1886

JAWAHAR SINGH v. MUL RAJ.

at p. 391 of Mr. Russell's work, it is said :—" An arbitrator may in general fix the time and place at which payment is to be made, though he need not do so unless he think fit. It seems he may award one party to give the other a promissory note payable at a future day, for that is the same thing in effect as awarding the payment of the money at the future day. So he may order one party to execute a bond for the payment to the other of an ascertained sum of money at a specified time. He may direct payment to be made by instalments. He may add that if the sum awarded be not paid by the appointed day, the party shall pay a larger sum by way of penalty ; or when the payment is to be by instalments, that if one be overdue the whole amount shall be payable at once." This is the general rule which is observed in England, and I see no reason why it should not equally be followed in this country. With reference to the remarks of my learned brother as to s. 518 of the Code, I agree that the word " award," used in the last sentence of s. 522, must be understood to mean an award as given by the arbitrators, and not as amended by the Court under s. 518. The words " in excess of, or not in accordance with, the award," used in the former section, were intended to enable the Court of appeal to check the improper use of the power conferred by s. 518, and, in the absence of such a check, a Court of first instance, professing to act under s. 518, might pass a decree far in excess of the powers given by that section.

Under these circumstances I agree with the orders proposed by my learned brother Oldfield in both cases.

1886
May 21.

Before Mr. Justice Straight, Offg. Chief Justice, and Mr. Justice Mahmood.

MAHRAM DAS (PLAINTIFF) *v.* AJUDHIA (DEFENDANT).*

Act IV of 1882 (*Transfer of Property Act*), *ss.* 10, 11—*Vendor and purchaser—Contemporaneous "ikrar-namah"—Condition restraining alienation—Restriction repugnant to interest created—Lambardar and co-sharer—Collection of rents by co-sharer—Suit by lambardar for money had and received—Costs—Suit to recover costs by way of damages.*

M, a co-sharer in a village, transferred to *A*, another co-sharer, a two annas share, by deed of sale. Upon the same date, *A* executed an *ikrar-namah* in which

* Second Appeal No. 1640 of 1885, from a decree of J. Liston, Esq., Deputy Commissioner of Lalitpur, dated the 2nd June, 1885, confirming a decree of J. Greenwood, Esq., Extra Assistant Commissioner of Lalitpur, dated the 14th April, 1885.

1886

MAHRAM DAS v. AJUDHIA.

he agreed that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and that he would not alienate or mortgage it or otherwise exercise proprietary rights over it. It was further provided that in the event of *A* committing any breach of covenant the sale should be avoided, and the proprietary rights in the two annas share should re-vest in *M*. A suit was subsequently brought by *M*, upon the allegations that, in breach of the covenants of the *ikrar-namah*, *A* had collected the rents of the share; that he had sought to obtain partition of the same by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff had been compelled to sue the tenants; that in these suits the tenants exhibited receipts given by *A*, on the basis of which the suits were dismissed; and that he had been subjected to various costs and expenses. He therefore claimed, by way of damages from *A*, the amount of these costs and expenses, and also to recover certain sums of money realized by *A* as rent from the tenants, and further, by reason of the *ikrar-namah*, to avoid the sale-deed which preceded it.

Held that the deed of sale and the *ikrar-namah* must be regarded as recording one single transaction, *i.e.*, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the other by the former; and that, in this view, it was clear from the *ikrar-namah* that the proprietary title created by the sale-deed was cut down to *nil*, and limitations placed upon it which rendered it useless as a proprietary right. *Sital Parshad* v. *Luchmi Parshad* (1) referred to.

Held that provisions of this kind which absolutely debar the person to whom the proprietary rights have passed from exercising these rights, impose conditions which no Court ought to recognize or give effect to; that a covenant in a sale-deed the effect of which is to disable the vendee from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of the principle of ss. 10 and 11 of the Transfer of Property Act; and that, therefore, as the agreement on the basis of which the plaintiff asked for relief was one which no Court should assist him in enforcing, the suit must fail.

Holman v. *Johnson* (2), *Anantha Tirtha Chariar* v. *Nagmuthu Ambalagaren* (3), *Bradley* v. *Peixoto* (4) and *Hussain Khan Bahadur* v. *Nateri Srinivasa Charlu* (5) referred to. *Balaji J. Rahalkar* v. *Narayanbhat* (6) distinguished.

