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The sale was made at the time Act XVIII of 1873 was in force, and sales of rights of occupancy were not void under s. 9 when made with the consent of the landlord. This principle was affirmed by the Full Bench of this Court in the case of *Umrao Begam v. The Land Mortgage Bank of India* (1), and the sale the plaintiffs have consented to will be valid, but under any circumstances they are estopped by their conduct from bringing this suit to set aside the sale.

I would reverse the decree of the lower appellate Court, and restore that of the first Court dismissing the suit with all costs.

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Before Mr. Justice Oldfield and Mr. Justice Mahmood.

BHAIRO AND OTHERS (PLAINTIFFS) v. PARMESHRI DAYAL AND OTHERS  
(DEFENDANTS).\*

*Transfer of property—Condition restraining alienation—Inheritance—Act IV of 1882 (Transfer of Property Act), ss. 2, 10—Act VI of 1871 (Bengal Civil Courts Act), s. 24.*

In a suit for possession of certain shares in certain villages, a compromise was effected between the plaintiffs and *B* the defendant. The terms of the compromise were embodied in a deed, the terms of which were (*inter alia*) as follows:—“The said *B* will hold possession as a proprietor, generation by generation, without the power of transferring in any shape ... The following shares recorded in *B*'s name shall not be transferred or sold in auction in payment of any debt payable by the said *B*, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession.” *B* obtained possession of the shares allotted to him by the compromise. Subsequently, certain creditors of *B* attached the shares referred to in the deed in execution of a decree obtained against the heirs of *B* for money lent to *B* on a bond, which he had executed while in possession of the shares, and in which he made a simple mortgage of them. The representatives of the plaintiffs in the suit in which the compromise was made objected to the attachment.

*Held* by OLDFIELD, J., that the deed of compromise passed an absolute estate to *B* and his heirs to which the law annexed a power of transfer, and that, in reference to s. 10 of the Transfer of Property Act, the stipulation against alienation on *B*'s part, or against sale by auction in execution of decrees against him, was void.

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\* Second Appeal No 1609 of 1883, from a decree of R J Leeds, Esq., District Judge of Gorakhpur, dated the 12th May, 1883, affirming a decree of Hakim Shah Rahat Ali, Subordinate Judge of Gorakhpur, dated the 23rd March, 1882.

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*Per MAHMOOD, J.*—That the rule contained in s. 10 of the Transfer of Property Act was not binding upon the Court in this case, inasmuch as the question was one of succession or inheritance, to be governed by s. 24 of the Bengal Civil Courts Act; that it was for those objecting to the attachment to show that, under the Hindu Law, the rights of *B* in the property ceased to exist at his death, or that his estate devolved upon them free of his debts; that, the Hindu Law being silent on this subject, the principles of justice, equity and good conscience must be applied, to which, so far as transfer was concerned, effect was given by s. 10 of the Transfer of Property Act; that the restrictions imposed by the deed of compromise upon *B*'s powers of alienating the absolute estate which it conferred upon him were opposed to the policy of the law and could not be recognized; and that *B* must be held to have had an absolute estate which would devolve upon his heirs, and which could be sold in execution of decrees for his debts.

The *Tagore Case* (1) referred to.

THE defendants in this suit represented one Sahib Dayal and certain other persons, who, in 1863, brought a suit for possession of certain shares in certain villages against a lady named Raghubans Kuari and Bishan Lal, who was the manager of her estate. On the 7th October, 1863, the parties to that suit executed a deed of compromise, of which the part material to the purposes of this report was as follows:—“In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Raghubans Kuari and Bishan Lal, defendants, pending in this Court, to obtain possession of the shares in mauza Ahrauli, &c., situate in pargana Dhuriapur, the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute; and we have settled the matter as follows.” [The deed then proceeded to direct a division of the property among the parties in certain proportions, and continued thus:—] “That the said Bishan Lal shall hold possession over the under-mentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance, and he is bound to pay the Government revenue; but in the case of his doing any act against the said conditions, it will be invalid, and the other sharers will have no concern with the shares so allotted to the said defendant Bishan Lal; and according to the division the names are to be recorded in the *khewat*, and the right of the shares so vested shall not fall to the plaintiffs or any other than the male heirs of the said Bishan Lal. The following shares recorded in Bishan Lal's

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name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal; and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside that transfer, and to obtain possession."

Upon this compromise, the Court passed a decree in favour of the plaintiffs to that suit for the shares allotted to them by the compromise, and dismissed the rest of their claim. Bishan Lal obtained possession of the shares allotted to him by the compromise, and while in possession of them he, on the 27th February, 1865, gave a bond to the plaintiffs in the present suit, in which he made a simple mortgage of the shares. This bond was for more than Rs. 100 and was not registered. The obligees of the bond brought a suit against the heirs of Bishan Lal on the bond, and obtained a decree. In execution of this decree the shares allotted to Bishan Lal by the compromise were attached. The defendants in the present suit, as the representatives of the plaintiffs in the suit in which the compromise was made, objected to the attachment. Their objection was allowed, and in consequence the present suit was brought by the plaintiffs to establish that the shares were the property of Bishan Lal and liable for his debts. The main question raised by the suit was as to the interest which Bishan Lal took under the compromise in the shares, and whether the shares were liable for his debts. Both the lower Courts dismissed the suit. The lower appellate Court held that the compromise transferred to Bishan Lal a life-interest in the shares only, and that as such an interest was not alienable, the condition in the compromise as to forfeiture on breach of the covenant against alienation was a perfectly valid one. The Court therefore held that the shares were not liable for the debt of the plaintiff.

