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**(1888) 06 CAL CK 0003**  
**In the Calcutta High Court**

Hurbuns Sabai and Another

APPELLANT

Vs

Chunder Coomar

RESPONDENT

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**Date of Decision :** 15-06-1888

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 13

**Citation :** (1889) ILR (Cal) 138

**Hon'ble Judges :** Pigot, J; Macpherson, J

**Bench :** Division Bench

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**Judgement**

Pigot and Macpherson, JJ. 1. This is an appeal from a decree in favour of the plaintiff by the Subordinate Judge of Shababad. The plaintiff brings this suit as son and heir of Lala Bhugwandut, who died on the 14th Kartick 1276, leaving the plaintiff, then an infant, and Ruttonjote, his widow, and mother of the plaintiff. The plaintiff says that Lala Bhugwandut, on 28th September 1866, purchased some property from Juneswar Das, the defendant's uncle, of which property, though by the deed of sale it was conveyed to Ruttonjote, Lala Bhugwandut was the real owner in the, name of Ruttonjote. The plaintiff says that after his father's death, and while he was an infant, the defendant brought an unfounded suit of pre-emption against Ruttonjote in respect of this property, and by compromise with her obtained a decree for the property and took possession of it. He says that he was the real owner, that Ruttonjote had no right to compromise the suit, that the decree was obtained fraudulently and illegally; and he asks for a declaration to that effect, that he be put into possession of the property and for mesne profits; offering, if this Court thinks fit, to repay to defendant the sum of Rs. 7,080-2-0, being the amount said to have been paid by defendant to Ruttonjote under the consent decree in the pre-emption suit. The defence is shortly this: (a) Ruttonjote was the real owner defendant believed her to be. (b) The decree is as between plaintiff and defendant binding on plaintiff, (c) Even if Ruttonjote was no more than a manager for the plaintiff, her compromise was the act of a prudent manager and was binding on the plaintiff, (d) Under no circumstances can the plaintiff recover, inasmuch as the deed of the

sale from Juneswar was a conveyance of part of the property of a Mitakshara family, by one member of the family, under pretence that it was his own, and that the sale was void as against the defendant. These are the substantial points made by defendant in his written statement, though stated in a different order. He of course denies fraud, etc., in the decree. A description of the property claimed in this suit and of the manner and the dates of its acquisition is given in the plaint as follows :

1. That Baboo Dyal Singh, deceased, was the proprietor of the entire 16 annas of mehal Athur, pergunnah Bhojpur, to which the undermentioned mouzahs appertain.
2. That in accordance with the conditions specified in the taksimnamah executed by Baboo Dyal Singh, in the mehal aforesaid, 6 annas came into the possession of Baboo Rip Bhunjun Singh, 5 annas into that of Baboo Goman Bhunjun Singh, and 5 annas into that of Baboo Ari Bhunjun Singh, sons of Baboo Dyal Singh.
3. That the entire 16 annas of the aforesaid mehal was mortgaged on behalf of Baboo Rip Bhunjun and Baboo Goman Bhunjun Singh for selves and as guardians of Baboo Rip Bhunjun Singh, minor, to Juneswar Das for self and as guardian of Baboo Chunder Coomar, and out of the mouzahs aforesaid appertaining to the mehal aforementioned, mouzah Athur, mouzah Kunhuan and mouzah Runbirpore were under two zurpeshgi leases, severally dated 17th February 1862 and 21st September 1860, in the possession of Baboo Juneswar Das for self and as guardian of Baboo Chunder Coomar.
4. That Juneswar Das, for self and as guardian of Chunder Coomar, obtained a decree on the basis of his mortgage bond, and caused the shares of Baboo Rip Bhunjun Singh and Baboo Goman Bhunjun Singh in mehal Athur aforesaid to be sold at auction, and purchased them himself on the 4th March 1865.
5. That after the purchase made at auction, Juneswar Das, for self and as guardian for Chunder Coomar, held the entire 16 annas of mouzah Athur, mouzah Kunhuan and mouzah Runbirpore in possession under zurpeshgi lease, and entered into possession of 11 annas of the entire mehal by virtue of purchase at auction, and out of this one-half was the share of Juneswar Das, and the other half that of Chunder Coomar.
6. That out of half of the share which belonged to Juneswar Das under the zurpeshgi deed and the auction purchase one-fourth was sold by Juneswar Das to Lala Bhugwandut, father of the plaintiff, under the deed of sale dated 28th September 1866, and possession made over, and that Lala Bhugwandut got that deed of sale executed in the fictitious name of Mussummat Ruttonjote Koer, his wife.
7. That under the deed of sale above adverted to, Lala Bhugwandut became proprietor and holder of 1 anna 4 pie 10 krants in the entire mehal Athur as auction-purchaser, and in that mehal in mouzah Athur, mouzah Kun-huan and

