APPELLATE CIVIL.

Before Pearson and Mallik JJ.

1932

Jan. 29;
Feb. 1, 19.

SURENDRANATH HALDAR

v.

RAMANATH BARMAN.*

Benâmi—*Source of consideration as a test of the nature of transaction—Execution against personally acquired property of a party, decree being against his predecessor—Objection whether can be raised in defence in a separate suit—Code of Civil Procedure (Act V of 1908), s. 47.*

The source of the consideration is no doubt an important test in deciding a question of *benâmi*, but it is not a *sine qua non* for a decision of the question. Other facts and circumstances pointing to a finding of *benâmi* may be sufficient in cases where the evidence on the source of the consideration is not clear.

Objection to proceedings in execution against properties acquired by a party on the ground that the decree was against his predecessor-in-interest cannot be raised by him in defence in a suit brought by the auction-purchaser for declaration of his title and possession, unless the party was kept out of the knowledge of the execution proceedings by the fraud of the decree-holder. Section 47 of the Code of Civil Procedure would operate as a bar against such defence.

Beni Madhab Mandal v. *Rai Charan Ari* (1) followed.

Lakshmanchandra Naskar v. *Ramdas Mandal* (2) referred to.

SECOND APPEAL by the defendant.

The facts of the case are sufficiently set out in the judgment.

Prakashchandra Pakrasi for the appellant.

Bishwanath Naskar and *Haridas Gupta* for the respondents.

Cur. adv. vult.

MALLIK J. The suit that has given rise to the present appeal was one for declaration of title to and

*Appeal from Appellate Decree, No. 2916 of 1929, against the decree of J. M. Pringle, District Judge of 24-Parganas, dated July 31, 1929, reversing the decree of Debendrachandra Biswas, Third Addl. Subordinate Judge of 24-Parganas, dated Dec. 17, 1928.

(1) (1928) I. L. R. 56 Calc. 467. (2) (1929) I. L. R. 57 Calc. 403.

recovery of possession of some landed properties. The facts which are relevant for the purposes of the present appeal are briefly these: The plaintiff obtained a money decree against the predecessors of defendants Nos. 1 to 5 and defendant No. 6 and, on the 12th March, 1903, in execution of that decree, attached the entire property in suit. On the 18th April, 1903, there were two claim cases filed against that attachment. One was in respect of the one-third share of the property and the other was in respect of the remaining two-thirds. The first claim case was rejected, but the second case, that was brought by one Nandakumar Chatterji was allowed on the 11th May, 1903, and the two-thirds share was, thereupon, released from attachment. During the pendency of the claim case, however, Nandakumar sold the two-thirds share to defendant No. 7. This was on the 19th April, 1903. On the 19th May, 1903, the one-third share was purchased by the plaintiff at an auction-sale and this sale was confirmed on the 16th September, 1903. Thereafter, in the year 1914, the plaintiff started an execution case (Case No. 45 of 1914) praying for sale of the two-thirds share on the allegation that the defendants Nos. 1 to 5 were the real purchasers at the sale of the 19th April, 1903 and defendant No. 7 was nothing but a *benâmdâr* for them. Some objections were filed in this execution case by defendants Nos. 1 to 5, but the two-thirds share was ultimately purchased in auction by the plaintiff. This was on the 19th September, 1916, and this purchase by the plaintiff was confirmed on the 26th May, 1917, and symbolical possession was given to the plaintiff. On the basis of this purchase, as also the purchase of the one-third share on the 16th September, 1903, the plaintiff brought a suit for declaration of title to and recovery of possession, the suit that has given rise to the present appeal. Defendants Nos. 1 to 5 did not contest and the contest, so far as it related to the two-thirds share, was between the plaintiff on the one side and defendant No. 7 alone on the other, the case of defendant No. 7 being that he was not a *benâmdâr* for defendants

1932

Surendranath Haldar v. *Ramanath Barman.*

Mallik J.

Nos. 1 to 5, but the real purchaser at the sale by Nandakumar on the 19th April, 1903. Both the courts below dismissed the plaintiff's case as regards the one-third share, on the ground that so far as this share was concerned, plaintiff then had no cause of action; and as regards this one-third share, there is no appeal before us. As regards the two-thirds share, the first court dismissed the plaintiff's suit, holding that defendant No. 7 was the real purchaser and not the *benâmdâr* of defendants Nos. 1 to 5. This decision of the court of first instance as regards the two-thirds share was reversed by the court of appeal below and the appellate court gave a decree to the plaintiff in respect of the two-thirds share, finding that defendant No. 7 was the *benâmdâr* of the real purchasers—defendants Nos. 1 to 5—at the sale on the 19th April, 1903. Defendant No. 7 has appealed to this Court.

