

(1915) 11 MAD CK 0078
In the Madras High Court

S.M. Chidambaram Chettiar

APPELLANT

Vs

Subramania Aiyar and Another
Marimuthu Nadar Vs
S.M. Chidambaram Chettiar and Others

RESPONDENT

Date of Decision : 16-11-1915

Acts Referred:

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

Citation : 32 Ind. Cas. 434 : (1916) 3 LW 86

Hon'ble Judges : Srinivasa Aiyangar, J; Coutts-Trotter, J

Bench : Division Bench

Judgement

Coutts-Trotter, J.—The plaintiffs have brought thin suit to have it declared that they were entitled to the suit properties and that the defendants had no right in the properties at all. The properties in question originally belonged to one Ponnusami Nadar, and they were attached on the 25th February 1904 in execution of a decree obtained against Ponnusami Nadar in the District Munsif's Court of Kumbakonam, and in March 1905 they were sold, subject to a prior mortgage for Rs. 31,000, for a sum of Rs. 85 to the predecessor-in-title of the 2nd defendant. The 1st plaintiff had purported to buy these properties by a private sale-deed from Ponnusami Nadar in December 1901. That, of course, was subsequent to the attachment. The short point taken against the plaintiff at the trial, and on its failure at the trial reiterated in this appeal, is that his suit was out of Court by reason of Section 317 of the old CPC corresponding to Section 66 of the present Code, on the ground that the plaintiff's suit seeks to have it declared that the purchaser in the Court auction, one Ramasami Nadar, was really acting benami for the 1st plaintiff. The contention put forward by the defendants is than to allow such suits as the present to be brought is a direct violation of the express prohibition in the Statute. The learned Judge rejected this contention on the ground that subsequent to the Court sale, the purchaser, Ramasami Nadar, recognized the title of the 1st plaintiff. It is not suggested that his recognition took the form of executing a sale-deed or a gift-deed, or doing

any other act recognized by law as capable of transferring the ownership of the properties to the 1st plaintiff It is said there is a doctrine that Section 317 does not apply to cases where the alleged benamidar has recognized the title of the person who asserts himself to be the real owner. For that a number of decisions alleged to enunciate that principle were cited. Speaking for myself I cannot see how such a principle, if it existed, would not be a direct contradiction of the words of the CPC and of the Transfer of Property Act. And I think that apart from the words of the Statute this case is completely covered by the authority of this Court in *Sowcar Kamurudeen Sahib v. Nour Mohamad Usman Sahib* 23 Ind. Cas. 205 and is also indistinguishable from the cases of *Durga v. Bhagwan Das* (1933) A.W.N.193 and *Bishan Dial v. Ghaziuddin* (1901) A.W.N. 44, I agree respectfully with these decisions, and to my mind that is sufficient to decide this case. I thought at one time that the point would possibly be taken that the Code of 1882 applied to this case and in that Code, Section 317, the words "certified purchaser" ought to be construed strictly and did not include the heir or any other representative of the certified purchaser. For that, to my mind it is obvious there is some little authority in the Madras High Court, although there is authority exactly to the opposite effect in Bombay in *Hari Govind v. Ramchandra* 8 Bom. L.R. 873. The view of the Bombay High Court has undoubtedly been adopted by the framers of" the new Code, because there specific words are inserted to make it clear that persons claiming under a certified purchaser stand on the same footing as the certified purchaser himself. When I put it directly to the learned Vakil for the plaintiff as to whether he did or did not contend that the words "certified purchaser" in Section 317 must be construed with literal strictness and confined to the original purchaser at the auction sale, he said that he did not feel able to contend that it should be so construed.. The learned Vakil now says that he did not abandon that contention and it will, therefore, have to be dealt with. So far as I understand, the Madras High Court in the case I have cited, *Sowcar Kamurudeen Sahib v. Noor Mohamad Usman Sahib* 23 Ind. Cas. 205, treats Section 66 of the new Code as purely declaratory of the true meaning of Section 317 of the old Code, and as not being an amendment of it at all as regards the first part of it with which we are concerned in this case. Whether that be so or not I do not know; and I hesitate to subscribe without further consideration to a view which assigns to the Legislature the interpretative functions of the Courts. All I can say is that if in construing Section 317 of the old Code I am not permitted to look at Section 66(1) of the new Code, nevertheless I agree respectfully with the decision of the Bombay High Court in the interpretation put by them upon Section 317 and I disagree with the Madras decisions to the contrary. I am, therefore, of opinion that the plaintiff's suit cannot succeed because of the express prohibition in the section. All that the section does is to prohibit a suit being brought with the object of getting such transactions as these declared benami. It does not affect any confirmation or validation of the title either of the defendant or of anybody else and, therefore, if the plaintiff had any other remedy beyond the one he has been ill-advised enough to seek to enforce in this suit, it will be unaffected by any decision

