1887

JANI BEGAM v. JAHANGIR KHAN.

assignee, prove what you paid for the interest in it, on the strength of which you set up your right? What greater morality is there in the *status* of the assignee after suit and decree than before? I confess I can see none, nor do I think that the Legislature intended to inflict a penalty on a person against whom an actionable claim might subsist in the hands of an assignee, by making him forfeit a right he would otherwise have had, because he puts such assignee to proof of the kind I have indicated. Moreover, this absurdity would arise, that the assignee might exact a false price, and so drive such person into Court, and yet if the latter proved the true price, he could not be ordered to pay that, but would have to satisfy the whole claim. I need only add that the principle which is embodied in s. 135 of the Transfer of Property Act is very fully and clearly stated in ss. 1048 to 1057, inclusive, of Story's *Equity Jurisprudence* by Grigsby, ed. 1884, which provision, following on the cases decided by their Lordships of the Privy Council of *Chedambara Chetty* v. *Renga K. M. V. Puchaiya Naickar* (1) and *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2), shows that the Legislature intended by statutory enactment to adopt the doctrine of champerty recognised by the English Courts. The present case was essentially one to my mind in which the plaintiff-appellant's proceedings came within the mischief contemplated by s. 135, and holding the Subordinate Judge's view to have been right for the reasons I have given, I would dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

1887
March 16.

Before Mr Justice Straight and Mr. Justice Tyrrell.

BENI SHANKAR SHELHAT AND OTHERS (DEFENDANTS) v. MAHPAL BAHADUR SINGH (PLAINTIFF.)*

Pre-emption—Co-sharers—Recorded co-sharers—Benami purchase of shares—Sale by co-sharer—Claim for pre-emption resisted by person alleging himself to be co-sharer by virtue of benami transaction—Equitable estoppel.

A secret purchase *benami* of shares in a village does not constitute the purchaser a co-sharer for the purposes of pre-emption either under the Muhammadan Law or under the provisions of a *wajib-ul-arz*, so as to enable him upon the

* First Appeal, No 207 of 1885, from a decree of Pandit Kashi Narain, Subordinate Judge of Ghazipur, dated the 4th September, 1885.

(1) L. R., 4 I .A. 241 ; 13 B. L. R. 509.
(2) L. R., 2 App. Cas, 186 ; L. R., 4 I. A. 23.

strength of the interest so acquired to defeat an otherwise unquestionable pre-emptive right preferred by a duly recorded shareholder who had no notice direct or constructive of his title, and asserted immediately upon his purchase of a share, for the first time, in his true character. *Ramcoomar Koondoo* v. *Macqueen* (1) referred to.

THE facts of this case are sufficiently stated for the purposes of this report in the judgment of the Court.

The Hon. *T. Conlan*, Munshi *Sukh Ram* and Lala *Juala Prasad*, for the appellants.

Mr. *C. H. Hill* and Munshi *Hanuman Prasad*, for the respondent.

STRAIGHT and TYRRELL, JJ.—The facts of this case can be stated without many words. The plaintiff is a recorded sharer in the villages Nagra, Deokali, Dhekwari, Chachia, Pairahi, Parasrampur, Pal Chandbha, Gothba, Masaha, Abirauli, Tilokha, Chainpur, and Karsand. Two other sharers in the same, namely, Babus Fakir Chand and Moti Lal, sold their interests therein on the 21st March, 1883, to the two answering defendants Bhawani Shankar Shelhat and Beni Shankar Shelhat. On the 1st May, 1883, the plaintiff, learning of the sale, preferred his claim of pre-emption. The defendants defended the action on the main and practically the single ground that they were co-sharers in the villages in question, and, as such, being in the same relation to the vendors as the plaintiff, were unassailable by way of pre-emption. It is true that other pleas were raised, but in fact the case was fought, and must be decided, on this issue only. It is admitted that the defendants have never been recorded shareholders in any part of the estate in question, but they contend that on various occasions they purchased shares in the *farzi* names of their gomashta Bisheshar Tiwari and his brother Baldeo Tiwari. For example, they allege that on the 20th December, 1873, in execution of a decree obtained on the 29th March, 1866, by Bisheshar Tiwari against Babus Ram Narain Singh and Jagdeo Bahadur Singh, they bought these judgment-debtors' shares in Chainpur, Pal Chandbha, and Kársand. Again, on the 20th February, 1882, they profess to have similarly acquired shares in Dhekwari and Parasrampur, and on the same date, in Masaha and Pairabi. Likewise, on the 20th December, 1882,

(1) L. R., I. A. Sup. Vol. p. 40.

