

ALLAHABAD HIGH COURT

Kishan Lal

Vs

Garuruddhwaja Prasad Singh

18.02.1899

(Blair, CJ. Burkitt, J.)

JUDGMENT

Burkitt, J.

1. This is an appeal by the plaintiff from a decree of the Subordinate Judge of Aligarh, partly dismissing the plaintiff's suit. The suit was one for sale on a mortgage of certain property executed by the defendant Garuruddhwaja Prasad Singh on February 28th 1893. Among the mortgaged properties, in addition to landed property, was one-half of a fort or kila at Baswan, which had belonged to the mortgagor. This fort had, previous to suit, been sold in execution of a money decree held by one Madhri Saran, and had been purchased by the defendant, Hub Lal. The Subordinate Judge has given the plaintiff a decree against the mortgagor, but dismissed the suit as against the mortgagor's minor son, Matmatangadhwa Prasad Singh, and as against Hub Lal. The result of this decree is that in execution the plaintiff can proceed only against the father's (the mortgagor's) interest (presumably one-half) in the mortgaged property, other than the fort, and that the latter cannot be touched at all.

2. The plaintiff now appeals, contending that he is entitled to a decree for sale of the whole property mortgaged to him without any exception. There are thus two matters to be considered in this appeal. The first is concerned with the dismissal of the suit against the respondent, Matmatanga Prasad, the minor son of the mortgagor. We regret that this respondent has not been represented by counsel at the hearing of the appeal. The grounds on which the lower Court dismissed the suit against him are "that Garuruddhwaja is an extremely immoral and extravagant man, and that he has wasted property worth lakhs of rupees in a very short time. Therefore the sons and grandsons of such a man should not be held liable for any debt incurred by him." Further, the Subordinate Judge says that "whatever portion of the debt passed into Garuruddhwaja's hand was, like other debts, spent by him for his own private purposes."

3. These reasons are not, in our opinion, sufficient to exonerate the son from the pious duty of paying his father's debt. Had it been proved that the debt had been contracted for immoral

purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed, the son would not have been liable. There is, however, not a scrap of evidence to show that the debt which formed the consideration for the bond in suit was contracted for any such purpose. Indeed the details in the schedule show that such was not the case. A mere general allegation that the father led an extravagant, immoral, and licentious life would, even if proved, not be sufficient to relieve the son. It is now settled law in this Court since the case of *Badri Prasad v. Modan Lal*¹ that a son can be sued jointly with his father to recover a debt contracted by the father if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt. We are therefore constrained to allow this appeal as far as the respondent Matmatangadhwa Prasad Singh is concerned, and to give a decree against him in favour of the appellant.

4. We have next to deal with the second portion of this appeal, namely, the case of the respondent, Hub Lal, the purchaser of the mortgagor's interest in the fort at Baswan. That interest was purchased by Hub Lal for Rs. 2,901 on May 10th 1894, in execution of a decree held by one Madhri Saran, and was under attachment by the Court in execution of the latter decree when it was mortgaged to the plaintiff-appellant in February 1893. That mortgage, therefore was void to the extent provided for by Section 276 of the Code of Civil Procedure. The contention for the appellant is that at the auction sale the real beneficial purchaser was not the respondent, Hub Lal, who is the certified purchaser, and that the latter purchased benami for the judgment-debtor Garuruddhwaja Prasad Singh, appellant's mortgagor. It was thereupon contended for the appellant that his mortgagor is the real beneficial owner of the fort, and that the latter was liable to be taken in execution to satisfy any decree which appellant might obtain on his mortgage. It is to be noticed that the plaint does not contain any prayer asking for a declaration that the mortgagor, Garuruddhwaja Prasad, was the beneficial owner, and Hub Lal a fictitious purchaser. But the plaint contained a prayer which is certainly peculiar, bearing in mind the fact that this Court had refused to set aside the sale to Hub Lal. It asked that if the sale to him were found not to be fictitious, the Court should direct him to receive back the purchase-money he had paid, and that on that being done the Court should direct the sale of the fort with the rest of the mortgaged property. This rather extraordinary request does not seem to have been pressed in the Court below, and is not repeated in the memorandum of appeal. The memorandum of appeal, however, contends that it has been established that Hub Lal had purchased benami for Garuruddhwaja Prasad, but like the plaint, it abstains from asking that a declaration to that effect should be made. The appeal, as regards Huh Lal, was, however, fought before us by counsel on both sides as if the object of the suit, as far as the appellant was concerned, was to obtain a declaration that the plaintiff's mortgagor, Garuruddhwaja Prasad, was the beneficial purchaser and an order thereupon that the fort should be sold in satisfaction of the mortgage of February 1893. Such a construction can certainly be put on the plaint, as otherwise the allegation of the benami purchase would be superfluous.

