APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

1893. March 17. October 11.

SANKUNNI NAYAR (DEFENDANT No. 2), APPELLANT IN SPECIAL APPEAL No. 779 of 1892,

v.

NARAYANAN NAMBUDRI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 1), RESPONDENTS.*

RAMAN NAMBIAR (DEFENDANT No. 1), APPELLANT IN SPECIAL APPEAL No. 943 OF 1892,

v.

NARAYANAN NAMBUDRI AND ANOTHER (PLAINTIFF AND DEFENDANT No. 2), RESPONDENTS.*

Civil Procedure Code—Act XIV of 1882, *s.* 317—*Effect of benami purchase, and purchase as execution-debtor's agent.*

Where the purchaser at an execution sale is the agent of the execution-debtor and buys the property as such, though he advances the purchase money on the understanding that he is to be repaid, a suit for possession of the property is maintainable by the latter against the former. Such a transaction is not a mere *benami* purchase, and is not a bar to such a suit under section 317 of the Civil Procedure Code.

SECOND APPEAL against the decrees of E. K. Krishnan, Subordinate Judge of South Malabar, in appeal suits Nos. 1064 and 1065 of 1890, confirming the decree of U. Achutan Nayar, District Munsif of Nedunganad, in original suit No. 339 of 1889.

The facts of the case appear sufficiently for the purpose of this report from the judgments delivered by the High Court.

Sundara Ayyar for appellant in No. 779.

Govinda Menon for respondents in No. 779.

Sankaran Nayar for appellant in No. 943.

Bhashyam Ayyangar for respondents in No. 943.

BEST, J.—These two appeals are against the same decree, the appellant in No. 779 being the second defendant, and appellant in No. 943 the first defendant.

* Special Appeals Nos. 779 and 943 of 1892.

The suit was brought by plaintiff for possession of two items of land alleged to be the jenm property of plaintiff's house and demised by plaintiff's ancestor on kanom for Rs. 412-9-2 to a former karnavan of defendants 2 to 15 in Kollam 1040 (1864-65). Plaintiff's case is that on the land being sold (in 1874) in execution of decree in original suit No. 232 of 1868, obtained against plaintiff's father, it was purchased by first defendant's late karnavan Raman Nambiar *benami* for plaintiff's mana (house), the said Raman Nambiar having been appointed by plaintiff's mother manager of plaintiff's mana, plaintiff being an infant aged two years in 1048 (1872-73) when his father died; that Raman Nambiar continued as such manager till 1054 (1878-79), when first defendant was appointed as his successor and is still the kariastan; that in 1064 (1888-89) when the kanom was renewed to second defendant at the advice of the first defendant, the plaint items were fraudulently excluded. Hence this suit.

The first defendant denied that either his karnavan or himself ever managed on behalf of plaintiff's mana, and pleaded that the purchase in 1874 was made by his karnavan with his own money and on account of his own tarwad and not *benami* for plaintiff; that the suit was opposed to sections 30 and 317 of the Code of Civil Procedure, and also bad for misjoinder of causes of action; further, that it was time-barred, and that plaintiff attained his majority more than three years before the institution of the suit.

Defendants 2 to 5 supported first defendant, and the other defendants allowed the suit to proceed *ex parte* as far as they were concerned.

The two lower Courts have concurred in finding that at the date of the purchase of the plaint property, first defendant's karnavan was managing on behalf of plaintiff's mana; that he did in fact purchase the property for the plaintiff's illom, though the money paid was first defendant's karnavan's own; that there was no adverse possession till January 1889 when plaintiff granted the renewal kanom and first defendant executed the kanom deed XXIII shortly after for the plaint lands; also, that the suit is brought within three years of plaintiff's attainment of majority, and that the cause of action did not arise till January 1889. It has further been found that the suit is not bad either for misjoinder of causes of action or under section 30 of the Code of Civil Procedure.

SANKUNNI NAYAR v. NARAYANAN NAMBUDRI.

