

(1960) 10 MP CK 0032
In the Madhya Pradesh High Court
Case No : First Appeal No. 36 of 1956

Ratanlal Hazarilal	Vs	APPELLANT
Seth Laxminarayan Surajkaranji and Others		RESPONDENT

Date of Decision : 26-10-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66

Citation : AIR 1962 MP 28 : (1960) ILR (MP) 854

Hon'ble Judges : V.R. Newaskar, J; M.A. Razzaque, J

Bench : Division Bench

Advocate : S.R. Joshi, for the Appellant; J.D. Patel and M.P. Avadhoot, for the Respondent

Final Decision : Allowed

Judgement

Newaskar, J.—The only question involved in this appeal is whether the purchase of the disputed property viz., the eight annas share in the partnership concern known as Madhav Cotton Press, is vitiated as regards the plaintiffs 1/5th share therein by Section 66 C. P. G.

2. The plaintiff Ratanlal filed the present suit against defendants Seth Laxminarayan, Seth Kanhaiyalal and the Firm Nazarali Alabux for dissolution of partnership and for accounts on the allegations that the eight annas share in the aforesaid concern owned by Hal Saheb Seth Mulchand proprietor of the Firm Pannalal Ganeshdas had been put up for auction in execution of a decree against him; that while the auction sale was in progress five persons including (1) the plaintiff Ratanlal, (2) defendant No. 1 Laxminarayan, (3) Munnixlalji the father of defendant No. 2, (4) Basantilal Palwia, the Munim of the Firm Tilokchand Kalyanmal and (5) Lalji Bhai, agreed that each should contribute his 1/5th share of money required for the purchase of the aforesaid eight annas share in the auction-sale and thereafter each should have an equal share in the profits and losses of the property thus purchased; that in pursuance of this, agreement the property was purchased but the auction-sale was knocked in the name of Seth

Laxminarayan and Seth Munnalal only; that the plaintiff contributed his 1/5th share of the price namely 3,240/-, 1/4th amount of Rs. 810/- on the date of the auction-sale i.e. 24-2-1939 and the balance of 3/4th on 4-3-1939.

The other partners also contributed their share of the auction price and the property stood purchased for Rs. 16,200/-, that later Basantilal and Lalji Bhai sold their respective shares to defendant No. 1 Laxminarayan and Seth Munnalalji and withdrew from the partnership thereby increasing the shares of each of them to 2/5th: that Munnalalji died about 2 years before the suit and his son Kanhaiyalal who became the Karta of his joint family was impleaded as such to represent his 2/5th share in this suit; that the plaintiff called upon the defendants 1 and 2 to render accounts of the Firm, they avoided doing so which compelled the plaintiff to give them registered notices for the purposes; that defendant No. 3 who re-presented the other eight annas share was impleaded as pro forma defendant as the suit related to the dissolution of the Firm regarding eight annas share of the concern and for its accounts. The plaintiff on these allegations claimed dissolution and for accounts.

3. The defendant No. 3 besides either not admitting or denying the plaintiff's allegations asserted that he had purchased four annas share of defendant No. 1 under a registered deed of sale dated 26-2-1951. It was consequently asserted that for accounts prior to 26-2-1951 to the extent of defendant No. 1's four annas share defendant No. 3 was not responsible.

4. The defendant No. 2 compromised with the plaintiff as regards his liability to account to the extent of his share admitting the plaintiff's claim to 1/5th share and a compromise petition to that effect was submitted.

5. The defendant No. 1 denied the plaintiffs allegations as regards the formation of the alleged partnership, his having contributed Rs. 3,240/- towards the 1/5th price of the eight annas share, and asserted that the Chithi Written by defendant No. 1 in the plaintiff's name suggesting plaintiff's partnership was Benami and without authority and that no partnership could have been formed on strength of such a Chithi.

6. After the submission of these written statements by defendants Nos. 1 and 3 an application Was submitted on behalf of defendant No. 3 raising the contention that on the allegations made in the plaint the plaintiffs claim is barred u/s 66 of the Civil Procedure Code.

7. The trial Court thereupon framed the following as a preliminary issue:

"Whether the plaintiff has a right to file the present suit in view of his allegations in paras 2 and 3 of the plaint?"

