1932.

SRIMATI SABITRI THAKURAIN v. MRS. F. A. SAVI.

KHAJA MOHAMAD NOOR AND DHAVLE, JJ.

determine the appeal against the recording of the compromise.

Our thanks are due to the bar for the great assistance they have so willingly rendered to us; one and all they have been of great use to us.

The result is that the appeal of the plaintiff against the order recording the compromise is dismissed with costs. We fix the hearing fee at Rs. 5,000, out of which Rs. 250 will go to Mrs. Savi and Miss Mouna Savi, respondents Nos. 1 and 2, and the remaining Rs. 4,750 to respondent Suraj Mohan. These respondents will also get their other costs incurred by them in this appeal. The other respondents will bear their own costs. The cross-objection of Suraj Mohan is allowed. The observation or finding of the learned Subordinate Judge in respect of the debuttar properties is set aside, Suraj Mohan is allowed all the costs incurred by him in the Court below, since the time the matter was sent back to that Court by the order of this Court, dated the 8th of June, 1926; pleader's fee Rs. 3,350. A decree for the costs of lower Court will be prepared in the Court and will be incorporated in the decree to be prepared in this appeal.

Appeal dismissed.

Cross-objection allowed.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Scroope, JJ.

KESHRI MULL

v.

SUKAN RAM.*

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January, 20, 23, 24. February, 3.

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 66, *scope of—suit by real owner against certified purchaser*

* Appeal from Appellate Decree no. 286 of 1930, from a decision of H. Ll. L. Allanson, Esq., C.I.E., I.C.S., District Judge of Gaya, dated the 20th November 1929, reversing a decision of Maulavi Amir Hamza, Subordinate Judge of Gaya, dated the 31st March, 1928.

for declaration of title and confirmation of possession, whether maintainable—deed of relinquishment, whether alone can pass title.

Per KHAJA MOHAMAD NOOR, J.—The general result of the case law on section 66, Code of Civil Procedure, 1908, and on the corresponding section of the old Codes is that a suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail.

But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis the real owner can successfully defend it on the ground of his being the real purchaser.

If, however, the plaintiff does not base his suit upon the title which he has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of section 66 of the Code.

Per SCROOPE, J.—For the application of section 66 it is immaterial whether the plaintiff, the real owner, is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

Bishun Dial v. Ghaziuddin(1), *Hanuman Prashad Thakur* v. *Jadu Nandan Thakur*(2) and *Umashashi Debi* v. *Akrur Chandra Mazumdar*(3), followed.

Sasti Churn Nundi v. *Annopurna Shonoka*(4) and *Monappa* v. *Surappa*(5), dissented from.

Musammat Buhuns Kowar v. *Lalla Buhooree Lal*(6), *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*(7), *Abdul Jalil Khan* v. *Obaid Ullah Khan*(8) and *Patrachariar* v. *T. R. M. S. Ramaswami Chettiar*(9), distinguished.

(1) (1901) I. L. R. 23 All. 175.
(2) (1915) I. L. R. 43 Cal. 20.
(3) (1925) I. L. R. 53 Cal. 297.
(4) (1896) I. L. R. 23 Cal. 699.
(5) (1886) I. L. R. 11 Mad. 234.
(6) (1872) 14 Moo. I. A. 496.
(7) (1875) L. R. 2 I. A. 154.
(8) (1929) I. L. R. 51 All. 675; L. R. 56 I. A. 330.
(9) (1918) 49 Ind. Cas. 734.

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Title to land cannot pass by admission where the statute requires a deed.

Therefore a *bazidawa*, or a deed of relinquishment, executed by an alleged *benamidar* in favour of the real owner, and containing a mere admission of title with an undertaking not to interfere with the latter's possession, cannot alone pass title from the *benamidar* to the real owner.

Jadu Nath Poddar v. *Rup Lal Poddar*(1) and *Bishan Dial* v. *Ghaziuddin*(2), followed.

Balaram v. *Naktu*(3), distinguished.

Raja Bhupendra Narayan Sinha Bahadur v. *Rajeswar Prasad Bhakat*(4) and *Govind Prasad* v. *Jagdeep Sahai*(5), referred to.

Appeal by the plaintiffs.

The facts of the case material to this report are stated in the judgment of Scroope, J.

Manuk and *A. N. Lal*, for the appellants.

