

APPELLATE CIVIL—FULL BENCH.

*Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling
and Mr. Justice Sadasiva Ayyar.*

AMRUTAM VENKATAPPA AND TWO OTHERS (PLAINTIFFS),
APPELLANTS,

1918,
December 2,
1919,
April 7.

v.

VAVILALA JALAYYA (DEFENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), sec. 68—Auction sale in the name of defendant—Agreement to sell half-share to plaintiff after sale-certificate is obtained—Sale, whether benami—Agreement subsequent to sale to convey—Suit for specific performance of latter agreement, whether barred.

Where the defendant agreed that certain immoveable property should be purchased in his name in Court auction and that one-half of it should be conveyed by him to the plaintiff after the sale-certificate was obtained, and under an agreement subsequent to the purchase the defendant agreed to execute a registered conveyance :

Held, by the Full Bench, on a suit being brought for specific performance of the latter agreement, that the suit was not barred under section 68 of the Civil Procedure Code.

SECOND APPEAL against the decree of K. SRINIVASA RAO, the District Judge of Guntūr, in Appeal Suit No. 396 of 1916, preferred against the decree of K. KALYANASWAMI, the District Munsif of Ongole, in Original Suit No. 337 of 1915.

The material facts appear from the following ORDER OF REFERENCE TO THE FULL BENCH, passed by SESHAGIRI AYYAR and PHILLIPS, JJ. :—

ORDER OF REFERENCE TO A FULL BENCH.

SESHAGIRI AYYAR, J.—The facts found are: Plaintiff and the defendant agreed that at the Court auction the property in suit should be purchased in the name of the defendant and that one-half of it should be conveyed to the plaintiff after obtaining the certificate of sale: some money was paid before the Court auction, and apparently plaintiff was put in possession of the half-share. In September 1907, a promissory note for the balance of the purchase money due from plaintiff was executed. Nearly 5 years afterwards, the promissory note was discharged,

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and Exhibit A was executed to the plaintiff in which it was provided that the defendant should execute a conveyance for the half-share whenever plaintiff demanded it. This suit is to enforce that agreement. In the plaint it is stated that the half share intended to be conveyed was purchased in the name of the defendant benami for the plaintiff. The question for consideration is whether the suit is within the mischief of section 66 of the Code of Civil Procedure.

There is some difference between the language of section 317 of the old Code and that of section 66 of the new Code: but we do not think there is any material alteration in the principle of the section. In this Court, the decisions have not been uniform on the question; in *Kumara v. Srinivasa*(1), *Sankunni Nayar v. Narayunan Nambudri*(2), and *Kumbalinga Pillai v. Ariaputra Padiachi*(3), suits under similar circumstances were held not barred by section 317. On the other hand, in *M. Subramaniam Pillai v. Gopalarama Subramania Ayyar*(4), the decision was the other way. Recently, COURTS TROTTER and SRINIVASA AYYANGAR, JJ., had to consider the question in A.S. Nos. 167 and 215 of 1914. Apparently, in the view taken by COURTS TROTTER, J., such a suit would not be affected by section 66 of the Code. There is also the dictum of the Judicial Committee in *Gangai Sahai v. Kesari*(5), that the object of the section is to prevent judgment-debtors from getting property purchased in the names of third parties benami for themselves. The language of the section seems to be wider. However, as the question is one of some importance, we have resolved to ask the opinion of a Full Bench on the following question:—

When the plaintiff alleges that the auction-purchaser is a *benamidar* for him and sues to enforce specifically a subsequent agreement executed by the certified purchaser to convey the property, is section 66 a bar to such a suit?

ON THIS REFERENCE

P. Chenchiah for the appellants.—The case is referred to the Full Bench on account of some conflict of rulings of this High Court. The decisions on section 317 of the old

(1) (1898) I.L.R., 11 Mad., 213.

(2) (1894) I.L.R., 17 Mad., 283.

(3) (1895) I.L.R., 18 Mad., 436.

(4) (1915) 29 I.O., 138.

