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KHAN.

The policy of the Act is not to be defeated by any ingenious devices, arrangements, or agreements between a vendor and a vendee for the relinquishment by the vendor of his "sir" land or land which he has cultivated continuously for twelve years at the date of the transfer; for a reduction of purchase money on the vendor's failing or refusing to relinquish such lands; or for the vendor being liable to a suit for breach of contract on his failing or refusing to relinquish such lands. All such devices, arrangements, and agreements are in contravention of the policy of the Act and are contrary to law and are illegal and void, and cannot be enforced by the vendee in any Civil Court or in any Court of Revenue.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

*Appeal dismissed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Truefitt & Francis.*

*J. V. W.*

HAR CHANDI LAL AND OTHERS (PLAINTIFFS). v. SHEORAJ SINGH  
AND OTHERS (DEFENDANTS).

[On appeal from the High Court of Judicature at Allahabad.]

P.C.\*  
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November, 6.  
December, 19.

32 M.L.J. 41

*Mortgage—Question as to whether mortgage was or not extinguished by subsequent mortgage—Intention to release it shown by return of mortgage deed—Intention frustrated by subsequent mortgage becoming unenforceable—Plea not consistent with equity and good conscience—Act No. IX of 1872 (Indian Contract Act), section 41—Contract not performed.*

The question in this appeal was whether the appellants could enforce against the respondents a mortgage, dated the 13th of November, 1876, for Rs. 5,500, of a five-sixth share in a certain mauza. The mortgagor died leaving a widow and a separated nephew who was the owner of the other one-sixth share of the mauza, which, in 1879 and 1881, he mortgaged to the same mortgagee for Rs. 1,000 and Rs. 3,000 respectively. In September and October, 1887, the widow and the nephew executed two mortgages to the same mortgagee, each purporting to affect the entire mauza, the first being in respect of the principal and interest due on the mortgage of 1876, and the second for the principal and interest due on the nephew's mortgages of 1879 and 1881. On the execution of these the mortgagee handed the mortgage deed of 1876 to the nephew. In 1896 the mortgagee brought a suit on the basis of the mortgages of 1887 in which a

\* Present:—Lord PARKER of WADDINGTON, Lord SUMNER, Sir JOHN EDGE, and Sir LAWRENCE JENKIN.

decree was made against the entire mauza. The nephew and the widow both appealed, but the nephew died and his heirs (the respondents in the present appeal) abandoned his appeal. The widow's appeal was allowed by the High Court, it being held that the deeds of 1887 (even if executed by her) were not binding on her. Pending an appeal by the mortgagee to the Privy Council the widow died, and the respondents in the present appeal were made parties in her place as heirs of her husband, the mortgagor of the deed of 1876: they succeeded therefore to the property subject to that mortgage, but free from any further charge created by the nephew.

*Held* that the intention of the mortgagee after the two deeds of 1887 were executed was to accept in them a new security, but that intention was entirely frustrated by the fact that the deeds of 1887 were held to be not binding on the widow; and it was not in accordance with equity and good conscience that the respondents, who had successfully maintained that the transaction embodied in the deeds of 1887 was not binding on the widow, and consequently did not bind them as the heirs of her husband, should now claim the benefit of that transaction as a release of the mortgage of 1876. Their Lordships, therefore, in the events that had happened, were of opinion that the mortgage of 1876 was wholly unaffected by the mortgages of 1887.

Section 41 of the Contract Act (IX of 1872) on which the High Court had relied had no application to the present case; it applies only where a contract has been in fact performed by some person other than the person bound thereby. Here the contract contained in the mortgage of 1876 had not in fact been performed at all.

APPEAL 100 of 1915 from a judgement and decree (25th February, 1913) of the High Court at Allahabad which reversed a judgement and decree (8th July, 1911) of the Subordinate Judge of Bareilly.

The principal question for decision on this appeal was whether the appellants, the representatives of the mortgagee, Lal Chatri Lal, since deceased, were entitled to enforce a mortgage, dated the 13th of November, 1876, against the respondents.

