PRIVY COUNCIL.

MOTI CHAND AND OTHERS (PLAINTIFFS) *v.* IKRAM-ULLAH KHAN AND OTHERS (DEFENDANTS).

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

P. C. 1916 *November*, 16. *December*, 11.

32 M.L.J. 383

Act (Local) No. II of 1901 (*Agra Tenancy Act*), *sections* 10, 20, 83—*Sale of zamindari—Agreement to surrender ex-proprietary rights—Suit for damages for breach of contract to deliver possession—Contract void as contravening policy of Act—Act No IX of* 1872 (*Indian Contract Act*) *sections* 23, 65.

In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court at Allahabad in the case of *Ikram-ullah Khan* v. *Moti Chand*, I. L. R., 33 All., 695, holding that an agreement by the defendants for relinquishment of all their "sir" and "khudkasht" lands, and ex-proprietary rights therein to the plaintiffs, none of whom were at the execution of the agreement proprietors, landholders or co-sharers in the land to be relinquished, and agreeing to pay damages for any breach of the contract by them, was illegal and void as being in contravention of the policy of Act No. II of 1901 (Agra Tenancy Act).

APPEAL 45 of 1914, from a judgement and decree (24th May, 1911) of the High Court at Allahabad, which reversed a judgement and decree (13th October, 1909) of the Court of the Subordinate Judge of Azamgarh.

The questions for determination in this appeal were whether an attempted sale of prospective ex-proprietary rights in "sir" and "khudkasht" land, and an agreement to execute a deed of relinquishment in respect of those rights, with a provision that if the vendors failed to carry out this undertaking, they should be liable for damages at the rate of Rs. 16 per bigha was unlawful; and whether the same sum can be claimed twice, first as rent and afterwards as damages.

The facts are sufficiently stated in the report of the hearing of the appeal to the High Court (KARAMAT HUSAIN and E. M. D. CHAMIER, JJ.) in *Ikram-ullah Khan* v. *Moti Chand*, I. L. R., 33 All., 695.

The suit for damages for breach of contract was decided by the Subordinate Judge in favour of the plaintiffs, but was dismissed by the High Court on the ground that the contract was unlawful and void.

On this appeal—

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

1916

MOTI CHAND v. IKRAM-ULLAH KHAN.

De Gruyther, K. C., and *B. Dube* for the appellants contended that the High Court was in error in holding that an agreement to surrender ex-proprietary rights or holdings in favour of the zamindar was illegal and void. The terms of section 83, clause (3), of the Agra Tenancy Act (II of 1901), empowered him to make a surrender of such a tenancy: reference was also made to sections 6, 10, and 20 of that Act, and to the former Act (XII of 1881), sections 7, 9, and 31. In one sense the agreement avoided the Act; but it was submitted it was quite valid and legal, and the suit on it could be maintained; and the defendants were liable to pay compensation for the breach of it. The law prohibited the sale of "sir" lands, but this transaction was merely the surrender of a tenancy. Reference was made to the Contract Act (IX of 1872), sections 23 and 65, which latter section the High Court found to be inapplicable, and held that section 23 was the only section that applied. It was submitted that the agreement did not defeat the object of the Act (II of 1901), and that section 83 would cover this case. There was a series of decisions on Act XII of 1881 and Act II of 1901 against this view referred to in the judgements of the High Court. They were cited and commented on, and reference was made to *Dipan Rai* v. *Ram Khelawan* (1). The judgement of the Subordinate Judge was right.

Abdul Majid for the respondents was not called upon.

1916, *December*, 11*th*:—The judgement of their Lordships was delivered by Sir JOHN EDGE:—

This is an appeal from a decree, dated the 24th of May, 1911, of the High Court of Judicature at Allahabad, which set aside a decree of the Subordinate Judge of Azamgarh, and dismissed the suit of the plaintiffs. The suit was brought to recover damages for an alleged breach by the defendants of an agreement contained in a sale deed of the 2nd of May, 1903, by which the defendants had agreed to execute and file a deed of relinquishment of their rights in their "sir" lands in mauzas Khorant, Daulsapur, and Bharthipur, in the district of Azamgarh. The mauzas in question are mahals within the meaning of "The Agra Tenancy Act, 1901" (Act No. II of 1901).

(1) (1910) I. L. R., 32 All., 388.

The defendants, who were the proprietors within the meaning of that Act of mauzas Khorant, Daulsapur and Bharthipur, and had in those mauzas considerable "sir" lands in their occupation, to which the Act applied, by their deed of the 2nd of May, 1903, transferred by sale to the plaintiffs the three mauzas and all the rights appertaining to the zamindari property. By the deed the defendants also purported to sell to the plaintiffs the zamindari property "together with 'sir' and 'khudkasht' lands, and ex-proprietary tenancy right without the exception of any thing or right"; declared that, "we, the executants, have relinquished our claims and interest in respect of all the 'sir' and 'khudkasht' land"; and agreed that—

"We shall execute a deed of relinquishment of claim in respect of the 'sir' lands, and shall file an application surrendering the holding. If we should make a delay in or take any objection to the filing of an application surrendering the holding or to the execution of the deed of relinquishment of claim in respect of the 'sir' lands, or should we, the executants, our heirs or representatives or successors, keep in our possession any portion of the 'sir' and 'khudkasht' lands, then we and our heirs and representatives and successors shall pay damages in respect thereof at the rate of 16 rupees per bigha. In case of non-payment, the vendees shall have power to bring a suit in a competent court and to realize the amount of damages at the above rate from the person and property of us, the executants, and our heirs and representatives and successors. We, the executants, shall have no objection to pay it."

