

APPELLATE CIVIL.

1885
December 22.*Before Mr. Justice Oldfield and Mr. Justice Mahmood.*

DURGA AND ANOTHER (DEFENDANTS) v. JHINGURI AND OTHERS (PLAINTIFFS)*

Act XVIII of 1873 (N.-W. P. Rent Act), s. 9—Sale of occupancy-rights with zamindar's consent—Acceptance of rent by zamindar from vendees—Act IX of 1872 (Contract Act), ss 2, 23—Estoppel—Act I of 1872 (Evidence Act), ss. 115, 116.

Under a deed dated in 1879 the occupancy-tenants of land in a village sold their occupancy-rights, and the zamindars instituted a suit for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873 (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land. It was found that the zamindars had consented to the sale to the vendees, and received from them arrears of rent due on the holding by the vendors, and had recognized them as tenants.

Held by OLDFIELD, J., that sales of occupancy-rights were not void under s. 9 of Act XVIII of 1873, when made with the consent of the landlord, that the sale which the zamindars had consented to was valid, and that, under any circumstances, they were estopped by their conduct from bringing a suit to set aside the sale. *Umrao Begam v. The Land Mortgage Bank of India* (1) referred to.

Per MAHMOOD, J.—That the sale-deed was invalid with reference to the provisions of ss. 2 and 23 of the Contract Act, inasmuch as its object was the transfer of occupancy-rights, which was prohibited by s. 9 of Act XVIII of 1873. *Umrao Begam v. The Land Mortgage Bank of India* (1) distinguished.

Also *per MAHMOOD, J.*—That s. 115 of the Evidence Act implies that no declaration, act or omission will amount to an estoppel, unless it has caused the person whom it concerns to alter his position, and to do this he must both believe in the facts stated or suggested by it, and must act upon such belief; that in the present case it could not be said that the vendee was misled by the fact that the zamindars were consenting parties to the sale-deed; that he could not plead ignorance that the deed was unlawful and void; that it had not been shown that he acted upon the zamindars' agreement to take no action, so as to alter his position with reference to the land; and that, under these circumstances, the zamindars were not estopped from maintaining that the sale-deed was invalid.

Also *per MAHMOOD, J.*—That the zamindars having accepted the vendees as tenants and taken rent from them, a tenancy was thereby constituted under the Rent Law; that the vendees were therefore not trespassers; and that therefore the question as to ejectment did not fall within the jurisdiction of the Civil Court

UNDER a deed dated the 5th July, 1879, Gopal and Jai Ram, the occupancy-tenants of certain land in a village called Shikaripur, sold their rights in the land to Durga and Mahadeo the de-

* Second Appeal No. 1741 of 1883, from a decree of D. M. Gardner, Esq., District Judge of Benares, dated the 15th August, 1883, reversing a decree of Shah Ahmad Ullah, Munsif of Benares, dated the 22nd March, 1883.

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defendants in this suit, for Rs. 700. The present suit was brought by the zamindars of the village, in July 1883, for a declaration that the sale-deed was invalid under s. 9 of Act XVIII of 1873, (the N.-W. P. Rent Act in force in 1879), and for ejectment of the vendees, who had obtained possession of the land.

The Court of first instance (Munsif of Benares) dismissed the suit, on the ground that the plaintiffs had consented to the sale, and had recognized the vendees as tenants by accepting rent from them, and that Act XVIII of 1873 did not prohibit a sale of occupancy-rights made with the consent of the landlord. On appeal by the plaintiffs the District Judge of Benares reversed the Munsif's decision, and decreed the claim. He did not, however, record any definite finding as to whether or not the plaintiffs had consented to or acquiesced in the sale. The defendants appealed to the High Court.

The Court (OLDFIELD and MAHMOOD, JJ.) remitted the following issues for trial by the lower appellate Court :—

“ Whether the plaintiffs gave their consent, expressly or impliedly, to the alienation.

“ Whether they have recognized the defendants as tenants.”

Upon both these issues the lower appellate Court returned findings in the affirmative.

On the case coming again before the Court,

Lala Lalta Prasad, for the appellants.

The *Senior Government Pleader* (*Lala Juala Prasad*), and *Munshi Hanuman Prasad*, for the respondents.

The Court (OLDFIELD and MAHMOOD, JJ.) delivered the following judgments :—

MAHMOOD, J.—I regret to say that in this case my brother Oldfield and I are unable to agree upon the questions of law involved. The zamindars contend that the sale-deed of the 5th July, 1879, was void *ab initio*, and that in consequence of its being void the present defendants possess no rights as occupancy-tenants. The prayer in the plaint is for possession of the land in dispute, and for the ejectment therefrom of the defendants as trespassers. The main question in the case is that raised by the

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second plea in appeal :—“ As the plaintiffs were consenting parties to the sale, and realized rent from the appellants, they cannot now sue to set aside the sale.”

