1873

KALLY PROSONNO BOSE v. DINONATH MULLICK.

where there is no distinction between legal and equitable estates, the only person who can sue is he who has the beneficial interest. [MITTER, J., referred to *Grishchandra Lahury* v. *Fakir Chand* (1). COUCH, C.J.—Can we dismiss a suit simply because the plaintiff is wrongly named?] The point was decided in *Fuzeelun Bebee* v. *Omdah Beebee* (2). It is not a

(1) B. L. R., Sup. Vol., p. 503.

(2) *Before Sir Barnes Peacock, Kt., Chief Justice, and Mr. Justice Mitter.*

The 7th December 1868.

FUZEENLUN BEBEE, WIDOW AND HEIRESS OF SHAIKH ABDOOL WAHED (PLAINTIFF) *v.* OMDAH BEEBEE AND ANOTHER (DEFENDANTS).*

Parties—Sale of Land—Benami—Non-joinder of real Purchaser—Vákael and Client.

THIS was a suit for possession of property valued at Rs. 13,764. The plaint stated that the defendants, Omdah Beebee and her brother Syud ShahJonab Ali, were the two shareholders of property left by their father; that the respective shares having been determined in a suit brought against Omdah Beebee by her brother, Omdah Beebee sold a *mokurrari*, lease of part of her share to the plaintiff for Rs. 100, and subsequently sold to him a further part of her share, together with a moiety of her proprietary rights in the property included in the *mokurrari* for the sum of Rs. 3,000. The *mokurrari* was alleged to have been obtained, and the purchase made by the plaintiff through the instrumentality and with the assistance of his paternal uncle Moonshee Keramut Ali. The plaintiff produced the deed of sale, which recited that out of the Rs. 3 000, the sum of Rs. 2,500 was to be satisfied by setting off an old debt, the nature of such debt not being stated; the remaining Rs. 500 was paid in cash.

The defendants alleged, *inter alia*, that Shaikh Abdool Wahed was only the nominal plaintiff, and that Moonshee Keramut Ali, had got up the case and forged the *mokurrari* pottah and deed of sale, and that, as he had not been joined as a co-plaintiff. the suit ought be dismissed.

Mr. *Money* (with him Baboo *Joggoda nund Mookerjee*) for the appellant.

Baboos *Ashootosh Chatterjee*, *Girja Sunker Mojoomdar*, and *Gopeenath Mookerjee* for the respondents.

The judgment of the Court was delivered by

PEACOCK, C.J.—(The portion of the judgment relating to the point mentioned was as follows):—The first issue in bar is whether the suit is bad by reason of Keramut Ali not having been made a co-plaintiff in it?

That involves two questians: first assuming that a sale took place by Mussamut Omdah Bdebee, the defendant No. 1. whether Abdool Wahed was the real purchaser, or whether his father-in-law Keramut Ali, the vakeel of Omdah Beebee, was the real purchaser of the estate from his client?

The suit is valued at Rs. 13,764. Of part of the property for which the suit is brought a *mokurrari* was purchased for Rs. 100 in the name of the plaintiff Abdool Wahed. As to the residue of the property, it is said that it was sold to the plaintiff for the sum of Rs. 3,000 of which Rs. 500 were paid, and the residue settled by giving up certain debts. There is no evidence in the

* Regular Appeal. No, 98 of 1868. from a decree of the Principal Sudder Ameen of Beerbhoom, dated the 15th February 1868.

condition precedent to the grant of a certificate under s. 286 of Act VIII of 1859 that the Court should satisfy itself that the

1873

[KALLY PROSONNO BOSE v. DINONATH MULLICK.]

