

## Bishen Dayal Vs Kesho Prasad and Another

**Court:** Allahabad High Court

**Date of Decision:** Aug. 11, 1936

**Final Decision:** Dismissed

### Judgement

1. This is a plaintiff's appeal arising out of a suit for joint possession of one-half share in certain properties which were admittedly sold at auction

and purchased in the name of Kesho Prasad, defendant 1. The plaintiff is the son of a daughter of Ram Dayal who was Kesho Prasad's uncle. It is

admitted by both the parties that Ram Dayal and Kesho Prasad were separate and did not form members of a joint Hindu family. The plaintiff's

case as put forward in the plaint was that the property was put up for sale on several occasions and bids were made, but they were not ultimately

accepted as the price offered was considered to be inadequate; but finally the highest bid was accepted on 20th July 1907 on which occasion Ram

Dayal was absent and

Kesho Prasad, defendant 1 called out bids on his own behalf and on behalf of Ram Dayal, and that the said sale was confirmed. (Para. 5 of the

plaint.)

2. His case was that the said property was jointly held by Ram Dayal and the defendants as a family property (not joint family property) and that

after the death of Ram Dayal, his widow Mt. Ram Piari Kuer was in possession and defendant 1, who was the lambardar of the village, went on

paying profits to the real owners. The plaintiff claimed joint possession over one-half of the property together with mesne profits for three years.

The defendant denied that Ram Dayal was the joint owner of this property and asserted that he and his brother were the sole purchasers and the

only proprietors. There was a further denial of the allegation that Ram Dayal and after him his widow were in possession of the property or

received any profits and there was a further plea that the plaintiff's claim was barred by Section 66, Civil P.C. There was however no case put

forward by the plaintiff in the plaint suggesting that subsequent to the auction purchase of 1907 either Ram Dayal or his widow had by adverse

possession for over 12 years acquired title to this property. The suit was not based on any such adverse title claimed independently of the rights

alleged to have been acquired by the auction purchase of 1907. The learned Subordinate Judge has dismissed the plaintiff's claim deciding these

main issues against the plaintiff. The main point argued before us is the question of law whether the claim is or is not barred by Section 66, Civil

P.C. Now that section consists of two parts. Sub-section (1) provides that:

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. Accordingly, if a suit is brought on the ground that the purchase is made on behalf of the plaintiff or on behalf of some one through whom he

claims and is maintained against a person who claims title under a purchase certified by the Court in the manner prescribed, the suit is not

maintainable and must be dismissed. Sub-section (2) provides that:

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, etc.

4. It is to be noted that while Sub-section (1) prohibits a claim brought forward on the ground that the auction-purchase had been made on behalf

of the plaintiff or his predecessor, although nominally in the name of the defendant or his predecessor, Sub-section (2) refers to a suit to obtain a

declaration that the name of any certified purchaser was inserted in the sale certificate fraudulently or without the consent of the real purchaser.

Apparently Sub-section (2) would apply to cases where the auction-purchase itself is not directly challenged, but the case is that the name of the

defendant or his predecessor was wrongly entered in the sale certificate either fraudulently or without the consent of the real purchaser. Where the

plaintiff not only wishes to have the sale certificate rectified, but desires to claim that the auction-purchase itself had been made on his behalf or on

behalf of his predecessor, though ostensibly in the name of the defendant or his predecessor, the case would obviously fall under Sub-section (1)

and not under Sub-section (2). The scope of the section has been made clear by several pronouncements of their Lordships of the Privy Council.

While Act 8 of 1859 was in force, of which Section 260 corresponded to the present Section 66, their Lordships had to consider a case in *Bodh*

*Singh Doodhuria v. Gunesh Chunder Sen* (1874) 12 Beng.L.R. 317 where a suit was brought by a member of a joint

Hindu family to recover possession of certain property alleged to belong to a joint estate, but which had been purchased by the defendant at a sale

in execution of a decree passed against the estate of one member of the family only. Their Lordships, after remarking that the provisions of the

section were designed to check the practice of making what are known as benami purchase at auction sales, i.e., transaction in which A secretly

purchases on his own account in the name of B, observed 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. The case is of a joint Hindu family

and is obviously peculiar inasmuch as acquisitions made by any member of such family are presumed to belong to the whole family. The Courts in

India have followed their Lordships pronouncement, consistently holding that it is open to a member of a joint Hindu family to recover his share in

the property purchased at auction by another member and that Section 66, Civil P.C., would not stand in his way. Their Lordships of course, did

not lay down that the application of Section 260 of the old Act was confined solely to the case where the purchase was made by a judgment-

debtor secretly in order to defraud his creditors. The scope of the old section was again considered by their Lordships in Mt. Buhuns Kowur v.

