

APPELLATE CIVIL.

Before Mallik and Jack JJ.

UPENDRALAL PAL

v.

AJAHARUDDIN AHMAD.*

1933

Dec. 14, 19, 20 ;

1934

Jan. 8.

Execution—Sale—Certified purchasers, some of the decree-holders—Suit by co-decree-holders against the certified purchasers alleging private agreement—Maintainability of suit—Code of Civil Procedure (Act V of 1908), s. 66.

The operation of section 66 of the Code of Civil Procedure cannot be ousted by the existence of any private agreement or understanding between the certified purchasers (some of the decree-holders) of any property at an execution sale and the co-decree-holders.

Bodh Singh Doodhuria v. Gunes Chunder Sen (1) distinguished.

SECOND APPEAL by the plaintiffs.

The material facts and the arguments appear from the judgment.

Roopendrakumar Mitra and *Bijanbihari Mitra* for the appellants.

Gunadacharan Sen and *Praphullakumar Ray* for the respondents.

Cur. adv. vult.

MALLIK J. The facts, which gave rise to the present litigation, were briefly these: the plaintiffs, who may be described as the Pals, and two brothers, Mahim Ghatak and Ramesh Ghatak, and one Radharaman all got decrees against one Izzat Bux and when, in an execution proceeding, the property in suit, which belonged to Izzat, was put up to sale, it was purchased in the name of Ramesh and Mahim

*Appeal from Appellate Decree, No. 1333 of 1931, against the decree of A. N. Sen, District Judge of Faridpur, dated Jan. 5, 1931, reversing the decree of Shibcharan Sil, First Subordinate Judge of Faridpur, dated April 29, 1930.

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alone, in pursuance of an agreement that the property would belong to Mahim and Ramesh in 8 annas and to the Pals and Radharaman in 8 annas, Mahim getting a 4 annas share, Ramesh another 4 annas share, the Pals two-thirds of 8 annas and Radharaman one-third of 8 annas, the parties having contributed in these shares to the fund, with which the property was purchased at the sale. This took place in the year 1915 and the parties were put in joint possession of the property in 1918. Thereafter, Ramesh sold three-fourths of his share in the property to defendants Nos. 1 to 7 in the name of defendant No. 9 and one-fourth share to defendant No. 10, stating, however, in the *kabâlâs* that were executed that his share in the property was 8 annas. On these facts the plaintiffs, the Pals, instituted the suit, that has given rise to the present appeal, for declaration of their title to an one-third share in the property (being two-thirds of 2) and for recovery of possession of the same after partition. Mahim Ghatak, who was defendant No. 11 in the suit, supported the plaintiffs' case. The plaintiffs' claim, however, was resisted by defendant No. 9 only, none of the other defendants having filed any written statement in the case.

The main grounds, on which the plaintiffs' claim was resisted, were two in number and these two grounds were: (1) that the suit was not maintainable, in view of the provisions of section 66 of the Code of Civil Procedure, the property having been purchased in the name of Mahim and Ramesh and Mahim and Ramesh having been the only certified purchasers and (2) that defendant No. 9, having purchased a six-anna share in the property from Ramesh who was the ostensible owner of one-half of the property for value without notice of the rights of the other people, he (defendant No. 9) was entitled to a six-anna share under section 41 of the Transfer of Property Act.

Both the courts below found that the arrangement before the purchase at the auction-sale in 1915 had been as stated by the plaintiff, that is, that Mahim

should get one-fourth share, Ramesh one-fourth share, the plaintiffs one-third share and Radharaman one-sixth share of the property and that they had contributed to the purchase-money in these shares. The trial judge held also that section 66 of the Code of Civil Procedure was no bar to the suit and, holding in addition that defendant No. 9 was not a *bona fide* purchaser without notice, found for the plaintiffs and made a preliminary decree for partition. Against that decision of the trial judge, an appeal was taken by defendant No. 9 to the appellate court and the learned District Judge set aside the decision of the court of first instance and, holding that section 66 was a bar to the suit, dismissed the suit in its entirety finding also at the same time that defendant No. 9 was a *bona fide* purchaser for value without notice. The plaintiffs are the appellants before us.

The chief controversy before us has centred round the question as to the applicability or otherwise of section 66 to the present case.

On behalf of the appellants, it was contended that section 66 would not operate as a bar and in support of this contention reliance was mainly placed on the decisions in *Bodh Singh Doodhuria v. Gunesh Chunder Sen* (1), *Ganga Sahai v. Kesri* (2), *Achhaibar Dube v. Tapasi Dube* (3) and *Vishwanath Dhondiraj Gayadhani v. Pandharinath Ganesh* (4). Leaving aside from our consideration for the present the case of *Vishwanath Dhondiraj Gayadhani v. Pandharinath Ganesh* (4), none of the other three cases cited would, in my opinion, help the plaintiffs-appellants in the present case. In *Bodh Singh's* case (1), where a property was purchased at a court-sale by a member of a joint Hindu family in his name but with the family funds, the other members were held to be entitled to sue him for a declaration that the purchase was made on behalf of the whole family though the

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(1) (1873) 12 B. L. R. 317.

