(1868) 11 CAL CK 0013

Calcutta High Court

Case No: Application for Review No. 209 of 1868

Mussamut Bihans Kunwar		APPELLANT
	Vs	
Bihari Lal and Another		RESPONDENT

Date of Decision: Nov. 12, 1868

Judgement

Macpherson, J.

Ganga Prasad Tewari being the holder of a decree against Brijo Lal Upadhya (which decree had been originally obtained by one Ajudhya Prasad) in execution of the decree, attached and sold a decree for mesne profits which Brijo Lal Upadhya held against one Mati Sundari. At the sale, the appellant, Bihari Lal, became the purchaser. Bihari Lal being thus the holder of Brijo Lal''s decree against Mati Sundari, took out execution of it and attached and sold the right, title and interest of Mati Sundari in the Talook Dudhur in Pergunna Siris (which property is the subject of the present suit), and at the sale became himself the purchaser of it.

2. Mati Sundari''s share (eight and half annas) of Dudhur had previously, in 1844, been mortgaged by way of zuripeshgi lease to Brijo Lal Upadhya, who was put in possession and remained in possession until his death, which occurred before the institution of the present suit. From the time of his death the respondents, the widow and minor son of Brijo Lal''s son Bichan, who died before his father, have been and still are in possession.

3. The present suit is brought by Bihari Lal for redemption and to recover possession of the property mortgaged, and for an account, his allegation in the plaint being that the mortgage debt has been liquidated from the usufruct. The plaint, however, contains a further prayer that if any portion of the mortgage debt is found, on taking the accounts, to be still due, the plaintiff may be declared to be entitled to possession on bringing into Court the balance due.

4. In their written statements, the respondents, the widow and son of Bichan, state that throughout the proceedings which have been referred to, as well as other proceedings to which it is unnecessary to refer in detail, both Ganga Prasad Tewari

and Bihari Lal acted merely benami for Brijo Lal Upadhya, and that the purchase of Mati Sundari''s rights, though made in Bihari Lal''s name, was in fact made by and for the benefit of Brijo Lal. The written statement further alleges that the mortgage-debt has not been satisfied, and pleads that the plaint is inconsistent and bad as regards the prayer for possession on depositing the balance due in the event of its turning out that a balance still is due.

5. The lower Court most improperly (and notwithstanding many decisions of this Court that such a course is wrong and not warranted by the Code of Civil Procedure) allowed the plaintiffs to put in a written statement by way of reply to that of the defendants. The most important point raised in this reply is, that u/s 260 of Act VIII of 1859, the defendants cannot plead that Bihari Lal, who obtained the certificate as auction-purchaser, was not the real purchaser, but bought merely benami for Brijo Lal.

6. The Principal Sudder Ameen held that Bihari Lal did purchase merely benami as alleged, and that the defendants were entitled to plead this fact, section 260 notwithstanding, and he dismissed the plaintiff''s suit.

7. In appeal before us the appellants contend (amongst other things) that the lower Court was wrong in law in holding that the defendants could plead that Bihari Lal bought benami for Brijo Lal, and wrong also in finding as a fact that he was only a benamidar.

8. As regards the question of fact we arrive at the same conclusion as the lower appellate Court, and substantially for the same reasons. We have no doubt that Bihari Lal was not the real purchaser, but that the purchase was made by Brijo Lal in the name of Bihari Lal.

9. The question of law is one of greater difficulty. Various cases have been referred to in argument, and at one time it appeared to us that there existed a conflict of decisions which would render a reference to a Full Bench necessary, but a consideration of the several judgments showed that there was no conflict. The point turns on the construction to be put upon section 260 of Act VIII of 1859. That section enacts, "that the certificate shall state the name of the person who at the time of sale is declared to be the actual purchaser, and any suit brought against the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." It is argued that although a suit brought against the certified purchaser is to be dismissed, there is nothing in this section which, in the case of a suit brought by a certified purchaser, prevents the defendants from pleading that the purchase was made by him and on his behalf, though by agreement the Dame of the certified purchaser was used. And it is contended, that although if the certified purchaser had once succeeded in getting possession, the defendants could not have successfully sued to eject him on the

ground that they had themselves made the purchase benami in the name of the certified purchaser, still the defendants being in actual possession and the certified purchaser coming into Court as plaintiff, the defendants can plead that he bought for them and that the purchase is in fact theirs.

