

nature referred to in section 244 and is determinable only by order of the court executing the decree. The purchaser was entitled to the benefit of the adjudication between the decree-holder and the judgement-debtor. Following the decision in that case, had the judgement-debtors raised the objection now urged by them and failed, the decision arrived at in that case would have been available for the benefit of the purchaser. The fact that he did not raise any objection places the judgement-debtor in no better position. I think, therefore, that their contention is not maintainable. I agree with the order of my learned brother.

BY THE COURT.—The order of the Court is that the appeal is dismissed with costs.

*Appeal dismissed.*

## FULL BENCH.

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

BHAGWAN DEI (PLAINTIFF) v. MUKARI LAL, AND OTHERS (DEFENDANTS).<sup>\*</sup>  
Act No. IX of 1872 (Indian Contract Act), section 23 Contract—Agreement opposed to public policy—Assignment of mortgage taken by a patwari.

*Held* that the taking of an assignment of a mortgage by a patwari is not a transaction opposed to public policy within the meaning of section 23 of the Indian Contract Act, 1872. *Shiam Lal v. Ohhaki Lal (1)* and *Sheo Narain v. Mata Prasad (2)* overruled.

THE facts of this case were briefly as follows:—

The plaintiff appellant was the transferee of a mortgage, dated the 13th of July, 1912, the deed of transfer in his favour bearing date the 29th of August, 1912. A suit to enforce the mortgage was instituted in September, 1913. The defendant pleaded, *inter alia*, that the real transferee of the mortgage-deed was one Jamna Prasad, who was a patwari, and the plaintiff was only a *benamidar*, and that as a patwari was not allowed by the Board of Revenue to engage in money-lending business, the transfer was invalid and was also against public policy; hence

<sup>\*</sup>Second Appeal No. 1508 of 1914, from a decree of Mubarak Hussain, Subordinate Judge of Meerut, dated the 30th of July, 1914, confirming a decree of Piari Lal Katara, Munsif of Ghaziabad, dated the 23rd of March, 1914.

(1) (1900) I. L. R., 22 All., 220. (2) (1905) I. L. R., 27 All., 73.

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the suit could not be maintained. The courts below found that the real owner of the mortgagee rights was the patwari, gave effect to the plea of the defendants and dismissed the suit. The plaintiff appealed to the High Court.

Babu *Sital Prasad Ghosh*, for the appellant :—

There is no law or rule having the force of law which lays down that a patwari cannot become a mortgagee. Section 234 of Local Act III of 1901 (Land Revenue Act), clause (b), lays down that the Board may make rules "regulating the appointment of patwaris, their salaries, qualifications, duties, removal, punishment, suspension and dismissal." Now the Act nowhere says that the rules made by the Board of Revenue shall have the force of law. Compare the wording of section 257 of Act XIX of 1873. The rule framed by the Board of Revenue, department VII, Chapter I, rule 10, does no doubt lay down that no patwari should engage in money lending, but it does not say what would happen if he were to contravene the rules, and this Court is not bound to give effect to these rules; *Shiam Lal v. Chhaki Lal* (1). For breach of these rules he can be punished departmentally only. I would draw attention to section 257 of Act XIX of 1873. In that section two distinct sets of rules are contemplated; one set mentioned in clauses (a) and (b) has the force of law, the other set mentioned in the other clauses has no such force. When the Legislature intend that certain rules framed by certain bodies should have the force of law they expressly say so. See sections 129 and 130 of the Civil Procedure Code (Act V of 1908). Had this been a suit to enforce a contract of assignment, the defence taken in this case might have been effectively raised. In *Shiam Lal v. Chhaki Lal* (1) this Court has held that a sale to a patwari is against public policy. I submit that is bad law. A breach of departmental rules should not be held to be against public policy when any other person could legally have been the transferee of the mortgagee rights. Only those acts are against public policy which though not technically illegal, are looked upon by an ordinary person as immoral or improper. Public policy is not a safe and trustworthy ground for legal decision; *Janson v. Driefontein Consolidated Mines, Limited* (2).

