(1955) 02 MAD CK 0002

In the Madras High Court

Case No : Second Appeal No. 2699 of 1949

S.S.S. Latohumanan Chettiar — APPELLANT

Vs

M.L.N. RM. Vebeappa Chettir and others — RESPONDENT

Date of Decision : 28-02-1955

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 66, 66(1)

Citation : (1955) 02 MAD CK 0002

Hon'ble Judges : Krishnaswami Nayudu, J

Bench : Single Bench

Advocate : M. Murugappa Chettiar, for the Appellant; G.R. Jagadesan, for the Respondent

Final Decision : Allowed

Judgement

Krishnaswami Nayudu, J.—The plaintiff is the appellant. His suit was for partition of two items of immoveable properties in which his claim

was for an 1/6th share. He obtained a money decree in O.S. No. 160 of 1933 on the file of the District Munsif''s Court, Periakulam, against one

Palanisami Chetti. The firm of which the second and third defendants were partners also obtained a money decree in another suit, O.S. No. 44 of

1933, on the file of the same Court against the said Palanisami Chetti. The suit properties were attached in execution of both the of expenses in

respect of which the plaintiff pays his 1/6th share. Exs. A-9, A-10 and A-11 are similar further extracts of accounts relating to the expenses. There

is also the evidence of the plaintiff''s witnesses that the produce of both the items of land were divided in 1936 in the proportion agreed upon.

There is, therefore, no doubt that the parties had acted on the agreement excepting that the properties were not partitioned as per the shares agreed upon. On 5th March 1937, the second defendant on behalf of his firm assigned the entire item 1 under Ex. B-1 to one Kodumudi Alagappa

Chetti claiming that the firm was solely entitled to the property and without reference to the agreement entered into with the plaintiff. Alagappa

Chetti in his turn sold item 1 along with his other properties to the first defendant under Ex. B 2 dated 6th February 1939. The purchases made by

Alagappa Chetti and by the first defendant, who was a minor on the date of the sale in his favour, have been found to have been made with the

knowledge of the agreement Ex-A-5. The truth and the binding nature of the agreement was denied by the defendants. But both the Courts have

found that the agreement was true and was executed by the agent of the plaintiff and the agent of defendants 2 and 3 and that it was acted upon

and that till 1936 they adjusted their rights relating to their proportionate share of the income. The suit was however, dismissed as being barred

under S. 66, C.P.C and confirmed in appeal by the learned Subordinate Judge of Dindigul. The only question therefore that requires to be

determined in this suit is whether the suit for partition is not maintainable in respect of item 1 of the suit properties under S. 66, C.P.C. The plaintiff

claims title to 1/6th share on the strength of the agreement, Ex. A. 5. The case in the plaint is that, since the amounts due under their respective

decrees were not paid, both of them had to attach the same properties belonging to the judgment-debtor and bring them to sale, then they entered

into an agreement, Ex. A. 5 that in order to recover the said debts both of them should jointly execute the decrees and that in case the properties

were brought to sale and the same purchased by either of them both should be entitled in the proportion of 1/6th and 5/6th respectively and, in

pursuance of this arrangement, they brought the properties to sale and the plaintiff was only asking for a share consequent on the arrangement

between himself and the second and third defendants.

2. S. 66, Cl. (1), C.P.C. which is the relevant provision is in the following 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.

3. The bar under this provision arises if the suit is laid on the ground that the

purchase was made on behalf of the plaintiff or on behalf of some one

through whom the plaintiff claims. The case set up by the plaintiff in answer to this objection in the lower Court was that this was not a case of a

benami transaction but that the plaintiff and defendants 2 and 3 became partners in a joint venture to purchase the properties and a suit by a

partner to get his share was not therefore affected.

4. There has been a series of judicial decisions on the subject. The corresponding provisions in the earlier Codes are S. 260of the Act of 1859 and

S. 317of the Act of l882. The earliest case is Mst. Buhuns Kowur v. Lalla. Budhooree Lall 14 M.I.A. 496, where a purchaser in a Court sale was

resisted by the defendant in possession who pleaded that he was the real purchaser and that the purchase was made benami by the certified

purchaser, it was found that the fact of the plaintiff''s title being certified as purchaser was not conclusive by S. 260of that Act and that S. 260was

confined to a suit brought against a certified purchaser and did not embrace a suit brought by him against a party in possession. The plea of benami

therefore was found to be permissible as a defence, though it could not found a cause of action for a suit for possession against the Court auction

purchaser. The Privy Council observed at page 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 benami

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 benami shall be dismissed.

