1929, against the decree of Kaminikumar Datta, Subordinate Judge, Bakharganj, dated Jan. 26, 1929, modifying the decree of Charuchandra Ganguli, Munsif, Barisal, dated Nov. 18, 1927.

(1) (1907) I. L. R. 34 Calc. 711; L. R. 34 I. A. 138.
(2) (1872) 11 B. L. R. 46.
(3) (1918) I. L. R. 46 Calc. 566; L. R. 46 I. A. 1.
(4) [1895] 1 Q. B. 521.
(5) [1897] 1 Ch. 315.
(6) [1902] A. C. 325.
(7) [1926] A. C. 671.

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proper enquiries as to who the real owner was, and not relied on a mere statement of Jogesh. The defendants did not even ask for the sale certificate. They could have made enquiries from the landlord but did not do so. In fact, circumstances indicate that the defendants were colluding with Jogesh and Baikuntha. It is even doubtful whether they paid *selâmi* to Baikuntha. The defendants in this case cannot be said to have acted in good faith.

Atulchandra Gupta (with him *Panchanan Ghosh* and *Gunendrakishore Ghosh*) for the respondents. It has been found that the defendants acted *bona fide*, and without notice of the real title. Amulya is bound by the acts of his *benâmdâr* and the plaintiffs who claim through Amulya must also be bound by the acts of Jogesh. The principle applicable to such a case is laid down in *Henderson & Co.* v. *Williams* (1), *viz.*, when one of two innocent persons should suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud. So, when a person purchases in the *benâmi* of another and thus makes the latter the ostensible owner to the outside world, the real owner must be bound by any fraudulent dealing of his *benâmdâr* when a third person deals *bona fide* and without any notice of fraud or of the real title. The fact that the defendants took from a person whom the *benâmdâr* represented to be the real owner does not make any difference. Compare section 41 of the Transfer of Property Act. No circumstances have been proved which ought to have roused the defendants' suspicion as to the truth of Jogesh's representation and so the defendants were not put on enquiry. *Ramcoomar Koondoo* v. *John and Maria McQueen* (2).

Chatterji in reply. The case of *Ramcoomar Koondoo* v. *John and Maria McQueen* (2) helps my case. That clearly indicates that where the purchaser had any notice that the title was in somebody other than the apparent owner he ought to

(1) [1895] 1 Q.B. 521. (2) (1872) 11 B. L. R. 46.

make proper enquiries. The equitable doctrine raised by the defendants is subject to exceptions; see *Farquharson Brothers & Co.* v. *King & Co.* (1), and *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2). It cannot be said that the plaintiffs enabled Jogesh to commit the fraud. Amulya may have done so but he does not suffer. It is a well-known equitable doctrine that where equities are equal that party will succeed who has the legal title. Therefore the plaintiffs ought to succeed.

The English cases cited do not apply as they are concerned with sale of goods and not sale of land. The Privy Council has recently laid down that provisions of Indian statute should not be modified by applications of principles of English law. *G. H. C. Ariff* v. *Jadunath Majumdar* (3).

[MITTER J. Is not a *benâmdâr* a trustee for the real owner?]

That may be so, but if a trustee makes a transfer by committing a breach of trust and the transferee knows of the breach of trust or had the means of knowing it, he cannot claim good title against the real owner. In this case the defendants could have found out as to who the real owner was.

Cur. adv. vult.

MITTER J. The lands in dispute in the suit in which the appeal arises are situate within a *sadar mirâsh ijârâ* which belonged to defendants Nos. 6 to 18 and one Baikunthanath Chakrabarti in the shares of 11 annas and 5 annas, respectively. The 5 annas share of Chakrabarti was sold at an execution sale and was purchased by Amulya in the *benâmi* of Jogesh Chakladar. Plaintiffs (now appellants) rest their title to the 5 annas share of the lands described in the plaint on the basis of: (*i*) their purchase of 3 annas from Jogesh and Amulya and (*ii*) on the basis of a lease for ten years regarding the other 2

(1) [1902] A. C. 325. (2) [1926] A. C. 671, 683.
(3) (1931) L. R. 58 I. A. 91.

