APPELLATE CIVIL.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, and Mr. Justice Coutts Trotter.

1922, April 21.

NATARAJA MUDALIYAR (SIXTH DEFENDANT), APPELLANT,

v.

D. P. RAMASAMI MUDALIAR AND OTHERS (PLAINTIFFS AND DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), sec. 66—Old Code (Act XIV of 1882), s. 317—Benami sale—Execution—Sale—Managing member of a joint Hindu family—Purchase of property in the name of another—Suit for partition by other members of the family in respect of such property—Maintainability of suit—Bar of suit—Act of managing member in buying benami, whether on behalf of other members—Right of benamidar.

Where in a sale held in execution of a decree the manager of a joint Hindu family purchased property, benami in the name of another person, using family funds for the purpose, and some of the other members of the family instituted a suit for partition of the property as joint family property against the other members and the benamidar,

Held, that section 66 of the Civil Procedure Code, 1908, was no bar to the plaintiffs' recovering their share in the property in the partition suit.

The managing member buying property in the name of another person, using family funds for that purpose, cannot be properly said to buy benami on behalf of the other members of the family, under section 66 of the Code, as he is doing something wholly wrong in putting the benamidar in a position, if so minded, to set up a claim in derogation of the claims of the joint family.

The language of section 317 of the old Code (Act XIV of 1882) is wider than that of section 66 of the new Code (Act V of 1908).

* Original Side Appeal No. 62 of 1920.

Suraj Narain v. *Ratan Lal*, (1918) I.L.R., 40 All., 159 (P.C.), distinguished as a decision under the old Code; *Baijnath* v. *Bishen Devi*, (1921) 19 A.L.J., 787, dissented from.

APPEAL against the judgment and decree of KUMARASWAMI SASTRI, J., in the exercise of the ordinary Original Civil Jurisdiction in Civil Suit No. 226 of 1918.

This is a suit for partition and recovery of possession of the plaintiffs' share in the suit property, which was a house. The father of the first plaintiff had obtained a decree for money against the original owner of the property and in the auction sale held in execution of the decree, the father of the first plaintiff, who was the managing member of the joint family of the plaintiffs and the defendants other than the sixth, had purchased the property benami in the name of the sixth defendant, and had used family funds for that purpose. He did not obtain the leave of the Court to purchase in auction, though he was the decree-holder. After the death of his father, the first plaintiff and his sons, the second and third plaintiffs, instituted the present suit for partition of the suit property against the other members of the family as well as the benamidar who was the sixth defendant. The latter pleaded that he was himself the real purchaser and that, if he was a benamidar for the first plaintiff's father, the suit was barred under section 66 of the Civil Procedure Code. The learned Judge (KUMARASWAMI SASTRI, J.) held that the sixth defendant was only a benamidar, and that section 66 of the Code was no bar to the plaintiffs' recovering their shares in the property as joint family property, and decreed that the plaintiffs were entitled to recover their one-fourth (and not one-third as claimed in the plaint) share in the suit property. The sixth defendant appealed against the decree.

A. Viswanatha Ayyar for appellant.—The first plaintiff is the son and second and third plaintiffs are

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the grandsons of Arunachalam, who is said to have purchased the property benami in the name of the sixth defendant. The grandfather was the managing member of the family. The sale was made in July 1907, before the new Act came into force. The old Code (Act XIV of 1882) is applicable. When a manager of a joint Hindu family purchases property in the name of another person, he purchases benami on behalf of all the members. The nominal purchaser is a benamidar for all the coparceners. The family and not the manager alone is the real owner and the benami is on behalf of all the members. The plaint itself admits that the *benami* was on behalf of the family, and not on behalf of the manager alone. The benami transaction is not alleged to have been made fraudulently by the manager, i.e., to defraud the other members which may stand on a different footing. This case is governed by the ruling of the Privy Council in *Suraj Narain* v. *Ratan Lal*(1). The argument and judgment in the above case shows that the old Code (Act XIV of 1882), section 317 and not the new Code of 1908, would apply when the sale was held before 1909, though the suit was brought after the new Code came into force. The ruling in *Baijnath Das* v. *Bishen Devi*(2), is under the new Code and supports the appellant. The ruling of the Privy Council in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*(3), was under the old Code and the sale was in the name of a member of the family to defraud the other members, but the ruling of the Privy Council in *Suraj Narain* v. *Ratan Lal*(1) was given in a case where the benami purchase was in the name of a stranger, as in this case. So the latter and not the former ruling governs this case. The ruling in *Natesa Ayyar* v. *Venkataramayyan*(4) applies