P. R. Das and *Satyadeva Sahay*, for the respondent.

SCROOPE, J.—The plaintiffs brought the suit out of which this appeal arises for a declaration that the disputed properties were purchased by the defendant at an auction sale on the 17th March, 1920, in an execution case as an agent of the plaintiffs for the plaintiffs and with the money of the plaintiffs and they also sought for a declaration that they were the owners of the disputed properties and were in possession of them and they sought for confirmation of their possession. Their case was that the defendant had been their servant or munib and used to look after their litigation, and that they had sent him to court with instructions to get their pleader to bid for the property of one Kailaspati Singh which was up for

(1) (1906) I. L. R. 33 Cal. 967.
(2) (1901) I. L. R. 23 All. 175.
(3) (1928) 108 Ind. Cas. 11, P. C.
(4) (1927) 106 Ind. Cas. 117.
(5) (1922) 77 Ind. Cas. 252.

sale in court in execution proceedings on foot of a mortgage decree obtained by the plaintiffs against Kailaspati Singh. The defendant, it is alleged, could not find the pleader and purchased the property in his own name; but it is the plaintiffs' case that they paid the earnest money and obtained the sale certificate in the name of the defendant and got his name registered in Register D and have all along been in possession of the properties, subsequently in 1925 defendant executed a *bazidawa* in favour of the plaintiffs; but when the plaintiffs sought for mutation in the land registration department, defendant objected; with the result that the application of the plaintiffs was rejected. There were also proceedings under section 145 of the Code of Criminal Procedure in respect of certain khud kasht lands within the property which ended adversely to the plaintiffs: hence the suit.

The case of the defendant was that he had purchased the property for himself, paid the money and had been in possession ever since and that the bazidawa deed was a nominal transaction to conceal the defendant's ownership of the property. The Subordinate Judge of Gaya decreed the suit finding that the defendant purchased the property as agent of the plaintiffs and that the plaintiffs had been in possession ever since and he held that the bazidawa deed was a genuine transaction; and he also found that section 66 of the Code of Civil Procedure was not a bar to the suit, defendant having purchased the property not as a mere *benamidar* but as an agent. The District Judge of Gaya, however, reversed the decision and dismissed the suit holding that the defendant purchased the property as *benamidar* for the plaintiffs whose servant he was and that section 66 is therefore a bar to the suit.

Mr. Manuk, the learned Advocate for the appellant-plaintiffs, now in appeal faced with the finding of fact that the defendant purchased the

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property as *benamidar* and in order to get over the difficulty in which section 66 places him on this finding, has first taken up, what in my opinion, is an entirely unarguable position, namely, that his suit is not a suit for declaration of his title. This cannot possibly be maintained in face of paragraph 12 of the plaint which runs as follows:

"That these plaintiffs are still in possession of the said mauza but the said facts have caused defect in their title, hence they seek relief in court";

vide also the prayer portions of the plaint:

"(*i*) The Court may be pleased to hold and declare that the defendant purchased the disputed mauzas as agent of and for the plaintiffs and with their money at a public sale held on the 17th March 1920 in execution case no. 599 of 1920 of the 1st Court of Sub-Judge at Gaya.

"(*ii*) The Court may be pleased to adjudicate and hold that in the above circumstances and also on account of execution of the deed of relinquishment of claim dated the 5th August 1925 the said properties belong to these plaintiffs and that they are in possession of the same.

"(*iii*) The possession and occupation of the plaintiffs over the said properties may be confirmed but if for any reason the plaintiffs be considered to be out of possession then possession over the same may be awarded to them".

At one stage the learned Advocate argued that it was merely a suit for confirmation of possession; but obviously in the face of the land registration decision and the section 145 case plaintiffs cannot be held to be in possession for as to the concurrent findings of the courts below that they are in possession what they mean is that they were in possession up to the time of these proceedings. The suit thus becomes one in ejectment and they have therefore to establish their title. Then it was contended that it would suffice if the plaintiffs obtained a declaration that the defendant was not to interfere with their possession; and again that the suit was one for specific performance of contract but in my opinion all these contentions are equally unsustainable and it is unnecessary to labour the point further.

The second branch of the argument for the plaintiff-appellants merits more consideration: it is contended that assuming the suit was a title suit it did not fall within the mischief of section 66 of the Code of Civil Procedure because the appellants were in possession and that they have acquired a title by this fact plus the fact of the deed of relinquishment in their favour and the fact that the purchase money was theirs; in fact a title by waiver is set up and Mr. Manuk relies very strongly on certain observations of their Lordships of the Privy Council in *Mussammat Buhuns Kowar* v. *Lalla Buhooree Lal*(1) and *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*(2). I emphasise the word "observations" because the facts of these two cases are not on all fours with the present case, both the suits having been brought by the certified purchaser and the Privy Council held that section 66 was no bar to the true owner as defendant setting up his title; here the alleged true owner is the plaintiff. So far as the question of waiver is concerned it is dealt with in both these decisions and their effect is thus summarised by Sir Arthur Strachey, C.J., in *Bishun Dial* v. *Ghazi-ud-din*(3) "they say that the former decisions that where the real owner has been permitted to have or retain possession by the ostensible purchaser the latter cannot insist on his certified title to recover, do not rest on the ground of waiver but upon the legality of benami transaction except in so far as such transactions are restricted by some express statutory provisions.....they also say that the mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner." Mr. Manuk's argument based on waiver thus receives no support from either of these decisions nor does the Privy Council decision in *Abdul Jalil Khan* v. *Obaid Ullah*