8. The trial court heard arguments on this preliminary point and it relying upon the decisions reported in *Dolgovind Mahapatra and Another Vs. Anathbandhu Naik and Another*, and *Moulavi Ali Ahmed Vs. Sm. Shamsunnessa and Others*, came to the conclusion that the plea regarding bar of Section 66 C. P. C. could be

availed of by defendant No. 3 who was a transferee from the certified purchaser and that the suit by the plaintiff was incompetent as that would involve upholding, of plaintiff's secret title as against a certified purchaser in an auction-sale held through Court. The suit was consequently dismissed. Plaintiff now appeals.

9. Mr. Joshi for the appellant contended that neither the plaintiff's title to 1/5th share in the eight annas share of the concern "Madhav Cotton Press Ujjain" nor his claim to dissolution and accounts is barred by reason of Section 66 C. P. C. The learned counsel in this connection relied upon the decisions reported in AIR 1940 1 (Nagpur) ; Vishwanath Dhondiraj v. Pandharinath Ganesh. ILR 50 Bom 600: (AIR 1921 Bom 525), Achhaibar Dube v. Tupasi Dube ILR 29 All 557 in support of his contention.

It was urged relying upon these decisions that since in this case the purchase of eight annas share in the concern Madhav Cotton Press was on plaintiff's allegations a joint partnership venture and the funds of the partnership had been utilized in making the purchase the fact that the certificate of sale stood in the name of only two of the partners ought not to prevent the partner not named in the sale-certificate to claim his share of the property as also other consequential reliefs such as dissolution and accounts.

10. On the other hand it was contended on behalf of the defendant that to allow the plaintiff, whose name is not included in the certificate to claim a right in the property sold at a court auction as against the certificated purchaser or his transferee, would mean to set at naught the provisions of Section 66 C. P. C. which in terms ought to apply. Reliance was placed in this connection upon the decision reported in Iswar Chandra Pal and Others Vs. Kabiruddin Ahmed and Others, .

11. In order to appreciate either of the two opposing views it will be necessary to consider the terms of Section 66 C. P. C. and the object which it was designed to serve. Section 66 C. P. C. reads as follows :

"(1) 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.

(2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner."

12. The primary object of the provisions in this section in the words of their Lordships of the Privy Council in 42 Ind App 177 (182) : (AIR 1915 PC 81 at p.

82), Ganga Sahai v. Kesri is :

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

13. The same view was expressed earlier by the Privy Council in *Mt. Buhuns Koonwur v. Lalla Buhooree Lall* 14 Moo Ind App 496 (525) :

"The object which the framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property, and to empower the Court selling under a Decree to give effect to its own, sale, without contention on the ground of benamee purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that possession by enacting that any suit brought against him on the ground of benamee shall be dismissed."

14. It is clear from the observations in the last mentioned case of the Privy Council that the section does not declare all benami transactions as illegal. They observe :

"Its provisions must have been, framed on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider, that where the Legislature has stopped, the Courts must stop."

15. Thus it is clear that the provisions ought not to be extended beyond the actual terms of Section 66 which should be construed strictly.

16. Thus the section prohibits a person suing another who claims title under a purchase certified by the court in pursuance of an execution-sale on the ground that the said purchase was made by certified purchaser on his behalf.

17. There are certain exceptions to the generality of the expression used in Clause (1). They are mentioned in Clause (2). These exceptions are :

(1) Where the claimant under a purchase certified had got his name inserted fraudulently or without the consent of the real purchaser then that claimant is not protected.

(2) Where the third party has a right to proceed against the property on the ground that the said property is liable to satisfy his claim against the real owner then the claim of the benamidar under a certified purchase cannot stand in the way of such third party.

18. At one time it was thought that the words "on behalf of the plaintiff " in Sub-section (1) are meant to cover only those cases where the purchase was wholly on behalf of the plaintiff and not to cases where the purchase was partly for the

plaintiff and partly for the benamidar. But the decision of the Privy Council in AIR 1940 202 (Privy Council) has set at rest that controversy by holding that the section equally applied to the case of purchase made by the defendant certified purchaser partly for the plaintiff and partly for himself. But the Privy Council in *Bodhsingh v. Ganesh Chunder*, 12 Beng LR 317 themselves have treated the case of purchases made for a Joint Hindu family differently and have held as below;

"They (the provisions of Section 260 of Act VIII of 1859 C. P. C.) were designed to check the practice of making what are known as benami purchases at execution sales, i.e. transactions in which A secretly purchases on his own account in the name of B. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement or understanding, are entitled to treat as part of their common property an acquisition, howsoever made, by a member of the family in his sole name, if made by the use of the family funds."

