APPELLATE CIVIL.

Before Chatterjea and Panton JJ.

1923

Aug. 14.

JOGGESWAR MAHATA

v.

JHAPAL SANTAL.*

Statute, construction of—Alienation, voluntary or involuntary, by an aboriginal—Aboriginal's right to waive benefit of provisions of an Act—Public policy in a statute—Limitation in the case of void sale—Bengal Tenancy (Amendment) Act (Beng. II of 1918), Preamble, ss. 49B, 49K.

The Bengal Tenancy (Amendment) Act, 1918, prevents alienation, voluntary or involuntary, of an aboriginal's tenure or holding except as provided in Chapter VIIA of that Act.

The object of the said enactment being the protection of aboriginals, it is not open to an aboriginal to waive the benefit of the provisions of the Act.

The mere fact that the enactment was made for the benefit of a class of persons does not show that it was not on the ground of public policy.

Where a sale is a nullity, no question of limitation arises.

Ashutosh Sikdar v. *Behari Lal Kirtania* (1), *Rajani Kanta Ghose* v. *Sheikh Rahaman Gazi* (2) and *The Liverpool Borough Bank* v. *Turner* (3) referred to.

Malkarjun v. *Narhari* (4) distinguished.

APPEAL from Appellate Order by Joggeswar Mahata and others, the decree-holders.

The application out of which this appeal arose was by the judgment-debtor to set aside a sale held in contravention of the provisions of Bengal Act II of 1918,

*Appeal from Order No. 99 of 1923, against the order of A. Henderson, District Judge of Midnapore, dated Nov. 21, 1922, affirming the order of Abinash Chandra Ghosh, Munsif of Jhargram, dated July 24, 1922.

(1) (1907) I. L. R. 35 Calc. 61, 74.
(2) (1922) 27 C. W. N. 765.
(3) (1860) 2 De G. F. & J. 502, 508; 129 R. R. 172, 175.
(4) (1900) I. L. R. 25 Bom. 337.

on the ground that it was as such a nullity. This contention was overruled by the Court of first instance, but he held that the sale was a nullity as being opposed to public policy and so Art. 166 of the Limitation Act had had no application to the case. He therefore set aside the sale on certain terms. The decree-holders appealed and contended that the judgment-debtor having waived the benefit of the provisions of the Bengal Tenancy (Amendment) Act, 1918, and allowed the tenure to be sold could not be permitted to say that the sale was a nullity and further that the application for setting aside the sale was barred by limitation. The appeal was dismissed.

The decree-holders, thereupon, preferred this appeal to the High Court.

Dr. Dwarkanath Mitter (with him *Mr. J. M. Mitra*), for the appellants. The sale was not a nullity. Section 49K of the Bengal Tenancy (Amendment) Act, 1918, was applicable only to a few districts and was meant for the benefit of a particular class of persons and not for the general public of which that particular class of persons formed a part. It cannot therefore be said that the statutory provision was made on grounds of public policy. The respondents could, therefore, waive the irregularity of the sale as they had done. Further, it was admitted that there was no fraud and hence application under O. XXI, r. 90 of the Code of Civil Procedure to set aside the sale was barred under Art. 166 of the Limitation Act and the same Article governed applications under section 47 of the Code. A sale cannot be impeached after expiry of period of limitation on the ground of mere irregularity as in this case: *Khiarajmal* v. *Daim* (1). The sale was not void, but was at best voidable: see *Ashutosh Sikdar* v.

(1) (1904) I. L. R. 32 Calc. 296.

1923

JOGGESWAR MAHATA v. JHAPAL SANTAL.

Behari Lal Kirtania (1), per Mookerjee J. Formal proceedings must be taken to avoid a sale, even if it be voidable, being in contravention of a case : *Uttam Chandra Daw* v. *Rajkrishna Dalal* (2), *Pancham Lal Chowdhury* v. *Kishun Pershad Misser* (3), *Rajani Kanta Ghose* v. *Sheikh Rahaman Gazi* (4). A sale cannot be set aside except in accordance with statutory provision: *Birj Mohun Thakur* v. *Rai Uma Nath Chowdhry* (5), *Khetter Nath Biswas* v. *Faizuddin Ali* (6). See also *Malkarjun* v. *Narhari* (7) in this connection.