5. It was pointed out by the Privy Council that the Code has not made benami purchase unlawful and that therefore the real owner may set up his

right against the benamidar when his possession is interfered with, as in that case. It was also observed that there was no reason for giving the

provisions of the Code a larger operation that the language imported.

6. In Bodh Singh Doodhooria v. Gunesh Chunder Sen 12 Beng. L.R. 317 it was held that the provisions of S. 260of the Code of 1859 applied to

ordinary benami purchases at execution sales but did not affect purchases of property by one member of a joint Hindu family in his own name with the joint funds. As regards the object of the provisions, the Privy Council observed at page 3-9:

They were designed to check the practice of making what are known as benami purchases at execution Bales 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, however made, by a member of the family in his sole name, if made by the use of the family funds.

7. In Monappa v. Surappa 11 Mad. 284, where a purchaser acted benami in buying the property, the initial deposit for the purchase having been

paid by the person claiming to be the real owner, the balance having been found by the purchaser, and after the sale the real owner was allowed to

continue in possession with an understanding that the purchaser would transfer the property on repayment of the balance of the purchase money, it

was held, following the dictum of the Privy Council in Mst. Bhuns Kower v. Lalla Budhooree Lall 14 M.I.A. 496, that, since the purchaser

acknowledged that his purchase was benami and gave up possession on the understanding that he would transfer the property, S. 317of the Code

was no bar to the institution of the suit and that S. 317contains only a statutory direction that a benami purchase at an auction sale in execution of a

decree shall not be accepted as the sole ground of a suit against the certified purchaser.

8. In Sankunni Nayar v. Narayanan Nambudiri 17 Mad. 282, Kumbalinga Pillai v. Aripautra Padiachi 18 Mad. 436, and Patracharier v.

Rantaswami Chettiar 9 L.W. 276, where the purchases have been found to have been made by agents, suits for recovery of the properties were

held not to be barred under S. 317.

9. In Venkatappa v. Jalayya 42 Mad. 615 = 9 L.W. 598 (F.B.), in a suit against the auction purchaser for specific performance of an agreement to

convey half a share of the immoveable property, which was purchased in Court auction under an agreement subsequent to the purchase, but in

pursuance of an arrangement even before the sale, that the property should be purchased in his name and one half of it should be conveyed to the plaintiff after the sale certificate was obtained, a Full Bench of our High Court held that such a suit was not barred on the ground that the purchase

was made on behalf of the plaintiff within the meaning of S. 66, C.P.C. it was also held that it was not a benami transaction at all and the allegation

in the plaint that the auction purchaser was a benamidar had not the effect of debarring the plaintiff under S. 66, C.P.C., from maintaining the suit

for specific performance.

10. The decision was cited with approval by the Privy Council in Vadivelu Mudaliar v. Peria Manicka Mudaliar 48 Mad. 643 = 12 L.W. 1 (P.C.).

Here as well, there was an agreement prior to the sale that after the purchase the property will be conveyed by the appellant, in whose name the

properties were allowed to be purchased. After the sales were made in the name of the appellant, the appellant bound himself by agreements to

carry out the original agreement with the respondents. In suits by the respondents against the appellant for specific performance, the defence was

that the suits were barred under S. 66, Sub S. (1). It was held that the fresh agreements made after the sale, though carrying out those made

before the sale, were not affected by S. 66and the suits were therefore not barred. The Privy Council took the view that the subsequent

agreements were unaffected by the section.

11. In Vadrevu Suryanarayana Vs. Kocherlakota Venkata Subbarao and Another, the plaintiff''s property was sold in execution of a decree

against him and it was bought by the defendant in his name but the entire amount of the sale price and expenses of the sale was admittedly

furnished by the plaintiff, part of it on the day of sale and the balance four days after the sale. On the latter date the defendant addressed a letter to

the plaintiff where he referred to the fact of the sale and of the plaintiff having got the defendant to bid at the sale at the plaintiff''s cost and

concluded by slating that the said land shall be re-conveyed to the plaintiff whenever required by him without demanding any consideration

therefore. In a suit for specific performance of the agreement contained in the letter, the defendant pleaded S. 66 (1) C.P.C in bar of the suit. It

was held that the fact fell directly within the scope of S. 66 (1), C.P.C. The decisions in Venkatappa v. Jalayya 42 Mad. 615 = 9 L.W. 598

(F.B.), and Vadivelu Mudaliar v. Peria Manicka 48 Mad. 643 = 12 L.W. 1 (P.C.), were distinguished. In that case it will be seen that the

judgment debtor himself entered into an agreement with a third party for purchase of the properties benami, he having provided the entire

consideration and the fact that the agreement was subsequent to the sale was held not to make difference on the facts of the case, and if such a

transaction were to be allowed, it would be frustrating the object of S. 66 (1), provisions of which, in the view of the Privy Council in Ganga Sahai

v. Kesri 87 All. 545. (P.C.)

were designed to create some check on the practice of making what are called benami purchases at execution sales for the benefits of the

judgment debtors.

