

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Walsh,  
M. A., K. C.

RAJENDRA PRASAD (PLAINTIFF) v. RAM JATAN RAI (DEFENDANT)\*  
Mortgage—Mortgage comprising both fixed-rate and occupancy holdings executed before the passing of the Agra Tenancy Act, 1901.—Suit for sale of the fixed-rate holdings only.

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A mortgage made prior to the passing of the Agra Tenancy Act, 1901, comprised both occupancy and fixed-rate holdings. The mortgagee brought a suit for sale of the fixed-rate holdings only. Held that the mortgage, so far as it related to the fixed-rate holdings, was not bad, and, these being distinct from the occupancy holdings, the suit was maintainable. *Kanhai v. Tilak* (1) and *Badri Mallah v. Sudama Mal* (2) distinguished.

THE material facts of this case were as follows :—

Musammat Asharfi Kunwar executed a hypothecation bond as the guardian of her son, Ram Jatan, on the 27th of September, 1900. In this bond she hypothecated certain occupancy and fixed-rate holdings of her son. On the basis of this hypothecation bond Babu Ram Chandra Prasad brought a suit for the sale of the fixed-rate holdings of the defendant in 1914. The money under the bond was payable on the 21st of June, 1902, and the suit was within twelve years from this date. The defendant raised various pleas, one of them being that a hypothecation bond in respect of occupancy holdings and lands held at fixed-rate under one contract was contrary to law and the bond sued upon was invalid. The Munsif decided all the issues against the defendant and decreed the plaintiff's claim. On appeal the District Judge, relying on *Badri Mallah v. Sudama Mal* (2), decided that, even before the passing of the present Tenancy Act, the mortgage of occupancy holdings was unlawful. And further, relying on S. A. No. 214 of 1912, he held that when a portion of the mortgaged property was an occupancy holding the entire deed was void and no suit could be maintained thereon. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the plaintiffs, submitted that the plaintiff in the present case was not suing to have an executory contract specifically performed, but was seeking to enforce an equity arising in his favour under the completed

\* Second Appeal No. 1316 of 1915, from a decree of Ram Prasad, District Judge of Ghazipur, dated the 1st of May, 1915, reversing a decree of Abdul Halim, Munsif of Fallia, dated the 23rd of December, 1914.

(1) (1912) 16 Indian Cases, 42. (2) (1912) 10 A. L. J., 176.

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transfer effected by the mortgage in suit. The case of *Badri Mallah v. Sudama Mal* (1) relied on by the lower appellate court did not decide the present question and was no authority in defendant's favour. The other case relied on by that court, viz. *Kanhai v. Tilak* (2), proceeded in the first place on an erroneous admission by counsel, in the next place went much further than *Abdul Ghafur v. Raja Ram* (3) and *Dipan Rai v. Ram Khelawan* (4), which were deemed to be authorities in favour of the proposition laid down therein. *Bajrangi Lal v. Ghura Rai* (5) laid down the correct principle of law which ought to govern the present case. Fixed-rate holdings were transferable by law and the plaintiff in this case was merely seeking to enforce his mortgage against them.

Pandit *Radha Kanta Malaviya*, for the respondent :—

A lease is not a transfer of an interest in immovable property. The case reported in I.L.R., 15 All., 219, only decided that sub-letting was not a transfer and so not prohibited by the Rent Act. Though a usufructuary mortgage was permitted by the said ruling a simple mortgage of an occupancy holding was never allowed even under the old Rent Act. Then, if the claim of the plaintiff were allowed, it would mean direct encouragement to violation of the law. What the law does not allow directly people would be encouraged to do indirectly. There could be no equity in favour of plaintiff who with his eyes open entered into an unlawful contract. Under the rulings of this Court he cannot sue for the refund of an amount lent on an unlawful consideration. A simple money suit would evidently be time-barred. A suit for specific performance or for sale of the mortgaged property on the basis of a bond which purported to mortgage an occupancy holding could not be maintained. When a part of a contract is unlawful the whole contract is unlawful. (Section 24, Indian Contract Act). So the plaintiff's suit was rightly dismissed.

RICHARDS, C. J. : This appeal arises out of a suit in which the plaintiff sought the ordinary mortgage decree in respect of a

(1) (1912) 10 A. L. J., 173.

(3) (1900) I. L. R., 22 All., 262, (265).

(2) (1912) 16 Indian Cases, 42.

(4) (1910) I. L. R., 32 All., 383.

(5) (1916) I. L. R., 38 All., 232.

certain fixed-rate tenancy. The mortgage was made as far back as the 27th of December, 1900. Various pleas were raised in the court of first instance. The execution of the mortgage was denied; the consideration was denied and legal necessity for the loan was also denied. Amongst the pleas was a plea to the effect that the entire mortgage was bad, inasmuch as the mortgage-deed comprised not only a fixed-rate tenancy but also an occupancy holding. The court of first instance decided all the issues in favour of the plaintiff and decreed his suit. In first appeal the learned District Judge reversed the decree of the court of first instance upon the sole ground that the mortgage was bad, because, in addition to the fixed-rate tenancy, an occupancy holding was also included. The plaintiff does not in the present suit claim to sell the occupancy holding.