Lalla Buhooree Lall (1870 14 M.I.A. 496, where a certified purchaser had brought a suit against the true owner who was actually in possession.

Their Lordships held that the provisions of that section could not debar the defendant who was in possession from setting up his title as against the

certified purchaser.

5. In Ganga Sahai v. Keshri AIR 1915 P.C. 81, one of the three joint decree-holders of a mortgage decree had alone taken out execution u/s 231

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

representatives, and on that account had obtained leave to bid at the sale and actually purchased the property in his own name and, furnished with

a certificate of sale, got possession of the property. Their Lordships held that the heirs of the other decree-holders were entitled to receive their

shares from him and that Section 317 of the Code of 1882 was not applicable as a defence of the suit. Their Lordships took care to point out that

Ganga Sahai, one of the decree-holders, had tried to perpetuate a fraud against his co-decree-holders under cover of that section and emphasized

that his application for execution had been made u/s 231 of the Code and was made professedly subject to the rights of his co-decree-holders,

and pointed out that had he not even embodied this reservation in his petition, the Court executing the decree would have of its own motion

protected the interests of the other decree-holders. Their Lordships accordingly held that the heirs and representatives of the other decree-holders

were entitled to recover their one-third share of the property purchased by Ganga Sahai in execution of the joint mortgage decree.

6. Order 21, Rule 15 of the present Code contains a similar provision and one of several joint decree-holders is allowed to apply for execution of

the whole decree for the benefit of all the decree-holders, and only where the Court sees sufficient cause for allowing the decree to be executed on

an application made under that rule, i.e. an application to execute the whole decree for the benefit of all the decree-holders, the Court is bound to

protect the interests of the other persons who have not joined in the application. "When such a decree is executed for the benefit of all and the

property is ultimately purchased by the decree-holder (who is executing the decree) in lieu of the decretal amount and the decree is consequently

satisfied, the purchase is obviously made for the benefit of all the joint decree-holders whose money goes towards the acquisition of the property.

Indeed one decree-holder may not be allowed to execute the decree at all, unless there is an assurance that the rights of the other persons would

be adequately protected. It is in such circumstances that the purchase is deemed to have been made on behalf of all the joint decree-holders and in

such a case, as laid down by their Lordships of the Privy Council, the provisions of Section 66, Civil P.C., would not apply. The learned advocate

for the appellant relies on the observation made in Ganga Sahai's case Ganga Sahai v. Keshri AIR 1915 P.C. 81 to the effect that:

The provisions of section 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.

7. 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 auction-purchases, who are not entitled to maintain the suit contrary

to the provisions of Section 66. Further, the title of persons otherwise beneficially interested would not be affected; and if by some means they

obtain possession of the property and are sued as defendants, Section 68 would not stand in their way as their title has in no way been destroyed.

The next case relied upon on behalf of the appellant is the case in Deonandan Prashad v. Janki Singh AIR 1916 P.C. 227. That was a special case

not arising under the Civil Procedure Code. There, under the terms of his mortgage, a usufructuary mortgagee was liable to pay a certain amount of

Government revenue. He had on a previous occasion paid an excess amount which however was somehow absorbed. Later he made a deposit

which was short by Rs. 2-10-0. Their Lordships agreed with the Courts in India that the Government revenue had been deliberately allowed to fall

into arrear with a view to the property being put up for sale and bought by the mortgagee. Although the mortgagee himself being a minor could not

be considered to have been a party to the fraud, it was found that his agents had deliberately committed default in breach of the terms of the

mortgage. When the property was sold and purchased in the name of the mortgagee, their Lordships held that the mortgagee could not be allowed

to hold for himself the advantage gained by the default for which his agents were responsible and that the advantage gained by the scheme must be

held for the benefit of the co-owners who were not shown to have been aware of the default or sale, or to have disentitled themselves to the

equitable relief. The sale had not taken place in execution of any decree, but for recovery of revenue under the provisions of Act 11 of 1859, and

the case was really governed by Section 90, Trusts Act. Illus. (c) to that section was directly in point:

A mortgages land to B, who enters in possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale

and his becoming the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage and of his

expenses properly incurred as mortgagee, B holds the land for the benefit of A.

