

1951

DASHARATH-  
RAO  
GANPATRAO  
v.  
RAM-  
CHANDRA-  
RAO  
VINAYAK-  
RAO

Gajendra-  
gadkar J.

grows weaker and weaker with the advent of newer generations. The coparcenary under Hindu law is a somewhat unique institution. It is very elastic. Community of interest and unity of possession are its invariable features. But its membership and the respective rights of the members are not immutable or fixed. By deaths senior coparceners depart, while births introduce new coparceners. The respective rights of such coparceners increase or decrease according as there are deaths or births in the family. In a sense the institution of coparcenary is indestructible. Whenever a partition breaks up an old coparcenary, several new coparcenaries are born as each dividing member forms a separate coparcenary with his own sons and grandsons. Even so, from time to time partitions do bring about a change in the constitution of such coparcenaries so that we rarely come across cases where property belonging to a coparcenary remains undivided for generations together. But when we come across a case like the present, we must decide the plaintiffs' right principally by reference to the question as to whether the plaintiffs had a right by birth in the properties in suit. On the findings which we have already recorded in this appeal we hold that the plaintiffs must be deemed to have a right by birth in the properties in suit. If that is so, we are not prepared to hold that this right is either divested or extinguished merely because the plaintiffs seek to enforce that right against defendants who are more than four degrees removed from them.

[The rest of the judgment is not material to this report.]

*Appeal dismissed.*

M. W. P.

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### APPELLATE CIVIL

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*Before the Hon'ble Mr. M. C. Chagla, Chief Justice, and Mr. Justice Gajendragadkar.*

1951  
Feb. 7

NIMALCHAND GULABSA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. MADANLAL JAGANNATH AND OTHERS (ORIGINAL PLAINTIFFS), RESPONDENTS.\*

*Civil Procedure Code (Act V of 1908), s. 66—Agreement antecedent to Court-sale—Undertaking to convey property to be purchased at auction—Suit against purchaser to enforce agreement—Whether suit is barred.*

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\* Letters Patent Appeal No. 38 of 1949.

Section 66 of the Civil Procedure Code, 1908, only applies where the plaintiff claims or asserts a title in himself and challenges the title of the defendant as merely being benami. It does not contemplate cases where the plaintiff does not claim a title in himself but, admitting the title of the defendant, he claims the possession of the property by reason of an agreement entered into with the defendant by which the defendant was bound to transfer the property to him.

1951  
 NIMAL-  
 CHAND  
 GULABSA  
 v.  
 MADANLAL  
 JAGANNATH

Hence a suit against a purchaser at a Court-sale to enforce an agreement made by him before the sale to convey the property after the purchase is not barred under this section.

*Ganga Sahai v. Kesri Munshi Lal v. Ganga Sahai*,<sup>(1)</sup> and *Vadivelu Mudaliar v. Peria Manicka Mudaliar*,<sup>(2)</sup> explained.

*Harendra Chandra Roy v. Ram Kumar Roy*,<sup>(3)</sup> and *Upendralal Pal v. Ajaharuddin Ahmad*,<sup>(4)</sup> distinguished.

Section 66 of the Civil Procedure Code, 1908, ousts the jurisdiction of the Civil Court to grant equitable relief in certain cases where specific performance of an agreement is claimed, and by the accepted canon of construction to the extent that the jurisdiction of the Court is ousted the section must be strictly construed.

LETTERS PATENT APPEAL from the decision of Shah J. reversing the decision of N. K. Dravid, District Judge, at Jalgaon in appeal from the decision of N. K. Vani, Joint Civil Judge (Junior Division) at Bhusawal.

Suit for specific performance.