(1) (1900) I. L. R., 22 All., 220.

(2) [1902] A. C., 434.

Babu *Piari Lal Banerji*, for the respondent, referred to *Sheo Narain v. Mata Prasad* (1).

Babu *Sital Prasad Ghosh* in reply referred to *Lobo v. Brito* (2), *Ramkrishna Trimbak Nadkarni v. Narayan Shivrao Aras* (3).

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RICHARDS, C. J.—This appeal arises out of a suit brought by the plaintiff to realize the amount of a mortgage, dated the 13th of July, 1912. The plaintiff alleged that the mortgage was assigned to her on the 29th of August, 1912. Various pleas were taken, and amongst others that the real assignee of the bond was Janna Prasad, a patwari in Government service, and that consequently the assignment was void. Both the courts below have found that the assignment was taken in the name of the plaintiff for the benefit of her son, the patwari, and have dismissed the suit on the ground that the assignment was against public policy. Section 234 of the Land Revenue Act provides that the Board of Revenue may, from time to time, subject to the sanction of the Local Government, make rules consistent with the Act for various purposes set forth in the section. Clause (b) is as follows:—"Regulating the appointment of Kanungos and Patwaris, their salaries, qualifications, duties, removal, punishment, suspension and dismissal." Certain rules were made by the Board, purporting, I assume, to be under the powers conferred by the Acts. Rule 10 is as follows:—"Every patwari is forbidden to engage in trade or money lending, under any circumstances to borrow money from any land-holder or cultivator of the circle; and to own or cultivate any land on any tenure within his circle." It is not by any means free from doubt whether clause (b) of section 234, authorized the making of this rule, and I do not think that the taking of an assignment of a mortgage can be said to be engaging in trade or money lending. It has not been contended that the rule in itself rendered the assignment void. The next question is whether, apart from this rule, the assignment to the plaintiff was absolutely void as being against public policy. In this connection I think it is not immaterial to remark that the present suit is not a suit to enforce any contract in connection

(1) (1905) I. L. R., 27 All., 73.      (2) (1908) I. L. R., 21 Mad., 231.

(3) (1915) 17 Bom. L. R., 955; s.c. 31 Indian Cases, 301.

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with the assignment of the mortgage to the plaintiff. It is a suit by the transferee of a mortgage against the mortgagor to enforce payment of the mortgage debt. The contract between the transferor and the transferee was completed long ago and the mortgage debt was transferred by a person competent to make the transfer. To succeed, the defendant must get the court to hold that the deed of transfer was absolutely void and that no interest was transferred. I cannot hold this. Apart from this view, it seems to me that the contract to assign the mortgage cannot be said to be contrary to public policy. If there were no rules prohibiting a patwari from taking an assignment of a mortgage, I think no court could possibly hold that his doing so was "contrary to public policy." I am deciding this as a question of law. I quite recognize the objection to a patwari having money-lending transactions or acquiring property or any interest in property in his circle. The courts below have relied upon the case of *Shiam Lal v. Chhaki Lal* (1) and also on the case of *Sheo Narain v. Mata Prasad* (2). Both these cases are undoubtedly in favour of the respondents, but I confess that I am unable to agree with the judgement in either of the two cases.

I would allow the appeal, set aside the decrees of both the courts below and remand the case to the court of first instance. It is quite clear that the patwari must have known that in taking the assignment he was violating conditions of his appointment and I would therefore allow no costs in this Court or in the lower appellate court.

MUHAMMAD RAFIQ, J.—The point raised by this appeal is whether an assignment of a mortgage to a patwari is void under section 23 of Act IX of 1872 as opposed to public policy. The point is not a new one. There are at least two reported cases of this Court where a similar transaction was held to be void because opposed to public policy. See *Shiam Lal v. Chhaki Lal* (1), and *Sheo Narain v. Mata Prasad* (2).

