

Tarinikamal Pandit And Ors vs Perfulla Kumar Chatterjee (Dead) By ... on 21 February, 1979

Equivalent citations: 1979 AIR 1165, 1979 SCR (3) 340, AIR 1979 SUPREME COURT 1165, 1979 (3) SCC 280, (1979) 3 SC CR R 340, 1979 BBCJ 89, (1979) 2 SCJ 347

Author: P.S. Kailasam

Bench: P.S. Kailasam, V.R. Krishnaiyer, A.D. Koshal

PETITIONER:
TARINIKAMAL PANDIT AND ORS.

Vs.

RESPONDENT:
PERFULLA KUMAR CHATTERJEE (DEAD) BY L.R.S

DATE OF JUDGMENT 21/02/1979

BENCH:
KAILASAM, P.S.
BENCH:
KAILASAM, P.S.
KRISHNAIYER, V.R.
KOSHAL, A.D.

CITATION:
1979 AIR 1165 1979 SCR (3) 340
1979 SCC (3) 280
CITATOR INFO :
R 1984 SC1471 (27,54)

ACT:

Plea, which is a pure question of law taken for the first time may be permitted to be raised even at the last tier of appellate stage in the Supreme Court.

Suit against purchaser non-maintainability on ground of purchase being on behalf of plaintiff-Whether applies to an auction sale by a Receiver appointed under Order 40 Rule 1 of the Civil Procedure Code-Scope of section 66 of the C.P.C. read with order XXI Rule 82 and order XL Rule 1.

"Purchase certified by the Court" in Section 66 refers only to the certificate issued by the Court to the Purchaser under order XXI Rule 94 C.P.C.

HEADNOTE:

The plaintiffs-appellants filed a suit against the defendants-respondents claiming their title on an unregistered document to the suit property and premises purchased by the latter through a sale by the Receiver under the orders of the Court, on the ground that they were co-owners thereof by virtue of the said document. The trial court decreed the suit but the High Court, on appeal, accepted the appeal and dismissed the suit.

Allowing the appeal by certificate, the Court

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HELD: 1. A pure question of law on the facts and circumstances of a case can be taken for the first time in the Supreme Court. [351 B-C]

(a) In the instant case, the plea that "as the title has vested in the respondent by virtue of the confirmation of sale and the registered conveyance, the plaintiffs-appellants cannot rely on an unregistered document" is a pure question of law not involving any investigation of the facts. [351C-E]

Yaswant Deorao Deshmukh v. Walchand Ramchand Kothari, [1950] S.C.R. 852 @ 861; Raja Sri Sailendra Narayan Bhanja Rao v. State of Orissa [1956] S.C.R. 72; Seth Badri Prasad and ors v Seth Nagarmal and ors., [1959] Suppl. 1 S.C.R. 769 @ 773; State of U.P. and Anr v Anand Swarup [1974] 2 S.C.R. 188; T. A. A. Appanda Mudaliar v. State of Madras A.I.R. 1976 S.C. 2459; applied.

2. In a suit against the purchaser on the ground that the purchase was made on behalf of plaintiff or on behalf of some one through whom the plaintiff claims, the plaintiff cannot succeed in displacing the title of the defendant on the basis of the unregistered agreement, [352 C]

on the pleadings, in the instant case, the question of law raised cannot result in the suit being dismissed as not maintainable. The claim of the appellant as a real owner was not based on the unregistered agreement alone.

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The suit was based on the plea that the suit property and the premises were purchased in ownership (i.e.) on the claim that the appellants-plaintiffs were the real owners of the property. [352 C-D]

G. H. C. Ariff v. Jadunath Mazumdar Bahadur, A.I.R. 1931 P.C. 79, Meritime Electric Co. Ltd. v. Genral Dairies Ltd., A.I.R. 1937 PC 114; referred to.