Held by MAHMOOD, J., with reference to the sums realized by the defendant as rent, that whatever may be the rights of a lambardar in reference to the collection of rents, the defendant, being a co-sharer in the village, and having, though perhaps irregularly, realized sums of money from the tenants, could not, in a Civil Court and in a suit of this nature, be made to repay the lambardar; and the latter's only remedy was to deduct the items when the *bujharat* or rendition of accounts between the co-sharers and himself took place.

Held by MAHMOOD, J., with reference to the costs incurred by the plaintiff in the Revenue Court, that such Court in the former suit was entitled to deal

(1) I. L. R., 10 Calc. 30.
(2) 1 Cowper, 543, quoted in Leake on Contracts, 970.
(3) I. L. R., 4 Mad. 200.
(4) Tudor's Leading Cases on Real Property, 968.
(5) 6 Mad. H. C. Rep. 356.
(6) 6 Bom. H. C. Rep., A. C., 63.

1886

MAHRAM DAS v. AJUDHIA.

with the question of costs, and dealt with it, and the costs could not be made the subject-matter of fresh litigation, and therefore could not be claimed in this suit by way of damages. *Chengulva Raya Mudali* v. *Thangakki Ammal* (1), *Jalam Punja* v. *Khoda Javra* (2), *Kabir* v. *Mahadu* (3), and *Pranshankar Shivshankar* v. *Govindhlal Parbhudas* (4), referred to.

The facts of this case are sufficiently stated for the purposes of this report in the judgments of the Court.

Munshi *Sukh Ram*, for the appellant.

Babu *Ratan Chand*, for the respondent.

STRAIGHT, Offg. C. J.—This was a suit brought by plaintiff-appellant under the following circumstances:—The plaintiff is the owner of a nine annas and six pies share in a village, in which the defendant is the owner of a four annas share. Prior to 1880, the defendant sold his four annas share to the plaintiff. On the 24th August, 1880, the plaintiff re-transferred two annas out of the four to the defendant for Rs. 50. This sale was effected by a sale-deed of that date. Concurrently with the sale-deed an *ikrar-namah* or agreement was executed by the defendant, in which, among other things, the defendant undertook that he would not collect the rents of the two annas transferred to him, that he would not ever demand partition of that share, and would not alienate or mortgage it, or otherwise exercise proprietary rights over it. It was further provided that in the event of the defendant committing any breach of these covenants of the agreement, the sale should be avoided, and the proprietary rights in the two annas should re-vest in the plaintiff. This suit has been brought by the plaintiff on the allegations that, in breach of the covenants of the agreement, the defendant has collected the rents of the share; that he has sought to obtain partition thereof by certain proceedings in the Revenue Court; that, in consequence of his action in collecting the rents, the plaintiff has been compelled to sue the tenants; that in those suits the tenants have exhibited receipts given by the defendant, on the basis of which his suits have been dismissed; and that he has thus been subjected to various costs and expenses. He therefore claims, by way of damages, from the defendant the amount of these costs and expenses as having been incurred by him in consequence of the defendant's action. He further claims, by reason of

(1) 6 Mad. H. C. Rep., 192.
(2) 8 Bom. H. C. Rep., A. C., 29.
(3) I. L. R., 2 Bom. 360.
(4) I. L. R., 1 Bom. 467.

the *ikrar-namah* of the 24th August, 1880, to avoid the sale-deed which preceded it. The Courts below have dismissed the claim on the ground of limitation, the lower appellate Court holding that art. 91 of the Limitation Act was applicable, and the suit, having been brought beyond five years from the date of the plaintiff's obtaining knowledge of the defendant's breach of the covenants, was barred by time. It appears to me that neither of the Courts have dealt with the case upon the correct footing. The sole ground upon which I propose to dispose of this appeal and the suit is this: I think, in the first place, that the two instruments of the 24th August, 1880, must be regarded as recording one single transaction. That is to say, they must be read together as stating the nature of the transaction entered into upon that date between the plaintiff and the defendant, which, on the face of it, professed to be a sale of a two annas share to the defendant by the plaintiff. In this view, it is clear from the *ikrar-namah* that the proprietary title in the share conferred on the defendant and created by the sale-deed is thereby cut down to *nil;* in other words, limitations are placed upon it which render it useless as a proprietary right. Now the principle embodied in s. 11 of the Transfer of Property Act has been recognised time out of mind by Courts, both of law and equity, in dealing with such agreements; and as the reason for it I do not think that I can do better than refer to the observations of Lord Mansfield in *Holman* v. *Johnson* (1). He says:—"The objection that a contract is immoral or illegal as between the plaintiff and the defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded on general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff."

