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The result is that we allow the appeal, set aside the decree of this Court and of the lower appellate court, and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number in the file and to proceed to hear and determine the same according to law.

Appeal allowed and cause remanded.

APPELLATE CIVIL.

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May, 2.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

MATA PRASAD AND OTHERS (DEFENDANTS) *v.* RAM CHARAN SAHU AND OTHERS (PLAINTIFFS)*

Civil Procedure Code (1908), *section* 11—Res judicata—*Benamidar—First suit against defendant alleging herself to be merely a benamidar, but found in that suit to be the real owner—Second suit by persons alleging themselves to be the real owners.*

A suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property. She pleaded that she was not the real purchaser but was merely a benamidar for her three sons. The court, however, declined to accept this plea and gave a decree against the defendant upon the record as being the real purchaser. *Held* in a subsequent suit for possession of the same property brought by the sons that the previous decision did not operate as *res judicata* in respect of their claim.

Khub Chand v. *Narain* (1), *Nand Kishore Lal* v. *Ahmad Ata* (2), *Yad Ram* v. *Umrao Singh* (3), *Kaniz Fatima* v. *Waliullah* (4) and *Gopinath Chaubey* v. *Bhagwat Prasad* (5) referred to.

THE facts of this case were as follows :—Baijnath and Jagannath, two brothers, were members of a joint Hindu family. Baijnath obtained a simple money decree against one Ramjas Das on the 17th of June, 1878. In the year 1881 under a deed of partition between the brothers, Jagannath also got a half share in the said decree. Both the brothers applied for execution of the said decree, and in execution attached 16 annas of mauza Karma on the 20th of September, 1884. On the 27th of July, 1887, Ramjas Das executed a deed of simple mortgage in respect of an 8 anna share of mauza Karma to the defendants first party. In the meantime both Jagannath and Baijnath died; and on the

* First Appeal No. 205 of 1913, from an order of Srish Chandra Basu, Additional Judge of Gorakhpur, dated the 9th of August, 1913.

(1) (1881) I. L. R., 3 All., 812.
(2) (1895) I. L. R., 18 All., 69.
(3) (1899) I. L. R., 21 All., 380.
(4) (1907) I. L. R., 0 All., 30.
(5) (1884) I. L. R., 10 Calc., 697 (705).

10th of January, 1891, Ramjas Das executed a sale deed in respect of a 9 anna 6 pie share for Rs. 9,471, in favour of Musammat Sheolagna, wife of Jagannath, who had also left three sons, Ram Charan, Tirbeni and Gauri Shankar. Out of the consideration Rs. 127 were paid in cash to the vendor and the balance was left with the vendee to pay off the amount of the decree, dated the 17th of June, 1878, held by the sons of Jagannath and Baijnath, and also the amount of another decree held by the sons of Baijnath. Mutation of names was effected in favour of Musammat Sheolagna. The defendants, first party, brought a suit on the basis of the mortgage deed dated the 29th of July, 1887, against Thakur Das, heir of Ramjas Das, the original mortgagor, and also against Musammat Sheolagna, the purchaser of the 9 anna 6 pie share. Musammat Sheolagna defended the suit, raising amongst others, the plea that she was not the owner of the sale deed dated the 16th of January, 1891; that her sons, *viz.*, Ram Charan, Tirbeni and Gauri Shankar, were the real owners, and that they were necessary parties. The Subordinate Judge found, on the issue as to who was the real owner, that Musammat Sheolagna was the real owner, and finding on the other issues also in favour of the then plaintiffs, passed a decree in favour of the plaintiffs on the 2nd of June, 1893. In execution of that decree a six anna share, which included 4 annas of the share purchased by Musammat Sheolagna, was sold, and purchased by the decree-holders, who obtained possession on the 14th of April, 1900. On the 16th of December, 1911, Ram Charan, Tirbeni and Gauri Shankar brought the present suit for possession of the 4 anna share of mauza Karma against the defendants, first party, on the ground that they were the real purchasers of the property under the sale deed of the 10th of January, 1891, and that the decree against Musammat Sheolagna, which was collusively obtained, was not binding on them. The Subordinate Judge held that Musammat Sheolagna was the real owner, and that even if she was a *benamidar* the decree against her was binding on the real owners (the plaintiffs). On appeal the Additional Judge reversed the findings on both the issues and remanded the case for trial on the merits. The defendants first party appealed.