(1) (1918) I.L.R., 40 All., 159 (P.C.); s.c., 44 I.A., 201 (2) (1921) 19 A.L.J., 787.
(3) (1873) 12 B.L.R., 317 (P.C.). (4) (1883) I.L.R., 6 Mad., 135.

only where the manager fraudulently puts property in the name of a benamidar so as to defraud a family and does not apply to a case where the manager bona fide enters into a benami transaction. *Rama Kurup* v. *Sridevi*(1), supports the appellant; *Minakshi Ammal* v. *Kalianarama Rayer*(2) and *Krishna Aiyan* v. *Raghavaiyan*(3), simply follow the decision in *Natesa Ayyar* v. *Venkatramayyan*(4). The first plaintiff actively assisted in bringing about and supporting the benami transaction and must be taken to be a party to the benami transaction. The proviso to section 66 does not apply to this case.

S. Krishnama Achariyar with *P. R. Ramakrishna Ayyar*, *V. Chellamiah* and *N. Viswanatha Ayyar* for respondents relied on the Madras rulings from *Natesa Ayyar* v. *Venkatramayyan*(4) onwards and on *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*(5) and distinguished *Suraj Narain* v. *Ratan Lal*(6) as under the old Code.

JUDGMENT.

SCHWABE, C.J.

SCHWABE, C.J.—The first plaintiff's father having a decree against the owners of some house property in Madras, brought that property to sale in execution. Without obtaining the leave of the Court to bid, he bought it himself using for that purpose the joint family money, and in order to conceal this fraud on the Court, he bought it in the name of the sixth defendant. This is the case of the plaintiffs and of some of the defendants. That has been found by the learned Judge who saw the witnesses and examined the facts obviously with the greatest care, to be the truth and I can find no ground for interfering with that finding of fact.

The first plaintiff with his sons, the second and the third plaintiffs, joining as defendants the other members

(1) (1893) I.L.R., 16 Mad., 290.
(2) (1897) I.L.R., 20 Mad., 349.
(3) (1899) 9 M.L.J., 298.
(4) (1883) I.L.R.,6 Mad., 135.
(5) (1873) 12 B.L.R., 317 (P.C.).
(6) (1918) I.L.R., 40 All., 159 (P.C.).

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of the joint family has brought this suit for partition, and he claims that part of the joint family property to be brought in and divided in the partition consists of this house property standing in the name of the sixth defendant, and he brings in the sixth defendant to have that case decided. The sixth defendant resists that claim setting up, firstly, as a fact that the plaintiff's case is not true at all, that he never was a benamidar or nominee of the first plaintiff's father—which, as I have pointed out, has not been accepted as the fact, and secondly, he says that, in law although he is not entitled to this property, it is not open to the plaintiffs in this case to recover it from him by reason of section 66 of the Code of Civil Procedure, 1908; and it is on the proper interpretation of that section, and that section only, that this case must turn.

Before the passing of that section there was in existence section 317 of the Civil Procedure Code of 1882. The terms of that section were,

"No suit shall be maintained against the certified purchaser (which means the certified purchaser who has purchased the property at Court auction) 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 was very soon a conflict of authorities as to the meaning of that section and I think it may be stated that the Madras view, established first of all in *Natesa Ayyar* v. *Venkatramayyan*(1) and followed in *Krishna Aiyan* v. *Raghavaiyan*(2) and *Minakshi Ammal* v. *Kaliana-rama Rayer*(3) was that there was nothing in that section to prevent a member of a joint family from recovering the property which had been bought out of the joint family money in the name of some person benami at a Court

(1) (1883) I.L.R., 6 Mad., 135. (2) (1899) 9 M.L.J., 298.
(3) (1897) I.L.R., 20 Mad., 349.