One Buda Vanjari, who owned two pieces of lands bearing survey numbers 21 and 71 situated at Dhamangaon in Bhusawal taluka, mortgaged them on June 4, 1919, to Gulabsa and two others (defendants). In 1923, Madanlal and others (plaintiffs) purchased the equity of redemption of survey No. 21 for a sum of Rs. 5,000. The defendants filed a suit in 1926 against Shambhu, the grandson of Buda, and the plaintiffs to enforce their mortgage and obtained a mortgage decree. In 1938 they filed a darkhast and brought the lands to sale to realise the decretal amount. On July 14, 1940, while the darkhast was pending, an agreement was executed by the defendants in favour of the plaintiffs which was in the following terms:—

“.....you, by your free will, have given S. No. 21 by name Hiramani, in our possession today together with crops. In the said Darkhast after the aforesaid properties have been auctioned and got into possession, half the land out of S. No. 71 by name Nagarthi, we shall give you

<sup>(1)</sup> (1915) L. R. 42 I. A. 177, s. c.    <sup>(2)</sup> (1920) 43 Mad. 643, p. c.  
 17 Bom. L. R. 998.

<sup>(3)</sup> (1931) 35 C. W. N. 940.

<sup>(4)</sup> (1934) 61 Cal. 371.

1951

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH

Shah J.

under a sale deed made and registered at our cost. If we do not give you a sale deed, we shall pay (you) the price of half the land in S. No. 71. But if S. No. 71 is purchased at the auction by some one else, we shall give you half the sum of the price thereof after we get the same from the Court. Secondly, if in the matter of possession of S. No. 21, by name Hiramani, any obstruction comes from you, this agreement shall be considered void.....”

Pursuant to this agreement possession of S. No. 21 was given to the defendants and the plaintiffs executed a rent note in favour of the defendants agreeing to pay Rs. 105 as rent for one year.

The auction sale was held on January 25, 1942, and at that auction the defendants purchased S. No. 21 for Rs. 2,500 and 20 acres out of 23 acres and 39 gunthas of S. No. 71 for Rs. 3,681. As a result of these auction sales the decree of the defendants was satisfied. On August 3, 1942, the defendants obtained possession of the properties purchased by them through Court.

On July 14, 1943, the plaintiffs filed the present suit against the defendants to enforce the agreement dated July 14, 1940. They claimed to recover Rs. 2,100, being half the Panchnama valuation of S. No. 71 or in the alternative to recover possession of half the portion of S. No. 71. The defendants *inter alia* contended that the agreement was void as it was against public policy and without consideration.

The trial Court decreed the suit and passed a decree for Rs. 2,100 in favour of the plaintiffs. In appeal, the District Judge was of the opinion that the agreement was without consideration, and he, therefore, dismissed the suit.

The plaintiffs appealed to the High Court. The appeal was heard by Shah J. on August 18, 1949, when he delivered the following judgment :—

SHAH J. This appeal is filed against a decree passed by the learned District Judge of East Khandesh at Jalgaon in appeal No. 162 of 1944, by which he allowed the appeal before him and reversed the decree of the Court of the Civil Judge, Junior Division, at Bhusawal, in suit No. 356 of 1943. The plaintiffs have come to this Court in second appeal.

The plaintiffs filed the suit against the defendants to recover a sum of Rs. 2,100 and Rs. 200 as interest, relying on an agreement executed by defendants Nos. 2 and 3 and one Gulabsa Mohansa, the deceased father of defendants Nos. 1A and 1B on

