*Before Sir Cecil Walsh, Acting Chief Justice, Mr. Justice Dalal, Mr. Justice Banerji, Mr. Justice Kendall and Mr. Justice Pullan.*

AULAD ALI AND OTHERS (DEFENDANTS) *v.* ALI ATHAR (PLAINTIFF) AND NASIR-UD-DIN (DEFENDANT).* 1927 *January*, 31.

*Act No. IX of 1872 (Indian Contract Act), sections 32 and 37—Act No. IV of 1882 (Transfer of Property Act), sections 14 and 40—Rule against perpetuities—Covenant running with the land—Contract—Uncertainty—Pre-emption.*

A deed of exchange was executed by *MR* and *N*, in which, in lieu of certain property transferred by *N* to *MR*, the latter transferred 7 annas 11 pies in village Gurdih Aimma to *N*, retaining only 1 pie, and it was mutually agreed that if either party should wish to transfer his property in the village he should transfer it to the other, but if either transferred it to a third person, the other party should have a right to pre-empt. *N* having sold his property in the village in question in three separate lots, three suits for pre-emption were brought by the legal representative of *MR*.

*Held*, that the suits would lie. The agreement upon which it was based was neither void for uncertainty nor offended against the rule against perpetuities, but on the contrary was a perfectly good agreement in law.

*Muhammad Jan* v. *Fazal-ud-din* (1), referred to. *Gopi Ram* v. *Jeot Ram* (2) and *Balli Singh* v. *Raghubar* Singh (3), overruled.

THIS appeal was referred to the Chief Justice with a view to its being heard by a Full Bench. The facts of the case are fully stated in the following order of reference.

LINDSAY and SULAIMAN, JJ.:—We have decided that these cases ought to be referred to a Full Bench

* Second Appeals Nos. 381, 382 and 1544 of 1925, from 3 decrees of Krishna Das, Additional Subordinate Judge of Azamgarh, dated the 10th of November, 1924, reversing 3 decrees of Ilias Ahmad, Additonal City Munsif of Azamgarh, dated the 7th of April, 1924.

(1) (1924) I.L.R., 46 All., 514. (2) (1923) I.L.R., 45 All., 478.
(3) (1923) I.L.R., 45 All., 492.

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for decision. The appeals arise out of three suits for pre-emption brought in the following circumstances :—

On the 1st of February, 1908, two persons, Muhammad Razi and Shah Nasir-ud-din, executed a document of exchange. At the time this document was written Muhammad Razi was the owner of an 8-anna share in mauza Gurdih Aimma and Shah Nasir-ud-din was the owner of the other 8-anna share in the same village.

Muhammad Razi transferred 7 annas and 11 pies out of his 8-anna share in this village to Nasir-ud-din. Muhammad Razi retained a 1-pie share, of which he granted a perpetual lease to Nasir-ud-din.

The situation after this transaction, therefore, was that Muhammad Razi was the owner of a 1-pie share in this village, while Nasir-ud-din became the owner of 15 annas and 11 pies.

When the deed of exchange was executed an agreement was entered into between Muhammad Razi and Shah Nasir-ud-din to the following effect, namely, that if either of the parties was desirous of transferring his interest in mauza Gurdih Aimma he should offer it, in the first instance, to the other party. It was further provided that if either party transferred to a stranger, then the other party would be entitled to pre-empt the property, in the case of a sale, at the rate of Rs. 8-5-4 per pie (English), and in the case of other transfers at the rate of Rs. 4-2-8 per pie (English).

What has happened now is as follows :—

Shah Nasir-ud-din has by three separate deeds of sale transferred the 15 annas and 11 pies share which he owned in this village and three suits have been brought for pre-emption of these sales by one

Saiyid Ali Athar who is the legal representative (sister's son) of Muhammad Razi who is now dead. The question which arises for decision in these three cases is whether the contract for pre-emption contained in the agreement of the 1st of February, 1908, is now enforceable. The court of first instance dismissed the two suits out of which second appeals 381 and 382 of 1925 have arisen. In appeal the judgement of the trial court was reversed by the lower appellate court, which decreed the claim for pre-emption in each case. In the third case, which gave rise to Second Appeal No. 1544 of 1925, the trial court had in the first instance dismissed the case, but after an order of remand passed by the lower appellate court it gave a decree for pre-emption which the lower appellate court subsequently affirmed on appeal.

