

1900

HEM  
KUNWAR  
v.  
AMBA  
PRASAD.

necessary to amend the memorandum of appeal, as in my opinion the preliminary objection fails.

It was not suggested that if the decree of the lower appellate Court should be set aside, an opportunity should be given to the appellants in that Court to bring the representatives of the deceased respondent on the record, as was suggested by the Court in *Chandarsang v. Khimabhai* (1). They had, it was found, by a mistake put a person on the record as representative, who was not in fact the legal representative of the deceased respondent, but even then the application to amend the record was made too late.

For the reasons which I have given, I think the proper order for the lower appellate Court to have made was to have directed the appeal to abate. I therefore allow this appeal and set aside the decree of the lower appellate Court. The result will be that the decree of the first Court will be restored. The appellants are entitled to their costs in this Court and the lower appellate Court.

*Appeal decreed.*

1900  
July 7.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

GANGA BAKSH AND OTHERS (PLAINTIFFS) v. RUDAR SINGH  
(DEFENDANT).\*

*Civil Procedure Code, sections 294, 317—Indian Trusts Act (No. II of 1882), sections 82, 88—Purchase by alleged agent of decree-holder at sale in execution.*

Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

\* Second Appeal No. 997 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 22nd September 1897, reversing a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Aligarh, dated the 30th June 1896.

1900

GANGA  
BAKSH  
v.  
RUDAB  
SINGH.

*Held*, that under such circumstances the second paragraph of section 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section.

*Held* further, that sections 82, 88 of the Indian Trusts Act (No. II of 1882) did not apply.

*Sankuni Nayar v. Narayan Nambudri* (1) and *Kumbalinga Pillai v. Ariaputra Padiachi* (2) distinguished. *Monappa v. Surappa* (3) referred to.

THE facts are fully set forth in the judgment of Mr. Justice Banerji.

Babu *Jogendro Nath Chaudhri* and *S. C. Banerji*, for the appellants.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya* for the respondent.

BANERJI, J.—Sujan Singh, the father of the plaintiffs, held a decree against Hira Singh and Sahib Singh, which the plaintiffs put in execution. It is alleged by the plaintiffs, but denied by the defendant, that the defendant Rudar Singh was the agent and general attorney of the plaintiffs for the purpose of supervising the proceedings connected with the execution of the decree. It is further alleged that an application was made on behalf of the decree-holders under section 294 of the Code of Civil Procedure, for permission to purchase the property which was advertised for sale in execution of the decree, and that the application was refused on the ground that other decree-holders had taken out execution against the same property. This allegation is not traversed on behalf of the defendant. The plaintiffs further state in their plaint that after the refusal of the Court to grant them leave to bid at the sale, the defendant purchased the property in his own name, and made the deposit required by section 306 of the Code of Civil Procedure by raising money on the plaintiffs' credit; that subsequently the plaintiffs paid that money and the remainder of the purchase-money, and that the defendant agreed to convey the property to them after the confirmation of the sale. Objections were taken to the sale on behalf of the judgment-debtors but they were overruled, and the sale was confirmed, and a certificate of sale was granted to the defendant under section 316 of the Code of Civil Procedure. The sale took place on the

(1) (1893) L. L. R., 17 Mad., 282. (2) (1895) I. L. R., 18 Mad., 436.

(3) (1887) I. L. R., 11 Mad., 234.

1900

---

GANGA  
BAKSH  
v.  
RUDAR  
SINGH.

20th August, 1891. It was confirmed on the 5th March, 1892, and the certificate of sale was granted to the defendant on the 11th March, 1892. The plaintiffs state that after the confirmation of the sale the defendant was asked to execute a sale deed, but he refused to do so, and that in April, 1895, he applied for partition of the property. It is thus clear that between the date of confirmation of sale and the date of the suit the defendant was admittedly in possession. In the 9th paragraph of the plaint the plaintiffs assert that they were the real purchasers of the property, and that the name of the defendant was entered as purchaser "*farzi*," that is, nominally. Upon these allegations the plaintiffs ask for a declaration that they are the real purchasers and that the defendant has without their permission got his name entered as purchaser, and they pray to be put into possession. The defendant denied that the purchase had been made by him on the plaintiffs' behalf and with the plaintiffs' money. He also pleaded the bar of section 317 of the Code of Civil Procedure. The Court of first instance granted the plaintiffs a decree, but the lower appellate Court has dismissed the suit on the ground that section 317 precluded the plaintiffs from maintaining it. The question we have to determine in this appeal is whether section 317 is a bar to the maintenance of the suit.

