1899

JANKI PRASAD v. ISHAR DAS.

answered in the negative. The argument that "at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action," was not allowed to prevail.

For these reasons I am of opinion that the suit ought to have been dismissed by the Courts below, and that we ought to allow the defendants' second appeal and dismiss the suit with costs in all Courts

KNOX, BANERJI, BURKITT and AIKMAN, J J., concurred.

Appeal decreed.

1899
May 16.

APPELLATE CIVIL.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.

YAD RAM (PLAINTIFF) v. UMRAO SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Suit for sale on a mortgage—Benamidar—Right of benamidar mortgagee to sue.

Held, that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person. *Nand Kishore Lal* v. *Ahmad Ata* (1) followed. *Gopi Nath Chobey* v. *Bhugwat Pershad* (2); *Bhola Pershad* v. *Ram Lall* (3); *Sachitananda Mohapatra* v. *Baloram Gorain* (4); *Shangara* v. *Krishnan* (5); *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (6) and *Dagdu* v. *Balvant Ramchandra Natu* (7) referred to; *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (8); *Issur Chandra Dutt* v. *Gopal Chandra Das*, (9) and *Baroda Sundari Ghose* v. *Dino Bandhu Khan* (10) dissented from.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Harendra Krishna Mukerji*) for the appellant.

Mr. *D. N. Banerji* and Munshi *Ram Prasad* for the respondents.

* Second appeal No. 21 of 1897, from a decree of T. C. Piggott, Esq., Additional District Judge of Aligarh, dated the 2nd October 1896, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 24th March 1896.

(1) (1895) I. L. R., 18 All., 69.
(2) (1884) I. L. R., 10 Calc., 697.
(3) (1896) I. L. R., 24 Calc., 34.
(4) (1897) I. L. R., 24 Calc., 644.
(5) (1891) I. L. R., 15 Mad., 267.
(6) (1897) I. L. R., 22 Bom., 672.
(7) (1897) I. L. R., 22 Bom., 820.
(8) (1889) I. L. R., 16 Calc., 864.
(9) (1897) I. L. R., 25 Calc., 98.
(10) (1898) I. L. R., 25 Calc., 874.

STRACHEY, C. J.—This is a suit for sale of mortgaged property brought by a second mortgagee offering to redeem the first mortgagees, who are parties to the suit. The first mortgage was a usufructuary mortgage. The only defendants who resisted the suit were the purchasers, subsequent to the plaintiff's mortgage, of the equity of redemption of part of the mortgaged property. Their main defence was that the plaintiff had no right to maintain the suit, as he was only a benamidar, the mortgage money having been advanced by the defendants, first mortgagees. The Court of first instance decreed the suit. The lower appellate Court, without going into the merits, dismissed the suit on the ground that the plaintiff was merely a benamidar of the first mortgagees, and therefore was not competent to maintain the suit. That is the only question which we have to consider in this appeal. We must take it that the plaintiff, in whose favour the mortgage sued on was executed, was only a benamidar for the first mortgagees.

Now the question whether, and in what circumstances, a benamidar is competent to maintain a suit in his own name and without the beneficial owner being a party to the suit, has been discussed in a number of rulings in the various High Courts, and in regard to it a considerable conflict of authority prevails. In those cases which affirm the right of the benamidar so to sue the right has been based partly on the fact that he is the transferee named in the registered instrument constituting the transfer, and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the benamidar must be presumed to be suing on behalf of the beneficial owner, or, to put the same idea into other words, that the suit is really brought by the beneficial owner through, and in the name of, the benamidar. On the other hand, those rulings which are adverse to the right of the benamidar to sue are mainly based on the ground that a suit cannot be maintained by any person who fails to prove, if his title is challenged, that he has a real interest of his own in the subject-matter of the suit.

1899

YAD RAM v. UMRAO SINGH.