There has been a good deal of discussion in recent years in this Court regarding the enforceability of a contract of this kind and the Judges composing the present Bench are not in agreement upon the question whether a contract of this nature is enforceable as between the representatives of the parties to the contract. We may refer in this connexion to the case of *Muhammad Jan* v. *Fazal-ud-din* (1). It is not necessary for us to refer to the other cases in which one or the other view has been taken in this Court. We have no doubt that when the cases come up before the Full Bench the learned counsel on both sides will place all the relevant decisions before the Bench. We make this reference accordingly, and in view of the fact that we both stand committed to definite opinions upon the question involved we think it right to say that we do not desire to be members of the Full Bench.

(1) (1924) I.L.R., 46 All., 514.

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Let this be laid before the Hon'ble Chief Justice for constitution of a Bench.

On this appeal—

Mr. *B. E. O'Conor* and Maulvi *Mukhtar Ahmad*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

WALSH, A. C. J.:—We are of opinion that this is a clear case and we agree with the judgement of our brother Mr. Justice LINDSAY.

I propose to give my reasons as shortly as possible. The question arises out of a contract* which may be compendiously stated as one for exchange by the parties thereto of certain properties belonging respectively to each of them. It relates to a certain mauza, in respect of which Muhammad Razi transferred the whole of his interest, except one pie, and the parties entered into a mutual agreement as a fundamental condition of sale, that if either of them should wish to transfer the whole, or part, of his share in that mauza, that is to say, as regards the transferee Nasir-ud-din what he was taking under the document, and as regards the transferor Muhammad Razi the single pie share which he was reserving to himself, they might do so by transferring it from one to the other, but if either of them desired, or in fact attempted to transfer to a third person, the other party was to have the right to pre-empt. That is a perfectly harmless and natural mutual

* The relevant passage containing the pre-emption clause in the deed of exchange was as follows:—

"I, Saiyid Muhammad Razi, cannot transfer the said share by sale or mortgage. If I, Saiyid Muhammad Razi, wish to transfer the remaining 1 pie (English) share or if I, Shaikh Nasir-ud-din, wish to transfer the whole or part of my share in mauza Gurdih aforesaid, we can transfer it among ourselves, that is, one executant can transfer it to the other. In case of transfer to another person, the other executant will acquire it by pre-emption on payment of consideration at the rate of Rs. 8-5-4 for each pie (English) in case of sale and on payment of Rs. 4-2-8 for each pie (English) in case of other transfers."

arrangement, very common in India, quite intelligible, the object being that so long as the parties to the transaction preferred to keep out third persons from the body of co-sharers, they should have a right of veto. In other words, it cannot be described better than as creating an obligation, imposing a restriction on the use of the land by each of the parties to this contract respectively. To my mind there is no uncertainty about such a contract. It is as clear and definite as language can make a contract, and with all respect to my brother SULAIMAN'S view, it seems to me that that is the fallacy underlying his opinion.

I, therefore, think that section 32 of the Contract Act, which deals with contingent contracts, is a complete answer to the appellants' contention. The right springs into existence upon the happening of a contingency. There is nothing in the contract which offends against the law upon that subject. I am also clearly of opinion that section 37 confers that benefit and imposes the obligation upon the representatives of the parties if the parties should die before the contingency occurs, and I do not understand my brother SULAIMAN really to have denied that proposition.

Mr. *O'Conor* quite rightly, having regard to the state of the authorities on the point, relied upon the contention that this contract, and other similar contracts, offended against the rule against perpetuities. Having the advantage in India of having most of our law codified, it is always useful, both at the beginning and the end of a discussion, to look at what the Code says. The rule against perpetuity is codified in section 14 of the Transfer of Property Act, which begins in these words "No transfer of property can operate." Documents of mutual

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rights and obligations, contained in contracts, such as that with which we are here dealing, are not a transfer of property at all. Therefore, section 14 clearly has no applicability. That would be a complete answer to the argument, were it not that two experienced Judges of this Court, in dealing on two previous occasions with this precise matter, followed a decision of the Bombay High Court in *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (1) and of the Madras High Court in *Kolathu* v. *Ranga* (2). As the matter has been expressly referred to us for the purpose, it is our duty to express our opinion about those two decisions. They do not appear to have been based on any independent reasoning of the two learned Judges themselves. They adopt the view which had been laid down after a very elaborate consideration and judgement in Bombay. With great respect to the Judges who decided the Bombay case, it seems to me that they drifted into this fallacy. The learned Chief Judge's judgement complains that difficulty arises in India owing to the distinction that exists between the law in England and the law in India, namely, that the law in India does not recognize what is called the creation of an equitable interest in land arising from some inchoate transaction short of an actual transfer. Having made that complaint, it seems to me that he somewhat illogically proceeded to supply the absence of which he complained by applying the equitable rule of "analogy to the statute" to pre-emption contracts, which, although no equitable interest was created, he held should by analogy be treated as offending against the rule of perpetuities, as though they did create an equitable interest, and by analogy to

