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result of having been invested with such authority, and must be exercised before he proceeds to deal with the case further in the exercise of his jurisdiction.

It appears to me then that a Judge cannot give himself jurisdiction by wrongly determining the preliminary question, and that the High Court has authority to inquire whether such preliminary question is rightly or wrongly decided, and, if wrongly decided against the plaintiff, to direct the Judge to exercise his jurisdiction, and if wrongly decided in the plaintiff's favor, to set aside the decree or order as passed without jurisdiction.

PARKER, J.—I concur with the judgment of Muttusámi Ayyar, J.

APPELLATE CIVIL.

Before Mr. Justice Muttusámi Ayyar and Mr. Justice Brandt.

1886. Sept. 13. 1887. Nov. 14.

MONAPPA (APPELLANT),

and

SURAPPA (RESPONDENT).*

Civil Procedure Code, s. 317—Suit against benámi purchaser at court-sale, by owner, to recover the land after ejectment.

If after obtaining a certificate of sale in execution of a decree, the purchaser acknowledges that his purchase is benámi and gives up possession, or does some act which clearly indicates an intention to waive his right, or restores the property to the real owner, such act may, by reason of the antecedent relation of the parties, operate as a valid transfer of property. Defendant acted benámi in buying certain land at a court-sale for plaintiff, paid part of the purchase money for plaintiff, and allowed plaintiff to remain in possession on the understanding that defendant was to transfer the property on repayment of the balance of the purchase money. Defendant having ejected plaintiff, plaintiff sued to recover the land:

Held that s. 317 of the Code of Civil Procedure was no bar to plaintiff's suit.

APPEAL from the decree of H. M. Winterbotham, Acting District Judge of South Canara, confirming the decree of U. Babu Rau, District Múnsif of Kandapur, in suit No. 73 of 1884.

The plaintiff sued to recover from the defendant certain land. She alleged that the defendant had purchased the land on her account on the 14th September 1876 at a sale in execution of a decree, and that she had obtained possession, and that the defend-

* Second Appeal No. 1058 of 1885.

ant being certified purchaser had brought a suit in 1880 and ejected her. Defendant denied that the purchase was on plaintiff's behalf and plaintiff's dispossession, and pleaded that plaintiff was barred from maintaining suit by s. 317 and also by s. 13 of the Code of Civil Procedure, inasmuch as she was a party to the suit of 1880.

The suit was dismissed, the District Judge holding that it was barred by s. 317 of the Code of Civil Procedure.

Plaintiff appealed. She died, and the appeal was prosecuted by her brother and representative, Monappa.

Mr. *Subramanyam* and *Srinivasa Rau* for appellant.

Ramachandra Rau Saheb for respondent.

On the 13th September 1886, the Court (Muttusámi Ayyar and Brandt, JJ.) directed the District Court to return a finding on the issue—

"Did the defendant's conduct ever amount to a transfer or waiver in favor of plaintiff, of his title and possession under the purchase, before he got possession under the ejectment decrees of 1880?"

The District Court having returned a finding on this issue, the Court delivered the following

JUDGMENT:—The respondent purchased the land in dispute at a court-sale in September 1876, and the appellant's case was that the purchase was made benámi for Lingamma Shettati, his sister, and with her money. He alleged further that, though the respondent obtained the sale certificate, he agreed to transfer it to Lingamma Shettati and allowed her to continue in possession though he obtained formal delivery until he ejected her in March 1883. The third issue recorded for decision was whether the purchase was benámi, whether it was made with the plaintiff's money, and whether the respondent's conduct amounted to a transfer to Lingamma Shettati of his title as purchaser. It is found by the Judge that the respondent acted benámi for the appellant's sister in buying the property, that Rs. 600 paid as deposit belonged to her, that the respondent paid himself the balance of the purchase money (Rs. 1,650), and that the appellant's sister was allowed to continue in possession until March 1883 on the understanding that the respondent was to transfer the property back on his being paid the balance of the purchase money.

Though the respondent objects to the finding and contends that he only agreed to resell for Rs. 3,600, we see no sufficient

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reason to doubt the correctness of the conclusion at which the Judge has arrived. It must be observed that the facts, as now found, support neither the appellant's nor the respondent's case. According to the appellant, the purchase was benámi and it was paid for with his sister's money; and, according to the respondent, there was only an agreement to resell for Rs. 3,600 and that the purchase was made on his own account and with his own money. The question which we have to decide is whether the appellant is entitled to any and what relief upon the facts actually found, regard being had to s. 317 of the Code of Civil Procedure. That section enacts that 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 some one through whom such other person claims. There is thus a statutory direction that a benámi purchase at an auction sale in execution of a decree shall not be accepted as the sole ground of a suit against the certified purchaser. In *Mussumat Buhuns Kowur* v. *Buhoorec Lall*(1), the Judicial Committee observed, with reference to the corresponding s. 270 of Act VIII of 1859, that it should be construed strictly and literally, and that it was applicable only to a suit brought *against* a certified purchaser to assert the benámi title against him; that the statute did not make benámi purchases illegal; and that the real owner for whom the purchase was made, if in possession, might defend a suit brought by the holder of the certificate and show that the latter was an apparent owner only and a mere trustee. The Judicial Committee referred with approval to a passage in the judgment of the High Court at Calcutta (11 Suth., W.R.F.B., 20), in which the learned Chief Justice Sir Barnes Peacock, in delivering the judgment of the High Court, held in effect that if the certified purchaser was really a benámidár or trustee for another person, and after the certificate of sale did some fresh act to put the purchaser in possession, that might operate as a transfer of the property to him. The Court observed that "if a person who has gained a title by limitation waives that title in favor of the real owner and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right, which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benámidár should acknowledge the purchase to have been made

(1) 14 M.I.A., 496.

benámi and waive the right conferred upon him by ss. 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of possession to the real purchaser." The Judicial Committee observed, with reference to the foregoing passage, that when possession is given by one party to another, it is material to inquire whether by reason of the antecedent relation between the parties, it was meant to operate as a transfer of the property. It is obvious, therefore, that, when after obtaining the certificate of sale, the purchaser acknowledges that his purchase is benámi and gives up possession, or does some act which unequivocally indicates an intention to waive his right, or to restore the property to the real owner, the fresh act might, by reason of the antecedent relation between the parties, operate as a valid transfer of property, the reason being that benámi purchases are not made illegal, though the real purchaser is disabled from maintaining a suit against the certified purchaser at an auction sale in execution of a decree on the sole ground that he was only a benámidár.

We accept the finding of the Judge and decree that, on payment of Rs. 1,650 by the appellant to the respondent within three months from the date of receipt by the lower appellate court of a certified copy of the decree of this Court, the respondent do deliver up possession to appellant of the property in suit, and, failing such payment, that this suit do stand dismissed; and we allow mesne profits only from date of our decree, the amount to be determined in execution; and there will be no costs throughout as the case of neither party is wholly true.