

*Before Sir Shah Muhammad Sulaiman, Chief Justice, and
Mr. Justice Bennet*

GAYASI RAM AND OTHERS (PLAINTIFFS) *v.* SHAHABUDDIN
AND OTHERS (DEFENDANTS)*

1935
January, 22

Transfer of Property Act (IV of 1882), section 10—Absolute restraint on alienation—Sale of house with a condition prohibiting transfer to any one except the vendor and his heirs and entitling the latter, in case of transfer to another, to recover at a fixed price.

Where a house was sold with a condition prohibiting transfer by mortgage, gift or sale to any one excepting the vendor and his heirs and providing that even an auction sale would be void, and further providing that if ever the house were transferred in contravention of the said terms then the vendor or his heirs would be entitled to recover the house on payment of Rs.175: *Held*, that the condition amounted to an absolute restraint on alienation within the meaning of section 10 of the Transfer of Property Act and was void.

In order to see whether in a particular case there is an absolute restraint or only a partial restraint, one has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency, e.g. if the other party consents, in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in section 10. On the other hand where there is no prohibition against the transfer itself but a right of pre-emption is conferred on the vendor to take the property from a stranger vendee, section 10 would be inapplicable.

Aulad Ali v. Ali Athar (1), discussed and distinguished.

Mr. *A. P. Bagchi*, for the appellants.

Dr. *N. P. Asthana*, for the respondents.

BENNET, J.:—This is a Letters Patent appeal by the plaintiffs who have lost their suit in both the lower courts and before the learned single Judge of this Court. On the 3rd July, 1912, Bhuja Ram, father of the plaintiff Gayasi, sold a house to Nanhu, the father of Ramsarup, defendant No. 3, for the sum of Rs.150. In that sale deed there was a clause providing that the vendee would not transfer the house or mortgage, gift

*Appeal No. 46 of 1933, under section 10 of the Letters Patent.

(1) I.L.R., 49 All., 527

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or sell to anyone excepting the vendor or his heirs; that if the house were sold by auction sale the sale would be invalid, and that if the house were transferred in contravention of the said terms then the vendor or his heir would have a right to get back the house by paying Rs.175. On the 13th April, 1928, Ramsarup, son of the vendee, sold the house to defendant No. 2, Raja Ram, for Rs.1,000. On the 3rd April, 1929, Raja Ram sold the house to defendant No. 1, Shahabuddin, for Rs.800. On the 12th April, 1929, the plaintiffs have brought the present suit against all the defendants, claiming possession of the house on payment of Rs.175 to defendant No. 1. The courts below dismissed the suit on the ground that the condition was contrary to section 10 of the Transfer of Property Act as amounting to an absolute restraint on alienation. That view has been upheld by the learned single Judge of this Court. Learned counsel in Letters Patent appeal relies on certain rulings which he claims will show that in similar cases it has been held that such conditions are not contrary to section 10 of the Transfer of Property Act. The first ruling on which he relied is a Full Bench ruling in *Aulad Ali v. Ali Athar* (1). Learned counsel points out that the contract in that case quoted in the foot-note at the bottom of page 530 amounts in effect to the same result as the contract in the present case. The contract in that case is 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, Sheikh 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

(1) (1927) I.L.R., 49 All., 527.

for each pie (English) in case of other transfers." I would note firstly that the contract in the ruling differs because it does not state that alienation shall not take place. It sets out that a transfer may be made between the parties and further provides that if a transfer is made to another person then the opposite party will acquire the property by pre-emption. The pre-emption differs from the usual contract for pre-emption because the rate at which the purchase is to be made is fixed by the agreement. But in dealing with this case the Full Bench did not lay any stress on this particular condition that the price was fixed. On the contrary the Full Bench treated the case as one of a contract creating a right of pre-emption. On page 530 the ACTING CHIEF JUSTICE stated, after quoting the contract and stating that it gave the right to pre-emption: "That is a perfectly harmless and natural mutual 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." On page 528 it is stated that each of the parties was the owner of an eight anna share in a certain village and one party transferred all his eight anna share with the exception of a one pie share to the other. Again at the bottom of page 532 the learned ACTING CHIEF JUSTICE objected to the application of the equitable rule of "analogy to the statute" to pre-emption contracts, that is, he treated the present contract as one of pre-emption.

The second point on which the Full Bench ruling is distinguishable is that in no part of that ruling is any reference made to section 10 of the Transfer of Property Act. The case was not put forward that the contract in that ruling would amount to an absolute restraint on alienation. As the case was not argued on that ground I consider that it cannot be held that the ruling is an authority for the proposition that section 10 does not apply to a contract of that nature. It should further

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be noted that in the ruling the case was one between co-sharers in a village. In the present case the property in suit is not zamindari property but a house and the parties are in no sense co-sharers, nor can there be any question of pre-emption by a contract.