It is admitted that the defendant is the certified purchaser, but it is alleged that the plaintiffs are the real purchasers, and that the purchase by the defendant was made on their behalf. If that is so, the case clearly comes within the first paragraph of section 317, and by reason of the provisions of that paragraph the plaintiffs are precluded from maintaining the suit. It is contended on the plaintiffs' behalf that this is a case to which the second paragraph of section 317 applies, and for this contention reliance is placed on the words used in the prayer for relief, where the plaintiffs ask the Court to declare that the defendant has got his name entered in the sale certificate without the permission of the plaintiffs. No doubt in the prayer in the plaint the plaintiffs do ask the Court to make the declaration referred to above, but the case set out by them in the plaint is wholly inconsistent with the allegation that the name of the defendant was entered without

1900

---

 GANGA  
 BAKSH  
 or  
 RUDAR  
 SINGH.

the plaintiffs' consent. As has already been stated, I take the plaintiffs to assert that the purchase by the defendant was made without reference to them, that subsequently when the plaintiffs were informed of the purchase, they supplied the purchase-money, ratified what the defendant had done, and consented to take a conveyance of the property from the defendant after the sale had been confirmed in his name. They do not say in the plaint that when the defendant's name was entered in the sale certificate it was entered without their consent. On the contrary, they assert that it was entered nominally, that is, as *benamidar* for them. Upon such allegations it is not open to the plaintiffs to contend that the second paragraph of section 317 applies to the case. As they had been refused permission to bid, they could not possibly have said that their own name should have been entered in the sale certificate.

It is next contended on behalf of the plaintiffs-appellants that this is not a case of a *benami* purchase at all, and therefore section 317 has no application. This contention is not borne out by any of the allegations contained in the plaint, but is, on the contrary, opposed to what is stated in the 9th paragraph of the plaint. It is, however, urged that the plaintiffs have stated all the facts in the plaint, and that upon those facts the case which arises is that the defendant is the plaintiffs' agent, and has purchased the property as such with the plaintiffs' money, that this is therefore a case of a constructive trust, and that the plaintiffs are entitled to the benefit of the purchase made by the defendant, and must be deemed to be the purchasers of the property. Reliance is placed upon the provisions of section 88 of the Indian Trusts Act, 1882. That section contemplates the case of a person clothed with a fiduciary character, who by availing himself of his position, gains an advantage for himself. The foundation for the rule laid down in that section is that a person should not place himself in such a position that his duty may conflict with his interest. It is not asserted that the defendant was employed for the purpose of purchasing the property in question on behalf of the plaintiffs, and it is not alleged that it was within the general scope of his duty to make such a purchase. According to the plaintiffs, the defendant was employed as their agent for supervising the execution

1900

---

GANGA  
BAKSH  
v.  
RUDAR  
SINGH.

proceedings. In the performance of his duties as such agent, he was competent to purchase property on behalf of the plaintiffs in execution of that particular decree. But this he could not do unless the leave of the Court to bid and purchase had been obtained under section 294 of the Code of Civil Procedure. In this case leave was refused, and therefore neither the plaintiffs themselves nor the defendant as their agent could buy the property. It could not be said that it was the duty of the defendant to purchase the property in violation of the specific provisions of section 294, which forbids a purchase by the decree-holder without the express permission of the Court. When, therefore, the defendant purchased the property, no conflict could arise between his duty and his interest. He was in no different position from any other purchaser. Section 88, therefore, has no application. If the plaintiff's allegation be true that the money with which the purchase was made was their money, section 82 would have applied but for the proviso appended to that section. That proviso saves the operation of section 317 of the Code of Civil Procedure. Although, therefore, the plaintiffs may have paid the money with which the sale consideration was paid, since the certified purchaser was the defendant, it was not open to the plaintiffs to sue the defendant on the allegation that they were the real purchasers, and that the defendant had purchased the property on their behalf. It is a suit of this description which is contemplated by section 317, and it is the policy of that section to preclude the institution of such a suit. The analogy of a purchase by one member of a joint Hindu family in his own name on behalf of the other members of the family does not, in my opinion, apply in this case. In the case of a joint Hindu family the purchase itself is made by all the members of the family, including the person in whose name the purchase is made, and it is not a case of a purchase by a person who is not the real purchaser. The learned vakil for the appellants relied upon the ruling of the Madras High Court in *Sankunni Nayar v. Narayan Nambudri* (1). With what was said by Mr. Justice Best in his judgment in that case it is not easy to agree; but Mr. Justice Muttuswami Aiyar based his judgment upon the ground that the

