

APPELLATE CIVIL.

1915
April 13.

Before Mr. Justice Chamier and Mr. Justice Piggott.

KAMTA PRASAD (APPLICANT) v. INDOMATI AND ANOTHER (OPPOSITE PARTIES).*

Act No. IV of 1882 (Transfer of Property Act), section 89—Execution of a decree—Benamidar.

Held that in an application under section 89 of the Transfer of Property Act the fact that the court came to the conclusion that the applicants transferees, were *benamidars* was no bar to its granting an order absolute. A *benamidar* is competent to take out execution of a decree. *Intikhab Husain v. Raft-un-nissa* (1), *Yad Ram v. Umrao Singh* (2), *Nand Kishore Lal v. Ahmad Ata* (3), *Bachcha v. Gajadhar Lal* (4), *Parmeshwar Datt v. Anardan Datt* (5) referred to.

THE facts of this case briefly stated were as follows :—

A decree passed under section 88 of the Transfer of Property Act was attached in execution of another decree and brought to sale. The auction purchasers' rights were subsequently transferred by private sales to two persons who applied for an order absolute under section 89 of the Transfer of Property Act. The court held that these two persons were *benamidars* for the original holders of the decree under section 88 and that therefore they were not entitled to apply for an order absolute. This appeal was filed in the High Court by the representative in interest of one of the applicants against the dismissal of the application. A connected appeal was filed by the other applicant also.

The Hon'ble Dr. *Sundar Lal* (with him Dr. *Satish Chandra Banerjee*), for the appellant :—

The lower court has proceeded on a wrong principle in determining the question whether the appellant is a *benamidar*. The party who would put a different complexion and meaning upon a sale-deed from what it *prima facie* bears has to prove his allegation strictly by adequate evidence. Mere suspicious and doubts cannot form the basis of a decision unless supported by legal testimony. *Sreeman Chundar Dey v. Gopaul Chundar Chuckerbutty* (6), *Ramabai v. Ramchandra Shivram* (7).

* First Appeal No. 331 of 1909, from a decree of Pirzhiwi Nath, Subordinate Judge of Mainpuri, dated the 2nd August 1909.

(1) Weekly Notes, 1907, p. 39.

(4) (1905) I. L. R., 28 All., 44.

(2) (1899) I. L. R., 21 All., 380.

(5) (1915) I. L. R., 37 All., 113.

(3) (1895) I. L. R., 18 All., 69.

(6) (1866) 11 M. I. A., 28 at p. 43.

(7) (1905) 7 Bom. L. R., 293.

[He then discussed the evidence and submitted that the appellant was not *benamidar*.]

Assuming for the sake of argument that the appellant is a *benamidar* there is no legal bar to his applying for an order absolute. There is a concensus of opinion in this Court that a *benamidar* is entitled to maintain a suit in his own name for the beneficial owner. *Nand Kishore Lal v. Ahmad Ata* (1), *Yad Ram v. Umrao Singh* (2), *Bachcha v. Gajadhar Lal* (3). Although there is no direct authority in this Court as to a *benamidar* being entitled to apply for execution of a decree but the principle in the case of a suit and in the case of execution of a decree is the same. The precise point has been decided in favour of the *benamidar* in *Purna Chandra Roy v. Abhaya Chandra Roy* (4). The case of *Balkishen Das v. Bedmati Koer* (5) also supports the appellant in principle. The judgement-debtor has no *locus standi* to raise objections to the execution of the decree by the ostensible decree-holder. *Intikhab Husain v. Rafi-un-nissa* (6).

The Hon'ble Dr. *Tej Bahadur Sapru* (with him, the Hon'ble Pandit *Moti Lal Nehru*, the Hon'ble *Munshi Gokul Prasad*, Pandit *Baldeo Ram Dave*, Babu *Purushottam Das Tandon*, *Munshi Parmeshwar Dayal*, Pandit *Rama Kant Malaviya* and Maulvi *Iqbal Ahmad*), for the respondents :—

The contention for the appellant that strict proof should be given is not disputed.

[He then discussed the evidence and submitted that it sufficiently established that the appellant was a mere *benamidar*.]