July 14, 1940. In the alternative the plaintiffs claimed to recover possession of a half share of Survey No. 71 of the village of Dhamangaon and Rs. 300 by way of mesne profits for the year 1942. The plaintiffs claimed that Survey No. 71 and Survey No. 21 of the village of Dhamangaon originally belonged to one Buda Sura Vanjari, that the defendants were mortgagees of the lands under a deed executed in their favour in the year 1919, that subsequently the plaintiffs purchased Survey No. 21 from Buda Sura for Rs. 5,000 in the year 1926, that the defendants filed a suit against Shambhu, the grandson of Buda, and the present plaintiffs as purchasers from Buda on their mortgage of the year 1919, and a mortgage decree was passed in their favour. Execution applications were filed for enforcing the mortgage decree, and the last darkhast application in which execution was claimed was darkhast No. 526 of 1938. In that darkhast the plaintiffs raised various contentions. Before the contentions of the plaintiffs were heard, on July 14, 1940, the plaintiffs and defendants Nos. 2 and 3 and Gulabsa Mohansa entered into an agreement, as a result of which the plaintiffs agreed to deliver possession of Survey No. 21, which was in their possession, to the defendants with the crops standing thereon and in consideration thereof the defendants agreed to give a half of Survey No. 71 when purchased by them at an auction under a proper sale deed to be executed and registered. It was further agreed that in case the defendants did not give a half share in Survey No. 71, or if Survey No. 71 was purchased at the auction by some one else, the defendants would give to the plaintiff half the value of Survey No. 71. Further, it was provided that if possession of Survey No. 71 was not delivered or any obstruction was made by the plaintiffs, the agreement was to be considered as void. This agreement was arrived at on July 14, 1940, and on the very day the plaintiffs delivered possession of Survey No. 21 to defendants Nos. 2 and 3 and Gulabsa Mohansa. After the delivery of possession, there was a rent-note executed by Laduram Hajarimal, plaintiff No. 4, in favour of Gulabsa Mohansa and defendants Nos. 2 and 3, under which he agreed to hold Survey No. 21 as a tenant at an annual rental of Rs. 105. The execution proceedings thereafter continued and objections which the plaintiffs had raised in the darkhast were not pursued further, and the properties were sold and Survey No. 21 as well as a portion of Survey No. 71 were purchased by defendants Nos. 2 and 3 and Gulabsa in satisfaction of the full liability of Shambhu under the mortgage deed. After defendants Nos. 2 and 3 and Gulabsa purchased Survey No. 21 and a part of Survey No. 71, the plaintiffs

1954

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH.

Shah J.

1951

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH  
Shah J.

called upon them to perform their part of the contract by executing a conveyance of a half share of Survey No. 71 or to pay Rs. 2,100 as being the value of a half share of Survey No. 71. The defendants failed to give any reply to this notice, and thereupon the present suit was instituted, being suit No. 356 of 1943, by the plaintiffs in the Court of the Joint Civil Judge, Junior Division, at Bhusawal, for the reliefs stated above.

Defendant No. 3, who was the main contending defendant, contended *inter alia* that there was no consideration for the agreement dated July 14, 1940, that the agreement was contrary to public policy and there was a breach of the agreement committed by the plaintiffs, and consequently the agreement had become void as provided in the deed dated July 14, 1940.

The learned trial Judge negatived all the contentions of the defendants and passed a decree in favour of the plaintiffs for Rs. 2,100 and proportionate costs of the suit together with future interest on Rs. 2,100 at 6 per cent. per annum from the date of the suit till realization from defendants Nos. 2 and 3 personally and from the estate of Gulabsa Mohansa in the hands of defendants Nos. 1A, 1B and 1C. Against this decree an appeal was preferred to the District Court at Jalgaon. Before the learned District Judge only one point was argued, namely that the agreement between the plaintiffs and the defendants was without consideration. The learned District Judge observed in his judgment that the contentions that the terms of the agreement were contrary to public policy and that there was obstruction by the plaintiffs to the execution of the decree and to possession being delivered to the defendants in breach of the terms of the agreement were not raised at the hearing of the appeal. The learned appellate Judge accepted the contention of the defendants that the suit agreement was without consideration, and reversed the decree of the trial Court and dismissed the plaintiffs' suit with costs throughout. The plaintiffs have come to this Court in second appeal.