auction by the managing member of the family, he himself being the decree-holder. A different view was taken in Allahabad, and the matter came before the Privy Council in *Suraj Narain* v. *Ratan Lal*(1). In that case there is no doubt that the Privy Council supported the view contrary to the view taken in Madras, though it is worth observing that there seems to have been very little discussion on the matter and the Madras cases do not seem to have been cited. If, however, the matter stood there, I should find great difficulty in distinguishing that case as was done by the learned Judge below; but that case was tried when the Civil Procedure Code of 1882 was in operation and it is a decision under section 317 of that Code. After that case, or rather after the first hearing of the case, section 66 of the Civil Procedure Code of 1908 was introduced, and that altered the law very materially, because now the only prohibition is contained in these words:

"No suit shall be maintained against any person, claiming title under a purchase certified by the Court in such manner as may be prescribed, on the grounds that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The obvious alteration is that now the penal provision is confined to purchases on behalf of a plaintiff or persons through whom he claims, whereas before it was wide enough, on one interpretation of it, to cover purchases on behalf of any other person. I should think that that alteration was made because, on what I may call the Allahabad interpretation, there might be an injustice. For it would follow that infants, whose father using the infants' property entered into such a transaction would be deprived, though perfectly innocent themselves, of their family property, and that it would

(1) (1918) I.L.R., 40 All., 159 (P.C.); s.c., 44 I.A., 201.

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remain in the hands of a benamidar. It was therefore desirable that the inability to enforce rights should be restricted to the person who was guilty of the act, which was looked upon as an illegal act. It is argued in this case that the purchase was made on behalf of the plaintiff and that the real meaning of that clause is that if a managing member makes a purchase and for that purpose uses the money of the family, he is making that purchase on behalf of all the members of the family. Unless I were driven to an interpretation which would have the results which, as I have already stated, in my view, it was the desire to prevent, I should be very loath to come to such a conclusion; but, in my judgment, it is quite unnecessary, because I do not think that a managing member buying property using family funds for that purpose can be properly said, within the meaning of that section, to buy on behalf of other members of the family. He is doing something wholly wrong. It cannot be right for him to take the family money and put it into property in such circumstances that, if the man who lends his name chooses to behave in the way that this sixth defendant has behaved, the family would be deprived of the property. I can see no distinction between the case of a co-parcener and the case of a partner. Where partnership money is used for a benami transaction of that kind, it would follow, if the interpretation suggested of the section is right, that the innocent partner would lose his property. In my judgment that is not the meaning of the section.

The learned Judge also relies on the proviso to that section, and there is a great deal to be said in favour of his interpretation of the proviso, but in the view that I have expressed of the section itself, it is unnecessary to decide anything in respect of the proviso. I am aware that in coming to this conclusion I am taking a different

view to that takenin *Baijnath Das* v. *Bishen Devi*(1). It is enough to say that I do not agree with that decision or with the reasoning on which it is based. I think the Court in that case gave much too wide a meaning to the words in section 66 (1) " made on behalf of the plaintiff."

Therefore in my judgment this appeal fails and must be dismissed with costs. This is a proper case for two sets of costs to be allowed, one for the plaintiffs and the other for defendants 7 to 9, the reason being that the interests of some of the infant defendants might have been quite different to the interests of the plaintiffs, and on one head of the argument which has been addressed to us, was different.

COUTTS TROTTER, J.—I am of the same opinion. It was established by the case of *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*(2) that the sections of the Code which were designed to punish a person who puts his property in the name of the benamidar were not to be applied to the case where one member of a joint family gets property in his name and the rest of the family seek to enforce their rights against that property standing in his name. The words of the Privy Council (at page 330) were these :

" Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition however made by a member of the family in his sole name, if made by the use of the family funds. It is obvious that under Hindu Law it is natural and appropriate to regard a member of a family as being in possession on behalf of the family so that possession would enure to the family as a whole rather than to him in the character of benamidar or

(1) (1921) 19 A.L.J., 787.

(2) (1873) 12 B.L.R., 317 (P.C.).

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nominee which is quite alien to the conception of the relation of one member of a Hindu family to another."

Further their Lordships held in that case that the section of the old Code did not apply to a case where the alleged benamidar was himself a member of the undivided family.

