
(1951) 02 BOM CK 0008

In the Bombay High Court

Case No : Letters Patent Appeal No. 38 of 1949

Nimalchand Gulabsa and Others

APPELLANT

Vs

Madanlal Jagannath Shet and Others

RESPONDENT

Date of Decision : 07-02-1951

Acts Referred:

Civil Procedure Code, 1882 — Section 317
Civil Procedure Code, 1908 (CPC) — Section 66

Citation : AIR 1952 Bom 30 : (1951) 53 BOMLR 810 : (1952) ILR (Bom) 40

Hon'ble Judges : Chagla, C.J.;Gajendragadkar, J

Bench : Division Bench

Advocate : P.V. Kane, for the Appellant; B.N. Gokhale, for the Respondent

Judgement

Chagla, C.J.

[1] This Letters Patent appeal is preferred against a judgment of Mr. Justice Shah and the few facts that are necessary to be stated are that two survey numbers, 21 and 71. belonged to one Buda Yanjari. Buda Vanjari mortgaged these two survey numbers to the defendants on June 4,1919. Plaintiffs purchased the equity of redemption of 8. No, 21 in 1923. Defendants filed a suit, being suit NO. 117 of 1826, to enforce their mortgage and they obtained a mortgage decree. In execution of the decree they filed a darkhast in 1938, At that time the sum due to them under the decree was Rs. 6,181. An agreement was arrived at while that darkhast was pending on July 14, 1940, between the plaintiffs and the defendants. We will consider the particular terms of this agreement and the effect of it later. Pursuant to that agreement, possession of Section No. 21 was given to the defendants and the plaintiffs in their turn executed a rent-note in favour of the defendants agreeing to pay Rs. 105 as rent for one year. On January 25, 1943, in execution of the mortgage decree 3. No. 21 was put up to auction and purchased by the defendants for Rs. 2,600. On the game day 20 acres of Section No. 71 was also put up to auction and sold for RS. 3, 681. We might mention bore that the extent of Section No. 71 was 23 acres, 39 gunthag,

and only part of it was sold at this auction. By reason of these auctions the decree of the mortgagee was satisfied. On August 3, 1912, the defendants obtained possession of 8. No. 21 and the portion of Section No. 71 which they had purchased through the Court. On July 1943, the plaintiffs filed the suit claiming half of Section No. 71 purchased by the defendants or in the alternative a sum of Rs. 2,100. Their claim was based upon the agreement of July 14, 1940. The trial Court decreed the plaintiffs suit. The learned District Judge to whom the appeal was preferred dismissed the plaintiffs' suit. In second appeal, Mr. Justice Shah differed from the view taken by the learned District Judge and restored the decree passed by the trial Court. Subsequently the learned Judge gave a certificate for a Letters Patent appeal and hence this appeal.

[2] Now, in order to decide the questions raised by Dr. Kane we have to consider the effect and the true purport of the agreement of July 14, 1940. As we said before, the agreement is between the plaintiffs, who were co-judgment-debtors along with the heirs of Buda Vanjari because they had purchased the equity of redemption of Section No. 21, and the mortgagees, the defendants. And the agreement was that the plaintiffs who were in possession of Section No. 21 were to hand over possession of this survey number with the crop standing thereon to the defendants. It was further agreed that when Section No. 71 came to be auctioned in execution of the darkhast and the defendants got possession, they were to hand over half of those lands in Section No. 71 under a sale-deed which was to be executed and registered at the cost of the defendants. It was further agreed that if the defendants did not execute a sale-deed, then they were to pay the price of half the land in Section No. 11. It was further provided that if Section No. 71 was purchased at the auction by someone else, then the defendants were to give half the sum of the price thereof after that price had been recovered by the defendants from the Court. The suit substantially was for the specific performance of this agreement. The contentions raised both in the Courts below and before us were, first, that the agreement was unenforceable by reason of Section 66, Civil P. C., and the second contention was that there was no consideration for the agreement and it was nudum pactum and therefore no suit could lie on it. Finally it was urged that in any event plaintiffs were not entitled to a sum of Rs. 2,100.

