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EMPEROR  
v.  
RAMA.

I therefore set aside the convictions and sentences and direct that the fines if paid be refunded.

*Convictions set aside.*

## APPELLATE CIVIL.

1913

January, 3.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Banerji.*  
NARAIN DEI (PLAINTIFF) v. DURGA DEI AND ANOTHER (DEFENDANTS.)\*  
*Civil Procedure Code (1908), section 65—Execution of decree—Benami purchase—Claim against certified purchaser, but not by representative of the real purchaser.*

The widow of one Bhola Nath purchased a house at a civil court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters claimed the house as an heir of her deceased father. The son-in-law in whose name the house was purchased raised the plea that he was the certified auction purchaser and the suit was barred by section 66 of the Code of Civil Procedure. *Held* that as the plaintiff did not claim through the widow, but through the widow's husband, her father, the suit did not come within the purview of section 66 of the Code. *Ram Narain v. Mohanian* (1) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgement of a single Judge of the Court. The facts of the case are fully set out in the judgement under appeal, which was as follows :—

"In order to understand this appeal, it will be better in the beginning to set out, that one Bhola Nath had a wife, named Musammat Sundar Dei. Of these two, were born four ladies, Musammat Narain Dei, Musammat Durga Dei, Musammat Uttam and Musammat Piari. Bhola Nath died leaving his widow, and these four ladies him surviving. Musammat Sundar Dei is now dead, and the dispute relates to property which is said to be the property of Musammat Sundar Dei. It will be well to note also, that the lady, Musammat Durga Dei, married one Baldeo. In this appeal the parties are Musammat Narain Dei, who was the plaintiff in the court of first instance, Musammat Durga Dei and her husband Baldeo. The property with which this appeal is concerned, is a house situate in muhalla Mandi Said Khan in the city of Agra. This house was put up to sale by the Civil Court at Agra. It was purchased—so the sale certificate sets out—by Baldeo. The sale certificate shows that it was sold subject to a lien of Rs. 119-14-0, arising out of a deed, dated the 3rd June, 1891, of which one Ganga Prasad was the holder. Musammat Narain Dei came into court and asked for possession of this property as being part of the property left by Musammat Sundar Dei. After setting out the pedigree, she alleges that Musammat Sundar Dei, her mother, got possession of all the property left by Bhola Nath, and that in her life-time she purchased the house in dispute, adjoining the house left by

\* Appeal No. 87 of 1912 under section 10 of the Letters Patent.

(1) (1903) I, L. R., 28 All., 82.

Bhola Nath, and included it in one house. The purchase was made, she says, by Musammat Sundar Dei, out of the money which she had inherited, but she adds that the name of Baldeo was entered fictitiously. According to her Musammat Sundar Dei always remained in possession of the property. She puts the cause of action as arising on the 10th of March, 1907. In the written statement the defendants distinctly denied that the house in dispute was purchased by Musammat Sundar Dei; they deny that she was the owner of it, they specifically deny that the property was purchased fictitiously in the name of Baldeo, and that Musammat Sundar Dei was ever in adverse possession of it. The court of first instance holding that Musammat Sundar Dei was in the receipt and enjoyment of the rent of the house in dispute up to the date of her death, and that Baldeo had no right after her death—the date of wrongful possession as against the legal heirs of Musammat Sundar Dei—decreed the plaintiff's claim for possession of a one-third share in the house in dispute, and directed that it should be partitioned. In appeal, the lower appellate Court held that section 66 of the Code of Civil Procedure of 1908 barred this suit. It held that Baldeo was the purchaser certified by the court, and in consequence decreed the appeal which had been brought by Baldeo and Durga Dei and modified the decree of the court of first instance, directing that the suit for possession by partition of the house in Mandi Said Khan be dismissed together with mesne profits for the same. Musammat Narain Dei comes here in appeal and contends, first that section 66 of Act V of 1908 has no application; secondly, that the plea was for the first time raised in appeal, and the lower appellate Court should not have entertained it. There is a third plea by which it is contended that the whole of the house in muhalla Mandi Said Khan was not purchased by a sale of the Civil Court, that only one-third of it was so purchased and the remaining two-thirds were the result of a private purchase. The fourth plea raised is one regarding the mesne profits of the house.