12. In the present case, however the suit was not for specific performance of any agreement subsequent to the sale and these decisions may not

have any direct application, though subsequent to the sale the conduct of the parties would justify the conclusion that they confirmed the

arrangement entered into and acted upon it and intended to stand by it.

13. In Ganga Sahai v. Ketti 87 All. 545 (P.C.) one of the three joint decree-holders of a mortgage decree alone took out execution under S.

231of the Code stating that the other decree-holders had died, and praying that execution might be subject to the rights of their theirs and

representatives. He obtained leave to bid at the sale, purchased the property in his own name, and furnished with a certificate of sale, got

possession of the property. It was held in a suit by the heirs of the other decree-holders for the shares they were entitled to under the decree, that

S. 317of the Code was not applicable as a defence to the suit, and that the plaintiffs were entitled to recover their shares of the mortgaged

property. After referring to S. 317corresponding to S. 66of the present Code, it was observed in that decision as follows at page 564:

IN their Lordships'' opinion the provisions of that section have no application to the present ease. They 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.

14. In Anhaibar Dube v. Tapasi Dube 29 All. 557, in execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at

the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the mortgage debt, interest and costs.

Satisfaction of the decree was entered up and the purchaser took possession of the property. It was held that S. 317, C.P.C. did not preclude the

other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser.

After referring to the decision in Bodh Singh Doodhooria v. Gunesh Ghunder Sen 12 Beng. L.R. 817, Richards, J. observed as follows at page

560:

It seems to me, however, that the principle of the reasoning of their Lordships of the privy Council goes somewhat further than the case of a joint

Hindu family. For example, the reasoning would apply with equal force to the case of a partnership under the circumstances I have supposed

above. I think also, if the allegations of the plaintiff were proved, that is to say, that the plaintiff being entitled to half of the debt and interest

recovered against Babu Janaki Prasad, the defendants purchased the property by means of setting off the amount of the joint decree, and that the

property so purchased from the date of purchase up to the commencement of the proceeding for partition was treated as joint property, that the

plaintiff would, notwithstanding the provisions of S. 817, be entitled to a declaration that the purchased property was under the circumstances joint

property and must be treated as such in the partition proceedings.

15. In Vishwanath Dhondiraj v. Bandharinath Ganesh 50 Bom. 600, a house was sold in execution of a decree. The first defendant was the

certified purchaser, but half the money was supplied by the plaintiff The plaintiff brought a suit claiming to recover half of the house by partition.

The lower Courts dismissed the suit on the ground that it was a case of a joint venture to bay property at a Court sale and as the sale certificate

was issued in the name of one only the suit was not maintainable under S. 66, Civil Procedure Code. On appeal to the High Court, it was held that

the case was one of partnership in a single transaction for the purpose of purchasing the property and that S. 66had no application to the facts of

that case. Macleod, C.J., after referring to the case in Achhaibar Dube v. Tapasi Dube 29 All. 537 observed as follows at page 604 :

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 purpose of purchasing the property. There is no intention then of a secret purchase by one person in the name of

another. It is a joint transaction. The fact that it is conducted by one partner on behalf of himself and as agent of the other partner or partners, takes

it out of the range altogether of benami transactions.

16. Reliance was placed by the lower Court on the decision in Bishan Dayal v. Kesho Prasad ILR 1987 All. 118 where the plaintiff sued for

possession of a half share of a certain property, of which the defendant was the certified purchaser at an auction sale in execution of some other

person''s decree. The plaintiff alleged that the bid at the auction was made by the defendant on behalf of both the plaintiff and the defendant and the

plaintiff was accordingly the owner of half the property. The parties were not members of a joint Hindu family, or of a partnership 6rm. It was held

that the suit was barred by S. 66, Civil Procedure Code. Sulaiman, C.J. and Bajpai, J. in dealing with the Privy Council case in Ganga Sahai v.