3. Section 66 of the Civil Procedure Code prohibits any person claiming that a purchase certified by the Court in such manner as may be prescribed in favour of a person was made on behalf of the plaintiff. In order to invoke the prohibition it is necessary to establish that the person against whom the suit cannot be maintained is a person claiming title under a purchase certified by the Court in such manner as may be prescribed. A certificate by the Court

for the purchase in the manner prescribed is, therefor, essential. [353 B-C]

The word "prescribed" is defined under section 2(16) of the Civil Procedure Code, as meaning prescribed by Rules. The provision as to grant of a certificate by a court under a purchase is prescribed in Order 21. Order 21, Rules 64 to 73 prescribe the procedure relating to sale generally while Rules 82 to 103 prescribe the procedure relating to sale of immovable property. When the Court makes an order confirming the sale under Order 21, Rule 92, the sale becomes absolute. After the sale becomes absolute under Rule 94 the Court shall grant a certificate specifying the properties sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate is required to bear the day and the date on which the sale became absolute. [353 C-E]

The certificate by the Court referred to in Section 66 C.P.C. is a certificate under Order 21, Rule 94. The procedure envisaged for sale generally and sale of immovable property under Order 21 is sale by a public auction. Sale by a Court through the Receiver appointed by Court is not contemplated under these provisions. In a sale by a Receiver a certificate to the purchaser under Order 21, Rule 94, is not given by the Court. Therefore, the prohibition under Sec. 66 cannot be invoked in the case of a sale by the Receiver. A Receiver is appointed under Order 40 Rule 1, and a property can be sold by the Receiver on the directions of the Court even by private negotiations. The requirement of Sec. 66 of the C.P.C., is a certificate by the Court as prescribed. Since Section 66 is not applicable to sales by Receiver it is not necessary to go into the question whether a sale by the Receiver under the Rules of the Calcutta High Court would come within the purview of s. 66. Section 66 refers to execution of sales only and has no application to a sale held by a Receiver. In this case, the conveyance Ex. 5 was in accordance with the original side Rule of the High Court. [353 E-G]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1626 of 1973.

Appeal by Special Leave from the Judgment and Order dated 16-9-1971 of the Calcutta High Court in Appeal from Original Decree No. 209/66.

S. N. Andley, K. C. Sharma, Prem Malhotra and Uma Datta for the appellant.

L. N. Sinha, G. S. Chatterjee, D. N. Mukherjee and D. P. Mukherjee for the Respondent.

The Judgment and Order of the Court was delivered by KAILASAM, J.-This appeal is by plaintiff 1, legal representatives of plaintiff 2 and plaintiff 3 by certificate granted by the High Court Calcutta against its judgment dismissing the suit.

The suit was filed by the plaintiffs for the declaration of each of the plaintiffs' title to the extent of 1/4th share each and in all 3/4th for all the plaintiffs of the suit property and the premises with the findings that the suit property and the premises were purchased in co- ownership awarding the plaintiffs and the defendants equal 1/4th share each in terms of the agreement dated 2.4.1960 and for partition of the suit property and premises in equal 1/4th share each and for a decree of Rs. 45,000 with further accruals by way of receipt of further rent till full realisation of the claim. In the alternative a decree for accounts of the dissolved partnership on declaration of dissolution of the same and partition of the suit property and premises in equal 1/4th share to each of the plaintiffs and the defendant by metes and bounds.

The defendant in his written statement denied the claim of the plaintiff and contended that the suit property was never purchased in co-ownership or that the plaintiffs were entitled to 3/4th share. He contended that plaintiffs 2 and 3 advanced Rs. 10,000 each as loan and that they had no claim to the property he having purchased the property in court auction as the absolute owner.

The trial court decreed the suit. The defendant preferred an appeal to the High Court which accepted the appeal and dismissed the suit.

The facts of the case may be shortly stated. The suit property in Darjeeling belonged to one Harbhajan Singh Wesal. He executed a mortgage in favour of the Calcutta National Bank Ltd. The bank instituted a suit against Harbhajan Singh Wesal for recovery of Rs. 1,82,403-11-3 and for enforcement of the mortgage. Pending suit the Calcutta National Bank was wound up and the High Court of Calcutta passed a decree against Harbhajan Singh and appointed the Official Liquidator of the Calcutta National Bank as Receiver of the mortgaged property including the suit properties. On 5-9-1959 a final decree was passed directing the sale of the mortgaged property including the suit properties at Darjeeling by public auction subject to confirmation by the Court.

The defendant Prafulla Kumar Chatterjee was interested in buying the property in Darjeeling. He was negotiating with the Receiver for the purchase of Darjeeling properties. On 10.6.1959 he received a letter from D. N. Mukherjee advocate advising him to give an offer to the Receiver and on 22.6.59 the defendant obtained an engineering estimate and made an offer to the Receiver to purchase the property for Rs. 32,000. On 20.11.59 an advertisement appeared in the newspaper by P.W. 1, K. K. Kshetry, Solicitor of the bank, for auction of the suit property. The property was auctioned on 15th December, 1959 and the defendant offered the highest bid for Rs. 30,000. On the same day the defendant deposited Rs. 7,500/-. While the sale was awaiting confirmation by the High Court a higher offer was made by one Baidyanath Garsi and thereupon the defendant offered Rs. 40,000 which was accepted by the court and the sale in favour of the defendant was confirmed by the the High Court for a sum of Rs.40,000 on 19.1.60. The defendant deposited a sum of Rs. 2,500 in addition to Rs. 7,500 that had already been deposited. The defendant was granted three months' time for depositing the balance sum of Rs. 30,000. The defendant did not have funds to pay

the balance of Rs. 30,000 and had to raise the amount.

On 2.4.1960 an agreement was entered into between the three plaintiffs and the defendant. The suit by the plaintiffs is mainly based on this agreement P-45 dated 2.4.60. The agreement is signed by the three plaintiffs as well as by the defendant. According to the recital in the agreement the parties after learning from the notification in the newspaper of the sale of the suit property agreed between themselves to call the bid jointly in co-ownership in the name of the defendant and that in pursuance of the agreement the defendant was deputed to call the bid. The agreement further states that accordingly the defendant was sent to Calcutta and the bid at the auction which was finally knocked down on 19.1.60 for a sum of Rs. 40,000 in the name of the defendant. The agreement also provided that the plaintiffs and the defendants would be entitled to equal shares in the property. Another term of the agreement provided that the conveyance shall be drawn in the joint names of the parties by obtaining leave from the High Court.

On 7.4.60 the defendant executed two receipts Exs. 22 and 22A in favour of the second and the third plaintiffs respectively. It is recited in the receipt that the defendant received a sum of Rs. 10,000 as the share of the purchase price of the property sold in public auction by the Official Liquidator in pursuance of the agreement amongst themselves. Though the receipt was typed in Darjeeling on 7.4.60 the defendant signed the receipt at Calcutta on 11-4-

60. In the meantime on 8.4.60 the defendant filed an application in the High Court of Calcutta praying that the time for completion of the sale be extended by three months from 19-4-60 and the conveyance be executed in favour of the three plaintiffs and himself. On 11-4-60 a sum of Rs. 30,000 was paid to M.R. Kshetry. The request for the conveyance to be made in favour of the three plaintiffs and the defendant was given up and the court directed the execution of the conveyance in favour of the defendant alone. On 17-6-60 a conveyance was executed by the Registrar of the High Court and the Receiver in favour of the defendant alone in pursuance of the order of the court dated 11-4-60. On 2-1-61 the plaintiffs served a notice on the defendant calling upon him to partition the property and deliver their shares and render accounts. On 3-6-61 the plaint in the suit was filed.

The plaintiffs apart from oral evidence very strongly rely on three documents to prove that they are joint owners and are entitled to 3/4th share in the suit property. The first document is the agreement between the parties dated 2.4.60. The second are two receipts dated 7.4.60 issued by the defendant in favour of plaintiffs 2 and 3. The third document is the application filed by the defendant on 8-4-60 in the High Court praying that the conveyance may be effected in favour of the three plaintiffs and himself. The case for the plaintiffs is that between 20th and 23rd November, 1959 there was an advertisement in the newspapers by the Official Receiver announcing the sale of the suit property. According to the plaintiffs the three plaintiffs and the defendant mutually agreed to call the bid jointly in co-ownership in the name of the defendant and to purchase the property in equal shares contributing equally the bid money and the other costs as might be incurred for the conveyance of the property. It was further agreed that the plaintiffs and defendant would have equal share in the property. According to the plaintiffs in pursuance of the agreement the defendant was sent to Calcutta where he bid on 15.12.59 for Rs. 30,000 and the bid was confirmed by the High Court on 19.1.60 for a sum of Rs. 40,000. Out of the bid money a sum of Rs. 7,500 was paid to the