*Walsh, A. C. J.*

(1) (1922) I.L.R., 47 Bom., 191. (2) (1912) I.L.R., 38 Mad., 114.

section 14 of the Transfer of Property Act, must be treated as offending against the mischief prohibited in that section. I am unable to agree with this view. I see nothing, either legal or equitable, offending or purporting in any way to offend against the rule, in such contracts as these. I, therefore, am of opinion that the two cases decided in this Court, *Balli Singh* v. *Raghubar Singh* (1) and *Gopi Ram* v. *Jeot Ram* (2), having followed the Bombay case, were wrongly decided, and must be held as no longer binding in this province.

It is not immaterial to observe that in the *ratio decidendi* of the Bombay judgement, which was quoted by our learned brothers in both the cases they decided, to which I have just referred, the learned Chief Justice expressly stated that he regarded an obligation found in a contract of this kind as one which ran with the land, and also that it was not a mere personal contract which died with the person. If those two views are correct, and I agree with them, and the rule against perpetuities does not apply, the question we have to answer is simple.

I am inclined to think, though it is not necessary for the decision of this case, and not having fully considered the matter I prefer to say no more about it, that section 40 of the Transfer of Property Act, which deals with obligations imposing restrictions on the use of land, is also a complete answer to my brother SULAIMAN'S view.

The result is that we affirm the judgement of Mr. Justice LINDSAY and dismiss the appeal with costs.

DALAL, J. :—I agree. The view of Mr. Justice SULAIMAN also is that a contract like the one before

(1) (1923) I.L.R., 45 All., 492. (2) (1923) I.L.R., 45 All., 478.

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us does not offend against the rule agianst perpetuities, enacted in section 14 of the Transfer of Property Act;—see observations at pages 522 and 523 of *Muhammad Jan* v. *Fazal-ud-din* (1). His opinion was, in that case, that if a contract was for an unlimited period of time, it might be contended that it was unenforceable against the heirs and representatives as being too vague and uncertain. An agreement, the meaning of which is not certain, or capable of being made certain, is void; and it is difficult to understand how a contract, which is valid at the time it was entered into, would become unenforceable as against the heirs and representatives as being too vague and uncertain. The principles enunciated in section 40, clause 2, of the Transfer of Property Act would apply here. *A* contracts to sell Sultanpur to *B*. While the contract is still in force, he sells Sultanpur to *C*, who has notice of the contract. *B* may enforce the contract against *C* to the same extent as against *A*. The short question for decision, therefore, before us is whether the contract of the 1st of February, 1908, was in force or not, at the date of the three sales objected to by the plaintiff. In my opinion the contract had not come to an end under any rule of law. The plaintiff was, therefore, entitled to enforce the agreement between Muhammad Razi and Nasir-ud-din.

BANERJI, J.:—I agree. The rulings referred to by the learned Chief Justice, and reported in *Balli Singh* v. *Raghubar Singh* (2), are really not distinguishable in principle from that decided by a Bench of this Court in the case of *Basdeo Rai* v. *Jhagru Rai* (3). The question in this case is whether the contract entered into between the parties,

(1) (1924) I.L.R., 46 All., 514. (2) (1923) I.L.R., 45 All., 492.
(3) (1924) I.L.R., 46 All., 333.

namely, that one of the parties should have the right to pre-empt in the case of a sale, is void on account of uncertainty or not. I am clearly of opinion that a contract, which a party alleges to be a void contract, must be void *ab initio*, and such a contract cannot be treated to be valid up to a certain time and then treated as invalid. Such a clause in the sale-deed is a clause which, although not amounting to an interest in the land, entitles the parties to it to the benefit of the obligations arising out of the contract. There is no difference in principle between a case where the parties entered into such a contract, so that it was enforceable for a hundred years, and the case where the contract comes into operation upon the happening of an event which, though uncertain in the sense that one does not know when one of the contracting parties will die, is certain, and arises when the property is sold. I am, therefore, of opinion that the agreement is a good agreement in law.

KENDALL, J. :—I agree.

PULLAN, J. :—I agree.

BY THE COURT.—The appeal is dismissed with costs.

*Appeal dismissed.*