Kesri 37 All. 545 observed at page 119 as follows:

It is urged before us that their Lordships intended to lay down that the rights of persons who are otherwise beneficially interested in the purchase

can never be affected by the provisions of the section. We think that their Lordships intended to protect the interest of persons beneficially

interested in the property purchased, other than those who claim to have made a benami purchase in the name of the auction purchaser, who are

not entitled to maintain the suit contrary to the provisions of S. 66. Further, the title of persons otherwise beneficially interested would not be

affected.

17. The learned Judges, however, were unable to agree with the view expressed by the Bombay High Court in Vishwanath Dhoondiraj v.

Bandarinath Ganesh 50 Bom. 600.

18. The decision in Bishun Dayal v. Kesho Prasad ILR 1987 All. 118 went up to the Privy Council and it was confirmed vide AIR 1940 202

(Privy Council) the judicial Committee observing that it was sufficient to say that the only case pleaded by the plaintiff was that Ram Dayal derived hit right to half of the village from the auction purchase having been made in part on his behalf by Kesho Prasad, and no case independent of this

purchase and basing title upon subsequent possession was traceable in the memorandum of appeal.

19. The decision in Bishun Dayal v. Kesho Prasad ILR 1987 All. 118 was followed by the Patna High Court in Shiva Shankar Sah v. Manbharan

Roy 18 Pat. 181 where it was held that S. 66, Civil Procedure Code, operates as a bar to a claim by a person who alleges that the actual

purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in

execution of an express agreement or otherwise and the fact that the principal claims only to have provided a part of the purchase money and to be

entitled to only a share in the property does not make any difference in principle.

20. In Upendralal Pal v. Ajaharuddin Ahmed 61 Cal. 371 where the plaintiffs and three others had all decrees against a common judgment debtor,

and when the properties of the judgment debtor were put up for sale, the decree-holders agreed that the properties would be purchased in the

name of two of them and subsequently the properties would be divided in certain proportions, the parties having contributed towards the purchase

in the said proportions, and when a suit was instituted for recovery of the plaintiff''s share, it was held that S. 66was a bar. The learned Judges

were of opinion that the operation of S. 66cannot be ousted by the existence of any private agreement or undertaking and that the only cases in

which S. 66could not come in are those where, independent of any agreement or undertaking, the plaintiffs had a right to the purchase by operation

of law.

21. In another case of the Calcutta High Court in Duryadas De v. Bagalananda De 61Cal. 440, where the purchase was made by a member of the

Dayabhaga family, not being the karta, out of joint family funds and a suit was instituted by a member for recovering the share, the suit was held to

be maintainable and the defence raised under S. 66, C.P.C. was rejected. The object with which the section was enacted as observed by the Privy

Council in Bodh Singh Boodhooria v. Gunesh Chunder Sen 12 Beng. L.R. 317, and Ganga Sahai v. Kesri 37 All. 545 (P.C.), was approved.

22. The Bombay High Court in Nimalchand Gulabsa and Others Vs. Madanlal

Jagannath Shet and Others, did not agree with the view taken by

the Calcutta High Court in Upendralal Pal v. Ajaharuddin Ahmed 61 Cal. 371, that the operation of S. 66cannot be custed by the existence of any

private agreement or undertaking. In the Bombay case the facts are these: Two items of properties belonging to one Buda Vanjari in survey

numbers 21 and 71 were mortgaged to the defendants in 1919. The plaintiffs purchased the equity of redemption in S. No. 21 in 1923. The

defendants instituted a suit on the mortgage. An agreement was then entered into between the plaintiffs and the defendants on 14th July 1940 under

which possession of S. No. 21 was to be given the defendants. In execution of his decree the defendants brought to sale and purchased both the

items. The plaintiffs claimed half a share in S. No. 71 as per the terms of the agreement entered on 14th July 1940. A defence under 5. 66, C.P.C.

was taken, relying on the observations of the Privy Council in Ganga Sahai v. Kesri 37 All. 545 (P.C.), that the provisions ""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 it was

contended that the plaintiffs having purchased the equity of redemption in respect of one of the properties were in position of judgment debtors and

therefore it was a pure and simple benami transaction, which was sought to be prevented by the enactment of S. 66. The learned Judges were of

the opinion that it was not every private agreement or undertaking that necessarily attracted the application of S. 66, nor could it be said that every

private agreement or undertaking affecting the property sold at an auction sale was within the mischief of S. 66.