purchaser, in that case was the agent of the plaintiffs, and had been employed as agent for the purpose of making the purchase on behalf of the plaintiffs. That was not a case in which the real purchaser was the decree-holder himself who had not obtained the permission of the Court to buy, and consequently would have infringed the provisions of the law if he had bid at the sale and purchased the property. That case is therefore clearly distinguishable from the present. Section 88 of the Trusts Act might be applicable to the case which was before the Madras High Court. The case of *Kumbalinga Pillai v. Ariaputra Padiachi* (1), is also distinguishable. That was a suit for the specific performance of a contract by the auction-purchaser to convey the property to the plaintiff. Had this suit been a suit for the specific performance of the contract which the plaintiffs alleged the defendant had made with them to convey the property to them after confirmation of the sale, that ruling might possibly have been applicable. Even if the suit had been one for the specific performance of the alleged contract, it would still have been a matter for consideration whether such a suit would not be a suit the object of which was to defeat the provisions of law. But we need not consider the point, as the present suit is not one for the specific performance of a contract. The ruling in *Monappa v. Surappa* (2) has no bearing on the present case. In that suit the auction purchaser had delivered possession to the real purchaser, and had subsequently dispossessed him, and it was held that there was a waiver of right, and that the delivery of possession might amount to a transfer of title. For the above reasons the decree of the lower appellate Court is, in my opinion, right. I would dismiss the appeal with costs.

AIKMAN, J.—I am entirely of the same opinion. The plaintiffs, who were decree-holders, had tried to obtain permission of the Court to bid for the property advertised for sale in execution of their decree. That permission was refused. The property was then, it is said, purchased by the defendant as agent of the plaintiffs, and the sale was confirmed in his name. He therefore became a certified purchaser. The plaintiffs come into Court, alleging that the purchase was made with their funds, that they are the

1900

---

 GANGA  
 BAKSH  
 v.  
 RUDAR  
 SINGH.

(1) (1895) I. L. R., 18 Mad., 436.

(2) (1887) I. L. R., 11 Mad., 284.

1900

GANGA  
BAKSH  
v.  
RUDAR  
SINGH.

real purchasers, and that the defendant's name was entered in the sale certificate fictitiously. It follows from this statement that the plaintiffs' suit is one which section 317 of the Code of Civil Procedure declares not to be maintainable unless the entry of the name of the certified purchaser was made fraudulently or without the consent of the real purchaser. In this case no allegation of fraud is made. In the relief the plaintiffs, it is true, ask for a declaration that the defendant's name was entered in the certificate without their consent; but in the body of the plaint they lay no foundation for such a case. In fact, the statement in paragraph 6 of the plaint is quite opposed to the theory that the entry of the defendant's name in the sale certificate was made without the consent of the real purchasers, for in that paragraph the plaintiffs state that the agreement between them and the defendant was that after the sale had been confirmed in his name, he would execute a sale-deed of the property to them. In the face of this allegation it is impossible for the plaintiffs to maintain that the entry of the defendant's name was made without their consent. Further, such a contention on their behalf would at once have been met by a reference to the first paragraph of section 249 of the Code of Civil Procedure, which precludes a decree-holder from bidding for or purchasing a property sold in execution of the decree without the express permission of the Court. I entirely agree also with my learned brother in holding that the provisions of section 88 of the Indian Trusts Act, No. II of 1882, will not help the plaintiffs. It cannot be said that there is any fiduciary duty on an agent towards his principal to assist him in evading the provisions of the law. It is, in my opinion, clear that the Legislature in framing the Trusts Act were careful that it should not in any way enable the provisions of section 317 of the Code of Civil Procedure to be evaded. This appears from section 4 and section 82 of that Act. I agree in the order proposed.

*Appeal dismissed.*