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As the appeal to the Court below was decided upon a preliminary point, and its decision on that point was erroneous, I set aside the decree below and remand the case to the lower appellate Court under section 562 of the Code of Civil Procedure with directions to readmit the appeal under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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August 3.

Before Mr. Justice Blair and Mr. Justice Burkitt.

NAND KISHORE LAL (PLAINTIFF) *v.* AHMAD ATA AND ANOTHER (DEFENDANTS).

ANMOLI BIBI AND ANOTHER (PLAINTIFFS) *v.* AHMAD ATA AND ANOTHER (DEFENDANTS).

BHOLE BIBI (PLAINTIFF) *v.* AHMAD ATA AND ANOTHER (DEFENDANTS).*

Benamidar—Suit by benamidar on title for possession of immovable property—Right of benamidar to sue in his own name.

A *benamidar* suing for the recovery of immovable property on title can sue in his own name, and when such a suit is instituted by a *benamidar* it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*. *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (1) and *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (2) dissented from. *Fuseelun Beebee* v. *Omdah Beebee* (3) and *Meheroonissa Bibee* v. *Hur Churn Bose* (4) distinguished. *Gopeekrist Gosain* v. *Gungapersaud Gosain* (5) explained. *Ram Bhurosee Singh* v. *Bissesser Narain Singh* (6). *Gopi Nath Chobey* v. *Bhugwat Pershad* (7) *and Shangara* v. *Krishnan* (8) referred to.

THIS was a suit upon a deed of sale to recover possession of a share in zamíndári property. The plaintiff, Nand Kishore Lal, stated in his plaint that one Musammat Jokhan Bibi had at one time been in proprietary possession of a sixteen anna mahál of which the property in suit formed part; that on the death of Jokhan Bibi this sixteen anna mahál descended in equal portions

* Second Appeal Nos. 920, 1081 and 1245 of 1893, from decrees of L. M. Thornton, Esq., District Judge of Jaunpur, dated the 8th June 1893, confirming the decrees of Rai Anant Ram, Subordinate Judge of Jaunpur, dated the 23rd December 1892.

(1) 3 W. R., 159.
(2) I. L. R., 16 Calc., 364.
(3) 10 W. R., 469.
(4) 10 W. R., 220.
(5) 6 Moo. I. A., 53.
(6) 18 W. R., 454.
(7) I. L. R., 10 Calc., 697.
(8) I. L. R., 15 Mad., 267.

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to Ahmad Ata, her husband, the first defendant, and to Muhammad Amir Ali, her maternal uncle; that on the death of Amir Ali in 1885 his eight anna share descended to his son Muhammad Ali, the second defendant, and that Muhammad Ali, on the 25th November 1885, had sold to him a one anna share out of the eight anna share which he had inherited from his father. The plaintiff further alleged that defendant No. 1 had obstructed him in obtaining possession of the property sold to him as above described, and he accordingly claimed possession of the property sold and mesne profits.

The suits out of which the two other appeals (Nos. 1081 and 1245) arose were similar suits in respect of other portions of the same property sold by the defendant Muhammad Ali to other vendees, namely, the former in respect of a four anna share sold to Musammat Anmoli Bibi and Musammat Mariam Bibi in 1885, and the latter in respect of a two anna share sold to Musammat Bhole Bibi in 1889.

In all three suits the defendant Muhammad Ali admitted the plaintiffs' claims; but the other defendant resisted the suits and raised the plea *inter alia* that in all three cases the plaintiff or plaintiffs were not entitled to sue, as in each case the transaction was *benami* and the plaintiff or plaintiffs appearing on the record were not the persons really entitled to the benefit of the transactions upon which the suits were based.

The three suits were tried together by the Court of first instance (Subordinate Judge of Jaunpur) and dismissed, the Subordinate Judge holding that the transactions in question could not be enforced at the instance of the plaintiffs before the Court.

In each case the plaintiffs appealed, and their appeals were dismissed by the lower appellate Court (District Judge of Jaunpur).

The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Majid*, Munshi *Ram Prasad*, Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the appellant.

Mr. *Amir-ud-din* and Maulvi *Ghulam Mujtaba*, for the respondents.

} in S. A. No. 920 of 1893.