The next case is where the person put in as benamidar was not a member of the undivided family but a nominee chosen by the head of the family, and the question arose whether the Code prohibited the members of the undivided family not concerned in the transaction from asserting their rights in the property or whether they were precluded from doing so by the section. In this Presidency, the cases in my opinion, with one possible exception, have shown a consistent course of decision. It began with the case of *Natesa Ayyar* v. *Venkatramayyan*(1) and *Krishna Aiyan* v. *Raghavaiyan*(2). There is a dictum, for it has been analysed by other Courts and in my opinion rightly pronounced to be nothing more, in *Rama Kurup* v. *Sridevi*(3), which seems to go the other way. But, on the whole, the current of decisions in this Court has been uniform that the proposition which the case in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*(4), laid down where the property stood in the name of a member of the family, was equally applicable when the nominee was a stranger, provided that members of the family were merely seeking to enforce their claim to what they alleged to be the undivided family property or the proceeds of the money belonging to the undivided family. It cannot be denied that there is in the Allahabad Court a direct decision the other way, in the case of *Baijnath Das* v. *Bishen Devi*(5)

(1) (1883) I.L.R., 6 Mad., 135.
(2) (1899) 9 M.L.J., 298.
(3) (1893) I.L.R., 16 Mad., 290.
(4) (1873) 12 B.L.R., 317 (P.C.).
(5) (1921) 19 A.L.J., 787.

which has been referred to by my Lord. The reasoning is not difficult to follow. The property is put in the name of the benamidar, both in the Allahabad case and in the case before us, by the managing member of the family, and it is said that that is the act, under the Hindu Law, of the whole family and therefore the prohibition, which undoubtedly would extend to the managing member himself who carried out the transaction, must equally apply to the whole of the family on whose behalf he acts or purports to act. The answer appears to me to be that, whatever the rule may have been under the section of the old Code, under the section of the present Code 66 (1) that result does not follow. In my opinion, the plaintiff in this suit and in similar suits is not seeking to enforce rights against the benamidar as his trustee, but he is following into the hands of the benamidar whose position as a trustee he *ipso facto* repudiates, a portion of the proceeds of what he alleges and has proved to be the ancestral estate in which he has a share and of which he is entitled to partition and severance of his own share. I am therefore of opinion that it cannot be said that the purchase at the sale of this property was a purchase made on behalf of the plaintiff. The managing member when he put in a benamidar knew that he was disobeying the Court, knew that he was putting the benamidar in a position to set up claims in derogation of the rights of his own family and of his co-parceners and, in such circumstances, it seems impossible to say that the purchase was made on behalf of this plaintiff within the meaning of section 66 (1) of the Code.

There only remains the difficulty created by a stray sentence in *Suraj Narain* v. *Ratan Lal*(1). It is suggested by my brother KUMARASWAMI SASTRI, J., that it may

(1) (1918) I.L.R., 40 All., 159 (P.C.); s.c., 44 I.A., 201.

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be that the items of property in question may have been in the same category as the other properties, namely gifts made to the son-in-law not as a benefaction to be held for the donor but as an advancement in life by way of gift. However, that does not appear from the report and I think the simplest method of dealing with that is to say, as my Lord has said, that the Allahabad case is dealing with a situation governed by the words of the old Code and that the differentiation in wording effected by the new Code is sufficient to distinguish the observation of their Lordships in that case and to make it not applicable to the present case.

With regard to the two other points that were argued as to the complicity of the first plaintiff in the transaction itself, the material put forward in support of that, to my mind, is quite unsubstantial. It amounts to no more than that he recorded the transaction in the family account books and it does not in the least follow that he appreciated exactly what was done, much less that he took an active and consenting part in it.

Finally, it was argued that not only was the first plaintiff completely aware of what was done but that in truth the sixth defendant was not a benamidar at all and he was never intended to be, but he was the real purchaser and had an independent right to the properties put up at Court auction. With regard to that, the learned Judge who heard all the witnesses and discussed and weighed their evidence very carefully has come to the conclusion, with which I entirely agree, that there is no evidence worth the name to support the suggestion that the sixth defendant had an independent right over these properties.

I agree that the appeal fails and that it must be dismissed with costs.

K.R.