

APPELLATE CIVIL.

1914
November, 26.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

PARMESHWAR DAT (PLAINTIFF) v. ANARDAN DAT (DEFENDANT).*

Benamidar—Right of suit.

Held in suit for sale on a mortgage that the facts that the mortgagee named in the bond is only a *benamidar* and that the real owner of the bond is known to the court are no bar to the maintenance of the suit by the person named in the bond as mortgagee. *Yad Ram v. Umrao Singh* (1) referred to.

THIS was a suit for sale upon a mortgage. The mortgage deed was executed by the defendant in favour of the plaintiff. The defence to the suit, among others, was that the plaintiff was only a *benamidar* for one Bhaia Lal and could not maintain the suit without the consent of the beneficial owner. The plaintiff called Bhaia Lal as a witness and he stated that he was the real owner of the bond. The lower appellate court dismissed the suit holding that "the respondent is not the owner of the bond in suit; he has no right to bring the present suit." The plaintiff appealed.

Mr. D. R. Sawhny, for the appellant, submitted that a *benamidar* could maintain a suit. The test is whether he could give a valid discharge. A person in whose favour a bond is executed could give such a discharge; *Nand Kishore Lal v. Ahmad Ata* (2), *Yad Ram v. Umrao Singh* (1).

Munshi Damodar Das, for the respondent, submitted that a *benamidar* could sue only with the consent or on behalf of the beneficial owner. He is only entitled to give a discharge with the real owner's consent. The case in 18 All., it was submitted, was really in favour of the respondent.

Mr. D. R. Sawhny, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit on foot of a mortgage, dated the 22nd of March, 1900. Various pleas were taken, but the court of first instance decided in favour of the plaintiff and granted a decree. On appeal the learned District Judge reversed the order of the court of first instance and dismissed

*Second Appeal No. 1652 of 1913, from a decree of Austin Kendall, District Judge of Cawnpore, dated the 15th of September, 1913, reversing a decree of Achal Behari, Subordinate Judge of Banda, dated the 25th of April, 1913.

(1) (1899) I. L. R., 21 ALL, 380.

(2) (1895) I. L. R., 18 ALL, 69.

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the plaintiff's suit on the sole ground that one Bhaia Lal was the real owner of the bond and that the plaintiff was merely a *benamidar* for him. It seems to us that the view of the District Judge was not correct. The alleged beneficial owner Bhaia Lal was actually produced as a witness for the plaintiff. He raised no objection whatever to the decree being made in favour of the plaintiff. The defendant never alleged that Bhaia Lal had made any claim, or raised any objection, to the amount of the bond being paid to the plaintiff. The plaintiff is the person named in the mortgage and was clearly entitled to sue, even if he was the *benamidar*. This was held in the case of *Yad Ram v. Umrao Singh*(1). There can not be the least doubt that the plaintiff could have given a perfectly valid discharge to the defendant if he had paid up the amount of the bond; and if the Court grants a decree to the plaintiff it is quite clear that Bhaia Lal could never sue again, even if we assume the finding of the lower appellate court to be correct that Bhaia Lal was in fact the real owner of the bond. We think that the view taken by the court of first instance on this point, namely, that the question of the ownership of the bond did not arise under the circumstances of the present case, was correct. We, accordingly, allow the appeal, set aside the decree of the court below and remand the case to the lower appellate court with directions to re-admit the appeal upon its original number on the file and to proceed to hear and determine the same according to law. The costs of both sides will be costs in the cause. The deficiency in the court fee in the lower appellate court of Rs. 5 due by the defendant must be made good before the appeal is heard. If that amount is not paid within a time to be fixed by the court, the appeal to that court by the defendant ought to be dismissed.

Appeal decreed and cause remanded.

(1) (1899) I. L. R., 21 All., 380.