

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

BAJRANGI LAL (DEFENDANT) v. GHURA RAI (PLAINTIFF).*

*Suit for cancellation of document—Sale deed—Alleged illegality of transaction—
Sale by one deed of fixed-rate and occupancy holdings.*

The plaintiff by one and the same sale-deed purported to transfer (1) a fixed rate holding and (2) part of an occupancy holding. *Held* that he was not entitled to a decree setting aside the sale-deed merely because part of the property covered by it was by law not transferable.

THE facts of this case, so far as the purposes of this report are concerned, were as follows:—

The plaintiff purported to transfer to the defendant Bajrangi Lal by one and the same sale-deed, first, a certain fixed-rate holding and, secondly, part of an occupancy holding. He subsequently sued to have this sale-deed cancelled upon the ground that it had been obtained from him by fraud and misrepresentation on the part of the vendee, and also that it was void because it included a transfer of part of an occupancy holding.

The court of first instance found that the sale-deed had been executed for good consideration and that there was no fraud. It, however, declared the sale-deed void because it included a transfer of a portion of an occupancy holding, and this decision was upheld on appeal by the District Judge. The defendant vendee appealed to the High Court.

The Hon'ble Dr. *Sundar Lal* and the Hon'ble Dr. *Tej Bahadur Sapru*, for the appellant.

Babu Sital Prasad Ghosh, for the respondent.

RICHARDS, C. J., and MUHAMMAD RAFIQ, J. :—This appeal is connected with Second Appeals Nos. 1354 of 1914 and 1511 of 1914. The suit out of which the appeals arise was brought by Ghura Rai against Lala Bajrangi Lal and Chatarpati Ojha. The plaintiff alleged that defendant No. 1 had fraudulently obtained from him a sale-deed on misrepresentation. He also alleged that the sale-deed was void because it included a transfer of part of an occupancy holding. As against defendant No. 2 he claimed to have a mortgage-deed set aside on the ground that it was a

* Second Appeal No. 1352 of 1914, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 23rd of July, 1914, confirming a decree of Muhammad Husain, Subordinate Judge of Ghazipur, dated the 30th of April, 1914.

1916

BAJRANGI
LAL
v.
GHURA RAI

mortgage of an occupancy holding which was void by law. He claimed accordingly that the sale-deed and the mortgage-deed might be declared void. Alternative relief was claimed that if for any reason the two documents should be held to be genuine, then he should get Rs. 1,600, part of the consideration which was not paid. The present appeal is the appeal of the defendant No. 1. Second Appeal No. 1354 of 1914 is an appeal by the same defendant on the question of costs. The third appeal is that of defendant No. 2 who complains that the court below has not decided whether or not he should get back the Rs. 400, which he alleges he paid as consideration for the mortgage.

The court of first instance has found many of the issues in favour of defendant No. 1. In his case that court found that the sale-deed was duly executed for good consideration and that there was no fraud. It, however, declared the sale-deed void because it included a transfer of a portion of an occupancy holding. As against defendant No. 2 it held that the mortgage of an occupancy holding was bad in law, and (apparently) that the Rs. 400 was not paid.

The lower appellate court held that the mortgage in favour of defendant No. 2 was void. It also decided a question of costs the correctness of which decision depends on the ultimate result of the case. It also held that defendant No. 2 was not entitled to get back the Rs. 400, he alleged he paid. All other questions were left undecided.

The court of first instance decreed that the sale-deed, dated the 20th of January, 1914, executed in favour of Bajrangi Lal was void, and the learned Judge upheld this part of decree of the first court on the ground that the plaintiff had in the same deed purported to sell part of his occupancy holding. The decision is based on the provisions of sections 23 and 24 of the Indian Contract Act. Section 23 provides that every agreement of which the object or consideration is unlawful is void. Section 24 provides that if any part of a single consideration for one or more objects or any part of any one of several considerations for a single object is unlawful the agreement is void. The contention is that under the provisions of the Tenancy Act an occupancy tenant is prohibited from transferring his occupancy holding. It is said that because the sale-deed

1916

BAJIRANGI
LAL
v.
GHURA RAI.

included the transfer of part of an occupancy holding the contract was void and therefore the plaintiff was entitled to the decree he sought. In considering the force of the contention we must bear in mind that we are not dealing with a case in which the court is asked to decree specific performances or even to enforce a contract. We must deal with the question without any regard to the allegations of fraud or of non-payment of the consideration. We must assume that the plaintiff comes into court admitting that he duly executed the deed of transfer after receiving the consideration and contending that the mere fact that the deed purported to transfer an occupancy holding as well as a fixed rate holding entitles him to the declaration. We think it is clear that the plaintiff is not entitled to a decree declaring the transfer of the fixed rate holding void unless he would have been entitled to a decree for possession of the fixed rate holding if the transferee had obtained possession after the transfer. Let us suppose that after the transfer the transferee had entered into possession by receiving profits, collecting rents from the sub-tenants or any other legal way and the transferor had brought a suit for ejectment. Could such a suit be successful? The plaintiff's case would be:— "I have received the money I bargained for. I executed a deed of transfer sufficient in law to pass my interest in the fixed rate holding, but because I myself purported at the same time to transfer other property which I could not transfer, the transfer of the interest in the fixed rate holding is also invalid and I can get the holding back." It may here not be out of place to refer to certain provisions of the Transfer of Property Act. By section 5 the expression "transfer of property" is defined as "an act by which a living person conveys property in present or in future to one or more living persons or to himself and one or more living persons." The expression "to transfer property" means to perform such an act. Section 8 is as follows:—"Unless a different intention is expressed or necessarily implied a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and the legal incidents thereof." By section 54 "Sale" is defined to be a "transfer of ownership in exchange for a price paid or promised or part paid and part promised." By the same section