8. Although their Lordships did not in their judgment specifically refer to the Trusts Act, the language of their Lordships suggests that that section

was in their Lordships mind particularly as it appears to have been referred to at the Bar. It is noteworthy that there was no reference whatsoever

either at the bar or in the judgment of their Lordships to Section 317 of Act 14 of 1882 corresponding to the present Section 66. No doubt

Section 66 of the Act contained a somewhat similar provision, but in that case the finding being that the default had been made intentionally in order

to acquire the property for the mortgagee, it could not have been contended that the purchase had been made by the defendant ""on behalf of the

plaintiff."" The mortgagee's idea obviously had been to make the purchase on his own behalf to defraud the mortgagor.

9. So far as the present Code is concerned the case of Deonandan Prashad would be clearly distinguishable. Section 66, Civil P.C., is confined to

a purchase certified by the Court in such a manner as may be prescribed; and the word ""prescribed"" is defined in Section 2 (16) as meaning

prescribed by rules""; and ""rules"" under Sub-section (18) mean ""rules and forms contained in Schedule 1 or made u/s 122 or Section 125 Civil

P.C."" It is therefore patent that a person who is not claiming title under a purchase certified by the Court under any of the rules framed under the

Code would not be protected u/s 66, Civil P.C. In Suraj Narain v. Ratan Lal AIR 1917 P.C. 12 one of the points which arose for consideration

was whether Section 317 of the Code of 1882 applied to certain items of properties which had been purchased at auction at a sale under order of

the Court in the name of Ratan Lal who was the son-in-law of one of the members of the joint Hindu family. The Judicial Commissioners' Court

held that the son-in-law was entitled to resist the claim u/s 317. Their Lordships of the Privy Council in affirming that view remarked:

There only remains one further point for consideration and that affects certain properties Nos. 14 inclusive and No. 32 in List 5, which were

purchased at auction at a sale under order of the Court in the name of Ratan Lal. Their Lordships were satisfied that any claim to these properties

by the appellants is defeated by Section 317, Civil P.C.

10. As their Lordships were affirming the view of the Indian Court on this point, they did not think it necessary to deal with the matters further. But

the decision is clear and conclusive. The point raised in Ramathai Vadivelu Mudaliar v. Peria Manicka Mudaliar AIR 1920 P.C. 30 was different,

but at p. 649 their Lordships remarked:

The object of Section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf

of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow.

11. This observation also shows that the only object of the section is not to prevent benami purchases made by judgment-debtors. Coming to the

cases of this Court it was laid down by a learned single Judge in Durga v. Bhagwan Das (1900) 23 All. 34 that where one of several joint

mortgagees brought a suit in his own name and obtained a decree in his own name and executed it and purchased the property at auction, the

representatives of the other mortgagees could not recover a part of the property so purchased although they might recover their share of the

mortgage money. It is to be noted that in that case a suit had been brought by only one mortgagee and the decree obtained was not a joint one.

The same view seems to have been followed by another learned Judge of this Court in Makhan Lal v. Badri Prasad AIR 1923 All. 405. Great

reliance has been placed by the learned advocate for the appellant on the case in Achhaibar Dube v. Tapasi Dube (1907) 29 All. 557. That also

was a case where two partners who 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 auction-sale by one of the decree-holders only out of the partnership funds or by setting off the joint

decree obtained by the partners. The learned Judge held that in such a case Section 317, Civil P.C. was not a bar. In the course of his judgment he

referred to the object of the section being to check the practice of making benami purchases and remarked that the principle applicable to

members of a joint Hindu family might well apply to partners. It is not clear that the learned Judge meant to lay down that even if one of the

partners has sued alone for the recovery of his debt and obtained a decree exclusively in his name and purchased the property in his name, the

other partner can recover his share of the property from him. In any case even if such a view was expressed it would be an obiter dictum.