Receiver on 15.12.59 and a sum of Rs. 2,500 on 19-1-60 and the balance of Rs. 30,000 on 11-4-60. In the meantime it is stated that the plaintiffs and the defendants considered it advisable to have the verbal agreement between them reduced to writing and thus the agreement dated 2.4.60 came into existence. After the full bid money was paid, the plaintiffs contributing equally, a deed of conveyance was executed on 17-6-60 and registered at Darjeeling. According to the mutual agreement the parties were entitled as co-sharers to enjoy and occupy the suit property in co-ownership and were also entitled to income from them. It was further agreed that the defendant would manage the joint property for the co-owners of the property and the defendant would realise the rents for and on behalf of the parties with liability to pay the respective shares to each of the plaintiffs. The defendant, on the other hand, submitted that he was trying to purchase the suit property from the previous owner Harbhajan Singh by private negotiations before the proceeding was started for auction sale. The defendant's efforts to purchase the property from the owner proved abortive and he decided to purchase the suit property in the auction sale when the property was advertised for sale. As the defendant was not acquainted with the procedure of court's sale he approached the first plaintiff for legal service and the first plaintiff gave directions as to how the defendant should proceed. The defendant denied that he was sent by the plaintiffs to Calcutta for calling the bid. According to him he went of his own accord, attended the public auction on 15.12.59 and offered Rs. 30,000 for purchasing the property and when the bid was accepted he paid Rs. 7,500 and that money belonged to him alone. Eventually, the sale was confirmed in favour of the defendant for Rs. 40,000 and he paid a sum of Rs. 2,500 in court to make up Rs. 10,000 i.e. One-fourth of the bid-amount all by himself. As the defendant had to pay the balance of Rs. 30,000 and as he was in short of funds he approached the first plaintiff who was his lawyer and asked for his advice. As the time for payment of balance amount was fast approaching the defendant frantically tried to find a person who could advance him temporary loan of Rs. 20,000 which amount he needed for completing the purchase. As he was not successful he requested the first plaintiff to find from amongst his clients persons who could make temporary advance of the amount. According to the defendant in the first week of April, 1960 the first plaintiff informed the defendant that two of his clients, namely plaintiff Nos. 2 and 3, were agreeable to advance the requisite amount but in view of the provisions of Bengal Money Lenders' Act they were not willing to advance the amount unless some sort of safeguards were provided for and the transaction was not described as loan. The first plaintiff drafted a document in the form of an agreement and the defendant signed it under the advice and suggestion of the first plaintiff on the understanding that the document was not intended to be acted upon and was only to remain as a security for the loan and that the recitals in the said document do not represent the real nature of the transaction. The defendant admitted that plaintiffs 2 and 3 advanced to the defendant a sum of Rs. 10,000 each by way of loan and the defendant had to sign in their favour the documents acknowledging the receipt of the loan. The defendant denied that the plaintiffs and the defendant contributed equally for payment of the bid money or in defraying the incidental costs in equal shares. The defendant asserted that he alone paid the entire bid money and bore all the incidental expenses and that there was never any co-ownership or co-

partnership. He submitted that as the conveyance was executed exclusively in his favour the plaintiffs had no right to the property.

The plaintiffs have sought to prove that the parties after learning from the notification in the newspaper of the sale of the property agreed between themselves to call the bid jointly in co-ownership in the name of the defendant and in pursuance of that agreement the defendant paid the deposit. Further it is the plaintiffs' case that in pursuance of the agreement the defendant was sent to Calcutta where he bid at the auction which was finally knocked down for the benefit of all. The plaintiffs' claim that they contributed 1/4th of the price of the property and the expenses i.e. Rs. 13,500 each. Further, it was contended by the plaintiffs that the bid by the defendant was for the benefit of the three plaintiffs and the defendant and that it was agreed that the conveyance should also be in favour of all of them.

