

## APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan and Mr. Justice  
Gokaran Nath Misra.

MATHURA (PLAINTIFF-APPELLANT) v. H. H. MAHARANA  
SIR UDAI BHAN SINGH AND ANOTHER (DEFEND-  
ANTS-RESPONDENTS).\*

1927  
September, 20.

*Landlord and tenant—Sale by a tenant (riyaya) of his house in the village—No registered deed of sale executed though transfer for over Rs. 100, but possession transferred—Vendee under an invalid transfer, position of—Ejectment of vendee under an invalid transfer, Landlord's right of—Estoppel—Sale, whether effective between vendor and vendee by reason of estoppel—Part performance, doctrine of.*

Where a tenant (*riyaya*) transferred possession of his house, relinquishing all his rights in the said house, to another person on receipt of Rs. 25 only out of a consideration of Rs. 112, but no registered sale-deed was executed, held, that the abandonment on his part was complete and as the transfer which he made was invalid both for the reason of there being no registered document to prove it and also for the reason that such a transfer was forbidden by village custom the transferee acquired no rights under that transfer. His possession, therefore, was that of a trespasser and the owner of the land was entitled to eject him.

The doctrine of part performance is clearly one of equitable estoppel and the proprietor of the village not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale, even in the absence of a registered deed to evidence it, may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee, but there the estoppel ends. [*Azmat-un-nisa v. Ganesh Prasad* (1), and *Mahabir Prasad v. Uman Shankar* (2), relied upon.]

\*Second Civil Appeal No. 1 of 1927, against the decree of Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 22nd of September, 1926, reversing the decree of Girja Shankar, Munsif of Rae Bareilly, dated the 3rd of June, 1926.

(1) (1925) 28 O.C., 119.

(2) (1925) 28 O.C., 138.

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This appeal was originally heard by MISRA, J., who referred it to a Bench. His order of reference is as follows :—

MISRA, J. :—This is an appeal arising out of a suit brought by the Maharana of Dholpore for ejection of the defendants from house No. 80, situate in village Bainti, district Rae Bareli, of which he is the landlord. The suit was brought on the allegations that defendant No. 1, Mathura, was his *riyaya* (tenant) occupying house No. 80 in the *abadi* of the said village; that he sold the house to defendant No. 2, Parai Din, without the consent of the plaintiff; and that the sale was not good because of a custom prevalent in the village by virtue of which a tenant could not sell his house without the permission of the landlord.

Defendant No. 1 contended that he had not sold the house but had only temporarily given it to defendant No. 2 for occupation on rent.

Defendant No. 2, however, asserted that the house had actually been sold to him for Rs. 112-8-0, out of which he had paid Rs. 62-8-0 once previously and the remaining amount of Rs. 50 subsequently on the day when he had gone to occupy the house. He, however, alleged that no sale-deed had been executed. He denied the custom alleged by the plaintiff.

The three main contentions, therefore, for trial were whether the house had actually been sold by defendant No. 1 to defendant No. 2; whether the sale price Rs. 112-8-0 had been paid in full; and whether the custom prohibiting tenants to sell their houses had been in existence in the village.

The learned Munsif of Rae Bareli, who tried the suit, held that the defendant No. 1's story that he had let out his house on rent to defendant No. 2 was untrue; that the house had actually been sold to defendant No. 2

for Rs. 112-8-0 and that the custom alleged by the plaintiff had been established. He also found that although there was a contract for sale yet because there was no sale-deed executed no title passed to defendant No. 2 and there was no completed sale, and thus no cause of action accrued to the plaintiff. On this view of the case he dismissed the plaintiff's suit.

On appeal the learned Subordinate Judge of Rae Bareli agreed with the findings of the learned Munsif on the question of custom and also on the question of the contract for sale. He, however, did not agree with the view taken by the learned Munsif with regard to the cause of action. He was of opinion that because defendant No. 2 had been put in possession by defendant No. 1 under a contract for sale and also because a portion of the price had been paid to defendant No. 1, that was enough to constitute a sale which could give the plaintiff a cause of action. Being of this opinion he allowed the appeal and decreed the plaintiff's claim.

In second appeal on behalf of the defendant No. 1 it is contended before me that the view of law taken by the learned Subordinate Judge is erroneous, and that under section 54 of the Transfer of Property Act no sale could be completed without the execution of a registered deed. It was further contended that the receipt (exhibit B1) was inadmissible in evidence to prove the contract for sale relating to the house.

The point of law involved in this appeal is an important one which is likely to affect a number of cases arising in Oudh out of similar circumstances. I am, therefore, of opinion that this is a fit case for decision by a Bench of two Judges of this Court. I, therefore, refer it to a Bench under section 14 of Act IV of 1925.

Mr. *Daya Kishun Seth*, for the appellant.

Mr. *Radha Krishna*, holding brief of Mr. *Bisheshwar Nath Srivastava*, for the respondents.

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*Hisan on  
Misra, JJ.*

HASAN and MISRA, JJ. :—This is the appeal by Mathura defendant No. 1 from the decree of the Subordinate Judge of Rae Bareli, dated the 22nd of September, 1926, reversing the decree of the Munsif of the same place, dated the 3rd of June, 1926.

The plaintiff is the proprietor of the village Bainti, pargana Kumbrawan, district Rae Bareli. He claims possession of a house, together with the site thereof, which formerly belonged to Mathura, defendant No. 1. The plaintiff's case is that Mathura sold the house to Paridin, defendant No. 2; that under the village custom the sale was invalid, Mathura having no right to transfer the house and that in the right of the proprietor of the site he is entitled to the possession of the house, together with the land on which it stands. Mathura's defence was that he had made no sale but that he had transferred possession of the house in question to Paridin on an agreement of rent being paid by Paridin for the occupation of the house. Paridin admitted the sale.