As I understand it, provisions in a contract of the kind before me, which absolutely debar the person to whom the proprietary rights have passed, from exercising those rights, impose conditions which no Court ought to recognise or give effect to; and that a covenant in a sale-deed, the effect of which is to disable the vendee for ever from either alienating or enjoying the interest conveyed to him, is not only contrary to public policy, but in violation of

(1) 1 Cowper, 543, quoted in Leake on Contracts, 970.

1886

MAHRAM DAS v. AJUDHIA.

the principle enunciated in ss. 10 and 11 of the Transfer of Property Act. The agreement, therefore, on the basis of which the plaintiff in this case asks for relief, is one which no Court should, in my opinion, assist him in enforcing, for, as I have already remarked, the sale-deed and *ikrar-namah* must be read as one instrument and as recording a single transaction. I, therefore, uphold the decision of the lower appellate Court, but on grounds different from those which that Court has given, as, upon the point of limitation, I think the Deputy Commissioner was wrong. I am of opinion that the suit failed, the plaintiff not being entitled to have the relief prayed by him, and that this appeal must be, and it is, dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusions as the learned Chief Justice, but as both of the judgments of the Courts below have dealt with the case in an unsatisfactory manner, I am anxious to recapitulate the important facts essential to the determination of the question of law involved. I have read the original record and it appears to me that the case cannot properly be disposed of upon the ground of limitation, as it has been by both the lower Courts. I need say nothing further as to the point of limitation, because I think with the learned Chief Justice that, upon the merits, the suit is unmaintainable. The facts of the case are, that in a village called Dasui, there was a nine annas and six pies share of Mahram Das, the plaintiff in this case, and a four annas share owned by Partab and Ajudhia, the former of whom was the father of the latter, who is the defendant. Early in the year 1880, a sale-deed was executed jointly by Partab and Ajudhia, conveying the four annas share to Mahram Das. Under this deed an area of 15 acres was specially reserved for the vendors. It appears that when *dakhil-kharij* was to be effected in the revenue records, the vendors did not, as required by the rules, consent to express their concurrence, and no *dakhil-kharij* was carried out. So matters stood when the vendee Mahram Das, on the 24th August, 1880, executed a deed of sale, whereby he conveyed a two annas share out of the four annas previously purchased by him from Partab and Ajudhia, to the latter. This deed contained a clause to the effect that the covenant as to the 15 acres contained in the former sale-deed was null and void, and that the rights of

the parties should in future be governed by the new sale-deed. Contemporaneously with this deed, Ajudhia executed an *ikrar-namah* of the same date in favour of the plaintiff Mahram Das, containing certain specific conditions, which were a reproduction of some of the most important terms of the sale-deed itself. Now, I concur with the learned Chief Justice that these two documents should be treated as if they recorded one and the same transaction, and should be read together in order to ascertain the intention of the parties. If any authority is required for this view, the reports are full of cases on the point in connection with the *bye-bil-wafa* form of mortgages. The Courts in this country have ruled to this effect, when it appears that the deed of absolute sale is accompanied by a contemporaneous *ikrar-namah* by a mortgagee or conditional vendee, providing for the re-conveyance of the property to the mortgagor on payment of the price the mortgagee has paid. This view is borne out by the principle on which the judgment of the Privy Council in *Sital Pershad* v. *Luchmi Pershad* (1) proceeded. Reading the two documents as one, there is every reason to say that if any part of either is such as the law disallows, it must be treated as invalid to that extent. The sale-deed, after reciting that Mahram Das was the owner of a nine annas and six pies share, and had purchased four annas, sets forth conditions which I need not mention, because they are more fully stated in the *ikrar-namah* executed by Ajudhia upon the same dates. The chief points in the *ikrar-namah* are—(i) that the vendee Ajudhia would never sell or mortgage what he had purchased, and if he did, it would be to Mahram Das himself only, for the same price as he had paid; (ii) the executant Ajudhia would never have the right to ask for partition of his share, and was bound to keep it joint, and Mahram Das was entitled to collect rent therefrom; (iii) the property purchased was to remain in the possession of the vendee, and devolve upon his natural or adopted heirs; but in case neither were alive, no other person could succeed to the property under the ordinary law. There were other conditions as to the rent payable by the vendee for the land cultivated by himself, and the condition as to the 15 acres in the old sale-deed was set aside. Then comes an important clause to the effect that if the vendee should act in breach of the terms of the agreement, the sale-deed of the two

(1) I. L. R., 10 Calc. 30.