1887

BENI SHANKAR SHUKHAT v. MAHPAL BAHADUR SINGH.

they claim to have become sharers in Ujraon, Tilokha, Nagra, Deokali, and other villages, and lastly, they boldly state that when the present vendors, Fakir Chand and Moti Lal, in 1877, purchased the properties they are now transferring, they purchased them not for themselves only, but, to the extent of the two parts out of three, for the present vendees, the defendants and appellants before us. By virtue of all these transactions the defendants claim to be substantial co-sharers in all the villages in suit, no less than the plaintiff, although they have to admit that on every occasion their acquisitions were *benami*, under cover of the name of Bisheshar Tiwari, who, with his brother Baldeo, in all the proceedings, was the ostensible and only apparent creditor, suitor, decree-holder and vendee of the original shareholders Ram Narain Singh and Jagdeo Bahadur Singh. On these pleadings two issues arose—one of fact, whether Bisheshar Tiwari was the *farzi* purchaser, the real purchasers being the defendants-appellants; the other of law, whether in the event of its being found that the defendants were the real vendees on the various occasions above mentioned, they may not be equitably estopped from pleading these covert acquisitions in defeasance of the plaintiff's open and unquestionable rights and privileges as a duly recorded shareholder. The question of fact formed the subject of the seventh issue tried by the Subordinate Judge, who decided that Bisheshar Tiwari was not the *farzi* of the defendants-vendees in his acquisitions of the estate of Ram Narain Singh and Jagdeo Bahadur Singh, or in the agreement he made on the 13th August, 1874, with Fakir Chand and Moti Lal.

[Their Lordships proceeded to consider the correctness of this finding upon the evidence, and while not agreeing with the Court below that Bisheshar Tiwari had no business relations as gomashta or other servant with the defendants' firm, concurred in holding that he was not proved to have lent the defendants his name for *benami* purposes on the occasions and to the extent asserted. After dealing with matters of evidence upon this point, which are not material to the purposes of this report, the judgment continued as follows]:—

This finding would suffice to dispose of the defendants' case. But we may add that even if there had been better reason for

thinking that the purchases of the Tiwaris in 1873 and 1882 had been *benami* for the defendants, we should have hesitated very much in holding that such covert and undisclosed interests in an estate should be regarded as the co-sharership therein contemplated by the *wajib-ul-arz* provisions and the Muhammadan Law in respect to the right of pre-emption. Under the Revenue Act of 1873, a co-sharer to be qualified to assert pre-emption at a sale of an undivided estate in satisfaction of a claim for revenue must be "a recorded sharer." This is mentioned by way of analogy only; but it appears to us that it would be unjust from many points of view to allow an otherwise unquestionable right of pre-emption to be defeated by a stranger asserting that, by subterranean proceedings and carefully preserved *incognitos*, he had been in fact a sharer in the dark for a period long enough to baffle any action to get rid at law of his unauthorised acquisitions. The act of transfer, it is true, is that which furnishes the *bonâ fide* shareholder with the occasion to claim his pre-emptive right, but it is the disclosure of that transfer, whether by way of physical seizure or of registration of the instrument of sale, that is held to afford not only the *terminus a quo* but also the complete cause of action for the pre-emptor's suit. The principle of natural equity laid down in *Ramcoomar Koondoo* v. *Macqueen* (1) is applicable to this case. It suited the defendants to conceal their alleged acquisitions of shares in the plaintiff's villages, which he might have hindered at the time if he could have known of them: and they cannot now be allowed upon these secret titles to defeat his right of pre-emption, which he asserted at once at their first appearance as purchasers in his villages in their true character. For it cannot be held that there is any sufficient evidence, or indeed even plausible grounds, for suggesting that the plaintiff had direct notice, or anything amounting to constructive notice of the *farzi* nature of Bisheshar's interference in the village management, collections, and affairs generally; or that there were any circumstances connected with Bisheshar's *original* dealings with the Babus, or with his appearances against them in Courts, his purchases of their shares, the consequent mutations of names, or the *personnel* of his local agents and servants, to put him on inquiries that, duly prosecuted, should have

(1) L. R., I. A. Sup. Vol. p. 40.

1887

BENI SHANKAR SHELHAT v. MAHPAL BAHADUR SINGH.

led him in Gházipur to discover that Bisheshar and Baldeo were mere *ism-farzi* for the stranger-bankers at Benares, the Shelhatjis.

Some objections were filed on behalf of the respondent; but his learned counsel declined to support them. We accordingly disallow the objections. And dismissing the appeal of the defendants, we direct that they pay all the costs of the appeal.

Appeal dismissed.

1887
March 18.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

JOHARI MAL AND ANOTHER (JUDGMENT-DEBTORS) *v.* SANT LAL AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Decree for sale of hypothecated property and against judgment-debtor personally—Execution against judgment-debtor's person—Decree-holder entitled to proceed against property or person as he might think fit.

Where a decree upon a hypothecation bond allows satisfaction of the debt from the hypothecated property and also from the judgment-debtor personally, and contains no condition that execution shall first be enforced against the property, and where there is no question of fraud being perpetrated on the judgment-debtor, there is no principle of equity which prevents the decree-holder from enforcing his decree against the judgment-debtor's person or property, whichever he may think best. *Wali Muhammad* v. *Turab Ali* (1) explained.

IN this case Sant Lal and others had obtained a decree upon a hypothecation bond against Johari Mal and Kalian Das. The decree allowed satisfaction of the debt from the hypothecated property and also from the judgment-debtors personally. In the execution department, the judgment-debtors contended that the decree should be executed first against the hypothecated property, and if any balance remained due under the decree, then against their persons. The Court executing the decree, (Subordinate Judge of Aligarh) dismissed the objection raised by the judgment-debtors on this point, observing that the Court had only to execute the decree as it stood, and the decree contained no condition to the effect that execution should first be enforced against the hypothecated property, but left it optional to the decree-holder whether it should be enforced against the property or against the persons of the judgment-debtors.

---

* First Appeal, No. 20 of 1887, from an order of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 6th November, 1886.

(1) I. L. R., 4 All. 497.