Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Buhuns Koonwur v. *Lalla Buhoree Lall and another, from the High Court of Judicature at Fort William, in Bengal; delivered 2nd March,* 1872.

Present:

Sir James W. Colvile.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THE facts which raise the question for decision in this Appeal may be very shortly stated.

Brijlal Opadhia was mortgagee in possession of Talooka Doodhur. Whilst he was so in possession the interest of the mortagor was offered for sale under a Decree obtained against him by a creditor. Buhoree Lall became the ostensible purchaser at such sale, and the certificate of sale was granted to him in his own name as the purchaser.

Brijlal Opadhia remained in possession until his death, and after it this suit was brought by Buhoree Lall against his heirs (the present Appellants) for the redemption of the Talook and possession of it; alleging that the mortgage debt had been paid off by the receipt of the profits, and, if not, that he was ready to pay what might remain due.

The defence was that the purchase was made by Buhoree, in his own name, as a benamee purchaser for Brijlal Opadhia, and with his money; and that the attempt by Buhoree to set up title in himself was a fraud.

It has been decided by the Courts in India that this defence is true in fact, and it was admitted that

it must be so treated in dealing with the question to be decided in the present Appeal, which is, whether, having reference to certain clauses of the Code of Procedure, the defence can in law be made available.

The point upon the construction of the Code is one of considerable difficulty, and was felt to be so by the Courts in India. The principal Sudder Ameen decided in favour of the Defendants (the Appellants). His decision was reversed by a Division Bench of the High Court. However, the same Division Bench, in consequence of the doubts they entertained, upon a second hearing, referred the point by a short Memorandum to the Full Bench, who gave judgment for the Respondents; Mr. Justice Jackson dissenting from the decision.

It must be observed at the outset that the suit to be dealt with is one in which the Plaintiffs (the present Respondents) seek to establish a right against the Defendants (the Appellants), and that they invoke the aid of the Courts to give effect against equity and good conscience to a claim founded upon fraud.

It must be conceded that it is only by force of positive statutory law, that it can be obligatory upon the Courts to give their active assistance in such a case to the fraudulent plaintiffs against the defrauded Defendants. But it is said that this obligation is found in the Code of Civil Procedure.

It is well known that benamee purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not, by any general measure, declared such transactions to be illegal; and therefore they must still be recognized, and effect given to them by the Courts, except so far as positive enactment stands in the way, and directs a contrary course.

The enactments relied on by the Plaintiffs are found in a Code professing to deal, not with rights, but with remedies, and procedure to enforce rights.

The Preamble states the object of the Code to be "to simplify the procedure of the Courts of Civil Judicature." It is right to bear this object in mind in construing the clauses on which the Plaintiffs rely.

The only express enactment on the subject occurs in Section 260. That clause, after directing that the certificate shall state the name of the

person who is declared at the sale to be the actual purchaser, says this:—"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 purchaser was used, shall be dismissed with costs."

This enactment is clear and definite; there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit brought against the certified purchaser, and to a specific direction as to what shall be done with that suit, viz.:—that it shall be dismissed with costs.

The present suit, which is the converse of that pointed at in the clause, is not within the words or scope of it, and if dealt with in the manner directed, would, of course, come to a disastrous end.

It has, however, been contended, in support of the opinion of the majority of the Judges of the High Court, that there may be inferred from this clause, taken in connection with Section 259, and the sections relating to the manner of giving possession, a general intention, having for its object to prevent any inquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased, upon the question whether the purchase was benamee or not, and that effect should be given to that general intention.

Their Lordships consider it would not be safe to make such an inference except it arose upon very clear implication, and that it would be especially unsafe so to construe the Act as by inference to import into it prohibitory enactments, which would exclude an inquiry into the truth in *any* suit between the parties; when the express enactment is narrowed and confined to a specific direction as to what shall be done in a particular suit, which is described and defined in precise terms. And it appears to their Lordships that effect can reasonably be given to the provisions of the Code without making such implication.

Section 259, requiring the Court to grant a certificate to the person declared to be the purchaser at the sale, and directing that such certificate shall be taken and deemed to be a valid transfer of the debtor's right and interest, does no more than

create statutory evidence of the transfer, in place of the old mode of transfer by bill of sale. Their Lordships consider that no inference fairly arises from this clause, that it was intended to interfere with benamee transactions; for the language is adapted to meet the case of ordinary purchasers, and the same language might well have been used if benamee transactions had been wholly unknown.

The same observations apply to sections 261 to 266, which prescribe modes of giving possession of the various kinds of property. These provisions would naturally find a place in the Act in order to govern ordinary purchases, and no inference can, therefore, be drawn from them of an intention to prohibit benamee transactions.

It is evident from this analysis of the sections of the Code, that the inference sought to be made against benamee transactions rests entirely on the 260th clause, and that if this clause were absent from the Code, there is absolutely nothing in the other sections from which such an inference could be drawn.

It was strongly pressed upon their Lordships that as, by the express terms of the 260th section, a suit brought against a purchaser on the ground that the purchase was benamee must be dismissed, that it would, in many cases, lead to inconsistency, if that ground could be set up as a defence against a suit brought by a benameedar.

