1899
January 28.

Before Mr. Justice Banerji and Mr. Justice Aikman.

SIBTA KUNWAR (PLAINTIFF) *v.* BHAGOLI (DEFENDANT)*

Civil Procedure Code, section 317—*Benami transaction*—*Suit against heir of certified purchaser*—*Interpretation of Statutes.*

Held that s. 317 of the Code of Civil Procedure would not preclude a suit against a person who claimed title through the certified purchaser based on the allegation that the certified purchaser was not the real purchaser, but only purchased benami for the person through whom the plaintiff claimed. *Mussumat Buhuns Kowur v. Lalla Buhooree Lall* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* for the appellant.

Messrs. *C. Dillon* and *Roshan Lal* for the respondent.

BANERJI and AIKMAN, JJ.—This was a suit for the possession of certain shares in two villages, namely, Amirta and Nadeli, and of a share in a house in the village Amirta, which belonged originally to one Kishan Lal. The plaintiff is one of two daughters of Kishan Lal. The defendant is the daughter of a pre-deceased son of Kishan Lal, named Lokman. Lokman's widow was Musammat Natholi, who survived Kishan Lal, but is now dead. On the 19th of February 1884, Kishan Lal executed a deed of gift in favour of Musammat Natholi is respect of the village Nadeli and a house. In execution of a decree which a creditor of Kishan Lal had obtained against him the share in the zamindari of Amirta was sold by auction on the 20th of June 1884, and was purchased in the name of Musammat Natholi. Upon the death of Musammat Natholi the property now in suit was taken possession of by her daughter, Musammat Bhagoli. Hence the present suit.

The plaintiff asserts that the deed of gift relating to the village Nadeli and the house property was a colourable transaction; that Kishan Lal purchased the share in the village Amirta with his own funds benami in the name of Musammat Natholi; that he continued in possession as owner of the whole property till his

* First appeal No. 250 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 21st September 1896.

(1) (1872) 14 Moo., I. A. 496.

death; that upon his death the plaintiff and her sister have succeeded to that property by right of inheritance, and that the plaintiff is thus entitled to a half share of it.

As regards the village Amirta, the suit was defended upon two grounds: first, that section 317 of the Code of Civil Procedure bars the suit; and, secondly, that the share was purchased by Natholi with her own funds. As for the property covered by the deed of gift, the contention was that the gift was a real transaction, and that by it Kishan Lal intended to, and did actually, transfer his interest in the property to Musammat Natholi.

As regards the property covered by the deed of gift, we are of opinion that the appeal must fail. The deed itself affords internal evidence of the fact that the intention was that the property should go to Natholi. It is stated in it, as a condition attached to the gift, that Musammat Natholi would have power to transfer it to her daughters, Bhagoli and Jika, but that she would have no power to transfer it to any other person. It further provides that after Natholi's death the property should go to her daughters. If the gift was a mere paper transaction, we should not have expected clauses, like those to which we have referred, carefully limiting the right of the donee. We further find that on the date on which the deed of gift was executed Kishan Lal obtained a power of attorney from Musammat Natholi, evidently for the purpose of managing the property on her behalf. It is natural to expect that he would wish to make some provision for his widowed daughter-in-law and her children, and it seems to us in the highest degree probable that it was with that intention that he executed the deed of gift. The plaintiff's own witness, Ram Dial, said that "Kishan Lal made the gift for the maintenance of his daughter-in law, Natholi. He made the gift for the maintenance of his son's widow, thinking that she might be put to trouble after him." We agree with the Court below in thinking that the plaintiff has failed to show that the gift was a nominal transaction and did not convey to Musammat Natholi the property to which it relates. So far the appeal must fail.

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As for the village Amirta, the learned Subordinate Judge has held that section 317 of the Code of Civil Procedure precludes the plaintiff from maintaining the present suit, as Musammat Natholi was the certified purchaser of that village at auction. Had Natholi herself been the defendant to the suit, we should have seen no reason to differ from the conclusion of the learned Subordinate Judge; but the suit was not brought against the certified purchaser but against a person who derives title from her. Section 317 forbids the maintenance of a suit "against the certified purchaser," which the defendant in this case is not. Why the Legislature stopped here and did not bar a suit against persons claiming through a certified purchaser, we are unable to say; but, as was observed by their Lordships of the Privy Council in *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall and Jokhee Lall* (1), "where the Legislature has stopped the Court must stop." As the provisions of section 317, as they now stand, are in restraint of an ordinary right of suit and preclude a suit against a certified purchaser only, we do not think we should be justified in extending the scope of the section beyond what the language of the section warrants. We are therefore unable to agree with the learned Subordinate Judge in holding that that section bars the maintenance of the present suit.

