(1875) 02 PRI CK 0003

Privy Council

Case No: None

Lokhee Narain Roy Chowdhry		APPELLANT
	Vs	
Kalypuddo Bandopadhya and Shamapuddo Bandopadhya		RESPONDENT

Date of Decision: Feb. 13, 1875

Citation: (1875) 2 IndApp 154

Hon'ble Judges: James W. Colvile, Barnes Peacock, Montague E. Smith, Robert P. Collier, JJ.

Judgement

Montague E. Smith, J.

1. This suit was brought by the widow and two sons of Ishan Chunder Bannerjee against Baboo Lokhee Narain Roy, to recover possession of a 9-annas share of the zemindary called Kishenpoora. The case set up in the plaint was that the nine annas had been purchased at an auction sale held in execution of a decree obtained against a lady of the name of Monmoheenee Dabea, and that the certificate of purchase was given to Ishan Chunder; and it is alleged that Lokhee Narain Roy obtained forcible possession of the nine annas subsequently to the certificate of sale. The defence was that Ishan Chunder was the manager of Lokhee Narain, and had purchased the nine-annas benamee for him. It appears that Lokhee Narain is himself the owner of seven annas of the zemindary, and that Monmoheenee was the owner, for life only, of the other nine annas; and that it was her life interest which was sold. It would seem also that Lokhee Narain claims the reversionary interest after Monmoheenee''s death in those nine annas.

2. The Judge in settling the issues refused to lay down any issue upon the question whether the purchase was benamee or not, in consequence of a decision of the full bench of the High Court of Calcutta which had determined that it could not be shewn against the holder of a certificate of sale under an execution that he purchased benamee

for another, whether the suit was brought by any person against him, or was brought by such holder himself as Plaintiff. The section of the Code of Civil Procedure upon which the question turned is Section 260, and the words applicable to the question are these: "And any suit brought against the certified purchaser on the ground that a purchase was made on behalf of any person not the certified purchaser, though by agreement the name of the purchaser was used, shall be dismissed with costs." It was held by this Committee in appeal from the case referred to,--the case of Musmmat Buhuns Kowur v. Beharee Lall 17 Moore"s Ind. Ap. Ca. 496,--that this section should be construed strictly and literally, and was applicable only to a suit brought against the certified purchaser to assert the benamee title against him, that the statute did not make benamee purchases illegal, and that the real owner for whom the purchase was made, if in possession, and if that possession had been honestly obtained, might defend a suit brought by the holder of the certificate and shew that he was the apparent owner only and a mere trustee. However, these issues being settled before the case had been decided on appeal, the Judge of course felt bound by the decision of the full Court and settled the following issues only: "First, is the Defendant in possession of the disputed share of the zemindary under circumstances which amount to a transfer to him of the title which the Plaintiffs derived from their purchase (made by Ishan chunder Bannerjee)? If not, can the Plaintiffs obtain the relief sought for, and if in possession under such circumstances can the Defendant"s possession be disturbed?" The Judge adds the note, "The plea set up by the Defendant, that the Plaintiff"s father had purchased the property in question benamee for Defendant"s benefit, and with his money, was not allowed under the full bench ruling of November 12, 1868."

3. In Mussumat Buhuns Kowur v. Beharee Lall 11 Suth. W.R. F.B. p. 20, it was stated in the judgment of the High Court that if the certified purchaser was really benameedar, or a trustee for another person, and after the certificate of sale did some fresh act to put the real purchaser into possession, that might operate as a transfer of the property to him. They say: "If a person who has gained a title by limitation, waives that title in favour of the real owner, and gives up possession to him as the rightful owner, such act would probably be held to amount to a waiver of the right which he had gained by limitation, and to confer it upon the real owner. In like manner, if a benameedar should acknowledge the purchase to have been made benamee, and waive the right conferred upon him by sections 259 and 260, and give up possession to the real purchaser as the rightful owner, such act would probably amount to a transfer of the title as well as of the possession to the real purchaser." This passage in the judgment was the authority under which the Judge laid down the two issues. It is obvious that in the decision of those issues it becomes material to inquire under what circumstances possession was given by one party to the other, and whether by reason of the antecedent relation between the parties it was meant to operate as a transfer of the property. Therefore the relation of the parties, whether they really were benameedar and beneficial owner, was very proper to be inquired into and tried upon the issue in fact laid down; and accordingly the Judge of the Court of Cuttack, having taken evidence as to the sale and the circumstances under