The appeal came up for hearing originally before a Bench of two Judges, when during the course of argument doubts were expressed as to the soundness of the said two decisions. The case was, therefore, referred to a larger Bench.

(1) (1900) I. L. R., 22 All., 220. (2) (1905) I. L. R., 27 All., 73.

It appears that one Murari Lal executed a simple mortgage on the 13th of July, 1912, in favour of Jagmohan Lal, Brij Mohan Lal and Kunwar Girwar Krishna in respect of a house in lieu of Rs. 1,200. On a partition bet ween the three mortgagees the mortgage fell to the share of Girwar Krishna. On the 29th of August, 1912, he executed a deed of assignment in respect of the mortgage in favour of the plaintiff, whose son is a patwari. On the 19th of November, 1913, the plaintiff instituted the suit out of which this appeal has arisen for the recovery of the money due on the mortgage of the 13th of July, 1912, by sale of the mortgaged house. The claim was brought against the mortgagor and one of the mortgagees and the legal representatives of the other mortgagees. It was resisted on various pleas, two of which were that the assignment in favour of the plaintiff was fictitious, the real assignee being her son, the patwari, and that the suit was not maintainable on the contract of assignment as it was void under section 23 of Act IX of 1872. The latter objection was urged on two grounds. It was said that the assignment in question was void for considerations of public policy and for the reason that it was forbidden by law, inasmuch as under the rules framed by the Board of Revenue under section 234 of Act III of 1901 which have the force of law, a patwari may not engage in trade or money lending under any circumstances.

The learned Munsif in whose court the suit was filed held that the assignment in favour of the plaintiff was *benami* and that the real assignee was her son, the patwari. He also held that the contract of assignment, being in favour of a patwari, was void for two reasons *viz.*, because it offended against the rules made by the Board of Revenue relating to the conduct and guidance of the patwaris, which rules have the force of law, and because it was opposed to public policy. The claim was accordingly dismissed. The decree of the first court was affirmed on appeal. In her second appeal to this Court the plaintiff challenges the findings against her both as regards the *benami* character of the assignment and its invalidity under section 23 of Act IX of 1872. The finding as to the assignment in favour of the plaintiff being *benami* is in my opinion one of fact and cannot be questioned in second appeal. I must, therefore, take it for the purposes of this appeal

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that the real assignee is the son of the plaintiff, the patwari. The question then for determination is whether the assignment of the 19th of November, 1913, is void for the reasons given by the court below. It is conceded for the respondents that the rules framed by the Board of Revenue have not the force of law, and hence the assignment in question cannot be said to be a contract forbidden by law. But they strenuously contended that it is void on the ground that such a transaction is opposed to public policy. They rely on the two cases of this Court already mentioned above in support of their contention as also on the case of *Vithal v. Siwa* (1). In view of the admission for the respondents it is unnecessary to express an opinion as to the effect of the rules framed by the Board of Revenue relating to the conduct of the patwaris on the assignment of mortgage to a patwari. I would, however, remark that the assignment of a mortgage to a patwari would hardly fall under the prohibition, "to engage in trade or money lending." Nor do I think that such a transaction can be said to be opposed to public policy. I take it that the law in this country as to what is opposed to public policy follows the English law on the subject. And according to English law the rule is that in considering whether an agreement is void as opposed to public policy regard must be had to the principles of public policy recognized by the law as illustrated by decided cases. The doctrine of public policy will not be extended beyond the classes of cases already covered by it. No court can invent a new head of public policy or condemn an agreement because in its opinion it is not consistent with public interest. See *Janson v Driefontein Consolidated Mines, Limited* (2). The cases decided by the English courts on the point have been examined and classified by Sir William Anson under seven heads viz.