The principal contention before this Court is that the suit is bad as being opposed to section 317 of the Code of Civil Procedure, which declares that "no suit shall be maintained against the certified purchaser (at a Court sale) 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."

The District Munsif held the above section to be no bar to the suit, because "the auction was held and the sale certificate "granted before the new Act (X of 1877) came into force and the "provisions of section 317 apply to a certified purchaser under the "Act." But, as well observed by MAHMOOD, J., in *Aldwell* v. *Ilahi Bakhsh*(1), section 317 of the present Civil Procedure Code has not altered in principle the rule of law contained in section 260 of the old code (VIII of 1859). The Subordinate Judge's reason for holding this suit not to fall within the prohibition contained in section 317 is because it was held in *Sohun Lall* v. *Lala Gya Pershad*(2) that section 260 of Act VIII of 1859 did not preclude a suit by a decree-holder against the certified purchaser for the purpose of establishing his right to bring the property to sale in execution as the property of the judgment-debtor, and "if so," says the Subordinate Judge "I do not see why the judgment-"debtor himself cannot bring a suit for a declaration that the "property was purchased by his agent *benami* for himself." I imagine, however, that it is this latter case that the legislature had expressly in view in enacting section 317. As observed by the Chief Justice and HANDLEY, J., in *Rama Kurup* v. *Sridevi*(3) "the object of the section is to put a stop to *benami* purchases at "execution sales, and this object can only be carried out by en-"forcing it in all cases without regard to consequences." As further observed in the same judgment, "It is not a sufficient rea-"son for declining to carry out the express terms of the section; "that to do so would be to allow a fraud to be perpetrated. The "person in whose name a purchase has been made for the benefit "and with the money of another, of course, commits a fraud in "claiming the property as his own. Nevertheless, the law says "that a suit shall not be maintained against him on the ground "that the purchase was *benami* and thus provides that his fraud

(1) I.L.R., 5 All., 478. (2) 6 N.W.P., 265.
(3) I.L.R., 16 Mad., 290.

"shall prevail." As was also remarked in *Ramakrishnappa v. Adinarayana*(1) "the effect of section 317 can only be taken to "be to enable certified purchasers and those claiming under them "to avoid any arrangement made with them in regard to the "purchase in the nature of a trust."

The present, however, is not a case of benamidar pure and simple. It is found that Raman Nambiar was, at the time of the purchase, manager on behalf of plaintiff, who was an infant, and that other would-be purchasers of the property abstained from bidding, because they were given to understand that the purchase by Raman Nambiar was being made by him as such manager and on behalf of the minor. Consequently, property worth Rs. 2,000 was allowed to be knocked down for Rs. 230. Moreover, Raman Nambiar never set up any claim to the property as his own Such being the case, I do not think the first defendant can be allowed to succeed in his attempt to secure the property for himself under colour of section 317 of the Civil Procedure Code.

But first defendant is entitled to interest on the Rs. 230 decreed to him from 25th July 1874, the date of sale. The lower Courts' decrees will, therefore, be modified by directing plaintiff to pay to first defendant interest at 6 per cent. per annum from 25th July 1874 to date of payment on the Rs. 230 decreed to first defendant. Plaintiff and first defendant will pay each other costs of the appeal proportionate to the amount allowed and disallowed.

Second defendant's appeal No. 779 is dismissed with costs.

MUTTUSAMI AYYAR, J.—I come to the same conclusion. The question for determination in these second appeals is whether upon the facts found the decision of the Courts below is correct. The substantial parties to this suit are the son of the execution-debtor in original suit No. 232 of 1868 and the representative of the certified purchaser at the Court sale held in execution of the decree passed therein. It is provided by section 317 of the Civil Procedure Code 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 of some one through whom such other person claims. Although Act VIII of 1859 was in force when the sale took place in the present case, section 317 has not,

(1) I.L.R., 8 Mad., 511.