12. But the principle underlying this case was extended by the Bombay High Court in Vishvanath Dhondihaj Gayadhani Vs. Pandharinath Ganesh,

In that case the plaintiff and the defendant had agreed to unite their funds for the purpose of purchasing the property. But the purchase was made in

execution of a decree by one of them only. Apparently it was not a case of a joint decree-holder at all. The learned Chief Justice after quoting the

remarks of Richards, J. in Achhaibar Dube's case Achhaibar Dube v. Tapasi Dube (1907) 29 All. 557 remarked:

I do not think that 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 fund 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.

13. As already pointed out the case before Richards, J. was quite different and was clearly distinguishable inasmuch as there the plaintiff and the

defendant had been co-decree-holders. ""With great respect, we are unable to agree with the view expressed by the Bombay High Court that if

two persons privately enter into an agreement to purchase property in the name of one at auction, Section 66, Civil P.C., would have no

application. In Baijnath Das Vs. Bishan Devi and Another, certain property was purchased at auction in execution of, a decree by a father in a joint

Hindu family benami in the name of his wife. A suit brought by the members of the family against the wife who defended the claim was held not to

be maintainable as she was not a member of the joint Hindu family and she could take shelter behind the provisions of Section 66, Civil P.C. In

Ram Rup Teli Vs. Khaderu Teli and Others the father of a joint Hindu family had made a purchase at an execution sale in the name of an outsider.

One of the members who had got some property at the family partition brought a suit to recover possession, but was resisted by the ostensible

purchaser. The Bench held that the claim was barred by Section 66, Civil P.C.

14. The learned advocate for the appellant relies strongly on the case *Durga Das De Vs. Bagalananda De and Others*, in which these cases were

dissented from. The learned Judges apparently considered that where a member of a joint Hindu family brings a suit to recover possession of

property which has been purchased in the name of another at auction, sale, he does not claim the property on the ground that it was bought on his

behalf or even on behalf of the joint family but his case is that the joint family in fact bought it, because it was bought with funds belonging to the

joint family. With great respect, it is difficult to see the distinction between the case that the property was purchased in the name of a stranger on

behalf of the joint family and the case that the joint family itself purchased the property in the name of the stranger. According to that view property

purchased by a stranger could always be recovered in spite of the provisions of Section 317 if any minor member of a joint family can be put up to

bring the suit. The learned Judges themselves felt the difficulty on account of the pronouncement of their Lordships of the Privy Council in *Suraj*

*Narain v. Ratan Lal* AIR 1917 P.C. 12, already referred to, and felt that in that case "apparently a contrary view was taken." They however

remarked that that case was decided under the old Section 317, Civil P.C., the wording of which differed materially from that of Section 66. The

difference in the wording which would be relevant was however not quoted. As far as can be seen the alteration in the language of the new section

would make no difference so far as the point under consideration was concerned. One of the learned Judges remarked:

Moreover the point raised u/s 317, which affected part of the claim was disposed of by their Lordships within six lines of the report and the

relevant facts are nowhere stated. No decisions are mentioned in the judgment nor that there seems to have been much discussion on the matter.

15. We would find it very difficult to brush aside a clear decision of their Lordships of the Privy Council on the ground that the point was disposed

of in six lines or that the relevant facts were not stated or that no decisions were mentioned by their Lordships in their judgment or that there was

no discussion of the matter by their Lordships. We would feel it our bounden duty to accept the ruling as conclusive and binding. As already noted,

all the necessary facts were clearly mentioned, and as their Lordships were affirming the judgment of the Judicial Commissioner's Court it was not

thought necessary to deal with the matter at greater length, but it was clearly decided that a suit brought against a son-in-law by one of the



members of the joint family could not be maintained in view of the provisions of Section 317. We therefore think that the view expressed by this

Court in the two cases which were dissented from the Calcutta High Court was perfectly sound and we adhere to it. It seems that another Bench

of the Calcutta High Court has taken a different view which is in consonance with the view expressed in this Court. In the same volume in Iswar

Chandra Pal and Others Vs. Kabiruddin Ahmed and Others, it was held that where a suit was brought to recover a share of the property

purchased at auction which had been purchased by one decree holder (but not a joint decree-holder) although there were other decrees against

the same judgment-debtor, the claim of the other decree-holders who held different decrees was barred. The Bombay case in Vishvanath

Dhondihaj Gayadhani Vs. Pandharinath Ganesh, was distinguished because the learned Counsel for the respondent unnecessarily conceded that

Section 66 would be no bar to a case of partnership. In view of these authorities it must be held that Section 66 is a bar to the present claim.