Babu Pyarimohan Chatterjee, for the respondents, referred to *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1). The Court is to look at the object of the statute to see if it is directory or obligatory. The new Act, as the preamble shows, was passed to protect the aborigines against their own indiscretions, and its very object would be frustrated if their alienations were not nullified for disobedience of its provisions. The provisions are undoubtedly based on grounds of public policy. See section 49K of Bengal Act II of 1918.

The right of the aborigines is thereby rendered absolutely inalienable on execution of any decree or order. The sale is therefore null and void: *Annada Mohan Roy* v. *Gour Mohan Mallik* (8). It is not merely non-compliance with formal requisites prescribed for any transaction, but it is an attempt to accomplish a transfer of property which has been rendered inalienable by statutory provision. To such a case, the principle of estoppel or waiver can have no application. As the sale is absolutely void *ab initio*

(1) (1907) I. L. R. 35 Calc 61, 74.
(2) (1919) I. L. R. 47 Calc. 377.
(3) (1919) 14 C. W. N. 579.
(4) (1922) 27 C. W. N. 765, 768.
(5) (1892) I. L. R. 20 Calc. 8; L. R. 19 I. A. 154.
(6) (1897) I. L. R. 24 Calc. 682.
(7) (1900) I. L. R. 25 Bom. 337.
(8) (1920) I. L. R. 48 Calc. 536.

and not merely irregular, it does not require to be set aside. Therefore no question of limitation arises and Art. 166 or Art. 12 of the Limitation Act has no application to this case. The application is made merely to get an adjudication of the Court that the sale is void and not to set it aside. See *Gurudas Biswas* v. *Bhowanipore Zemindary Co. Ld.* (1).

CHATTERJEA AND PANTON JJ. The question involved in this appeal is whether a sale held in contravention of the provisions of Bengal Act II of 1918 is merely an irregular sale or a nullity.

The appellant obtained a decree for money against the respondent who is an aboriginal residing in the District of Midnapore, to which the Act applies, and in execution of the decrees put up his tenure to sale and purchased it himself on the 20th August, 1920. An application was made to set aside the sale on the 13th January, 1922. It was far beyond the period prescribed by Article 166 of the Limitation Act or even Article 12 of the Limitation Act. The Courts below, having come to the conclusion that the sale was a nullity, over-ruled the objection of limitation and set aside the sale.

The decree-holders have appealed to this Court and it is contended that the sale was not a nullity and that the provisions of the Act having been made for the benefit of a particular class of persons and not for the general public, the respondents could waive the irregularity of the sale and the sale, therefore, was not altogether invalid. We have been referred to certain observations made by Mookerjee J. in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (2). The learned Judge observes—"When the object of the sta-"tute has been determined, if the statutory provision

(1) (1921) 25 C. W. N. 972, 976. (2) (1907) I. L. R. 35 Calc. 61, 74.

1923

JOGGESWAR MAHATA v. JHAPAL SANTAL.

"is not based on grounds of public policy, and is in-"tended only for the benefit of a particular person or "class of persons, the conditions prescribed by the "statute are not considered as indispensable and may "be waived, because every one has a right to waive, "and to agree to waive, the advantage of a law or rule "made solely for the benefit and protection of the in-"dividual in his private capacity, and which may be "dispensed with without infringement of any public "right or policy." The mere fact that the statutory provisions are intended for the benefit of a class of persons does not necessarily show that it is not based on grounds of public policy. As was observed by Lord Campbell L. C. in *The Liverpool Borough Bank* v. *Turner* (1), that "no universal rule can be laid down "for the construction of statutes as to whether "mandatory enactments shall be considered directory "only or obligatory with an implied nullification for "disobedience. It is the duty of courts of justice to "try to get at the real intention of the Legislature by "carefully attending to the whole scope of the statute to "be construed" and in the case of *Rajani Kanta Ghose* v. *Sheikh Rahaman Gazi* (2), Mr. Justice Mookerjee observes, "the only rule that may be adopted is, that "when the provisions of a statute have been contra-"vened, if a question arises as to how far the proceed-"ings are affected by such contravention, the matter "must be determined with regard to the nature, scope "and object of the particular provision which has "been violated. No hard and fast line can be drawn "between a nullity and an irregularity." We there-fore have to consider the object of the Act. The pre-amble states—"Whereas it is expedient to supplement