As regards the point of law, the cases of this Court cited by the appellant are all cases in which *benamidar* was held entitled to maintain a suit or an appeal. They cannot apply to the case of execution of a decree, for which there is a special statutory provision. Order XXI, rule 16, Civil Procedure Code, speaks of the "transferee of a decree". Transferee, in this rule, means a person who in truth and in good faith acquires the rights and

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

(4) (1870) 4 B. L. R., Appendix, p. 40.

(2) (1899) I. L. R., 21 All., 380.

(5) (1892) I. L. R., 20 Calc., 368, at p. 394.

(3) (1905) I. L. R., 28 All., 44.

(6) Weekly Notes, 1907, p. 89.

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interest of the decree-holder, and not a person who is in name only and not in fact a transferee. The Calcutta High Court has uniformly ruled that a *benamidar* is not entitled to execute a decree as a transferee thereof. *Denonath Chuckerbutty v. Lalit Coomar Gangopadhya* (1), *Gour Sundar Lahiri v. Hem Chunder Chowdhry* (2). The case in 4 B. L. R., cited by the appellant, is supported by no reasons and has been dissented from in later rulings of the same High Court; that case therefore, is no authority now.

Pandit *Rama Kant Malaviya*, for Gopal Das respondent, (who in execution of a decree against Sheo Prasad and Tulsi Ram attached and brought to sale the decree in question in this case), also supported the judgment of the court below.

The Hon'ble Dr. *Sundar Lal* was heard in reply.

CHAMBER and PIGGOTT, JJ.—These are appeals against an order of the Subordinate Judge of Mainpuri, rejecting an application presented by the appellants for an order absolute under section 89 of the Transfer of Property Act. A decree *nisi* was passed in favour of two persons, Sheo Prasad and Tulsi Ram, on December, 24th, 1900, and was confirmed on appeal by this Court with a slight modification on the 19th January, 1914. That decree was passed against Musammat Indomati and others. The business of the decree-holders failed and their rights under the decree were put up for sale in execution of a decree held against them by Moti Lal and Fateh Lal. At the execution sale the share of the decree-holder Sheo Prasad was sold to one Ram Bharose and the appellants assert that on the 27th September, 1905, the rights of Ram Bharose were transferred to Bisheshar Nath and that on the 3rd May, 1906, Bisheshar Nath transferred his rights to Kamta Prasad the appellant in appeal No. 331. At the same execution sale the share of the decree-holder Tulsi Ram was sold to Ajudhia Prasad. Badlu Ram the appellant in appeal No. 332 says that on the 31st March, 1905, Ajudhia Prasad transferred to him all his rights under the decree.

The appellants therefore applied to the court below for the passing of an order absolute in the capacity of transferees of the

(1) (1882) I. L. R., 9 Cal., 633. (2) (1889) I. L. R., 16 Cal., 355.

decree. The application was resisted by the judgement-debtors on the ground that the applicants were *benamidars* and, therefore, could not maintain the application. The court below on the question of fact has held that the appellants are no more than *benamidars* for the original decree-holders, Sheo Prasad and Tulshi Ram, who, it is supposed, have re-purchased their rights under the decree in the names of other persons in order to protect those rights from attachment and sale at the instance of their other creditors. The court below has in accordance with the decisions of the Calcutta High Court held that the appellants as *benamidars* are not entitled to apply for an order absolute.

In appeal it is contended that the decision of the court below on the question of fact is erroneous. We have been taken through the evidence regarding the purchases effected by the appellants and we think it sufficient to say that we agree with the Subordinate Judge that it is proved that the appellants are no more than *benamidars* for other persons.

Next it is contended that even if the appellants are *benamidars* they are entitled to maintain the application. All the reported cases upon the question whether a *benamidar* can execute a decree as the transferee thereof seem to have been decided by the Calcutta High Court, and we have been referred in the course of the arguments to a number of them. The net result of the Calcutta cases seems to be that a *benamidar* is not entitled to take out execution of a decree as the transferee thereof, but if he succeeds in doing so his application for execution may in some cases be sufficient to save a subsequent application by the real decree-holder from the bar of limitation. The question whether a *benamidar* may take out execution of a decree as the transferee thereof does not seem to have been decided by any other High Court. But this Court agreeing with the Bombay and Madras High Courts and differing from the Calcutta High Court has held that a *benamidar* may bring a suit of any kind in his own name, see *Yad Ram v. Umrao Singh* (1) which was a suit for sale; *Nand Kishore Lal v. Ahmad Ata* (2) which was a suit for possession; *Bacheha v. Gajadhar Lal* (3)

(1) (1899) I. L. R., 21 All., 380. (2) (1895) I. L. R., 18 All., 69.