1886

MAHRAM DAS v. AJUDHIA.

annas share executed by Mahram Das to Ajudhia should be treated as "waste paper." Further, the *ikrar-namah* says that this purchase of two annas shall be free from all attachments and sales in execution of decrees, and that if any person should attach the share, then Mahram Das would have the right to pay in Rs. 50, and such person might not bring to sale the property purchased by Ajudhia. The learned Chief Justice has said that the Courts of Equity and of Law in England have never allowed such a transaction, and this rule is based upon fundamental principles of public policy.

After the execution of the two documents, there was a litigation between Mahram Das and Ajudhia in connection with partition. There was a partition by some other co-sharers in the village, and Ajudhia having joined with them, succeeded on the 21st June, 1882, and an order was passed by the Deputy Commissioner that the partition proceedings should go on. On the 8th December, 1884, Ajudhia, in contravention of another condition of the *ikrar-namah*, realized two small items from tenants as rent. In consequence of this the plaintiff, Mahram Das, on the 12th December, 1884, brought a suit in the Rent Court against the tenants for the recovery of rent from them as lambardar. His suit was dismissed on the 14th January, 1885, in consequence of the tenants having proved that they had paid their rents to Ajudhia. Upon this the plaintiff prayed for three reliefs,—first, the cancelment of the deed of sale of the 24th August, 1880, on the ground that, by reason of his breaches of covenant, namely, his action regarding the partition and the collection of rents, the defendant had ceased to be owner; secondly, that the defendant had wrongly received Rs. 30 and again Rs. 10 from the tenants, against the terms of the *ikrar-namah*, and was liable to repay the same to the plaintiff as lambardar, as money had and received to his use; thirdly, a sum of Rs. 9-2, which represented costs incurred by the plaintiff in his unsuccessful litigation in the Revenue Court, and was now claimed by way of damages. I will deal separately with each of the reliefs claimed. As to the nature of the rule formulated by the Legislature in s. 11 of the Transfer of Property Act, I need only say that while at one time it might have been doubtful whether the rule was applicable to transfer by way of sale, or was limited to

grants short of absolute transfer, the mode in which the doctrine has been dealt with by the Legislature is applicable alike to transactions of both kinds. In other words, the principle of s. 11 applies as much to mortgages or leases as to gifts or sales. Among the cases on the subject, perhaps the best authority is the judgment of Muttusami Ayyar, J., in *Anantha Tirtha Charior* v. *Nagmuthu Ambalagaren* (1), and particularly where it is said:—"It appears to us to be a general rule of jurisprudence that where an estate in fee is given, a condition in restraint of alienation is a condition repugnant to the nature of the grant, and, as such, inoperative. We think there can be no doubt on general principles that, when property is transferred absolutely, it must be transferred with all its legal incidents, and that it is not competent to the grantor to sever from the right of property incidents which the law inseparably annexes to it, and thereby to abrogate the law by private agreement. The introduction of a condition against alienation in a grant absolute in its terms has been declared to be equivalent to introducing an exception of the very thing which is of the essence of the grant." These views are in pursuance of the rule laid down in *Bradley* v. *Peixoto* (2), and is consistent with many other English cases. The same rule obtains in the Muhammadan law. In the case of *Hussain Khan Bahadur* v. *Nateri Srinivasa Charlu* (3), Holloway, J., said that the rule of justice and equity in these cases was universal, and that where the main object of the grant is clear, conditions clearly inconsistent with that object, cannot be held valid. There are two ways of dealing with a question of this kind. The first is to regard it as a question of construction, and to ask what the parties mean by first saying that ownership is to be transferred, and then saying that what is transferred is not ownership in the proper sense. Of course, in such a case every attempt to reconcile these statements should be made, but where no reconciliation is possible, the Courts say that, under these circumstances, the main object of the parties must be kept in view, and that provisions inconsistent therewith must be treated as void. So the matter stands in this case. The case is not like that with which Couch, C. J., had to deal in *Balaji J. Rahalkar* v.

