

FULL BENCH.

1908
June 20.

Before Sir John Stanley, Knight, Chief Justice, Mr. Justice Blair, Mr. Justice Banerji, Mr. Justice Burkill and Mr. Justice Aikman.

RAM NARAIN AND OTHERS (PLAINTIFFS) v. MOHANIAN (DEFENDANT).^{*}
Act No. IV of 1882 (Transfer of Property Act), section 43—Civil Procedure Code, section 317—Benamidar—Suit by mortgagee for sale on a mortgage alleging that the purchaser of part of the mortgaged property held benami for the mortgagor.

One Ram Sahai mortgaged a house, representing himself to be the owner thereof, to Ram Narain and others. As a matter of fact, part of the house did not belong to Ram Sahai, but to one Jaswant Singh. In execution of a money decree against Jaswant Singh the portion of the house which belonged to him was sold by auction, and it was purchased by Musammat Mohanian, the wife of Ram Sahai. The mortgagees brought a suit for sale on their mortgage, alleging, as to the portion of the house purchased by Mohanian, that it was purchased benami for, and was really the property of, their mortgagor, Ram Sahai.

Held that inasmuch as the plaintiffs claimed as representatives of the alleged beneficial owner they were precluded by the provisions of section 317 of the Code of Civil Procedure from suing for the sale of the portion of the house purchased by Mohanian. *Uncovenanted Service Bank, Ltd., v. Abdul Bari* (1), *Delhi and London Bank, Ltd., v. Chaudhri Partab Bhaskar* (2), and *Kishan Lal v. Garurudhwa Prasad Singh* (3) referred to.

THE facts of this case are as follows:—

One Ram Sahai, representing himself to be the owner of a house, mortgaged it to Ram Narain and others. To a portion of this house Ram Sahai had no title, it being owned by one Jaswant Singh. In execution of a money decree against Jaswant Singh this portion of the house was sold, and was purchased by Musammat Mohanian, the wife of the mortgagor Ram Sahai. The suit out of which this appeal arose was then instituted by the mortgagees, and in it they asked for sale of the entire mortgaged property, alleging as regards that portion of the house which was purchased by Musammat Mohanian that the purchase was in reality a benami purchase on behalf of Ram Sahai. The Court of first instance (Munsif of Aligarh) found

^{*} Second Appeal No. 249 of 1901 from a decree of Maulvi Maula Baksh, Additional Subordinate Judge of Aligarh, dated the 6th of December, 1900, reversing a decree of Babu Hira Lal Singh, Munsif of Aligarh, dated the 10th of July, 1900.

(1) (1896) I. L. R., 18 All., 461. (2) (1898) I. L. R., 21 All., 29.
(3) (1899) I. L. R., 21 All., 288.

1903

 RAM NABAIN
 v.
 MOHANIAN.

that the purchase was benami, and gave a decree in favour of the plaintiffs for sale of the entire property. Musammat Mohanian appealed from this decree in respect of the portion of the house which had been purchased by her, relying upon the provisions of section 317 of the Code of Civil Procedure. The lower appellate Court (Additional Subordinate Judge of Aligarh) accepted the contention of Mohanian and modified the decree of the Court of first instance by exempting from its operation that portion of the house which had been purchased by her. The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* (with whom Babu *Satyra Chandra Mukerji*), for the appellants, contended that section 317 of the Code of Civil Procedure applied only when the plaintiff is the person who alleges himself to be the beneficial owner or the representative of the beneficial owner. He referred to section 260 of the former Code of 1859, and argued that the insertion into section 317 of the present Code of the words "or on behalf of some one through whom such other person claims" indicated that the suit which the section was intended to prevent was a suit by the person who claimed to be the beneficial owner or the successor in title of the beneficial owner. Reference was made to *Sohm Lall v. Lala Gya Pershad* (1), *Puran Mal v. Ali Khan* (2), *Uncovenanted Service Bank, Ltd., v. Abdul Bari* (3), *Kanizak Sukina v. Monohur Das* (4), *Subha Bibi v. Hara Lal Das* (5), *Delhi and London Bank, Ltd., v. Chaudhri Partab Bhaskar* (6), *Kishan Lal v. Gururuddhvaja Prasad Singh* (7) and *Nokori Dhar v. Surup Chunder Dey* (8).