At the time of the execution of the sale deed of the 2nd of May, 1903, the plaintiffs were not nor were any of them proprietors, landholders, or co-sharers in the mauzas or in any of them.

On the 5th of May, 1903, and in pursuance of the agreement in that respect contained in the sale deed of the 2nd of May, 1903, the defendants executed a deed of relinquishment, in favour of the plaintiffs, of their claim and right in all their "sir" lands in the three mauzas; they, however, refused to file the deed of relinquishment in the Revenue Court, and on the 14th of July, 1903, refused to quit possession of the "sir" lands, of which they have since then continued in possession as ex-proprietary tenants. In respect of that refusal to file the deed of relinquishment or to quit possession of the "sir" lands, this suit for damages was brought in the Court of the Subordinate Judge of Azamgarh on the 3rd of July, 1909. The damages claimed were at the rate of 16 rupees per bigha, amounting to 9,468 rupees 8

1916

MOTI CHAND v. IKRAM-ULLAH KHAN.

annas, with interest thereon at the rate of 8 annas per centum per mensem from the 14th of July, 1903, to the 3rd of July, 1909. The total amount of the claim, including interest, was Rs. 12,837-5-9.

The Subordinate Judge gave the plaintiffs a decree for the amount claimed, with costs, and interest thereon at the rate of 8 annas per centum per mensem to the date of realization. The High Court, on appeal, holding that the transaction as to the "sir" lands, whether it was to be regarded as an attempted sale of ex-proprietary rights or an agreement to relinquish those rights when they should arise, was unlawful, decided that the claim for damages for breach of the agreement could not be maintained, and dismissed the suit. There was abundant authority for that conclusion to be found in the decisions of the High Court on the effect of Act No. II of 1901, and of the previous Act No. XII of 1881.

In section 10 of Act No. II of 1901, it is enacted, so far as is material for present consideration, that—

"(1) Every proprietor whose proprietary rights in a mahal, or in any portion thereof, whether in any share therein or in any specific area thereof, are transferred, on or after the commencement of this Act, either by sale in execution of a decree or order of a Civil or Revenue Court, or by voluntary alienation, otherwise than by gift or by exchange between co-sharers in the mahal, shall become a tenant, with a right of occupancy in his 'sir' land, in the land which he has cultivated continuously for twelve years at the date of the transfer, and shall be entitled to hold the same at a rent which shall be four annas in the rupee less than the rate generally payable by non-occupancy tenants for land of similar quality and with similar advantages in the neighbourhood.

"(2) A usufructuary mortgage shall be deemed to be a transfer within the meaning of this section.

* * * * * *

"(4) Every such tenant, and every tenant having the same rights under the corresponding provisions of Act XVIII of 1873, Act XII of 1881, or any other enactment for the time being in force, shall be called an ex-proprietary tenant, and, save as otherwise expressly provided, shall have all the rights and be subject to all the liabilities conferred and imposed upon occupancy tenants by this Act.

"(5) The land in which such occupancy right has been created shall be specified, and the rent payable therefor shall be fixed by the Collector under section 86 of the North-Western Provinces and Oudh Land Revenue Act, 1901."

In section 20 of Act No. II of 1901 it is enacted:—

"(2) The interest of an ex-proprietary tenant, an occupancy tenant, or a non-occupancy tenant other than a 'thekadar' is, subject to the provisions of this Act, heritable, but is not transferable in execution of a decree of a Civil or Revenue Court, or otherwise than by voluntary transfer between persons in favour of whom, as co-sharers in the tenancy, such right originally arose, or who have become by succession co-sharers therein."

In section 83 of Act No. II of 1901 it is, amongst other things, enacted:—

"(1) A tenant, not bound by a lease or other agreement for a fixed period, may, at the end of any agricultural year, surrender his holding; but he shall not be entitled to surrender a portion only of his holding.

* * * * * *

"(3) Nothing in this section shall affect any arrangement by which a tenant and his landholder may agree to the surrender of the whole or any portion of a holding."

The Subordinate Judge apparently considered that clause (3) of section 83 had some bearing upon the facts of the case. Their Lordships cannot regard the agreement for relinquishment by the defendants in the sale deed of the 2nd of May, 1903, and the execution by the defendants of the deed of relinquishment of the 5th of May, 1903, as separate and distinct transactions. The execution of the deed of relinquishment on the 5th of May, 1903, was merely a step taken towards giving effect to the agreement for relinquishment which was contained in the sale deed of the 2nd of May, 1903, and was not an arrangement between a tenant and his landlord. The relation of landlord and tenant did not exist between the plaintiffs and the defendants at the time when the sale deed of the 2nd of May, 1903, was executed.

It appears to their Lordships that it cannot be doubted that the policy of Act No. II of 1901 is to secure and preserve to a proprietor whose proprietary rights in a mahal or in any portion of it are transferred otherwise than by gift or by exchange between co-sharers in the mahal a right of occupancy in his "sir" lands, and in the land which he has cultivated continuously for twelve years at the date of the transfer, and that such right of occupancy is by the Act secured and preserved to the proprietor, who becomes by a transfer the ex-proprietor, whether he wishes it to be secured and preserved to him or not and notwithstanding any agreement to the contrary between him and the transferee.

1916

MOTI CHAND v. IKRAM-ULLAH 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.)

P.C.*
1916
November, 6.
December, 19.

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

32 M.L.J. 241

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

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