

We, therefore, find no reason for disturbing the judgment or decree of the lower Appellate Court. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Macpherson.

KANIZAK SUKINA (ONE OF THE DEFENDANTS) v. MONOHUR DAS
(PLAINTIFF.)*

1885

August 18.

*Civil Procedure Code (Act XIV of 1882), s. 317—Benami system—Fraud—
Suit against purchaser buying benami—Sale certificate granted in name
of benamidar.*

Certain property belonging to a judgment-debtor was brought to sale and purchased by a person in the benami name of her daughter, then an infant, and the sale certificate was made out in the name of the latter. Subsequently the mother mortgaged the property, and the mortgagee brought a suit, obtained a decree, and had the property sold and purchased it himself. Upon his being registered by the daughter in attempts to get his name registered as proprietor, he instituted a suit against both mother and daughter to establish his rights to the property. The daughter thereupon objected that such suit would not lie by reason of the provisions of s. 317 of the Civil Procedure Code.

Held, that the provisions of that section, which were intended to prevent fraud, were inapplicable to the facts of the case, and that the suit was maintainable.

THE plaintiff in this case sued to establish his right to, and to obtain possession of a ten-gunda and odd share in a certain village, alleging that he was a creditor of the defendant Takdir-un-nissa, and had purchased the land in suit at a sale in execution of a decree which he had obtained against her. The other defendant was Mussumat Sukina, daughter of the first defendant. The facts of the case were as follows:—One Hyder Ali, father of the defendant Takdir-un-nissa, was the owner of a one-third share in the whole village, and after his death a creditor named Dabi Misser obtained a decree against his widow, three sons and three daughters, whom he left surviving, and caused the whole of the one-third share in the village to be sold. The purchaser at that sale was one Mahomad Saleh, a pleader, who immediately

* Appeal from Appellate Decree No. 385 of 1885, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 23rd of October 1884, confirming the decree of Baboo Koilas Chandra Mukhorjee, Second Subordinate Judge of that District, dated the 29th of November 1880.

put in a petition, dated the 2nd October 1866, stating that he had purchased the property for certain members of Hyder Ali's family in various shares, and amongst others that he had purchased the share, the subject-matter of this suit, for Sukina. The sale certificate was drawn up accordingly. In 1867 the first defendant borrowed money through her husband from the plaintiff's father, and to secure the repayment thereof mortgaged the share of the village now in suit. In 1873 plaintiff obtained a decree upon his mortgage, caused the property in suit to be sold, and purchased it himself.

He alleged in his plaint in this suit that upon applying to have his name registered the first defendant put in an objection on behalf of her daughter the second defendant, and his application was in consequence disallowed. He, therefore, brought the suit to set aside the Collector's order, to have his right declared, and to obtain possession alleging that the second defendant's name had been used in the transaction as benamidar for her mother and that she had no right to the property in suit. The second defendant alone contested the suit and claimed to be entitled to the property by virtue of the sale certificate being in her name; she denied that she was a mere benamidar, although she admitted that she was a minor at the date the purchase was made on her behalf.

The first Court found that the purchase was made benami by the first defendant in the name of her daughter Sukina, and holding that the suit was not barred under s. 317 of the Code of Civil Procedure, gave the plaintiff a decree.

Sukina thereupon appealed, but her appeal was dismissed upon the ground that no one appeared on the day fixed for its hearing; she therefore preferred a special appeal to the High Court, and succeeded in getting the case remanded for retrial by the lower Appellate Court upon the merits.

Upon such retrial the lower Appellate Court confirmed the decision of the lower Court that Sukina was a mere benamidar for her mother, and upon the question as to whether the suit could be maintained having regard to the provisions of s. 317, delivered the following judgment: "Then can the case lie in view of the terms of s. 317? I think it can. In the

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first place the section was intended to check the benami system by denying to a person who has employed an agent a remedy against that agent, if the latter turns traitor. Here there can be no question of that sort. In the second place I think the transaction is clearly a fraudulent one intended to defraud subsequent transferees. (See s. 53, Transfer of Property Act). The second paragraph of s. 317 expressly lays down that when the cause of action is that the name of the purchaser has been fraudulently inserted the suit will lie."

That Court therefore dismissed the appeal.

Sukina now preferred a special appeal to the High Court.

Mr. *R. E. Twidale* for the appellant.

No one appeared for the respondent.

The judgment of the High Court (MITTER and MACPHERSON, JJ.) was as follows :—

We are of opinion that the lower Courts are right in overruling the objection that the present suit does not lie under the provisions of s. 317 of the Code of Civil Procedure. It is found by the Courts below that the property in dispute was purchased by the appellant's mother in her name while the appellant was a minor, in the year 1866; that the mother and not the appellant was in possession; that the mother hypothecated it in a bond executed by her in favor of the plaintiff; that the plaintiff obtained a decree against the mother on that bond, and in execution of that decree purchased this property and obtained possession.

These being the facts of this case we do not think that s. 317 applies. There cannot be any doubt that if a creditor of the real owner of a property brings a suit for declaration that it belongs to his debtor and not to the certified benami purchaser, it would not be precluded by the provisions of s. 317. That section was intended to prevent fraud, and if it were to apply to a case like that stated, instead of preventing fraud it would promote fraud.

We are, therefore, of opinion that upon the facts found by the lower Court, there is no force in the objection that has been taken.

We dismiss the appeal without costs as no one appears for the respondent.

Appeal dismissed.