APPELLATE CIVIL.

1928
April, 17.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice Wazir Hasan.

BALBHADDAR SINGH (PLAINTIFF-APPELLANT) *v.* KUSEHAR DAS AND ANOTHER (DEFENDANTS-RESPONDENTS).*

Transfer of Property Act (IV of 1882), section 43—Muafi land, transfer of—Sale for consideration and vendor asserting erroneously but honestly that they were authorized to transfer—Revenue courts subsequently declaring that vendors had acquired transferable under-proprietary rights—Vendee's right to hold plots sold in which vendor had acquired under-proprietary rights.

The provisions of section 43 of Act IV of 1882 can have no application to a case of transfer of property which cannot be transferred under the provision of law. But where the vendors asserted erroneously but honestly that they had a right of transfer in their *muafi* and there was nothing in the circumstance that the land was held *muafi* to show that it was thereby incapable of transfer and they received consideration for the sale and subsequently obtained a declaration from the revenue courts during the subsistence of the sale that they had acquired under-proprietary rights in the land sold by them which rights were transferable, *held*, that the provisions of section 43 of the Transfer of Property Act had operation and the vendee was entitled to a declaration that he was the holder for value of the plots held in under-proprietary rights subject to payment of the rent fixed by the revenue courts to the zamindar.

Per HASAN, J. :—In Oudh *shankalap* and *marwat* grants are ordinary grants which connote under-proprietary tenure and the grantee enjoys a heritable and transferable estate in the subject-matter. But where in such a grant the grantor adds that the grantee will not have transferable rights, the result is that the grantee holds with heritable and non-transferable rights under a private grant. A grantee or his successor can make a valid transfer of the subject-matter

*Appeal under section 12 (2) Oudh Courts Act, No. 3 of 1927, against the decree of Mr. Justice A. G. P. Pullan, Judge of the Hon'ble Chief Court of Oudh, Lucknow, dated the 5th of December, 1927.

of the grant in spite of the restraint on the power of alienation imposed originally by one of the terms of the grant, but the transfer of such a grant is valid only between the transferor and the transferee and is not void *ab initio*. The restraint against alienation being for the benefit of the grantor will be given effect in his favour only.

There is an essential difference between restriction on transfers imposed by the Legislature and those imposed by a court, decree or grant. There are cases in which for the protection of particular interest it is deemed expedient to depart from the general principle and to fetter privilege of free alienation. In such cases the prohibition against transfer being founded upon considerations of public interest must be treated as absolute. But no such force can be attributed to a restriction which has its origin in the agreement of parties or decree of court. *Ananda Mohan Roy* v. *Gour Mohan Mullick* (1), and *Wazir Mohammad* v. *Har Prasad* (2), relied upon.

Messrs. *L. S. Misra* and *Kashi Prasad*, for the appellant. Mr. *Radha Krishna*, for the respondents.

STUART, C. J. :—These are appeals under section 12 of the Oudh Courts Act against an appellate decision of a Judge of this Court sitting singly. The facts are these. Kusehar Das and Raghunandan held a *muafi* holding of 2 bighas, 13 biswas in area in the village of Papnamau in the Lucknow district. This holding had been held *muafi* from a date prior to the date of the First Regular Settlement in 1862. It would appear that the holders had hereditary but not transferable rights in the holding. On the 16th of February, 1923, they sold their rights in the holding to Balbhaddar Singh for Rs. 450. The price given was a good price considering that only 2 bighas and 13 biswas were transferred. We have examined the deed of sale and the deed of sale contains a distinct assertion on the part of the vendors that they had transferable rights in the holding. Now if

(1) (1923) L.R., 50 I.A., 239. (2) (1912) 15 O.C., 67.