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The next ruling on which learned counsel relies is a ruling of their Lordships of the Privy Council in *Muhammad Raza v. Abbas Bandi Bibi* (1). That ruling sets out (page 262) that on September 19, 1870, there was a compromise which stated: "it has been settled that both wives should, in accordance with this agreement, in their capacity as wives, from this very time be declared permanent owners of a moiety each of the entire mahal Shadipur The said females shall not have power to transfer this property to a stranger." In accordance with this contract their Lordships observed on page 267: "In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family." At page 269: "Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her." Their Lordships came to the conclusion that section 10 of the Transfer of Property Act did not make any change in the law prior to its enactment in 1882 and that the arrangement before their Lordships was an arrangement which would not be contrary to the provisions of section 10. But I consider that the present case is very different from the family arrangement which was before the Privy Council. In the present case there is an absolute restraint on alienation to anyone other than the vendor or his heirs. In the case before their Lordships of the Privy Council

(1) (1932) I.L.R., 7 Luck., 257.

their Lordships held that it was open to Sughra Bibi to make an alienation to anyone she desired within the family circle. Further the case before their Lordships was one in which provision was made for the wives of the person executing the agreement. In the present case the sale deed which gave rise to this case is a sale deed between strangers and cannot be considered parallel to a family arrangement.

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On the other hand I consider that there are three rulings in which the principle has been laid down in favour of the defendants respondents. The first of these rulings is *Dol Singh v. Khub Chand* (1). In that ruling there was a sale with a condition that the vendee or his heirs should sell to the vendor or his heirs for the same price and to no one else. It was held that this would amount to an absolute restraint on alienation and that this clause was not enforceable. In *Asghari Begum v. Maula Bakhsh* (2) there was a condition against the transfer of an allowance by way of maintenance which was a charge on immovable property and the condition forbade making the transfer during minority or after minority. It was held that this was an absolute restraint on alienation and was void as contrary to the principle of section 10 of the Transfer of Property Act. In *Gomti Singh v. Anari Kuar* (3) there was a case of a settlement between a husband and his two wives by way of the execution of a document styled a *tamliknama* in which it was held that the property should be held by the husband of the two wives and that neither he nor his wives could transfer separately and the transfer could be made only when all combined. It was held that this was an absolute restraint on alienation so far as the one-third share of the husband was concerned and this condition was not valid as it violated section 10 of the Transfer of Property Act so far as that one-third share was concerned.

(1) (1921) 19 A.L.J., 848.

(2) [1920] A.L.J., 515.

(3) [1929] A.L.J., 880.

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Following those three rulings I hold that the condition in restraint of alienation in the present case is contrary to section 10 of the Transfer of Property Act, and therefore void.

Accordingly I hold that the suit of the plaintiffs fails and I dismiss this Letters Patent appeal with costs.

SULAIMAN, C.J.:—I concur. As laid down by their Lordships of the Privy Council in the case of *Muhammad Raza v. Abbas Bandi Bibi* (1), the prohibition contained in section 10 is operative against an absolute restraint on alienation only and not against partial restraints. But in order to see whether there is absolute restraint or not, one has to examine the effect of all the conditions and find whether for all practical purposes alienation is prohibited. The mere fact that there may be some remote contingency in which there may be a possibility of an alienation taking place would not necessarily take the case out of the prohibition contained in section 10. For instance, if the condition is that the property shall not be transferred without the consent of the other party, it may be argued that there is a remote possibility, when the promisee agrees, that a transfer can take place. But obviously such a condition is for all practical purposes a complete prohibition against a transfer, unless the promisee gives his consent. On the other hand where there is no prohibition against the transfer itself but a right of pre-emption is conferred on the promisee to take the property from a stranger vendee, section 10 would be inapplicable.

The only difficulty which I have felt in this case is on account of a similarity between the conditions which were to be found in the document considered by the Full Bench in the case of *Aulad Ali v. Ali Athar* (2) and the present one. The mere fact that in that document there was no sentence laying down that the property shall not be transferred except to the executant, whereas there is a sentence in the present agreement, is not, to

(1) (1932) I.L.R., 7 Luck., 257.

(2) (1927) I.L.R., 49 All., 527.

my mind, of very great importance. My conclusion would not have been different even if in the present deed that sentence had not found a place. In both the documents there was a provision that in case of a transfer to another person, the other executant would acquire the property on payment of a consideration at a fixed rate and not on payment of the price paid by the purchaser. But I agree with my learned brother that the Full Bench case cannot be treated as an authority for the proposition that section 10 does not apply to such cases, because the point was never argued by counsel before the learned Judges and there is nothing in the judgment to indicate that their attention was drawn to the contention. We cannot therefore presume from the mere fact of the similarity of the language of the two documents that this point was necessarily decided by the Full Bench. Looking at all the conditions entered in the document prohibiting transfer by mortgage, gift or sale to any one except the promisee and his heirs, and entitling the latter to recover it for Rs.175 only, no matter for how much more it may be sold, and even prohibiting an auction sale for more than Rs.175, and all this for all generations to come, there is no doubt that for all practical purposes there is an absolute restraint on alienation, and the conditions are void.

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REVISIONAL CRIMINAL

Before Justice Sir Charles Kendall and Mr. Justice Bajpai

EMPEROR v. BANWARI LAL*

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January, 22

Criminal Procedure Code, sections 369, 561A—Review of judgment in criminal cases—Second application, through counsel, for revision after jail application for revision was dismissed—Jurisdiction—Whether the High Court has power to review its judgment in a criminal revision case, after it has been signed and sealed—Inherent powers.

Where a jail application for revision had already been dismissed on the merits, and a fresh application for revision was

*Criminal Revision No. 831 of 1934, from an order of Hari Har Prasad, Sessions Judge of Azamgarh, dated the 18th of July, 1934.