

that he was free to withdraw the agreement on which the courts below have proceeded in that behalf. We do not think that we should decide this contention in this application for revision. The courts below have accepted the agreement of the parties and have founded their judgments on that agreement. We find no reason to make a departure therefrom. It may be open to the defendants to induce the court of first instance or the appellate court to allow them to resile from the position which they took up in this behalf in those courts; but that is a matter with which we are not concerned.

We allow this application, set aside both the order of the Munsif and the order of the learned District Judge and direct that the plaint of this suit be again restored by the Munsif to its original number in the register of suits pending in his court and that the suit be decided according to law. Costs here and hitherto incurred will abide the event.

*Application allowed.*

## APPELLATE CIVIL.

*Before Mr. Justice Wazir Hasan, Chief Judge and  
Mr. Justice B. S. Kisch.*

MOHAMMAD MUZAFFAR HUSAIN (DEFENDANT-  
APPELLANT) v. MADAD ALI (PLAINTIFF-RESPONDENT).\*

*Oudh Rent Act (XXII of 1886), section 7A—Indian Contract Act (IX of 1872), sections 23 and 24—Ex-proprietary tenancy land—Mortgage of ex-proprietary tenancy land, legality of—Consideration of a mortgage of ex-proprietary tenancy, whether lawful.*

A mortgage of ex-proprietary tenancy land is clearly in contravention of the provisions of section 7A, sub-section (3), of the Oudh Rent Act, 1886, and therefore unlawful within

\*Second Civil Appeal No. 158 of 1930, against the decree of Pandit Damodar Rao Kelkar, Subordinate Judge of Partabgarh, dated the 28th of March, 1930, upholding the decree of Babu Avadh Behari Lal, Munsif, Kunda at Partabgarh, dated the 21st of December, 1929.

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the meaning of section 23 of the Indian Contract Act, 1872, and by virtue of section 24 of the same Act, the consideration for such a mortgage transaction is also unlawful and therefore the whole transaction is void.

In such a case the payment of the consideration money does not constitute an independent transaction of loan between the parties but is the essence of the consideration of the transaction of the mortgage, and the mortgage being unlawful, the consideration also must be held to be unlawful.

Mr. *H. D. Chandra*, for the appellant.

Mr. *Akhlaque Husain*, for the respondent.

HASAN, C. J. and KISCH, J.:—This is the defendant's appeal from the decree of the Subordinate Judge of Partabgarh, dated the 28th of March, 1930, affirming the decree of the Munsif of Kunda, dated the 21st of December, 1929.

The defendant is an ex-proprietary tenant of certain plots of land situate in the village of Mawai Kalan, pargana Bihar, in the district of Partabgarh. The ex-proprietary rights in the lands arose in favour of the defendant in consequence of the sale of his share in the village in the year 1924 to one Nasir Beg. On the 12th of October, 1926, the defendant executed a deed of possessory mortgage in respect of these plots of land in favour of the plaintiff in consideration of the sum of Rs. 500. It is not in dispute now between the parties that the entire sum of Rs. 500 was paid by the plaintiff to the defendant as consideration for the mortgage transaction. The deed of mortgage further provided for the remedy of sale of the mortgaged property in the event of the mortgagor failing to deliver possession to the mortgagee.

The courts below have found and the finding is accepted that the mortgagee did enter into the possession of the mortgaged property and remained

in possession of the same for a period of one year. Subsequently, however, he was dispossessed. In the suit out of which this appeal arises, the plaintiff has been given a decree for the recovery of the mortgage money but no relief has been granted to him in the character of a mortgagee because the mortgage being of ex-proprietary holding was void *ab initio*.

In second appeal it is argued on behalf of the defendant that the relief as to the recovery of the mortgage money was also not open to the mortgagee on the ground that it formed consideration of an unlawful transaction. It seems to us that the argument advanced on behalf of the defendant is wholly covered by a decision of a Bench of this Court, to which one of us was a party, in the case of *Dasrath v. Sandala* (1). We think that we can add very little to what was said in that decision in support of the view stated in the following passage:—"The payment of that sum of money does not constitute an independent transaction of loan between the parties, but is the essence of the consideration of the transaction of the mortgage, and the mortgage being unlawful, according to our judgment, the consideration also must be held to be unlawful."

In the present case the mortgage transaction of the ex-proprietary tenancy land is clearly in contravention of the provisions of 7A., sub-section (3), of the Oudh Rent Act, 1886, and therefore unlawful within the meaning of section 23 of the Indian Contract Act, 1872, and by virtue of section 24 of the same Act, the consideration for this mortgage transaction is also unlawful. The result is that the whole transaction is void. This being the nature of the mortgage in question in this case the observations of their Lordships of the Judicial Committee in the case of *Moti Chand v. Ikram Ullah Khan* (2), are entirely apposite.

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(1) (1926) 3 O.W.N., 217.

(2) (1916) L.R., 44 I.A., 54.

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The learned Advocate for the appellant also relied upon a decision of the High Court at Allahabad in *Har Prasad v. Sheo Gobind* (1). In this decision the same view was taken as was taken in the case decided by this Court, to which reference has already been made. We may here quote the observation of ROMER, L. J. in the case of *Thurstan v. Nottingham Permanent Benefit Building Society* (2). "The short answer is that a Court of Equity cannot say that it is equitable to compel a person to pay any moneys in respect of a transaction which as against that person the Legislature has declared to be void."

We are of opinion that the case before us falls within the principle stated by ROMER, L. J. in the quotation just now given.

Had the sum of money which the mortgagee advanced as consideration of the mortgage transaction represented an independent transaction of loan between the parties it might have been possible to give some relief to the plaintiff for the recovery of that sum of money but on the facts proved the plaintiff paid this money to the defendant as consideration of the mortgage simpliciter.

The appeal is therefore allowed, the decrees of the court below are set aside and the plaintiff's suit is dismissed with costs in all courts.

*Appeal allowed.*

(1) (1922) I.L.R., 44 All., 486.

(2) (1902) 1 Ch., 13.