cause to induce me to believe that bonds legally due from Omdah Beebee to the extent of Rs. 2,500 either to Abdool Wahed or to moonshee Keramut Ali were ever delivered up. If Keramut Ali was the real purchaser, I believe that no more was actually paid than the Rs. 100 and Rs. 500 for this property, valued at Rs. 13,764. I have already pointed out on delivering judgment upon the second issue on the merits that the bill of sale speaks of debts generally, and not of bonds, and there is no specification anywhere, either in the bill of sale, or in any memorandum at the foot of it, of what the alleged debts for Rs. 2,500 consisted, or of the dates or amounts of the alleged bonds. It may be, but it is unnecessary to enter into that question now, that Keramut Ali had some claim against some one for costs which had been incurred in the suit between No. 1 and No. 2 defendants; but there is no evidence to induce me to think that defendant No. 1 ever owed any money whatever to the plaintiff Abdool Wahed. If, therefore, Keramut Ali was the real purchaser, and the name of his son-in-law Abdool Wahed was used as a blind, and that it might not appear that the purchase was a purchase by the vakeel from his client, Keramut Ali ought to have been made a party to the suit as plaintiff, in order that the sale of the *mukurrari* and the absolute interest in the land might have been impeached.

Speaking of the relationship of client and attorney, Story. J., in his Equity Jurisprudence, s. 310 8th Edition, says.—"It is obvious that this relation must give rise to great confidence between the parties and to very strong influences over the actions and rights and interests of the client. The situation of an attorney or solicitor puts it in his power to avail himself, not only of the necessities of his client, but of his good nature, liberality, and credulity, to obtain undue advantages, bargains, and gratuities. Hence the law, with a wise providence, not only watches over all the transactions of parties in this predicament, but it often interposes to declare transactions void, which, between other parties, would be held unobjectionable. It does not so much consider the bearing or hardship of its doctrine upon particular cases, as it does the importance of preventing a general public mischief (which may be brought about by means, secret and inaccessible to judicial scrutiny) from the dangerous influences arising from the confidential relation of the parties. By establishing the principle that, while the relation of client and attorney subsists in its full vigor, the latter shall derive no benefit to himself from the contracts or bounty, or other negotiations of the former, it supersedes the necessity of any enquiry into the particular means, extent, and exertion of influence in a given case, a task often difficult and ill-supported by evidence which can be drawn from any satisfactory sources." The same remarks apply with equal force to the relationship of a vakeel and client, and it is very important that this principle should be generally known; and it is equally important that the Courts should in these cases take care that they are not blinded by allowing transactions of this nature between pleaders and their clients to be enforced in the name of a third person put forward as the real purchaser.

Assuming, therefore, that the husband had the authority of the wife to execute the *mokurrari* pottah and the bill of sale, or assuming that the fact was, as some of the witnesses would wish to make it appear, that she actually touched the pen with which her name was signed by the husband, I have no doubt that Keramut Ali, the vakeel, was the person really interested in those documents, and that his son-in-law Abdool Wahed's

1873

KALLY PROSONNO BOSE v. DINONATH MULLICK.

decree cannot be executed; the certificate is to be given when satisfaction has not been obtained; see s. 285. But, however that may be, the certificate having been granted, it must be presumed that the Court did satisfy itself. Further, assuming that the certificate was illegally granted, the defendant ought to have objected before the Naddea Court before execution, under s. 290. *Saroda Prosaud Mullick* v. *Luchmeeput Sing Doogur* (1) shows that a decree may be transmitted to different Courts, concurrently, for the purpose of execution; if the impossibility of execution is a condition precedent to the grant of the