Pandit *Sundar Lal*, for the respondent, argued that section 317 of the Code of Civil Procedure was intended to prevent suits which were (1) against certified purchasers, and (2) based on the ground that the purchase was benami, but there was no limitation as to the person suing. The object of the section is to discountenance benami purchases. If the operation of this section be limited to suits by persons claiming to be real purchasers against the certified purchaser the object of the section

(1) N.-W. P., H. C., Rep., 1874, 265.

(2) (1876) I. L. R., 1 All., 235.

(3) (1893) I. L. R., 18 All., 461.

(4) (1885) I. L. R., 12 Calc., 204.

(5) (1894) I. L. R., 21 Calc., 519.

(6) (1898) I. L. R., 21 All., 29.

(7) (1899) I. L. R., 21 All., 238.

(8) (1900) 3 C. W. N., 341.

1903

RAM SAHAI
v.
MOHANIAN.

might be easily defeated by the person claiming to be the real purchaser inducing one of his creditors to put up the property to sale. The certified purchaser would not be able, on the appellants' contention, to plead the bar of section 317, Civil Procedure Code, against the creditor of the real purchaser.

Difficulty however would arise again after sale at the instance of the creditor of the person claiming to be the real purchaser. The new auction purchaser at this sale would be the representative of the original real purchaser and would be a person claiming through him. A suit by the later purchaser would be barred by section 317, Civil Procedure Code, against the first certified purchaser.

But in this case the plaintiffs are mortgagees and claim through their mortgagor Ram Sahai, the alleged beneficial owner. They, therefore, in any view of section 317, cannot maintain the present suit against the certified purchaser. It was submitted further that the last words of the first paragraph of section 317 did not refer to the claimant in the suit. Reliance was placed on *Delhi and London Bank, Ltd., v. Chaudhri Partab Bhaskar* (1), *Kishan Lal v. Gururuddhwaja Prasad Singh* (2) and *Rama Kurup v. Sridevi* (3).

Babu Jogindro Nath Chaudhri, replied.

STANLEY, C. J.—The question raised in this appeal depends upon the true construction of a somewhat obscure section of the Code of Civil Procedure. One Ram Sahai, representing himself to be the owner of a house, mortgaged it to the plaintiffs-appellants. To a portion of this house he had no title, it being owned by one Jaswant Singh. A money decree was obtained against Jaswant Singh by a creditor, and his share in the house was sold on the 15th of November, 1897, and purchased by the defendant-respondent, Musammât Mohanian, who was the wife of the mortgagor, Ram Sahai. The plaintiffs instituted the suit, out of which this appeal has arisen, for a sale of the entire mortgaged property, alleging as regards the share which was purchased by Musammât Mohanian that the purchase was in reality a *benami* purchase on behalf of Ram Sahai. The Court

(1) (1898) I. L. R., 21 All., 29.

(2) (1899) I. L. R., 21 All., 238.

(3) (1892) I. L. R., 16 All., 290.

of first instance found that the purchase was *benami*, and gave a decree in favour of the plaintiffs in respect of the entire property. Musammatt Mohanian appealed from this decree, so far as regards the share of the premises which were purchased by her, relying upon the provisions of section 317 of the Code of Civil Procedure, which 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." What these words "or on behalf of some one through whom such other person claims" mean it is impossible to say. The lower appellate Court accepted the contention of Musammatt Mohanian, and modified the decree of the lower Court by exempting from its operation the portion of the house which was purchased by her. From this decision the present appeal has been preferred.

Upon the meaning of section 317 there has been great divergence of opinion amongst the Judges of this and other High Courts. In the case of the *Uncovenanted Service Bank, Ltd.*, v. *Abdul Bari* (1), a limited operation was given to the section. My learned brothers Banerji and Aikman held that the section only contemplated suits between a certified purchaser and the beneficial owner, and cannot operate so as to bar a third party from asserting that the certified purchaser is not the beneficial owner. In their judgment they say:—"That section forbids a suit by a person claiming to be the beneficial owner against the certified purchaser, except on the ground of fraud. There can be no doubt that the section contemplates a suit between the certified purchaser and the person claiming to be the beneficial owner, and not a suit like the present, in which a third party asserts that the certified purchaser was not the beneficial owner." In the latter case of the *Delhi and London Bank, Ltd.*, v. *Chaudhri Partab Bhaskar* (2), in which the meaning of section 184 of the Land Revenue Act, which is almost identical in its terms with section 317 of the Code of Civil Procedure, was considered, my brother Knox held that the operation of the section was not confined to disputes between certified auction purchasers and persons who alleged that such auction

1908

RAM NARAIN

v.