mouzah Runbirpore he came to hold possession of 2 annas share under a zurpeshgi lease.

2. The Judge in the Court below held that the case of fraud (which consisted of a charge of intimidating Ruttonjote by threatening her to kill her son by sorcery) was false. He held that the purchase in Ruttonjote's name was a benami purchase, and that everything that passed under the deed of sale passed to Lala Bhugwandut. He found that Purbhu Das, defendant's father, Juneswar Das, his uncle, and the defendant were members of a faint Mitak-shara family, and that Purbhu Das did not, as was alleged, retire from the world, but continued in the family.

3. We accept these findings as correct.

4. The Judge further held: (a) that the compromise and consent decree could not bind the plaintiff; (b) that, although the defendant's family were joint, Juneswar was, as to the property of which that in dispute was one-fourth, separate owner, and capable of giving a good title to it by sale; and (c) that even if he were not, defendant could not now insist on the defect of title, as he had not made it a ground of claim when he instituted the pre-emption suit.

5. As to the first point, the Judge expresses no opinion upon the question whether defendant had, at the time he entered into the compromise, notice that Ruttonjote was a benamidar. The defendant wholly denies that he had; and we find, upon the evidence, that there is no ground for finding that he had, and that the facts of the case are not such as to justify a Court in fixing him with constructive notice of the plaintiff's rights such as they were. Not merely was the purchase made in Ruttonjote's name, but the reasons for the use of her name by Lala Bhugwandut are given by the Judge. It was desired to conceal from the Maharajah of Dumraon, in whose service Lala was, that he had purchased property of persons who were the Maharaja's relatives; and there was the further very substantial reason that the disputed properties were heavily encumbered, as Sheo Gholam, witness No. 7, says: "He made the purchase in the name of Ruttonjote with a view that in case of dispute arising his exclusive property might not be prejudiced, and no liability in consequence of debt might attach to it," and then mentions also the consideration about the Maharajah.

6. It is plain that the concealment (assuming the purchase to have been a benami one) was intended to be effectual. There seems no reason to doubt that it was effectual. It is plain that after Lala's death the property continued to be treated as Ruttonjote's. She obtained a certificate of guardianship of her son under Act XL of 1858, but this property was not included in it. A number of exhibits have been put in showing that for years, and down to near the time of the pre-emption suit, the property was managed and proceedings relating to it conducted in her name. There is not a fact in evidence such as could be calculated to put a purchaser from her (supposing for the moment that the defendant was such) upon enquiry, save the fact that plaintiff was her son; and

the fact that she had excluded the properties from the certificate of guardianship is probably a sufficient indication of the answer that might have been expected from her to an enquiry as to the ownership of the property.