"To take plea No. 2 first, the question raised is a question of law. The shadow of it had certainly been cast in the pleadings and I think, the lower appellate Court was fully justified in considering the plea. There remains the question how far section 66 of the Civil Procedure Code of 1908, is or is not, a bar to the suit as brought. The contention of the appellant, as I understand it, is that this is a suit by an heir claiming inheritance to the property left by Musammat Sundar Dei, that section 66—if it applies at all—allows a suit of this kind to be brought under the second clause of the same section. The contention was that when Musammat Sundar Dei purchased the property in the name of Bhola Nath, the appellant, as her reversioner, could have brought a suit to challenge this act, and she is within her rights in so doing after Musammat Sundar Dei's death. The plea raised is a very ingenious one, but it does not seem to me to be strong enough to take it out of the clear words of section 66. The first clause of section 66 is practically the same as the old section 317, clause (1). That clause has been the subject of several rulings by this Court, one of them being a Full Bench ruling. The words used in section 317 were the subject of careful consideration by five Judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser,

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by the beneficial owner or the successor in title of the beneficial owner. In the present case, the beneficial owner is said to have been Musammat Sundar Dei. The appellant, if she has any standing, is a successor in title of the beneficial owner, and unless the Code of Civil Procedure of 1908 has introduced any change, the ruling of this Court holds that she, the appellant, is precluded from instituting a suit against Baldeo. But it is contended that the second clause of section 66 enables the suit to be brought. There is no doubt that Act V of 1908 has introduced new words which did not exist in the second clause of old section 317. So far, I am with the learned counsel for the appellant, but I confess considerable difficulty in following him, as he applies the new words to the present case. Is this a case in which a third person is claiming to proceed against property sold ostensibly to a certified purchaser for a *benamidar* on the ground that he is liable to satisfy a claim of the third person against the real owner? Take it that the real owner was Musammat Sundar Dei. What claim has Musammat Narain Dei against Musammat Sundar Dei which gives her a right to proceed against this property though ostensibly sold to Baldeo? It is to meet this, that her position as reversioner is put forward. It seems to me that it would require a great deal of twisting to make these words fit in with the claim as now brought. My attention was directed to the case of *Achhaibar Dube v. Tapsi Dube* (1). In that case, the finding of this Court was that the purchase was not a purchase made secretly by one person for another, the ostensible purchaser having no interest in the purchase, and the real purchaser wishing for some reason that his name should not appear. In other words, the finding of the Court was, that it was not *benami* purchase. In the present case, however, the contention, right through, of the appellant—as the lower appellate Court points out—has been, that Baldeo was a *benami* purchaser for Musammat Sundar Dei and with her knowledge. An attempt was made to bring the present case within the purview of two rulings of the Madras High Court—*Monappa v. Surappa* (2) and *Sankunni Nayyar v. Narayanan Nambudri* (3), and the contention was that section 66 applies not to purchases made by an agent and does not apply when possession has been transferred. Neither of these views have, at any time, so far as I know, found favour with this Court.

“There remains the third plea, viz., to the effect that one-third of the house in dispute was the purchase made at the auction held by the Civil Court and two-thirds were the subject of a private purchase. The purchase is one of a nature similar to that which is made, times out of number, in Civil Court sales. I have been referred to no authority which held that under the circumstances of this kind, namely, where property is sold subject to a lien, the purchaser purchased one fraction at the Civil Court sale and the remaining fraction when he paid off the lien. What the purchaser purchased is the whole of the property, subject to any demands that may be made by the lien advertised at the time of the auction. The appeal fails and is dismissed with costs.”

Pandit *Shiam Krishna Das*, for the appellant.

Dr. *Tej Bahadur Supru*, for the respondents.

(1) (1907) I. L. R., 29 All., 557.

(2) (1883) I. L. R., 11 Mad., 234

(3) (1893) I. L. R., 17 Mad., 282.

RICHARDS, C. J., and BANERJI, J. :—The facts out of which this Letters Patent appeal arises are very clearly stated in the judgement of the learned Judge of this Court. The judgement is reported in 10 A. L. J. R., 97. The suit is to recover, amongst other things, a share in a house by partition, and also for mesne profits. The court of first instance decided in favour of the plaintiff. On first appeal the decision of the court of first instance was reversed so far as the property now in dispute was concerned, on the ground that the claim in respect thereof was barred by the provisions of section 66 of the Code of Civil Procedure. This decision was in due course affirmed by a learned Judge of this Court, and against his decision the present Letters Patent appeal has been preferred.