10. The point now raised has never, so far as I can ascertain, been decided.

11. In the case of Mussamut Shorosutty Dasee v. Gopee Sundaree Dasee Mar. Rep. 423, where a third party disputed the plaintiff''s right to sue on the ground that she was not the certified purchaser, the Chief Justice in delivering judgment (to the effect that as it was not the certified purchaser but a stranger who sought to take advantage of section 260, that section did not form any bar to the plaintiff) said that the object of section 260 was to prevent disputes between a certified purchaser and a person claiming that the certified purchaser purchased benami for him.

12. The case of Sheetanath Ghose v. Madhub Narain Roy 1 W.R. 829 has really no bearing on the question we have now to decide. The same remark may be made of another case relied upon, Mirza Khyrat Ali v. Mirza Syfoolah Khan 8 W.R. 130. In that case the sale to the certified purchaser was declared to be clearly fraudulent as made collusively between him and the judgment-debtor. In the present instance there is no element of fraud, so far at any rate as the certified purchaser and the judgment-debtor are concerned.

An unreported case, decided on the 19th August, 1865 by Trevor and Glover, JJ., has also been quoted, but nothing is there decided which has any bearing on this case, although it may be inferred from the judgment that the respondent''s counsel was of opinion that a defence such as that raised by the respondents now before us is good. That was a case u/s 36 of Act XI of 1859, which is in substance similar to section 260 of Act VIII of 1859.

Section 36 of Act XI of 1859 provides, that "any suit brought to oust the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser, shall be dismissed with costs." A question similar in many respects to the one now before us arose under that section sometime ago before Mr. Justice Seton-Karr and myself. The main difference in the position of the parties is that, in that case, the certified purchaser, had in the first instance got possession and was subsequently ousted by the defendants, who pleaded that they were the real purchasers, though the name of the certified purchaser had been used. We decided (so far as this point was concerned) in favor of the certified purchaser, being of opinion that the fact that the plaintiff is, by reason of what has occurred, obliged to come into Court to recover possession, does not as it seems to us alter the position of the parties so as in any way to deprive the plaintiff of any benefit which he might have had u/s 36, if his suit had been brought against him as defendant to oust him, the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser."--Jadub Ram Deb v.

Ram Lochun Muduck 5 W.R. 56.

The opinion thus expressed by us appears to me still to be right, and if it is, it is applicable equally to the present case, making every allowance for the difference existing in the circumstances under which the parties respectively appear in Court. It seems to me that the object of section 260 which, as has been decided, is to prevent disputes between a certified purchaser and a person claiming that the certified purchaser purchased benami for him, would be very much defeated if the defendant could make use of those facts by way of defence which he could not make use of in order to prove his case if he came before the Court as plaintiff.

In the view of the law which I take, it is clear that the plaintiffs as the purchasers of the equity of redemption, which was in Mati Sundari, are entitled to redeem the zuripeshgi mortgage and to recover possession, if it appear upon taking the accounts that the whole mortgage-debt has been liquidated. With this declaration, we remand the case to the lower Court to take the accounts. If upon taking the accounts, a balance still appear to be due to the defendants (the representatives of the mortgagees) the plaintiffs will be entitled to possession, if they deposit the money in Court within one month from the date on which such balance is declared by the lower Court.

The costs of this appeal and those incurred in the lower Court heretofore, will depend upon the result of the remand. The plaintiffs, however, will not in any event recover costs, unless, upon taking the accounts, it appears that the mortgage debt had been paid off in full before the present suit was instituted.

Bayley, J.--I concur in the order proposed. Looking to all the cases cited and to the terms of section 260, I think the provision of the section applies to a defendant''s case in the same way as to a plaintiff''s.

A review of the above decision was subsequently applied for, when the case was referred to a Full Bench under the following order by

Order of Reference To Full Bench

JUDGMENT

Macpherson, J.

--An application has been made to us today to review our judgment in this case, upon the ground that we were wrong in holding that u/s 260 of Act VIII of 1859 the defendant was debarred from pleading that the plaintiff Bihari Lal, although the certified purchaser, in reality bought benami for Brijo Lal. As the question is undoubtedly one of difficulty, and at the same time of importance, and as our decision does seem to conflict in principle with that of Trevor and Glover, JJ., of the 19th August 1865, in Special Appeal No. 131 of 1864, and with that of E Jackson and Roberts, JJ., of the 7th July, 1863, in Regular Appeal No. 55 of 1862 (to which our

attention has been called to-day for the first time), we think it desirable to refer the matter to a Full Bench for decision.

