

Privy Council Appeal No. 106 of 1938
Allahabad Appeal No. 48 of 1936

Bishun Dayal - - - - - *Appellant*

v.

Kesho Prasad and another - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH JULY, 1940

Present at the Hearing :

VISCOUNT MAUGHAM

LORD RUSSELL OF KILLOWEN

LORD WRIGHT

SIR GEORGE RANKIN

MR. M. R. JAYAKAR

[*Delivered by* SIR GEORGE RANKIN]

This appeal is brought by the plaintiff from a decree dated 11th August, 1936, of the High Court at Allahabad, which affirmed the decision (30th June, 1932), of the Subordinate Judge at Banda dismissing the suit. The only question which now arises is as to the maintainability of the suit in view of section 66 of the Code of Civil Procedure:—

“ 66.—(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims.

“ (2) Nothing in this section shall bar a suit to obtain a declaration that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.”

The plaint was filed on 8th January, 1932, and the case made thereby was as follows. One Ram Dayal died in 1910 leaving as his heiress Musammat Ram Piari Kuer, his widow. On her death in 1922 the plaintiff succeeded to his property as reversioner according to the Hindu law. The first defendant Kesho Prasad was nephew to Ram Dayal, and on the 20th July, 1907, at a Court sale at which the village of Mamsi Khurd was sold in execution, he had bid therefor on behalf of himself, his brother Kedar Nath and Ram Dayal. The bid was accepted and the sale confirmed.

but the sale certificate was made out in the sole name of Kesho Prasad, and his name alone was recorded in the revenue record (*khewat*). The property was held by Ram Dayal and the defendants jointly, Ram Dayal and afterwards his widow receiving their share of the net profits from Kesho Prasad, who was himself the *lambardar* of the village. But after the death of the widow in 1922 the defendants stopped paying any part of the profits and denied the right of the plaintiff. The relief prayed for by the plaintiff was a decree for joint possession of one-half of the village and mesne profits. This was on the footing that Ram Dayal had a one-half interest, the other half belonging to Kesho Prasad either alone or jointly with his brother Kedar Nath.

The plaintiff contained other allegations directed to show that at the time of a previous suit brought by the plaintiff in 1923 against the defendants and others he did not know of the facts giving rise to his present claim. It contained an express averment that Ram Dayal was not joint with the defendants at the time of his death and it is not now suggested that they were joint in 1907 at the time of the execution sale.

The learned trial Judge held that the purchase was made by Kesho Prasad solely on his own account and that neither the plaintiff nor Ram Dayal nor the widow were ever in possession of a half share. The High Court (Sulaiman C.J. and Bajpai J.) having pointed out that Ram Dayal and Kesho Prasad were separate, and that the plaintiff's claim as laid in the plaintiff was to rights alleged to have been acquired by the auction purchase of 1907, held that section 66 applied to the case and barred the suit. The learned Judges did not find it necessary to come to a finding on the questions of fact upon which the plaintiff had failed in the trial Court. They were careful in two parts of their joint judgment to make clear that the plaintiff's case was rested by him upon the auction purchase:—

“ There was, however, no case put forward by the plaintiff in the plaintiff suggesting that subsequent to the auction purchase of 1907 either Ram Dayal or his widow had by adverse possession for over 12 years acquired title to this property. The suit was not based on any such adverse title claimed independently of the rights alleged to have been acquired by the auction purchase of 1907.

* * * *

“ Had the plaintiff come into Court on the allegation that subsequent to the auction purchase of 1907 either Ram Dayal or after him his widow acquired title by adverse possession extending over 12 years, we would have certainly entertained the claim. It has been laid down by their Lordships of the Privy Council in the case of *Abdul Jalil Khan v. Obaid-ullah Khan* (1929, L.R. 56, I.A. 330, I.L.R. 51, All. 675), that section 66 is not a bar to a claim based on a title independent of the auction purchase; but no such case was put forward in the plaintiff and none has been pressed before us in appeal.

On this appeal learned counsel for the appellant has confined his argument to maintaining that the plaintiff properly interpreted did raise a case based upon possession

subsequent to the auction purchase, which possession had continued for sufficient time to bar the rights of Kesho Prasad under article 142 or 144 of the Limitation Act and to extinguish his title under section 28 thereof. Learned counsel did not dispute that section 66 excluded any claim of the plaintiff based upon an averment that the auction purchase had been made by Kesho Prasad on account of Ram Dayal as well as on his own account. Their Lordships have therefore no occasion to discuss the various points emerging from the careful study made in the High Court of the case law upon the section. It is sufficient to say that their examination of the plaint leads them to agree with the High Court in holding that the only case pleaded by the plaintiff was that Ram Dayal derived his right to half of the village from the auction purchase having been made in part on his behalf by Kesho Prasad. No case independent of this purchase and basing title upon subsequent possession is traceable in the memorandum of appeal to the High Court or in the grounds of appeal to His Majesty. In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the costs of the first respondent, who alone has appeared to contest the appeal.

In the Privy Council

BISHUN DAYAL

v.

KESHO PRASAD AND ANOTHER

DELIVERED BY SIR GEORGE RANKIN

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
POCOCK STREET, S.E. 1.

1940