

PRIVY COUNCIL.

ANNADA MOHAN ROY (PLAINTIFF)

v.

GOUR MOHAN MULLICK (DEFENDANT)

(AND CONSOLIDATED APPEALS).

P. C. °
1923

June 4.

[ON APPEAL FROM THE HIGH COURT OF CALCUTTA.]

Contract—Sale of expectancy—Agreement to transfer on possession vesting—Transfer of Property Act (IV of 1882), s. 6 (a)—Agreement “discovered to be void”—Recovery of money paid—Accrual of cause of action—Indian Contract Act (IX of 1872), s. 65.

A contract by a Hindu to sell immovable property to which he is the then nearest reversionary heir, expectant upon the death of a widow in possession, and to transfer it upon possession accruing to him, is void. The Transfer of Property Act, 1882, s. 6 (a), which forbids the transfer of expectancies would be futile if a contract of the above character was enforceable.

Sri Jagannada Raju v. Sri Rajah Prasada Rao (1) approved.

The time at which such an agreement is “discovered to be void,” so that a cause of action to recover the consideration arises under s. 65 of the Indian Contract Act, 1872, in the absence of special circumstances, is the date of the agreement.

Harnath Kunwar v. Indar Bahadur Singh (2) distinguished.

Judgment of the High Court affirmed.

CONSOLIDATED APPEAL (No. 10A of 1921) from a judgment and three decrees of the High Court in its appellate jurisdiction (April 22, 1921) affirming decrees of the Court in its original jurisdiction.

The three suits giving rise to the consolidated appeal were brought by the appellant in the High

° Present: LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE and MR. AMEER ALI.

(1) (1915) I. L. R. 39 Mad. 554

(2) (1922) I. L. R. 45 All. 179 ;

L. R. 50 I. A. 69.

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Court against the respondents severally in the following circumstances:—

Gopal Lal Seal, a Hindu, governed by the Dayabhaga, died childless in 1902 leaving two widows and five nephews, including among them the three respondents. After his death a will was propounded by which the greater part of the property of the deceased was devised to his nephew, including the respondents. That will was pronounced by the High Court to be a forgery.

On May 7, 1908, while an appeal to the Privy Council was pending, the appellant and the respondents severally entered into agreements now sued on. These agreements were to the same effect, and it is sufficient to refer to that with the first respondent. In consideration of payments of Rs. 300 a month, which the appellant had been making to the respondent and agreed to continue, the agreement provided: "I, Gour Mohan Mullick, shall convey in your favour whatever rights I have to the estate of Gopal Lal Seal deceased (that is to say, rights under the will or reversionary rights) immediately upon the same being established." It was further provided that if the appeal failed, the respondent within three months of getting any share of the property would sell to the appellant for the consideration already stated; also that if the widows of the deceased should relinquish their life interest, either jointly, or severally, or sell the same to the appellant, then the respondent becoming owner of a share by inheritance would within three months transfer it to the appellant.

The appeal to the Privy Council was dismissed in 1909.

One of the widows died in 1917, and in 1918 one of the respondents brought a suit against the other widow claiming the property, and the parties to that

suit entered into a compromise whereby the nephews obtained half the entire property in equal shares.

The appellant by his plaints in the present suits claimed a conveyance from each of the respondents of the share which he had received, or alternatively to recover the sum advanced to him. The respondents by their written statements pleaded (*inter alia*) that the agreement was void and inoperative in law as being for a transfer of an expectancy.

Four issues arising upon that pleading were tried as preliminary issues by Greaves J., the trial of the remaining issues, which included issues as to the plaintiff's alternative claim and whether it was barred by limitation, stood over.

The learned Judge held that the agreement was void and the suit for specific performance not maintainable.

That decision was affirmed on appeal by Mookerjee and Fletcher JJ., the remaining issues not being tried.

De Gruyther K. C. and *Abdul Majid*, for the appellant. If the agreement was unenforceable the appellant nevertheless was entitled under s. 65 of the Indian Contract Act to recover the money which he had advanced. Whether that cause of action was barred by limitation depends upon when it was "discovered" that the agreement was void; that date may have been later than the date of the agreement: *Harnath Kun var v. Instar Bahadur Singh* (1). If necessary the suit should be remitted in order that evidence may be adduced on that question. But it is submitted that the property having come to the hands of the defendant the agreement is enforceable. Section 6(a) of the Transfer of Property Act prohibits merely a transfer of an expectancy, but does not

(1) (1922) I. L. R. 45 All. 179; L. R. 50 I. A. 69.