[3] Now, turning to the first contention with regard to Section 66, this section bars a suit by a person who claims the beneficial title in himself against a person upon whom has been conferred the legal title by a certificate of the Court in respect of property purchased at an auction sale. Further, this section only bars such a suit provided the purchase by the legal owner was made on behalf of the plaintiff the person claiming the beneficial title or on behalf of someone through whom the plaintiff claims. Now, it is clear that Section 66 ousts the jurisdiction of the civil Court to grant equitable relief in certain cases where specific performance of an agreement is claimed, and by the accepted canon of construction to the extent that the jurisdiction of the Court is ousted the section must be strictly construed. The prohibition laid down in Section 66 should not be

in any way extended or widened; it must be kept strictly within the four corners indicated by the section itself. Now, it is clear on the language of Section 66 that it only applies where a plaintiff claims or asserts a title in himself and challenges the title of the defendant as merely being benami. It does not contemplate cases where the plaintiff does not claim a title in himself but, admitting the title of the defendant, he claims possession of the property by reason of an agreement entered into with the defendant by which the defendant was bound to transfer property to him. The two cases are entirely different. In the one case the plaintiff's case is that title is in himself and he is suing on the strength of that title. In the other case the plaintiff admits that the title is in the defendant and his title would only arise provided the Court gave specific performance of an agreement entered into between him and the defendant. Therefore, the plaintiff when he files the suit has no present title in himself; his title is dependent upon specific performance being ordered by the Court. Sometimes the line between these two cases may be narrow and not clearly defined. But there is no difficulty in understanding or appreciating the distinction that lies between the two classes of cases. It is also clear that Section 66 prohibits only private agreements or understandings arrived at between the purchaser at the auction sale and the third party who seeks to acquire his title through the purchaser. It is not aimed at that class of cases where although A may purchase at the auction sale B or C may have an interest in the property as a result, not of a private understanding or agreement, but in law. Now, if these principles are borne in mind, then the facts of the present case do not present any difficulty. The plaintiffs' suit is for specific performance of the agreement of 14th July 1940. The plaintiffs do not claim that they are the beneficial owners of the properties and that the defendants' title is merely a benami title. The plaintiffs make it clear that their only right is to a specific performance of the agreement. They claim no interest in the lands as such. Their interest would only arise if the Court were to grant them specific performance and order the defendants to convey the property to the plaintiffs. Therefore, in our opinion, the present suit does not fall within the mischief of Section 66 in as much as the defendants did not purchase the property on behalf of the plaintiffs as contemplated by that section. Dr. Kane has drawn our attention to several decided cases and we will presently look at them. But in our opinion these cases do not go counter to what we have suggested is the true principle underlying Section 66.

[4] The first case on which reliance is placed is a decision of the Privy Council reported in *Ganga Sahai v. Kesri*, 42 Ind. App. 177 : 17 Bom. In R. 998 and the relevant observations are to be found at p. 183. That was a case where a joint decree-holder purchased the property at the auction sale and the other decree holders filed a suit for their interest in the property. The Courts in India upheld the contention of the plaintiffs and rejected the contention of the defendant that the suit was barred u/s 317 of the CPC of 1882, which corresponded to Section 66 of the present Code, and in the light of these facts their Lordships observed that the provisions of Section 317

"were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefit of judgment-debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase."

From this observation Dr. Kane wishes to argue that whenever an agreement is entered into antecedent to an auction sale between a judgment debtor and the decree-holder with regard to the property to be purchased at the auction sale of the judgment-debtor, that agreement cannot lie sued upon as coming within the mischief of Section 66. Now, surely that is not the effect of the decision of the Privy Council. The Privy Council is merely pointing out what the object of enacting Section 317 was; it does not lay down that every agreement entered into by the judgment debtor is necessarily bad, nor is it laying down that only agreements by judgment-debtors came within the mischief of Section 66. Section 66 does not lay down any qualifications as to who should be a party to the agreement. All agreements entered into by any person which fall within the ambit of Section 66 cannot be enforced by Courts of law. In this particular case it is true that the agreement was entered into with the defendants by the judgment, debtors, the plaintiffs, to the extent that they were judgment-debtors with regard to Section No. 21. It is also true that the judgement-debtors have derived considerable benefit from this agreement and we shall point out the extent of that benefit later. But that fact by itself cannot make the agreement unenforceable at the hands of the judgment-debtors.

