

## RIVISIONAL CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,  
and Mr. Justice Ziaul Hasan*

**JAGANNATH (PLAINTIFF-APPLICANT) v. BAIJ NATH**  
(DEFENDANT-OPPOSITE PARTY)\*

1936  
September 30

*Contract Act (IX of 1872), section 23—Mortgage of simple tenancy holding, whether an unlawful transaction—Consideration paid at time of execution, if unlawful—Redemption—Mortgagor instead of paying cash executing simple money bond—Another bond subsequently executed—Consideration for both bonds, whether unlawful.*

A mortgage of a simple tenancy holding is unlawful and where the consideration of the mortgage is paid to the mortgagor at the time of the execution of the mortgage, the consideration of the mortgage must be held to be unlawful. In such a case if the mortgage is redeemed but instead of paying the mortgage money in cash the mortgagor executes a simple money bond for the mortgage-money in favour of the mortgagee, the consideration for the mortgage is unlawful. Such a bond cannot, therefore, form a valid consideration of another bond which is subsequently executed in renewal of it. *Dasrath v. Sandala* (1), *Banda Ali v. Banspat Singh* (2), *Suraj Narain v. Sukhu Ahir* (3), and *Bindeshri Bux Singh v. Chandika Prasad* (4), referred to.

Messrs. *Hyder Husain* and *P. N. Chaudhri*, for the appellant.

Mr. *Akhtar Husain*, for the opposite party.

SRIVASTAVA, C.J. and ZIAUL HASAN, J.:—This is an application in revision by the plaintiff under section 25 of the Small Cause Courts Act.

On 2nd August, 1912, Lachman, father of the defendant-opposite party, executed a mortgage-deed with possession in favour of Suraj Bakhsh, father of the plaintiff, for a sum of Rs.50 in respect of his tenancy land. This mortgage was redeemed on 1st September,

\*Section 25 Application No. 92 of 1934, against the decree of Babu Bhagwat Prasad, Civil Judge, sitting as Small Cause Court Judge, Bara Banki, dated the 11th of May, 1934.

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

(2) (1882) I.L.R., 4 All., 352.

(3) (1928) I.L.R., 51 All., 164.

(4) (1927) A.I.R., All., 242.

1936

JAGANNATH  
v.  
BALI NATHSrivastava,  
C.J. and  
Ziaul Hasan,  
J.

1926, but instead of the mortgage money being paid in cash the defendant executed a simple money bond (exhibit A-2) for Rs.50 in favour of the plaintiff, the original parties to the mortgage having died in the meantime. The bond exhibit A-2 was renewed by the execution of the bond in suit exhibit 1 on 23rd March, 1930.

The plaintiff instituted the present suit to recover the amount due on the bond exhibit A-1. The lower court dismissed the suit on the ground that the mortgage (exhibit A-1) being in respect of tenancy land was not lawful and therefore repayment of the mortgage money due in respect of such a mortgage could not form a valid consideration either of the bond exhibit A-2 or of its renewal, the bond in suit exhibit 1. The learned counsel for the applicant has conceded that the mortgage exhibit A-1 being in respect of tenancy land was void. His only contention is that the mortgage having been redeemed the transaction evidenced by exhibit A-2 should be treated as independent of the mortgage and that the deed in suit being in renewal of the last mentioned bond must also be treated as an independent transaction.

In *Dasrath v. Musammatt Sandala* (1), it was held that the mortgage of a simple tenancy holding was unlawful and the mortgagee under such a mortgage was not entitled to the return of the money forming consideration of the mortgage transaction. However it was further held that where the amount mentioned in the mortgage-deed as consideration constitutes an independent transaction of loan between the parties the mortgagee would be entitled to the return of that money if on the date of the deed his claim for that sum is not barred by limitation. It is admitted in the present case that the sum of Rs.50 which formed the consideration of the mortgage was paid to the mortgagor in cash at the time of the execution of the

mortgage. