APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ.

1914

Jan. 30.

AMULYA RATAN SIRCAR

v.

TARINI NATH DEY.*

Occupancy Holding—Non-transferable occupancy holding, whether devisable by will—Bengal Tenancy Act (VIII of 1885) ss. 26, 178 sub-s. (3) cl. (d)—Heir, if estopped by testator's act from claiming inheritance under the statute.

A non-transferable occupancy holding cannot be the subject of a valid testamentary disposition. In the case of a testamentary devise of such a holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity.

Hari Das Bairagi v. *Udoy Chandra Das* (1) not followed.

SECOND Appeal by Amulya Ratan Sircar, the plaintiff.

This case arose out of a conflict of title between two tenants each claiming occupancy rights in the land in dispute. The following are the admitted facts of the case. The land in suit formerly formed part of one holding standing in the name of one Tarapada Chatterji, a Christian, who died in 1894 leaving one heir, his widow Krishto Moni. At his death Tarapada left a will appointing as his executors the Secretary and Treasurer of the District Committee of the London Missionary Society. In 1903 Krishto Moni sold this land in suit to one Beni Madhab Ghose who sold to

*Appeal from Appellate Decree, No. 2740 of 1911, against the decree of J. C. K. Peterson, District Judge of 24-Parganas, dated July 26, 1911, reversing the decree of Khagendra Nath Bose, Munsif of Alipore, dated Sept. 30, 1910.

(1) (1908) 12 C. W. N. 1086 ; 8 C. L. J. 261

one Martha Mandal who sold to the plaintiff, Amulya Ratan Sircar. In 1908, the defendants Tarini Nath Dey and others purchased the land in suit from the executors of the late Tarapada. According to the plaintiff's case the defendants dispossessed him in 1909, and he sued for recovery of possession upon a declaration of his title and for mesne profits. The first Munsif of Alipore decreed the plaintiff's suit, but on appeal that decision was reversed. Hence this second appeal to the High Court by the plaintiff.

Babu Girija Prasanna Roy Chowdhury, for the appellant.

Babu Jyotish Chandra Hazra, for the respondents.

MOOKERJEE AND BEACHCROFT JJ. The subject matter of the litigation which has culminated in this appeal, is one half share of an occupancy holding, which admittedly belonged at one time to Tarapada Chatterjee. The right to this one half share is claimed, on the one hand, by the transferee from the heir-at-law who is the plaintiff, appellant, and on the other hand, by the transferees from the executor who are the defendants respondents. The occupancy holding, it is not disputed, is not transferable by custom or local usage. In so far as the plaintiff is concerned, his transfer from the heir-at law has been recognised by the landlord, and no question can arise as to its validity on that ground. The substantial question in controversy is, whether the testamentary disposition was valid and operative so as to exclude the heir-at-law, because if there was a valid testamentary devise, the property passed to the executor, and the heir-at-law consequently took nothing. On behalf of the defendants respondents, it has been contended that the occupancy holding, though not transferable

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by custom or local usage, may be the subject of a valid testamentary disposition. The Bengal Tenancy Act admittedly does not contain any provision expressly applicable to this subject. But our attention has been drawn to section 26 which regulates the devolution of occupancy right when a ryot dies intestate, and it has been argued that the Legislature has herein, by implication, indicated that a raiyat is competent to make a testamentary disposition of his occupancy right. There is clearly no force in this contention. In the first place, if we were to accept the mode of interpretation of section 26 suggested by the respondents, we would have to contravene the elementary rule of construction that rights cannot be conferred by mere implication from the language used in a statute; there must be a clear and unequivocal enactment: *Arnold* v. *Mayor of Gravesend* (1).

In the second place, full effect would be given to the implication contained in section 26, if it were shown that a raiyat is competent to make a testamentary disposition of his right of occupancy in certain events. Now, section 178, subsection (*3*), clause (*d*) indicates that in this respect the right of an occupancy raiyat stands on the same footing as his right to transfer his holding. Clause (*d*) provides that nothing in any contract made between a landlord and a tenant after the passing of the Act shall take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage. In the case before us, no local usage has been proved and the respondents are not in a position to support the validity of the bequest as made in accordance with a local usage. The respondents have consequently been driven to take up a different position. Their contention is that the heir-at-law is estopped from questioning the validity of the

(1) (1856) 2 K. & J. 574, 591; 110 R. R. 372.

devise made by the testator, and in support of this view reliance has been placed upon the judgment of Mr. Justice Doss in the case of *Hari Das Bairagi* v. *Udoy Chandra Das* (1). It may be conceded that the view taken by that learned Judge does support the argument for the respondents. But it is worthy of note that when an appeal was preferred under the Letters Patent against the decision of Mr. Justice Doss, the decree was affirmed on a different ground: *Udoy Chandra Das* v. *Hari Das Bairagi*(2). It is consequently impossible for us to treat the matter as concluded by authority, although the opinion expressed by Mr. Justice Doss must be deemed entitled to the highest consideration. On behalf of the appellant, the correctness of the view taken by Mr. Justice Doss has, however, been controverted; and we have been invited to examine the grounds upon which that opinion is based.