which it was made, proceeded to give his opinion upon the question whether the purchase was made by Ishan Chunder on his own behalf, or as the manager, and on behalf of Lokhee Narain.

4. A good deal of evidence was given upon that question, but the learned Judge seems to have rested his decision entirely upon two witnesses, and resting his decision upon those witnesses he came to the conclusion that the purchase had been made by Ishan Chunder on his own account and with his own funds. He says : "It is proved from the evidence of two of the most trustworthy of their witnesses, both of them native gentlemen, whose evidence is entitled to the fullest belief, viz., Kanye Lall Pundit and Baboo Mohun Persad Roy, that the purchase of the zemindary in dispute was made by Ishan Chunder on his own account and with his own funds." Their Lordships will refer to that evidence presently, hut it seems to them that the learned Judge has drawn too broad a conclusion from the facts which they proved. On the case coming before the High Court, the Judges seemed to think that it was unnecessary to go into the facts. They thought themselves bound by the decision of the full Court, and that they could not inquire into the transaction of the sale, whether it was benamee or not, and so tying their hands they came to the conclusion that what was done after the sale did not amount to a transfer of, the property from Ishan Chunder to Lokhee Narain. Their judgment proceeds on those short grounds.

5. As the law at present stands, it is open for their Lordships to consider what was the real state of the case between these parties, and whether or no this purchase was made by Ishan Chunder on his own account, or on behalf of Lokhee Narain.

6. It is right to see in the first place what was the relation between the parties. It is plain, and indeed is not denied, that Ishan Chunder had been for a period of about a year the manager of this zemindar, Lokhee Narain, and had the possession and management of some at least of his funds. It seems that a month only before this sale, he had advanced a sum of Rs. 4400 to this lady Monmoheenee upon a mortgage bond. That bond was taken in his own name, but it is admitted by the Plaintiffs that the bond, although, taken in his own name, was in respect of an advance out of Lolchee Narairis money, and that he held the bond on behalf of, and as benameedar for, Lokhee Narain. The transaction of this sale followed soon after. The lady appears to have been in difficulties. A creditor obtained a judgment against her, and there was to be a sale in execution of her life interest in nine annas of an estate in which Lokhee Narain held the other seven in his own right, and a reversionary interest in the nine that were sold. It would be a very proper thing for his general manager to look after that sale and see whether he could make an advantageous purchase for him.

7. It seems to be a fair conclusion from the evidence that Ishan Chunder had no express instructions previous to the sale from Lokhee Narain to purchase these nine annas for him. But these facts are proved, that Russool, who was an agent, or acting at that time as an agent, of Lokhee Narain, was a bidder for these nine annas, and had bid Rs. 2260 for the property. At that stage, when he had given that bidding, which was the last of four,

somebody suggested to him that he ought not to bid for the zemindar, but that Ishan Chunder, the manager, was the proper person to purchase the property for Lokhee Narain. Accordingly the evidence is that Ishan Chunder was called into the room, the state of the biddings made known to him, and then he made upon the last bidding of Russool the small advance of Rs. 2. If the witnesses are believed, he took the bidding out of Russool"s hands, who was professing to act for Lokhee Narain, saying at the time, or shortly after, that he purchased for Lokhee Narain. No doubt that depends upon the credit due to the witnesses, but there are circumstances in the case which corroborate them. There is the undoubted relation in which Ishan Chunder stood to the zemindar; the facts, also, that Russool bid no more, and the very small advance upon his previous bidding seem to shew that there was an understanding between the two agents, otherwise it is very unlikely that that small advance should have stopped the biddings, and that the property should have been knocked down at that point.