(1) (1860) 2 De G. F. & J. 502, 508 ; (2) (1922) 27 C. W. N. 765, 768. 129 R. F. 172, 175.

"and amend the Bengal Tenancy Act, 1885." Section 49 B of the Act lays down, "No transfer by an aboriginal tenure-holder, raiyat or under-raiyat of his right in his tenure or holding, or in any portion thereof, by private sale, gift, will, mortgage, lease or any contract or agreement, shall be valid to any extent except as provided in this chapter." The voluntary alienation, therefore, is absolutely prohibited except as provided for in that chapter, and section 49K lays down "Notwithstanding anything in this Act, no decree or order shall be passed by any Court for the sale of the right of an aboriginal tenure-holder, raiyat or under-raiyat in his tenure or holding, or in any portion thereof, nor shall any such right be sold in execution of any decree or order." There are certain provisos to which we need not refer. Section 49K, therefore, clearly lays down that there shall be no decree for sale of a tenure of an aboriginal and no sale shall be held in execution of a decree except a rent-decree and certain other cases mentioned in the proviso. It is not reasonable to hold that the Legislature having enacted that there shall be no voluntary alienation by an aboriginal to any extent except as provided in this chapter should allow an involuntary sale in the same chapter. The enactment is for the protection of the aboriginals against any indiscreet transaction. That being the object of the enactment, we think it was not open to him to waive the benefit of the provisions. We do not think that the mere fact that the enactment was made for the benefit of a class of persons, viz., the aboriginals, in certain district, does not show that that it was not on the ground of public policy. We are therefore of opinion that the sale was a nullity and, if the sale is altogether void, the question of limitation does not arise. That question arises where the sale is a valid sale until it is set aside, as it

1923

JOGGESWAR MAHATA v. JHAPAL SANTAL.

was in the case of *Malkarjun* v. *Narhari* (1). Having regard to the view taken by us that the sale in the present case was not an irregular sale but a void one, we are of opinion that the application is not barred by limitation.

The appeal is accordingly dismissed with costs.

S. M. *Appeal dismissed.*

(1) (1900) I. L. R. 25 Bom. 337.

APPELLATE CIVIL.

Before Chatterjea and Panton JJ.

1923.

Aug. 17.

PRAMADA NATH ROY

v.

BASIRUDDIN QUANJI.*

Jurisdiction—Trial—Suit instituted before certification by Government under s. 101 of the Bengal Tenancy Act, if and when can be tried—Bengal Tenancy Act (VIII of 1885), s. 111.

Section 111 of the Bengal Tenancy Act precludes the trial of a suit instituted even before certification by the Government under s. 101 of that Act of preparation of a record-of-rights, until three months after the final publication of the record-of-rights.

Ram Narain Singh v. *Lachmi Narain Deo* (1) and *Hira Koer* v. *Lachman Gope* (2) referred to.

APPEAL from Appellate Order by Pramada Nath Roy, the plaintiff.

This appeal arose out of a suit for recovery of rent at an enhanced rate. The plaintiff claimed additional

* Appeal from Order, No. 129 of 1923, against the order of Girish Chandra Sen, District Judge of Pabna, dated Feb. 12, 1923, reversing the order of Girja Bhusan Sen, Offg. Subordinate Judge of Bogra, dated Sep. 29, 1921.

(1) (1912) 17 C. W. N. 403. (2) (1913) 19 C. W. N. 1141.