(5) (1915) I.L.R., 37 All., 545.

Code of 1882 hold that a suit such as the present is not prohibited by section 317 of the Code; see *Kumara v. Srinivasa*(1), *Sankunni Nayar v. Narayanan Nambudri*(2) and *Kumbalinga Pillai v. Ariaputra Padiachi*(3). But the ruling in *M. Subramaniam Pillai v. Gopalarama Subramania Ayyar*(4) was the other way. The last case is distinguishable from the present on the ground that here possession has been given to the plaintiff and he wants only a conveyance to be executed. This case is not really a case of a real owner suing as such to recover property from a benamidar. There was really no benami transaction. There was an agreement with the real purchaser, namely, the defendant, that the plaintiff should pay a part of the consideration and that the defendant should purchase the property in auction and convey one-half of it to the plaintiff, after the defendant obtained the sale certificate. The plaintiff also paid some money before the auction and got possession of his half share. Subsequently a promissory note for the balance was executed and discharged. Thereupon the defendant executed an agreement, Exhibit A, to execute a conveyance whenever plaintiff demanded. The suit is to enforce this agreement. The suit is not prohibited by section 66 of the new Code (Act V of 1908).

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[THE COURT.—The plaint refers to the transaction as a benami one, and that is the cause of the trouble?]

We relied on the subsequent agreement, and the District Munsif notes it.

[SADASIVA AYYAR, J.—Why did you not amend the plaint?]

I might have done so; I shall do so even now, with your Lordship's permission.

H. Suryanarayana for respondent.—There is a reference to benami in the plaint. The plaintiff relies in the plaint on the benami character of the purchase made by the defendant. Even the new agreement is not independent of the original benami agreement. There is no new agreement to be enforced apart from the original transaction. Section 66 clearly applies to the case. Reference was made to *M. Subramaniam Pillai v. Gopalarama Subramania Ayyar*(4), and *Ganga Sahai v. Kesari*(5).

(1) (1888) I.L.R., 11 Mad., 213.

(2) (1894) I.L.R., 17 Mad., 282.

(3) (1895) I.L.R., 18 Mad., 436.

(4) (1915) 29 I.C., 133.

(5) (1915) I.L.R., 37 All., 545.

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The OPINION of the Court was delivered by

WALLIS, C.J.—We do not think that this is a suit against the auction-purchaser on the ground that the purchase was made on behalf of the plaintiff within the meaning of section 66, Civil Procedure Code. The finding is that the defendant agreed that the property should be purchased in the name of the defendant and that one-half of it should be conveyed by the defendant to the plaintiff after the sale certificate had been obtained. This in our opinion is not a benami transaction at all. The mere fact that the plaintiff alleges in the plaint that the auction-purchaser was the benamidar for him has not in our opinion the effect of debarring the plaintiff under section 66, Civil Procedure Code, from maintaining his suit for specific performance of an agreement by the auction-purchaser subsequent to the purchase to convey the property to the plaintiff. Such an agreement is not inconsistent with auction-purchaser's own title, but rather the reverse. We answer the question in the negative.

K.B.

APPELLATE CIVIL.

Before Mr. Justice Phillips and Mr. Justice Krishnan.

1919,
January 7,
8 and 10.

JAGANNATHA ACHARIAR AND ANOTHER (SECOND RESPONDENT
IN THE LOWER APPELLATE COURT), APPELLANTS,

v.

SEENU BHATTACHARIAR AND EIGHT OTHERS (PLAINTIFF
AND DEFENDANTS NOS. 5, 7, 8, 9, 12 TO 14),
RESPONDENTS.*

Trustees of a temple—Suspension from office of an hereditary archaka—Order passed without notice to archaka or previous inquiry, whether valid—Order, ad interim, continued for an unreasonably long time, whether legal—Punitive order of suspension, whether valid without notice.

Where the trustees of a temple suspended an hereditary archaka of the temple from his office on account of certain imputations of misconduct made against him, without giving him notice or making any inquiry previous to

* Second Appeal No. 2171 of 1917.