When the case was before us on a previous occasion we determined that we would consider the evidence in the case without remanding the case and so avoid putting the parties to the expense and delay of referring issues. We granted time to the parties in order that the evidence might be looked into. As a result we are able to consider the present case upon a state of facts which have to be admitted. The house in question was purchased by one Musammat Sundar Dei, the widow of one Bhola Nath. This house was subsequently incorporated into another one which admittedly belonged to Bhola Nath and formed part of his estate. It is quite clear therefore that it was the intention of his widow that this house should be part of her husband's estate and should not remain her separate property. Dr. *Tej Bahadur* has further to admit that he cannot contend on the evidence that the house was not in fact purchased on behalf of the widow, though the purchase was made in the name of Baldeo. We are also satisfied upon the evidence that Musammat Sundar Dei remained in possession of the house up to the time of her death, and that during her life-time Baldeo never pretended that the property was his, or that the auction purchase had been made in reality for his benefit.

The only question therefore for decision in the case is a purely legal one, namely, whether under the circumstances of the present case section 66 of the Code of Civil Procedure prevents the present suit being brought. It is no doubt a suit against a certified auction purchaser, and so far it is within the words of section 66. However, it is contended by the appellant that the plaintiff does not

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claim through Musammat Sundar Dei, but through her own father Bholā Nath; that consequently the suit is not a suit brought on the ground that the purchase was made on behalf of the plaintiff or on behalf of any one through whom she claims, and that therefore the suit is not barred by the provisions of section 66. In our opinion this plea is well founded. The learned Judge of this Court refers in his judgement to the Full Bench case of *Ram Narain v. Mohanian* (1). In that case one Ram Sahai had represented himself to be the owner of certain property. It turned out that he had no title to part of the property at the date of the mortgage. Subsequently, however, that part of the property to which he had no title was put up to sale in execution of a simple money decree against the real owner and purchased in the name of Musammat Mohanian, the wife of Ram Sahai. The plaintiffs in the suit, who were the mortgagees of Ram Sahai, claimed that the purchase of Mohanian was *benami* for Ram Sahai and that under the provisions of the Transfer of Property Act any estate which Ram Sahai subsequently acquired in the property which he purported to mortgage became subject to the mortgage. It was held that the plaintiffs were not entitled to maintain the suit having regard to the analogous section 317 of the Code of Civil Procedure of 1882. Referring to the case the learned Judge of this Court, says:—"The words used in section 317 were the subject of careful consideration by five judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor in title of the beneficial owner." We do not think that the decision in the Full Bench case justified these remarks of the learned Judge of this Court. True it is that the learned Chief Justice says in his judgement (at page 87):—"It appears to me clear that the section was intended to preclude the institution of a suit against a certified purchaser by the beneficial owner or the successors in title of the beneficial owner." It is quite clear when the learned Chief Justice uses the words "successors in title" he was referring to a claim which was being made by a person who derived title from the alleged beneficial owner. It is quite clear that the plaintiff mortgagee was claiming directly through the

(1) (1908) I. L. R., 26 All., 82.

mortgagor, whose wife, it was alleged, had purchased the property *benami* for him. The judgement of two of the members of the Court in the most express language decided the case upon the ground that the plaintiff was claiming through Ram Sahai, and that inasmuch as Ram Sahai could not have maintained the suit against Mohanian, the persons who claimed through him had no better right to do so. We think that under the circumstances of the present case the plaintiff's claim is as heir of her father Bhola Nath, that she is not claiming in any way through her mother Musammat Sundar Dei and that therefore her suit does not come within the provisions of section 66. The facts being as already stated, she, in our opinion, was entitled to recover possession by partition of the property in dispute and was also entitled to mesne profits as held by the court of first instance.

We therefore allow the appeal, set aside the decree of this Court and also of the lower appellate court and restore the decree of the court of first instance with costs in all courts.

*Appeal allowed.*

## REVISIONAL CRIMINAL.

*Before Mr. Justice Tullball.*

CHHEDI v. MUHAMMAD ALI\*.

Act XIII of 1859—(*Workman's Breach of Contract Act*)—*Magistrate not competent to take proceedings under, unless moved by the employer.*

The provisions of Act XIII of 1859 can only be applied at the instance of the employer. A magistrate has no jurisdiction *suo motu* to pass orders under that Act as an alternative to taking action under the Indian Penal Code.

THE facts of this case were as follows :—

One Muhammad Ali made a complaint against Chhedi of cheating. Process was issued, but before the witnesses for the prosecution had been cross-examined or any defence witnesses had been called or a charge framed, the Magistrate passed an order, purporting to be under Act No. XIII of 1859, to the effect that Chhedi was either at once to pay Rs. 60, which had been advanced to him by Muhammad Ali or to give security for Rs. 60 with one surety that he would make two pairs of boots every week for Muhammad Ali; in default he was to undergo two months' rigorous

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\* Criminal Revision No. 942 of 1912.