pronounced by this Court, and his rights are unimpaired. Appeal No. 167 of 1914 is allowed with costs here and in the lower Court. Appeal No. 215 of 1914 is dismissed with costs. The memorandum of objections in Appeal No. 167 of 1914 is dismissed without costs.

Srinivasa Aiyangar, J.

2. I agree. I think that Section 317 of the old Code meant what the new Section 66 expressly says, and I have no doubt that the new section is merely declaratory of the real meaning of the old Section 317. That is the view taken in *Manji Karimbhai v. Hoorbai* 8 Ind. Cas. 752. In this Court there has been a conflict of opinion on the question whether the words "certified purchaser" in Section 317 do not include persons claiming title under the certified purchaser. I also entertain a considerable amount of doubt as to whether the section applicable to this case is not the Section 66 of the present Civil Procedure Code. That section does not purport to take away or affect any right which the real owner had, but similar to the Limitation Acts prevents a particular person from bringing a suit against the certified purchaser on certain grounds. I am inclined to hold that it is merely a regulation of procedure, and that, to this suit, the new Section 66 must be applied. But as I hold that the meaning of the old Section 317 is exactly the same, so far as this question is concerned, as that of the new, it is unnecessary to say anything more about it. As pointed out by my learned brother, this view has been adopted in *Sowcar Kamurudeen Sahib v. Noor Mohamad Usman Sahib* (1915) M W.N. 231. In that case, as in this, the purchase was made while the old Act was in force and the suit was instituted after the new Act came into force.

3. There was another point raised by the learned Pleader for the respondent, that the 2nd defendant had executed what he called an agreement to release, namely, Exhibit H, and he having afterwards executed an actual release, Exhibit K, the plaintiff is now bringing the suit for the declaration of his title under that release and not as the real owner under the benami purchase by Ramasami Nadar. That, I might say, is not the ground of claim made in the plaint. In the next place, any release executed by the 2nd defendant would not adversely affect the rights of the 1st defendant who had acquired an interest in the property from the 2nd defendant prior to the date of Exhibit K. Exhibit K is not an agreement which creates any obligation which passes along with the property and enforceable against any transferee of the property. I have not considered the question whether Exhibit K is genuine or not. I am assuming it is.

4. A third point was taken that the plaintiff was entitled to rely upon his purchase pending the attachment under which the property was sold to Ramasami Nadar. The purchase by Ramasami would supersede any title which the plaintiff might have under his private sale from Ponnusami after the attachment. Further, the plaint does not seek for any declaratory relief on that basis. After all the plaintiff's substantive rights, if he has any, would not be affected by our decision if he is in possession. The certified purchaser would not be entitled to bring any

suit against the real purchaser, who is actually in possession, by virtue of his sale certificate; and if the plaintiff continues to be in possession for over the limitation period, he can certainly acquire a statutory title under the Limitation Act, in which case he need not rely on the benami purchase by Ramasami Nadar on his behalf.

5. Under these circumstances I agree in the order proposed by my learned brother.