when it agreed with the judgement, could not be corrected under section 152. The court, however, gave the indulgence of having the same application treated as an application for review. Obviously the court's attention was not drawn to a simpler method of treating the application as an application for the correction of the judgement as well as for the correction of the decree. I have read the judgement of Mr. Herchenroder and agree with Mr. Bennet that Mr. Herchenroder has made a slip and the correction was necessary for the ends of justice.

This application is dismissed with costs.

PRIVY COUNCIL.

ABDUL JALIL KHAN AND OTHERS (PLAINTIFFS) *v.* OBAIDULLAH KHAN AND OTHERS (DEFENDANTS).

*J. C.** 1929 *June*, 17.

[On appeal from the High Court at Allahabad.]

Civil Procedure Code, section 66—*Sale in execution*—Benami *purchase*—*Real purchaser obtaining title by adverse possession*—*Dispossesson by transferee from* benamidar —*Indian Limitation Act* (*IX of* 1908), *section* 28 *article* 144.

If after an auction sale of immovable property in execution of a decree the real purchaser has for twelve years possession adverse to the certified purchaser (his *benamidar*) and is then dispossessed by a transferee of the certified purchaser, he can sue for possession on the title acquired by him under the Indian Limitation Act, 1908, section 28 and article 144, and need not aver or prove that the auction purchase was made for him; section 66 of the Code of Civil Procedure, 1908, therefore, does not apply in that case.

Decree of the High Court, I. L. R., 43 All., 416, varied; it was unnecessary to decide whether the High Court had rightly held that in the case of a sale and transfer before 1909

*Present: Lord BLANESBURGH, Lord DARLING, Lord TOMLIN, JOHN WALLIS and Sir GEORGE LOWNDES.

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section 66 of the Code of 1908, and not section 317 of the Code of 1882, applied.

APPEAL (No. 82 of 1924) from a decree of the High Court (January 15, 1920) which affirmed, so far as is material to the subject-matter of this report, a decree of the Additional Subordinate Judge of Aligarh.

The suit related to immovable properties which, having been sold in execution of decrees, were transferred in 1900 by the certified purchasers to the first respondent Obaid-Ullah. Both courts in India found that Abdul Shakur and Abdul Latif, whose heirs were the appellants, were the true purchasers, who obtained possession upon the sales, and that they and the appellants after them had been in physical possession until 1915. In 1909 Abdul Ghafur had executed a deed of *waqfnama* of all his property, including his share of properties bought at the sales.

The suit was brought by the appellants on the 5th of August, 1916. They prayed by their plaint for a declaration that they were owners in possession of the properties; alternatively, if it were found that the first respondent was in possession, for an order for possession; they alleged that they were the true purchasers, also that any right or title which the first respondent had was extinguished by adverse possession. They also alleged that the *waqfnama*, of which Obaid-Ullah had been appointed *mutwalli*, was inoperative.

The material facts appear from the judgement of the Judicial Committee.

The Subordinate Judge held that so far as the suit related to properties transferred by the certified purchasers it was barred by section 66 of the Code of Civil Procedure; but that the *waqfnama* had never been brought into operation, and that the plaintiffs were entitled to recover the properties included in it, except

those purchased at the auction sale. He decreed accordingly.

On an appeal and cross-objection the High Court dismissed the suit altogether. The learned Judges (MEARS, C. J. and KNOX, J.) affirmed the view that so far as the suit related to properties transferred by the certified purchaser it was barred by section 66 of the Code of 1908; they rejected a contention that section 317 of the Code of 1882, and not section 66 of 1908, applied. With regard to the *waqfnama* they held that the intention having been to create a genuine dedication the subsequent conduct of Obaid-Ullah did not invalidate it.

1929. April 16, 18. *Dunne, K. C.* and *Wallach*, for the appellants:—The sale and transfer were both before 1909, consequently the Code of Civil Procedure, 1908, section 66 did not apply, as it is not retrospective in effect: *Promatha Nath Pal* v. *Mohini Mohan Pal* (1). Section 317 of the Act of 1882 which was in operation did not in terms apply to a suit against a transferee from a certified purchaser. The High Court at Allahabad in *Sibta Kunwar* v. *Bhagoli* (2) rightly held that section 317 did not so apply by implication; the High Courts at Calcutta and Madras have also so held, though in Bombay it was held to the contrary. Section 66 should not be given a retrospective effect which takes away a right of action existing when it was passed; that is so, even if the section deals with a matter of procedure: *Colonial Sugar Refining Co.* v. *Irving* (3). Further, the plaintiffs pleaded alternatively that they had a title by adverse possession, and it was concurrently found that they were in possession from the date of the sale until 1915. They therefore had a title by adverse possession, and it was concurrently found that they were in possession from the date of the sale unit 1915. They therefore had a

(1) (1920) I.L.R., 47 Cal., 1108. (2) (1899) I.L.R., 21 All., 196.
(3) [1905] A.C., 369.

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title under the Indian Limitation Act, section 28 and article 144 and an alternative cause of action to which section 66 of the Code did not apply.

DeGruyther, K. C. and *E. B. Raikes*, for the first respondent:—There is no ground for holding that section 66 of the Code of 1908 does not apply to every suit brought after that Code came into force by a person claiming to have purchased *benami*. Even if the Code of 1882 applied, the High Court at Bombay rightly held in *Hari Govind* v. *Ramchandra* (1) that section 317 applied to a suit against a transferee from a certified purchaser. The title by limitation was not put forward in the High Court, nor in the appellants' reasons upon the present appeal. There was no finding that the plaintiffs' possession was adverse; it may equally have been by the consent of the certified purchaser.