The suit which gave rise to the appeal was brought to recover Rs. 20,000 by sale of the mortgaged property, against the respondents 1, 2 and 3, the heirs of Jai Chand, the mortgagor of the mortgage bond of the 13th of November, 1876.

The defence was that nothing was due upon the mortgage in suit; that the mortgage became void when a new contract, dated the 9th of September, 1887, was entered into; that a decree having been obtained in a former suit, the present suit was not maintainable; and that the claim was barred by section 11 and by order II, rule 2, of the Civil Procedure Code, 1908; and was

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merged in a Privy Council decree of February, 1903, in a suit (62 of 1896) brought in the Court of the Subordinate Judge of Bareilly.

The Subordinate Judge held that only Rs. 4,500 had been realized in execution of the decree in the former suit; that there had been no contract or novation of contract between the mortgagee and one Nandan Kunwar; that there was a contract between the mortgagee and one Phul Singh which, if effect had been fully given to it, might have operated as an estoppel, but that Nandan Kunwar having successfully repudiated it the respondents could not now fall back upon it; that the debt was not merged in the decree, and that the decree therefore did not bar the present suit; and that the suit was not barred either as res judicata under section II or by order II, rule 2, of the Code of Civil Procedure. He consequently gave the plaintiffs the usual mortgage decree on their claim.

On appeal by the defendants the High Court (Sir H. G. RICHARDS, C. J., and P. C. BANERJI, J.) held that at the time of the institution of the suit the mortgagee was neither possessed of, nor entitled to the possession of, the mortgage sued upon, and that the suit was therefore not maintainable; that it was possible that if the mortgagee had succeeded in showing in the former suit that a fraud had been practised on him by Phul Singh, the equities between them might have been adjusted, but that nothing of that kind was done; and that the mortgagee must be held to have accepted the performance of the contract contained in the mortgage sued upon by Phul Singh within the meaning of section 41 of the Contract Act (IX of 1872). The appeal was accordingly allowed and the suit dismissed, both parties to pay their own costs in both Courts.

The High Court judgement, in which the facts are fully stated, was as follows :—

“ This appeal arises out of a suit on foot of a mortgage, dated the 13th of November, 1876. The original sum secured was Rs. 5,500. Plaintiffs claim Rs. 20,000 for principal and interest, relinquishing a very large amount. The circumstances are a little peculiar and the question for determination is chiefly a question of law.

“ Maharaj Singh and Jai Chand were two brothers. Maharaj Singh had a son, Phul Singh. Jai Chand had no issue but left a widow, Masammatt Nandan Kunwar, who survived not only Maharaj Singh but also Phul Singh.

The mortgagor in the bond sued on was Jai Chand, who was admittedly separate from Phul Singh, his nephew. Jai Chand was entitled to five-sixths of the property in question and Phul Singh to one-sixth.

"On 6th March, 1879, and on 26th September, 1881, Phul Singh alone executed mortgages in favour of the same mortgagee (the predecessor in title of the plaintiffs). On 9th September, 1887, and on 3rd October, 1887, fresh mortgages were executed. They purported to be executed not only by Phul Singh but also by Nandan Kunwar. The consideration for these fresh mortgages was the amount due upon the mortgage now sued upon and also the two mortgages of 6th March, 1879, and the 26th September, 1881 (executed by Phul Singh alone, as already mentioned).

"The result of the transaction, if it had held water, would have been that the mortgagees got the security of Jai Chand's property for the indebtedness of Jai Chand, in other words the entire village was mortgaged under both mortgages. A suit was brought upon foot of the two mortgages of 9th September, 1887, and the 3rd October, 1887, against Phul Chand and Nandan Kunwar some time in the year 1896. A decree was obtained on both from the Court of first instance. On appeal, however, it was held by this Court that Nandan Kunwar was not bound by either of the two mortgages in suit and the result of that litigation was that a decree was given against Phul Singh alone for the sale of his property for the aggregate amount of the two mortgages of the 9th of September, 1887 and the 3rd of October, 1887. There was an appeal to their Lordships of the Privy Council by the plaintiff mortgagee, but the decision of this Court was upheld. The decree was put into execution, but the full amount was not realized, and we accept the finding of the Court below that no more was realized than the original amount of the mortgage debt and interest which ought to be attributed to Phul Singh.