It is seen from the evidence that the defendant was interested in buying the property alone before the advertisement appeared in the newspapers on 20-11-59 and 23- 11-59. The defendant received Ex. V a letter dated 10-6-59 from D. N. Mukherjee advocate, advising him to give an offer to the Receiver so that he can place the matter to the court for an order for sale by private negotiation. Soon after, the defendant obtained an engineering estimate of the value of the property under Ex. M and in accordance with the valuation wrote Ex. L on 22.6.59 to K. K. Kshetry offering Rs. 32,000 for the property. On 15-12-79 the defendant went to Calcutta by himself and made a bid for Rs. 30,000 and deposited Rs. 7,500 of his money. The plaintiffs admit that the entire deposit was made by the defendant but pleaded that it was agreed that on accounts being taken the expenses will be shared by the plaintiffs. Due to a third party making a higher offer the defendant had to raise the bid for Rs. 40,000. It is also not in dispute that the defendant by himself paid Rs. 2,500 over Rs. 7,500 already paid to make 1/4th of the bid amount. The bid for Rs. 40,000 was made by the defendant alone. On behalf of the plaintiffs it is stated that 2 or 3 days after the advertisement appeared the defendant went to the first plaintiff and told him that he did not have sufficient funds and requested the first plaintiff to join him to purchase the property and that 2 or 3 days later plaintiff 3 and son of plaintiff 2 came to first plaintiff and expressed their desire to purchase the property and the plaintiff advised them to purchase the property jointly with the defendant in shares. Plaintiff 3, Daluram Agarwala, deposing as P.W. 5 does not support this case. In cross examination P.W. 5 stated that on November 24 or 25, 1959 he and one N. K. Aggarwala, who is the son of plaintiff No. 2, went to see the first plaintiff. It was decided among them that the property would be purchased in the names of all the four of them, the plaintiffs and the defendant. He would further say that the defendant on return from Calcutta towards the end of December, 1959 stated that the property had been purchased in the names of three plaintiffs and the defendant. It is thus the case of P.W. 5 that the defendant was sent by all the three plaintiffs to bid on their behalf and that the defendant bid on behalf of all of them. P.W. 7, the son of the second plaintiff, would state that it was agreed that the property would be bought in the name of the defendant and that there was no talk that it would be purchased in the names of all the four of them. It is rather inexplicable as to how plaintiffs 2 and 3 who wanted to buy the property separately for themselves agreed to purchase jointly for the benefit of all of them. It is also difficult to accept the plea that plaintiffs 2 and 3 went to the first plaintiff who is an advocate and there agreed to purchase the property in equal shares between the defendant, first plaintiff and themselves. The second plaintiff had an office in Calcutta and the Calcutta office had a Munim and three other partners in whom they had complete confidence. In the circumstances it is strange that they wanted the first plaintiff to be a co-sharer so that he could attend to all the legal questions. There is no explanation as to why plaintiffs 2 and 3 who were independent businessmen would join

to purchase the property. The explanation that the agreement was arrived at to keep the bid low is purile. The evidence discloses that the plaintiffs were taking active part in the transaction after 2.4.1960 while between November, 1959 when the advertisement appeared and the date of agreement, there was comparative quiet, which fact probablises that the plaintiffs were not taking any part in the activities of the defendant regarding the bid in the court auction of the property. The dealings of plaintiffs 2 and 3 show that they were dealing with the defendant at arms' length insisting on passing of a receipt for their payment of Rs. 20,000 and accompanying the defendant and paying the money to the Receiver themselves. It is highly improbable that they would have deputed the first defendant to go and bid on their behalf. There is no explanation as to why their share of the bid of Rs. 30,000 or the subsequent bid for Rs. 40,000 was not paid by them. The story that before the defendant bid for the property for Rs. 30,000 there was an agreement between the plaintiffs and the defendant that the bid should be on behalf of all of them cannot be accepted.

The next question that arises is whether the plaintiffs have proved their case that plaintiffs 1, 2 and 3 each of them paid Rs. 13,500, Rs. 10,000 being their share of the bid money and Rs. 3,500 towards expenses. The two receipts Exs. 22 and 22A are acknowledgements by the defendant of receipt of Rs. 10,000 from each of the plaintiffs 2 and 3. The defendant admits that he did receive Rs. 10,000 from each of the plaintiffs 2 and 3 but his case is that it is a loan. There can be no doubt that the defendant was paid Rs. 10,000 by each of the plaintiffs 2 and 3. The case of the plaintiffs is that they paid in addition Rs. 3,500 each towards expenses. There is no receipt for this extra payment. But the plea on behalf of plaintiffs 2 and 3 is that the son of the second plaintiff paid Rs. 27,000 to the Receiver Kshetry personally representing the share of plaintiffs 2 and 3 of Rs. 13,500 each. We find it difficult to accept the story for plaintiffs 2 and 3 were reluctant to part with Rs. 10,000 each without receipt even though the first plaintiff assured that there was no need for a receipt. In fact the money was not parted with by them till the second plaintiff's son accompanied the defendant to Calcutta and paid it in person to the Receiver. In such circumstances, it is not possible to accept the plea of plaintiffs 2 and 3 that they did not insist on a receipt for payment of Rs. 3,500 each. In this connection, the evidence of P.W. 1 Kshetry that out of the sum of Rs. 30,000 paid in cash Rs. 27,000 was handed over to him by Narendra Kumar Aggarwal and only the balance was paid by the defendant was relied on by the plaintiffs to show that the share of plaintiffs 2 and 3 of Rs. 13,500 each was paid. According to the defendant second plaintiff's son Narendra gave him Rs. 20,000 and he had Rs. 10,000 and he and Narendra counted Rs. 30,000 and handed over the sum of Rs. 30,000 to Kshetry, in the presence of the Judge. On the evidence the High Court came to the conclusion that the money was counted by Narendra and the defendant before it was paid to Kshetry and if Narendra handed to the Solicitor a sum of Rs. 27,000 after counting, the inference that Rs. 27,000 belonged to plaintiffs is not justified. We agree with the view taken by the High Court. We therefore find that plaintiffs 2 and 3 have not proved that they paid Rs. 3,500 each towards the expenses. The evidence relating to payment by the first plaintiff is even worse. According to the first plaintiff, who examined himself as P.W. 2, on 2nd April, 1960 when the agreement was signed he paid Rs. 10,000 as his share of purchase price and Rs. 2,500 towards cost, Rs. 12,500 in all in cash to the defendant. He did not consider it necessary to take a receipt in view of the signed agreement which he thought was sufficient acknowledgment of the liability by the defendant. The first plaintiff was cross-examined about the availability of the sum with him. He admitted that he had no accounts and that the payment of Rs. 12,500 is not recorded any where. The first plaintiff would add that he paid