19. The same principle is emphasized in a later case of the Privy Council in 42 Ind App 177 : (AIR 1915 PC 81), as will appear from the observations in that case quoted above suggesting that the provisions of this section in no way affect the title of the persons otherwise beneficially interested in the purchase.

20. The underlying principle of these observations can well be applied to the case of legal relationship created by the contract of agency or partnership. Where a partner purchases a property in an execution sale with the aid of the partnership fund in his personal name the other partner whose name does not appear in the certificate can well be held entitled to claim his share of the property. In a case reported in *Patrachariar v. Ramaswami* AIR 1919 Mad 942, *Sadasiva Aiyar and Napier, JJ.* applied the principle of *Bodhsingh's* case 12 Beng LR 317 (PC) and of *Ganga Sahai's* case 42 Ind App 177 : (AIR 1915 PC 81) to the case of purchase of a property in an execution sale by an agent with his master's funds. The master was held entitled to recover. It was observed:

"The result of the decisions seems to be that if the plaintiff does not seek relief merely on the ground that the certified purchaser was a name-lender, but relies upon a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser which entitled him to rely on those relations as involving and creating effectual legal claims in favour of the plaintiff over the property purchased, he could rely on such facts and circumstances in support of his legal claims."

21. Partners are agents for one another and what applies to agents may well apply to partners. In *I. L. R. 29 All 557* Justice Richards observed :

"Suppose it were clearly proved that two partners had lent partnership money to a third person, obtained against him a joint decree, and in execution of that joint decree certain property was purchased at an auction sale by one of the decree-holders out of the partnership funds or by setting off the joint decree obtained by

the partners, Section 317 could, I think, never operate to bar a suit brought by one of the partners for a declaration that the property purchased was partnership property. In such a case the plaintiff would not be merely setting up that the ostensible purchaser had purchased the property benami for him; but his case would be that the property purchased was partnership property by virtue of the partnership which existed between them altogether irrespective of the sale."

22. In *Vishvanath Dhondiraj Gayadhani Vs. Pandharinath Ganesh*, , Macleod, C. J. and Coyajee, J., applied and extended the principle enunciated here to the case of a single venture. His Lordship Macleod, C. J., who delivered the judgment observed:

"I do not think there is any difference between the case where one of the partners in a partnership, which is in existence for other purposes, buys property from the joint funds in his own name, and the case where there is a partnership in a single adventure in which two or more persons agree to unite their funds for the purposes of purchasing the property."

23. In AIR 1940 1 (Nagpur) , three persons combined their funds and agreed to purchase a certain village in a court-auction and the agent of one of them acting for all purchased the property only in the name of his master. It was held that the other two were entitled to recover the property both because they were entitled to the property by reason of legal relationship which entitled them to claim beneficial interest in the property otherwise than merely by the auction purchase, and also because the agent put his own master's name without the consent of the plaintiff.

24. The decision in *Iswar Chandra Pal and Others Vs. Kabiruddin Ahmed and Others*, , relied upon by the respondent does not run counter to the observations in ILR 29 All 557 and *Vishvanath Dhondiraj Gayadhani Vs. Pandharinath Ganesh*, . In fact that decision distinguishes the aforesaid cases by observing :

"What was laid down in those observations was that the provisions of Section 66 do not apply when the parties stand in the relationship of partners and one of the partners purchases the property in his own name with the partnership funds"

25. In view of this position in law it is clear that on the allegations made in paras 2 and 3 of the plaint the suit of the plaintiff is not barred by Section 66 C. P. C. The plaintiff in this case had alleged existence of partnership, contribution of capital by each partners for purchasing a running business concern with a view to run it for profit, the purchase of the property with the fund of partnership and subsequent sale of interests of some of them. This clearly is a case based on legal relationship independent of the benami character of the sale and the suit is not barred on the wording of Section 66 C. P. G.

26. The result therefore is that the appeal ought to succeed. The order passed by the court below ordering dismissal of plaintiff's suit is (sic) aside and the case is sent back to the trial court for trial on other issues left undetermined by it. As

the trial court had dismissed the suit on a preliminary point and the decision is set aside in appeal the plaintiff will be entitled to a certificate for refund of court-fees paid by him for this appeal as provided by Section 13 of the Court-fees Act A certificate accordingly may be issued. The appellant is entitled to his costs consisting of counsel's fees if duly certified as also other costs incurred apart from the court-fees from the respondents. Costs in the court below will abide the final result.

M.A. Razzaque, J.

27. I agree.