"The present suit has been instituted on foot of the mortgage of 19th of November, 1876, it being the contention of the plaintiffs that in the events which have happened they are entitled to put this mortgage in suit, notwithstanding that upon the terms of the mortgage of the 9th of September, 1887, the mortgage now sued upon was discharged and handed over to Phul Singh. The Court below has decreed the plaintiffs' suit and the defendants appeal.

"In our opinion the decree of the Court below was wrong. It is impossible now to say exactly who was to blame for the transaction which took place in 1887. It would appear that it was the opinion of this Court when it dismissed the suit brought in 1896, that a fraud had been practised upon Musammatt Nandan Kunwar by Phul Singh and the predecessor in title of the plaintiffs. The question in a case of this kind is one of intention. There can be no doubt that it was the intention of Phul Singh and the mortgagee that the new mortgage should supersede and be substituted for the mortgage which is now sued upon and there can be no doubt that in pursuance of that intention the mortgage bond which is now sued upon was handed over to Phul Singh. In the present suit the plaintiffs were unable to produce the mortgage and had to sue upon a copy. It is quite possible that if the plaintiff had succeeded in 1896, when this Court held that Nandan Kunwar was not liable, in showing that a fraud had been practised upon the mortgagee by Phul Singh, the equities between Phul

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Singh and the mortgagee might have been in some way adjusted. The mortgagee might have taken a decree against Phul Singh only for the amount due by him and got a declaration that his rights under the mortgage now sued on should be revived, or he might have taken some steps to recover the mortgage-dead or to get a declaration that Phul Singh held it in trust for him. But nothing of this kind was done. A decree for the aggregate amount was obtained against Phul Singh and this decree was put into execution. No step of any kind was taken by the plaintiffs until limitation was on the eve of expiry. In our opinion at the time of the institution of the present suit the plaintiffs were neither possessed of, nor entitled to the possession of, the mortgage bond sued upon, and under these circumstances we do not think that his representatives were in a position to maintain the present suit. Notwithstanding that the mortgagee did not get all that he thought he was getting at the time of the execution of the new mortgages, we think that he must be held to have accepted the performance of the contract contained in the mortgage now sued upon (*i.e.*, the mortgage of the 13th of November, 1876,) by Phul Singh within the meaning of section 41 of the Contract Act. It is true no doubt that the defendants are the sons of Phul Singh. It must be remembered at the same time that they are in possession of the property, not as the sons of Phul Singh but as the reversioners to the estate of Jai Chand, upon the death of his widow, Musammat Nandan Kunwar."

On this appeal—

*De Gruyther, K. C.*, and *B. Dube* for the appellants contended that the High Court was in error in holding that the appellants were not entitled to enforce the mortgage of the 13th of November, 1876, which was not discharged by the making of the new contract of the 9th of September, 1887. There was no novation of contract under section 62 of the Contract Act (IX of 1872). The mere execution of the second mortgage did not create a discharge of the mortgage in suit. There might have been an intention to discharge it, but if so, the fact that there remained something still due on it, and Nandan Kunwar's repudiation of liability prevented there being an absolute discharge. The respondents who were made parties to this appeal on Nandan Kunwar's death could be in no better position than she was. There was no acceptance of performance by Phul Chand within the meaning of section 41 of the Contract Act. That section therefore was not applicable nor was section 62. Section 11, and order II, rule 2, of the Code of Civil Procedure, 1908, had, under the circumstances of the case, no application.