5. It being then admitted for the appellant that his suit, as far as Hub Lal, the certified purchaser,

is concerned, is a suit against Hub Lal, instituted on the ground that his purchase was made on behalf of the appellant's debtor Garuruddhwaja Prasad, the question arises whether such a suit can be maintained, or whether it is forbidden by Section 317 of the Code of Civil Procedure. The words of that Section are: "No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person." The opening words "no suit shall be maintained" mean, we have no doubt, "no suit shall be instituted, and if such a suit be instituted it shall fail." That is the only meaning we can attach to the word "maintained." We have heard very able and learned arguments from counsel on either side as to the construction to be put on this Section 317. For the respondent it was contended that the Section means what it says, neither more or less, and that it forbids the institution of any suit by any plaintiff against the certified purchaser if the object of the suit is to have it declared that the purchase was made on behalf of any person other than the certified purchaser. For the appellant, on the other hand, it was argued that, we should not put on the Section its literal and grammatical meaning, that we should import into it an exception which finds no place in it, and that the Section should be construed so as to permit of a suit by a creditor of the alleged beneficial purchaser, by adding after "any other person" the words "except it be a suit by a creditor of such other person."

6. We fail to see why we should put such a restrictive interpretation on the very wide language of the section, and why we should say that the words "no suit" do not really mean "no suit," in their plain grammatical sense, and do mean "no suit excepting a suit by a creditor." Had the Legislature intended that a certain class of suits should be excepted from the sweeping prohibition laid down in Section 317 it would, we think, certainly have altered the wording accordingly, and would not have left it to the ingenuity of Judges to discover that it really did not mean what it purported to say in the plainest language.

7. The object of the Section was no doubt to prevent judgment-debtors from purchasing their own property at auction in the name of another, and for that purpose the Section provided that no suit shall lie against the certified purchaser on the ground that the purchase was benarai. The Section does not designate any particular person or class of persons as being the person who shall not sue. It confines itself to indicating the person who shall not be impleaded as defendant in a suit instituted on the specific ground mentioned. In that way it prevents judgment-debtors who have purchased in the names of other persons from suing the certified purchasers for possession; that is to say, it permits the benami certified purchaser to reap the benefit of his fraud by barring the real purchaser from suing him, and if it also prevents the creditors of such a judgment-debtor from suing the certified purchaser, it may well be that the evil is not unequally balanced. The cases are by no means few in which the benami certified purchaser defies all attempts by the real purchaser to get possession and holds on to the property. According to the construction for which appellant contends, such a certified purchaser could be sued by the creditors of the judgment-debtor, though not by the judgment-debtor, the beneficial purchaser. It appears to us that if one infringement of the hard-and-fast rule laid down by Section 317 be allowed in the case of creditor of judgment-debtor it will be impossible to prevent others. Why should not the same

privilege be allowed to a person who had purchased from the judgment-debtor the property fraudulently withheld benami by the certified purchaser? Similarly, why should not a mortgagee holding a mortgage executed by the alleged beneficiary after the alleged fictitious sale, be allowed to sue such certified purchaser for sale on his mortgage? Other cases might be put, such as cases of gift, devise by will, and the like. It seems to us that if the creditor of a judgment-debtor be not debarred by Section 317 from suing the certified purchaser on the ground mentioned in that section, it will be impossible to exclude many other classes of plaintiffs from the same privilege. It is objected that the classes of persons mentioned above derive title from the judgment-debtor. But surely so does the appellant in the present case. How does his title differ from that held by a vendee or mortgagee to whom the alleged beneficiary had sold or mortgaged the property after the alleged fictitious sale? Ex hypothesi the property really belongs to the judgment-debtor to deal with as he pleases. If then the benami certified purchaser set him at defiance, we fail to see how, on the construction of Section 317 for which the appellant contends, a suit by such a vendee or mortgagee could be held to be barred by that section, or even a suit by the holder of a simple money decree for money borrowed subsequent to the date of the alleged fictitious sale, and in this way the alleged real purchaser would be allowed to maintain that suit indirectly through a friendly party which the law forbids him to maintain directly. We cannot see that the fact that these new obligations came into existence subsequently to the alleged fictitious sale has any bearing on the question. On the above considerations we are of opinion that if we accept appellant's contention we must read the opening words of Section 317 as if they ran "no suit by a judgment-debtor shall be maintained" and must hold that with one exception any person may institute a suit against a certified purchaser "on the ground that the purchase was made on behalf of any other person." We are not prepared to adopt that conclusion. If the construction we put on this Section is one which in some cases enables fraudulent judgment-debtors to defraud their creditors the remedy is, we think, to be sought for in legislation, and not by putting a constrained meaning on words which are plain and unmistakeable.