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annas from the same persons. Under the *mirâsh ijârâ* there was *karshâ* tenant, Bhanga Baidya, who abandoned the holding. When the plaintiffs went to take possession they were resisted by defendants Nos. 1 to 5. Hence the present suit for declaration of plaintiffs' title to the 5 annas share of the lands mentioned in the plaint and for recovery of joint possession to the extent of that share with the defendants.

The defences of defendant No. 1, which it is necessary to notice, are (1) that they have a settlement from defendants Nos. 6 to 18 in respect of their 11 annas share and also a settlement from Jogesh Chakladar and Baikuntha Mukherji, whom the former stated to be the beneficial owner, and this settlement is binding on the plaintiffs and their vendor and that plaintiffs were not entitled to *khâs* possession; (*ii*) that the suit is barred by section 66 of the Code of Civil Procedure.

The Munsif negatived the defence based on section 66 and, accepting the other defence, dismissed plaintiffs' prayer for joint possession after declaring plaintiffs' title to the disputed 5 annas share of the plaint lands.

On appeal, the Subordinate Judge has modified the decision of the Munsif to this extent that he has awarded joint possession of plot No. 3 to the plaintiff, in respect of which plot also the Munsif refused to decree joint possession.

The present appeal has been brought by the plaintiffs against the decree of the Subordinate Judge in so far as it has refused them joint possession in all plots except plot No. 3 and there is a cross-objection by defendant with reference to plot No. 3.

The question of law which falls for determination in this appeal is whether the tenancy evidenced by the *kabuliyat* executed in favour of Jogesh and Baikuntha Mukherji by defendants 1 to 5 is binding on the plaintiffs, who are purchasers from the real owner Amulya. Both courts have held in favour of

the defendants and the question in this appeal is whether the decisions are right.

The plaintiffs have got title from both the beneficial owner and the *benâmdâr* of the disputed 5 annas share and their title is perfect. The question is whether the plaintiffs are bound by the fraud of the *benâmdâr*. If, in taking the settlement from Jogesh and Baikuntha Mukherji, the defendants had colluded with one and acted to the prejudice of the real owner, there can be no question that plaintiffs would not have been bound by the *kabuliyat*. If any authority be needed for this proposition, reference may be made to the decision of their Lordships of the Judicial Committee in the case of *Annada Pershad Panja* v. *Prasannamoyi Dasi* (1). In that case, a *patnidâr* obtained, by fraudulent collusion with a *benâmi darpatnidâr*, a decree for sale of the *darpatni* tenure and himself became the purchaser and dispossessed the true owner and it was held that the defendant could acquire no title from the *benâmdâr*. Lord Collins, in this state of facts, observed as follows:—"On the facts, as now admitted, "Dhankrishna Mandal was the true owner of the "interest in the land which was sold by Jogendranath "Singh, and nothing that happened between "Saratchandra Mandal and Raghunath Panja could "affect his title unless he was estopped from denying "the authority of the *benâmdâr* to deal with it. On "the facts of the case, no such estoppel could exist, "and therefore, Raghunath Panja could not acquire "from Saratchandra Mandal more than the latter "had to give." These observations are pertinent to the present controversy, as they direct prominent attention to the rule that it is estoppel alone which can prevent the true owner from disputing the acts of his *benâmdâr*. In this case, it is true that it has not been found that there was any fraud on the part of defendants Nos. 1 to 5, but that the *benâmdâr* was acting fraudulently there can be no question. It is argued for the appellant that it is a significant

(1) (1907) I. L. R. 34 Calc. 711 (717); L. R. 34 I. A. 138 (141).

