Before Mr. Justice Piggott and Mr. Justice Walsh.

1919
February, 10.

PARBHU NARAIN SINGH (PLAINTIFF) *v.* RAMZAN (DEFENDANT).*

Agreement forming part of consideration of a licence to build on the land of another for payment of haq chaharum *in the event of sale of house—Purchaser, whether bound by agreement—Notice.*

One of the conditions upon which the owner of certain land granted permission to a person to build on it was that if any house built on such land was sold, the licensee would pay to the owner of the soil one-fourth of the purchase money.

Held that the purchaser of a house to which this covenant applied who purchased with notice of the existence of the covenant was bound by it equally with his vendor. *Tulk* v. *Moxhay* (1), *Abadi Begam* v. *Asa Ram* (2) and *Churaman* v. *Balli* (3) referred to.

THE facts of this case were as follows :—

In the year 1882 the plaintiff appellant granted to one Musammat Mahugi permission to build on certain land belonging to him. He took from her an agreement, which contained, amongst other stipulations, the following, that if at any time she were to vacate the land and to sell any house or houses which she had built thereon, she would, according to the ancient custom of the locality, pay to the plaintiff one-fourth of the purchase-money. Admittedly, the heirs and successors of Musammat Mahugi sold two houses built by the latter on the site in question to the defendant respondent, Ramzan. The present suit was to recover from the surviving heir of Musammat Mahugi and from said Ramzan one-fourth of the purchase-money. The court of first instance gave a decree for the ascertained amount, recoverable jointly and severally from the two defendants. Ramzan appealed to the District Judge and the latter dismissed the suit as against him, holding that under the agreement only the heir of Musammat Mahugi was liable to answer the plaintiff's claim.

The plaintiff appealed to the High Court, seeking to enforce the joint and several liability of the purchaser Ramzan.

Munshi *Gokul Prasad*, for the appellant.

Munshi *Kanhaya Lal*, for the respondent.

* Second Appeal No. 887 of 1916, from a decree of S. R. Daniels, District Judge of Allahabad, dated the 7th of March, 1916, reversing a decree of Triloki Nath, officiating Judge of the Court of Small Causes, exercising the powers of Munsif of Allahabad, dated the 15th of May, 1915.

(1) (1849) 18 L. J., Ch., 83; 2 Phill., 774. (2) (1879) I. L. R., 2 All., 162.
(3) (1887) I. L. R., 9 All., 591.

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PIGGOTT, J.:—This second appeal arises on the following set of facts. In the year 1882 the plaintiff appellant granted to one Musammat Mahugi permission to build on certain land belonging to him. He took from her a certain agreement, which contained, amongst other stipulations, the following, that if at any time she were to vacate the land and to sell any house or houses which she had built thereon, she would, according to the ancient custom of the locality, pay to the plaintiff one-fourth of the purchase-money. Admittedly the heirs and successors of Musammat Mahugi sold two houses built by the latter on the site in question to the defendant respondent, Ramzan. The present suit was to recover from the surviving heir of Musammat Mahugi and from the said Ramzan one-fourth of the purchase-money. The court of first instance gave a decree for the ascertained amount, recoverable jointly and severally from the two defendants. Ramzan appealed to the District Judge, and the latter dismissed the suit as against him, holding that under the agreement only the heir of Musammat Mahugi was liable to answer the plaintiff's claim. The object of this appeal is to enforce the joint and several liability of the vendee, Ramzan. The case seems to turn, as the appellant rightly contends, on the nature of the case set up by Ramzan in the trial court. In the first and formal part of his written statement he denied, or put the plaintiff to proof of, all the allegations contained in the plaint, except the allegation that he, Ramzan, had purchased under a sale deed from the heirs of Musammat Mahugi. In his additional pleas, where the case which he specifically desired to set up was outlined, he said that having purchased the houses in question in the month of January, 1910, he had paid one-fourth of the purchase-money to the actual proprietors of the site. He said that the plaintiff was not the owner of the site and had no interest in it whatsoever. The question of the ownership of the site has been determined in favour of the plaintiff and is not now in issue. The only question is whether, on the facts stated, the defendant Razman was or was not jointly and severally liable with his vendors to see that the proprietor of the site received one-fourth of the purchase-money, to which he was entitled under the contract. I think we must take it on the pleadings that Ramzan had notice of