Dunne, K. C., replied.

June, 17. The judgment of their Lordships was delivered by Sir JOHN WALLIS:—

The parties to this suit are members of a Muhammadan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid-Ullah, the first defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid-Ullah is the son of a younger brother. The second and third defendants are widows who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain properties in the aforesaid villages, which were purchased at court auctions in execution of decrees by Mahmud Ali on the

(1) (1906) I.L.R., 31 Bom., 61.

20th of April, 1885, and by Sirajul Haq on the 21st of March, 1892. On the 7th and 8th of July, 1900, Sirajul Haq and Mahmud Ali executed sale-deeds of these properties in favour of Obaid-Ullah, the first defendant.

The plaintiffs' case is that the purchases at the court auctions and the subsequent transfers were made *benami* for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death had executed a *waqfnama* of all his properties, but it was alleged that this *waqfnama* was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the first defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardised the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the first defendant. The plaint was subsequently amended by including a prayer for possession in case the court should be of opinion that the plaintiffs were not in possession.

The first defendant pleaded that as regards the properties purchased at court auctions in the name of Sirajul

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Haq and Mahmud Ali, the suit was barred by section 66 of the Civil Procedure Code of 1908. He denied that the auction purchase was *benami*, and alleged that he and his transferors had all along been in possession. As regards the *waqf* created by Abdul Latif, the first defendant admitted the execution of the deed of *waqf*, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed *mutwalli* or trustee of the *waqf*, but he alleged that he was then unaware that the *waqf* deed included properties of his own which had been purchased by Sirajul Haq and Mahmud Ali at the court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the *waqf* unless the deed of *waqf* was cancelled. The second and third defendants filed written statements in which they challenged the validity of the *waqf* and prayed that their interest as heirs of Abdul Latif should be protected.

The issues material to this appeal were as follows :—

(3) Whether the plaintiffs are in possession?

(4) Whether the claim is time-barred.

(5) Whether the plaintiffs by adverse possession extending over twelve years have become the proprietors of the properties in suit?

(6) Whether section 66 of the Civil Procedure Code bars the suit?

(7) Whether purchases and acquisitions made by Sirajul Haq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan?

(8) Whether the sales in favour of the defendant No. 1 were fictitious and the transactions were *benami* for Abdul Latif and Abdul Shakur?

(11) Whether the *waqfnama* executed by Abdul Latif was a genuine transaction or was it only a nominal one?

As regards issues (3) and (4) the Subordinate Judge, whose findings of fact were accepted by the High Court, found that plaintiffs were not in possession at the date of suit, but that they and those through whom they claimed had been in possession, "physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur and that the sales by Sirajul Haq and Mahmud Ali to the first defendant were also *benami* for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases he held the suit was barred by section 66 of the Civil Procedure Code.

As regards the 5th issue the Subordinate Judge disposed of it by observing "the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession. The finding of the court being that in respect of the bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

The Subordinate Judge also held that the *waqf* created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder as the first defendant had taken possession of the *waqf* properties not as a duly appointed *mutwalli*, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased *benami* at the court auctions, and directed that as regards any questions aris-

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ing between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the first defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the *waqf* created by Abdul Latif, as the gift of those properties to the *waqf* had been duly perfected by Abdul Latif in accordance with the requirements of Muhammadan law, and as, after his death, the first defendant had been duly appointed *mutwalli* of the *waqf*.

They therefore dismissed the plaintiffs' appeal and allowed the first defendant's cross-objections as to the *waqf* properties.

As regards the properties which, according to the findings, were purchased at court auctions by Sirajul Haq and Mahmud Ali *benami* for Abdul Shakur and Abdul Latif, and were subsequently transferred to the first defendant, Obaid-Ullah *benami* for them, both the lower courts were of opinion that the suit was barred under section 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a "person claiming title under a purchase certified by the court . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims." The present section says that "no suit shall be maintained against any person claiming title under a purchase certified by the court," whereas the wording of the corresponding section 317 of the Code of 1882 was "no suit shall be maintained against the certified purchaser," and the alteration was admittedly made

because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of section 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from *benamidars* made when section 317 of the Code of 1882 was in force, and it has been contended before their Lordships on the authority of that decision that the lower courts were wrong in applying the provisions of section 66 of the Code of 1908 to the present case.

Their Lordships do not propose to deal with this question, because, in their opinion, assuming the courts to have been right in holding that the case must be dealt with under the provisions of section 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative cause of action, which is the subject of the 5th issue, viz., their dispossession by the first defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

In dealing with these questions their Lordships think it desirable in the first place to refer to *Buhuns Kowur* v. *Lalla Buhooree Lall* (1), a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to make these *benami* transactions illegal,

(1) (1872) 14 Moo., I.A., 496.

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but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya* (1), it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained, is not precluded by the section from showing the real nature of the transaction.

Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section. In such a case, if the true owner has been in possession for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so

(1) (1875) L.R., 2 I.A., 154.

acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of section 66 of the Code of Civil Procedure, 1908, and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the *waqf* created by Abdul Latif in 1909. It has been found by both courts that the gift to the *waqf* was duly perfected according to the rules of Muhammadan law and by the High Court that the first defendant was duly appointed *mutwalli* or trustee of the *waqf* after the founder's death, and the plaintiffs' claim to the *waqf* properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the lower courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not included in the *waqf*, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the courts below and here, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondent: *T. L. Wilson & Co.*