*Privy Council Appeal No.* 38 *of* 1921.

*Patna Appeal No.* 16 *of* 1919.

**Rai Radha Krishna and others** - - - - - *Appellants*

*v.*

**Bisheshar Sahay and others** - - - - - *Respondents*

FROM

## THE HIGH COURT OF JUDICATURE AT PATNA.

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## JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH MAY, 1922.

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*Present at the Hearing:*

LORD PHILLIMORE.
LORD CARSON.
SIR JOHN EDGE.

[*Delivered by* LORD PHILLIMORE.]

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Rai Gudar Sahay, a landowner in the District of Mozaffapur, borrowed from a joint family of money-lenders to whom the defendants belong, a sum of Rs. 16,000 on the 2nd May, 1873, and mortgaged for it his village Mouza Kataya. The family afterwards separated, and upon the partition of their property various fractions in the mortgage became allotted to the different members. They, however, all joined in a suit brought in 1886 to enforce the mortgage, and in the ordinary course obtained a decree on the 31st May, 1886, under which if the money was not paid the property was to be brought to sale.

For a time no steps were taken to realise this decree, and the judgment debtor paid off portions by purchasing, through a *benamidar*, the shares of some of the decree-holders, for prices which it is noteworthy were considerably less than the nominal values. In January, 1889, he bought a share nominally worth Rs. 7,140 for Rs. 3,266; in March, 1891, a share nominally worth Rs. 15,209 for Rs. 5,000; and in November, 1894, shares nominally worth Rs. 24,619 for Rs. 7,476. This left something under 5 annas of the judgment unsatisfied, and these were held in severalty by the respondent Bisheshar Sahay and two of his brothers. In 1898 Bisheshar, on behalf of himself and the remaining decree-

holders, took proceedings to have the decree executed, and the property was sold by the Court on the 18th April, 1899. By that time the judgment debtor was dead, and his widow was proceeded against in his place. Upon the record of the execution proceedings one Hari Narain was declared purchaser of the village, and he obtained a certificate of sale and possession. The widow applied to set aside the sale on various grounds, but failed. She died in 1904 and was succeeded by her daughter, who died in 1910. Upon the daughter's death the estate of the original judgment debtor devolved upon the appellants as the next heirs, and they in 1914 instituted the present suit, alleging that the proceedings at the sale had been collusive and fraudulent, that they had recently discovered that Bisheshar had applied to be allowed to bid and had been refused leave, but in spite of the refusal had purchased the village in the name of Hari Narain, who was his *benamidar*. The present appellants made certain other points which were disposed of in the course of the proceedings.

The respondent Bisheshar denied that Hari Narain was his *benamidar*, and said that Hari Narain was the true purchaser, who had since sold and transferred to him. He also took the point of the Statute of Limitations.

It must be taken to be true that he had applied to the Court for leave to bid and had been refused. Hari Narain purchased the property for Rs. 625 only and sold it, or purported to sell it to Bisheshar on the 9th December, 1902, for Rs. 1,500. The case came before the Subordinate Judge, who by his decree, dated the 27th December, 1916, decided in favour of the plaintiffs, the present appellants. He held that the purchase by Hari Narain was made by him as *benamidar* for Bisheshar Sahay, and he thought that the Statute of Limitations did not apply, because he held that it was not a suit to set aside a voidable sale, but a suit to recover possession of immovable property by the heirs in reversion on the death of the last female heir, and was therefore covered by Article 141 of the Indian Limitation Act.

Bisheshar appealed to the High Court, which by its judgment, dated the 27th February, 1919, reversed the decision, held that Hari Narain was not a *benamidar*, and further held that the suit was barred by Article 12 of the Indian Limitation Act as being a suit to set aside a sale in execution of a decree by a civil Court, for which the period of limitation is one year from the date when the sale is confirmed or would otherwise have become final and conclusive. If either of the defences raised by Bisheshar be established, the judgment of the High Court at Patna would be right and the suit would fail.