In dealing with this question, we must first read the second paragraph of s. 9 of the Rent Act (XVIII of 1873), the effect of which was considered by a Divisional Bench of this Court in *Umrao Begam v. The Land Mortgage Bank of India* (1), and again by a Full Bench in the same case (2), but the question did not arise in that case in precisely the same shape as now. The ruling of the Court was, that s. 9 did not prevent a landholder from causing the sale in execution of his own decree of the occupancy-right of his own judgment-debtor in land belonging to himself. The judgment did not relate to a private transfer, but to the question whether or not the zamindar could sell the property through the Court. Spankie, J., was of opinion that, even in the execution of a decree, the zamindar's consent could not make valid a transfer prohibited by s. 9. He held—and I agree with him—that no order of the Court could make valid a transaction which the parties themselves could not privately effect ; for what can be sold in execution of a decree is only the rights and interests of the judgment-debtor. That case, however, is distinguishable from the present, and although the judgment may contain *dicta* which seem to apply here, nothing in it is binding on us which was not essential to the point actually determined. There is here no question as to the execution of a decree, but only as to the validity of a private transfer. The question is, whether or not the sale-deed of the 5th July, 1879, is contrary to law, and therefore void. I may here refer to s. 2 of the Contract Act, and in particular to clause (g) of that section :—“ An agreement not enforceable by law is said to be void,” and clause (h)—“ An agreement enforceable by law is a contract.” “ Contract,” therefore, means a valid agreement *enforceable* by law. Clause (d) of the same section defines “ consideration,” and s. 23 specifies what considerations are lawful and what are not :—“ The consideration or object of an agreement is lawful unless it is forbidden by law ; or is of such a nature that, if permitted, it would defeat the provisions of any law ; or is fraudulent ; or involves or

(1) I. L. R., 1 All. 547.

(2) I. L. R., 2 All. 451.

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implies injury to the person or property of another ; or the Court regards it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void." Lastly, s. 24 provides that "if any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void."

Now, the sale-deed of the 5th July, 1879, was undoubtedly a contract entered into at a time when Act XVIII of 1873 was in force. There can be no doubt that its object was such as to bring it within the terms of s. 23 of the Contract Act, which makes the consideration of an agreement unlawful when it is of such a nature that, if permitted, it would defeat the provisions of the law. In the Full Bench case of *Gopal Pandey v. Parsotam Das* (1) I explained my own conception of the rights of an occupancy-tenant in these Provinces, and I expressed the opinion that this prohibition of transfer contained in s. 9 of the Rent Act was designed by the Legislature to prevent the rights of agriculturists from being shifted, and was intended for the benefit, not only of the zamindars, but also of the tenants referred to in the section. If this sale-deed is held to be valid, then the transfer will take place, and will enable the defendants to claim all the rights which the occupancy-tenants possessed.

The second point before us relates to estoppel. It is said that whatever may be the object of the contract contained in the deed, and however illegal it may be, the zamindars consented to it, and cannot now maintain that it is void. The fundamental principle of estoppel is given effect to by s. 115 of the Evidence Act in the following terms : — "When one person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such a belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." This implies that no declaration, act, or omission will amount to an estoppel unless it has caused the person whom it concerns to alter his position ; and to do this he must

(1) I. L. R., 5 All., 121.

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both believe in the facts stated or suggested by it, and must act upon such belief. The altering of his position by the person pleading estoppel is an essential part of the rule. In this case at most it can be said that the zamindars were consenting parties to the execution of the sale-deed. But how was the vendee misled by this? He cannot plead ignorance that the deed was unlawful and void, because ignorance of law cannot be accepted as a plea in any case. But it is said that the plaintiff is estopped because he agreed to take no action. Here also I think it has not been shown that the vendee acted upon such an agreement so as to alter his position with reference to the land. Payment of rent may of course be evidence of tenancy, and tenancy once established would estop the *tenant* from disputing the landlord's title. The rule is codified in s. 116 of the Evidence Act; but I am unaware of any rule of law by which the *landlord*, under the circumstances of this case, would be estopped by reason of having received rent from saying that the tenant has derived his title under a conveyance opposed to the express terms of the law. What then should be our decree in this case? The first Court dismissed the claim, the lower appellate Court has decreed it *in toto*. My judgment, however, is only in part in the plaintiffs' favour, namely, that they are competent to maintain that the sale-deed is void and gives no occupancy-rights to the vendee. But the finding of the lower appellate Court upon the second issue is, that the plaintiff accepted the defendants as tenants, and took rent from them. Now, the taking of rent under such circumstances constitutes a tenancy under the Rent Law, and therefore the plaintiff is wrong in saying that the defendants are trespassers; and hence the question as to ejectment does not fall within the jurisdiction of the Civil Court. My own conclusion is, therefore, that the decree of the lower appellate Court should be upheld so far as it declares the sale-deed to be void, and that the suit should be dismissed so far as the claim for ejectment is concerned, leaving the plaintiff to his proper remedy in the Revenue Court.

OLDFIELD, J. — I would accept the findings of the Judge to the effect that the plaintiffs consented to the sale in favour of the appellants, and received arrears of rent due on the holding by the vendors from them, and recognized them as tenants.

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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.

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.

* 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.