In second appeal, "the" plaintiffs contended that the lower appellate Court had placed a wrong construction on the compromise, and that document conveyed to Bishan Lal an absolute proprietary interest in the shares allotted to him, and those shares were liable to be sold in execution of the decree of the plaintiffs as the property of Bishan Lal.

Mr. T. Conlan and Munshi Sukh Ram, for the appellants.

Pandit Ajudhia Nath and Munshi Kashi Prasad, for the respondents.

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OLDFIELD, J.—The plaintiff obtained a decree for money lent to one Bishan Lal on a bond. The decree was against the heirs of Bishan Lal. He sought to bring to sale in satisfaction of it the property in suit, and the respondents objected to the sale, and the objection was allowed. The object of this suit is to have it declared that the property was the property of Bishan Lal, and liable to be sold in satisfaction of his debt.

It appears that this property and other property was the subject of litigation some years ago between Bishan Lal and the respondents, and they came to a compromise by which this property was transferred to Bishan Lal. The respondents, however, allege that the terms of the arrangement placed restrictions on Bishan Lal's power of transfer. I have examined the copy of the deed of compromise filed on which the respondents reply, and I find that it passes an absolute estate to Bishan Lal and his heirs. The terms are :—“The said Bishan Lal will hold possession as proprietor, generation by generation, (*naslan bad naslan*).” These words show that he obtained an estate heritable according to law, to which the law annexes a power of transfer, and the stipulation against alienation on his part, or against sale by auction in execution of decrees against Bishan Lal, must be held void. I may refer to *Ashutosh Dutt v. Doorga Churn Chatterjee* (1) and the *Tagore Case* (2), and s. 10, Transfer of Property Act. The decree of the lower appellate Court is set aside, and the case remanded for disposal on the merits.

MAHMOOD, J.—The question raised by the facts of the present case is whether the property in suit is or is not liable to sale in execution of the decree obtained by the plaintiffs against the heirs of Bishan Lal for debts due by him.

In the first place, we have to consider in what way the interest of Bishan Lal in the property was created. To answer this question it is necessary to refer to the deed of compromise which ended the litigation of 1863. This deed is a fact of the greatest

(1) I. L. R., 5 Cal. 438. (2) 9 B. L. R. 377.

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importance in the case. It begins with the words:—"In the suit instituted by Sahib Dayal Singh and others, plaintiffs, against Musammat Raghubans Kuari and Bishan Lal, defendants, pending in the Court, to obtain possession of the shares in mauza Ahrauli .....the plaintiffs have actually the proprietary and hereditary rights in the shares in dispute, and have settled the matter as follows." That is, the first sentence in the deed admits, on behalf of all the parties to the suit, that the plaintiffs are full proprietors of the disputed property, but have entered into an agreement in the form of a *suleh-nama* as follows. The deed goes on to provide the manner in which the property is to be divided among the parties, and the last portion of it says that certain properties are, with the consent of the plaintiffs, to be allotted to Bishan Lal. But then comes the most important clause in the *suleh-nama*:—"That the said Bishan Lal hold possession over the under-mentioned shares as a proprietor, generation by generation, without the power of transferring in any shape, such as mortgaging the property by taking an advance sum, and he is bound to pay the Government revenue; but in the case of his doing anything against the said terms, it will be invalid, and the other sharers will have no concern with the shares so allotted to the defendant Bishan Lal, and according to this decision the names are to be recorded in the *khewat*, and the right of the shares so invested would not fall to the plaintiff or any other than the male heir of the said Bishan Lal. The following shares recorded in Bishan Lal's name shall not be transferred or sold in auction in payment of any debt payable by the said Bishan Lal, and in the event of their being transferred or sold, such transfer will be invalid, and the plaintiffs will then be entitled to set aside such transfer and to obtain possession." Now, this deed of compromise was presented to the Court with an application for a decree in accordance with its terms. But the Court to which the application was made passed the following decree:—"According to the compromise, out of the property a four-pies share in each of the mauzas" (names of mauzas set out) "and a two-pies share in" (name of mauza set out) "and a two-annas and eight-pies share in each of the mauzas" (names of mauzas set out) "be decreed in favour of the plaintiffs, and the rest of the claim be dismissed.

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As the parties have not written anything about costs they shall bear the costs in proportion to the claim decreed and dismissed." In other words, the suit of the plaintiffs in 1863 was decreed to the extent of the claim less the property given by the compromise to Bishan Lal. Then the decree went on to say :—" Such passages in the compromise as are unnecessary and irrelevant in this case may be regarded as void and unnecessary; and having regard to the fact that the said passages are irrelevant to the present case, they have not been attested by the parties, and they are at liberty to be bound by the said passages or not; the Court has nothing to do with them."