*Sir W. Garth* for the respondents contended that the mortgage of the 9th of September, 1887, was substituted for the contract

contained in that of the 13th of November, 1876, which then became discharged: evidence of the appellants' witnesses showed that that was so. After Nandan Kunwar's repudiation of liability had been upheld, the mortgagee had to choose whether he should enforce against the widow the mortgage of the 13th of November, 1876, or continue to hold Phul Singh liable on his bond of 1887; under which the whole of the mauza was affected; and he must be considered to have accepted Phul Singh's liability on the decree against the whole property, as a performance of the contract by Jai Chand. The suit, it was submitted, was not maintainable with respect to section 11, and also order II, rule 2, of the Civil Procedure Code, 1908.

*Dube* replied.

1916, *December, 19th*:—The judgement of their Lordships was delivered by Lord PARKER:—

This is an appeal from a decree, dated the 25th of February, 1913, of the High Court (Allahabad), reversing a decree, dated the 8th of July, 1911, of the Subordinate Judge of Bareilly. The question is whether the appellants are entitled to enforce a mortgage against the respondents.

The mortgage in question is dated the 13th of November, 1876, and was executed by Jai Chand in favour of Lala Chatri Lal, the mortgaged property being a five-sixths share in the mauza Nagaria Bikrampur. The amount secured was 5,500 rupees. The mortgagor died leaving a widow, Musammat Nandan, and a separated nephew, Phul Singh. Under the Hindu law Musammat Nandan had a widow's interest and Phul Singh had a reversion contingent on his surviving her in the property subject to the mortgage. Musammat Nandan could dispose of the property with the concurrence of Phul Singh, but Phul Singh could not, without the concurrence of Musammat Nandan, dispose of the reversion so as to defeat the interests of those who would become entitled if he died in her life-time.

Phul Singh was the owner of the remaining one-sixth share in the mauza in question. On the 6th of March, 1879, and the 26th of September, 1881, he mortgaged his one-sixth in favour of Lala Chatri Lal for 1,000 rupees and 3,000 rupees, respectively, with interest. Obviously, therefore, Lala Chatri Lal had a better

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security for the 5,500 rupees due on Jai Chand's five-sixths share than he had for the 1,000 rupees and 3,000 rupees due on Phul Singh's one-sixth share. On the 9th of September and 30th of October, 1887, respectively, Musammat Nandan and Phul Singh executed or were expressed to execute two mortgages in favour of Lala Chatri Lal. Each mortgage purported to effect the entire mauza, the first being in respect of the principal and interest due on Jai Chand's mortgage of the 13th of November, 1876, and the second being in respect of the principal and interest due on Phul Singh's mortgages of the 6th of March, 1879, and the 26th of September, 1881. If these mortgages were valid, Lala Chatri Lal would get the security of Jai Chand's property for the indebtedness of Phul Singh, and the security of Phul Singh's property for the indebtedness of Jai Chand.

In the year 1896 the mortgagee instituted a suit on the basis of the two deeds of 1887. The Subordinate Judge decreed the suit in full, so that judgement went for the whole amount of the indebtedness both of Phul Singh and Jai Chand against the entire mauza. Both Phul Singh and Musammat Nandan appealed, but Phul Singh having shortly afterwards died, his appeal was abandoned by his heirs (the first three defendants in the present suit). The appeal of Musammat Nandan, however, came on for hearing, and was allowed by the High Court. It was held that even if she had in fact executed the deeds of 1887, they were not binding on her. The mortgagee appealed to His Majesty in Council. Musammat Nandan died pending the appeal, and the first three defendants in the present suit as Jai Chand's heirs were made respondents in her place. The appeal was dismissed. The real effect therefore of the deeds of 1887 must be determined on the footing that Musammat Nandan had never been made a party thereto. On this footing, Phul Singh must be taken to have made his own property a security of Jai Chand's indebtedness, and to have tried to make Jai Chand's property a security for his own indebtedness—an attempt which could only succeed if he survived Musammat Nandan, which event did not happen. It follows that on Musammat Nandan's death the first three defendants succeeded to Jai Chand's property, subject to the mortgage of the 13th of November, 1876, but free from any further charge