another Rs. 1,000 by issuing a cheque in favour of the third plaintiff with a direction that the third plaintiff should pay the sum of Rs. 1,000 to the defendant towards expenses. A cheque was no doubt drawn by the first plaintiff in favour of the third plaintiff but there is nothing to indicate that this amount was to be paid to the defendant. The third plaintiff did not obtain any receipt from the defendant. The High Court rightly rejected the plea on behalf of the first plaintiff that the proceeds of the cheque were paid to the defendant. On the record there is hardly any acceptable evidence for establishing the payment of Rs. 13,500 by the first plaintiff to the defendant or the payment of Rs. 3,500 each by the plaintiffs 2 and 3 to the defendant.

There is no explanation by the plaintiffs as to how the conveyance came to be registered in the name of the defendant only when the agreement was that it should be taken in the name of the three plaintiffs and the defendant jointly. The agreement contemplated taking of the conveyance in the names of the three plaintiffs and the defendant and in fact the application made by the defendant to the court prayed that the sale be confirmed in favour of the three plaintiffs and the defendant and the conveyance issued in their joint names. But the application for confirmation in the joint names was not pressed and the conveyance was ultimately made in favour of the first defendant alone. There is no explanation as to why the plaintiffs did not insist on the bid being confirmed in the names of all of them and the conveyance issued in their joint names. Equally on the side of the defendant there is no explanation as to why he signed the agreement which provided that the sale should be for the benefit of all of them and as to why he applied to the court praying for the confirmation of the sale in favour of all of them. Neither has the defendant denied receipt of Rs. 10,000 from each of the plaintiffs 2 and 3. There is no provision for payment of interest by the defendant to plaintiffs 2 and 3 for the sums advanced. If it had been loan simpliciter there could be no explanation for absence of provision for payment of interest. On a close analysis of the evidence led on behalf of the plaintiffs and the defendant we agree with the High Court that neither the version of the plaintiffs nor that of the defendant discloses the entire truth. The conclusion we arrive at on the evidence is that the plaintiffs have failed to prove any prior agreement before the defendant made his bids for Rs. 30,000 and later for Rs. 40,000 and paid the deposits amounting to Rs. 10,000 by himself. Plaintiffs 2 and 3 have failed to prove that they have paid Rs. 3,500 each towards expenses in addition to payment of Rs. 10,000 by each of them which is admitted. The first plaintiff has totally failed in proving that he had paid any part of the consideration. On the side of the defendant there is no explanation as to why he subscribed to the agreement agreeing to share the property along with the three plaintiffs and for his applying to the court for confirmation of the sale in favour of all of them. Neither is there any explanation by him as to why plaintiffs 2 and 3 advanced Rs. 20,000 without interest.