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the fact that the proprietor or proprietors of the site had a right to receive one-fourth of the purchase-money, whatever might be the basis of that right. He never pleaded that he had paid the whole of the purchase-money to his vendors, either in ignorance of the existence of any right vested in the owners of the site, or on the strength of assurances that the vendors would satisfy the rightful claims of the owners of the site to one-fourth of the purchase-money. What he said was that he had himself been at pains to satisfy the rights of the zamindars of the land. On this state of pleadings it seems to us that it was not open to the District Judge to find that the defendant was not jointly and severally liable along with his vendors to see that the plaintiff, as proprietor of the site, received the one-fourth of the purchase-money to which he was entitled. If the defendant set up a defence a portion of which was false to his knowledge he must take the consequences of having done so. If, on the other hand, it be assumed that he in good faith believed the defence set up by him to be true, then the position is that he had paid certain money which the plaintiff was entitled to receive, under a misapprehension of fact, to some other person or persons. That does not acquit him of his liability to account for the same to the plaintiff. On these grounds I think the decree of the lower appellate court should be reversed and that of the court of first instance restored, the defendant respondent paying the costs in this and in the lower appellate court.

WALSH, J.:—I entirely agree. The judgment of the learned District Judge appears to me to result from a slight confusion between the cases where there is custom proved and enforceable, and the cases where there is a mere agreement binding upon the particular party concerned relating to a specific subject-matter, which latter he seems to regard as not binding in any event upon a purchaser unless the purchaser has become by his own agreement expressly liable to perform the covenant. This seems to me to overlook the well-known doctrine that a purchaser with notice of any restrictive covenant binding upon his vendor as a condition of the interest or the grant which he enjoys in the land, is affected in equity with notice of such restriction and is

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liable after he becomes a purchaser for any act done in breach of such restriction. The frequency with which these cases come up to this Court and the changes which are rung by the dissatisfied party between custom, covenant running with the land, personal covenants, entries in the wajibu-ul-arz, and what not, seems to me to make it desirable—and partly on that account I referred this case to a Bench of two Judges—to arrive at some distinct and definite principle by which the existence of the right in any particular case can be tested. It is of no use to members of the public and to the parties themselves to indulge in vague generalities and to say that in this case the party ought to be bound and in the other case he ought not to be bound. In this particular case there is no question of custom. That is found as a fact in favour of the respondent, nor is there any question of any personal covenant or liability undertaken by the respondent to the zamindar. There is an undertaking in the *sarkhat* under which the tenant enjoyed her holding binding her in the most absolute form (and alleging further that it was in accordance with a custom prevailing in that locality) not to part with her interest by transfer without the zamindar receiving his right of one-fourth of the purchase-money, and it cannot be contended that there is any legal or equitable ground which would justify a purchaser who had read that document in paying the tenant the purchase-money without seeing that the zamindar received his one-fourth share, or in other words, that the restriction which the tenant had imposed upon herself was not broken when the transfer took place. To my mind, if that is a correct view of the legal position, it is no more than the expression applied to this case of the old English rule in *Tulk* v. *Moxhay* (1). It is well illustrated by two decisions in this Court. In *Abadi Begam* v. *Asa Ram* (2) the original owner of land had bound himself to pay a monthly sum to his wife out of the income of the land and not to alienate the land without arrangement for the payment of such sum out of the income of the land. He granted a usufructuary mortgage of the land to another person subject to the payment of the stipulated sum and such person gave a sub-mortgage to another person orally agreeing with the sub-mortgagee

(1) (1849) 18 L.J., Ch., 83; 2 Phill., 774. (2) (1879) I. L. R., 2 All., 162.

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to continue the payment of the sum himself. In a suit by the wife against both the original mortgagee of the land and the sub-mortgagee, this Court held that the sub-mortgagee, being in possession of the land, was bound to pay the sum out of his income to the wife with whom he had never entered into any agreement at all, and had never bound himself by any covenant in the mortgage-deed. All that he had done was to acknowledge the verbal notice of the liability and to promise verbally, not to the obligee but to one of the intermediate transferors, that he would pay the sum, and he had taken the property with notice of that restrictive covenant. *Churaman* v. *Balli* (1) is a decision of three Judges of this Court decided after the Transfer of Property Act. The case was a suit for arrears of *malikana* and followed upon much the same lines. In my opinion section 40 of the Transfer of Property Act (No. IV of 1882) was intended to codify this principle and governs this class of case. The same view appears to be taken by the learned commentators of this Act whom I propose to quote. Dr. Gour says:—"This section deals with what are known in the English Law as restrictive covenants, which are equitably enforced against all transferees under circumstances mentioned in the section. They are not covenants running with the land, and hence not binding upon all purchasers with or without notice. Nor are they covenants of the nature of easements, which avail against all the world. The object of this section is to protect covenants which are universally regarded as necessary for the improvement or beneficial enjoyment of one's property, and since these restrictions are not of the same importance as easements, or covenants running with the land, it is considered equitable that they should be enforced only as against transferees with notice, or gratuitous transferees." In another passage he further illustrates this principle:—"If a purchaser knows of an incumbrance either before or after the execution of his conveyance, but before the payment of the whole of his purchase-money, he will be liable to the extent of any purchase-money which he subsequently, without the consent of such incumbrancer, pays to the vendor." That is substantially the statement of the position in the case