Dr. Kane on behalf of respondents urged that the pleader for the defendants erroneously abandoned the contention that the agreement was contrary to public policy and therefore void. The question being a pure question of law, Dr. Kane says his clients were not bound by the omission to argue the point in the lower Court and that he was entitled to argue that the agreement was contrary to public policy. Dr. Kane has further argued that there was no consideration supporting the agreement to give a half share of Survey No. 71 or to pay half the

value of Survey No. 71. He contends that in any case the alleged consideration was so illusory as to be non-existent, and consequently the plaintiffs were not entitled to file a suit on the strength of that agreement. I have heard Dr. Kane at considerable length on both the points. Assuming that Dr. Kane is entitled to contend that the agreement was contrary to public policy, in my view there is no substance in that contention. Dr. Kane has submitted that the agreement was contrary to public policy, in the sense that it was prohibited by law, and that law was contained in s. 66 of the Civil Procedure Code, and consequently the agreement being prohibited by law it was contrary to public policy within the meaning of s. 23 of the Indian Contract Act. Now, the terms of s. 66 of the Civil Procedure Code are:

“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 some one through whom the plaintiff claims.”

What the section seeks to prohibit is a benami purchase, though it does not render a benami purchase illegal. Under s. 66 of the Civil Procedure Code a suit filed by a person who comes to the Court claiming relief on the basis that a purchase at a Court auction made by the defendant was for and on behalf of the plaintiff, must be dismissed. But the section does not apply to cases in which a Court may be called upon incidentally to consider a question whether a purchase made at a Court auction was made benami for some one else, nor do the provisions of s. 66 touch cases in which there has been an agreement, either prior to the date of the auction sale or after the auction sale, under which a person has agreed to purchase property from the auction purchaser for proper and valid consideration. In such a case it is obvious that the plaintiff is not seeking to set up a case that the property has been purchased for him or on his behalf, but what he seeks to assert is that the property was purchased by the defendant for himself, but he contends that the defendant-auction-purchaser by reason of an agreement, which may be either before the date of auction or after the date of auction, was under an obligation to sell the property to the plaintiff. Such an agreement, in my view, is not vitiated by the provisions of s. 66 of the Civil Procedure Code. An agreement of that character affirms that the defendant is the real purchaser of the property, but seeks to hold the defendant liable to convey or transfer the property to the plaintiff in pursuance of an independent

1951

NIMAL-  
CHAND  
GULABSA  
v.MADANLAL  
JAGANNATH

Shah J.

1951  
 NIMAL-  
 CHAND  
 GULABSA  
 v.  
 MADANLAL  
 JAGANNATH  
 . Shah J.

agreement under which the defendant is under an obligation to convey the property. Such a case is different from the case in which by reason of an agreement between parties it was agreed that the property was to be purchased by one party and thereafter to be held for the benefit of the other party to the agreement. The latter class of agreements are within the mischief of s. 66 of the Civil Procedure Code. The matter is now beyond the pale of controversy in view of the decision of the Privy Council reported in *Bishun Dayal v. Kesho Prasad*,<sup>(1)</sup> where the head-note is as follows:—

“Section 66 of the Civil Procedure Code, 1908, excludes any claim of plaintiff based upon an averment that property purchased by the certified purchaser at a Court auction sale was purchased by him or on his own behalf and on behalf of the plaintiff or some one through whom he claims. The section is not a bar to a claim based on a title independent of the auction purchase.”

The sole test to be applied is, does the plaintiff claim under a title arising by reason of an agreement to purchase the property for and on behalf of himself or does he assert a claim based on a title independent of the auction purchase. If it is the latter, s. 66 of the Civil Procedure Code can be no bar. An agreement to purchase property to be acquired in future from another person at a Court auction is a title independent of the auction purchase. Consequently, it cannot be said that the agreement to sell a part of Survey No. 71 or to pay half the value of Survey No. 71 is contrary to public policy.

