Privy Council Appeal No. 82 *of* 1924.

Allahabad Appeal No. 15 *of* 1921.

Kunwar Muhammad Abdul Jalil Khan and others - - - *Appellants*

v.

Khan Bahadur Muhammad Obaid Ullah Khan and others - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH JUNE, 1929.

Present at the Hearing:

LORD BLANESBURGH.
LORD DARLING.
LORD TOMLIN.
SIR JOHN WALLIS.
SIR GEORGE LOWNDES.

[*Delivered by* SIR JOHN WALLIS.]

The parties to this suit are members of a Mahomedan family, and the plaintiffs sue to establish their rights as heirs of Abdul Shakur and Abdul Latif to certain properties in the villages of Chakathal and Kakathal, which are in possession of Obaid Ullah, the 1st defendant.

The deceased Abdul Shakur was the youngest of four brothers, Abdul Latif was the son of the eldest brother and Obaid Ullah is the son of a younger brother. The second and third defendants are widows who have been made parties as being among the heirs of Abdul Latif. The present appeal relates only to certain properties in the aforesaid villages, which were purchased at court auctions in execution of decrees by Mahmud Ali on the 20th April, 1885, and by Sirajul Haq on the 21st of March, 1892. On the 7th and 8th July, 1900, Sirajul Haq and Mahmud Ali executed sale deeds of these properties in favour of Obaid Ullah, the 1st defendant.

The plaintiffs' case is that the purchases at the court auctions and the subsequent transfers were made *benami* for Abdul Shakur and Abdul Latif, who had provided the purchase money.

The plaintiffs further alleged that Abdul Latif, who died in 1909, and Abdul Shakur, who died in 1915, and the plaintiffs after them, had been in proprietary possession of these properties ever since the date of the court auctions, and that by virtue of their possession for more than twelve years the plaintiffs had become absolute owners in possession of the properties in question.

It was admitted in the plaint that Abdul Latif, in April, 1909, some months before his death had executed a *wakfnama* of all his properties, but it was alleged that this *wakfnama* was a mere paper transaction, and was not binding on the plaintiffs.

The plaint also alleged that after the deaths of Abdul Latif and Abdul Shakur, the 1st defendant, in September, 1915, instituted suits for arrears of rent against tenants of the properties, and in May, 1916, instituted a suit for profits, which jeopardised the plaintiffs' rights, and made it necessary to institute the present suit.

They accordingly prayed for a declaration that they were the actual owners in possession of the suit properties, and for an injunction against the 1st defendant. The plaint was subsequently amended by including a prayer for possession in case the Court should be of opinion that the plaintiffs were not in possession.

The 1st defendant pleaded that as regards the properties purchased at court auctions in the name of Sirajul Haq and Mahmud Ali, the suit was barred by section 66 of the Civil Procedure Code of 1908. He denied that the auction purchase was *benami*, and alleged that he and his transferors had all along been in possession. As regards the *wakf* created by Abdul Latif, the 1st defendant admitted the execution of the deed of *wakf*, and that he had attested it, and alleged that after the death of Abdul Latif he had been duly appointed *mutawalli* or trustee of the *wakf*, but he alleged that he was then unaware that the *wakf* deed included properties of his own which had been purchased by Sirajul Haq and Mahmud Ali at the court auctions, and subsequently transferred to him. He further pleaded that the plaintiffs were not entitled to sue in respect of the properties owned by the *wakf* unless the deed of *wakf* was cancelled.

The 2nd and 3rd defendants filed written statements in which they challenged the validity of the *wakf* and prayed that their interest as heirs of Abdul Latif should be protected. The issues material to this appeal were as follows :—

(3) Whether the plaintiffs are in possession ?

(4) Whether the claim is time barred ?

(5) Whether the plaintiffs by adverse possession extending over 12 years have become the proprietors of the properties in suit ?

(6) Whether section 66 of the Civil Procedure Code bars the suit ?

(7) Whether purchases and acquisitions made by Sirajul Ilaq and Mahmud Ali Khan were really made by Abdul Latif Khan and Abdul Shakur Khan ?

(8) Whether the sales in favour of the Defendant No. 1 were fictitious and the transactions were *benami* for Abdul Latif and Abdul Shakur ?

(11) Whether the *wakfnama* executed by Abul Latif was a genuine transaction or was it only a nominal one ?

As regards issues (3) and (4) the Subordinate Judge, whose findings of fact were accepted by the High Court found that plaintiffs were not in possession at the date of suit, but that they and those through whom they claimed had been in possession, " physical possession at any rate," down to the death of Abdul Shakur in 1915.

On the 6th, 7th and 8th issues, he found that the purchases and acquisitions made by Sirajul Haq and Mahmud Ali were really made by Abdul Latif and Abdul Shakur and that the sales by Sirajul Heq and Mahmud Ali to the 1st defendant were also *benami* for Abdul Latif and Abdul Shakur, but as regards the properties covered by the auction purchases, he held the suit was barred by section 66 of the Civil Procedure Code.

As regards the 5th issue the Subordinate Judge disposed of it by observing " the plaintiffs have pleaded in the alternative that if they had no title initially they acquired one by adverse possession The finding of the Court being that in respect of the bulk of the property the owners were Shakur and Latif, no question of gain of proprietary title by adverse possession arises."

The Subordinate Judge also held that the *wakf* created by Abdul Latif was a good and valid one, but that this was not a sufficient ground for refusing to give possession to the rightful heirs of the founder as the 1st defendant had taken possession of the *wakf* properties not as a duly appointed *mutawalli*, but as a mere trespasser.

In the result he decreed the suit except as to the properties which had been purchased *benami* at the court auctions, and directed that as regards any questions arising between the heirs of Abdul Shakur and Abdul Latif the parties should be referred to a separate suit.