(3) (1905) I. L. R., 28 All., 44.

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which was a suit for partition, and the very recent case of *Parmeshwar Dat v. Anardan Dat* (1) which was a suit for sale on a mortgage. It was pointed out by Sir ARTHUR STRACHEY in the case of *Yad Ram v. Umrao Singh*, cited above, that in those cases which have affirmed the right of the *benamidar* to sue, the right has been based partly on the fact that he is the transferee named in the registered instrument constituting the transfer and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the *benamidar* must be presumed to be suing on behalf of the beneficial owner or to put the same idea in other words that the suit is really brought by the beneficial owner through and in the name of the *benamidar*. It is well-established in this Court that a *benamidar* is entitled to maintain a suit. It seems to us that the principle upon which a *benamidar* has been allowed to maintain a suit applies equally to the execution of a decree. It was contended that order XXI, rule 16, shows that it is only the real transferee, that is the person beneficially interested in the transfer, who can apply for execution of a decree. We cannot accept this argument. It seems to us that the considerations which have led this Court to hold that a *benamidar* can maintain a suit apply with even greater force to an application for execution by a transferee who is a *benamidar*. The transfer is in favour of the person who applies for execution of the decree and it seems unreasonable that the court executing the decree should be required to enter into the question whether the ostensible transferee is the real transferee or not, and in this connection we may refer to what was said by the present Chief Justice in the case of *Intikhab Husain v. Rafi-un-nissa* (2). He observed that it might be urged with great force that whether the assignment was real or not was a matter with which the judgement-debtor was not concerned.

In the present case there can be no doubt whatever that the application for order absolute was put in with the full approval and consent of the persons for whom the appellants are said to be *benamidars*. In our opinion the application should not have

(1) (1915) I.L.R., 37 All., 113. (2) Weekly Notes, 1907, p. 39.

been dismissed on the ground that the appellants were *benami-dars*. As between the appellants and Sheo Prasad and Tulshi Ram on the one hand and the judgement-debtors on the other we hold that the application of the appellants is maintainable. We put it in this form because we have been told that in consequence of the decision of the court below one Gopal Das who held a decree against Sheo Prasad and Tulshi Ram has in execution of that decree attached, brought to sale and purchased himself the rights of Sheo Prasad and Tulshi Ram under the decree *nisi* of January, 1904, and we have also been informed that the present appellants have brought a suit for a declaration of their rights as beneficial owners of the decree *nisi*. It will be for the court below to consider and determine the effect of the alleged purchase by Gopal Das and of any decision that may be arrived at in the suit brought by the appellants for a declaration of their rights. We would also point out that Gopal Narain and others resisted the application for an order absolute on the ground that they are purchasers of two-thirds of a village called Pale Kalan and they say that the suit was dismissed by the High Court against them and their property. This is a point which must be taken up and decided by the court below. We set aside the order of the court below and sending the case back to that court we direct that the appellant's application be restored to the pending file and disposed of according to law. Costs of this appeal will be costs in the cause.

Appeal decreed—Cause remanded.

Before Mr. Justice Chamier and Mr. Justice Piggott.

EMPEROR v. RAHMAT AND OTHERS.*

Criminal Procedure Code, sections 345 and 439—Compromise—Assault in the course of which the person assaulted received fatal injuries—High Court's revisional juri diction.

Four persons assaulted one P with the result that P died.

Held that it was not competent to the widow of P to compound the case with P's assailants in respect of the injuries caused to P.

Held further, that when several persons were acquitted by the Sessions Judge and on being moved by the Government, the High Court issued warrants

* Criminal Appeal No. 186 of 1915, by the Local Government from an order of Mohan Lal Hukku, Officiating Sessions Judge of Agra, dated the 12th December, 1914.

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