## APPELLATE CIVIL.

*Before Lort-Williams and M. C. Ghose JJ.*

# DURGADAS DE

*v.*

# BAGALANANDA DE.*

1934

*Feb.* 1, 2, 5.

Benâmi *purchase—Code of Civil Procedure (Act V of 1908), s. 66.*

Section 66 of the Civil Procedure Code is intended to discourage *benâmi* purchases at execution sales held by the court, by penalising the person who purchases *benâmi* in the name of another. The penalty applies equally to any one claiming through him.

It does not apply where the name of the *benâmdâr* has been inserted in the sale-certificate fraudulently or without the consent of the real purchaser.

It is designed to prevent fraud on third parties resulting from the collusive acts of the real and the certified purchaser.

There would be neither justice nor reason in penalising an innocent person, who was no party to the prceeding which the legislature seeks to discourage.

The words in section 66 refer to private agreements or understandings between the *benâmdâr* and the person who employs him.

*Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1), *Ganga Sahai* v. *Kesri* (2) and *Nataraja Mudaliyar* v. *Ramasami Mudaliar* (3) referred to and approved.

*Baijnath Das* v. *Bishan Devi* (4) and *Ram Rup Teli* v. *Khaderu Teli* (5) dissented from.

*Suraj Narayan* v. *Ratan Lal* (6) distinguished.

SECOND APPEAL by the defendant.

The facts of the case and the arguments advanced at the hearing of the appeal appear sufficiently in the judgment.

*Brajalal Chakrabarti* and *Panchanan Ghosh* for the appellant.

*Appeal from Appellate Decree, No. 722 of 1932, against the decree of K. C. Das Gupta, District Judge of Bankura, dated Oct. 9, 1931, affirming the decree of Jyotishchandra Niyogi, Additional Subordinate Judge of Bankura, dated June 23, 1930.

(1) (1873) 12 B. L. R. 317.
(2) (1915) I. L. R. 37 All. 545; L. R. 42 I. A. 177.
(3) (1922) I. L. R. 45 Mad. 856.
(4) (1921) I. L. R. 43 All. 711.
(5) (1927) I. L. R. 50 All. 512.
(6) (1917) I. L. R. 40 All. 159; L. R. 44 I. A. 201.

*Atulchandra Gupta and Urukramdas Chakravarti* for the respondents.

*Ramendrachandra Ray* for the Deputy Registrar.

*Cur. adv. vult.*

LORT-WILLIAMS J. For the purpose of this appeal the facts may be stated as follows:—

Plaintiff claims a declaration of title to certain property, which he alleges to be joint, and recovery of possession thereof. Defendant No. 1 is his uncle, and defendant No. 2 is the son of defendant No. 1. All three used to live jointly, plaintiff and defendant No. 1 each having an eight-anna share in the *ejmâli* property. Defendant No. 1 was the *kartâ* of the joint Hindu family. According to the *Dâyabhâga* system defendant No. 2 was not in law a member of the joint family.

In 1324 B. S., plaintiff and defendant No. 1 jointly purchased the property in suit, in adjustment of a debt due on a mortgage bond for a loan made by the plaintiff's grandfather. The property was subject to a rent charge, and was sold in execution of a rent decree. As *kartâ*, it was the duty of defendant No. 1 to see that the rent was paid. At the auction sale, the property was purchased by defendant No. 1 *benâmi* in the name of defendant No. 2.

In 1331 B.S., the parties separated in mess, and the joint property was partitioned by arbitrators. Defendant No. 1 prepared the list of properties and did not include the property, in suit. The award, upon which a decree was passed, contained a reservation of any property accidentally omitted from the partition and subsequently discovered.

The defence was that the property in suit was not joint, and had been purchased out of private funds belonging to defendant No. 1. The facts have been found by both courts below in favour of the plaintiff, and it is unnecessary to refer to them further. But the defendants rely upon the point of

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law, that the suit is barred by reason of the provisions of section 66 of the Civil Procedure Code.

The section is as follows :—

(*1*) 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.

(*2*) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.

In my opinion, this section has no application to the facts of this case. It is intended to discourage *benâmi* purchases at execution sales held by the court, by penalising the person who purchases *benâmi* in the name of another. The penalty applies equally to any one claiming through him. It does not apply where the name of the *benâmdâr* has been inserted in the sale-certificate fraudulently or without the consent of the real purchaser. It is designed to prevent fraud on third parties resulting from the collusive acts of the real and the certified purchaser. This view of the object of the section is confirmed by the observations of their Lordships of the Privy Council in *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1) and in *Ganga Sahai* v. *Kesri* (2).