Their Lordships will consider first the question whether it was proved that the transaction was *benami*. There is, as admitted in the judgment of the High Court, ground for suspecting that the transaction might be of this nature. The Judge of first instance took it as established, though there is some question as to the regularity of the proof, that Hari Narain was in position

a servant and a servant to a brother of Bisheshar, and one not likely to have money, though there was some evidence that he had engaged in commercial transactions. The sum for which the property was sold was exceedingly low. In the view of the Subordinate Judge it was worth Rs. 1,500 or Rs. 1,600 a year gross, from which should be deducted the revenue cesses amounting to about Rs. 400 a year. Not only, therefore, was the original price absurdly low, but Hari Narain, if he were the real purchaser, though making a considerable profit on the resale, nevertheless sold to Bisheshar for much less than he might have expected to get for the property.

But, on the other hand, the widow of the original judgment debtor, who seems to have been advised, made a number of objections to the sale and never raised this one, and the matter waited for upwards of 15 years, by which time Hari Narain was dead, before these proceedings were taken. It may be said that the widow and her advisers would not know who Hari Narain was, but the fact that the price was as low as it was would have put them upon inquiry, and indeed the witness for the plaintiffs, Khub Lal, if he is to be believed, told the widow's brother about it from the first. The fact that the decree-holders were content to take so small a proportion of the nominal value of their shares in the decree seems to point to there being a deficiency in the mortgaged property. Moreover, Bisheshar's two brothers got in respect of their shares, which together were larger than Bisheshar's, only their small proportion of the net proceeds of the sale, and as they would certainly have known who Hari Narain was, they must either have been satisfied that the sale was good and that no more could have been realised, or they must have been parties to the fraud, which has not hitherto been suggested. Except the witness Khub Lal, whose evidence, taken as a whole, was unfortunate for the side which called him, and another witness whom the High Court thought unworthy of belief, there was nothing like affirmative evidence of a *benami* case.

Upon the whole, their Lordships agree with the view of the High Court that it has not been proved that Hari Narain was *benami* for Bisheshar. This is sufficient to dispose of the appeal.

With regard to the point on the Statute of Limitations as it was presented before the Courts in India, their Lordships are also of opinion that the decision of the High Court was right. The applicable section of the Code of Civil Procedure regulating sales in execution by the Court is as follows :—

> "294. No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.
>
> "When a decree-holder purchases with such permission, the purchase money and the amount due on the decree may, if he so desires, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.
>
> "When a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person interested in the

sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the resale, and all expenses attending it, shall be paid by the decree-holder."

Upon the construction of this section it is evident that a purchase by a decree-holder who has not obtained permission is not void nor a nullity, but is only to be avoided on the application of the judgment debtor or some other person interested. It would be injurious to those interested in the sale if a decree-holder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown.

This position is well established and seems to have been accepted by the Subordinate Judge; but in his view the fact that the decree-holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree-holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the Court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it would be of any importance. The question would not be whether the decree-holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the Court would set the sale aside; if it had, then it mattered not that the decree-holder bought without permission or that he had applied and been refused. If, then, the sale is voidable only and not void, Article 12 in the Act of 1908 applies, and the suit must be brought within one year. Therefore it was too late.

Counsel for the appellants took a further point. He urged that this case might be treated as one of concealed fraud, to which Section 18 of the Act and Article 95 would apply, and that the fraud consisted in concealing from the Court that the decree-holder who had been refused was in fact buying through his *benamidar*. Their Lordships deem it unnecessary to consider this contention, which was never put forward or discussed in the Courts in India, and the foundation for which is deficient. There is indeed allegation but there is no proof of the time when the fraud, supposing that there were fraud, became known to the plaintiffs (appellants). Moreover, for this purpose the widow would represent the estate, and the Court would have to be satisfied that she did not know. In this connection the evidence of Khub Lal would have to be further considered, as well, perhaps, as that of other witnesses for the plaintiffs.

For these reasons their Lordships deem it unnecessary to express any opinion upon this contention, and, upon the whole, they will advise His Majesty that this appeal should be dismissed with costs.

**In the Privy Council.**

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RAI RADHA KRISHNA AND OTHERS

*v.*

BISHESHAR SAHAY AND OTHERS.

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DELIVERED BY LORD PHILLIMORE.

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