8. But not only do the circumstances attending the bidding at the sale give corroboration to the story, but the subsequent conduct of Ishan Chunder is inconsistent with his having purchased on his own account, and is entirely consistent with the view that he purchased on behalf of the zemindar, for whom he was acting as manager. The possession is one of the real facts in the case about which there can be little dispute. It is not pretended that Ishan Chunder or his sons after his death obtained anything more than formal, possession by the officer of the Court. They obtained, that formal possession. How did they lose it? They assert in their plaint, and for a purpose, that Lokhee Narain took forcible possession. There is not the slightest evidence of it, and it is conceded now that nothing like forcible possession was or could be taken. But what is proved is this,--by two ryots who appear to have no interest one way or the other,--that they went to Ishan Chunder, healing that he was the auction purchaser, to pay their rents. One of them says he went to him in the first place and was told by hi in to go to Lokhee Narain and. pay it. The other says that he went first of all to Lokhee Narain, who told him that Ishan Chunder was the auction purchaser. He went to him, and Ishan Chunder said : "It is true I am the auction purchaser, but the rents are payable to Lokhee Narain" There is beyond that the fact that Lokhee Narain received the rents from those two ryots, and therefore was in possession so far as possession can be obtained of property which is in the hands of ryots.

9. He also paid the Government revenue. The petitions he presented to the collector have been relied upon by the Plaintiffs as shewing that he did not then put forward his own title. He made no allusion to it in either of the petitions, and in the second petition he put forward Ishan Chunder as the owner of the property. It is perfectly well known to be a common practice in India where property is in the name of a man, although not the true owner, that all the proceedings as far as the Governments is concerned take place in his name. All that Lokhee Narain then wanted to do was to pay the Government revenue, so that the estate should be in no danger of being forfeited. Their Lordships think that no very strong inference can be drawn against him from the fact that in the petition he states

the title according to what it ostensibly was. It is stated by several witnesses that before Ishan Chunder left Cuttack to go to Calcutta he promised Lokhee Narain to give him a kobala for the property, saying: "There is no immediate baste about it; you are in possession; it shall be done when I return." He went to Calcutta and died there. His sons returned to Calcutta, and then made a claim to the property upon the ground that Inhan Chunder had purchased it for himself and out of his own funds. The question having arisen, the parties very sensibly" called a punchayet to decide the matter between them, and three or four respectable persons appear to have assembled and to have hoard the whole case. They came to the conclusion that Lokhee Narain ought to have the estate, but they also appear to have thought that Ishan Chunder had not funds in his hands sufficient to pay the purchase-money unless he had realized Monmoheenee"s bond. Probably the amount was not immediately available, and they directed that the bond should be given up by the sons to Lokhee Narain, having no doubt that it was a benamee transaction, and that the sons should convey the nine annas to the zemindar, on his paying Rs. 2800, which is the purchase-money and interest with a small sum for profit, the sons having contended that their father bought in order to sell again at a profit.

10. Now it is as well at this point to refer to the evidence of Kanye Lall, the pundit, on which the Judge of Cuttack relied for the conclusion to which he came. That witness says, "Before the arrival of the Plaintiffs from Calcutta, Lokhee Narain Row Chowdhry said that the zemindary of Kishenpoora had been purchased benamee in the name of Ishan Baboo, on which I replied that we shall know this when the son of Ishan Baboo arrives from Calcutta. Afterwards, when Kalypuddo, the said son of Ishan, came from Calcutta, he was one day called to the presence of Lokhee Narain roy Chowdhry, and he said that the said zemindary was purchased by his father, and if a profit were allowed to him he would execute a kobala. This took place in my house at the time several persons," mentioning them, "were present. I do not recollect who besides these were present. The Baboo (Ishan) had requested me and Shodanund Mohapatur and Mokoond Persad Roy to take care of his property before he left." These two persons, then, one the pundit, were to take possession and manage Ishan Chunder"s property in his absence. It might be expected that they would receive rent and pay the Government revenue if the estate had really belonged to Ishan Chunder. He goes on, "After his death, according to a letter written by his son Kalypuddo, we continued to take care of his property. We were assembled there with the object of coming to a settlement in respect of this Kishenpoora zemindary." He says the mooktears of both parties were present, and goes on thus : "We arranged that Lokhee Narain was to pay the purchase-money, together with interest from the date of purchase at the rate of 1 per cent, per mensem. Kalypuddo said that he would take a profit of Rs. 1000, and the Chowdhry said, "I will give Rs. 300 as profit." On that Kalypuddo said that he would consider, and give his answer early next morning, This was what passed on that occasion. At the time of attempting a settlement the Chowdhry said that he would pay Rs. 2800. The next day the Chowdhry sent me a sum of money, but I did not count how much." However, there is no doubt the money was sent. Then it appears that one of the sons intimated that in consequence of some advice he had