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Dr. *Satish Chandra Banerji* (with him Munshi *Jang Bahadur Lal*), for the appellants, submitted that even on the finding of the Additional Judge that the plaintiffs were the real owners and that Musammat Sheolagna was merely a *benamidar*, the decree in the former suit was binding on the plaintiffs. It has been consistently held by this and other High Courts that a decree in a suit brought by the *benamidar* binds the beneficial owner; *Nand Kishore Lal* v. *Ahmad Ata* (1), *Gopi Nath Chobey* v. *Bhugwat Pershad* (2), *Shangara* v. *Krishnan* (3) and *Ravji Appaji Kulkarni* v. *Mahadev Bapuji Kulkarni* (4). It makes no difference if the real owner's name is disclosed; *Yad Ram* v. *Umrao Singh* (5), *Kaniz Fatima* v. *Wali-ullah* (6).

The Hon'ble Munshi *Gokul Prasad* (with him Mr. *B. E. O'Conor*), for the respondent, was not called upon, but he invited the attention of the Court to *Civa Rao Nanaji* v. *Jevana Rau* (7).

MUHAMMAD RAFIQ and PIGGOTT, JJ.—This is an appeal from an order of the learned Additional District Judge of Gorakhpur, remanding the case under order XLI, rule 23, of the Code of Civil Procedure. The circumstances which led to the making of that order are as follows:—Baijnath and Jagannath were two brothers who were members of a joint Hindu family. In 1878 a simple money decree was passed in favour of Baijnath against one Ramjas. There was a partition among the two brothers, Baijnath and Jagannath, in 1881 when it was declared that Jagannath had also a share in the decree of 1878. Subsequent to the partition among the two brothers they applied jointly for the execution of the decree of 1878 against Ramjas. In execution of that decree the entire village of Karma with some other property was attached on the 20th of September, 1884. During the continuance of that attachment and before the property was brought to sale, Ramjas executed a deed of mortgage in respect of 8 annas of village Karma in favour of the defendants, first

(1) (1895) I. L. R., 18 All., 69.

(2) (1884) I. L. R., 10 Calc., 697 (705).

(3) (1891) I. L. R., 15 Mad., 267.

(4) (1897) I. L. R., 22 Bom., 672.

(5) (1899) I. L. R., 21 All., 380.

(6) (1907) I. L. R., 30 All., 30

(7) (1864) 2 Mad., H. C. Rep., 31.

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party. On the 10th of January, 1891, while this attachment was still pending, Ramjas executed a deed of sale in respect of 9 annas, 6 pies, of village Karma out of 16 annas in favour Musammat Sheolagna, the mother of the sons of Jagannath. The consideration of the sale deed consisted of the decretal amount due from Ramjas and Rs. 127 cash. Baijnath and Jagannath had died prior to the execution of the sale-deed. Rupees 127 were paid in cash to Ramjas and the remainder of the consideration was left in the hands of the vendee for payment of the decree of 1878 and another decree which Baijnath alone held against Ramjas. In the early part of 1893 the defendants, first party, brought a suit on foot of their mortgage for recovery of the money due on it by sale of the mortgaged property. The suit was brought against the son of Ramjas, as Ramjas had already died, and also against Musammat Sheolagna. She resisted the suit, principally on the ground that she was a *benamidar* and that the real purchasers under the sale deed of the 10th of January, 1891, were her sons who should be brought on the record as defendants in the case. This allegation of hers was denied by the defendants, first party, who were plaintiffs in that case. On their denial an issue was framed as to whether Musammat Sheolagna was a *benamidar* or not. The learned Subordinate Judge who tried the case held that she was not a *benamidar* and on the merits of the case decreed the claim for recovery of the mortgage money by sale of the mortgaged property. The defendants, first party, put their decree into execution and 6 annas of village Karma, which included admittedly 4 annas out of 9 anna 6 pie share conveyed by the deed of the 10th of January, 1891, were put up to auction and purchased by the plaintiffs decree-holders themselves. They obtained possession through the court on the 14th of April, 1900. On the 16th of December, 1911, the sons of Jagannath, plaintiffs respondents in the present case, sued in the court of the Subordinate Judge of Gorakhpur for the recovery of possession of 4 annas out of 6 annas sold in execution of the decree of the 2nd of June, 1893, on the allegation that they were the real purchasers under the deed of the 10th of January, 1891, and were not bound by the decree and sale in favour of the defendants, first party, whose mortgage they challenged on several grounds. The