name was used as a mere color. The husband swears that the whole transaction took place between him and the vakeel in collusion, and that the wife knew nothing about it. I do not believe the evidence of Keramut Ali in which he states that he has neither taken nor purchased the property in the benam of the plaintiff had Abdool Wahed, and that the plaintiff and full right in the disputed property. He wishes it to appear that his son-in-law had purchased the property out of some money which he had previously given to him; and if his evidence is to be believed, it would appear that the whole purchase-money was paid, for he says nothing of debts or bonds being given up as part-payment of the purchase-money. He says:—"Previous to the purchase of a portion of the said property, I made a gift of some money to plaintiff, as he is my son-in-law, and I have this son-in-law and no son. With that money, the said plaintiff purchased and took in *mokurrari* the said property." On cross-examination he says:—'I made the gift of the money subsequent to marriage. I cannot exactly remember in what year I made a gift of Rs. 4,600 previous to 1270 (1863), and gave some money also in that year. My son-in-law, the plaintiff, did not mess jointly with me. Plaintiff is paying the costs of this suit, and I am conducting it on his behalf. I have no interest in the suit." I do not believe that the plaintiff did pay, or was paying the costs of the suit, or any part of it. If the son-in-law to whom this liberality had been extended was really paying his father-in-law in advance the costs of conducting the suit, much clearer and more reliable evidence upon that subject could and ought to have been given. Two mohurirs of the pleader Keramut Ali both prove that he was the man who advanced the money, and the witness Zamin Ali specially proves that the said Moonshee (Keramut Ali) having purchased certain property with his own money in the name of his son-in-law Abdool Wahed, said one day in the presence of respectable witnesses that he had caused the *mokurrari* and the bill of sale to be purchased in the name of his son-in-law, and had made them over to him. We have, therefore, clear evidence that the purchase was made by Keramut Ali benami in the name of his son-in-law and we have Keramut Ali's own evidence to show that he never made them over to his son-in-law, for he swears that his son-in-law originally purchased it. I have no doubt that, if the defendant No. 1, Omdah Beebee, executed those conveyances Keramut Ali, and not the plaintiff, was the real purchaser. I therefore think that the first issue in bar must be decided in the affirmative, that is to say, that the suit cannot be maintained in the name of the plaintiff. That I think is the substance of the issue.

(1) 10 B. L. R., 214.

certificate, it follows that the Court isusing the certificate ought to satisfy itself of the impossibility of executing the decree in one district before transmitting a copy to another. A decree may be executed in several ways; and so long as any mode of execution—*e.g.*, by imprisoning the judgment-debtor—can be made effectual, it cannot be said that the decree "cannot be executed." Those words in s. 284, read by the light of the two succeeding sections, must mean "cannot satisfactorily or conveniently be executed;" and the words "unless there be any sufficient reason to the contrary" in s. 286 clearly show that impossibility to satisfy the decree is not a condition precedent in all cases. The *dictum* of Phear, J., in *The Maharajah of Burdwan* v. *Sree Narain Mitter* (1), relied upon by the appellant's Counsel was merely *obiter*. [COUCH, C.J.—If this estate could not be sold otherwise than as one entire estate, the opinion of the learned Judge would not stand in your way; because the decree clearly could not be executed in the 24-Pergunnahs.] The estate was one entire estate, paying one sum as Government revenue: the sale of the whole estate was asked for, and, considered as a whole, the estate is in the Nuddea District. *Háfi Fiáz Nur Muhammad* v. *Abubakar Ibráhim Meman* (2) was a ruling on s. 81, which applies only to attachments before judgment. Act VIII of 1859 must be reasonably construed; but the construction contended for on behalf of the appellant would prevent the sale of any estate which lies partly within one, and partly within another, jurisdiction.

The *Advocate-General* on the same side (3).—The certificate was rightly granted, and at all events cannot now be objected to. Act VIII of 1859 contains no express provisions for the sale in execution of an estate like this, but it could never have been intended that such property should enjoy complete immunity. To sell the estate in fractions would materially reduce the price, and would, moreover, be impracticable in consequence of the impossibility of apportioning the Government revenue.

(1) 9 W. R., 346. (2) 8 Bom. Rep., O. C., 29.

(3) He was not present in Court at the commencement of the argument for the respondent.

1873

KALLY PROSONNO BOSE v. DINONATH MULLICK.

Having regard to ss. 213, 239, 248, and 249 of the Civil Procedure Code, it is submitted that this estate must be taken to be substansially within the civil district of Nuddea. There being no law applicable to the case, the Court acting on principles of justice, equity, and good conscience will not set aside the sale no injustice having been done.

Baboo *Mohesh Chunder Chowdhry* in reply.

Cur. adv. vult

The judgment of the Court was delivered by

COUCH, C.J. (who after stating the facts as above, and remarking that "the striking off the file of the Court, seems to have been improper, and we fear was caused by the very prevalent desire to show as few pending suits as possible," continued).—It has been objected for the respondent that the suit ought to have beendismissed, because the plaintiff was not the real purchaser. In *Fuzeelun Beebee* v. *Omdah Beebee* (1), it was held that, where a purchase was made in the name of another, the real purchaser must be the plaintiff, and the suit cannot be maintained in the name of the other person. Taking the evidence of Kedarnath Bose to be entirely true, he ought, by the rule of Courts of Equity, to have been a co-plaintiff; and for his not being so, the decree might be reversed on an appeal; the reason being that Kedarnath Bose will not be bound by the decree in this suit. We think this would be a sufficint reason for our dismissing this appeal. A false case as to the purchase has been put forward in the plaint; and we have little doubt that this was done designedly and in order to conceal the part which Kedarnath Bose had taken in the transaction. It is, however, desirable that the case should be decided on its merits.

