

Vishvanath Dhondihaj Gayadhani Vs Pandharinath Ganesh

Court: Bombay High Court

Date of Decision: Feb. 16, 1925

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Section 63, 66

Citation: (1926) 28 BOMLR 997 : 97 Ind. Cas. 688

Hon'ble Judges: Norman Macleod, J; Coyajee, J

Bench: Division Bench

Final Decision: Allowed

Judgement

Norman Macleod, Kt., C.J.

This suit relates to a property, which originally belonged to one Vasantpuri, and was sold by auction in

Darkhast No. 535 of 1908 of the Nasik Court. Defendant No. 1 was the certified purchaser. The plaintiff now claims to be the owner of half,

saying that defendant No. 1 purchased it at the auction for plaintiff and defendant No. 1, on plaintiff's supplying half the amount needed for the

purchase and further expenses. The Judge said:-

I believe that the plaintiff actually paid the amounts which he says he paid for the purchase and possession of the house. I believe Exhibits 43 and

44 when they say that the plaintiff and defendant No. 1 had agreed to purchase the house jointly in their presence. I would have answered the

second issue, whether the plaintiff proved that he owned half share in the house, in the affirmative had I held this suit tenable,

2. But the Judge was of opinion that the suit was not tenable on account of the provisions of Section 63 of the Civil Procedure Code.

3. Clause (1) runs as follows :-

No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be proscribed on the

ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims,

4. The suit was accordingly dismissed, The appellate Judge, after consideration of the various authorities cited before him, came to the same

conclusion, It was conceded that the authorities show that a Court purchase of mortgaged property by one of two or more co-mortgagees would

be a purchase of all the mortgagees, and Section 66 did not apply, if he bought the property in his own name, it was also conceded that if a

manager of a joint Hindu family bought property in his own name out of the joint funds, although he took a sale certificate in his own name, still the

other members of the family could obtain a declaration that the property was joint family property. But, in the opinion of the appellate Judge, those

authorities could not be extended to a case where two persons enter into a joint venture to buy a property at a Court-sale, when, in spite of the

funds being provided jointly, the sale certificate was issued to one of the adventurers only.

5. Now, it is undoubted that Section 66, Civil Procedure Code, 1908, corresponding with Section 317 of the old Code of 1882, was designed to

check the practice of making what are known as benami purchases at auction sales, that is to say, transactions in which one person secretly

purchases on his own account in the name of another. The appellate Judge was of opinion that a benami transaction can arise even when A

becomes a co-purchaser with B in B's name for a share only

6. Without accepting that as a general proposition, it seems to me, on the facts of this case, the Judges were wrong in bringing it within the

provisions of Section 66. In *Achhaibar Dube v. Tapasi Dube* (1907) ILR 29 All. 557 in execution of a joint decree on a mortgage, one of the

decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree, namely, the

mortgage debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. The plaintiff then

sued for a declaration that the property which had been purchased at the auction sale by the defendant as mortgagee was the joint property of

himself and the plaintiff". Mr. Justice Richards, after referring to various cases which had been cited in argument before him, said (pp. 559, 660) :-

Suppose it were clearly proved that two partners 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 an auction sale by one of the decree-holders out of the partnership funds or by

setting off the joint decree obtained by the partners. Section 817 could, I think, never operate to bar a suit brought by one of the partners for a

declaration that the property purchased was partnership property. In such a case the plaintiff would not be merely setting up that the ostensible

purchaser had purchased the property benami for him; but his case would be that the property purchased was partnership property by virtue of the

partnership which existed between them altogether irrespective of the sale.

7. I do not think there is any difference between the case where one of the partners in a partnership, which is in existence for other purposes, buys

property from the joint funds in his own name, and the case where there is a partnership in a single adventure in which two or more persons agree

to unite their funds for the purpose of purchasing the property. There is no intention, then, of a secret purchase by one person in the name of

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

it out of the range altogether of benami transactions.

8. In my opinion, the decision of the Judge was wrong. The plaintiff is entitled to the decree which he asked for. The appeal is allowed with costs

throughout. There will be an inquiry as to future means profits.

Coyajee, J.

9. I agree.