

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

BISHAN DIAL AND ANOTHER (DEFENDANTS) v. GHAZI-UD-DIN
(PLAINTIFF).*

1901
February 5.

Civil Procedure Code, section 317—Suit by beneficial purchaser against certified purchaser—Suit not taken out of the section by reason of the beneficial purchaser being in possession and claiming only a declaration of his title—Execution of decree.

The plaintiff came into Court, alleging that certain property of his having been put up to sale in execution of a decree against him, two of the defendants had, at his request, purchased the said property in their own names and obtained a sale certificate. He further alleged that the purchase-money had been paid by him, and that he had all along remained in possession of the property, and he asked for a declaration that he was the real purchaser and in proprietary possession of the property in suit. *Held* that such a suit could not be exempted from the prohibition contained in section 317 of the Code of Civil Procedure, either upon the ground that the plaintiff being in possession claimed only a declaration, or upon the ground that there had been a retransfer to the plaintiff, and a new title created in him by the action of the certified purchasers. *Sasti Churn Nundi v. Annopurna* (1) and *Monappa v. Surappa* (2) distinguished. *Aldwell v. Ilahi Baksh* (3), *Mussumat Buhuns Kowur v. Lalla Buhoree Lall* (4) and *Lokhee Narain Roy Chowdhry v. Kalypaddo Bandopadhyaya* (5) referred to.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Munshi Jang Bahadur Lal, for the appellants.

Mr. W. K. Porter and Pandit Moti Lal Nehru (for whom Maulvi Ghulam Muftaba), for the respondent.

STRACHEY, C. J.—The question raised by this appeal of the defendants Nos. 2 and 3 is, whether the Courts below ought not to have dismissed the suit as barred by section 317 of the Code of Civil Procedure. The plaint sets forth that the plaintiff is the owner of a zamindari share, which was advertised for sale in execution of a money decree of Kishan Lal and others. At that time there were other decrees against the plaintiff, and in order to protect the property against those decrees, the plaintiff made an arrangement with the appellants, by which "the said property was

* Second Appeal No. 801 of 1898, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 18th July 1898, modifying a decree of Maulvi Ahmad Ali Khan, Additional Subordinate Judge of Aligarh, dated the 30th September 1897.

(1) (1896) L. L. R., 23 Calc., 699. (3) (1888) L. L. R., 5 All., 478.

(2) (1886) L. L. R., 11 Mad., 234. (4) (1872) 14 Moo. L. A., 496.

(5) (1875) L. R., 2 L. A., 154.

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purchased with the plaintiff's money fictitiously in the names of the defendants Nos. 2 and 3, in whom the plaintiff had full confidence by reason of their relationship with the defendant No. 1, and after the purchase the proceedings as to the acquisition of the sale certificate and possession, and as to the mutation of names were had in the names of the defendants Nos. 2 and 3, at the expense of the plaintiff, but in fact the plaintiff is the owner of it, and he is in proprietary possession of the said property by making collections and assessment, and paying the revenue." That sale took place in September, 1893. The plaint goes on to say that recently disputes arose, and in March, 1896, a shareholder in the same village applied for partition, and the defendants, appellants, being entered as the owners of the share in question, were made parties to the partition proceedings. The plaintiff then sought to get his name substituted, but the defendants, he says, "dishonestly denied the plaintiff's proprietary title"

Paragraph 7 of the plaint is as follows:—"The defendants are not the owners of the property; nor are they in possession thereof; on the contrary, the plaintiff is the owner thereof, and it was with his own money that the property in suit was purchased, only fictitiously in the names of the defendants Nos. 2 and 3, and the plaintiff is in possession thereof till now, but owing to the defendants' bad faith the plaintiff apprehends loss of his property. The plaintiff, therefore, prays for the following reliefs:—

"(a) By establishment of the fact that the plaintiff is the real purchaser of two-thirds of 6 biswas 8 biswansis 15 kachwansis $3\frac{1}{4}$ nanwansis share in mauza Paniara Abdullahpur, and is in proprietary possession thereof, it may be declared that the defendants, or any of them, are, or is, not the owners, or owner, of that property.

"(b) If by reason of entry of names in the revenue papers, the plaintiff be considered out of possession by the Courts, then he may be put in proprietary possession of the property."

The defendant No. 1 was only a *pro forma* defendant. The other defendants pleaded the provisions of section 317 of the Code, and further denied that the plaintiff was the real purchaser at the sale in September, 1893, and that they had purchased on his behalf. That being the nature of the suit, the question is

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whether section 317 applies. Section 317 provides that "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.

"Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser."

There are no allegations of fraud in the plaint which would make the second paragraph of the section apply. There can be no doubt that this is a suit against certified purchasers. The plaint clearly proceeds throughout upon the ground that the purchase was made by the certified purchasers on behalf of the plaintiff. That is the whole basis of the suit as set forth in the plaint; and the relief claimed is in express terms a declaration that the plaintiff was the real purchaser, and that the certified purchasers were not the real ones. The suit further appears to me to clearly exemplify the mischief against which section 317 is directed. It is the case of a judgment-debtor trying to evade and defeat his creditors by purchasing the property, which should be available for their debts, secretly in the name of other persons, and afterwards setting up his claim as the real owner. The decision of the Full Bench of this Court in *Aldwell v. Nahi Bakhs* (1) supports the view that section 317 would apply to a suit of this description. The lower appellate Court has held that section 317 does not apply, principally on the authority of *Sasti Churn Nandi v. Annopurna* (2). If the learned Judges in that case meant to lay down that section 317 applies only where the plaintiff, being out of possession, seeks to recover possession from a certified purchaser, and can never apply to a suit by a plaintiff in possession for a declaration that the certified purchaser out of possession was not the real purchaser, I cannot agree with them. I agree that section 317 must be construed strictly and not extended beyond its express terms. But its language is absolutely general: the only conditions are (1) that the suit must be one brought against the certified purchaser, and (2) that the suit must be based on the ground that the purchase was

(1) (1833) I. L. R., 5 All., 478.

(2) (1896) I. L. R., 23 Cal., 699.

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made on behalf of any other person or on behalf of some one through whom such other person claims. No doubt that is the only ground of the suit which section 317 prohibits. The section would not apply where the suit was based, not on the ground that the purchase was *benami*, but upon some other independent ground. In the Calcutta case the alleged ground of fraud was held not to be proved. The plaintiff there had been in possession for eight years. The terms of the plaint are not set forth in the report, but, from the judgment, I infer that the Judges regarded the suit as based upon the plaintiff's title by possession, which would be good against any person who could not show a better title, and which the defendant met by setting up a sale-certificate in his own name as purchaser. I understand the learned Judges to mean that that suit was based, not on the ground mentioned in section 317, but on the title by possession only, and that section 317 does not make a declaratory suit a suit on the ground mentioned in the section, if it is expressly based upon some other ground, and if the question of the certificate is only introduced by the defendant in reply to the claim. Whether that view is correct or not, is a question on which I express no opinion. All depends upon the nature of the suit as shown by the plaint, and in the present case the plaint proceeds throughout upon the ground that the purchase was *benami*, and expressly prays for relief upon that basis. No doubt in the course of the plaint the plaintiff alleges that he is in possession, and has been in possession since the sale. But having regard to relief (b) and the plaint as a whole, it appears to me that the fact of possession is only stated as a basis for the prayer for a declaration, in reference to the terms of section 42 of the Specific Relief Act. Before leaving section 317 I should add that the second paragraph seems clearly to imply that not merely a suit to recover possession, but a suit for a declaration, on the ground specified, would be barred, unless the declaration prayed for was that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser. The learned counsel for the respondent referred to the decision of the Madras High Court in *Monappa v. Surappa* (1). He suggested that we should direct an

(1) (1886) I. L. R., 11 Mad., 234.

inquiry, similar to that directed by the Madras High Court, as to whether the conduct of the defendants after the purchase, and particularly their allowing the plaintiff to remain in possession, amounted to a transfer or waiver in favour of the plaintiff of their title and possession. There can be no doubt that a certified purchaser may after the purchase do some fresh act which may have the effect of creating a new title in the plaintiff's favour by way of transfer. A suit based upon any title so created would not be barred by section 317, because it would not be a suit on the ground that the purchase was made on behalf of any person other than the certified purchaser. It would be a suit accepting the certified purchaser as the real purchaser, and claiming, not by virtue of the purchase as one made on the plaintiff's behalf, but by virtue of a new right subsequently created by the certified purchaser. But the plaint in this suit sets up a totally different case from that. It does not accept the certified purchaser as the real purchaser. It does not allege any fresh act subsequent to the purchase as creating the plaintiff's title; but proceeds throughout on the view that the plaintiff was the real purchaser, and relies on the purchase as creating his title. I cannot agree with some of the observations contained in the judgment in the Madras case. The learned Judges, if I may respectfully say so, appear to some extent to confuse the judgment of the Privy Council in *Mussumat Buhuns Kowur v. Lalla Buhoree Lall* (1) with the later judgment in *Lokhee Narain Roy Chowdhry v. Kalypuddo Bandopadhya* (2). It is incorrect to say that their Lordships of the Privy Council in the earlier case expressed approval of the view taken by the Calcutta High Court regarding waiver by the certified purchaser in favour of a person claiming as the real purchaser. So far as their Lordships in that case refer to the question of waiver, they appear to disagree with the observations of the High Court. They say that the former decisions, to the effect that where the real owner has been permitted to have or retain possession by the ostensible purchaser, the latter cannot insist on his certified title to recover, do not, as the High Court suppose, rest on the ground of waiver, but upon the legality of *benami* transactions, except in so far as such