(1) I. L. R., 4 Mad. 200.
(2) Tudor's Leading Cases on Real Property, 968.
(3) 6 Mad. H. C. Rep., 356.

1886

MAHRAM DAS v. AJUDHIA.

Naryanbhat (1), in which the terms of the document were distinctly capable of being interpreted to the effect that there was "no grant of any interest in the land, except of the personal use of it for the particular purpose specified," and that "it must have been intended by the parties to the grant that it was to expire when the grantee and his kinsmen ceased to occupy the house themselves." In the present case there is no doubt that the deed of sale purports to be a conveyance of ownership, and therefore all provisions inconsistent with that purpose are null and void. For these reasons I concur with the learned Chief Justice in holding that Ajudhia is not bound by any covenant which derogates from the ordinary legal incidents of ownership.

The second question is, whether the Rs. 30 and Rs. 10 realized by Ajudhia as rent can be recovered in a suit of this kind. It must be observed that, whatever may be the rights of a lambardar in reference to the collection of rents, the defendant in this case, being a co-sharer in the village and having, though perhaps irregularly, realized sums of money from the tenants, he cannot, in a Civil Court and in a suit of this nature, be made to re-pay the lambardar. The only remedy of the latter is to deduct the items when the *bujharat* or rendition of accounts between himself and the co-sharers takes place.

The third point relates to the sum of Rs. 9-2, the costs of litigation in the Rent Court. Upon this point I am anxious to state the reasons for my conclusions, because there exists some conflict of authority. In the case of *Chengulva Raya Mudali* v. *Thangakhi Ammal* (2) the Full Bench of the Madras High Court laid down the rule that an action lies in a Small Cause Court for the recovery of costs incurred by the plaintiff in a suit to compel registration of a document. The *ratio* of this ruling, and in particular of the judgments of Scotland, C. J., and Holloway, J., was that, inasmuch as the Registration Act omitted to provide for costs incurred by a party in the course of obtaining registration, therefore the ordinary Courts were entitled to deal with such costs as ordinary damages. Opposed to this view is a decision of the Bombay High Court in *Jalam Punja* v. *Khoda Javra* (3), in which Westropp, C.

(1) 3 Bom. H. C. Rep., A. C., 63. (2) 6 Mad. H. C. Rep. 192.
(3) 8 Bom. H. C. Rep., A. C., 29.

J., held that no action lies for the recovery of costs incurred by a defendant in defending himself in a possessory suit brought against him in a Mamlatdar's Court under Bombay Act V of 1864. So also in *Kabir* v. *Mahadu* (1), where a more reasonable view was adopted. It was there held that an action brought to recover costs of proceedings held under Act XX of 1864, is not maintainable when the Court before which such proceedings were taken has made no order as to the payment of such costs. A similar view was taken in *Pranshankar Shivshankar* v. *Govindlal Parbhudas* (2), where it was ruled that no action is maintainable for damages occasioned by a civil action, even though brought maliciously and without reasonable and probable cause, nor will it lie to recover costs awarded by a Civil Court. This no doubt shows some conflict of authority. My own view is, that the real principle is not limited to damages in tort. Wherever a Court has jurisdiction, and a civil suit is brought for the recovery of costs which might have been dealt with in the former litigation, the question may be made the subject of a plea *in limine* upon a matter of procedure. S. 13 of the Civil Procedure Code lays down the general rule of *res judicata*, and it is possible that this rule would in such a case be applicable by analogy. But whatever view may be adopted, the *ratio* depends upon the same principles. Where a Court has jurisdiction and orders costs, that order is final and binding. But where the former Court is not entitled to order costs, and costs are incurred, they may, in my opinion, be made the subject of consideration as to damages in a subsequent suit.

In the present case the Rent Court in the former suits was entitled to deal with the question of costs, and dealt with it, and they cannot be made the subject-matter of fresh litigation. I am therefore of opinion that the costs cannot be claimed in this suit. For these reasons I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

(1) I. L. R., 2 Bom., 360. (2) I. L. R., 1 Bom., 467.