Mr. Justice Doss points out, in the first place, that a transfer of an occupancy holding is not a void transaction, that it is binding between the parties, namely, the transferor and the transferee, and all persons claiming through them, and that it is voidable only at the option of the landlord or his representative in interest. This view is founded on the doctrine of estoppel, which was clearly recognized by Phear, J. when he observed in *Bibee Suhodra* v. *Maxwell Smith* (3) that the raiyat "certainly could not himself recover it (the holding) from the stranger to whom he had transferred it for valuable consideration", and by Couch, C. J., when he remarked in *Narendra* v. *Ishan*(4) that "the raiyat could not recover possession from the transferee, as he would be bound by his act of

(1) (1908) 12 C. W. N. 1086; 8 C. L. J. 261.

(2) (1909) 10 C. L. J. 608.

(3) (1873) 20 W. R. 139.

(4) (1874) 13 B. L. R. 274, 289 22 W. R. 22, 26.

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transfer." To the same effect is the express decision in *Bhagirath Changa* v. *Sheikh Hafizuddin*(1), where Stevens, J. pointed out that when the occupancy raiyat has transferred his holding on the representation that he had a transferable interest therein, he cannot, on principles of equity and good conscience, be permitted to prove against the transferee who had paid consideration for the transfer, that he had no transferable interest to convey. This is an intelligible principle, recognized so long and so firmly established that its soundness cannot now be successfully challenged. Mr. Justice Doss then concludes that if this is the character of the transaction, namely, the character of a voidable transfer, "it seems to follow that the heir of an occupancy raiyat ought to be held bound by a transfer of the holding made by a will." The learned Judge then proceeds to state the reason for this inference, namely, that if the heir is bound by a transfer for valuable consideration or by a gift, there does not seem to be any reason why he ought not to be held bound by a transfer made by a will. Before we test this reasoning, it is necessary to observe that the broad proposition that the heir of an occupancy raiyat is bound by a gift made by the raiyat himself may, when occasion arises, require examination. Cases are no doubt conceivable where the donee may, by the acceptance of the gift, have altered his position, and may, in such circumstances, be entitled to rely upon the doctrine of estoppel in support of his title. To take a concrete illustration: A is offered two gifts by two of his relations, on the condition that if he accepts one, he must renounce the other; he makes his election in favour of one of the gifts. His position would be altered if that donor were permitted thereafter to prove against him that the donor had no transferable

(1) (1900) 4 C. W. N. 679.

title to convey. But, on the arguments addressed to us, we are not prepared at present to accept it as an invariable principle of law that, in every case of gift, the doctrine of estoppel may be applied as between donor and donee. Let it be assumed, however, for the purposes of the present argument and for that purpose alone, that in all cases of transfer for valuable consideration as also in all cases of gift, the heir is bound by the same estoppel as the transferor or the donor himself; does it follow that this principle is applicable to cases of testamentary devise? In the case of transfer *inter vivos*, with or without consideration, there is, on the assumption made, an estoppel in favour of the transferee as against the transferor, and that estoppel is binding upon the heir of the transferor. In the case of a testamentary devise, is there any estoppel as between the testator and the intended legatee or the executor? It cannot be disputed that it is open to the testator, up to the very last moment of his life, to change his mind, and to revoke the disposition made by him. His testament does not come into operation till the moment after his death. Consequently, as between the testator on the one hand and the legatee or executor on the other, there is no room for any possible application of the doctrine of estoppel. The position becomes plain when we recall to mind the nature of the estoppel applicable to cases of transfer for consideration.

The principle is stated lucidly by Lord Denman in *Pickard* v. *Sears* (1) in the following terms: "where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things

(1) (1837) 6 A. & E. 469: 45 R. R. 538.

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as existing at the same time." The principle was amplified and re-stated by Lord Selborne in the *Citizen's Bank of Louisiana* v. *The First National Bank of New Orleans*(1) in these terms: "The foundation of that doctrine, which is a very important one and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which or without the statement of which the party would not enter into the contract and which being otherwise than as they were stated would leave the situation after the contract different from what it would have been if the representations had not been made, then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true and shall be compelled to make them good." Lord Selborne then proceeded to add a very important qualification,—"but those must be representations concerning existing facts"—and thereby emphasised the statement of Lord Cranworth in the case of *Jorden* v. *Money*(2) to the effect that in order to found an estoppel, the representation must be of existing facts and not of mere intentions. It is clear, therefore, that as between the testator on the one hand and the executor or legatee on the other, there is no estoppel. Consequently, so far as the heir-at-law is concerned, he cannot be deemed bound by any derivative estoppel traceable to an estoppel which bound his ancestor. If he is to be bound by any estoppel, it must be an independent estoppel against him; but on behalf of the respondents no intelligible principle of justice, equity or good conscience has been suggested upon which any such independent estoppel can be reasonably founded.

(1) (1873) L. R. 6 H. L. 352, 360. (2) (1854) 5 H. L. C. 185.

The truth is that the testament, if it takes effect, comes into operation immediately after the death of the testator; at the same moment, precisely, the statutory right of inheritance comes into operation; and there is no reason why an estoppel should be applied against the heir-at-law so as to deprive him of what he is entitled to take under the statute. We are thus constrained to hold that the view taken by Mr. Justice Doss cannot be supported on principle, and that in the case of a testamentary devise of a non-transferable occupancy holding, the heir-at-law is not debarred by the doctrine of estoppel from questioning its validity. In the case before us, the result follows that there was no valid disposition in favour of the executors. The plaintiff, as the transferee from the heir-at-law by successive devolution, is consequently entitled to the property claimed, in respect whereof the defendants are trespassers in the eye of the law.

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of appeal below.

G. S. *Appeal allowed*