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prohibit an agreement to transfer one; there is nothing in Hindu law which prohibits an agreement of that nature, and its validity is recognized by the Contract Act: *Ram Niranjun Singh v. Prayag Singh* (1), *Pindiprolu Sooraparaju v. Pindiprolu Veerabhadraudu* (2), *Bilbro Parshad Sahu v. Miller* (3), Colebrooke's Digest, Bk. II., ch. 2, s. 1 (25) (27); Indian Contract Act, 1872, s. 32, Transfer of Property Act, 1882, s. 54. *Sri Jagannada Raju v. Sri Rajah Prasada Rao* (4) was wrongly decided.

Sir George Lowndes K. C. and *E. B. Raikes*, for the respondents in the first two appeals.

The judgment of their Lordships was delivered by

June 4.

LORD SUMNER. Three points have been argued on these appeals, one by Mr. De Gruyther, the leading counsel for the appellant, and two others by Dr. Abdul Majid, the junior counsel.

The plaintiff, the present appellant, had agreements with three persons, who are the respondents, only two of whom however appear by counsel, under which he purported with great elaboration to purchase from them their expectations under the will of their uncle, or alternatively their rights as his nephews expectant upon the termination of the surviving widow's rights in the property of the uncle, and among many other purposes, which are recited in this agreement, for which advances are agreed to be made, one, and apparently the principal one, was that an appeal might be prosecuted ultimately to His Majesty in Council for the purpose of establishing a will which the deceased was said to have made. Unfortunately their Lordships, affirming the decision in the Court

(1) (1881) I. L. R. 8 Calc. 138, 145. (3) (1904) I. L. R. 31 Calc. 667, 674.
 (2) (1907) I. L. R. 30 Mad. 486, 492. (4) (1915) I. L. R. 39 Mad. 554.

below, found that that will was a forgery. That therefore reduced the expectations of the three respondents to their interest in the property after the widows' rights should come to an end, and as a matter of fact after a time one widow died and a compromise was entered into with the approbation of the Court in respect of the rights of the other widow, the effect of which was to accelerate the time when the nephews became entitled to the inheritance.

In the present suits in India the trial Judge stated eleven issues. The first four of those issues were argued and dealt with by him. The point in substance upon which those four issues turned was whether or not the agreements were illegal or void on the ground that they dealt with an expectancy. The remaining seven issues were not dealt with by the learned Judge. An application was made to him that he should pronounce a decree giving effect to his determination of the first four issues, which he declined to do upon the ground that there remained some issues in the case which had not been dealt with, one of them, for example, being an issue whether the plaintiff was entitled to a refund of the amounts which he had in fact paid or any of them, and another whether his rights were barred by limitation. The present appellant was advised that his best course was to obtain an immediate decree upon the four issues, which had been dealt with and appeared at that time to be the only substantial ones, in order that he might prosecute his appeal to the High Court, and ultimately to His Majesty in Council, and he therefore elected to abandon all the other issues, whatever they might be; in fact, he never called any evidence in support of them, and a formal order was made upon his petition disposing of them all in that way. We are told, and very likely it may be so, that at that time the advice was

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largely influenced by the consideration that it was still thought to be an open question before their Lordships whether, apart from the Transfer of Property Act, it might be held competent to these heirs, according to the ordinary Hindu law, to contract to transfer, and ultimately to transfer their expectation, such as it was, and no doubt, if that was the real point of the litigation, it was worthwhile to abandon minor points in order to get that issue determined. Between the time when the decree was asked for and obtained and the present time there has been a decision of their Lordships' Board in the case of *Harnath Kunwar v. Indar Bahadur Singh* (1), and although, as it appears to their Lordships, it simply restates what had frequently been stated before, the appellant now recognizes that the last word has been said, so far as he is concerned, about the possibility under Hindu law of such an interest being transferred.

Under these circumstances an application was made to their Lordships by Mr. De Gruyther to allow the petition which had been presented to the High Court to be recalled, and the decree that was made upon that petition to be set aside and so to allow in some shape or form discussion, if not proof, of the remaining issues in the case, the object being to show that there were or might be, circumstances in which it possibly could be held that the time of the discovery of the illegality of the contracts was not the time when the contracts were made and the parties knew the law or must be presumed to have known it, but at a later date (what date their Lordships are not exactly told). It was urged that, if such circumstances could be suggested here, a view similar to that which the Board took in the case above mentioned might be taken in favour of the present appellant also. In that case,

(1) (1922) I. L. R. 45 All. 179 ; L. R. 50 I. A. 69.