received from his mother, he would not assent to the arrangement, nor would she; and so it appears to have gone off. The other witness, Kodanundo Mohapaller, states the award still more explicitly. He says: "The arrangement was to the effect that when the sum of Rs. 2800, together with the stamp for the kobala, was deposited with Kanye Lall Pundit, Kalypuddo and Shamupuddo should execute a kobala."

11. The award of the punchayet is really consistent with the case of Lokhee Narain. They evidently came to the conclusion that Ishan Chunder had not funds in his hands sufficient to pay the purchase-money, but they thought that Lokhee Narain ought to have the estate, and they accordingly made an award, that he was to have the estate, and the others the purchase-money, allowing, probably by way of compromise, a small profit over.

12. Their Lordships, therefore, upon the whole matter, think that although Ishan Chunder may have had no previous instructions to purchase from Lokhee Narain, yet that, being his manager, and finding himself at this sale, he purchased for him, after having stopped Russool, who was there before him bidding for the zemindar, in that operation. It would be contrary to equity to allow a man who steps in and assumes the character of a principal agent, and deposes another who was really acting as agent, afterwards to turn round and say, I purchased the estate, not for the principal, but for myself, and to obtain a profit out of the estate lie had so purchased. Ishan Chunder himself does not appear to have intended to act in this manner, because, as already observed, he gave possession of the estate to the zemindar, by directing the tenant:-! to pay their rents to him, and does not appear to have interfered in any manner inconsistent with the character he took upon himself at the sale-the character of a manager for the zemindar.

13. Under these circumstances, their Lordships think that the judgments of the Courts below cannot be sustained, but they are anxious that the whole question between these parties should be determined without further litigation. In their view, the parties having agreed to submit to the award of arbitrators, it is right and equitable that if the estate is maintained in the zemindar Lokhee Narain"s hands, he should pay to the representatives of Ixhan Ghunder the Rs. 2800 which the arbitrators thought was the proper sum to be paid to them, together with interest thereon. It is difficult to fix the precise date from which the interest should run, but their Lordships think it is equitable the Respondents should receive interest for six years at 6 per centum per annum, making the sum of Rs. 1008 for interest. Their Lordships are desirous to secure the execution of this arrangement, and they will therefore humbly recommend Her Majesty to reverse the decrees below, and to direct that in case the Appellant pays into Court within six months the sum of Rs. 3808 (being the Rs. 2800 and interest thereon as aforesaid), the Respondents be at liberty to take such sum out of Court upon executing a kobala of the property to the Appellant, the stamp of which is to be paid by the Appellant, and that upon such payment into Court being made, the suit be dismissed, and the Respondents do pay to the Appellant the costs of the litigation in India and of this appeal.

14. That in case the Appellant does not pay the above amount into Court, the suit at the end of the said six months be dismissed, but in that case without any order as to the costs in India or of this appeal, and without prejudice to the right of the Respondents to retain the certificate of sale, and to take such proceedings as they may be advised to recover any moneys due to them from the Appellant in respect of the purchase of the said property or otherwise.