

**APPELLATE CIVIL.***Before Harries, C.J. and Agarwala, J.*

SHIVA SHANKAR SAH

v.

MANBHARAN RAY.\*

1938.

November,  
2, 3.

*Code of Civil Procedure, 1908 (Act V of 1908), section 66—plaintiff's claim based on allegation that auction-purchase was made by him jointly with certified purchaser—suit not against certified purchaser—section, whether operates as a bar.*

Section 66, Code of Civil Procedure, 1908, operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise. The fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased does not make any difference in principle.

*Bishun Dayal v. Kesho Prasad*(1), followed.

*Bikram Ahir v. Lala Lajpati Lal*(2), not followed.

*Held, further*, that section 66 would be a bar even if the suit is not brought against the certified purchaser, so long as the success of the plaintiff in the suit depends on proof of the alleged agreement.

Appeal by the defendants.

The facts of the case material to this report are set out in the judgment of Agarwala, J.

*Hareshwar Prasad Sinha*, for the appellants.

*Harinandan Singh*, for the respondents.

AGARWALA, J.—This appeal by the defendants arises out of the following facts. Lakshman Rai

\* Appeal from Appellate Decree no. 117 of 1938, from a decision of Babu Bijay Krishna Sarkar, Subordinate Judge of Chapra, dated the 14th June, 1937, modifying a decision of Babu Ramnandan Prasad, Munsif, First Court, Chapra, dated the 26th March, 1936.

(1) I. L. R. [1937] All. 113.

(2) (1920) 62 Ind. Cas. 720.

1938.

SHIVA  
SHANKAR  
SAH  
v.  
MANBHARAN  
RAY.  
AGARWALA,  
J.

obtained a money decree against Hira Sah. In execution of that decree he put up to sale five items of property which belonged jointly to his judgment-debtor and the latter's brother. Two items, namely nos. 1276 and 3565 were purchased by Manbharan Rai and the remaining three items nos. 1422, 1425 and 3562 were purchased by Lakshman Rai. Each of the auction-purchasers obtained possession of the items purchased by him, respectively, jointly with the brother of the judgment-debtor. Subsequently a suit was instituted for partition as against the brother of the judgment-debtor, purporting to be a suit by Manbharan Rai and Lakshman Rai, the two auction-purchasers. Defendant no. 1 pleaded, inter alia, that Lakshman Rai was not in fact a party to the suit and that Manbharan Rai had no rights in those items of property which had been purchased by Lakshman Rai. Lakshman Rai also filed a petition supporting this plea of the defendant. He alleged that his name had been fraudulently used as a plaintiff in the suit and he had nothing to do with it. The plaintiff Manbharan Rai, on the other hand, affirmed that there had been an agreement between himself and Lakshman Rai that any of the properties to be put up to sale in execution of the money decree which should be purchased by either of them should be held on behalf of both of them by the purchaser. It is on the strength of that agreement that he claims partition. The claim is met by the bar of section 66 of the Code of Civil Procedure. As was pointed out by a Division Bench of the Allahabad High Court, in a case where the facts were indistinguishable from the facts of this case, *Bishan Dayal v. Kesho Prasad*(1), that section is a bar to a suit where a partnership or agreement is entered into between two persons to purchase property at an auction execution sale with funds contributed by both in the name of one person only.

(1) I. L. R. [1937] All. 113.

The plaintiff-respondent relies on the decision of a single Judge of this Court, *Bikram Ahir v. Lala Lajpati Lal*<sup>(1)</sup>, in which it was held that section 66 does not take away the jurisdiction of the Civil Court to deal with a cause of action based on a contract between the parties and on the equities arising out of that contract. If that decision is in fact contrary to the decision of the Division Bench of the Allahabad High Court already referred to, I respectfully disagree with it. To me it seems that the section operates as a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise, for it is clear that no benami purchase can ever be otherwise than as the result of an agreement of some sort between the principal and the benamidar; nor does the fact that the principal claims only to have provided a part of the purchase money and to be entitled to only a share in the property purchased make any difference in principle. In my view, therefore, the section is a bar to the present suit. But it is contended by the learned Advocate for the plaintiff that this is a suit not against Lakshman Rai, the certified purchaser of three of the items of the property, but defendant no. 1. With regard to the three items of property purchased by Lakshman, the plaintiff admittedly has no title at all unless he can establish that Lakshman purchased on his behalf, so that in that event he would not be entitled to succeed in this suit for partition against defendant no. 1; and if he does rely on that agreement, as I have already indicated, section 66 bars the suit.

The learned Advocate sought to rely on the finding of the appellate court that Lakshman Rai was in fact a party to the suit. That finding was based on a statement in an affidavit filed by Manbharan Rai,

1938.  
SWIVA  
SHANKAR  
SAH  
v.  
MANBHARAN  
RAY.  
AGARWAL  
J.

(1) (1920) 62 Ind. Cas. 720.

1938.

SHIVA  
SHANKAR  
SAH  
v.  
MANBHARAN  
RAY.  
AGARWALA,  
J.

the plaintiff, after the hearing of the suit had been completed, in which he alleged that Lakshman Rai had filed an affidavit of service at an earlier stage of the proceedings. Manbharan Rai's affidavit was for the purpose of inducing the court to call for this affidavit of service. The application was rejected and, therefore, the defendants had no occasion to controvert the allegation made in it. The Court below was not entitled in a suit to take evidence by affidavit. If it was necessary to secure the plaintiff's evidence with regard to any point, the other side was entitled to cross-examine.

The result of this appeal, therefore, is that with regard to items 1422, 1425 and 3562 the decree of the Courts below is set aside and the plaintiff's suit is dismissed. With regard to the other two items, namely, 1276 and 3565, the plaintiff claims in these a one-fourth share which he seeks to partition and to that extent his suit succeeds and the appeal with regard to those two items is dismissed. The parties will bear their own costs throughout.

HARRIES, C. J.—I entirely agree.

*Appeal allowed in part.*

S. A. K.

### APPELLATE CIVIL.

*Before James and Chatterji, JJ.*

SREE SREE RAMCHANDERJI

v.

HEM CHANDRA SINGH.\*

*Bengal Tenancy Act, 1885 (Act VIII of 1885), sections 86(6) and 167—landlord purchasing under a rent decree, whether bound to annul encumbrance—section 86(6), whether*

\* Appeal from Appellate Decree no. 237 of 1937, from a decision of Babu Jadunath Sahay, Additional Subordinate Judge of Bhagalpur, dated the 16th July, 1936, affirming a decision of Babu Ramchandra Misra, Munsif at Bhagalpur, dated the 31st January, 1935.

1938.

November,  
10.