

1885

The case before us is similar to that of *Raj Kissen Mookerjee v. Rudha Madhab Halder* (1), and for the reasons stated in that judgment, we think that the plaintiff is entitled to a decree. The appeal is therefore dismissed with costs.

J. V. W.

*Appeal dismissed.*

*Before Mr. Justice Wilson and Mr. Justice Beverley.*

1885  
July 21.

CHUNDRA KAMINY DEBEA (ONE OF THE DEFENDANTS) *v.* RAM-RUTUN PATTUCK AND ANOTHER (PLAINTIFFS).\*

*Act XI of 1859, s. 36, Construction of—Title of benami purchaser, how limited—Benami property, Its liability to claims against true owner.*

The object of s. 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing a claim against the true owner in respect of the *benami* property.

THE plaint in this suit was for declaration of right in respect of a certain property in the possession of the plaintiffs. Subsequent to the filing of the plaint, one Chundra Kaminy Debea applied to be and was made a party to the suit. The plaintiffs then presented a petition to the Court in which they added a prayer for undisputed possession. The grounds, among others, on which Chundra Kaminy, who became the principal defendant, resisted the claim were: (1) that the plaintiffs were out of possession, and therefore a suit for a mere declaratory decree was barred by the proviso to s. 42 of the Specific Relief Act; (2) that the suit was barred under the provisions of s. 36 of the Revenue Sale Law (Act XI of 1859) inasmuch as the property in dispute which was purchased in execution of a decree against one Nundo Lall, whose widow Chundra Kaminy was, stood in the name of his mother, Sonamoni (deceased), the certified purchaser under whose will Chundra Kaminy asserted her title. The Subordinate Judge decided both the points in favour of the plaintiffs and referred to *Ameeroonnissa Bibi v. Benode Ram Sein* (2). Chundra Kaminy appealed to the District Court. The Judge was

\* Appeal from Appellate Decree No. 1436 of 1884, against the decree of F. F. Handley, Esq., Acting Judge of Rajshahye, dated the 10th of June 1884, affirming the decree of Baboo Gonesh Chunder Chowdhuri, Subordinate Judge of that district, dated the 12th of March 1883.

(1) 21 W. R., 349.

(2) 2 W. R., 29.

apparently of opinion that, although the plaintiffs were out of possession and a suit for a mere declaratory decree therefore came within the operation of the proviso to s. 42 of the Specific Relief Act, their petition to the Court of first instance, in which they prayed for undisputed possession, should be read as a part of the plaint. On the second point the Judge held that s. 36 of the Sale Law was no bar to the plaintiff's claim, and referred to *Ameeroonnissa Bibi v. Benode Ram Sein* (1); and *Bukshee Booniadi Lal v. Bukshee Dewkee Nundun Lall* (2).

1885  
 CHUNDEA  
 KAMINY  
 DEBEA  
 v.  
 RAMRUPTON  
 PATTUOK.

Chundra Kaminy appealed to the High Court.

Baboo *Trailakhya Nath Mitter*, for the appellant.

Baboo *Gurudas Banerjee*, and Baboo *Rash Behary Ghose*, for the respondents.

The judgment of the Court (WILSON and BEVERLEY, JJ.) was as follows :

Two points have been raised before us upon this appeal. The first is this: It is said that the plaintiffs asked only for a declaratory decree in the first instance. The lower Appellate Court has held that they are not entitled to a mere declaratory decree, because being out of possession and therefore entitled to ask for possession, they could not, under s. 42 of the Specific Relief Act, have a mere declaratory decree. It is argued that they ought not to have had any relief at all, whereas the lower Appellate Court has given a decree declaring their title and giving them possession—a decree which it is said they never asked for.

The answer to that seems to us to be this. In their plaint it is true they asked specifically only for a declaration of their title. They did not ask for confirmation of possession in the form which is so often used in this country; but for declaration of title and for any other relief which they might be deemed entitled to.