The plaintiffs appealed to the High Court and the 1st defendant filed cross-objections.

The High Court agreed with the findings of fact of the Subordinate Judge and approved of his reasons for holding that the suit was barred as regards the properties covered by the auction purchases. They held, however, that he was wrong in giving the plaintiffs a decree in respect of properties which were included in the *wakf* created by Abdul Latif, as the gift of those properties to the *wakf* had been duly perfected by Abdul Latif in accordance

with the requirements of Mohammedan law ,and as, after his death, the 1st defendant had been duly appointed *mutawalli* of the *wakf*.

They therefore dismissed the plaintiffs' appeal and allowed the 1st defendant's cross-objections as to the *wakf* properties.

As regards the properties which, according to the findings, were purchased at court auctions by Sirajul Haq and Mahmud Ali *benami* for Abdul Shakur and Abdul Latif, and were subsequently transferred to the 1st defendant, Obaid Ullah *benami* for them, both the lower Courts were of opinion that the suit was barred under section 66 of the Civil Procedure Code of 1908 on the ground that it was a suit against a " person claiming title under a purchase certified by the Court . . . on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims." The present section says that " no suit shall be maintained against any person claiming title under a purchase certified by the Court," whereas the wording of the corresponding section 317 of the Code of 1882 was " no suit shall be maintained against the certified purchaser," and the alteration was admittedly made because it had been held by the Calcutta, Madras and Allahabad Courts that the section only prohibited suits of this nature instituted against the certified purchaser himself and did not prohibit them when instituted against transferees from him, whereas in Bombay it was held that it did. In these circumstances, it has been held in Calcutta that the provisions of section 66 of the present Code in so far as they prohibit suits on the ground specified in the section, do not apply to suits against transferees from *benamidars* made when section 317 of the Code of 1882 was in force, and it has been contended before their Lordships on the authority of that decision that the lower Courts were wrong in applying the provisions of section 66 of the Code of 1908 to the present case.

Their Lordships do not propose to deal with this question, because, in their opinion, assuming the Courts to have been right in holding that the case must be dealt with under the provisions of section 66 of the present Code, they are of opinion that the plaintiffs are entitled to succeed on their alternative cause of action, which is the subject of the 5th issue, viz., their dispossession by the 1st defendant after they had been in possession for more than twelve years, a contention very briefly dealt with by the Subordinate Judge and not mentioned by the High Court, though it was one of the grounds of appeal and was taken again in the application for leave to appeal to His Majesty in Council.

In dealing with these questions their Lordships think it desirable in the first place to refer to *Mussumat Buhuns Kowur* v. *Lalla Buhooree Lall and Jokhee Lall*, 14 Moo.I.A. 496, a decision of this Board on the corresponding section of the Code of 1859, which is the leading authority as to the scope of the section. It was held in that case that the effect of the section was not to

make these *benami* transactions illegal, but only to prohibit for reasons of public policy a suit against the certified purchaser on the grounds specified in the section; and in *Lokhee Narain Roy Chowdhry* v. *Kalypuddo Bandopadhya*, 2 I.A. 154, it was expressly ruled by this Board, following that decision, that where the certified purchaser is a plaintiff, the real owner, if in possession, and if that possession has been honestly obtained is not precluded by the section from showing the real nature of the transaction.

Now it is clear under these rulings that, while the section protects the certified purchaser, so long as he retains the possession given him by the Court, from a suit by the true owner, if he allows the real purchaser "being the true owner" to get possession, the section does not enable him to sue for possession, because possession has come into the hands of the true owner, who is entitled to it.

If then the true owner is subsequently dispossessed by the certified purchaser, is he precluded by the Section from suing for recovery of possession? That must depend on the question whether he is to be regarded as suing "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the Section. In such a case, if the true owner has been in possession for less than twelve years, he will no doubt have to aver and prove as part of his cause of action that the auction purchase was made on his behalf, but that is not the case here, and their Lordships express no opinion about this question as it has not been argued before them.

Where, however, as in the present case, the real purchasers have been allowed to remain in adverse possession for more than twelve years before dispossession, they are entitled to sue for possession on the title so acquired under the Limitation Act, and it is unnecessary for them to aver or prove that the auction purchases were made on their behalf.

In their Lordships' opinion the provisions of Section 66 of the Code of Civil Procedure and the corresponding sections of the earlier Codes have no application to such a case.

A suit based on dispossession after twelve years' adverse possession is clearly not a suit "on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims" within the meaning of the section, and does not become so merely because the plaintiff as part of an alternative cause of action sets up and proves that the purchases were, in fact, *benami*.

The plaintiffs are therefore entitled to succeed as regards the properties which were included in the auction purchases, except in so far as they are included in the *wakf* created by Abdul Latif in 1909. It has been found by both Courts that the gift to the *wakf* was duly perfected according to the rules of Mahommedan law

and by the High Court that the 1st defendant was duly appointed *mutawalli* or trustee of the *wakf* after the founder's death and the plaintiffs' claim to the *wakf* properties has therefore been rightly disallowed.

In these circumstances the appeal must be allowed and the decrees of the lower Courts varied by giving the plaintiffs a decree for the properties covered by the auction purchases and not included in the *wakf*, but in the circumstances their Lordships are of opinion that the plaintiffs should only recover half their costs in the Courts below and here, and they will humbly advise His Majesty accordingly.

In the Privy Council.

KUNWAR MUHAMMAD ABDUL JALIL KHAN
AND OTHERS

v

KHAN BAHADUR MUHAMMAD OBAID ULLAH
KHAN AND OTHERS.

DELIVERED BY SIR JOHN WALLIS.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1929.