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Stuart, C. J.

they had transferable and hereditary rights in the holding they had an under-proprietary right in the holding. There is no reason why land held in under-proprietary right should not also be held *muafi*. I have already noted that they had not transferable rights in the holding and the statement to the effect that they had such rights was a mis-statement. The zamindars Babu Mathura Prasad Singh and others thereupon instituted a suit in the revenue courts for resumption of the holding and they made Kusehar Das, Raghunandan and Balbhaddar all parties to the suit. The revenue courts held that Kusehar Das and Raghunandan had not transferable rights in the holding and that the holding was liable to resumption. They decided however that as the holding had been held for fifty years and by two successors to the original grantee the holding should be deemed to be a holding in under-proprietary right under the provisions of section 107H, Act XXII of 1886.

The revenue courts assessed a rent on the holding, which was equal to Government Revenue plus 15 per cent. of the same. As the under-proprietary right had necessarily been acquiredi by Kusehar Das and Raghunandan and their predecessors, the revenue court very rightly decided that the under-proprietary right was with Kusehar Das and Raghunandan. The under-proprietary right could not, by any possibility, be with Balbhaddar who was holding as a transferee of the *muafidars* for a very short period. The result however of this decision was that Balbhaddar Singh obtained nothing for the Rs. 450 which he had paid. He had parted with his money and he had now to part with his land. He then instituted a suit in the civil court for a declaration that he had obtained the title of Kusehar Das and Raghunandan as under-proprietor, or that in default they should be compelled to execute a sale-deed of their rights in his favour. The learned

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Munsif dismissed the suit. The learned Subordinate Judge decreed it. In second appeal Mr. Justice PULLAN set aside the decree of the appellate court and dismissed the suit. It is from his decision that the present appeal is preferred.

The learned Judge has taken the position that the transfer by Kusehar Das and Raghunandan to Balbhaddar Singh was void, as the *muafi* rights were incapable of transfer, and he has further taken the position that as the under-proprietary rights did not come into existence until the 17th of April, 1925, the date of the final revenue court decree, Balbhaddar Singh could obtain no advantage from the subsequent acquisition of such rights by Kusehar Das and Raghunandan. He further took the position that the decision of the revenue court finally decided the matter. I do not find that the decision of the revenue court can affect the question now before the civil courts. While accepting the view that the provisions of section 43 of Act IV of 1882 can have no application to a case of a transfer of property, which cannot be transferred under the provisions of the law, I do not find myself in agreement with the learned Judge in his view that the transfer of the 16th of February, 1923, was the transfer of property the transfer of which was forbidden by the law. Upon examining the deed I find that it is clear that the vendors asserted (erroneously no doubt, but so far as I can see honestly) that they had a right of transfer and there is nothing in the circumstance that the land was held *muafi* to show that it was thereby incapable of legal transfer. Some *muafi* land can be transferred, other *muafi* land cannot be transferred; and in any circumstances a *muafidar's* right to enjoyment can be transferred although such a transfer of course is not binding on the superior proprietor. In these circum-

Stuart, C. J.

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Stuart, C. J.

stances I do not see any reason why the provisions of section 43 should not be applied to his case. There is nothing to show that the vendee Balbhaddar Singh had any knowledge of the fact that the vendors had really no power to transfer anything more than their present enjoyment. If they had been capable of transferring more than their present enjoyment, no question could have arisen; for the transfer would then have been a transfer of an existent under-proprietary right. I therefore consider that the provisions of section 43 of Act IV of 1882 have application. What were the facts of the case? At the time that the transfer was made, the vendors had no under-proprietary right but subsequently they acquired an under-proprietary right at a time while the contract of transfer subsisted. They had erroneously, but as far as I can see honestly, represented that they were authorized to transfer the holding. They professed to transfer it and they received consideration for the transfer. Subsequently they acquired transferable rights and the provisions of section 43 have operation. For the above reasons I consider that these appeals should be decreed and that the plaintiff should be granted a declaration that he is the holder for value of these plots which are held in under-proprietary right subject to the payment of Government Revenue plus 15 per cent. of the same to the zamindars that is the defendants as rent. The zamindars Mathura Prasad Singh and others will pay their own costs throughout the proceedings. Kusehar Das and Raghunandan will pay their own costs throughout the proceedings. The plaintiff-appellant will be entitled to obtain his costs throughout the whole proceedings from the defendants jointly and severally.

