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**(1920) 04 CAL CK 0037**  
**In the Calcutta High Court**

Promotha Nath Pal Choudhary

APPELLANT

Vs

Sourav Dasi Chowdhurani and Another

RESPONDENT

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**Date of Decision :** 27-04-1920

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 66

**Citation :** 58 Ind. Cas. 327

**Hon'ble Judges :** Asutosh Mookerjee, C.J.;Richardson, J;Earnest Fletcher, J

**Bench :** Full Bench

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**Judgement**

Asutosh Mookerjee, C.J.—This is an appeal under Clause 15 of the Letters Patent in an appeal from an appellate decree, wherein the two Judge of the Division Court have been equally divided in opinion upon an important question of law, namely, who the rule embodied in Section 66 of the Civil Procedure Code, 1908, is applicable to an execution purchaser whose title war perfected when Section 317 of the Civil Procedure Code, 1882, was in force.

2. The plaintiff instituted this suit for a declaration of his title by purchase at an execution sale held on the 11th August 1903, His case is that he purchased the property in the name of his son, who is the first defendant in this litigation. The sale was confirmed under Sections 314 and 316 of the Code of 1882 on the 30th July 1906. The sale certificate, however, was not taken out till the 24th April 1909 but the title of the purchaser accrued, u/s 316, from the date of the confirmation of the sale that is from the 30th July 1906, which must be taken to be the date of the sale certificate. This sale certificate sets out the name of the recorded purchaser as the purchaser of the property, The first defendant, the recorded purchaser, appears to have subsequently contracted to sell the property to the second defendant, with the consequence that in a litigation between the two defendants the second defendant obtained a decree for a conveyance by the first defendant, in his favour. As the plaintiff was not made a party to that suit, he now seeks a declaration that the first defendant was not the real purchaser and that the second defendant has not acquired any title to the disputed

property under his conveyance The suit has been dismissed on the ground that it is barred under the provision of Section 66 of the CPC of 1908.

3. The plaintiff now contends that Section 66 of the Code of 1908 has no application, and that the rights of the parties are governed by Section 317 of the code of 1882, which was in force at the time when the execution sale took place and was confirmed. The sale certificates, as we have already pointed out was granted on the 24th April 1909 after the Code of 1908 had come into force, but it has not been contended, and, in our opinion, it could not be seriously contended, that the delay in the issue of the certificate could in any way affect the position of the parties. A sale certificate, it is well established, does not create title, but is merely evidence of title *Tantardhari Sing v. Sundar Lal Missir* 7 C.L.J. 384 and *Braja Nath Pal v. Joggestear Bagchi Ind. Cas.* 62 : 9 C.L.J. 346

4. The sale, which is the root of the alleged title of the plaintiff took place while the Code of 1882 was in force. Section 36 of that Code provides as follows: "When a sale of Immovable property has become absolute in manner aforesaid (that is as provided in Section 314), the Court shall grant a certificate stating the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear the date of the confirmation of the Sale; and, so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before, provided that the decree under which the sale took place was still subsisting at that date."

5. Under this provision, the title of the purchaser became absolute on the date of the confirmation of the sale, that is, on the 30th July 1906. That title, however, was subject to the limitation embodied in Section 17, which provides as follows:-- "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims." Consequently, the title acquired could not be enforced against the certified purchaser on the ground that he was not the real purchaser. We must bear in mind in this connection that it had been held, by this Court in the case of *Dukhada Sundari Dasi v. Srimonto Joardar* 26 C. 950 : 3 C.W.N. 657 : 13 Ind. Dec. (N.S.) 1208 that Section 317, which imposes a restriction upon the right of the owner to enforce his title, should be strictly construed, and that, consequently, such title could be enforced against an assignee of the certified purchaser, though not against the certified purchaser himself. The same view was adopted in the cases of *Theyyavelan v. Kochan* 21 M. 7 : 7 M.L.J. 290 : 7 Ind. Dec. (N.S. ) 361 and *Sibta Kunwar v. Bhagoli* 21 A. 196 : A.W.N. (1899) 30 : 9 Ind. Dec. (N.S.) 834. The position, then, is clear that at the time when the plaintiff acquired his title by purchase at the execution sale, he was subject to the restriction embodied in Section 317, that is, he had a title enforceable against the whole world except the certified purchaser. When, however, the Code of 1908 came into force on the 1st January 1909, Section 317 of the Code of 1882 was replaced by Section 66 of the new