This no doubt is very general; but subsequently, when the difficulty was pointed out, the plaintiffs put in a petition defining what was vague before and specifically asking for possession. In the first Court that petition was rejected, because, from the

(1) 2 W. R., 29.

(2) 19 W. R., 223.

1885  
 CHUNDRA  
 KAMINY  
 DEBEA  
 v.  
 RAMRUTTUN  
 PATTUCK,

view that that Court took of the facts, it was unnecessary to entertain it, but in the view taken by the lower Appellate Court of the facts it was necessary. It seems to us clear that the plaintiffs have asked with sufficient clearness for a declaration of title and for possession.

The second point raised is one of more substance.

The plaintiffs claim under an execution sale, against the estate of one Nundo Lal, and they claim to have purchased the property in question at that sale as the property of Nundo Lal. The property had been purchased by Nundo Lal at a sale held under Act XI of 1859, and he purchased it, not in his own name, but in the name of his mother Sonamoni, and the sale certificate was taken out in her name.

Now s. 36 of the Act says that "any suit brought to oust the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser, or on behalf partly of himself and partly of another person, though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

This suit, so far as the appeal is concerned, may be taken as a suit against Sonamoni, and it is said that by reason of that section the suit to oust her will not lie.

We do not think that this contention is well founded. The object of that section appears to be this, that with the view of discouraging *benami* purchases at sales of this nature, the Legislature says that a suit to oust the *benamidar* shall not lie. The section evidently contemplates this; that the purchaser having elected to make his purchase in a *benami* name, then wishes to come into Court to have it established that the purchase was a *benami* one and to have the *benamidar* ousted by the Court, and that appears to be what the Legislature intends to prohibit.

But in the vast majority of *benami* transactions no controversy ever does arise between the *benamidar* and the real owner. The real owner is left in possession and derives all the benefit of the estate notwithstanding that he chooses to run all the risks incident to that method of holding property, and when the real owner is thus left in enjoyment of his property, and the *benamidar* raises no dishonest claim against him, it would be a departure from the

principle on which these sections are framed and would introduce instead of checking fraud and dishonesty, if we were to construe the section as meaning that where a creditor of the real owner has to bring the property to sale, this sham title of the *benamidar* may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, an instrument of fraud.

This section and similar sections have frequently been before the Courts; some of the cases I am about to cite were dealt with upon this section, others upon the sections analogous to it. But all seem applicable to the section we have to deal with.

The earliest of these cases is *Ameeroonmissa Bibi v. Benode Ram Sein* (1). It is there said: "As to Takirpara it was bought in the name of the son of Afzul Ali at a sale under Act I of 1845; and it is contended before us that, under s. 21 of that Act, a judgment-creditor of Afzul Ali is precluded from attaching the property in execution of a decree against him. But the section in question was not intended to protect purchases made in the name of third parties from the operation of decrees against the persons beneficially entitled to the purchased property."

Here there is an express decision that, in such a case, as the present, the property may be attached and sold as the property of the real owner; and it certainly would be a monstrous thing if it might be attached and sold as the property of the real owner, and yet the purchaser under such attachment and sale should take no title.

The next case to which I think it is necessary to refer is *Tara Soonduree Debee v. Oajul Monee Dasee* (2). I refer to that case, although it is not so nearly in point as some others, because it seems to indicate the real principle which lies at the root of the matter. At page 111, it is said: "The Full Bench decision in *Bihuns Kunnwar v. Behari Lall*. (3), has been quoted to us as a precedent in this case. The ruling laid down in that case was that where a certified purchaser claimed to recover possession from a party in possession, the

(1) 2 W. R., 29.

(2) 14 W. R., 111.

(3) 8 B. L. R., F. B., 15; 11 W. R., F. B., 16.

1885

OHUNDR  
KAMINY  
DRBBA  
v.  
RAMRUTTUN  
PATUCK.

1886

CHANDRA  
KAMINY  
DEBBA  
v.  
RAMRUTTUN  
PATTECK,

party in possession could not plead that the certified purchase was merely a fictitious purchase for him. But the decision went on to say that "if the *benamidar* should acknowledge the purchase to have been made *benami* and waive the right conferred on him by ss. 259 and 260, and give up possession to the real owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser;" and then the decision goes on to hold that on the facts of that case there was no difficulty arising from this ruling in the Full Bench case.