16. The learned advocate for the appellant contends before us that Section 66 cannot apply unless the plaintiff alleges in the plaint that the purchase

had been made on behalf of the plaintiff or his predecessor and claims that he is the sole owner of the entire property purchased at auction without

the defendant being a joint owner and says that the name of the defendant had been entered in the sale certificate without his consent. We cannot

accept this contention but may point out that in the present case, the plaintiff had actually alleged that the last bid that was accepted had been made

on behalf of Ram Dayal and the contesting defendant. Further, when the plaintiff claims half the property on the ground that he is the owner and

that the defendant, although the ostensible purchaser, is not the owner, he must, by necessary implication, even though he has not expressly said so,

mean that the purchase of the half share claimed had been made in the name of the defendant by the plaintiff. By cleverly avoiding an express

reference to the purchase made on his behalf the plaintiff cannot evade the provisions of the section.

17. It also seems to us that it is immaterial whether the property in suit is the entire property which was purchased in one lot at the auction or

whether it is a part of a lot so purchased and whether the plaintiff claims the whole of it or only a share in it. The substantial thing to consider is that

the defendant who is resisting the claim, claims title to the property under a purchase certified by the Court, and if the property in dispute is part of

the property so purchased, the latter is protected. We see no reason why a distinction should be drawn between the cases where the whole of the

property purchased is claimed, and where the plaintiff says that he purchased only a share in the property mentioned in the sale certificate. In either

case the defendant claims title under a purchase certified by the Court, and the claim comes within the mischief of Section 66. There is authority for

the view that no such distinction should be introduced into the section. In Iswar Chandra Pal and Others Vs. Kabiruddin Ahmed and Others,

already quoted, the claim was in regard to only a part of the property purchased and the learned Judges did not consider that that saved the claim

from the bar of Section 66. Again in Hari Govind v. Ramchandra Narayan (1907) 31 Bom. 61, although the point was not expressly considered

and decided, the claim related to only a half-share in the property purchased. The point was expressly decided by an Assistant Judicial

Commissioner of the Nagpur Court in Govina Singh v. Mungaji AIR 1920 Nag. 147, where it was laid down that Section 66, Civil P.C. applies

where an ostensible purchaser is a real purchaser to the extent of the entire or only of a fraction of the property sold. If such an evasion were

allowed the result would be that all that would be necessary for a plaintiff to succeed would be to give up a negligible fraction of the property and

put forward a claim to the bulk or to exclude a part of the property purchased from the claim put forward in the suit. We do not think that this

could have been the intention of the legislature. The primary object of the section, as appears from the pronouncement of their Lordships of the

Privy Council in the cases quoted above, seems to be that the certified purchase should be deemed to be conclusive and no one should be allowed

to challenge it, unless he comes within the exceptions mentioned in the section itself and those exceptions are contained in Sub-section (2) under

which a wrong insertion of the name of the purchaser in the sale certificate made fraudulently or without the consent of the real purchaser can be

rectified and under which third persons are absolutely protected.

18. We therefore think that the view taken by the learned Subordinate Judge that the claim is barred by Section 66, Civil P.C., was correct. Had

the plaintiff come into Court. on the allegation that subsequent to the auction, purchase of 1907 either Ram Dayal or after him his widow acquired

title by adverse possession extending over 12 years, we would have certainly entertained the claim. It has been laid down by their Lordships of the

Privy Council in Abdul Jalil Khan v. Obaidullah Khan AIR 1929 P.C. 228, that Section 66 is not a (sic) to a claim based on the title independent

of the auction-purchase; but no such case was put forward in the plaint and none has been pressed before us in appeal. We have however not

considered it necessary to enter into the merits so far as the auction-purchase of 20th July 1907 is concerned, nor is it necessary for us to go into

the question of the plaintiff's previous knowledge of his title with regard to the objection under Order 2, Rule 2, Civil P.C. We dismiss this appeal

with costs.