7. Further, had the defendant known or suspected the ownership of the plaintiff, there seems no reason why he should not have made him a party to the suit. His mother was his guardian. She might have been enabled to defend the suit in respect of this property as his guardian. The Judge finds that the compromise was, so far as Ruttonjote was concerned, a bond fide compromise for the benefit of her son in respect of property which was then heavily encumbered; and this would have justified her as his guardian in what she did. On the whole, we see no reason to doubt that were the defendant in this case simply a purchaser for valuable consideration, he would be entitled to whatever defence bona fides, and absence of notice of plaintiff's claim, would entitle him to. That such a defence would be, in such a case as this, complete is decided by the case in the Privy Council of *Luchmun Chunder Geer Gossain v. Kally Churn Singh* 19 W.R. 292 where it was held, overruling the decision of this Court, that such a defence is good against an heir of the person who created the benami, even although an infant at the time, when, after the death of the ancestor, a sale is made by the benamidar, in breach of his trust, to a bond fide purchaser without notice, there being a continuing misrepresentation by the ancestor by which the heir is bound.

8. We can see no distinction in favour of the plaintiff between the present case and the case of a purchaser. If Ruttonjote was by the act of Lala Bhugwandut held out as the real owner, and so competent to make a good title on sale, she was at least as much so held out as such, as being competent to defend the title obtained by the sale—at any rate, as against a member of the vendor's family claiming that the sale was in derogation of that member's rights, and so was capable of entering into a compromise with him should she honestly think the title defective. No doubt the compromise may very possibly have been arranged before the suit was filed. There is nothing to suggest that this was the case with the preliminary mowasibut and istashad which long preceded the actual filing of the pre-emption suit. Nor should it be omitted from consideration that pre-emption is in fact a sale enforced by law, and that the price paid by Lala Bhugwandut was actually paid back to Ruttonjote.

9. The Subordinate Judge has said that the performance by Chunder Coomar of the preliminaries required by the Mahomedan law in a case of preemption do not appear to have been properly performed. That question was not before him save so far as it might bear on the question of fraud, which he has negatived; for he has found that the compromise was bond fide made by Ruttonjote so far as she was concerned, for the benefit of her son. If she had power to defend the suit, the decree is binding; if not, it is quite immaterial whether the preliminaries were performed or not in compliance with the strict Mahomedan law of pre-emption or whatever modification of it, if any, may apply amongst Hindus in this part of the country, where, by custom, the right of pre-emption exists amongst them. For

these reasons we are of opinion that upon this point the Judge was in error, that the plaintiff is bound by the compromise and the decree in pursuance of it, and that on this ground alone the suit ought to have been dismissed.

10. We may observe that the case of Luchmun Chunder Geer Gossain v. Kally Churn Singh 19 W.R. 292 was not cited before us, nor is it referred to in Mr. Mayne's chapter on benami, nor in Mr. Woodman's Digest under that title<sup>1</sup>; nor, so far as the reports show, does it appear to have been cited in any case in this Court. It is a decision of great importance, as showing that, in some cases, the heir of one who purchases benami may be bound as between him and a purchaser from the benamidar by that act of his ancestor, irrespective of any act or omission of his own whatever, and even although a minor when his ancestor's conduct was acted on by such purchaser.

11. Although our decision upon this point is decisive on the appeal, we think we should also decide the other question argued before us. Purbhu Das, Juneswar Das, and the defendant, who is the son of Purbhu Das, were members of a joint family living under the Mitakshara law. Juneswar Das died in October 1874. The date of the death of Purbhu Das does not appear, but from a deposition of Juneswar Das, made on the 19th August 1872 before the Subordinate Judge of Shahabad, put in this case and marked Exhibit 22, it does appear that at that date Purbhu Das was alive—a fact which appears to have escaped the attention of the lower Court and of learned Counsel in this. Purbhu Das had nominally renounced the world. The lower Court finds that, though it was given out that he had done so, he had not really done so, but managed the business of his house. The brothers appear to have become possessed of considerable means, to have bought a good deal of zemindari property, and to have been much engaged in law suits, which latter pursuit is referred to in the deposition above mentioned as though it were part of their business, as it possibly was.