We have now to consider whether the village Amirta was purchased at auction by Kishan Lal with his own funds, or, as alleged on behalf of the defendants, with the funds of Musammat Natholi. This was an issue which the pleadings in the case raised. The evidence conclusively proves that the purchase-money was paid by Kishan Lal, and there is not a particle of evidence before us to rebut the evidence to that effect. We have further the fact that mutation of names did not take place after auction purchase in favour of Musammat Natholi, and that up to the time of his death Kishan Lal continued to be the recorded owner of the share in question and in possession thereof. The learned Subordinate Judge has found that it was the intention of

(1) (1872) 14 Moo., I. A. 496.

Kishan Lal to give this property also to Natholi. In the first place, this view is opposed to the pleadings. It is certainly not borne out by the evidence of the witness Brij Lal, to which the learned Subordinate Judge refers, and it is not supported by any other evidence upon which we can rely. If it was the intention of Kishan Lal that this property also should go to Natholi, we should have expected to find that he had given expression to that intention by a proper deed, as he did in the case of the other village. If such was ever his intention, he died without giving effect to it. We therefore hold that, so far as the suit relates to the share in the village Amrita, the plaintiff is entitled to a decree; but as regards that portion of the claim which relates to the property covered by the deed of gift, her suit has been rightly dismissed.

The plaintiff also claimed a moiety of 214 bighas 18 biswas of khudkasht land in Amirta and some sir land in the same village. The Court below has granted her a decree in respect of the sir as an éxproprietary tenant. In the view which we have taken of the case the plaintiff is entitled to a decree for possession of the sir land as such. Her father could not be regarded as an ex-proprietary tenant of the sir land, inasmuch as we have held that he was the purchaser and proprietor of the zamindari to which the sir appertained down to the date of his death. As for the khudkasht land, we hold that Kishan Lal held it *quâ* zamindar, and it must go to his heirs along with the zamindari to which it appertained. The defendant has no title in respect of that land superior to that of the plaintiff.

The result is that we allow the appeal and vary the decree below by making a decree in favour of the plaintiff for possession of 3 biswas $6\frac{3}{4}$ biswansis share in mauza Amirta, and a moiety of 214 bighas 18 biswas of khudkasht land, and of 12 bighas of sir land and mesne profits in respect of the said share and lands for three years preceding the date of the suit, with future mesne profits up to the date of delivery of possession, or the expiry of three years from this date, whichever event first occurs, such mesne profits to

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be determined in execution. *Quoad ultra* we affirm the decree of the Court below. The parties will pay and receive costs both here and in the Court below in proportion to their failure and success.

Decree modified.

1899 *January* 30.

Before Mr. Justice Banerji and Mr. Justice Aikman.

GIRDHARI LAL AND ANOTHER (PLAINTIFFS) *v.* RAM LAL AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, section 539—*Trust—Suit to compel trustees to account—Court fee—Act No. VII of* 1870 *(Court Fees Act), sch. ii, art.* 17, *cl. (vi.)—Suit for removal of trustees.*

The mere fact that the plaintiffs in a suit under section 539 of the Code of Civil Procedure may ask for an account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of art. 17, cl. (vi) of the second schedule to the Court Fees Act, 1870, and render the plaintiffs liable to pay an *ad valorem* Court fee on that part of their plaint. *Thakuri* v. *Bramha Narain* (1) referred to.

A suit for the removal of an old trustee who has committed a breach of trust and for the appointment of new trustees may properly be brought under section 539 of the Code of Civil Procedure. *Huseni Begam* v. *The Collector of Moradabad* (2), approved. *Rangasami Naickan* v. *Varadappa Naickan* (3), dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the appellants.

Mr. *W. M. Colvin* and Munshi *Gokul Prasad*, for the respondents.

BANERJI and AIKMAN, JJ.—A preliminary objection was raised on behalf of the respondents to the hearing of this appeal, on the ground that the plaint in the Court below and the memorandum of appeal in this Court were not sufficiently stamped. The principal ground of this contention is that the claim embraces a prayer for an account, and that the Court fees ought to have

* First Appeal No. 251 of 1896 from a decree of J. E. Gill, Esqr., District Judge of Cawnpore, dated the 7th October 1896.

(1) (1896) I. L. R., 19 All., 60. (2) (1897) I. L. R., 20 All., 46.
(3) (1894) I. L. R., 17 Mad., 462.