

(1949) 01 MAD CK 0032
In the Madras High Court

Sowcar Chinna Basamma

APPELLANT

Vs

Veeradhi Veerappa and Another

RESPONDENT

Date of Decision : 10-01-1949

Acts Referred:

Citation : (1949) 1 MLJ 398

Hon'ble Judges : Horwill, J

Bench : Division Bench

Judgement

Horwill, J.—One Veerabhadrapa was a mortgagee; and he filed a suit for sale on his mortgage deed and obtained a decree. In execution of the decree he brought the hypotheca to sale on the 9th March, 1896; and according to the finding of fact which cannot be canvassed here in second appeal, it was purchased by him benami in the name of his father-in-law, Lingappa. Prior to the present Code of Civil Procedure, Section 317 of the Code of 1882 prevented any person from maintaining a suit against a certified purchaser on the ground that the purchase was made benami. The first defendant in this suit is not the certified purchaser herself, but a person who claims through him; and the question that arises in this appeal is whether the plaintiffs can put forward the benami nature of the transaction In the suit, in view of the wording of Section 66 of the present Code, which is wider than that of Section 317 of the old Code and runs:

No suit shall be maintained against any person claiming title under a purchase certified by the Court....on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims.

This point was not raised in the trial Court; but only in appeal to the lower appellate Court, which purported to follow Promatha Nath Pal Chowdhuri v. Mohini Mohan Pal Chowdhuri ILR (1920) Cal. 1108, in which it was held that Section 66 had no retrospective effect and that Section 317 did not prevent that plea being put forward against somebody who claimed through the certified purchaser.

2. It is strange that the attention of the learned District Judge was not drawn to the Madras decisions on this point. In *Theyya Velan Vs. Kochan and Another*, , a brief reference was made to the wording of Section 317; and it was held that a person taking an assignment from a certified purchaser at a Court sale is not entitled u/s 317 of the CPC to object to the maintainability of a suit on the ground that the purchase was made benami. The opposite view has however been taken in later decisions. *Sadasiva Ayyar, J., in Kandasami Pillai Vs. Rangasami Nainar (died) and Others*, , seems to have taken the view that even though Section 317 of the CPC was in force when the purchase was made, Section 66 of the new Code should be applied; for that section, as well as Section 317, Civil Procedure Code, did not deprive the true owner of his proprietary right, but merely prohibited him from maintaining a suit against a certified purchaser; and so the amendment was of a procedural nature and that it was Section 66 of the new Code rather than Section 317 of the old that had to be applied to a suit filed after the new Code came into existence. That view was affirmed in *Sowcar Kamurudeen Sahib v. Noor Mohammad Usman Sahib* (1914) 28 M.L.J. 251, It was also held in this latter case that Section 66 of the new Code was purely declaratory of the true meaning of Section 317 of the old Code. The same question arose in *Chidambaram Chettiar v. Subramania Aiyar* (1915) 3 L.W. 86. There, both the learned Judges were clearly of opinion that the law under the new Code was the same as the law under the old Code in that respect. The question was also raised, however, whether Section 66 had retrospective effect. *Coutts Trotter, J.*, did not discuss that question, and also *Srinivasa Aiyangar, J.*, was inclined to hold that it was a mere regulation of procedure and that Section 66 of the new Code had therefore to be applied; yet he preferred to base his decision on the same ground as *Coutts Trotter, J.*, i.e., that Section 317 of the old Code applied to persons claiming through the certified purchaser as well as to the certified purchaser himself. In view of these recent decisions, I have no doubt that the present law, as far as it relates to this High Court, is that a suit cannot be maintained against either the certified purchaser or any one claiming through him, whether the purchase was made before 1908 or afterwards.

3. Mr. Subramania Pillai argues that even if Section 66 of the new Code or Section 317 of the old prevents the plaintiffs from having recourse to their title through *Veerabhadrapa*; yet they are entitled to rely on long possession as affording them a title by prescription. That is no doubt true. The only question is whether at this stage they should be given a further opportunity to establish their title on that ground. In their plaint, they made reference to the long possession of *Veerabhadrapa* and his wife but they did not refer to their acquisition of a title on that ground. No issue on this matter was framed in the suit : nor was any mention made of it in either of the Courts below. It has however to be remembered that in the trial Court no question of the applicability of Section 66 was raised, and the plaintiffs had secured a finding in their favour on the question of benami, which in the absence of Section 66 would have been sufficient to entitle them to a decree. The appeal to the lower appellate Court

was by the first defendant; and there again the question of fact with regard to the benami nature of the purchase was the main question argued. The applicability of Section 66 was then raised; but the point was decided in favour of the plaintiffs; and so no occasion really arose for any argument on the question of the plaintiffs' alternative title by way of prescription. I think therefore that it would be only just that the plaintiffs should be given an opportunity, now that the point of law has been decided against them, to argue that they have acquired title to the property by prescription.

4. The appeal is allowed and A.S. No. 197 of 1945 remanded to the lower appellate Court for fresh disposal on the question of the plaintiffs' alternative claim. As the matter was not raised in the form of an issue before the trial Court, it will perhaps be more just if the parties, whose attention was not as forcibly directed to the question of possession as would have been necessary if there had been an issue on the question of adverse possession, be given an opportunity to adduce additional evidence.

5. The costs of this appeal will abide the result. The Court-fee paid in appeal will be refunded.