Now I do not propose to discuss on principle which of these conflicting views I should follow if the question were *res integra*. I propose to deal with it simply on the authorities. In this Court the authority is all one way. In *Nand Kishore Lal* v. *Ahmad Ata* (1), it was held that a benamidar was competent to sue in his own name to recover possession of immovable property, and that such a suit must be deemed to have been instituted with the consent and approval of the beneficial owner. I think that we are bound to follow that decision, unless we entertain so strong a view that it is wrong that we consider it our duty to refer the matter to a Full Bench. When the cases subsequent to that case are examined, I think that they show a very decided preponderance of authority in its favour. The decision expressly dissents from that in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar* (2), in which it was laid down that a benamidar cannot maintain a suit for recovery of land on title, even if the real owner disclaims or is a party to the suit. This Court's decision has again been dissented from, and the case reported in 16 Calc., p. 364, followed, in two recent decisions of the Calcutta High Court. In the first of these—*Issur Chandra Dutt* v. *Gopal Chandra Das* (3), it was held that a mere benamidar cannot maintain a suit for ejectment. The same was held in the case of *Baroda Sundari Ghose* v. *Dino Bandhu Khan* (4). Now these two decisions of the Calcutta High Court merely follow as correct certain previous decisions of that Court. They are not consistent either with the recent rulings of the Calcutta High Court itself, or with the rulings, not only of this Court, but of the Madras and Bombay High Courts. Taking first the decisions of the Calcutta High Court itself, in *Gopi Nath Chobey* v. *Bhugwat Pershad* (5), the principle was laid down generally that in the absence of evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner; and if so, any decision would bind the

(1) (1895) I. L. R., 18 All., 69.
(2) (1889) I. L. R., 16 Calc., 364.
(3) (1897) I. L. R., 25 Calc., 98.
(4) (1898) I. L. R., 25 Calc., 874.
(5) (1884) I. L. R., 10 Calc., 697.

real owner as if the suit had been brought by the real owner himself. The suit there was a suit for malikana, but the principle is laid down in all its generality. In the 24th volume of the Calcutta Series of the Indian Law Reports, there are two cases not referred to in the most recent decisions of that Court, but wholly inconsistent with the view that the benamidar cannot maintain a suit. In *Bhola Pershad* v. *Ram Lall* (1), the suit was for enforcement of a mortgage bond. In the judgment it is observed :— "We are unable to say that a benamidar cannot under any circumstances sue. * * * * Unless an objection be taken, a decree can be made in his favour. There is authority to show that the real owner is bound by a suit by the benamidar." In *Sachitananda Mohapatra* v. *Baloram Gorain* (2), the suit most closely resembled the present. It was a suit for foreclosure. It was held that a suit for foreclosure may be brought by the person named in the mortgage-deed, though he is only a benamidar, and that the suit should not be dismissed because the beneficial owner is not a party. The ground of that judgment which refers to another decision in a very similar case, was that the contract could be enforced by the parties who had entered into it, and that, whoever supplied the money, the transfer of the mortgaged property was by the deed made to the plaintiff. There is therefore strong authority in the Calcutta High Court itself, not referred to in the decisions which dissent from the ruling of this Court in *Nand Kishore Lal* v. *Ahmad Ata*, that a benamidar is competent to sue in his own name for enforcement of a mortgage without the beneficial owner or the person supplying the funds being made a party.

Turning next to the decisions of the other High Courts, the authorities are to the same effect. In *Shangara* v. *Krishnan* (3) the suit was to recover possession of land. It was held, citing the case reported in 10 Calc., p. 697, that the beneficial owner was bound by a decree passed in a previous suit brought by the benamidar and which must be presumed to have been brought with the true owner's authority and consent, and the decision

(1) (1896) I. L. R., 24 Calc., 34. (2) (1897) I. L. R., 24 Calc., 644.
(3) (1891) I. L. R., 15 Mad., 267.

1899

YAD RAM v. UMRAO SINGH.

implies that the benamidar was competent to maintain that suit. The most recent rulings are two decisions of the Bombay High Court. The first is the case of *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (1). In that case Mr. Justice Ranade referred to all the principal rulings on the subject, and observed that the Allahabad High Court in *Nand Kishore Lal* v. *Ahmad Ata* (2) had shown good reasons for its dissent from the ruling of the Calcutta High Court in *Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar*. He adds,—here speaking apparently for Mr. Justice Parsons as well as himself,—that they are inclined to agree with the Allahabad and Madras High Courts, and to hold that a benami certified purchaser can sue in his own name, even when the true owner's name is disclosed. That decision was followed in *Dagdu* v. *Balvant Ramchandra Natu* (3). The suit in that case was for redemption of mortgage; it was held that a benamidar may maintain a suit in his own name, but that the Court will put the defendant in the same position as if the real owner were the actual plaintiff. It was found in that case that the beneficial owner, who was not an agriculturist, was using the benamidar plaintiff, who was an agriculturist, for the purpose of suing without payment of the usual stamp fee, and of obtaining the benefit resulting from the provisions of the Dekkan Agriculturists' Relief Act in favour of agriculturists. The Court, while allowing the suit by the benamidar to proceed, imposed, for the purpose of defeating the contemplated fraud on the public revenue, the condition that it should only be allowed to proceed "on payment of the usual stamp fees as though Kelkar was the nominal as well as the real plaintiff."