(1) (1872) 14 Moo. I. A. 496 (509).
(2) (1875) L. R. 2 I. A. 154.
(3) (1901) I. L. R. 23 All. 175.

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Khan(1) help the appellants. In that case the true owner had a title by limitation and the suit was decided on that basis. It is true that their Lordships expressly declined to decide what would have been the result if the true owner had been in possession for less than 12 years. Their Lordships dealing with this hypothesis confined themselves to observing that in such a case 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," says the judgment, "and their Lordships express no opinion about this question as it has not been argued before them." So far then as the learned Advocate seeks to take the case out of section 66 by the fact that he is in possession, the weight of the case law is clearly against him. *Sastichurn Nundi* v. *Annopurna*(2) is a case in his favour but that decision must be regarded as obsolete and no longer good law as it was not followed in two later Calcutta decisions, namely, *Hanuman Prasad Thakur* v. *Jadu Nandan Thakur*(3) and *Umashashi Debi* v. *Akrur Chandra Mazumdar*(4) as well as in *Bishan Dial* v. *Ghazi-ud-din*(5). As was pointed out in both these Calcutta decisions, if *Sastichurn Nundi* v. *Annopurna*(2) is good law, then its effect is practically to repeal section 66 and the same objection applies to following *Monappa* v. *Surappa*(6). In my opinion for the application of section 66 it is immaterial whether the plaintiff is in possession and seeks a confirmation of possession or whether he is out of possession and seeks to recover it.

As to *Patrachariar* v. *T. R. M. S. Ramaswami Chettiar*(7) that was a case of a paid agent using his master's money and has been rightly distinguished

(1) (1929) I. L. R. 51 All. 675, P. C.
(2) (1896) I. L. R. 23 Cal. 699.
(3) (1915) I. L. R. 43 Cal. 20.
(4) (1925) I. L. R. 53 Cal. 297.
(5) (1901) I. L. R. 23 All. 175.
(6) (1886) I. L. R. 11 Mad. 234.
(7) (1918) 49 Ind. Cas. 734.

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by the learned District Judge as not applying to the facts of the present case.

Finally Mr. Manuk argued that he still has the *bazidawa* to fall back on and that it operates as a conveyance and also that it amounts to an estoppel against the defendant as in it he undertook not to interfere with the plaintiffs' possession. That a *bazidawa* can pass title in such a case is according to Mr. Manuk the result of the judgment of their Lordships of the Privy Council in *Balaram* v. *Naktu*(1). In that judgment, he again contends, there are certain observations which support his assertion that the *bazidawa* deed gives him a title and puts him on a better footing than if he merely had to rely on his possession. That was a suit for specific performance of a contract for sale based on a certain letter and the Judicial Committee held that the suit is barred by section 66 of the Code of Civil Procedure. As to the observations on which Mr. Manuk relies, they were made in the following circumstances. Their Lordships had under consideration the authenticity of a certain letter on which plaintiff based his claim for specific performance of the agreement and in considering the genuineness of that letter they were taking into consideration as one of the tests, the fact that the defendant had not executed a conveyance or deed of release in respect of the village [*vide* page 14 of the report in *Balaram's* case(1)]. Mr. Manuk argues from this discussion that a conveyance and a deed of release are on the same footing but it is clear their Lordships were not considering the matter from that point of view; they were only applying a test of the genuineness of the deed. It is well established that title cannot pass by a mere admission which is what the *bazidawa* contains with an undertaking not to interfere with plaintiffs' possession: *vide*, for instance, *Jadu Nath Poddar* v. *Rup Lal Poddar*(2). "It is well settled", says Mukherjee, J. in that

(1) (1928) 108 Ind. Cas. 11, P. C.
(2) (1906) I. L. R. 33 Cal. 967.