- (1) Agreements tending to injure the public service.
- (2) Agreements which injure the state in its relation with other states.
- (3) Agreements which pervert the course of justice.
- (4) Agreements which tend to abuse of legal process.
- (5) Agreements which affect the freedom or security of marriage.

(1) (1912) 15 Indian Cases, 933.      (2) [1902] A. C., 484.

(6) Agreements in restraint of trade.

(7) Agreements which are *contra bonos mores*.

It cannot for a moment be urged that an assignment to a patwari of a mortgage falls under any of these agreements. The two cases relied upon by the respondents are at variance with the rule of English law on the subject, and, with due deference to the learned Judges who decided those cases, I am unable to follow them.

In my opinion the contract in suit is not opposed to public policy. I would, therefore, allow the appeal.

WALSH, J.—I agree. It is only because we are expressing our dissent from two two-Judge decisions of this Court, that I think it necessary to add a word or two. The question of the validity or otherwise of this contract depends upon the terms of section 23 of the Contract Act. The words "opposed to public policy" add nothing to, and detract nothing from, the common law, and must therefore be interpreted accordingly; but in my view the fallacy underlying the two previous decisions of this Court, and therefore the decision of the lower appellate court in this case, which was bound to decide it as it did having regard to those two previous decisions, was that they overlooked the language of the section, and the distinction between the conduct of a person and the subject matter of a contract. The section provides for cases where the consideration or object of the agreement is illegal or opposed to public policy. There can be no question, having regard to the regulations governing his appointment, that the conduct of the patwari in this case was opposed to public policy. That is not the test. The subject-matter of the agreement was the assignment of the mortgage. It is impossible in my view to hold that that is opposed to public policy, and I doubt whether any case can be found at common law in which a contract has been held to be opposed to public policy, because it was entered into by a particular individual, subject to particular restrictions. An examination of the large number of illustrations given to section 23 of the Contract Act makes it perfectly clear that it is the subject-matter alone which is in question.

With regard to the rules, I think it very doubtful whether the power to make rules relating to the appointment, dismissal

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and so forth of a patwari, under section 234, confers any right to qualify the general law with regard to contracts or anything else, and I think the draftsman, who drew these rules, knew his business too well, and therefore omitted to do any such thing. In my view, a rule declaring contracts void would have been *ultra vires*, but that no such intention was ever contemplated is, I think, clearly indicated by the penalty provided by rule 11 which immediately follows the prohibition in rule 10. If the rules are *intra vires* they have "the force of law" in their application to the patwari, whether they say so or not, but that does not mean that they qualify the general law. I only desire to add that I entirely agree with what has been said with regard to the finding about money-lending.

BY THE COURT.—The order of the Court is that the appeal is allowed, the case is remanded to the court of first instance through the lower appellate court with directions to re-admit the case on its original number on the file and to proceed to hear the same according to law. The parties will bear their own costs in this Court and in the lower appellate court. All other costs will be costs in the cause.

*Appeal decreed and cause remanded.*

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July, 10.

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

KAMALA DEVI (PLAINTIFF) v. GUR DAYAL AND OTHERS (DEFENDANTS)\*

Act No. IX of 1872 (*Indian Contract Act*), section 23—Contract—Agreement opposed to public policy—Purchase by a *kanungo* of mortgaged property.

*Held*, that there exists no legal prohibition against a *kanungo* purchasing mortgaged property and suing to redeem the mortgage existing on it, nor is such a transaction opposed to public policy within the meaning of section 23 of the *Indian Contract Act, 1872*.

THE facts of the case were briefly as follows:—

This was a plaintiff's appeal. The suit was to redeem a mortgage. The plaintiff had purchased the equity of redemption from the heirs of the original mortgagor.

\* Second Appeal No. 1088 of 1915, from a decree of Gopal Das Mukerji, third Additional Subordinate Judge of Aligarh, dated the 6th of April, 1915, confirming a decree of Hanuman Prasad Varma, Munsif of Haveli, dated the 16th of November, 1914.