On behalf of the appellant it was, in the first place, contended before us that the lower appellate court, when it found that the evidence on the source of money that was actually paid for the purchase was not clear, was wrong in law in holding that the ostensible purchaser was not the real purchaser at the sale. It is true that the source of money is a very important test in deciding a question of *benâmi*, but there is no authority for the proposition that unless the source is established there can never be any finding of *benâmi* however good and numerous other facts and circumstances there may be pointing to such a finding. In the present case, the learned judge, although he was of opinion that the evidence on the source of money actually paid for the purchase is not very clear, came to a number of clear findings bearing on the point. He found that, about the time of the conveyance of 19th April, 1903, defendants Nos. 1 to 5 had borrowed a substantial sum of money. He found that, at the time of the transaction, the defendants were in funds. He found further that the conveyance was for the real benefit of defendants Nos. 1 to 5. He further found that defendant No. 7 abstained from making any claim or taking any steps in the execution proceedings during

the years 1914 to 1917. He found, moreover, that defendant No. 7 had admitted that he was never in possession of the property and that the possession was not with defendant No. 7 but with defendants Nos. 1 to 5. These findings were, in my opinion, abundant for the conclusion that the transaction was a *benâmi* one and that defendant No. 7, the ostensible purchaser, was not the real purchaser but the real purchasers were defendants Nos. 1 to 5.

In the lower appellate court, a point was raised by the defence that if the defendants Nos. 1 to 5 were the real purchasers at the sale of April, 1903, the plaintiff in execution of a decree which he obtained against the predecessor-in-interest of defendants Nos. 1 to 5 could not lay his hands on the properties in suit. The learned judge would not allow the defence to raise the point holding that the provisions of section 47 of the Code of Civil Procedure operated as a bar against him. There was a certain amount of controversy before us on this point. On behalf of the appellant, it was submitted that the defendant could raise the question in the present suit, while the contention of the other side was that the point could not be canvassed again. Both parties cited a number of cases in support of their respective contentions. There is no doubt that there was a conflict of decisions on the point raised, but before the Full Bench decision in the case of *Lakshmanchandra Naskar* v. *Ramdas Mandal* (1), the latest decision on the point was in the case of *Beni Madhab Mandal* v. *Rai Charan Ari* (2), where an attempt was made to reconcile the conflicting decisions and it was laid down that "parties are precluded from "raising or canvassing any such question" relating to the execution, discharge or satisfaction of the decree "in any separate suit or proceeding, except by way of "defence in a separate suit when the defendant has "been kept out of knowledge of the execution "proceedings until after such suit has been brought by "the fraud of the decree-holder or judgment-creditor."

(1) (1929) I. L. R. 57 Calc. 403. (2) (1928) I. L. R. 56 Calc. 467, 472.

1932

Surendranath Haldar v. *Ramanath Barman.*

Mallik J.

There was no question of any such fraud in the present case. That being so, following the decision in *Beni Madhab's* case (1), as also relying on the observations in the Full Bench decision in *Lakshmanchandra Naskar's* case (2), I hold that the District Judge was right in holding that section 47 of the Code of Civil Procedure operated as a bar against the defence raising the point that the plaintiff should not lay his hands on the properties in suit on the ground that, as the decree had been against the predecessor of defendants Nos. 1 to 5, the plaintiff, in execution of that decree, could not proceed against these properties which had been purchased by the defendants Nos. 1 to 5.

The third and the last contention on behalf of the appellant was that Order XXIII, rule 1 of the Code of Civil Procedure operated as a bar against the present suit of the plaintiff for recovery of the property in question. It appears that, in the year 1915, the plaintiff instituted a suit—Suit No. 88 of 1915—for possession of the whole of the property, but, by a subsequent petition, dated 15th January, 1917, he gave up his claim to the two-thirds share by an amendment of the plaint. From these facts, it was argued that the plaintiff could not entertain, as he has tried to do in the present case, any claim to this two-thirds share. In the circumstances of the present case, this argument has not, in my judgment, much substance in it. It was satisfactorily established that if in Suit No. 88 of 1915 the entire property was at first claimed, the claim to the two-thirds share was made through a mistake only and it appears that the plaintiff's purchase of this two-thirds share, on which alone a claim to it could be based, took place only on the 19th September, 1916 long after the institution of that suit. This purchase no doubt took place before the petition for amending the plaint was made on the 15th January, 1917. But this petition was filed several months before the plaintiff's auction-purchase

(1) (1928) I. L. R. 56 Calc. 467, 472. (2) (1929) I. L R. 57 Calc. 403.

1932

Surendranath Haldar v. *Ramanath Barman.*

Mallik J.

of the two-thirds share was confirmed and the plaintiff's title to that share became perfect. In these circumstances, the provisions of Order XXIII, rule 1 of the Civil Procedure Code would not, in my opinion, be applicable to this case.

All the three contentions, urged on behalf of the appellant, therefore, fail. The appeal is accordingly dismissed with costs.

PEARSON J. I agree.

Appeal dismissed.

A. A.