

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ameer Ali.

KARAMUDDIN HOSAIN (DEFENDANT), APPELLANT, v. NIAMUT
FATEHMA AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

1891
Nov. 18.

*Benami purchase—Suit against a purchaser from the benamidar—Civil
Procedure Code, s. 317.*

At a sale in execution of a decree, in February 1875, the plaintiff purchased certain property in the name of *M*, who was recorded as the purchaser. In 1886, eleven years after the execution sale, *M* sold the property to *H*, whose name was subsequently registered as owner, notwithstanding the plaintiff's objections. The plaintiff thereupon, in 1888, brought a suit against *H* for a declaration of his title to the property, on the grounds that it had originally been purchased on his behalf at the execution sale, and that he had been in possession for more than 12 years.

Held, that the suit did not fall within section 317 of the Civil Procedure Code. *Buhins Kowur v. Lalla Buhvoore Lall* (1) relied on.

THE facts of this case are sufficiently set out in the judgment of the High Court.

Babu *Rash Behari Ghose* and *Munshi Seraj-ul-Islam* for the appellant.

Mr. *C. Gregory* and *Babu Satigram Singh* for the respondents.

The judgment of the Court (PRINSEP and AMEER ALI, JJ.) was as follows :—

The plaintiff states that in February 1875 he, in the name of a third party, in execution of a decree purchased certain property ; that he has since that time continuously held possession of that property ; and that in 1886, that is to say, more than 11 years after the execution-sale, the benamidar has sold it to a third party, and that, in consequence of the benamidar's name being borne on

* Appeal from Appellate Decree No. 1471 of 1890, against the decree of G. W. Place, Esq., Judge of Tirhut, dated the 16th of August 1890, reversing the decree of Babu Matadin, Subordinate Judge of Tirhut, dated the 29th of June 1890.

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the Government register, the purchaser from the benamidar has succeeded in obtaining registration of his name, notwithstanding his (the plaintiff's) objection. The plaintiff accordingly asks for a declaration that he is the lawful proprietor of this property by reason of the original purchase having been made on his behalf, and also by reason of his having held possession thereof for more than 12 years before suit. He also asks for a further declaration that the sale by his benamidar to the defendant No. 1 conferred no title. There is a further prayer that if a decree be given in favour of the plaintiff, an order for registration of his name be passed. It is unnecessary to notice this part of the case, as we apprehend that if the plaintiff should otherwise succeed, the revenue authorities will necessarily recognize the rights that will be declared by the Civil Courts.

The Subordinate Judge dismissed the plaintiff's suit, finding that the plaintiff failed to prove his possession subsequent to the sale. The Subordinate Judge also held that the suit was barred under section 317, Civil Procedure Code.

On appeal, this decision was set aside by the District Judge, who held that section 317 was no bar to the present suit because, after the sale in this case, there was an actual transfer and the plaintiff got possession. He further found that the execution-sale was not really a benami transaction, inasmuch as the plaintiff paid up certain sums of money to Monohur Das, the person whose name was recorded as purchaser, and was allowed to take possession, although the nominal ownership remained with Monohur. He also found that the plaintiff proved his possession by a large mass of documentary evidence, while, on the other side, the defendant wholly failed to prove any possession whatever in the disputed land.

It would have been more satisfactory in this case if the District Judge had expressly found the continuous possession of the plaintiff for more than 12 years such as was pleaded by him in his plaint. That was, however, the plaintiff's case in the lower Court, and although the Judge's expression of opinion is somewhat ambiguous, we can have no reasonable doubt that his finding on this point amounted, and was intended to amount, to this.

It has been contended before us, as in the lower Court, that section 317 of the Civil Procedure Code bars this suit. We think, however, that this is not a suit strictly coming within the purview of that section. The plaintiff sues rather on a title acquired by long possession, that title being in itself alone sufficient to constitute a statutory title explained by him to have its origin in the transfer of title made by Monohur Dass, in whose name the execution purchase was made, by allowing plaintiff to obtain and take possession. The case, in our opinion, falls within the judgment of their Lordships of the Privy Council in the case of *Buhuns Kowur v. Lalla Buhoree Lall* (1), and specially within the terms of the passage at the bottom of page 527. Under such circumstances we think that section 317 is not applicable to the present case so as to bar it, and that this appeal must be dismissed with costs.

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Appeal dismissed.

C. D. P.

ORIGINAL CIVIL.

Before Sir W. Comer Petheram, Kt., Chief Justice.

COHEN AND ANOTHER (PLAINTIFFS) v. NURSING DASS AUDDY
 (DEFENDANT).*

1892

 April 7.

Civil Procedure Code—Act XIV of 1882 s. 80—Practice—Writ of summons, Service of.

An affidavit in support of service of a writ of summons under section 80 of the Civil Procedure Code should show that proper efforts have been made to find out when and where the defendant is likely to be found.

THIS was a suit brought by the trustees of a marriage settlement to recover a sum of money, forming part of the trust funds, lent by the plaintiffs to the defendant on the security of a certain indenture of mortgage. The suit was undefended, and to prove service of summons on the defendant, a joint affidavit of one T. C. Cohen and one Kissen Singh was relied upon. This affidavit showed that Cohen knew and was well acquainted with the defendant

* Suit No. 88 of 1892.

(1) 14 Moo. I. A., 496.