

Naraln Dei Vs. Durga Dei and anr.

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SooperKanoon Citation : sooperkanoon.com/450781

Court : Allahabad

Decided On : Jan-03-1913

Reported in : (1913)ILR35All138

Judge : Henry Richards, Kt. C.J. and ;Banerji, J.

Appellant : Naraln Dei

Respondent : Durga Dei and anr.

Judgement :

Henry Richards, Kt. C.J. and Banerji, J.

1. The facts out of which this Letters Patent appeal arises are very clearly stated in the judgment of the learned Judge of this Court. The judgment is reported in 10 A.L.J.R., 97. The suit is to recover, amongst other things, a share in a house by partition, and also for mesne profits. The court of first instance decided in favour of the plaintiff. On first appeal the decision of the court of first instance was reversed so far as the property now in dispute was concerned, on the ground that the claim in respect thereof was barred by the provisions of Section 66 of the Code of Civil Procedure. This decision was in due course affirmed by a learned Judge of this Court, and against Ha decision the present Letters Patent appeal has been preferred.

2. When the case was before us on a previous occasion we determined that we would consider the evidence in the case without remanding the case and so avoid

putting the parties to the expense and delay of referring issues. We granted time to the parties in order that the evidence might be looked into. As a result we are able to consider the present case upon a state of facts which have to be admitted. The house in question was purchased by one Musammat Sundar Dei, the widow of one Bhola Nath. This house was subsequently incorporated into another one which admittedly belonged to Bhola Nath and formed part of his estate. It is quite clear therefore that it was the intention of his widow that this house should be part of her husband's estate and should not remain her separate property. Dr. Tej Bahadur has further to admit that he cannot contend on the evidence that the house was not in fact purchased on behalf of the widow, though the purchase was made in the name of Baldeo. We are also satisfied upon the evidence that Musammat Sundar Dei remained in possession of the house up to the time of her death, and that during her life-time Baldeo never pretended that the property was his, or that the auction purchase had been made in reality for his benefit.

3. The only question therefore for decision in the case is a purely legal one, namely, whether under the circumstances of the present case Section 66 of the Code of Civil Procedure prevents the present suit being brought. It is no doubt a suit against a certified auction purchaser, and so far it is within the words of Section 66. However, it is contended by the appellant that the plaintiff does not claim through Musammat Sundar Dei, but through her own father Bhola Nath; that consequently the suit is not a suit brought on the ground that the purchase was made on behalf of the plaintiff or on behalf of any one through whom she claims, and that therefore the suit is not barred by the provisions of Section 66. In our opinion this plea is well founded. The learned Judge of this Court refers in his judgment to the Full Bench case of *Main Narain v. Mohanian* (1903) I.L.R., 26 All., 82. In that case one Ram Sahai had represented himself to be the owner of certain property. It turned out that he had no title to part of the property at the date of the mortgage. Subsequently, however, that part of the property to which he had no title was put up to sale in execution of a simple money decree against the real owner and purchased in the name of Musammat Mohanian, the wife of Ram Sahai. The plaintiffs in the suit, who were the mortgagees of Ram Sahai, claimed that the purchase of Mohanian was benami for Ram Sahai and that under the provisions of the Transfer of Property Act any estate which Ram Sahai

subsequently acquired in the property which he purported to mortgage became subject to the mortgage. It was held that the plaintiffs were not entitled to maintain the suit having regard to the analogous Section 317 of the Code of Civil Procedure of 1882. Referring to the case the learned Judge of this Court, says: 'The words used in Section 317 were the subject of careful consideration by five judges of this Court, and they arrived unanimously at the conclusion that this section was intended to preclude the institution of a suit against the certified purchaser by the beneficial owner or the successor in title of the beneficial owner.' We do not think that the decision in the Full Bench case justified these remarks of the learned Judge of this Court. True it is that the learned Chief Justice says in his judgment (at page 87): 'It appears to me clear that the section was intended to preclude the institution of a suit against a certified purchaser by the beneficial owner or the successors in title of the beneficial owner.' It is quite clear when the learned Chief Justice uses the words 'successors in title' he was referring to a claim which was being made by a person who derived title from the alleged beneficial owner. It is quite clear that the plaintiff mortgagee was claiming directly through the mortgagor, whose wife, it was alleged, had purchased the property benami for him. The judgment of two of the members of the Court in the most express language decided the case upon the ground that the plaintiff was claiming through Ram Sahai, and that inasmuch as Ram Sahai could not have maintained the suit against Mohanian, the persons who claimed through him had no better right to do so. We think that under the circumstances of the present case the plaintiff's claim is as heir of her father Bhola Nath, that she is not claiming in any way through her mother Musammat Sundar Dei and that therefore her suit does not come within the provisions of Section 66. The facts being as already stated, she, in our opinion, was entitled to recover possession by partition of the property in dispute and was also entitled to mesne profits as held by the court of first instance.

4. We therefore allow the appeal, set aside the decree of this Court and also of the lower appellate court and restore the decree of the court of first instance with costs in all courts.