Then Dr. Kane argued that in fact there was no consideration for the agreement, dated July 14, 1940. In order to appreciate this contention it is pertinent to note that the defendants had obtained a decree as early as 1926 and were taking steps for the purpose of realising their dues. The plaintiffs who were also judgment-debtors had raised numerous contentions to the executability of the decree against the property, Survey No. 21, in their possession. The defendants appear to have been persuaded to accept that the objections raised by the plaintiffs to the execution of the decree in so far as they related to Survey No. 21 were substantial. The plaintiffs being in possession of the property claimed to resist execution and they were entitled to resist execution by contending that the assets should be marshalled so that Survey No. 21 could be sold only after Survey No. 71 was sold and was found insufficient to satisfy the claim of the mortgagee. I do not mean to suggest that this contention

<sup>(1)</sup> (1940) 43 Bom. L. R. 138 P. C.

would have ultimately succeeded. But if the plaintiffs were entitled to and did raise contentions which created an apprehension in the minds of the defendants that if those contentions were permitted to be persisted in, either the execution of that decree might be jeopardised or there would be a further delay in obtaining satisfaction of their claim, it cannot be said that there was no consideration given by the plaintiffs in withdrawing the contentions raised. The plaintiffs agreed to deliver possession of Survey No. 21, and did in pursuance of the agreement deliver possession of that property. That was an adequate consideration in law for the plaintiffs to agree to sell a half share of Survey No. 71 or to pay to the plaintiffs half the value of Survey No. 71. It cannot be said that the consideration was either non-existent or illusory. A settlement of a disputed claim which may even turn out ultimately to be unsubstantial is always a good consideration for an agreement. Dr. Kane has suggested that a bilateral mistake of law would be sufficient to vitiate an agreement. That contention, however, is not supported by the terms of ss. 20 and 21 of the Indian Contract Act, and in any case the points argued in the Courts below and before me did not deal with the question that the contract which was valid between the parties was sought to be avoided on the ground of a mutual mistake. The sole ground sought to be argued before me was that there was absence of consideration supporting the agreement arrived at on July 14, 1940. As I said before, if there was some consideration given, and there is ample ground for holding that the plaintiffs did give consideration by withdrawing their contentions and delivering possession of property, the agreement relied upon by them is enforceable at law.

The learned advocate for the respondents contended finally that the defendants could not be entitled to anything more than half the value of that portion of land of Survey No. 71, which is purchased by them, and such value should be ascertained by reference to the proportion of the area purchased out of the entire Survey No. 71, it being assumed that the value of the entire Survey No. 71 is Rs. 4,200. Dr. Kane contends that, if the plaintiffs are entitled to half the land out of Survey No. 71 and the defendants were not allowed to purchase the entire Survey No. 71 but only a part of it, in equity his clients could not have been compelled to part with anything more than half the share of that much portion which was purchased by them; and as a corollary to that argument he submits that they having purchased only a 5/6th share of Survey No. 71 and the value of

1951

NIMAL-  
CHAND  
GULABSA  
v.MADANLAL  
JAGANNATH

Shah J.

1951

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH

Chagla  
C. J.

the entire Survey No. 71 being mentioned as Rs. 4,200 the plaintiffs would not be entitled to anything more than 5/12th of Rs. 4,200. In my view this would be making out completely new contract between the parties. It was stipulated by the parties that on the withdrawal of the objections by the plaintiffs and on transferring possession of Survey No. 21, the plaintiffs were either on the auction sale being held in execution of the defendants' decree to get half the share of Survey No. 71 or half the value of the entire Survey No. 71, which was assumed to be Rs. 4,200. The effect of the contract was that if Survey No. 71 could not for any reason be purchased by the defendants or that they were not in a position to purchase it or were unwilling to part with half the share of Survey No. 71, then they were under an obligation to pay a sum of Rs. 2,100 to the plaintiffs. In this case the plaintiffs have not been able to obtain a decree for a half of Survey No. 71, and in my view they are entitled to a decree for Rs. 2,100 according to the terms of the agreement.

Consequently, this appeal must be allowed and the decree of the trial Court must be restored with proportionate costs throughout.

The defendants appealed under the Letters Patent.

*P. V. Kane*, for the appellants.

*B. N. Gokhale*, for the respondents.