Code which introduced a restriction of a much wider scope. Sub-section(1) of Section 66 is in these terms: "No suit shall be maintained against any person claiming title under a purchase certified by the court in such manner as may be prescribed, on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims." Consequently, under the new Code, the title of the real owner cannot be enforced against the certified purchaser as also against persons who claim a title derived from the certified purchaser. The question thus arises, whether in these circumstances, the wider restriction embodied by the Legislature in Section 66 of the Code of 1908 can be applied to cases where the title accrued under the Code of 1882, and was, at the time of its inception, subject only to the restriction contained in Section 317 of that Code. In our opinion, the answer must be in the negative.

6. It is manifest that the respondent seeks to read into the Code of 1882 Section 66 of the Code of 1908, or in other words, to give retrospective operation to the latter provision of the law. This contention is opposed to well recognised canons for the interpretation of Statutes. As was observed in *Munjhoori Bibi v. Akel Mahmud* 19 Ind. Cas. 793 : 17 C.L.J. 36 345 : 17 C.W.N. 889 every Statute which takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability, in respect of transactions or considerations already passed, must not be deemed retrospective in its operation. The rule that enactments in a Statute are generally to be construed to be prospective and intended to regulate the future conduct of persons, is deeply founded in good sense and strict justice, and it has been repeatedly laid down that in the absence of clear words to that effect, a Statute will not be construed so as to take away a vested right of action acquired before it was passed. *Budhu Kumar v. Hafiz Hussain* 20 Ind. Cas. 821 : 18 C.L.J. 274 and *Gopeshwar Pal v. Jiban Chandra* 24 Ind. Cas. 37 : 41 C. 1125 : 119 C.L.J. 549 : 18 C.W.N. 804, But the respondent has argued that Section 66 of the Code of 1918, like Section 317 of the Code of 1882, embodies merely a rule of procedure, and that as no litigant has a vested interest in the course of procedure, the new Statute does not in fact take away a vested right. In our opinion, this contention is based upon a narrow and superficial view of the true effect of Section 63 of the Code of 1908 and Section 317 of the Code of 1882. Each of these -provisions no doubt finds a place in a code of procedure, but each imposes in essence a serious restriction upon the title of the real purchaser at the execution sale. As has been well observed, of things that do not appear and things that do not exist, the reckoning in a Court of law is the same, a title which cannot be proved against an opponent in the eye of law has in point of fact no existence in relation to that individual. It is consequently indisputable that both Section 317 of the Code of 1882 and Section 66 of the Code of 1908 operate to place a limitation upon the title of the purchaser, with this difference that the effect of Section 66 is to widen the fetter placed upon the title of the purchaser by Section 317. If we look at the matter from a different standpoint, the effect of Section 66 is to improve the position of the certified purchaser, and in effect to

confer upon him a power of alienation he would not otherwise enjoy. If the certified purchaser alienated the property, the result notwithstanding Section 317 would be that the title of the alienance could be forthwith defeated by the real owner u/s 66, on the other hand, the certified purchaser is enabled to confer a good title on the transferee, because the real owner is debarred from impeaching the title, not only of the certified purchaser but also of the person who has derived title from him. In our opinion, there can be no doubt that the view taken by Mr. justice Teunon is correct and that the decree made by the District Judge cannot be upheld.

7. The result is that this appeal is allowed,, the decree made by the District Judge set aside and the case remitted to the Court of first instance to be tried on the merits on fresh evidence to be adduced by both parties.

8. A question has been raised as to whether the person who obtained leave to prosecute the appeal after the death of the original plaintiff is really competent to do so. That question will be left open for consideration by the trial Court. The counter affidavit which has been filed here will be transmitted to the Court below as part of the record.

9. The appellant is entitled to his floats of this appeal, of the appeal before the Division Bench and also before the District Judge. The costs in the Court of first instance will abide the result of the retrial.

Fletcher, J.

10. I agree.

Richardson, J.

11. I also agree.