(3) (1907) I. L. R. 29 All. 557.

(2) (1915) I. L. R. 37 All. 545 (554);

L. R. 42 I. A. 177 (182).

(4) (1926) I. L. R. 50 Bom. 600.

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certificate of sale stood in his name. In that case, if their Lordships of the Judicial Committee held that section 66 was no bar to the suit, they held so, on the ground that by the operation of law the members of a joint Hindu family are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, and not because there had been any private agreement or undertaking as was the case in the case before us.

Our attention was drawn to the observations of their Lordships of the Privy Council in the case of *Ganga Sahai v. Kesri* (2) to the effect that the provisions of section 66 are designed to check the practice of making what are known as *benâmi* purchases at execution sales for the benefit of the judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. But the case of *Ganga Sahai v. Kesri* (1) was a case of a joint mortgagee-decree-holder against the other mortgagee-decree-holder, who, in execution of the joint mortgage decree, purchased the mortgaged property in his own name. If section 66 was, in that case, held to be inapplicable, it was not because the co-mortgagee-decree-holders had come to an agreement or undertaking that the property would be purchased in the name of one of them though it would be the property of both, but because the application for execution was made by one of the joint decree-holders subject to the rights of the other decree-holder. The rights of the other decree-holder accrued not from any agreement or undertaking between the two joint decree-holders but from the operation of law as embodied in section 231 of the old Civil Procedure Code corresponding to Order XXI, rule 15 of the Code of 1908.

The learned advocate for the appellant next drew our attention to the observations of Richards J. in the case of *Achhaibar Dube v. Tapasi Dube* (2) which

(1) (1915) I. L. R. 37 All. 545 (554);
 L. R. 42 I. A. 177 (182).

(2) (1907) I. L. R. 29 All. 557.

were quoted with approval in the case of *Vishwanath Dhondiraj Gayadhani v. Pandharinath Ganesh* (1). What was laid down in those observations was that the provisions of section 66 do not apply when the parties stand in the relationship of partners and one of the partners purchases the property in his own name with the partnership funds. Mr. Sen for the respondent in a way conceded that section 66 would be no bar to a case of partnership. But his contention was that the present case was not a case of partnership. This contention seems to me to be well founded. The facts of the present case are no doubt practically on all fours with the facts of the case of *Vishwanath Dhondiraj Gayadhani v. Pandharinath Ganesh* (1) where it was held that section 66 was inapplicable on the ground that the case was a case of partnership. But if one would look to the definition of the word "partnership", as contained in section 239 of the Indian Contract Act, with illustration (b) of the same, there can be no manner of doubt that the present case was not a case of partnership. None of the cases, on which so much reliance was placed on behalf of the appellant, is, therefore, in my judgment, of any avail to him. Indeed there are some observations in the case of *Bodh Sing Doodhoooria v. Gunesh Chunder Sen* (2), which, in my opinion, go against the appellant's case. In that case, their Lordships of the Privy Council observed that the provisions of section 66 cannot be taken to affect the rights of members of a joint Hindu family, who, by the operation of law, and not by virtue of any private agreement or undertaking, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds. This observation, containing, as it does, the expression "Not by virtue of any private agreement or undertaking," lays down, to my mind, by implication, that the operation of section 66 cannot be ousted by the

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existence of any private agreement or undertaking as was the case in the case before us. I would, therefore, hold, agreeing with the learned District Judge, that section 66 was applicable to the present case.

The learned District Judge dismissed the plaintiffs' suit in its entirety. With this, in the circumstances of the case, I am unable to agree. The plaintiffs claimed two-thirds share of 8 annas in the property on the allegation that 8 annas belonged to Ramesh and Mahim jointly and the remaining 8 annas to the plaintiffs (the Pals) and Radharaman in the proportion of 2 to 1. This claim of the plaintiffs was opposed by Ramesh's successor alone on the allegation that Ramesh had an 8 annas share and Mahim had the remaining 8 annas. Mahim, however, did not claim anything more than 4 annas. There was, therefore, no dispute as regards 4 annas and there was no resistance of the plaintiffs' claim to two-thirds so far as this 4 annas share was concerned.

I would, therefore, set aside the decree of the learned District Judge whereby the plaintiffs' suit was dismissed in its entirety and direct that the plaintiffs' title to the property to the extent of two-thirds of 4 annas or one-sixth share be declared and that they recover possession of that share of the property after partition or, in other words, I would uphold the decree of the trial court with this modification only that the plaintiffs' share in the property will be reduced from one-third to one-sixth.

In the circumstances of the case, I would make no order as to costs in this Court.

JACK J. I agree.

Appeal allowed in part.

A. K. D.