23. In the present case, the plaintiff attached the suit properties in execution of his decree and, if the properties had been sold, he would be

entitled, at any rate, to rateable distribution of the proceeds of the sale along with the defendants, the other attaching decree-holders, and, to that

extent, it cannot be said that he is nut interested in the result of sale or would not be affected by allowing the properties to be sold without his

interest being sufficiently protected. Though it cannot be that he had a beneficial interest in the properties sold, just as a member of a Hindu joint

family where the Court auction purchase is out of joint family funds, in the name of one of the members or in the case of a purchase of property in the name of the partners out of partnership funds, the plaintiff has certainly an interest to the extent of getting his decree satisfied out of the sale

proceeds. His position, therefore, though not identical with is analogous at least to that of the joint decree-holders. This is therefore a case where it

could not be said that that plaintiff''s claim is based on an agreement and solely for the reason that the purchase by the defendant was benami for

him, though in respect of a share in the properties. He cannot be considered to be an absolute stranger to the transaction having no connection or

interest in the properties, which were brought to sale. This will be sufficient to take this case away from the mischief of S. 66, which, as laid down

by the Privy Council, has been enacted to check benami purchases at execution sales for the benefit of or at the instance of judgment debtors. The

object is to discourage not only purchases for the benefit of the judgment debtors, but also to discharge secret purchases, with a view to secure the

best price for the properties in an open public auction and ensure the decree-holders the full benefit of their decrees. But the scope of the section

should not be extended so as to apply to cases like the present, where the decree-holders have, by an arrangement among themselves, sought to

safeguard their interests without being defeated by the judgment debtors. Such arrangements must be upheld and S. 66cannot be invoked to defeat

such arrangements. It has been seen that S. 66C.P.C. has been held not a bar to suits instituted for recovery of possession of the properties, or for

a share therein where, by operation of law, the plaintiff has been held to possess an interest, for instance, in cases of purchase by a manager of the

joint family in the name of a member out of joint family funds, as was the case in Bodh Singh Doodhooria v. Gunesh Chunder Sen 12 Beng.L.R.

317. and Durgadas De v. Bagalananda De 61 Cal. 440, or of purchase by agent for the principal as in Satikunni Nair v. Narayanan Nambudiri 17

Mad. 282, Kumbalinga Pillai v. Ariaputra Padiachi 18 Mad. 486, and Patrachariar v. Ramaswatni Chettiar 9 L.W. 276, or purchase by a partner

as in Viswanath Dhondiraj v. Bandharinath Ganesh 50 Bom. 600, and Bhudarsao v. Samart Mal AIR 1940 Nag. 1. The decisions in Venkatappa

v. Jalayya 42 Mad. 615 = 9 L.W. 598 (F.B.) and Vadivelu Mudaliar v. Peria Manicka Mudaliar 9 L.W. 598 (F.B.) = 12 L.W. 1 (P.C.), are

instances where the purchase was in pursuance of an agreement prior to the sale and ratified by a subsequent arrangement to re-sell, where also S.

66has been held to have had no application.

24. The preponderance of authority of the various Courts in India tends towards the view that S. 66, C.P.C., could be applied only when the suit

is based on the sole ground that the purchase at the auction by the certificated purchaser is on behalf of the plaintiff, that is when the purchase is an

ordinary benami transaction as it is commonly understood in this country, where the auction purchaser is a benamidar of the plaintiff and where no

other circumstances exist as to any antecedent relationship existing between the parties or any pre-existing interest in the properties arising under

law or under any arrangement. What has to be discouraged is a pure and simple benami transaction in Court auction purchase by virtue of this

provision. If it is shown that there is some independent pre-existing interest in the properties sold or the plaintiff is otherwise interested in the result

of the sale and, if in these circumstances, an arrangement is entered into whereby the property is purchased in the name of one and subsequently

the plaintiff was to be given a share or an interest in the same, it cannot be held that such a transaction is a benami transaction which is hit by S. 66,

C.P.C. It must be borne in mind that benami transactions are not as such held to be illegal. On the other hand, in cases where the real owner claims

title on the ground that the property was purchased benami, Courts have endeavoured to give effect to the real title notwithstanding that the ex

facie title was in another. It is necessary to apply S. 66, C.P.C. strictly and confine it to cases which come within the specific language of the

provision and not extend its scope to cases where it would be necessary in the interests of justice to give effect to the real nature of the transaction.

In the result the appeal is allowed with costs throughout. No leave.