The cases bearing on the question are mentioned in our judgment of the 16th July.

13. The point referred is this:-- "A purchaser of immovable property sold in execution of a decree, having obtained a certificate u/s 259 of Act VIII of 1859, and having instituted a suit to recover possession of property purchased by ejecting the person who is in possession, is the latter (the defendant in the suit) debarred by the terms of section 260 from pleading that although the plaintiff is the certified purchaser he did not purchase on his own behalf, but merely on behalf of and benami for the defendant, and is therefore not entitled to recover possession."

14. I am of opinion that the defendant is debarred by Act VIII of 1859 from setting up the defence mentioned in the question, unless the defendant is in possession under circumstances which amounted to a transfer to him of the title which the plaintiff derived from the purchase. I do not mean to say that he is debarred simply by section 260. He is, in my opinion, debarred by the general provision of the Act of which the provisions of section 260 must be looked at in arriving at a just conclusion as to what were the real intentions of the Legislature.

15. Section 259 of Act VIII of 1859 declares that the certificate of purchase shall be deemed a valid transfer to the purchaser of the right, title and interest of the judgment-debtor. The Act declares that the purchaser shall be put into possession of the property, and sections 261 to 266 inclusive point out the mode in which possession is to be delivered. Section 260 enacts that any suit brought against the certified purchaser, on the ground that although the name of the certified purchaser was used the purchase was made on behalf of another person, shall be dismissed with costs. Section 260 seems to assume that the certified purchaser would have possession delivered to him, and provides that he is not to be turned out upon the ground that the purchase was benami.

16. It may be admitted, for the sake of argument, that the contention of the learned Advocate-General is correct that there is no distraction in the mofussil between legal and equitable estates. That however shows that, according to section 259 the certificate amounts to a valid transfer both in law and in equity of the right and interest of the judgment-debtor to the person who is declared to be the purchaser.

17. It appears to me that the object of section 260 was to prevent any enquiry between the purchaser de facto and any person on whose behalf he is alleged to have purchased, as to whether the purchase was made benami or not. This is consistent with the case of Mussamut Shorosutty Dossee v. Gopee Soondery Dossee Mar. Rep. 423 and with the case of Mussamut Chunder Monee Debea v. Robert Watson S.D.A. (1858) 1733, and of Mohammed Hafiz v. Moulvee Abdul Ali S.D.A. (1859) 287.

18. With reference to the argument that the Court would be assisting in carrying out a fraud, if in the case put by the question it should refuse to admit the plea of the person in possession, I apprehend it is clear that the Court which executed the decree could not, at the instance of the real purchaser, have refused to pub the benamidar into possession under the provisions of sections 261 to 266, and that the real purchaser could not have recovered that possession from him.

19. If so, I see no greater objection to the Court''s putting him into possession by suit than to its putting him into possession under an execution, in opposition to the wish of the real purchaser. In many cases, as for instance, under sections 264 and 265, the possession given to the certified purchaser under an execution is not actual, but merely symbolical. In such cases it may become necessary for the certified purchaser to convert the symbolical possession into actual possession by means of a suit.