HASAN, J. :—I agree. As I understand the judgment under appeal the learned Judge would have been prepared to uphold the decree of the Subordinate

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Judge if he had found that the transfer of the *muafi* lands was not void in law and that the decision of the court of revenue was no bar to the granting of the relief for which the plaintiff prayed.

I am of opinion that the transfer in question is not void. These lands were held under a grant the terms of which are sufficiently clear from the entries in the revenue records of the village. The proprietors of the village made a grant of these plots to the ancestor of the defendants vendors by way of *shankalap* and *marwat*. If the terms of the grant had stood there, there could be no doubt that the grantee would have enjoyed a heritable and transferable estate in the subject-matter of the grant. It is a matter of common knowledge in Oudh that *shankalap* and *marwat* grants are ordinary grants which connote under-proprietary tenure. In the present case, however, the grantor added that the grantee will not have transferable rights. The result was that the grantee and his successors have held the lands in suit with heritable but non-transferable rights under a private grant. The general principle of law is that property of any kind may be transferred unless the transfer is forbidden by law. It follows that the grantee or his successor could make a valid transfer of the subject-matter of the grant in spite of the restraint on the power of alienation imposed originally by one of the terms of the grant; but having regard to that term such a transfer could only be valid as between the transferor and the transferee. The restraint against alienation being for the benefit of the grantor will be given effect to in his favour only. Therefore it cannot be held that the transfer in question was void *ab initio*.

Hasan, J.

The next matter to be considered in this connection is as to whether there is any provision of law

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Hasan, J.

which forbids the transfer of land held on the terms stated above. I can find no such provision. The only provision of law to which reference may be made is contained in section 6 of the Transfer of Property Act; and it was argued before us that the present case may well fall within the first portion of clause (i) of the said section; but the argument had not proceeded far when it was discovered that it had no substance whatsoever. For the application of that provision the transferor must occupy the position of a tenant. It was agreed that he did not occupy such a position the reason being that the plots in question were held without payment of any rent and without any liability for rent. It appears to me that this case falls within the principle of the decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Wazir Mohammad* v. *Har Prasad* (1). It was held in that case that there is an essential difference between restrictions on transfers imposed by the Legislature and those imposed by a court or decree, and I may add by grant. The general policy of law to promote free alienation and circulation of property was pointed out in that case and it was observed that there are cases in which for the protection of particular interest it is deemed expedient to depart from the general principle and to fetter the privilege of free alienation. In such cases the prohibition against transfer being founded upon consideration of public interest must be treated as absolute. But no such force can be attributed to a restriction which has its origin in the agreement of parties or a decree of court. So far as I am aware the principle enunciated in the decision just now referred has not been departed from in any subsequent case either in the same court or in the court which has succeeded that court.

(1) (1912) 15 O.C., 67.

1928

BALBHADDAR SINGH v. KUSHAR DAS.

Hasan, J.

The nature of the transfer being therefore not one which is void or forbidden by law, I see no reason whatsoever why the provisions of section 43 of the Transfer of Property Act, 1882, should not apply to the present case. On the face of the deed of sale in favour of the appellant the vendors describe the property which they desire to sell as property held by them with transferable interest. They therefore make an erroneous representation as to their authority to sell that property and transfer it for consideration. By the declaration which the court of revenue granted it comes to happen that the vendors acquired transferable interest, that is to say, under-proprietary interest in the property sold and they acquired this interest during the subsistence of the deed of sale Every part of section 43 therefore applies to the present case. This section is only an embodiment of principle of estoppel well understood by lawyers. It is expressed variously sometimes as "feeding the grant by estoppel," at another time by "no person is allowed to derogate from his own grant" and yet again by the principle that "equity considers done which ought to be done." In a recent case of *Performing Right Society, Ltd.* v. *London Theatre of Varieties, Ltd.* (1) Viscount CAVE, Lord Chancellor, said :—

> "No doubt when a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee."