We think the Nuddea Court had power to sell the whole estate, and that, for the purposes of attachment and sale in execution of a decree, it must be considered as wholly situated in Zillah Nuddea. If the Court of the 24-Pergunnahs sold the 18 mouzahs, it would

(1) Ante P. 60.

1873

KALLY PROSONNO BOSE v. DINONATH MULLICK.

have no power to apportion the Government revenue. The purchaser would be liable to pay the whole, and would be involved in constant disputes with the owner of the other mouzahs. Selling the estate thus in parts would greatly lessen the price that could be got for it, to the injury either of the decree-holder or the judgment-debtor, but possibly to the benefit of speculative persons such as the pleader Kedarnath Bose seems to be in this stance. Unless the law is imperative, this ought to be avoided. The Code of Civil Procedure has no special provision for such a case as this. "Part of an estate" in s. 249 means, we think, an aliquot part of an estate, which must frequently be attached and sold. In the proceeding in the Nuddea Court, it was possible to follow the directions of the Code as to making known the prohibitory order (s. 239) and as to sales (ss. 248. 249), and they have been followed. There is no direction in the Code to the contrary of this proceeding; and it appears to us that the estate may, as we have said, be considered as wholly in Zillah Nuddea. Then, so considering it, was the Nuddea Court authorized to sell? S. 284 says that a decree which cannot be executed within the jurisdiction of the Court whose duty it is execute it, to may be executed within the jurisdiction of any other Court in the manner following The plaintiff (s. 285) may apply to the Court whose duty it is to execute the decree, to transmit a copy of it with a certificate that satisfaction of it has not been obtained by execution within the jurisdiction of that Court. It will be observed it is not that the decree cannot be executed. The Court (s. 286), unless there be any sufficient reason to the contrary, is to cause the certificate to be prepared and transmitted to the Court which is to execute the decree; and (s. 287) the copy of any decree or order for execution, when filed in the Court to which it has been transmitted for execution, is to have the same effect as a decree or order for execution made by that Court. There was a certificate of the Judge of the 24-Pergunnahs that the amount of the decree had not been realized by means of that Court. It was made upon the application of the plaintiff (The Land Mortgage Bank) in accordance with s. 285, and there was a decree to be executed. Those two facts were sufficient

1873

KALLY PROSONNO BOSE v. DINONATH MULLICK.

to give the Court of 24-Pergunnahs jurisdiction to grant the certificate. Strictly it ought not to have been granted until the house and land in 24-Pergunnahs had been sold; but this error does not make the certificate void and a void the proceeding in the Nuddea Court. There is a wide distinction between a proceeding without jurisdiction, or in excess of jurisdiction, and an erroneous proceeding in a matter within jurisdiction. The latter is ground for an appeal, and one was presented, but not till the 15th of June 1870, after the time allowed by law. In the case of *The Máharajah of Burdwan* v. *Sree Narâin Mitter* (1), there was an appeal, and we understand the language of the Court in the judgment as used with reference to the case before it. We do not think the learned Judges intended to lay down that, when a decree has been executed by a Court other than that by which it was passed, the title of the purchaser may be avoided by showing that there was property of the judgment-debtor within the jurisdiction of the Court that passed the decree which might have been attached and sold. The judgment, indeed, goes so far as to say that it is only when the decree cannot be executed against the property or person of the judgment-debtor that it may be sent to another Court for execution. This would render it necessary in all cases before a decree is sent to another Court for execution for the sending Court to enquire whether the defendant can be arrested, and if he can, to refuse the application. We believe it has not been the practice to do this. We are of opinion, upon the facts of the case, that the decree of the lower Court is right, and the appeal ought to be dismissed with costs.

Appeal dismissed.

(1) 9 W. R., 346.