APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Parker.

KUMARA (PLAINTIFF), APPELLANT,

and

SRINIVASA (DEFENDANT), RESPONDENT.*

1887. Oct. 28. Dec. 20.

Evidence Act, s. 92—Civil Procedure Code, s. 317.

By an agreement in writing, A, after reciting that he bid for certain property sold in execution of a decree benámi for B and paid the deposit amount into court for B and that B paid the balance, promised to convey the property to B. In a suit by B to recover the property from A:

Held that, under s. 92 of the Evidence Act, B was not debarred from proving that A bought the property for himself and not benámi for B.

APPEAL from the decree of J. Hope, District Judge of South Arcot, confirming the decree of Appavayyar, District Múnsif of Chidambaram, in suit No. 559 of 1885.

The plaintiff sued to compel the defendant to execute to him a conveyance of certain property and to recover the same and mesne profits. He alleged in his plaint that defendant bought the land at a court-sale and promised to convey the same to plaintiff. The plaintiff filed the following agreement (exhibit A):—"In the court-sale (held) in suit No. 275 of 1881, on the file of District Múnsif's Court at Chidambaram, I bid for the property, which is the subject of sale, for Rs. 771, for you as a name-lender, received from you Rs. 200, the deposit money, on the date of sale, and paid for you. As the balance of Rs. 571, after deducting this, was paid by yourself in court this day, I shall obtain the sale-certificate for the said property as soon as the sale is confirmed, sell it to you, and put in a petition to the court to deliver the said property to you. Thus was this agreement executed by me out of my consent."

The Múnsif, from the terms of exhibit A, held that the suit was really one to recover property from a certified purchaser contrary to the provisions of s. 317 of the Code of Civil Procedure, and dismissed the suit.

* Second Appeal No. 87 of 1887.

KUMARA v. SRINIVASA.

Subramanya Ayyar for appellant.

Bhâshyam Ayyangâr for respondents.

The further facts necessary, for the purpose of this report, appear from the judgment of the Court (Collins, C.J., and Parker, J.).

JUDGMENT.—The case set forth in the plaint is that defendant really intended at first to purchase the land for himself and borrowed Rs. 200 of plaintiff for that purpose in order to make the deposit required by law; that defendant did bid and make that deposit on his own account, but that, when he afterwards found himself unable to complete the purchase, he executed exhibit A to the plaintiff, asking plaintiff to pay the balance of the purchase money into court and contracting on his part to convey the property to plaintiff on confirmation of the sale.

The recitals of exhibit A are no doubt inconsistent with this plaint, but the suit, as it is disclosed in the plaint, is one for specific performance of a promise to convey and is not one against the certified purchaser on the ground that the purchase was made on behalf of the plaintiff.

The allegations made in the plaint may or may not be true, but on the cause of action there disclosed it cannot be said that the suit is barred under s. 317, Code of Civil Procedure. The rule laid down in that section is, we may observe, a rule of procedure only, and there is nothing in itself illegal in one man buying property in the name of another.

The real question is whether plaintiff is precluded by s. 92 of the Evidence Act from giving evidence, which will be inconsistent with exhibit A. It is urged that a suit based upon the state of facts recited in exhibit A would be clearly prohibited under s. 317 of the Code of Civil Procedure, and that plaintiff cannot show that the agreement was of a different character.

In order to determine this question, it is necessary to consider what a contract really is. It is defined in s. 2(*h*) of the Indian Contract Act as an agreement enforceable by law, and an agreement is defined as "every promise and every set of promises forming the consideration for each other."

If the agreement was that expressed in exhibit A, the promise was to convey the land to the plaintiff. No consideration is alleged, and the writing could add no force to the promise implied by law to convey to a person the property purchased on his behalf.

If, on the other hand, the agreement was that set up in the plaint, the promise was the same, viz., to convey the land to plaintiff; but the consideration for the promise was the payment of Rs. 571 into court by plaintiff in order to enable defendant to complete the purchase which he had made for himself and save the forfeiture of the deposit money.

In each case, therefore, the promise was the same, viz., to convey to plaintiff, but the reason or the consideration for the promise is different. It has been held that s. 92 of the Evidence Act does not prevent a party to a contract from showing that the consideration was different to that described in the contract—*Hukum Chand* v. *Hirálal*(1)—and the Madras High Court has held in *Vasudeva* v. *Narasamma*(2) that s. 92 does not prevent the disproof of a recital in a contract as to the consideration that has passed by showing that the actual consideration was something different from that alleged.

Here the difference is between the actual promise to pay money into court and the promise legally implied as the consideration for the promise to convey, but whichever of them was the consideration the terms and character of the agreement, viz., that defendant shall convey to plaintiff, are neither contradicted nor varied.

We think, therefore, that plaintiff is not precluded by s. 92 from bringing evidence in support of the case put forward in his plaint, and we will, therefore, reverse the decrees of the courts below and remand the suit to the court of first instance for a decision upon the facts. We do not wish, at the present time, to express any opinion upon the merits. The appellant should have his costs in this and in the lower appellate court, and the costs in the court of first instance should abide and follow the result.

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(1) I.L.R., 3 Bom., 159. (2) I.L.R., 5 Mad., 6