Now this point occurred to me during the argument. This compromise was simply a petition to the Court for a decree according to its terms. The decretal order was one declining to grant the petition, and declaring the compromise ineffectual so far as concerned the estate conferred by it on Bishan Lal. I am inclined to think that this circumstance might be sufficient to justify the plaintiffs' claim. But I do not wish to base my judgment on that ground. Even if the compromise simply represented the terms of a previous oral agreement, I should still hold that the present appeal must prevail. Giving the greatest benefit to the position of the defendants-respondents, we have to consider whether this is a question of succession or inheritance within the meaning of s. 24 of the Bengal Civil Courts Act (VI of 1871). I think that it is, because the question is, on the death of Bishan Lal, what estate devolved on the present respondents. The law which governs such a question as this is contained in s. 24 of the Bengal Civil Courts Act. I think that it was for the respondents to show that, under the Hindu Law of succession and inheritance, the rights of Bishan Lal in the property in dispute ceased to exist at his death, or that his estate devolved upon them free of liabilities for his debts.

No authority was cited in support of this opinion, and therefore, this being a question of succession, and the Hindu Law being silent on the subject, we must decide in accordance with the principles of justice, equity, and good conscience referred to in s. 24 of the Bengal Civil Courts Act. In order to ascertain what is the rule of justice, equity, and good conscience in the pre-

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sent case, the principles of jurisprudence are the best guide that we can have. These principles, so far as transfer is concerned, have received effect in the Transfer of Property Act, to which therefore it may be useful to refer. My brother Oldfield has called attention to s. 10 of that Act. It is a section which forms part of Chapter II—"Of transfers of property by act of parties." Now s. 2 (*d*) provides that nothing in the Act shall be deemed to affect, "save as provided by s. 57 and Chapter IV of this Act, any transfer by operation of law or by, or in execution of, a decree or order of a Court of competent jurisdiction; and nothing in this Act shall be deemed to affect any rule of Hindu, Muhammadan or Buddhist law." The rule contained in s. 10 is, therefore, not binding upon us in this case. Still I do not think that there is any rule of Hindu Law which is inconsistent with the object of the Legislature as expressed in s. 10. The leading cases on the subject are those which have been referred to by my brother Oldfield. The exact point decided in those cases does not arise here, but the *ratio decidendi* is applicable. In the first place, I have no doubt that the deed of compromise of the 7th October, 1863, begins by declaring Bishan Lal to have an estate which is heritable, going to his heirs "generation by generation," and in fact to be the proprietor. Then come restrictions of his right and of his heir's right to alienate the property. The reason of the rule disallowing such restrictions, that is, the reason of s. 10 of the Transfer of Property Act, is best expressed in the judgment of the Privy Council in the *Tagore Case* (1). Their Lordships say: "The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law. Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy—*Domat*, 2413. It follows directly from this that a private individual who attempts by gift or will to make property inheritable otherwise than the law directs is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord

(1) 9 B. L. R. 377.

Justice Turner in *Soorjeemoney v. Denobundoo Mullick* (1). A man cannot create a new form of estate, or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy."

There is also another passage in the same judgment which applies in principle to the question raised in this case:—"If, again, the gift were in terms of an estate inheritable according to law, with superadded words restricting the power of transfer which the law annexes to that estate, the restriction would be rejected as being repugnant, or, rather, as being an attempt to take away the power of transfer which the law attaches to the estate, which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize."

These principles appear to me to be equally applicable to the circumstances of England and of India, and in the absence of any provision of Hindu Law by which their application is negatived, I think that the present case falls within their scope. The deed of compromise first gave an absolute estate to Bishan Lal, and then proceeded to impose restrictions upon his powers of alienation. These restrictions are opposed to the policy of the law, they cannot be recognised, and therefore Bishan Lal must be held to have had an absolute estate which would devolve upon his heirs and which could be sold in execution of decrees for his debts. I concur therefore in the order which my brother Oldfield has proposed.

*Appeal allowed.*

Before Mr. Justice Oldfield and Mr. Justice Mahmood.

NAND RAM AND ANOTHER (PLANTIFFS) v. FAKIR CHAND (DEFENDANT).\*

*Arbitration—Remand under Civil Procedure Code, s. 566 for trial of issues—Reference by first Court of whole case to arbitration—Refusal of arbitrator to act—Award by remaining arbitrators—Illegality of award—Civil Procedure Code, s. 510.*

A Court of first instance to which issues have been remitted under s. 566 of the Civil Procedure Code by the appellate Court, has only jurisdiction to try the issues remitted, and is *functus officio* in other respects, and cannot make a reference

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\* Second Appeal No. 51 of 1884, from a decree of H. A. Harrison, Esq., District Judge of Meerut, dated the 12th March, 1883, affirming a decree of Rai Bakhtawar Singh, Subordinate Judge of Meerut, dated the 27th January, 1882.

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January 14.