purported to be created by Phul Singh. The only difficulty is that the High Court, in allowing the appeal of Musammat Nandan, left the order of the Subordinate Judge standing as against Phul Singh. But the first three defendants do not claim Jai Chand's property as heirs of Phul Singh, but as heirs of Jai Chand, and it appears that after Musammat Nandan's death the order of the Subordinate Judge was executed (and, in their Lordships' opinion, rightly executed) only as against Phul Singh's own one-sixth share of the mauza, and not against Jai Chand's five-sixths share. The real question is whether anything has happened to preclude the mortgagee from enforcing the mortgage of the 13th of November, 1876, against the first three defendants as the now owners of Jai Chand's five-sixths share.

It is, of course, true that the mortgagee's intention at the time when the two deeds of 1887 were executed was to accept a new security, extending to the whole mauza, for the indebtedness both of Jai Chand and Phul Singh in lieu (*inter alia*) of the security of the 13th of November, 1876. Pursuant to this intention, he appears to have handed over the mortgage of the 13th of November, 1876, to Phul Singh. But the original intention of the mortgagee was entirely frustrated by the fact that the two deeds were held not to be binding on Musammat Nandan, and it does not appear to their Lordships to be consistent with equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the two deeds of 1887 was not binding on Musammat Nandan, and consequently did not bind them as heirs of Jai Chand, should now claim the benefit of such transaction as a release of the mortgage of the 13th of November, 1876. In their Lordships' opinion, the 41st section of the Indian Contract Act, upon which the High Court relied, has no application to a case like the present. It applies only where a contract has been in fact performed by some person other than the person bound thereby. If the mortgage of the 13th of November, 1876, be looked upon as a contract to pay money it cannot be said to have been performed at all, for though Phul Singh's one-sixth share was sold in the suit of 1896, the amount realized was not sufficient to meet the indebtedness of Phul Singh himself. Still less can Phul Singh be said to have performed the contract contained in

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the mortgage of the 13th of November, 1876, if such mortgage be looked on as a contract to give security, for his attempt to create a security on Jai Chan's property admittedly failed. In their Lordships' opinion, therefore, the mortgage of the 13th of November, 1876, was in the events which happened wholly unaffected by the mortgages of 1887.

It being admitted that if the mortgage of the 13th of November, 1876, is a subsisting mortgage, it is not statute barred, the appeal succeeds, and the order of the Subordinate Judge ought to be restored with costs here and below. Their Lordships will humbly advise His Majesty accordingly.

*Appeal allowed.*

Solicitors for the appellants: *T. L. Wilson & Co.*

Solicitors for the respondents: *Barrow, Rogers and Nevill,*  
*J. V. W.*

## APPELLATE CIVIL.

*Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.*

OHHIDDU AND ANOTHER (DEFENDANTS) v. SHEO MANGAL SINGH  
(PLAINTIFF)\*.

*Act (Local, No. XII of 1881 (N.-W. P. Rent Act), section 9—Occupancy tenant—  
Usufructuary mortgage of holding—Relinquishment by mortgagor in  
favour of the zamindar.*

Where a mortgage with possession of an occupancy holding had been made by the tenant before the coming into force of the Agra Tenancy Act, 1901, it was held that the tenant mortgagor could not defeat the rights of the mortgagees by surrendering the holding to the zamindar.

THIS was an appeal under section 10 of the Letters Patent from the judgement of a single Judge of the Court. The facts of the case are stated in the judgement under appeal, which was as below :—

" This is plaintiff's appeal in a suit for ejectment originally filed in the court of an Assistant Collector. The plaintiff is admittedly the zamindar of the land in suit. In his plaint he describes the two defendants, Chodu, son of Dan, and Ohhiddu, son of Matru, Kunjras, as non-occupancy tenants of the land in suit. The defendants filed a written statement in which they described themselves as mortgagees in possession on behalf of the tenant-in-chief, who was a tenant with occupancy rights. On their plea Mithu, son of Faqira, was

\* Appeal No. 31 of 1916, under section 10 of the Letters Patent,