it is enacted that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. "It does not of itself create any interest in or charge on such property." It thus appears that a contract for sale is one thing and a deed of transfer another and it does not necessarily follow that because the contract was unenforceable that the transfer is void. In the case we have supposed the transferor would have got all that he bargained for, and every part of the consideration passing from the transferee to the transferor the transfer of the interest in the fixed rate holding was perfectly legal. It may be urged that an occupancy tenant who executes a transfer of his interest can, notwithstanding the transfer, recover the holding. This is so, but the reason is, not because the contract was illegal, but because it was an interest which the transferor, by the express words of the Tenancy Act, was not capable of passing (see section 8 of the Transfer of Property Act and section 21 of the Tenancy Act). In the case of the interest in the fixed rate holding the transferor was capable of passing the interest, and the effect of the deed of transfer was to vest the interest in the transferee. Suppose that in pursuance of a contract for the sale of an interest in a fixed rate holding and of the interest in an occupancy holding for a lump sum of Rs. 1,000 the contract was completed by two separate deeds, one being a transfer of the interest in the fixed rate holding and the other a deed purporting to transfer the other interest. The contract would have been exactly the same, carried out and completed by two deeds instead of one. Could the transferor succeed in a suit in which he asked to have the deed of transfer of the fixed rate interest declared void and delivered up to be cancelled? It seems contrary to justice that the plaintiff should be allowed to set up the illegality of his own contract as a ground for defeating a valid transfer. It seems a violation of the well-known maxim *ex turpi causa non oritur actio*. By section 1 of the Infants' Relief Act, 1874, "all contracts whether by speciality or by simple contract henceforth entered into for the repayment of money lent or to be lent or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants shall be absolutely void." In the case of

1916

BAJBANGI
LAL
v.
GHURA RAI

1916

BAJRANGI
LAL
v.
GHURA RAI.

Valentini v. Canali (1) the plaintiff, an infant, agreed with the defendant to become tenant of a house and to pay a certain sum for the furniture. The plaintiff paid part of the sum in cash and gave a promissory note for the balance. The contract was set aside and the promissory note was ordered to be cancelled, but it was held that the plaintiff could not recover back the money he had paid after he had enjoyed the use of the furniture. In *Kearley v. Thomson* (2) it was held that where money was paid under an illegal contract which had been partially carried into effect the money could not be recovered. FRY, L. J., quotes the words of the Lord Chief Justice in *Collins v. Blantern* (3) :—"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of the court to fetch it back again. You shall not have a right of action when you come into a court of justice in this unclean manner to recover it back."

There is the maxim *in pari delicto potior est conditio possidentis*. In Broom's Legal Maxims the learned author says:—"Upon the whole, then, it seems that the true test for determining whether or not the objection that the plaintiff and defendant were in *pari delicto* can be sustained is by considering whether the plaintiff can make out his case otherwise than through the medium and by aid of the illegal transaction to which he himself was a party." In the present case, on the assumption that there was no fraud, it is only by proving and relying on the illegality of his own contract that the plaintiff can hope to succeed. In our opinion, in the absence of fraud, the plaintiff was not entitled to set aside the transfer of the fixed rate holding and the view taken by the learned Judge was not correct.

We have mentioned that the court below has held that defendant No. 2 was not entitled to get back the Rs. 400 he alleged he paid. The court has not decided the question whether defendant No. 2 paid this sum. Nor has it decided the question whether defendant No. 2 got possession of the occupancy holding mortgaged to him or whether the mortgage was obtained by fraud. We may mention that, if defendant No. 2 got possession, the plaintiff

(1) (1889) L. R., 24 Q. B. D., 166.

(2) (1890) L. R., 24 Q. B. D., 742.

(3) (1767) 2 Wilson, 341. 1 Sm. L. O., 12th Ed., 412.

should have sued for possession and not merely for a declaration. In our opinion the case must be remanded.

We allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to re-admit the appeal upon its original number on the file and proceed to hear and determine the same according to law. Costs here and heretofore will be costs in the cause.

Appeal decreed and cause remanded.

*Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice
Muhammad Rafiq.*

NIHAL SINGH AND OTHERS (PLAINTIFFS v. THE COLLECTOR OF
BULANDSHAHAR AND ANOTHER (DEFENDANTS)*.

*Contribution—Compromise—Claim by party to a compromise alleging payment
by himself of money for payment of which he and others were jointly liable—
Joint tort-feasors.*

A Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised, and the compromise was made a decree of court. Amongst the conditions of the compromise was one to the effect that the brothers should pay back a certain sum of money belonging to their sister's estate which had been collected and misappropriated by them.

Held, on suit by one of the brothers who alleged that he had paid the whole sum and asked for contribution, that the rule laid down in *Merryweather v. Niswan* (1) that there was no right of contribution amongst joint tort-feasors did not apply to this case when the claim was based on the terms of a compromise, and *quære* whether the rule should be applied in India at all. *Palmer v. Wick and Pultneytown Steam Shipping Company, Limited* (2) referred to.

THE facts of this case were as follows :—

Thakur Umrao Singh had four sons and a daughter. The daughter was married into a family possessed of considerable property. On the death of the husband of the daughter the father became the guardian of the property of the daughter. On the death of Umrao Singh one of his sons, Rao Girraj Singh, brought a suit against his sister, alleging that she had adopted

* Second Appeal No. 1519 of 1914, from a decree of C. M. Collett, First additional Judge of Aligarh, dated the 16th of May, 1914, confirming a decree of Shamsuddin Khan, First Additional Subordinate Judge of Aligarh, dated the 5th of March, 1914.

(1) (1799) 8 T. R., 186.

(2) (1894) A. C., 318.

1916

BAJRANGI
LAL
v.
GHURA RAI.

1916

February, 10.