The consideration for the sale is found by the court below to be the sum of Rs. 112-8-0 and according to the lower appellate Court Paridin has paid only Rs. 25 as part consideration of the sale. No sale-deed was executed and on that ground the trial court dismissed the suit. On appeal the lower appellate court has come to the conclusion that the sale must be held valid in spite of the absence of a registered deed for that purpose on the ground that there has been part performance in relation to that transaction, the vendee having paid a part of the consideration and the vendor having delivered possession in pursuance thereof.

In appeal it is argued on behalf of the vendor that the view taken by the court below as to the application of the doctrine of part performance was erroneous. On the side of the respondent the argument in support of the decree of the court below is that the findings of the court

below that Mathura has parted with the house altogether and that he has put Paridin in possession thereof and has received Rs. 25 towards the consideration of the transfer establish a case of abandonment by the tenant, who had no other right in the house except that of occupation. This being so, it is argued that the plaintiff being the owner of the land on which the house stands is entitled to enter into possession.

We are of opinion that the appeal fails on the ground now urged on behalf of the respondent. The doctrine of part performance is clearly one of equitable estoppel and the plaintiff-respondent not being privy to the transaction on which the estoppel rests can take no advantage of it. The sale even in the absence of a registered deed to evidence it may be an effective sale by reason of the estoppel as a transaction between the vendor and the vendee, but there the estoppel ends. The argument on the side of the respondent based on abandonment, it seems to us, must be accepted. The facts found by the court below clearly establish that Mathura has transferred the possession of the house to Paridin for consideration and has thereby relinquished all his rights in the said house. That being so, the abandonment on the part of Mathura is complete and as the transfer which he has made is invalid, both for the reason of there being no registered document to prove it and also for the reason that such a transfer is forbidden by the village custom, the transferee acquires no rights under that transfer. His possession, therefore, is that of a trespasser and the owner of the land is entitled to eject him. This principle was considered by one of us in the case of *Azmat-un-nisa v. Ganesh Prasad* (1) and was followed by a Bench of two Judges in the late Court of the Judicial Commissioner of Oudh in the case of *Mahabir Prasad v. Uman Shankar* (2). We think that those cases were rightly decided.

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(2) (1925) 28 O.C., 133.

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*Hasan and  
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There remains one matter to be considered in this case and that is the question of consideration for the transfer. The lower appellate court has found that the consideration was a sum of Rs. 112-8-0. It has further found that only Rs. 25 have been paid by the vendee to the vendor in part payment of that consideration. We have held that this act of transfer amounts to the abandonment and that the abandonment gives to the plaintiff the right to enter into the possession of the subject-matter of the transfer. The plaintiff obviously, therefore, must take the abandonment with all its incidents, one of the incidents being the payment of Rs. 112-8-0 to Mathura, the transferor. The abandonment rests on its consideration for it. Without the consideration there was no abandonment. Out of this sum of money the vendor has already received Rs. 25 from the vendee. The vendor, therefore, is still entitled to the balance of Rs. 87-8-0, and the vendee is entitled to the refund of the Rs. 25 on the failure of the consideration which has now happened by the effect of our decree which compels him to deliver possession to the plaintiff.

We accordingly confirm the decree of the court below, but delete from it the condition allowing the vendee Paridin to remove the materials within two months and in lieu thereof we direct that the plaintiff shall deposit in court a sum of Rs. 112-8-0 before he is allowed to enter into possession of the house. In the event of such deposit Mathura, the vendor, will be entitled to Rs. 87-8-0 and Paridin, the vendee, to Rs. 25 out of the same. This deposit should be made within one month from to-day. In the event of default the plaintiff's suit shall stand dismissed with costs in all the three courts. But in the event of compliance with the direction as to the deposit the plaintiff will get his costs from Mathura, defendant No. 1, to the extent of one half and from Paridin, defendant No. 2, to the extent of the other half

in both the courts below. The parties will bear their own costs in this Court.

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*Appeal partly allowed.*

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## APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and  
Mr. Justice Muhammad Raza.*

LAL BAHADUR SINGH (PLAINTIFF-APPELLANT) v.  
RAMESHWAR PRASAD AND ANOTHER (DEFENDANTS-  
RESPONDENTS).\*

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ber, 22.

*Transfer of Property Act (IV of 1882), section 59—Attestation of a deed—Signatures of witnesses to a mortgage-deed affixed with their consent by another—Mortgage-deed, whether properly attested—Indian Evidence Act (I of 1877), section 90—Executant, scribe, attesting witness and sub-registrar all dead—Presumption of genuineness of mortgage-deed—Deed of further charge—Stipulation in a deed that, in default of its payment, its amount will be paid at the time of redeeming other land mortgaged with him, whether creates a charge on the property.*

*Held*, that where the signatures of witnesses to a mortgage bond, who had witnessed the execution of the deed, are affixed for them to the deed by another person with their consent, the deed is properly attested within the meaning of section 59 of Act IV of 1882. [*Sasi Bhusan Pal v. Chandra Peshkar* (1), followed.]

Where all the executants of a deed, its scribe and attesting witnesses are dead, and the deed is registered and the executants admitted execution and receipt of consideration according to the endorsement of the sub-registrar, who is also dead, there is a very strong case for applying the presumption permitted by section 90 of the Evidence Act.

Where it is stipulated that the executant of a deed shall pay the amount mentioned therein with interest within one

\*First Civil Appeal No. 26 of 1927, against the decree of Damodar Rao Kelkar, Subordinate Judge of Rae Bareilly, dated the 11th of November, 1926, decreeing the plaintiff's claim.

(1) (1906) I.L.R., 33 Calc., 861.