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defendants in the case objected to the suit on the ground, among others, of *res judicata*. The learned Subordinate Judge held that the claim was barred by the rule of *res judicata* and dismissed it. On appeal the learned Additional Judge took a different view and held that the rule of *res judicata* did not apply and remanded the case for trial on the merits. The point, therefore, in appeal before us, is whether the claim of the plaintiffs respondents is barred by *res judicata*. It is urged on behalf of the appellants that on the admitted statements of the plaintiffs respondents in their plaint their mother Musammat Sheolagna was a *benamidar* for them, and if she was a *benamidar* for the plaintiffs respondents a decree passed against her in that capacity is binding upon the plaintiffs also, if the parties in the present litigation are the same who were parties in the former litigation and the questions in issue were the same. In support of this view the learned advocate for the appellants relies on *Khub Chand* v. *Narain Singh* (1), *Nand Kishore Lal* v. *Ahmad Ata* (2), *Yad Ram* v. *Umrao Singh* (3) and *Kaniz Fatima* v. *Wali-ullah* (4). We do not think that the rule of *res judicata* is applicable to the circumstances of the present case. It appears to us that the rule has been made applicable in cases of decrees in favour of or against a *benamidar* where the real owner has allowed the dispute to be fought out between his *benamidar* and a third party and has abstained from coming forward. The principle upon which the rule has been applied to cases fought in the name of a *benamidar* is well expressed in *Gopi Nath Chobey* v. *Bhugwat Pershad* (5), where the learned Judges held that "the proper rule is that in the absence of any evidence to the contrary it is to be presumed that the *benamidar* has instituted the suit with the full authority of the beneficial owner, and if he does so, any decision come to in his presence would be as much binding upon the real owner as if the suit had been brought by the real owner himself". In other words, if the litigation is carried on with the full knowledge and authority of the real owner and the latter does not wish to come forward he is bound by the decree. In the

(1) (1881) I. L. R., 3 All., 812.
(2) (1895) I. L. R., 18 All., 69.
(3) (1899) I. L. R., 21 All., 380.
(4) (1907) I. L. R., 30 All., 30.
(5) (1884) I. L. R., 10 Cal., 697 (705).

present case Musammat Sheolagna protested that she was a *benamidar* and she did not want to carry on the litigation which the defendants first party, brought against her, though not in her capacity as a *benamidar*, but wanted her sons to be brought on the record as defendants in the case. She gave information of the real state of the transaction of the 10th of January, 1891, to the defendants, first party who not only failed to take advantage of this information but contradicted it. It cannot, therefore, be said that the rule contended for by the learned advocate for the appellants is applicable to the circumstances of the present case. Moreover, the decree against Musammat Sheolagna was not passed as *benamidar* for her sons but on an express finding that she was the real owner and not a *benamidar* of her sons. The rule, therefore, that a decree against the *benamidar* binds the real owner does not hold good in the present case. There is another consideration why the plea of *res judicata* should not be given effect to in this case. There were certain defences open to the present plaintiffs which were not open to their mother in the suit of 1893. In fact one of those defences was put forward by Musammat Sheolagna and formed the subject-matter of the fourth issue. The learned Subordinate Judge overruled it by saying that she had no interest in the decree of 1878. We therefore, hold that the rule of *res judicata* does not bar the present suit and the order of the court below is a correct order. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

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MATA PRASAD *v.* RAM CHARAN SAHU.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Tudball.

1914
May, 7.

DURGA PRASAD PANDE AND ANOTHER (PLAINTIFFS) *v.* FATEH BAHADUR SINGH AND OTHERS (DEFENDANTS.) *

Pre-emption—Wajib-ul-arz—Custom—Effect of confiscation of part of village—"Karibi wa khandani."

In a village comprising two eight anna thoks a custom of pre-emption was recorded as prevailing in two wajib-ul-arzes of 1833 and 1860 and in the *zamima khewat* of 1884, the date of the last settlement. *Held* that the custom so recorded was in no way modified by the fact that a four anna undivided share in the village had been confiscated by the Government after the mutiny and regranted to other proprietors. *Held also* that a person related to a vendor through the female

* First Appeal No. 256 of 1912 from a decree of E. E. P. Rose, Additional Judge of Gorakhpur, dated the 11th of April, 1912.