20. If a judgment-debtor should, under an execution against himself, purchase in the name of a third person an estate belonging to himself in the possession of ryots, the Court executing the decree would according to section 264 be bound to put the certified purchaser into possession by fixing a copy of the certificate of sale in some conspicuous place on the land and proclaiming to the ryots that the right, title and interest of the judgment-debtor had been transferred to the certified purchaser. In such a case, if the judgment-debtor should induce the ryots to continue to pay their rents to him instead of paying them to the certified purchaser, the possession delivered to the certified purchaser u/s 264 by the Court which executed the decree would be fruitless, if the certified purchaser could not recover the rents from the ryots or from the judgment-debtor. So, if a judgment debtor should, under an execution against himself, purchase in the name of another person a debt due to himself from a third person, the Court u/s 265 would be bound to deliver the debt to the certified purchaser by a written order prohibiting the judgment-debtor from receiving the debt, and his debtor from making payment thereof to him. If after such delivery to the certified purchaser the judgment-debtor should induce his debtor to pay the debt to him, the delivery of the debt to the certified purchaser u/s 265 would be useless to him if he could not sue the judgment-debtor or his debtor for the debt so purchased. If we were to hold that he could not sue, we should be converting the section into a mere nullity, and the order that the creditor should not receive the debt into a command to be disobeyed at pleasure. The Statute of Limitations enacts that no suit for recovery of immoveable property shall be maintained, unless the same is instituted within the period of twelve years from the time when the cause of action arose. That Statute not only bars the real owner of his remedy, but it confers a title on the opposite party. So in the present case it appears to me that sections 259 and 260 confer a title upon the certified purchaser which entitles him to maintain a suit against any one who unlawfully dispossesses him, and that a dispossession of the benamidar by the person who purchased benami in his name, and who is precluded by section 260 from maintaining a suit against him

to recover the purchased property would be an unlawful dispossession. If a person who has gained a title by limitation waives that title in favor 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 benamidar should acknowledge the purchase to have been made benami and waive the right conferred upon him by sections 259 and 260, and gave 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.

21. In the case of Gunga Gobind v. Gobind Narayan Unreported 7th July 1863 the suit was brought by the real purchaser, not against the certified purchaser, but against a person to whom the certified purchaser had conveyed the property benami for the real purchaser. Gobind Narayan, the defendant, to whom the certified purchaser had conveyed the estate, allowed the real purchaser to remain in possession nearly twelve years, and subsequently turned him out. The case was, therefore, in effect one simply between a person for whose benefit an estate had been conveyed to another benami, who, after many years possession by the person for whom he held, had wrongfully dispossessed him.

22. In the case of Kunj Behari Lal v. Sheikh Khejra Ali and others Special Appeal No. 31 of 1864 the plaintiff sued to recover possession upon the ground that the defendants were mortgagees, and that after the expiry of the mortgage they had dispossessed the plaintiff of the property covered by the mortgage and other property held by him khas. The defendants set up that they had purchased at sales for arrears of revenue in the name of the plaintiff, and had been in possession since as proprietors. The Court said if the defendant''s allegation was true the plaintiff was out of Court, and they remanded the case for trial as to which of the allegations was true. It must be remarked that the allegation of the defendants was that they, ever since the purchase in the name of the plaintiff, had been in possession as proprietors. The defendants'' allegation was sufficient to enable them to prove that notwithstanding the estate had been purchased in the name of the plaintiff, he had waived his right and made over the property to the defendants as proprietors.

23. The case of Sheetanath Ghose v. Madhub Narain Roy 1 W.R. 329 turned upon the ground that the benami purchase by the judgment-debtor in the name of a third party was fraudulent as against the creditors of the real purchaser. The case was not one between the benamidar and the actual purchaser to redeem.

24. In the case out of which the question arose, the purchase was of the right of a mortgagor to redeem. I purposely abstain from using the words "equity of redemption." The purchaser could not under that purchase obtain anything more than symbolical possession of the right which be purchased. The possession of the mortgagee and of his representatives was merely the possession of the land and of the rents thereof and not of the right of the mortgagor. The suit is in effect to

enforce the right of the mortgagor, and to redeem the mortgage, and if the suit cannot be maintained on the ground that the purchase was benami for the mortgagee, the provisions of sections 259, 260 and 264, would be nugatory.

25. If the real purchaser is for wise purposes precluded, as in my opinion he is, by section 260 from recovering the property purchased from the benamidar when the latter is put into actual possession, there can be no reason why the law should allow the real purchaser by some device to obtain actual possession, and leave the certified purchaser to content himself with the symbolical possession in cases in which only symbolical possession can be given, or in other words to leave him a mere shadow instead of the substance.

26. The case is sent back to the Court which referred it.

Bayley, J.

27. I concur with the honourable the Chief Justice and would answer the question according to the view now taken. Mr. Justice Macpherson and J had come to the same conclusion on referring the question.

Macpherson, J.

28. I concur.

Glover, J.

29. I also concur.

Jackson, J.

30. In this case, I have the misfortune to differ from his Lordship the Chief Justice and from my other colleagues, but I apprehend that the doubts expressed by the two learned Judges who have referred this case to the Full Bench fully justify me in stating the opinion I have formed, if indeed, the importance and the nature of the case did not make it imperative on me to do so, although I have the misfortune to be alone in holding that opinion.