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Mr. *Abdul Majid*, for the appellants. } in S. A. No. 1081 and S. A. No. 1245 of 1893.

Mr. *Amir-ud-din* and Maulvi *Ghulam Mujtaba*, for the respondents.

BURKITT, J.—This and the two connected appeals, Nos. 1081 and 1245 of 1893, are second appeals from decrees of the District Judge of Jaunpur affirming the decrees of the Subordinate Judge of Jaunpur dismissing plaintiffs' suits. The facts of the cases appear to be that one Musammat Jokhan Bibi was the owner in possession of the entire village of mauza Dhania Mau. On her death in May 1880, her husband, the defendant-respondent Ahmad Ata, took possession of the whole 16 annas, and was recorded as proprietor. It is alleged that at the death of Musammat Jokhan Bibi one of her heirs was Sheikh Amir Ali, and that he was entitled to 8 annas of the property. This Amir Ali is now dead and is represented by his son Khwaja Muhammad Ali. Khwaja Muhammad Ali by three sale-deeds, purporting to be executed in respect of a four annas share in favor of Musammat Mariam Bibi and Anmoli Bibi in 1885, in respect of a two annas share in favor of Musammat Bhole Bibi in November 1889, and in respect of a one anna share in favor of the plaintiff-appellant in this case, one Nand Kishore, in 1889, purported to sell 7 out of the 8 annas to which he claims title in succession to his father Amir Ali. Three suits have been instituted on these deeds and have been dismissed.

In the course of the hearing it was alleged that the plaintiffs in those three suits were *benamidars* for other parties. The lower Courts have found that such was the fact and that finding is binding on us in second appeal. It is not very easy to say what was the precise ground on which the learned District Judge has affirmed the decision of the Court of first instance. The learned Judge distinctly and unmistakably holds that a *benamidar* can sue in his own name. He also apparently has not dismissed plaintiffs' suits on the ground that they were champertous, though he says:—"There is no positive law of champerty in the mofussil in India, but I still cannot suppose that the law permits and encourages the sort of person who has a good scent for sleeping and possible claims to possess himself of such for some slight and

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concealed consideration, then to cause the owner of the claim to execute any papers that are necessary for litigation and then to bring suits against persons in possession at his discretion.' These words certainly leave it doubtful whether the District Judge did not hold that the suits were bad as being champertous. He also says that there were no genuine sales and that the sales were fictitious and shams. From the tenor of his judgment and that of the Subordinate Judge which he adopts, it is clear that he has formed that opinion because he held that the sale considerations which actually passed between the vendor and the vendee were but small. In two cases it is shown by the Judge that a sum of Rs. 100 was paid in cash by the vendees to the vendor, and in the third case the sale-deed recites receipt of the sale consideration and further contains a promise by the vendee to assist the vendor in recovering the share he reserved to himself. The learned Judge as to this last deed finds that the sale consideration was not paid, and he also finds that the vendee did not assist the vendor in litigation. It is not easy to understand how the first of these questions could arise between the plaintiff and the defendant Ahmad Ata, and as to the failure to assist the vendor in his litigation, that might be a matter for a suit for damages by the vendor, but is not a reason for holding the sale-deed to be invalid or fictitious or a sham, or for allowing the defendant to raise such a plea.

It seems to me that in coming to a decision in these cases the learned District Judge has lost sight of section 54 of the Transfer of Property Act. In that section sale is defined to be "A transfer of ownership in exchange for a price paid or promised or part paid and part promised." Consequently it follows in all these three cases, as laid down in the case of *Shib Lal* v. *Bhagwan Das* (1), that, whether the sale consideration as entered in the sale-deed was fully paid, or only partially paid, or was not paid at all but was promised to be paid, the effect of the instruments was to transfer to the vendees whatever right and interest the vendor, Muhammad Ali, had in the property which he purported to transfer. If Muhammad Ali be the rightful owner of the 8 annas share to which he asserts

(1) I. L. R., 11 All., 244.

his right, his ownership as to seven out of those 8 annas has been effectually transferred to the vendees under the sale-deeds mentioned above.