To this rule of estoppel we are compelled by the statutory law of our country to annex certain qualifications. The most important of such qualifications

(1) (1924) A.C., 1.

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

Hasan, J.

is that under the guise of the provisions of section 43 we cannot uphold a transfer of property the transfer of which is forbidden by law. This view of law was pointed out at some length by Their Lordships of the Judicial Committee in the case of *Ananda Mohan Roy* v. *Gour Mohan Mullick* (1). In a preceding portion of this judgment I have endeavoured to show that the transfer now in question is not a transfer forbidden by law; I can therefore find no justification whatsoever why the provisions of section 43 should not apply to the present case.

It now remains only to say a few words with regard to the decision of the court of revenue in the resumption proceedings. The matter has been fully considered in the judgment of the Hon'ble the CHIEF JUDGE and I have very little to add. The whole scope of the rule of *res judicata* is not defined by the provisions of section 11 of the Code of Civil Procedure. The principle is much wider. The test in this case is not as to whether the present suit could have been entertained and decided by the court of revenue. The test is as to whether the decision of the court of revenue was the decision of a court of exclusive jurisdiction or not. If it was, then according to the second rule enunciated in the *Duchess of Kingston's* case (Smith's Leading Cases, 12th edition, vol. II, p. 754), the decision of that court would be *res judicata* as against the present suit. If it was not, then clearly the trial of the matter raised in the present suit is not barred by the rule of *res judicata*. What is the matter now in suit? The matter now in suit is the relief by way of declaration of rights which have arisen in favour of the plaintiff by the effect of rule of equity embodied in section 43 of the Transfer of Property Act and arising out of the declaration granted by the court of

(1) (1923) L.R., 50 I.A., 239.

1928

BALBHADDAR SINGH v. KUSEHAR DAS.

revenue. This matter surely was not only not within the exclusive jurisdiction of the court of revenue but was not at all within its jurisdiction and did not arise for determination in those proceedings.

BY THE COURT:—We accordingly allow the appeals and grant a declaration to the effect that the plaintiff is the holder for value of the plots in suit which are held in under-proprietary right subject to the payment of Government Revenue plus 15 per cent. of the same to the zamindars that is the defendants as rent. The zamindars Mathura Prasad Singh and others will pay their own costs throughout the proceedings. Kusehar Das and Raghunandan will pay their own costs throughout the proceedings. The plaintiff-appellant will get his costs throughout the whole proceedings from the defendants jointly and severally.

Appeal allowed.

APPELLATE CIVIL.

1928

April, 30.

Before Sir Louis Stuart, Knight, Chief Judge and Mr. Justice E. M. Nanavutty.

HAR MITRA AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* RAGHUBAR PRASAD AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Hindu law—Alienation by a Hindu widow—Widow transferring property for her own spiritual benefit—Transfer, whether binds husband's estate after the death of the widow.

Held, that where upon the facts it is proved that the transfer was made for the spiritual benefit of the widow and not for the benefit of the husband the transfer does not bind the husband's estate after the death of the widow.

Mere attestation of a deed by a relative does not necessarily import concurrence. Where, therefore, some of the collaterals were attesting witnesses and others were marginal witnesses to a deed of gift executed by the widow that fact would not validate the deed as their action in no way establishes that they had any knowledge of the contents of the

*First Civil Appeal No. 110 of 1927, against the decree of Syed Shaukat Husain, Additional Subordinate Judge of Gonda, dated the 22nd of July, 1927, decreeing the plaintiff's claim.