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

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transactions are restricted by some express statutory provision. They say that "the Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. Its provisions must have been framed on grounds of public policy to which the doctrine of waiver is not properly applicable." They also say that "the mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner." In the second of the two Privy Council cases the passage at page 156 of the report, implies no approval of the High Court's observations as to waiver. Their Lordships only say that in the circumstances of that case "it was material to inquire under what circumstances possession was "given by one party to the other, and whether, by reason of the antecedent relations between the parties, it was meant to operate as a transfer of the property." It is to be observed that these decisions were prior to the passing of the Transfer of the Property Act, 1882. In cases arising after the passing of that Act and subject to its provisions, it is more than ever true that "the mere permission to hold possession cannot alone give or transfer a title from the *benamidar* to the real owner," nor do I see how, in the case of property exceeding Rs. 100 in value, such a transfer could legally be effected except by means of a registered instrument. Under these circumstances I do not think that we ought to direct the inquiry suggested by the learned counsel. I think that the judgment of the lower appellate Court was wrong, and that the suit was barred by section 317 of the Code. I would therefore allow this appeal, set aside the decrees of the Courts below, and dismiss the suit with costs throughout. It is unnecessary, under the circumstances, to consider the objections under section 551 of the Code as to costs, and they are dismissed.

BANERJI J.—I agree in holding that section 317 of the Code of Civil Procedure, is a bar to the maintenance of the present suit. The suit is one against certified purchasers, on the ground that the purchase was made by them on behalf of the plaintiff. It therefore clearly comes within the purview of the first paragraph of the section. The Courts below have relied on the ruling of the Calcutta High Court in *Sasti Churn Nundi v. Annopurna* (1)

in support of their view that the section is not applicable to a suit like the present. If the suit in that case was not framed in the terms of section 317, that case is not analogous to the present. But if the learned Judges who decided that case meant to hold that a suit of the nature of the present suit was not open to the objection that it was precluded by the provisions of section 317, I am unable to agree with that view. There is nothing in the section which makes it inapplicable to a suit for a declaration of right on the ground that the auction-purchaser purchased the property on behalf of the plaintiff or his predecessor in title. On the contrary, as has been pointed out by the learned Chief Justice, the inference which arises from the second paragraph of the section is, that the first paragraph is not confined to a suit for recovery of possession only. As for the ruling of the Madras High Court in *Monappa v. Surappa* (1), it is difficult to agree with the view expressed by the learned Judges in that case, having regard to the observations of their Lordships of the Privy Council, to which the learned Chief Justice has referred in detail. Further, since the passing of the Transfer of Property Act, 1882, it is extremely doubtful that ownership can be transferred otherwise than under the provisions of that Act. I agree in making the decree proposed by the learned Chief Justice.

Appeal decreed.

PRIVY COUNCIL.

MAHARAJA OF BHARTPUR, PETITIONER-APPELLANT v. RANI KANNO
DEI, OBJECTOR-RESPONDENT.

On appeal from the High Court for the North-Western Provinces.

Construction of a decree upon a mortgage—Interest to date of realization of a mortgage debt—Act No. IV of 1882 (Transfer of Property Act), section 88.

Section 88 of the Transfer of Property Act, 1882, does not have the effect of limiting interest to the period preceding the date, fixed by a decree upon a mortgage, for payment of the principal and interest of the money secured, nor of precluding interest from extending over the time down to realization of the entire amount due. In a suit upon a mortgage the plaintiff's entire claim was decreed in 1886 with interest during the suit and future interest

Present:— LORDS HOBHOUSE, MACNAGHTEN and LINDLEY, SIR RICHARD COUCH and SIR HENRY STRONG.

(1) (1886) I. L. R., 11 Mad., 234.

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