

The Court ought to have tried the issues which were framed, and if the plaintiff failed in his proofs to establish his claim then reject the claim. We think the plaintiff should have had an opportunity at the trial of establishing his case. We cannot therefore dispose of this appeal without having a determination of two of the issues which were framed by the Court of first instance. These issues are Nos. 1 and 4, and are as follows:—

- “1. What were the boundaries and what was the extent of the land given by the plaintiff’s predecessor to the father of defendant (2)?”
- “4. Did the defendant (2) sell to defendant (1) any excess area of land over and above that area which had been given by the zamindar to his father, and what are the boundaries and area of such excess?”

We remand these issues to the Court of first instance through the learned District Judge under the provisions of section 506 of the Code and direct that Court to take such relevant evidence as may be adduced by either side. On return of the findings the parties will have the usual ten days for filing objections.

Case remanded.

Before Mr. Justice Banerji and Mr. Justice Aikman.

RAM SARUP (PLAINTIFF) v. KISHAN LAL (DEFENDANT).*

Act (Local) No. II. of 1901 (Agra Tenancy Act), sections 20, 21 and 31—Occupancy holding—Usufructuary mortgage—Act No. IX of 1872 (Indian Contract Act), section 23.

An occupancy tenant executed a usufructuary mortgage of his occupancy holding, and then executed a kabuliati undertaking to pay rent for the mortgaged land. Held on suit by the mortgagee for rent under the terms of the kabuliati that the agreement between the parties was of a nature which, if permitted, would defeat the provisions of the Tenancy Act, 1901; that it was unlawful within the meaning of section 23 of the Contract Act, and void. *Harnandan Rai v. Nakhedi Rai* (1), *Banmali Pande v. Bisheshar Singh* (2), and *Madan Lal v. Muhammad Ali Nasir Khan* (3) followed.

* Second Appeal No. 6 of 1905 from a decree of H. Warburton, Esq., District Judge of Agra, dated the 15th of November 1905, confirming a decree of V. E. G. Hussey, Esq., Assistant Collector of 1st class of Muttra, dated the 25th of July 1904.

(1) Weekly Notes, 1906, p. 302. (2) (1906) I. L. R., 29 All., 129.
(3) (1906) I. L. R., 28 All., 696.

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IN this case the defendant, an occupancy tenant, executed, on the 21st of October 1902, a usufructuary mortgage of his occupancy holding in favour of the plaintiff. He then executed a kabuliati undertaking to pay rent to the plaintiff for the mortgaged land. The plaintiff sued on this kabuliati to recover rent for the year 1311 Fasli. The Court of first instance (Assistant Collector of the first class, Muttra) sustained the defendant's plea that the mortgage and the kabuliati were invalid and dismissed the suit, and this decree was on appeal upheld by the District Judge. The plaintiff appealed to the High Court.

Babu *Lakshmi Narain*, for the appellant.

Dr. *Satish Chandra Banerji*, for the respondent.

BANERJI, J.—This appeal arises out of a suit brought by the appellant to recover from the respondent arrears of rent. The respondent is an occupancy tenant. On the 21st of October 1902 he made a usufructuary mortgage of his occupancy holding to the plaintiff appellant, and then executed a kabuliati undertaking to pay rent for the mortgaged land. It is on the strength of this kabuliati that the present suit was brought. The suit was resisted upon the ground that under the provisions of the Agra Tenancy Act, No. II of 1901, the mortgage was void and that the plaintiff had no title to sue for rent. Both the Courts below have sustained this defence. The plaintiff appeals.

It is contended on his behalf that the mortgage made by the defendant respondent is not absolutely void, but is only voidable at the instance of the landlord, and that it is not open to the defendant to question its validity. In support of this contention reliance is placed upon the provisions of section 31 of the Act. It is clear from the provisions of sections 20 and 21 that a transfer of his holding or of any interest therein by an occupancy tenant is wholly forbidden, except in the case of a sub-lease as provided in the Act. The object of the Legislature manifestly was to declare that certain rulings of this Court in which it was held that an occupancy tenant could mortgage his right to occupy should no longer have any binding effect. The usufructuary mortgage in the present instance was therefore void under the provisions of section 21. It is true that section 31 lays down that

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“every sub-lease or other transfer made by a tenant in contravention of the provisions of the Act shall be ‘voidable’ at the instance of the landholder, but it seems to me that the word ‘voidable’ was used, not in the sense in which that term is ordinarily used in law as distinguished from an agreement which is absolutely void, but in the sense that a transfer made in contravention of the provisions of section 21 may be avoided by the landholder in the manner provided in the section. It is also true that the Tenancy Act prescribes a limitation of one year from the date of the transfer for a suit for the cancellation of a transfer. But it may be that what the Legislature contemplated was that in the case of a landholder he might accept and recognize the transfer, but if he wished to repudiate it, he must do so at an early date and bring his suit within one year of the transfer. That, however, does not raise the inference that as against the transferor or any other person the transfer shall be deemed to be binding after the expiry of one year and even when the landholder has not chosen to avoid it. It is manifest from the scope of sections 20 and 21 that they were enacted in the interest as much of the tenant as of the landholder, and that the Legislature thought it fit to absolutely forbid a transfer by an occupancy tenant of his interests in his holding. That being so, if the mortgage in favour of the plaintiff be held to be valid, the object of the law would be defeated. As the agreement between the plaintiff and the defendant is of a nature, which, if permitted, would defeat the provisions of the Tenancy Act, it is unlawful within the meaning of section 23 of the Contract Act and is void. The object of the suit brought by the plaintiff is to enforce the mortgage made in his favour. If he were allowed to carry out that object, the provisions of the law, as enacted in section 21, would be rendered nugatory. In *Harnandan Rai v. Nakchedi Rai* (1) a usufructuary mortgagee who brought a suit for possession was held not entitled to do so, as section 20 of the Act “forbids the transfer of the interest held by occupancy tenants except under circumstances which do not exist in this case.” Probably the learned Judges meant to refer to section 21. In *Banmali Pande v. Bisheshar Singh* (2) a usufructuary mortgagee