8. The question of the construction to put on Section 317 of Code of Civil Procedure has recently been most exhaustively considered by our brother Knox in the case of *The Delhi and London Bank v. Chaudhri Partab Bhashar*² et seqq. The decision at which that learned Judge arrived was that he was "unprepared to import extrinsic matter which will limit or qualify the same words beyond those which are to be found in the Section itself, and which limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser." He also examined the long array of decisions which at first sight appear to support the construction of Section 317 for which the appellant here contends, and showed conclusively that nearly all of them were suits in which the ostensible auction-purchaser, the certified purchaser, was the plaintiff, and not suits against such a purchaser. There can be no doubt now that the maintenance of the former class of suits is not forbidden by Section 317, for, to use the words of their Lordships of the Privy Council in the case of *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*³ (on the Section corresponding to Section 317 of the present Code)--"there is nothing from which it can be inferred that more is

meant than is expressed. It is confined to a suit against a certified purchaser and to a specific direction as to what should be done with it, etc." In suits in which the certified purchaser is the plaintiff the question which has been discussed in this appeal could not arise, and any decision on it would be obiter and not binding on us. The case of the *Uncovenanted Service Bank v. Abdul Bari* (1896) I.L.R. 18 All. 461, to which our brother Knox did not refer, was a suit in which the certified purchaser was plaintiff, and in which he asked for a declaration that his purchase was not benami. Such a suit clearly is not within the prohibition contained in Section 317.

9. On the whole, we have come to the conclusion, for the reasons given above, that this suit, so far as it concerns the respondent Hub Lal, being a suit against the certified purchaser on the ground that the purchase was made on behalf of the respondent, Garuruddhwaja Prasad Singh, cannot be maintained. We fully concur in the opinion expressed by our brother KNOX in the case cited above, and we are supported in our conclusion by the High Court of Madras in the case of *Ram Kurup v. Sri Devi*⁴ in which the Chief Justice and Mr. Justice Handly, dissenting from one of the Calcutta decisions cited by our brother Knox in the case mentioned above, say that that decision "seems to us to contravene the clear meaning of the Section (317). It is not, in our opinion, a sufficient reason for not carrying out the express terms of the section, that to do so would be to allow a fraud to be perpetrated. The person in whose name a purchase has been made for the benefit of, and with the money of another, of course commits a fraud in claiming that property as his own. Nevertheless the law says that a suit shall not be maintained against him on the ground that the purchase was benami, and thus provides that this fraud shall prevail. The object of the Section was, we consider, to put a stop to benami purchases at execution sales, and this object can only be carried out by enforcing it in all cases without regard to consequences." The above observations have our fullest concurrence, and to them we would add the following from a judgment of Mr. Justice Wills in *Williamson v. Norris*⁵ "To argue that, because an enactment may have an effect which was not thought of when it was passed, it cannot have the plain and obvious meaning of the words used is a fallacy, though a common one."

10. The appeal therefore, as far as Hub Lal is concerned, fails and must be dismissed. It is therefore unnecessary for us to discuss the question of fact as to whether Hub Lal's purchase was or was not benami. We will only remark that the evidence of Hub Lal himself, whom the plaintiff-appellant called as his witness, seems to settle the question.

11. We allow this appeal with costs as against the respondent Matmatanga Prasad, and we dismiss the appeal with costs as against the respondent, Hub Lal.

Cases Referred.

1(1893) I.L.R. 15 All. 75

2(1898) I.L.R. 21 All. 29 at pp. 40

3(1872) 14 Moo. I.A. 496

4(1892) I.L.R. 16 Mad. 293