31. The question referred is this:-- "A purchaser of immoveable property sold in execution of a decree, having obtained a certificate u/s 259 of Act VIII of 1859, and having instituted a suit to recover possession of property purchased by ejecting the person who is in possession, is the latter (the defendant in the suit) debarred, by the terms of section 260, from pleading that although the plaintiff is the certified purchaser, be did not purchase in his own behalf, but merely on behalf of and benami for the defendant, and is therefore not entitled to recover possession?"

32. This question I may observe, in the form in which it is put, does not appear to me to raise the whole of the issues involved in the present case. It might be answered, generally, as if the defendant in possession was not a mortgagee in possession but had got otherwise into possession. I will not, however, shrink from the true import

of the question, and I will only observe that although it refers specifically to section 260 of Act VIII of 1859, yet from the course the argument has taken it has been contended, on behalf of the plaintiff, that the defendant is out of Court rather under the provisions of all the sections from 259 to 269, than u/s 260 alone. I under stand the plaintiff, as the case has been put for him, to rely on the express title he has acquired u/s 259, and the symbolical possession which he has obtained under the subsequent sections, rather than on the quasi penal terms of section 260.

33. There has been some discussion as to the character of section 260, Mr. Allan contending that it was of a remedial nature. I confess if any rule of construction is to be resorted to other than that founded on the very words of the Legislature, I should be inclined to treat the section rather as one of a penal than a remedial nature, and therefore one not to be construed over strictly against the defendant.

34. I understand that from the fusion of law and equity which characterizes the proceedings in our Civil Courts, the proceedings possess such a character of elasticity as to enable them to deal with all the rights and equities which arise in a suit. I therefore apprehend that every circumstance and every plea must be fully considered in order to do Justice, unless the cognizance of any particular plea and any particular circumstance is expressly barred by Legislative enactment.

35. I would ask, is there anything in the case set up by the defendant before us which would prevent the Court entertaining it in answer to the plaintiff''s case? I may possibly be told in answer, that there is an imputation of fraud arising from the mere mention of the word "benami." I humbly think that a fallacy lurks in the supposition that fraud necessarily attaches to the use of that word. The conditions of society in this country and the habits and feelings of natives here are so different from those of the people of European countries, that I think we ought to guard ourselves against imputing motives of fraud to what we find prevalent here, simply because it is not usual or recognized among ourselves. My own belief is that the benami system is not essentially one of fraud. I believe that benami arrangements are constantly resorted to by persons perfectly honest, perfectly solvent, and far from every expectation of insolvency. No doubt, serious frauds are frequently carried out by the use of the benami system. It may possibly be that the Legislature, at some future time or other, finding that frauds are perpetrated under that system of a serious character, may absolutely forbid benami transactions; and when the Legislature have so directed, the Courts will be bound to act accordingly. Up to this time the Legislature have not attached the taint of fraud to benami transactions. I think, therefore, that there is a priori nothing to hinder us from enquiring into and dealing with the case set up by the defendant. Of course, the question remains whether that case can be supported u/s 259 or to section 269.

36. It appears to me on reading the whole of those sections together, that section 260 seems to be and is out of place. It is a portion of substantive law inserted among various provisions of pure procedure. I have no knowledge of the secret

history of the framing of this Code, nor have I the means of ascertaining what took place in the Council Chamber when the bill was in Committee; but, looking to the near neighborhood of Acts VIII and XI of 1859 in the Statute book, and the circumstance that the two Acts were at the same time under consideration, it may have occurred to some one concerned in the framing of the Code, that it was very desirable to introduce this section in Act VIII from the Sale Law where it had stood for many years previously. I am confirmed in this view by the fact that no such provision appears in the Code of Procedure prepared by Her Majesty''s Commissioners. See their First Report, 1856, page 68; see also Third Report, 1856, page 45, Clause CLXXXIX.