(1) (1887) I. L. R., 9 All., 591.

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before us. In Shephard and Brown I find this passage :—" The rights mentioned in this section are not rights which come into existence on any transfer of property, nor is the third person " (in this case the zamindar) " to whom they belong a party to the supposed transfer. They are rights which previously to the transfer were available against the transferor, and the purport of the section is to state the conditions under which they may be enforced against the transferee." In a further passage is said :— " The liability of the purchaser must rest on the ground that in justice he ought not to evade the discharge of the obligation which was incumbent on his transferor." That is the ground on which these cases one way or another have almost universally been decided and I think that is the principle which section 40 is intended to codify.

If on the other hand it be contended, a view with which I do not myself agree, that the express language of section 40 is not appropriate to the particular case, then the courts must take refuge in an equitable principle analogous to the section. It seems to be recognized that the section is not comprehensive. To quote Shephard and Brown again :—" It is not clear that the section is intended to contain an exhaustive statement of the cases in which by operation of the doctrine of notice, the burden of an obligation is extended to persons who would not otherwise be affected by it." And they then give by way of illustration the case of a sub-lessee. They go on to say :—" Such a covenant, though it might not come within the section, and certainly could not be brought within the first part of it, would, nevertheless, it is submitted, be enforceable in India, as in England, against one who took with notice." All of which goes to show that, even in cases of the transfer of property, the contents of the Act or Code relating to the transfer of property, are not exhaustive, and that the courts are entitled to act upon general principles of equity even though they do not find them expressed in precise language by the Code itself. There is a long course of decisions in this Court giving effect to the principle now disputed by Mr. *Haribans Sahai* on behalf of the respondent in this case. They have generally been decided as questions of fact turning upon custom, but there is always room for controversy as to whether a finding

on custom is a question of fact or a question of law, and where no custom has been found the right of the zamindar has been protected by invoking or appealing to the principles of justice and equity. I have, therefore, endeavoured to express the true legal solution where no binding contract, and no prevailing custom, is established against the defendant.

BY THE COURT.—The appeal is allowed, the decree of the lower appellate court is set aside and that of the court of first instance restored, the defendant respondent paying the costs in this and in the lower appellate court.

Appeal allowed.

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

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SHEORAJ SINGH AND ANOTHER (PLAINTIFFS) *v.* NAIK SINGH SAHAI AND OTHERS (DEFENDANTS) *

Pre-emption—Sale to stranger—Plaintiffs joining in their suit persons who were not strangers but had pre-emptive rights inferior to theirs.

In a suit for pre-emption, where the suit is a suit against strangers, the plaintiffs by joining persons who have different rights *inter se* do not thereby forfeit their rights. *Gupteshwar Ram* v. *Rati Krishna Ram* (1) distinguished.

THE facts of this case were as follows:—

Two suits were brought by rival pre-emptors, one by Munna Lal alone, and the other by four other persons. In the second suit (where there were 4 plaintiffs) two of the plaintiffs withdrew the day after the plaint was filed. The two suits then continued, one in which Munna Lal alone was plaintiff and the other in which the remaining two plaintiffs were Sheoraj Singh and Ram Ghulam. During the trial the rival pre-emptors came to terms by which two-thirds of the property was given to Munna Lal and one-third to the other two plaintiffs out of the half of the property sold belonging to defendants Nos. 1—3. As to the other half of the property sold belonging to Badri Prasad (defendant No. 4) the claim for pre-emption was not pressed. The first court decreed the claim in the terms of the compromise. The vendees defendants 1—3 appealed to the Judge. As against the two plaintiffs Sheoraj

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* Second Appeal No. 86 of 1918, from a decree of W. T. M. Wright, District Judge of Budaun, dated the 15th of September, 1917, reversing a decree of Gopal Das Mukerji, Subordinate Judge of Budaun, dated the 9th of June, 1911.

(1) (1912) I. L. R., 34 All., 542.