At the hearing of these appeals, I may say, no strenuous effort was made to support the finding of the Judge as to that matter. The question to which the arguments of the counsel on both sides were directed was whether the vendees, being *benamidars*, were entitled as such to sue in their own names. The Judge has held that they can so sue, relying on two cases to which I shall refer further on. On this question it is to me difficult to understand how anyone other than the actual plaintiffs in these three cases could sue. They, and they only, are the persons in whom the legal estate is vested. It seems to me that they only are the persons who are entitled to say to the defendant Ahmad Ata,—"Our vendor was the real owner of 8 annas of this village; he has legally transferred 7 out of these 8 annas to us; we therefore call on you to surrender possession to us." And I cannot see how it matters to the defendant that these plaintiffs may be bound by a secret agreement to transfer to some other persons whatever benefit they may obtain by their suit. The latter persons, that is to say, the persons for whose benefit the Court below has found the purchases to have been effected, could not sue unless on the strength of the sale-deeds and without joining the *benamidar* as a party to the suit. A question between the *benamidars* and the alleged beneficiaries is not one to be decided in a suit between the purchaser and the defendant who is alleged to be in wrongful possession, but would be an issue in a suit by the alleged beneficiaries against the *benamidar* if the latter had been successful in obtaining a decree for the property and refused to hand over that property to the beneficiary. For the respondents great reliance was placed on the case of *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (1). That case is decidedly in their favor, as it lays down broadly that in the case of suits for recovery of land on title a *benamidar* is not entitled to maintain the suit. As an authority for the proposition the case just cited refers to the Privy Council case of *Gopeekrist Gosain* v. *Gungapersaud*

(1) I. L. R., 16 Calc. 364.

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Gosain (1). On a careful consideration of the latter case I cannot consider it to be an authority for the proposition that in the case of a suit for recovery of land on title a *benamidar* is not entitled to maintain the suit. No question of that kind was before their Lordships in that case nor is any such question dealt with in their judgment. But as this was one of the earliest cases in which the nature of and the law affecting *benami* transactions came before their Lordships, they, for the purpose of explaining the nature of *benami* transactions and of showing that such transactions had been recognized and adjudicated on by the Supreme Court at Calcutta, and for no other purpose, cited certain extracts from the judgments of Mr. Justice Hyde and of Sir Edward Ryan.

The first of these extracts, as I understand it, shows that the rule in mere personal demands was that the *benamidar* should sue in his own name, but that in "many cases the plaintiff had recovered on notes not in his own name, but in some other name, giving evidence that the transaction was really his." With reference to real estate the extract proceeds,—"But it cannot be allowed to be both ways; in the case of a dispute of land, without directly contradicting those former decisions of the Court." (The semicolon after the word 'ways' in the extracts is evidently a typographical error.) In my opinion the words last cited (assuming that they have any authority) do not support the rule laid down in 16 Calcutta, page 364. On the contrary, they appear to me to point to a diametrically opposite conclusion, and to mean that, though in mere personal demands a practice had grown up of allowing the suit to be instituted by the beneficiary instead of by the person in whose name the note stood, such a practice could not be allowed in the case of real estate.

It is impossible to my mind to give full effect to the antithesis contained in the words—"but it cannot be allowed to be both ways"—by any other interpretation. Those words, I hold, clearly point to a divergence in the practice in cases of disputes as to land from the practice obtaining in the case of mere personal demands. In the latter class of cases the beneficiary was in many cases

(1) 6 Moo. I. A. 53.

allowed to sue, but in the former, I take it, the rule was that the party who possessed the legal title to the property in dispute was the person who should sue, and not the persons for whom he might hold *benami*.

As to the case in Sir Edward Ryan's time I am unable to deduce any rule from it. It appears to have been a bill of complaint on the Equity side of the late Supreme Court, the nature of which is not stated, and no more can be gathered than that the plaintiffs had called for some kind of accounts, which the Court refused them, apparently because they were *benamidars*; but, as already mentioned in considering these extracts, it must be borne in mind that they form no portion of the judgment of their Lordships of the Privy Council and were cited by their Lordships simply for the purpose mentioned above.