37. Now it appears to me that the provision corresponding with this section in the Sale Law, viz., section 36 of Act XI of 1859, is very much in its place. It was enacted for a reason which is very well known, and taken in combination with the other provisions of the Sale Law, it affords ample security to purchasers. Under Act XI of 1859, the thing sold is the land, and by section 29 the Collector is directed to "order delivery of possession of the estate or share purchased'' to be made by removing any person who may refuse to vacate the same;" and following that, section 36 says, "any suit brought to oust the certified purchaser as aforesaid, on the ground that the purchase was made on behalf of another person not the certified purchaser, or on behalf partly of himself and partly of another person, though by "agreement the name of the certified purchaser was used, shall be dismissed with costs." Therefore the value of section 36 taken in connection with section 29 is apparent. The purchaser buys the land and is put into actual possession by the Collector, any suit to oust him on the ground of benami will be dismissed with costs.

38. Now it appears to me that there has been a not altogether successful attempt to engraft that provision of the Sale Law upon Act VIII of 1859, because as the thing sold under that Act are of many kinds and scarcely in any case actual land, but only the right title and interest of the defendant, the words "suit to oust the purchaser" would be inappropriate. Therefore the words used are "any suit brought against the certified purchaser, on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." I have endeavored in vain to bring myself to place on those words any construction more extended than that which they naturally bear, viz., that any person who may have entrusted or authorized another to buy property for him at execution sale, not using his own name, but that of the person employed, shall not succeed in a suit against the farzi to recover possession of the thing purchased, but that his suit will he dismissed with costs; and, therefore, in any case to which that provision distinctly applies, it must be put in force without qualification of any kind, and such a suit must be dismissed; but except in a case of this kind, I would in reading the Code put the section altogether aside. It contains two lines which are superfluous except as introductory of the rule taken from the Sale Law. They are "the certificate shall state the name of

the person who at the time of sale is declared to be the actual purchaser." These words have no signification whatever apart from the provisions which follow, because when u/s 259 the Court grants a certificate to the person who may have been declared the purchaser at the sale to the effect that he has purchased the right, title and interest of the defendant in the property sold, he has already done what is further directed in section 260, for he has necessarily stated the name of the person who is the actual purchaser. But now the "declared purchaser" becomes the "certified purchaser," and this is the term used in the Sale Act, section 36.

38. If section 260 be put out of the way as referring only to the class of suits expressly mentioned therein, is there any thing in the other sections relied upon, viz., section 259 and sections 261 to 269, which will prevent the defendant being heard in this case? I confess I do not see anything. It appears to me that a benami purchase in this country, when the facts are proved, simply means that a particular thing has been purchased by a certain person with his money and for his own benefit, but that the name of another has been used. There is nothing in the nature of a trust or any other idea but what I have stated. It seems to me that a benami purchase might be effected in the name, neither of the actual purchaser nor of the agent, but in a fictitious name, and that on proof of the facts the actual purchaser would be entitled to all the benefits of his purchase, and as much protected as if he had bought in his own name. Is there anything to prevent the possession given by the Court under sections 261 and 267, which has been given ostensibly to the farzi from being dealt with as a possession given to the real purchaser in that name, and when we find that possession has gone to the alleged real purchaser, and not to the farzi, I think this must be held to be the case, viz., that the real purchaser has got the possession, though he has taken it in the name of the farzi. In the present case there is no doubt some complication, because the defendant who is alleged to be the real purchaser was in possession of the land as mortgagee, and I am not certain what the state of the facts may be but it was and possibly may now be uncertain whether his possession since the purchase was that of mortgagee or purchaser, and that perhaps may be an issue to be tried. But I take it, if she defendant can make out that the purchase was made by his directions, for his benefit, with his money, and that he has since held without question proprietary possession, he will be entitled to retain that possession, although in making out the certificate of purchase the name of plaintiff may have been used instead of the name of the defendant. I cannot shut my eyes to the fact, that, if we hold otherwise in this suit, and in other suits which may resemble this, we shall be giving the direct assistance of the law and of the Courts to enable the plaintiff in such cases to perpetrate a shameful fraud. I take it to be quite clear that it is proved, in the opinion of all the Courts, in this case that the purchase was effected with the money of the defendant; that the plaintiff was at that time his servant and acting under his instructions, and that in strict equity as between plaintiff and defendant, plaintiff had not a shadow of right to this property. I think, therefore, that defendant is not debarred, either by the terms of section 260,

or otherwise, from raising the defence which be has raised; that that defence is a just and sufficient one; and that plaintiff''s suit ought to be dismissed with costs.