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case, "that title to land cannot pass by admission where the statute requires a deed"; and the same view in effect was taken in the case to which I have referred already in *Bishan Dial* v. *Ghazi-ud-din*(1). Sir Arthur Strachey, C.J. there observed, "in cases arising after the passing of the Transfer of Property Act and subject to its provisions, it is more than ever true that the mere permission to hold possession cannot alone give or transfer a title from the benamidar to the real owner, nor do I see how, in the case of property exceeding Rs. 100 in value, such a transfer could legally be effected except by means of a registered instrument". Two other cases may be referred to also in this connection, namely, *Bhupendra Narayan Sinha Bahadur* v. *Rajeswar Prasad Bhakat*(2) and a decision of this court in *Govind Prasad* v. *Jagdeep Sahai*(3); appellants, therefore, can get no benefit from this deed of relinquishment.

So far as estoppel is concerned, the matter seems to me to be clear; it is not a case of estoppel. Plaintiffs were not induced to change their position in any way by the execution of the bazidawa. It is true that the result of the decision may, on the facts found, be that the defendant acquires a valuable property by fraud, but the plaintiffs have only themselves to thank for the result which is what the legislature intended; and the case serves as a useful illustration of the dangers of indulging in benami transactions. In my opinion, therefore, the decision of the learned District Judge is quite correct and I would dismiss the appeal with costs.

KHAJA MOHAMAD NOOR, J.—I entirely agree. I would, however, like to add a few remarks of my own.

The general result of the case law on section 66 of the Civil Procedure Code and on the corresponding

(1) (1901) I. L. R. 23 All. 175.
(2) (1927) 106 Ind. Cas. 117.
(3) (1922) 77 Ind. Cas. 252.

section of the old Codes is that the suit of a plaintiff, who bases it on the ground that he was the real purchaser at a court sale and that the certified purchaser was not really so, must fail. But if the real owner is in possession of the property and the certified purchaser wants to take advantage of his name being in the sale certificate and brings the suit on that basis, the real owner can successfully defend it on the ground of his being the real purchaser. In my opinion, under the law, as was contended by Mr. Manuk, the title is with the real owner, but he is debarred under section 66 of the Civil Procedure Code to make that title a ground of a suit as a plaintiff, though that title is a good defence in a suit brought by the certified purchaser. Furthermore, if the plaintiff does not base his suit upon the title which, in my opinion, he undoubtedly has on account of his being the real purchaser at the court sale, but on some other title subsequently acquired, his suit does not come within the mischief of section 66 of the Civil Procedure Code. If, for instance, the plaintiff continues in possession for more than 12 years, this possession by itself gives him a title independent of the title which he had on account of his being the real purchaser at the court sale, and if he is subsequently dispossessed his suit based upon this possessory title will, as was pointed out in the case of *Abdul Jalil Khan* v. *Obaid Ullah Khan*(1), succeed. In this particular case Mr. Manuk has attempted to show that his suit is not based upon the ground of the plaintiff being the real purchaser at the court sale but is based upon something which happened since that sale, namely, the possession and the *bazidawa*. The difficulty in the way of Mr. Manuk is, first of all, that the plaint clearly shows that the suit was based upon the ground that the plaintiff was the real purchaser at the court sale, and therefore was based on the original title acquired at the court sale, and not upon any title subsequently acquired, as was the case in *Muhammad Abdul Jalil*

(1) (1929) I. L. R. 51 All. 675, P. C.

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Khan v. *Muhammad Obaid Ullah Khan*(1), in which the title was acquired subsequent to the sale by 12 years' possession. Assuming, however, that we can read the plaint as Mr. Manuk asks us to read, none of these two facts, namely, the possession or the *bazidawa* or both, is sufficient to entitle the plaintiff to get a decree for possession. As has been pointed out by my learned brother, neither the *bazidawa* nor the possession for less than the statutory period creates any title. Therefore, if the plaintiff can succeed, he can succeed only on the ground that he was the real purchaser at the court sale, and this he cannot do on account of the express prohibition of section 66.

I, therefore, agree in holding that the appeal fails and must be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

J. C.*

1933.

February, 14.

JAGDISHWAR DAYAL SINGH

v.

PATHAK DWARKA SINGH.

On Appeal from the High Court at Patna.

Sale for Rent—Rent Decree—Recorded Tenant not before Court—Jurisdiction of Civil Court to set aside Sale—Tenant not entered in Sherista—Chota Nagpur Tenancy Act (Ben. Act VI of 1908), sections 208, 211, 214.

In order to justify a sale of a tenure under section 208 of the Chota Nagpur Tenancy Act, 1908, all parties interested in the tenure must be joined as defendants in the rent suit, or be sufficiently represented. Cases decided on the construction of section 159 of the Bengal Tenancy Act, as regards this point are equally applicable to the construction of section 208 of the Chota Nagpur Tenancy Act. Where all the parties are not

* PRESENT: Lord Thankerton, Sir George Lowndes, and Sir Dinshah Mulla.

(1) (1929) I. L. R. 51 All. 675, P. C.