This review of the cases shows, I think, that, treating the matter purely as one of authority, the balance of authority is most distinctly in favour of the decision of this Court in *Nand Kishore Lal* v. *Ahmad Ata*. I think, therefore, that we ought to follow that ruling. The result of this view is that the decree of the lower appellate Court must be set aside and the case remanded

(1) (1897) I. L. R., 22 Bom., 672. (2) (1895) I. L. R., 18 All., 69.
(3) (1897) I. L. R., 22 Bom., 820.

to that Court, and the Court directed to dispose of the case on the merits.

In so disposing of the case I think the Court should have regard to the principle laid down by the Bombay High Court in *Dagdu* v. *Balvant Ramchandra Natu*. It is alleged or suggested that the object of this benami transaction and of the suit brought by the benamidar is to obtain a decree for sale for the benefit of the second set of defendants, who, as usufructuary mortgagees, would not themselves be entitled to obtain a decree for sale in respect of their usufructuary mortgage. As to whether this is the object of the suit we of course express no opinion : but in considering the question the lower appellate Court should, I think, bear in mind the observations of Sir Charles Farran in the case I have just mentioned.

The plaintiff will have the costs of this appeal. The other costs will abide the result.

BANERJI, J.—I agree that the decree of the Court below should be set aside and the case remanded to that Court. The suit is one for sale upon a mortgage in which the plaintiff is named as the mortgagee. It has been found by the lower appellate Court, and that finding must be accepted in this second appeal, that the plaintiff is only a benamidar for certain other persons. The question therefore which has to be determined in this appeal is whether a benamidar is entitled to maintain a suit like this in his own name. The question, so far as this Court is concerned, is covered by the authority of the ruling in *Nand Kishore Lal* v. *Ahmad Ata* (1). That ruling has been approved by the Bombay High Court in the cases to which the learned Chief Justice has referred. It is in consonance with the decision of the Madras High Court in *Shangara* v. *Krishnan* (2) and it is supported by at least one of the cases decided by the Calcutta High Court—I mean the case of *Sachitananda Mohapatra* v. *Baloram Gorain* (3). The weight of authority is thus in favour of the view

(1) (1895) I. L. R., 18 All., 69. (2) (1891) I. L. R., 15 Mad., 267.
(3) (1897) I. L. R., 24 Calc., 644.

1899

YAD RAM v. UMRAO SINGH.

taken by this Court, and I do not feel myself justified in departing from that view. On this short ground I would decree the appeal and remand the case under section 562 of the Code of Civil Procedure.

Appeal decreed and cause remanded.

1899
May 18.

Before Sir Arthur Strachey, Knight, Chief Justice, and Mr. Justice Banerji.
DHARAMRAJ KUNWAR (PLAINTIFF) *v.* SUMERAN SINGH AND ANOTHER (DEFENDANTS).*

Act No XII of 1881 *(N.-W. P. Rent Act), section* 44*—Landholder and tenant—Improvements—Wells—Power of tenants to construct wells without consent of landholder.*

Held, that having regard to section 44 of the N.-W. P. Rent Act, 1881, an occupancy tenant may, if such well be an improvement within the meaning of the section, construct either a kacheha or pacca well on his holding without any reference to the consent of the zamindar. *Raj Bahadur* v. *Birmha Singh* (1) and *Muhammad Raza Khan* v. *Dalip* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. *B. E. O'Conor*, for the appellant.

Mr. *J. Simeon* for the respondents.

STRACHEY, C. J.—The plaintiff in this case claimed an injunction involving the demolition of a pacca well constructed by the defendants on land which the plaintiff claimed as his own. He claimed a right, as owner of the land, to have the well demolished. The defendants pleaded that they had constructed the well on land belonging to themselves. It has been found as a fact that the defendants are occupancy tenants of the land on which they constructed the well. It is common ground that they constructed it without the consent of the plaintiff, who is the zamindar. That is how the case stood in the Court of first instance. The question as stated by that Court is:—"Can an occupancy tenant construct a well on his holding without the permission of

* Second Appeal No 170 of 1897, from a decree of J. J. McLean, Esq., District Judge of Jaunpur, dated the 7th December 1896, confirming a decree of Babu Bhawani Chandar Chakarvarti, Munsif of Jaunpur, dated the 25th August 1876.

(1) (1880) I. L. R., 3 All., 85. (2) Weekly Notes, 1892, p. 103.