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of an occupancy holding, whose mortgage was executed after the passing of the Tenancy Act, sued to redeem a prior mortgage. It was held that the mortgage under which the plaintiff claimed was invalid and unlawful, and that he had acquired no right under it so as to entitle him to redeem the prior mortgage. I may also refer to the decision of our brother Richards in *Madan Lal v. Muhammad Ali Nasir Khan* (1) which was affirmed on appeal under section 10 of the Letters Patent on the 13th of December 1906, and which was cited with approbation in the case of *Banmali Pande v. Bisheshar Singh* referred to above. In my opinion the view taken by the Court below is correct and I would dismiss the appeal with costs.

AIKMAN, J.--I am of the same opinion. On the 21st of October 1902, that is, after the date upon which the Agra Tenancy Act 1901, came into force, the respondent Kishan Lal and his brother, who were occupancy tenants, executed a usufructuary mortgage of their holding in favour of the plaintiff appellant Ram Sarup. He relet the land to the respondent Kishan Lal and now sues to recover the arrears of rent from Kishan Lal. The Courts below have dismissed the claim of the plaintiff, and in my opinion they were quite right. The plaintiff is really asking the assistance of the Court to enforce an agreement, the consideration of which was unlawful, and which is therefore void. In my opinion the Courts cannot give the plaintiff such assistance. A transfer of an occupancy holding such as that made in favour of the plaintiff is clearly forbidden by the terms of the Tenancy Act. For the appellant reliance was placed on an expression in a judgment of my own in the case of *Lalu Ram v. Thakur Das* (2) where I said that it was "clear from section 31 of the Act that a sub-lease or an agreement to sublet made by a tenant in contravention of section 25 is not void but merely voidable at the suit of a landholder." This observation was unnecessary for the decision of the question then under consideration, as the sub-lease in that case was granted before the new Tenancy Act came into force. In the passage cited above I am of opinion that I attached undue weight to the use of the term "voidable" in section 31. I

(1) (1906) I. L. R., 28 All., 696.

(2) Weekly Notes, 1905, p. 58.

agree with my learned colleague in thinking that the expression was not intended to indicate that a transfer in contravention of the Act was merely voidable, as distinguished from void. The word "voidable" was, it seems to me, used in the sense indicated by my learned colleague. I agree in the order proposed.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

DEPUTY COMMISSIONER OF KHERI REPRESENTING THE COURT OF WARDS (DEFENDANT) v. KHANJAN SINGH AND OTHERS (PLAINTIFFS)

[On appeal from the Court of the Judicial Commissioner of Oudh, Lucknow.]

Hindu Law—Alienation by widow—Legal necessity—Order for interest on decree in execution where decree did not allow interest—Sum for interest made part of consideration for sale deed—Res judicata—Decision in suit for pre-emption—Civil Procedure Code, section 13.

A Hindu widow in possession of her husband's immovable property for a widow's estate executed, on 22nd December 1868 a deed of sale of it in favour of a creditor of her husband under a decree, dated 12th July 1861. No future interest was allowed by that decree, but on 22nd October 1866 the decree holder in execution of it obtained from the Court of the Deputy Commissioner an order for interest on the decree, which order was however set aside by the Judicial Commissioner on 15th September 1869 on the ground that a Court executing a decree had no power to alter or add to it. The consideration for the deed of sale, which was executed whilst the order granting interest was in force, was made up of Rs. 7,080 the amount her husband was liable for under the decree, Rs. 5,638 for interest on the decree, and a sum of Rs. 7,280 in cash. On 23rd December 1869 the plaintiff as reversionary heir of the husband brought a suit against the vendee for pre-emption, but that suit was dismissed on the ground that his right of pre-emption was not established. The widow died in 1894, and in 1899 the plaintiff brought the present suit for possession of the property and for mesne profits from her death. The defendants were the Deputy Commissioner as representing the Court of Wards, into whose charge the vendee's estate had come, and the purchaser from the Court of Wards of the greater portion of the property in suit. The defence was that the alienation was made for legal necessity, and that the suit was barred by the decision in the pre-emption suit, which operated as *res judicata*. Both Courts below found on the facts that the item of Rs. 7,080 was justified by legal necessity, and that the advance of the sum in cash as part of the consideration was not proved.

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Present:—Lord MACNAGHTEN, Lord ATKINSON, Sir ANDREW SCOBLE,
and Sir ARTHUR WILSON.