[5] The next authority relied on is also of the Privy Council reported in *Ramathai Vadivelu v. Peria Manicka* 43 Mad. 643. In this case the appellant before the Privy Council purchased at an auction sale certain Immovable property which he had before the sale agreed with the respondents to convey to them, After the sale there where fresh agreements by which the appellant bound himself to carry out the original agreement with the respondent. When the respondents filed a suit for specific performance against the appellant, Section 65 was requisitioned in defence as being a bar to the suit. At p. 619 Viscount Cave delivering the judgment of the Board observed :

"If title agreement entered into before the auction stood alone there would be considerable force in this contention." (The contention was one advanced on behalf of the appellant that the suit was barred by Section 66), "The object of Section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of Title original agreement Is removed by the events which happened after the sale."

Now, Dr. Kane says that the Privy Council in this case Game to the conclusion that Section 66 had no application because the agreement was entered into subsequent to the auction and Dr. Kane wants to argue that whenever there is an

agree-meant antecedent to the auction which affects the property to be purchased at the auction, that agreement must necessarily be unenforceable. We do not read the Privy Council to lay down that proposition. The Privy Council emphasises the distinction between a purchase on behalf of another and a purchase coupled with an undertaking to convey to another, and what the Privy Council says is that if there had been only an agreement antecedent to the auction there may have been some doubt as to the nature of that agreement. But inasmuch as that agreement was ratified and confirmed by an agreement subsequent to the auction, any doubt as to the proper construction of the agreement disappeared. Therefore, even if we have an agreement antecedent to the auction and that agreement is clearly an agreement containing an undertaking to convey a property purchased at an auction, it would be a good, valid and enforceable agreement. It is only when that agreement is spelt out to be merely a declaration of the right of the legal owner along with the benamidar or against the benamidar that such an agreement would fall within the mischief of Section 66.

[6] Then reliance is placed on two Calcutta cases, one reported in *Harendra Ghandra v. Sam Kumar* 35 Cal. W. N. 940 which is a judgment; of a single Judge, Mitter J, and there on the facts it is clear that the agreement relied on was an agreement of purchasing benami. It was not a case of an agreement to reconvey. But in the course of the judgment the learned Judge seems to have construed the Privy Council case to which we have just referred as making a distinction between agreements antecedent to the auction and agreements subsequently to the auction. With very great respect, we are unable to agree with that view of the law. In *Upendralal Pat v. Ajahamddin Ahmad*. 61 Cal. 371, the agreement also was similar to the one in *Harendra Chandra v. Bam Sumar* 35 Cal. W. N. 940 and under the agreement clearly the purchase was by the purchaser on behalf of himself and others and it is in the light of these facts that a divisional bench of the Calcutta High Court observed at p. 375, that the operation of Section 66 cannot be ousted by the existence of any private agreement or undertaking. But, in every case, the Court has got to consider the nature and the scope and the effect of the private agreement or undertaking. It is not every private agreement or undertaking that necessarily attracts the application of Section 66, nor can it be said that every private agreement or undertaking affecting the property sold at an auction sale is within the mischief of Section 66. Therefore, on a review of these authorities we are of the opinion that Shah J. who took the same view of the law and held that Section 66 had no application to this case was, with respect, right.

[7] Therefore, in our opinion, the agreement duly understood made the defendants liable either to convey half the portion of Section No. 71 which they purchased at the auction sale or half the price of that portion purchased by them. Therefore, in our opinion the learned trial Judge was in error in passing a decree for Rs. 2,100. We would, therefore, vary the decree passed by the trial Court by substituting for Rs. 2,100 Rs. 1,840-8-0 which is half of Rs. 3,681.

[8] The learned Judge has also allowed interest at 6 per cent. from the date of the filing of the suit. Now, ordinarily the Court does not allow interest on damages and the plaintiffs' claim sounds in damages. We would, therefore, not allow the plaintiffs any interest from the date of the filing of the suit. We will only allow them interest on judgment and we will allow them interest on judgment not at 6 per cent, but at 4 per cent, 4 per cent, being the Court rate of interest. The decree will be for Rs. 1,840 8-0 with interest, thereon at 4 per cent, per annum from 22-3-1944, till payment.

[9] As Mr. Gokhale has substantially succeeded in this letters patent appeal the appellants will pay three, fourths costs of the appeal.

[10] Order accordingly.