However, there were special circumstances, wholly different from those in the present case, circumstances which were proved in evidence and were sufficient for their Lordships to act upon and to enable them to say that the discovery in the case was later than the date of the contract itself. There has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word "discovery" and of the time at which that discovery must be held to have occurred. Not only so, but it was by the deliberate act of the appellant himself, for considerations which at the time were very likely wise considerations, that he closed the door to any investigation of that issue at all. Their Lordships are content to dispose of the first point by saying that the additional issues cannot be gone into now and that upon the face of the matter the appeal must be dealt with upon the question whether, either under the Transfer of Property Act or under the Hindu law applying to purchases of expectations of inheritances, there is any ground upon which these contracts can be supported.

Dr. Abdul Majid has developed these points, and his points appear to be two, setting aside for the moment the Transfer of Property Act, upon the ground that it deals with an actual transfer or conveyance and not with a contract to transfer. It is contended that there is nothing in the reason of the thing to prevent two parties, who are concerned in the way in which these parties were concerned, from entering into a contract for the future sale of future expectations. It is admitted that there is no authority to be found anywhere which supports the view that such a contract is possible, and it is admitted that there is authority in India to the contrary, the authority in question

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being *Sri Jagannada Raju v. Sri Rajah Prasada Rao* (1), which so satisfied the learned Judge at the trial that he expressed his assent to the reasoning, without further discussion, and the High Court in its turn was satisfied also. The reasoning of that decision may well be summed up first in a quotation from the judgment of Wallis C. J., and secondly, in a quotation from that of his colleague, Tyabji J. The learned Chief Justice says (2): "On this question, " looked at apart from authority, I should not entertain any doubt, as it seems futile to forbid such " transfers of expectancies if contracts to transfer " them are to be enforced as soon as the estate falls " into possession. In these circumstances it seems " to me that it is our duty to give effect to what we " consider plain provisions of our statute law instead " of following a course of English decisions which " would appear to have been based, from the very " first, on a regard for long established practice rather " than on principle, and to have failed to commend " themselves to Lord Eldon."

Then Tyabji J. says (3): "The Transfer of Property " Act does not permit a person having expectations of " succeeding to an estate as an heir, to transfer the " expectant benefits; when such a transfer is purported " to be made an attempt is in effect made by the two " persons to change with each other their legal posi- " tions, and an attempt by the one to clothe the other " with what the Legislature refuses to recognise " as rights, but styles as a mere chance incapable of " being transferred. It would be defeating the pro- " visions of the Act to hold that though such hopes or " expectations cannot be transferred in present or " future, a person may bind himself to bring about the

(1) (1915) I. L. R. 39 Mad. 554. (2) (1915) I. L. R. 39 Mad. 554, 558.

(3) (1915) I. L. R. 39 Mad. 559.

“same results by giving to the agreement the form of
 “a promise to transfer not the expectations but the
 “fruits of the expectations, by saying that what he
 “has purported to do may be described in different lan-
 “guage from that which the Legislature has chosen
 “to apply to it for the purpose of condemning it.
 “When the Legislature refuses the transaction as
 “an attempt to transfer a chance, it indicates the
 “true aspect in which it requires the transaction to
 “be viewed.”

Their Lordships think that they are only following out numerous other passages which have been referred to in earlier judgments of this Board when they accept that reasoning and that conclusion. It is impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract, while permitting the contract to stand as a contract, or to see how by appealing to s. 65 of the Indian Contract Act or to the nature of the bargain as a mere bargain *de futuro*, they could uphold it as a contract when it is a contract to which, not only must specific performance be refused under the Transfer of Property Act, but as to which damages can never be recovered, because the contract is not a performable contract until the realization of the expectation occurs.

There is another way in which the learned counsel for the appellant puts the point—namely, that there is here a contract wholly distinguishable from any contract as to *spes successionis*, because, after carefully providing for all eventualities, the documents deal with the possibility of the widows, or one of them, relinquishing their life interests either jointly or severally, or selling them to the reversionary heirs, in which event from the date of the relinquishment or sale, the heirs would become the present owners of

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the estate by right of inheritance. It is suggested that this provision ought to be read as relating to a transaction with strangers, embedded in the middle of a much longer contract with the parties to this appeal and relating to their hopes of inheritance; in other words, that it should be treated as though it read: "Further, if we can obtain by purchase from total strangers to the family a portion of our late uncle's property, then we undertake to sell it to you on the same terms as those upon which we have undertaken to sell our *spes successionis*." It is not necessary to discuss how far such a contract might be supportable, because it is quite plain upon the documents that this is not such a contract, and therefore the point, ingenious though it is, is sufficiently dealt with by dismissing it.

The result, therefore, is that on all the points the appeals fail. As they have been consolidated in India and before their Lordships there will be one set of costs only, and the two successful respondents who appear by counsel will get that set of costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for the appellant: *Chapman Walker & Shephard*.

Solicitors for the respondent: *Watkins & Hunter*.

A.M.T.