Taking all the circumstances into account we feel the irresistible inference is that the defendant having made the bid by himself later on found himself badly in need of money to pay the balance of the bid amount. In trying to find the money he sought the help of the plaintiffs and received payment of Rs. 20,000 from plaintiffs 2 and 3. The crucial question is whether this amount was received merely as a loan as contended by the defendant or given on the agreement that plaintiffs 2 and 3 should be entitled to a share each. The conduct of the defendant shows that while he badly needed the money he was not willing to share the property with them for the amount. Equally plaintiffs 2 and 3 wanted the share in the property for the money advanced by them. It is clear that

the money was not advanced as a loan. It may be that the plaintiffs 2 and 3 were insisting on a hard bargain but it cannot be denied in the circumstances in which the defendant was placed that he had accepted it. The condition insisted upon by plaintiffs 2 and 3 might not have been fair but the agreement arrived at in the circumstances cannot be said to be due to undue influence. The relief to which the plaintiffs are entitled to under the agreement cannot be denied. The High Court after observing that plaintiffs 2 and 3 who are businessmen would not have lent a large sum of money without charging interest and that it is not likely that the plaintiffs would have been so charitable towards the defendant who was a stranger was of the view that it was not necessary to examine the defendant's financial position and record a finding on the point for the purpose of appeal. While holding that the defendant's version also does not disclose the entire truth the High Court held that would not help the plaintiffs who have to prove the case they set up in the plaint. On the short ground that the agreement dated 2nd April, 1960 does not reflect the true nature of the transaction the High Court held that the suit must fail. We are of the view that if the amount was not advanced as a loan but paid towards acquiring of a share in the property the relief cannot be denied. In the circumstances, the plaintiffs 2 and 3 are entitled to 1/4th share each in the property on their payment of their share of the expenses i.e. Rs. 3,500 each. The defendant has been in possession of the property ever since the purchase and the plaintiffs are entitled to their share of the rents collected by the defendant. We estimate the share of the rents collected for each of the plaintiffs at Rs. 25,000. The result is the appeal is allowed to the extent that there will be a decree for partition and separate possession of 1/4th share each of plaintiffs 2 and 3. Plaintiffs 2 and 3 will pay to the defendant Rs. 3,500 each and interest at 10 per cent per annum from the date of the conveyance and receive Rs. 25,000 each from the defendant towards their share of the rent collected upto date. The first plaintiff will not be entitled to any relief and the suit so far as he is concerned is dismissed. There will be no order as to costs.

Before we conclude we will shortly refer to the question of law raised by Mr. L. N. Sinha on behalf of the defendant. He submitted that as the title in the property vested in the defendant by confirmation of the court sale and later by a registered conveyance, the plaintiffs cannot seek relief on the unregistered agreement Ex. 4 as conveying any title to them. This point was not taken in any of the courts below but learned counsel submitted that because it is a pure question of law not involving any investigation of facts and as it goes to the root of the matter the court may permit the point to be taken. In support of his contention that a pure question of law in the circumstances can be taken for the first time in this Court he relied on the decisions of this Court in *Yaswant Deorao Deshmukh v. Walchand Ramchand Kothari*(1), *Raja Sri Sailendra Narayan Bhanja Deo v. The State of Orissa* (2), *Seth Badri Prasad and others v. Seth Nagarmal and others*(3), *State of Uttar Pradesh & Anr. v. Anand Swarup*(4) and *T. G. Appanda Mudaliar v. State of Madras*(5). As the point raised is a pure question of law not involving any investigation of the facts, we permitted the learned counsel to raise the question. The plea of the learned counsel is that as the title has vested in him by virtue of the confirmation of the sale and the registered conveyance the plaintiff cannot rely on the unregistered agreement. In support of his contention the learned counsel relied on the decision of the Privy Council in *G. H. C. Ariff v. Jadunath Majumdar Bahadur*(6) and *Maritime Electric Co. Ltd. v. General Dairies Ltd.*(7). In *G. H. C. Ariff v. Jadunath Majumdar Bahadur* it was doubted whether the English equitable doctrine can be applied so as to modify the effect of an Indian statute. The court expressed itself thus:".....but that an English equitable doctrine affecting the provisions of an

English statute relating to the right to sue upon a contract, should be applied by analogy to such a statute as the Transfer of Property Act and with such a result as to create without any writing an interest which the statute says can only be created by means of a registered instrument, appears to their Lordships, in the absence of some binding authority to that effect, to be impossible". The Court further observed:

"Their Lordships do not understand the dicta to mean that equity will hold people bound as if a contract existed, where no contract was in fact made: nor do they understand them to mean that equity can override the provisions of a statute and (where no registered document exists and no registrable document can be procured) confer upon a person a right which the statute enacts shall be conferred only by a registered instrument." In *Meritime Electric Co. Ltd. v. General Dairies Ltd.* (supra) the court observed: "...where as here the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppel to prevent it".