If this object is kept firmly in mind, no confusion will arise, as apparently has arisen from time to time, in applying the words of the section to particular facts. There would be neither justice nor reason in penalising an innocent person such as the plaintiff in this case. He was no party to the proceeding, which the legislature seeks to discourage; on the contrary, his case is that defendants Nos. 1 and 2 acted dishonestly and in fraud of him.

The purchase was not made on his behalf within the meaning of the section, but on behalf of defendant No. 1, if on behalf of anyone. These words in the section refer to private agreements or understandings between the *benâmdâr* and the person

(1873) 12 B. L. R. 317, 329. (2) (1915) I. L. R. 37 All. 545 (554-5 ; L. R. 42 I. A. 177 (182).

who employs him: *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1) [*Supra*]. Plaintiff does not claim the property on the ground that it was bought on his behalf, or even on behalf of the joint family. His case is that the joint family, in fact, bought it, because it was bought with funds belonging to the joint family by defendant No. 1, who, as *kartâ*, was, in the words of Mayne in his work on Hindu Law, acting as its mouth-piece. The *kartâ* is not the agent, or trustee of the joint family, but his position has been described as like that of a chairman of a committee.

The purchase being made out of joint family funds, *ipso facto* it became immediately the property of the joint family by operation of law. *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1) [*Supra*]. Nor does the plaintiff claim through defendant No. 1, in the sense indicated in the section. His title is not derivative, like that of an heir, legatee, assignee or purchaser, and, even if it could be argued that the plaintiff, however unfortunately, did fall within the words of sub-section (*1*), if read literally and strictly, he is protected under the provisions of sub-section (*2*). It is clear that the name of defendant No. 2 was inserted fraudulently and without the consent of the joint family, which was the real purchaser, or of the plaintiff, who was a member of it.

For these reasons, in my opinion, the Allahabad cases, *Baijnath Das* v. *Bishan Devi* (2) and *Ram Rup Teli* v. *Khaderu Teli* (3), were wrongly decided. In any case, they are not binding on this Court. They seem to be in conflict with the observations made in *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (1) and *Ganga Sahai* v. *Kesri* (4) [*Supra*], and the former decision was expressly dissented from in *Nataraja Mudaliyar* v. *Ramasami Mudaliar* (5), in which the law was definitely and correctly stated, and with which decision I fully agree.

(1) (1873) 12 B. L. R. 317.
(2) (1921) I. L. R. 43 All. 711.
(3) (1927) I. L. R. 50 All. 512.
(4) (1915) I. L. R. 37 All. 545; L. R. 42 I. A. 177.
(5) (1922) I. L. R. 45 Mad. 856.

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The only difficulty is raised by the case of *Suraj Narain* v. *Ratan Lal* (1), in which apparently a contrary view was taken. That was a decision of the Privy Council under the old section 317 of the Code of Civil Procedure, 1882, the wording of which differs materially from that of section 66. This decision, therefore, is clearly distinguishable. Moreover, the point raised under section 317, which affected part only of the claim, was disposed of by their Lordships within six lines of the report, and the relevant facts are nowhere stated. No decisions are mentioned in the judgment nor does there seem to have been much discussion on the matter.

The result is that this appeal must be dismissed with costs.

M. C. GHOSE J. I am of opinion that section 66 of the Code of Civil Procedure is not a bar to the success of the plaintiff in the particular circumstances of this case. The grandfather of the plaintiff had taken mortgage of this property and it was afterwards purchased from the mortgagors by the plaintiff and the defendant No. 1, the heirs of the plaintiff's grandfather. The facts found by the courts below show that afterwards defendant No. 1, who was the *kartâ* of the joint family, fraudulently defaulted in payment of a small amount of rent and had the property sold for arrears of rent and purchased it out of the joint family funds in the name of his second son, the defendant No. 2.

In these circumstances, having regard to the observations of their Lordships of the Privy Council in the cases of *Bodh Sing Doodhooria* v. *Gunesh Chunder Sen* (2) and *Ganga Sahai* v. *Kesri* (3), section 66 is no bar to the success of the suit.

I agree with my learned brother that the appeal should be dismissed with costs.

*Appeal dismissed.*

G.S.

(1) (1917) I. L. R. 40 All. 159; L. R. 44 I. A. 201.

(2) (1873) 12 B. L. R. 317.

(3) (1915) I. L. R. 37 All. 545; L. R. 42 I. A. 177.