If this really were so, it would result from the attempt to deal with the subject of benamee in a partial manner; and even in that case their Lordships would consider it fitting that the legislature should declare its view, and supply a remedy rather than that the Courts should strain the existing statute. But it will probably be found that the suggested inconsistencies will not be great, and even if the Respondents' view were adopted, they would not be wholly avoided.

The object which the framers of the Code probably had in view, was to prevent judgment debtors becoming secret purchasers at the judicial sales of their property, and to empower the Court selling under a Decree to give effect to its own sale, without contention on the ground of benamee purchase, by placing the ostensible purchaser in possession of what it had sold, and of insuring respect to that

possession by enacting that any suit brought against him on the ground of benamee shall be dismissed.

In the cases where actual possession can be given of the thing sold by the Court, no difficulty can arise; for there the certified purchaser, having both the certificate and possession, can hold the property by virtue of clause 260, against any suit brought against him; and if that possession should be interfered with, either by force or fraud, on the part of any person, even a benamee claimant, it no doubt ought, without inquiry as to the benamee claim, to be restored.

It has been suggested that difficulties may arise in the case of possession given, under section 264, of lands in the occupancy of ryots to a certified purchaser, who had bought benamee for the judgment debtor, to whom the ryots may have been afterwards induced to pay their rents. It was said that, upon the strict construction of the Code, the purchaser might be precluded from suing the ryots for these rents. It is not necessary to decide these questions, but their Lordships do not consider this to be a necessary consequence of the construction; for, as regards the ryots, the certified purchaser when put into possession, becomes their landlord, both by title and possession, and it may well be that they should not be allowed to set up the benamee right of another against the person to whom they had thus become tenants.

So, in the case where debts due to the judgment debtor have been sold and delivered to the certified purchaser, the debtors may well be prevented from setting up the benamee title of a third person in actions brought by the holder of the certificate of sale, for they are by Section 265 prohibited from paying to any one except the certified purchaser, and they could not, therefore, set up title in another. Besides, when suing them, the certified purchaser is only reducing into possession the very thing he purchased.

In fact, the instances would probably be very few where any difficulty would arise. It would occur only in cases like the present, where the certified purchaser, who is really a benamee-dar, having been put into complete possession by the Court of the thing purchased at the

judicial sale, attempts to bring a new suit against the real purchaser, not to complete the title or even the possession to the thing purchased, but to enforce a right attaching to it. In this case, the purchaser has full possession of the thing he bought, so far as the selling Court can give it, and it cannot be taken from him; but when he seeks, as mortgagor, in a suit altogether new, to redeem against the mortgagee in possession under his mortgage title, then the express enactment contains no words to restrain the defence set up.

But difficulties would also arise from giving a wide construction to the Code, beyond the ordinary meaning of the words. It was declared by the High Court, in conformity with former decisions, that where the real owner has been permitted to have or retain possession by the ostensible purchaser, the latter cannot insist on his certified title to recover. Now, if the Code is to be read as wholly prohibitory of benamee judicial purchases, thus rendering them illegal, the defence in such cases ought to be disallowed; for if allowed to be set up, then effect must necessarily be given to that which, upon the hypothesis, is prohibited and illegal. The mere permission to hold possession cannot alone give or transfer a title from the benameedar to the real owner. The title must depend upon the purchase having been made benamee, and if that be unlawful, then it ought not to be allowed to prevail in the cases in which the High Court agree that it should do so.

The authorities, therefore, which have held that, in the cases just referred to, the real owner may set up his benamee right against the benameedar, necessarily involve the opinion that the Code has not made benamee purchases unlawful; and if that is so, there seems to be no sufficient reason for giving the provisions of the Code, in cases like the present, a larger operation than the language imports.

The High Court, in their Judgment in this case, approve of the above authorities; but they say they may be explained on the ground that the benameedar has, by consenting to the possession of the real owner, waived his right to the benefit given to him by the Code; but the Code had certainly not for its object the desire to confer a benefit on fraudulent benameedars. Its provisions must have been framed

on grounds of public policy, to which the doctrine of waiver is not properly applicable. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment. Their Lordships consider that where the Legislature has stopped, the Couts must stop.

It was said that the certified purchaser in a case like the present, would have the shadow only, and not the substance of the thing he bought, but this is exactly what in equity and good conscience he ought to have, if no positive law intervened. The question is, whether such positive law does intervene in this case.

For the reasons given, their Lordships do not feel justified in adopting a construction beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so; and they are consequently of opinion that there is no bar to preclude the inquiry in this suit into the real title.

Their Lordships find that a Cross Appeal to Her Majesty against the decision of the Courts below on the question of fact is pending. Without prejudice to such Cross Appeal, and to any Order to be made thereon, in case the same should be prosecuted, their Lordships will humbly advise Her Majesty to allow this Appeal, to reverse the Decrees appealed from, and in lieu thereof, to order that the Appeal to the High Court from the Decree of the Principal Sudder Ameen be dismissed with costs. The Appellant will have the costs of this Appeal.

PRINTED AT THE FOREIGN OFFICE BY T. HARRISON.—11/3/72.