The only question which we have to decide in the present appeal is whether or not the learned District Judge was right in allowing the appeal and dismissing the plaintiff's suit upon the preliminary ground mentioned above. For the purpose of the present appeal we must assume that the mortgage was executed; that consideration duly passed, and that there was necessity for the loan. In my opinion the view taken by the learned District Judge was wrong. It was a perfectly legal transaction for the plaintiff or his predecessor in title to lend money to the defendant or his predecessor in title. It was perfectly legal to transfer the fixed-rate tenancy by way of mortgage to secure the repayment of the amount of the loan. The effect of the mortgage deed was to transfer the interest of the mortgagor in the fixed-rate holding by way of mortgage. In the present case we are not concerned with the validity or invalidity of the original contract, nor need we deal with this case in the way we might have had to deal with it if the present suit had been a suit by the mortgagee for specific performance of a contract to transfer certain property by way of mortgage. The transaction has long since passed the stage of contract. We have only to ask ourselves whether the mere fact that the mortgagor purported to transfer a class of property which by law he is not entitled to transfer makes the transfer of the fixed-rate tenancy (a class of property which he had a perfect right to transfer) illegal. I think that the answer to

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this question must clearly be in the negative. The defendant in the present suit must be taken (for the purposes of the appeal) as admitting that good consideration was received for the transfer of the fixed-rate tenancy. He must be taken also as admitting that the deed of transfer was duly executed. But he asks the court to hold that the transfer of the fixed-rate tenancy was bad because he or his predecessor in title purported to do an act which the law says he was not competent to do. I repeat here that the plaintiff in the present suit has sought no remedy in respect of the occupancy holding, and I am also dealing with the case on the assumption that no distinction can be raised by reason of the fact that the present transfer was made prior to the passing of the Act of 1901. I am not, however, to be taken as deciding that the fact that the transfer was made prior to the passing of the Act raises no distinction. In the course of the arguments the case of *Badri Mallah v. Sudama Mal* (1) was referred to. That was a case in which the court had to consider whether or not a mortgage of an occupancy holding in favour of the mortgagor's own landlord was or was not valid. The mortgage in that case had been made before the present Tenancy Act came into operation. The learned Judge held that the mortgage was bad, even though it was made in favour of the zamindar. Under section 9 of the Act of 1881, a Full Bench of this Court had held that while an occupancy tenant could not confer rights of occupancy, it could confer some interest and, at least, "the right to occupy." The learned Judges who decided the case must be taken to have come to the conclusion (rightly or wrongly) that the mortgagor was conferring on his landlord not merely "the right to occupy" but occupancy rights. The case can in no way be taken as overruling the previous decision of a Bench of this Court which consisted of the Chief Justice and five Judges, namely the case of *Khiali Ram v. Nathu Lal* (2). The next case which was referred to was a decision of the same learned Judge in the case of *Kanhai v. Tilak* (3). In that case the plaintiff claimed possession of an occupancy holding which the mortgagor had purported to transfer to him by way of a

(1) (1912) 10 A. L. J., 176. (2) (1893) I. L. R., 15 All., 219.

(3) (1912) 16 Indian Cases, 42.

usufructuary mortgage, or in the alternative a decree for the money advanced. The court held that he was entitled neither to a decree for possession nor to a decree for money. In that case the mortgage was made after the passing of the present Tenancy Act, and it is absolutely clear that the plaintiff was not entitled to a decree for possession. It is unnecessary in the present case for me to express any opinion as to whether or not he should have had a decree for the money. There are a number of cases decided by this Court in which it has been held in the case of a usufructuary mortgage of an occupancy holding that the mortgagee is not entitled to a decree for money. Where a person makes a valid usufructuary mortgage he is not (save as provided by the Transfer of Property Act) entitled to a decree for the money advanced. Both of the cases cited in my opinion differ very materially from the present case, in which, in my view, the plaintiff is seeking the mortgagee's ordinary remedy against certain property which has been legally and validly transferred to him as security for money which was properly and legally advanced. I do not consider that any of these cases apply to the present case. I would allow the appeal.

WALSH, J.—I agree. I would merely add that I can see no distinction between this case and the case reported in 16 Indian Cases, p. 42, decided by Mr. Justice CHAMIER, and I think that the real solution is that section 24 of the Contract Act does not apply to a case where the plaintiff is seeking to enforce an equity in respect of a perfectly valid security. I would have so decided if it had not been for the decision referred to. I may also add that I think that the decision we have come to is practically covered by the observations of this Court in the case of *Bajrangji Lal v. Ghura Rai* (1).

BY THE COURT.—The order of the Court is that the appeal is allowed, the decree of the lower appellate court is set aside and the case is remanded to the court below with directions to re-admit the appeal upon its original number in the file and proceed to hear and determine the same on the merits. Costs here and heretofore, will be costs in the cause.

*Appeal allowed and cause remanded.*

(1) (1916) I. L. R., 38 All., 232.