MOHANIAN.

Staaley, C. J.

(1) (1896) I. L. R., 18 All., 461.

(2) (1898) J. L. R., 21 All., 29.

1903

RAM NARAIN
v.
MOHANIAN.
Stanley, C. J.

purchasers purchased on their behalf as their *benamidars*, but extended to cases where the dispute is between the certified purchasers and third persons, who allege that the certified purchasers are not the real purchasers. My brother Banerji, on the other hand, in that case, maintained the view accepted by the Court in the *Uncovenanted Service Bank, Ltd., v. Abdul Bari*. Again the question came before a Bench of this Court consisting of my brothers Blair and Burkitt, JJ., in the case of *Kishan Lal v. Garuruddhwaja Prasad Singh* (1). In that case the judgment of Knox, J., in the case to which I have referred, was approved, and it was held that the provisions of section 317 are subject to no limitation other than such as is contained in the section itself, namely that the suit, the maintenance of which is prohibited by that section, should be brought against a certified purchaser, and based upon the ground that the purchase was made on behalf of a person other than the certified purchaser, and that the question who the plaintiff may be is not material. Upon the language of the section, whatever may have been the intention of the Legislature, it is difficult to my mind to see how any limitation can be placed upon its operation. There are certainly no words expressly limiting it to suits between the persons claiming to be the real purchasers and certified purchasers. The words of the section are general—"no suit shall be maintained against the certified purchaser." It appears to me, however, unnecessary in the present case to determine this question. The plaintiffs-appellants derive their title to the portion of the house which was purchased by Musammat Mohanian under the provisions of section 43 of the Transfer of Property Act, which is based upon an equitable rule long recognised in England. That section provides that "where a person erroneously represents that he is authorized to transfer certain immovable property, and professes to transfer such property for consideration, such transfer shall at the option of the transferee operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists." On the purchase, therefore, made by Musammat Mohanian, if the purchase was *benami* for her

(1) (1899) I. L. R., 21 All., 233.

husband, the mortgage of the plaintiffs-appellants at their option operated on the interest so acquired, and gave the plaintiffs-appellants *quod* mortgagees the rights and interests of their mortgagor. Having thus acquired this interest in the property, can they maintain a suit against the certified purchaser for the recovery of the property, whether or not the section is applicable to third parties, such as creditors of the beneficial owner? It appears to me clear that the section was intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successors in title of the beneficial owner. That it prohibits a suit by the beneficial owner is obvious, and it must, I think, be in any case interpreted as precluding a suit by the successors in title of the beneficial owner, otherwise it might be rendered practically nugatory. The plaintiffs-appellants upon their signifying their option that their mortgage shall operate on the interest which their mortgagee acquired, became successors in title of the beneficial owner, and so in my opinion clearly came within the provisions of section 317.

For these reasons I am of opinion that the decision of the lower Court is correct, and I would dismiss the appeal.

BLAIR, J.—I have nothing to add to the judgment of the Chief Justice. I still adhere to the view expressed in the ruling for which I and my brother Burkitt were responsible, and which is reported in I. L. R., 21 All., 238. In that case we had occasion to consider a previous judgment of our brother Knox to which attention has been called. I concur in the order which is proposed.

BANERJI, J.—The only question to be determined in this appeal is whether the plaintiffs-appellants are precluded by the provisions of section 317 of the Code of Civil Procedure from maintaining that portion of their claim by which they seek to enforce their mortgage against the one-sixth share of the mortgaged house which was purchased at auction in the name of Musammât Mohanian, defendant. That share, it is admitted, did not belong to the mortgagor, Ram Sahai, on the date of the mortgage. If, therefore, he acquired it subsequently to that date, the mortgage would, under the provisions of section 43 of the Transfer of Property Act, operate on it. The plaintiffs' case

1903

 RAM NARAIN
 v.
 MOHANIAN.