CHAGLA C. J. This Letters Patent appeal is preferred against a judgment of Mr. Justice Shah and the few facts that are necessary to be stated are that two survey numbers 21 and 71, belonged to one Buda Vanjari. Buda Vanjari mortgaged these two survey numbers to the defendants on June 4, 1919. Plaintiffs purchased the equity of redemption of S. No. 21 in 1923. Defendants filed a suit, being suit No. 117 of 1926, to enforce their mortgage and they obtained a mortgage decree. In execution of their decree they filed a darkhast in 1938. At that time the sum due to them under the decree was Rs. 6,181. An agreement was arrived at while that darkhast was pending on July 14, 1940, between the plaintiffs and the defendants. We will consider the particular terms of this agreement and the effect of it later. Pursuant to that agreement possession of S. No. 21 was given to the defendants and the plaintiffs in their turn executed a rent-note in favour of the defendants agreeing to pay Rs. 105 as rent for one year. On January 25, 1942, in execution of the mortgage decree S. No. 21 was put up to auction and purchased by the defendants for Rs. 2,500. On the same day 20

acres of S. No. 71 was also put up to auction and sold for Rs. 3,681. We might mention here that the extent of S. No. 71 was 23 acres, 39 gunthas, and only part of it was sold at this auction. By reason of these auctions the decree of the mortgagee was satisfied. On August 3, 1942, the defendants obtained possession of S. No. 21 and the portion of S. No. 71 which they had purchased through the Court. On July 14, 1943, the plaintiffs filed the suit claiming half of S. No. 71 purchased by the defendants or in the alternative a sum of Rs. 2,100. Their claim was based upon the argeement of July 14, 1940. The trial Court decreed the plaintiffs' suit. The learned District Judge to whom the appeal was preferred dismissed the plaintiffs' suit. In second appeal Mr. Justice Shah differed from the view taken by the learned District Judge and restored the decree passed by the trial Court. Subsequently the learned Judge gave a certificate for a Letters Patent appeal and hence this appeal.

Now, in order to decide the questions raised by Dr. Kane we have to consider the effect and the true purport of the agreement of July 14, 1940. As we said before, the agreement is between the plaintiffs, who were co-judgment-debtors along with the heirs of Buda Vanjari because they had purchased the equity of redemption of S. No. 21, and the mortgagees, the defendants. And the agreement was that the plaintiffs who were in possession of S. No. 21 were to hand over possession of that survey number with the crop standing thereon to the defendants. It was further agreed that when S. No. 71 came to be auctioned in execution of the darkhast and the defendants got possession, they were to hand over half of those lands in S. No. 71 under a sale-deed which was to be executed and registered at the cost of the defendants. It was further agreed that if the defendants did not execute a sale-deed, then they were to pay the price of half the land in S. No. 71. It was further provided that if S. No. 71 was purchased at the auction by someone else, then the defendants were to give half the sum of the price thereof after that price had been recovered by the defendants from the Court. The suit substantially was for the specific performance of this agreement. The contentions raised both in the Courts below and before us were, first, that the agreement was unenforcèable by reason of s. 66 of the Civil Procedure Code, and the second contention was that there was no consideration for the agreement and it was *nudum pactum* and therefore no suit could lie on it. Finally it was urged that in any event plaintiffs were not entitled to a sum of Rs. 2,100.

1951

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH

Chagla  
C. J.

1951

NIMAL-  
CHAND  
GULABSA  
v.  
MADANLAL  
JAGANNATH

Chagla  
C. J.