The decisions are clear that the plaintiffs cannot succeed in displacing the title of the defendant on the basis of the unregistered agreement. But this will not help the defendant as the suit is based on the plea that the suit property and the premises were purchased in co-ownership i.e. on a claim that the plaintiffs were the real owners of the property. The claims of the plaintiffs as a real owner is not based on the unregistered agreement alone. On the pleadings in the case the question of law raised cannot result in the suit being dismissed as not maintainable.

The second question the learned counsel raised was that the suit is barred under section 66 of the Civil Procedure Code. The trial court overruled the plea on the ground that although the sale in question is a court sale it is not according to the rules prescribed by the Civil Procedure Code but only according to the Rules of the Calcutta High Court on the original Side. The learned counsel submitted that the purpose of section 66, Civil Procedure Code, applies equally to court sales conducted under Rules of Civil Procedure Code as well as those conducted under the High Court Rules. Reliance was placed on a decision of the Privy Council in *Bishun Dayal v. Kesho Prasad and Anr.*(1) where the only case pleaded by the plaintiff was that the person through whom he claimed derived his right to half of the village from the auction purchase having been made in part on his behalf by the auction purchaser, it was held that the claim was barred by section 66, Civil Procedure Code, inasmuch as no case independent of auction purchase and basing title upon subsequent possession was put forward in the plaint. Section 66 of the Civil Procedure Code runs as follows:-

"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 some one through whom the plaintiff claims."

(2). x x x x x S. 66 prohibits any person claiming that a purchase certified by the court in such manner as may be prescribed in favour of a person was made on behalf of the plaintiff. In order to

invoke the prohibition it is necessary to establish that the person against whom the suit cannot be maintained is a person claiming title under a purchase certified by the court in such manner as may be prescribed. A certificate by the court for the purchase in the manner prescribed is therefore essential. The word "prescribed" is defined under s. 2(16) of the Civil Procedure Code as meaning prescribed by Rules. The provisions as to grant of a certificate by a court under a purchase is prescribed in Order 21. Order 21, Rules 64 to 73 prescribe the procedure relating to sale generally while Rules 82 to 108 prescribe the procedure relating to sale of immovable property. When the court makes an order confirming the sale under order 21, Rule 92, the sale becomes absolute. After the sale becomes absolute under Rule 94 the court shall grant a certificate specifying the properties sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate is required to bear the day and the date on which the sale became absolute. The certificate by the court referred to in sec. 66 is a certificate under order 21, Rule

94. The procedure envisaged for sale generally and sale of immovable property under Order 21 is sale by a public auction. Sale by a court through the Receiver appointed by court is not contemplated under these provisions. In a sale by a Receiver a certificate to the purchaser under Order 21, Rule 94, is not given by the Court. Therefore, the prohibition under sec. 66 cannot be invoked in the case of a sale by the Receiver. A Receiver is appointed under Order 40, Rule 1, and a property can be sold by the Receiver on the directions of the court even by private negotiations. The requirement of s. 66 of the C.P.C. is a certificate by the court as prescribed. In this case the conveyance Ex. 5 was in accordance with the original side Rules of the High Court. In the view we have taken that s. 66 is not applicable to sale by Receiver it is not necessary to go into the question whether a sale by the Receiver under the Rules of the Calcutta High Court would come within the purview of s. 66. Section 66 refers to execution of sales only and has no application to a sale held by a Receiver. In this view the objection raised by the learned counsel for the defendant has to be rejected.

ORDER When the Judgment was delivered in Court on 16th January, 1979, allowing the appeal to the extent that there will be a decree for partition and separate possession of one-fourth share each of plaintiffs 2 and 3, the parties expressed their desire to agree amongst themselves and divide the properties finally and report a settlement to that effect and prayed that the Court may be pleased to pass a decree in terms of the compromise. Leave was granted to the parties to enter into a compromise and report the matter to the Court for the passing of the decree in terms of the compromise. Accordingly the parties have entered into a compromise and have filed the compromise memo along with plans for passing of the final decree. Accordingly we direct that a decree be passed in terms of the compromise.

S.R.

Appeal allowed.