1903

RAM NARAIN
v.
MOHANIAN.

is that Ram Sahai himself purchased the share at auction in the name of his wife, Musammat Mohanian, and that she is only his benamidar. The Court of first instance found in favour of the plaintiffs on this point, but the lower appellate Court has not gone into the question, holding that the claim in this respect comes within the prohibition of section 317 of the Code. The learned advocate for the appellants has contended that the section contemplates a suit against the certified purchaser by a person who himself claims to be the real purchaser and beneficial owner of the property or to be the successor in title of such beneficial owner. The section is not happily worded, and, as it stands, is somewhat obscure. It is to be hoped that this obscurity will be removed by the Legislature when the Code is amended. We have therefore to place a reasonable construction on the section, and it seems to me that, having regard to the policy of the section, the intention of the Legislature was to prohibit a suit by a person claiming to be the beneficial owner or the successor in title of the beneficial owner. I have heard nothing in the argument addressed to us to induce me to alter the opinion I expressed in the cases of the *Uncovenanted Service Bank, Ltd.*, v. *Abdul Bari* (1), and the *Delhi and London Bank, Ltd.*, v. *Chaudhri Partab Bhaskar* (2). However, it is in my judgment unnecessary to decide the question in this case, because, even if we accept the appellants' contention to be correct, their suit comes, in my opinion, within the prohibition of the section. The appellants are mortgagees from Ram Sahai, and derive their title from him. It is in consequence of the mortgage executed in their favour by Ram Sahai that they seek to enforce their claim against the property of which the respondent is the certified purchaser. They have brought their suit against the certified purchaser on the ground that the purchase was made on behalf of Ram Sahai through whom they claim. Their suit is therefore one forbidden by section 317, and has been rightly dismissed, and this appeal must fail.

BURKITT, J.—In my judgment in the case of *Kishan Lal v. Garuruddhwaja Prasad Singh* (3), with the concurrence of my

(1) (1896) I. L. R., 18 All., 461.

(2) (1898) I. L. R., 21 All., 29.

(3) (1899) I. L. R., 21 All., 238.

brother Blair, following and approving of the opinion of my brother Knox in the *Delhi and London Bank, Ltd., v. Chaudhri Partab Bhaskar* (1), I expressed at length my opinion as to the true construction of section 317 of the Code of Civil Procedure. To the considered opinion I expressed in that case I still adhere. I have heard nothing in the arguments in the present case which causes me in any way to alter or modify that opinion. Whatever be the meaning of the last clause of section 317, it is admitted that it does not affect this case. I would dismiss this appeal.

AIKMAN, J.—I also am of opinion that this appeal should be dismissed. I do not propose to consider the conflicting views that have been expressed regarding the obscurely worded section 317 of the Code of Civil Procedure. I think it is sufficient for the decision of this appeal to say that it is quite clear that Ram Sahai could not have maintained a suit against the certified purchaser, Musammât Mohanian. Such a suit beyond any doubt is barred by the provisions of section 317, and if Ram Sahai could not have maintained such a suit, it appears to me clear that the plaintiffs, who derive their title from him, cannot maintain their present claim against Musammât Mohanian.

By THE COURT.—The order of the Court is that the appeal be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Aikman.

1903
July 22.

GANESH PRASAD (PLAINTIFF) v. KASHI NATH TIWARI (DEFENDANT)*
Civil Procedure Code, section 283—Execution of decree—Suit by purchaser of the rights of a person who had unsuccessfully filed an objection under section 278.

A person who had filed an objection under section 278 of the Code of Civil Procedure to the sale of certain immovable property in execution of a decree, after his objection had been disallowed, sold his interest in the property. *Hold* that there was nothing to prevent the purchaser of such interest from bringing a suit under section 283 of the Code. The right conferred by section 283 is not a personal right confined to the original claimant.

In this case Kashî Nath obtained a simple money decree against Achhaibar Rai, and in execution thereof attached a

* Second Appeal No. 353 of 1902, from a decree of J. Sanders, Esq., District Judge of Benares, dated the 27th of January 1902, confirming a decree of Babu Sris Chander Bose, Munsif of Benares, dated the 22nd of May 1901.

(1) (1898) I. L. R., 21 All., 29.