Now, turning to the first contention with regard to s. 66, this section bars a suit by a person who claims the beneficial title in himself against a person upon whom has been conferred the legal title by a certificate of the Court in respect of property purchased at an auction sale. Further, this section only bars such a suit provided the purchase by the legal owner was made on behalf of the plaintiff the person claiming the beneficial title, or on behalf of someone through whom the plaintiff claims. Now, it is clear that s. 66 ousts the jurisdiction of the Civil Court to grant equitable relief in certain cases where specific performance of an agreement is claimed, and by the accepted canon of construction to the extent that the jurisdiction of the Court is ousted the section must be strictly construed. The prohibition laid down in s. 66 should not be in any way extended or widened; it must be kept strictly within the four corners indicated by the section itself. Now, it is clear on the language of s. 66 that it only applies where a plaintiff claims or asserts a title in himself and challenges the title of the defendant as merely being benami. It does not contemplate cases where the plaintiff does not claim a title in himself but, admitting the title of the defendant, he claims possession of the property by reason of an agreement entered into with the defendant by which the defendant was bound to transfer property to him. The two cases are entirely different. In the one case the plaintiff's case is that title is in himself and he is suing on the strength of that title. In the other case the plaintiff admits that the title is in the defendant and his title would only arise provided the Court gave specific performance of an agreement entered into between him and the defendant. Therefore, the plaintiff when he files the suit has no present title in himself; his title is dependent upon specific performance being ordered by the Court. Sometimes the line between these two cases may be narrow and not clearly defined. But there is no difficulty in understanding or appreciating the distinction that lies between the two classes of cases. It is also clear that s. 66 prohibits only private agreements or understandings arrived at between the purchaser at the auction sale and the third party who seeks to acquire his title through the purchaser. It is not aimed at that class of cases where although A may purchase at the auction sale B or C may have an interest in the property as a result, not of a private understanding or agreement, but in law. Now, if these principles are borne in mind, then the facts of the present case do not present any difficulty. The plaintiffs' suit is for specific performance of the agreement of July 14, 1940. The

plaintiffs do not claim that they are the beneficial owners of the properties and that the defendants' title is merely a *benami* title. The plaintiffs make it clear that their only right is to a specific performance of the agreement. They claim no interest in the lands as such. Their interest would only arise if the Court were to grant them specific performance and order the defendants to convey the property to the plaintiffs. Therefore, in our opinion, the present suit does not fall within the mischief of s. 66 inasmuch as the defendants did not purchase the property on behalf of the plaintiffs as contemplated by that section. Dr. Kane has drawn our attention to several decided cases and we will presently look at them. But in our opinion these cases do not go counter to what we have suggested is the true principle underlying s. 66.

The first case on which reliance is placed is a decision of the Privy Council reported in *Ganga Sahai v. Kesri: Munshi Lal v. Ganga Sahai*,<sup>(1)</sup> and the relevant observations are to be found at p. 182. That was a case where a joint decree-holder purchased the property at the auction sale and the other decree-holders filed a suit for their interest in the property. The Courts in India upheld the contention of the plaintiffs and rejected the contention of the defendant that the suit was barred under s. 317 of the Civil Procedure Code of 1882, which corresponded to s. 66 of the present Code, and in the light of these facts their Lordships observed that the provisions of s. 317—

“were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment debtors, and in no way affect the title of persons otherwise beneficially interested in the purchase.”

From this observation Dr. Kane wishes to argue that whenever an agreement is entered into antecedent to an auction sale between a judgment-debtor and the decree-holder with regard to the property to be purchased at the auction sale of the judgment-debtor, that agreement cannot be sued upon as coming within the mischief of s. 66. Now, surely that is not the effect of the decision of the Privy Council. The Privy Council is merely pointing out what the object of enacting s. 317 was; it does not lay down that every agreement entered into by the judgment-debtor is necessarily bad, nor is it laying down that only agreements by judgment-debtors come within the mischief of s. 66. Section 66 does not lay down any qualifications as to who

1951

NIMAL-  
CHAND  
GULABSAv.  
MADANLAL  
JAGANNATHChagla  
& J.

<sup>(1)</sup> (1915) L. R. 42 I. A. 177, s. c. 17 Bom. L. R. 998,

1951  
 NIMAL-  
 CHAND  
 GULABSA  
 v.  
 MADANLAL  
 JAGANNATH  
 Chagla  
 C. J.

should be a party to the agreement. All agreements entered into by any person which fall within the ambit of s. 66 cannot be enforced by Courts of law. In this particular case it is true that the agreement was entered into with the defendants by the judgment-debtors, the plaintiffs, to the extent that they were judgment-debtors with regard to S. No. 21. It is also true that the judgment-debtors have derived considerable benefit from this agreement and we shall point out the extent of that benefit later. But that fact by itself cannot make the agreement unenforceable at the hands of the judgment-debtors.