12. But, while holding that the status of the family was joint, the Subordinate Judge holds that the kobala of September 1866 was valid under the Mitakshara law. He does so chiefly on the ground that Juneswar in that kobala recites that the original purchase at auction was made half for himself and half for Chunder Coomar, and in reliance on certain expressions used by Chunder Coomar in his evidence in this case, in his plaint in the pre-emption case, and in an objection filed by him on December 13, 1877, all of which, he appears to think, bar Chunder Coomar from now disputing that the property was joint. We think the construction put upon these expressions by the Subordinate Judge is erroneous, but, were it otherwise, they could not have the effect he attributes to them. Chunder Coomar's evidence in this case, in which he explicitly sets up the joint character of the property, cannot on the face of it be taken as an admission of a fact which he comes into Court to deny, while the language used by him in proceedings to which plaintiff was not a party could not bind him towards the plaintiff, even if it contained, as we do not think it does, admissions on his part that the property was not joint; nor can the language of the kobala have the

effect attributed to it, for Juneswar, if he was selling property which he had no right to sell, could not confer that right upon himself by asserting that he had it. It is not suggested that the money advanced on the zurpeshgi, leases, or the money which was the consideration for the auction sale, were not joint family funds; and the property which passed under those transactions became clearly joint family property.

13. Then the fact that Purbhu Das was an active member, as the Judge found, of the joint family, and was so at the time of the kobala, which latter fact was not mentioned in argument before us, is conclusive. The family did not consist of two persons jointly interested in the family property, but of three persons so interested. We take the Judge's finding to negative the supposition that Juneswar was the manager of the family. But even if he was, this sale did not pretend to be made by him in that capacity; nor was there any family object to be gained by it. It was simply an appropriation by him, without any partition, of part of the family property. Nor does the doctrine lately introduced, that sons are bound by force of a pious obligation incumbent on them to make good the acts of their father, extend to nephews in respect of the acts of their uncle, or to brothers of the acts of brothers. No doubt the Mitakshara law has been a good deal worn away by the decisions of recent years, which it is our duty to follow. But we are not aware of any authority according to which the sale by Juneswar in the present case could be sustained.

14. We think that the plaintiff has failed to show a good title to the property claimed, and that on this ground also the suit should have been dismissed.

15. As to the view taken by the Subordinate Judge, that having regard to Section 13 of the CPC and the case of Denobundhoo Choudhary v. Kristomonee Dossee ILR 2 Cal. 152 the defendant is not entitled to rely on this ground, as he did not put it forward when he brought his suit for pre-emption; we think it enough to point out that this suit is not between the same parties as the former suit. We should hesitate before holding that the bar arising from the acts of his father which, as we have decided, precludes the plaintiff from disputing Ruttonjote's right to compromise the pre-emption suit, had such an operation as to entitle him to treat it as if, for all purposes, it had been brought against him, and so to avail himself, against the defendant, of Section 13, explanation 2 of the Civil Procedure Code. Were it necessary to deal with this question, we should have to consider the bearing upon it of the recent decision of the Privy Council in Amanut Bibee v. Imdad Hossem L.R. 15 I. Ap. 106 decided on March 16th of this year. But for the purposes of this appeal, it is needless to determine that question. If the plaintiff is estopped, he cannot recover, for that reason, in this suit. If he is not, defendant is not barred by Section 13 from showing that under the Mitakshara law plaintiff has no title; and in either case the suit must fail.

16. We should add that had we felt able to sustain the decree of the , Subordinate Judge, we should have felt some difficulty in doing so without giving the defendant an opportunity of showing how far, if at all, the very great increase

in the value of the property since the pre-emption suit is attributable to the paying off of incumbrances at that time affecting it by the defendant. It has admittedly doubled in value at the least.

17. We set aside the decree of the Subordinate Judge, and dismiss the suit with all costs here and in the original Court.

1 It appears under title Estoppel-Estoppel by Conduct, case 168.-Ed.