I refer to this case as showing that what the section was intended to prohibit were controversies and claims between the real owner and the *benamidar* which the real owner may seek to enforce by suit against the *benamidar*.

Then there is a case in the same volume at page 372 (1). That case seems to be on all fours with the present, with one difference, namely that in that case the plaintiff was the person claiming under the *benamidar*, and it was held that the *benami* character of the transaction might be set up as a defence to that suit, the defendants being the purchasers at a sale in execution of a decree against the real owner.

Then there is the case of *Bukshee Booniadi Lal v. Bukshee Dewkee Nundum Lall* (2), in which it was held that the fact of a sale certificate being taken in the name of a *benami-dar* did not preclude the raising afterwards of any question as to the real title. That was the case of a sale certificate taken in the name of one member of an undivided family, and it was held that that did not preclude enquiry afterwards, and a finding that the property so purchased was family property purchased in the name of one member of the family.

Then there is also a case to which we have been referred, *Sohun Lall v. Lala Gya Pershad* (3), where dealing with an analogous section to the present it was held that s. 260 of the then Procedure Code "does not apply to a case such as the one under appeal; for if it did, it would cause great injustice by allowing the judgment-debtor to retain possession of property which in equity ought to be given up to the decree-holder; and as shown

(1) *Brijo Beharee Singh v. Shah Wajed Hossein*, 14 W. R., 372.

(2) 19 W. R., 223.

(3) 6 N. W. P., 265,

above, such a procedure would be opposed to the object of the Code."

These seem to be the authorities on the matter and they all point one way.

The result is that, in our opinion, the objection founded on s. 36 is not well founded. The appeal, therefore, fails on all points and will be dismissed with costs.

K. M. C.

*Appeal dismissed.*

1885

CHUNDR  
KAMINY  
DEBBA

v.  
RAMBUTTEN  
PATUCK.

*Before Mr. Justice Prinsep and Mr. Justice Grant.*

RAM LALL MOITRA (DEFENDANT) v. BAMA SUNDARI DABIA AND ANOTHER (PLAINTIFFS).\*

1885.

August 18.

*Sale in execution of decree—Power of Munsiff's Court to execute decree against property out of its local jurisdiction.*

In execution of a decree, property situate in three Munsiffia, viz., Serajgunge, Pubna, and Nattore, all three being at that time portions of the District and subordinate to the Court of Rajshaye, was attached and sold by order of the Court of the Munsiff of Serajgunge. *Held*, by analogy to the principle on which the case of *Kally Prosunno Bose v. Dinonath Mullick* (1) was decided, that the sale was not necessarily limited only to the portion of the property situate in the Munsiff of Serajgunge, but that that Court might have jurisdiction to make a valid sale of the whole estate, although it might be more convenient in such a case that the sale should be held by a superior Court having jurisdiction over the entire District.

THIS was a suit for declaration of the plaintiffs' title to certain land, for possession of the said land, and to have declared their right to have their names registered as being entitled to it.

The plaintiff alleged that one Shama Churn Chowdhry was the proprietor of a share in towji 294 of the Collectorate of Pubna, which consisted of mouzah Koailberh in thana Ullapara, zilla Pubna, and mouzahs Suail, Panch Suail, Charibole and Kabuli in thana Chatmohur, zilla Pubna, and mouzah Kushmail in thana Baraigram, zillah Rajshaye, recorded at a sudder jumma of Rs 600-14 per annum on the rent roll of the Pubna Collec-

\* Appeal from Appellate Decree No. 2223 of 1884, against the decree of F. McLaughlin, Esq., Judge of Pubna, dated the 23rd of August 1884, reversing the decree of Baboo Bepin Behari Mukherji, Sudder Munsiff of that District, dated the 23rd of June 1883.

(1) 11 B. L. R., 56; 19 W. R., 434.