The case in I. L. R., 16 Calcutta 364, cites the case of *Prosunno Coomar Roy Chowdhry* v. *Gooroo Churn Sein* (1) as authority for the proposition that a *benamidar* cannot sue for the recovery of land on title. But on examining that case I find that it does not proceed on the authority of any reported case; indeed the learned Judges who decided it say:—"There is no direct precedent upon this point, but we incline to the above view as consonant with equity and the policy of the Civil Procedure Code;" and they allude to certain inconvenient results which they conceive might occur if a *benamidar* were allowed to sue. The case of *Fuzeelun Beebee* v. *Omdah Beebee* (2) was the case of a vakil who during his employment as such had purchased some property from his client, and to conceal his improper and unprofessional conduct had taken the conveyance *benami* in the name of his son-in-law. It was held by the Court that the son-in-law could not sue, and, considering that the vakil was endeavouring under cover of his son-in-law to obtain an advantage from his client which the law forbad, it is difficult to understand how the Court could have decided otherwise. The case is entirely a peculiar one, and I cannot regard it as an authority on the general question.

(1) 3 W. R. 159. (2) 10 W. R., 469.

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Another case from the same volume, namely, the case of *Meheroonissa Bibee* v. *Hur Churn Bose* (1), was cited by the learned counsel for the appellant at the hearing of these appeals. This case also turns on a special state of facts. In it a tenant who had created several incumbrances on his holding allowed the tenure to be sold for default, and at auction purchased it in the name of a *benamidar*. The latter claimed to have acquired the tenure free from all the incumbrances which the original tenant had created. It was held most properly that the tenant could not take advantage of his own wrongful act and that the suit could not be maintained by the *benamidar*. In the case of *Ram Bhurosee Singh* v. *Bissesser Narain Mahata* (2) the case from 3 Weekly Reporter, p. 159, was discussed, and, though not actually dissented from, was not followed, or at least was held not to govern the case then under discussion. In the latter case the plaintiff held an ostensible title by a *mokurrureee* lease and a bill of sale, and sued to recover some land which he alleged to be covered by his instruments of title. The defendant objected that the plaintiff was not the real owner of the village and therefore was not entitled to sue. The Court held that the ostensible title set up by the plaintiff "was sufficient to enable him to bring the suit, and that the defendants were not at liberty, in a suit of this description, to raise the question whether he was only nominally the owner of the property, somebody else being the real owner." The Court also was of opinion that the difficulties suggested in the case in 3 Weekly Reporter might all be met without holding that the party who brings the suit and has a *primâ facie* title is bound to prove that he is the real owner. This case is very much on all-fours with the present appeals. The plaintiff-appellant in these appeals has *primâ facie* a legal title, and, in the words of the judgment I have just cited, I think the respondents are not at liberty to raise the question whether those plaintiffs are only nominally the owners of the property, somebody else being the real owners.

In the case of *Gopi Nath Chobey* v. *Bhugwat Pershad* (3) it was not contended that a *benamidar* might not sue in his own name,

(1) 10 W. R. 220. (2) 18 W. R., 454.
(3) I. L. R., 10 Calc. 697 at p. 705.

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but on the contrary it was admitted that he might do so, and that, in the absence of evidence to the contrary, it was to be presumed, in the case of a suit by a *benamidar*, that it had been instituted with the full authority of the beneficial owner, and that any decision come to would have the effect of a *res judicata* as against the real owner. To the same effect is the ruling of the Madras High Court in the case of *Shangara* v. *Krishnan* (1).

From the cases cited above I am unable to find that any rule supported by authority exists to the effect that a *benamidar* cannot sue in his own name for the recovery of immovable property on title. I am most strongly of opinion that such a suit is permissible and that when instituted by a *benamidar* it must be held to have been instituted with the consent and approval of the beneficiary, against whom any adverse decision on the title set up will take effect as a *res judicata*.

I therefore hold that these suits are not bad because they have been instituted by persons who have been found to be *benamidars*. This was the only ground on which a serious attempt was made to support the dismissal of the suits by the lower Courts.

I would therefore set aside the decrees dismissing the suits, and, as the suits were disposed of the preliminary point that they were not maintainable and without any decision on the merits as to the title of the vendor Muhammad Ali, I would remand the three cases through the District Judge to the Court of first instance with directions to replace them on the file of pending cases and decide them on the merits according to law. I would also direct that all costs here and hitherto should follow the result.

BLAIR, J.—I concur.

Appeal decreed and cause remanded.

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(1) I. L. R., 15 Mad., 267.