SANKUNNI NAYAR v. NARAYANAN NAMBUDRI.

as observed in *Aldwell* v. *Ilahi Bakhsh*(1) altered in principle the rule of law contained in section 260 of Act VIII of 1859. That rule is, *not* that a *benami* purchase is void altogether, but that it shall not be available as a ground of action against a certified purchaser. The Privy Council held in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya and Shamapuddo Bandopadhya*(2) that when the certified purchaser is the plaintiff, the real owner, if in possession, and if he honestly obtained that possession, may rely on the *benami* purchase as a ground of defence. It was also pointed out by this Court in *Ramakrishnappa* v. *Adinarayana*(3) that a *benami* purchase is not invalid even as a ground of claim as against defendants who are neither certified purchasers nor claim under them. Another limitation of the rule is that indicated by the second paragraph of section 317, viz., that the protection vouchsafed to a certified purchaser does not extend to cases of fraud. The suit from which these second appeals arise was brought against the anandravan of the certified purchaser, and the ground on which the Courts below rest their decision is that the plaintiff is the beneficial owner, and that the certified purchaser under whom the first defendant claims is *benami* purchaser or his trustee. This ground of decision is inconsistent with the effect of section 317 which is described in *Ramakrishnappa* v. *Adinarayana*(3) as enabling the person claiming under the certified purchaser to avoid any arrangement made regarding the *benami* purchase. If the facts found disclosed a *benami* purchase and nothing more, the appeals must prevail. But it is also found that Raman Nambiar was, at the time of the Court sale, managing the affairs of respondent's illom as its agent, and that he bought the land as such, though he advanced the purchase money on the understanding that he was to be repaid. It is also found, as a fact, that the market value of the land in dispute was Rs. 2,000, whilst it was bought at the Court sale for Rs. 230. The District Munsif observes that there is strong evidence to show that numerous persons who went to bid at the Court sale were dissuaded from doing so by Raman Nambiar, who represented to them that he was buying the land for the use of respondent's illom. It is also found that Raman Nambiar continued to be the

(1) I.L.R., 5 All., 478. (2) L.R., 2 I.A., 154.
(3) I.L.R., 8 Mad., 511.

agent of the illom till his death, and that after him, the first defendant was agent until the date of the controversy which resulted in this litigation. Until 1889, the kanom originally granted by the illom was outstanding, and it does not appear that Raman Nambiar ever asserted his title to the land in dispute, or that the first defendant asserted the right of his tarwad to it prior to 1889. Under these circumstances, I consider that the decision of the Courts below can be supported on the ground that Raman Nambiar bought the land as agent of plaintiff's illom subject to a charge in his favour for the amount advanced by him, and that until 1889 the land was treated as the property of the illom; otherwise an agent would be enabled to make a profit out of his principal's property, which he intended to deal with as agent, and continued to do so till 1889, and thereby to turn the understanding on which his name was inserted in the certificate and the land was since held into a means of perpetrating fraud on his principal. I also think that interest should be awarded on Rs. 230 in the decree proposed.

I concur with my learned colleague on the other questions raised on second appeal and in the decree proposed by him.

APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Best.

NARASIMHA RAZU (PLAINTIFF No. 1), APPELLANT,

v.

VEERABHADRA RAZU AND OTHERS (DEFENDANTS Nos. 2 and 3 and PLAINTIFF No. 2), RESPONDENTS.*

1893. Nov. 1, 2, 8. Dec. 12.

Hindu law—Inheritance—Illatom adoption—Sapratibandha property.

There is no evidence that the custom of *illatom* adoption exists among the Kondarazu caste of the Vizagapatam district. *Sapratibandha* (liable to obstruction) property vests in the heirs in existence at the time the inheritance opens, and is not subject to variation by the subsequent birth of any co-heir.

APPEAL against the decree of H. R. Farmer, District Judge of Vizagapatam, in original suit No. 3 of 1890.

---

* Appeal No. 85 of 1892.