The next authority relied on is also of the Privy Council reported in *Vadivelu Mudaliar v. Peria Manicka Mudaliar*.<sup>(1)</sup> In this case the appellant before the Privy Council purchased at an auction sale certain immovable property which he had before the sale agreed with the respondents to convey to them. After the sale there were fresh agreements by which the appellant bound himself to carry out the original agreement with the respondents. When the respondents filed a suit for specific performance against the appellant, s. 66 was requisitioned in defence as being a bar to the suit. At p. 649 Viscount Cave delivering the judgment of the Board observed:

"If the agreement entered into before the auction stood alone, there would be considerable force in this contention." (The contention was one advanced on behalf of the appellant that the suit was barred by s. 66). "The object of section 66 was to put an end to purchases by one person in the name of another; and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale."

Now, Dr. Kane says that the Privy Council in this case came to the conclusion that s. 66 had no application because the agreement was entered into subsequent to the auction and Dr. Kane wants to argue that whenever there is an agreement antecedent to the auction which affects the property to be purchased at the auction, that agreement must necessarily be unenforceable. We do not read the Privy Council to lay down that proposition. The Privy Council emphasises the distinction between a purchase on behalf of another and a purchase coupled with an undertaking to convey to another, and what the Privy Council says is that if there had been only an agreement antecedent to the auction there may have been some doubt as to the nature of that agreement. But inasmuch as that

<sup>(1)</sup> (1920) 43 Mad. 643, P. C.

agreement was ratified and confirmed by an agreement subsequent to the auction, any doubt as to the proper construction of the agreement disappeared. Therefore, even if we have an agreement antecedent to the auction and that agreement is clearly an agreement containing an undertaking to convey a property purchased at an auction, it would be a good, valid and enforceable agreement. It is only when that agreement is spelt out to be merely a declaration of the right of the legal owner along with the benamidar or against the benamidar that such an agreement would fall within the mischief of s. 66.

Then reliance is placed on two Calcutta cases, one reported in *Harendra Chandra Roy v. Ram Kumar Roy*,<sup>(1)</sup> which is a judgment of a single Judge, Mr. Justice Mitter, and there on the facts it is clear that the agreement relied on was an agreement of purchasing benami. It was not a case of an agreement to reconvey. But in the course of the judgment the learned Judge seems to have construed the Privy Council case to which we have just referred as making a distinction between agreements antecedent to the auction and agreements subsequent to the auction. With very great respect, we are unable to agree with that view of the law. In *Upendralal Pal v. Ajaharuddin Ahmad*,<sup>(2)</sup> the agreement also was similar to the one in *Harendra Chandra Roy v. Ram Kumar Roy*,<sup>(1)</sup> and under the agreement clearly the purchase was by the purchaser on behalf of himself and others and it is in the light of these facts that a Divisional Bench of the Calcutta High Court observed at page 375 that the operation of s. 66 cannot be ousted by the existence of any private agreement or undertaking. But in every case the Court has got to consider the nature and the scope and the effect of the private agreement or undertaking. It is not every private agreement or undertaking that necessarily attracts the application of s. 66, nor can it be said that every private agreement or undertaking affecting the property sold at an auction sale is within the mischief of s. 66. Therefore, on a review of these authorities we are of the opinion that Mr. Justice Shah who took the same view of the law and held that s. 66 had no application to this case was, with respect, right.

[The rest of the judgment is not material to this report.]

*Decree varied.*

M. W. P.

<sup>(2)</sup> (1934) 61 Cal. 371.

<sup>(1)</sup> (1931) 35 Cal. W. N. 940.

1951  
 NIMAL-  
 CHAND  
 GULABSA  
 v.  
 MADANLAL  
 JAGANNATH  
 Chagla  
 C. J.