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circumstance that the *benâmdâr* had disclosed to defendants Nos. 1 to 5 that title was not in him, but was in somebody else; as soon as he was so told, the defendant should have been put on enquiry and should have investigated into the question of possession. The respondents made a point founded on the law of estoppel which appears to me to deserve a very careful consideration. It has been said that a *benâmdâr* is a trustee for the beneficial owner. The question is: Is the real owner bound by the fraudulent conduct of his *benâmdâr*, where third parties are not privy to the fraud? The sale-certificate was not produced in court by Baikuntha Mukherji. The question is whether circumstances did exist which ought to have put the defendants on an enquiry that, if prosecuted, would have led to the discovery of the true title. The true rule is laid down in the case of *Ramcoomar Koondoo* v. *John and Maria McQueen* (1), where their Lordships point out that the title of a purchaser may be overthrown by showing either that he had direct notice, or something amounting to constructive notice of the real title. Or that circumstances exist which ought to have put him upon an enquiry, which, if prosecuted, would have led to a discovery of it. These circumstances must be of a specific character so that the court can lay its finger on them. The finding is that defendants have acted *bona fide* throughout, they spent a good sum over it and, although the abandonment by the tenant was in 1325 B.S., the present suit was not brought till 1926, nearly 8 years after. Here there is no evidence that the defendants Nos. 1 to 5 were cognisant of the fact that the real title lay in Amulya. They were told by the ostensible purchaser that the real title was in Baikuntha Mukherji who had joined in the lease. The learned advocate for the respondents contends rightly that the principle applicable to the present case is one laid down in the case of *Henderson & Co.* v. *Williams* (2), that when one of two innocent

(1) (1872) 11 B. L. R. 46, 54. (2) [1895] 1 Q. B. 521.

persons should suffer from the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud. This principle has been held to be generally good although some exceptions have been engrafted on it. See *Farquharson Brothers & Co.* v. *King & Co.* (1), *R. E. Jones, Ld.* v. *Waring and Gillow, Ld.* (2). The learned advocate for the appellant has sought to distinguish the cases on the ground that they refer to sale of goods by a fraudulent vendor who has sold the goods to a *bona fide* purchaser who has given value for the same. I do not think that does really make any difference in the application of the principle. The distinction sought to be made by the appellant seems to be an unreal one.

In the case of *Gur Narayan* v. *Sheolal Singh* (3), their Lordships of the Judicial Committee say that a *benâmdâr* is a trustee for the beneficial owner. Looking at the matter from this point of view, what is the real position? The trustee connives at a breach of trust, of which the third party is entirely ignorant, and passes good value for a transaction. What is the remedy of the beneficial owner? The beneficial owner might make the trustee personally liable, but the transaction with the third party should stand. If of course the lessee had colluded with the *benâmdâr* in getting the lease, knowing that neither he nor Baikuntha Mukherji had real title and that the real title was in Amulya, the lease could not be upheld. The case of *Chandler* v. *Bradley* (4) was a case of this type. In that case, a tenant for life of a freehold house granted a lease to the defendant in consideration of a certain yearly rent. As an inducement to execute the lease, the defendant had paid to the tenant for life the sum of £ 21 which the tenant for life applied to his own use. It was held that the lease was void and was not binding on the beneficiaries.

(1) [1902] A. C. 325, 332.
(2) [1926] A. C. 671, 683.
(3) (1918) I. L. R. 46 Calc. 566; L. R. 46 I. A. 1.
(4) [1897] 1 Ch. 315.

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I think, therefore, having regard to the concurrent finding of both courts, that the defendants made all the enquiry that it was possible to make and that they acted *bona fide* throughout. The lease in favour of the defendants must stand.

It has been argued by Mr. Chatterji for the appellants that there is no finding by the lower appellate court that the payment of Rs. 150 was made and the matter should be remanded to the lower appellate court for a distinct finding on the question of the payment. I do not think it necessary to do so, for the lower appellate court finds that "defendants "Nos. 1 to 5, in good faith, placed reliance on the "statement of Jogesh and took settlement from "Baikuntha Mukherji." I think the appeal should be dismissed but in the circumstances there will be no order as to costs of the appeal.

It remains now to notice a cross-objection on behalf of the respondents with regard to property No. 3. The lower appellate court has decreed joint possession of 5 annas share in respect of this property. It is said section 66 of the Civil Procedure Code is a bar to the claim. The first court found against the respondents. No cross-appeal was filed with reference to this property on the ground that plaintiffs' claim for declaration title should have been dismissed. The decree was adverse, to that extent, against the respondents and there being no cross-appeal, the point cannot be raised now. It is admitted in the grounds of cross-objection that property No. 3 was not included in the auction purchase in respect of which Jogesh was the *benâmdâr*. The cross-objection is also dismissed but without costs.

Leave to file an appeal under section 15 of the Letters Patent has been asked for. But I do not think it is a fit case in which leave should be granted.

Appeal dismissed.

S. M.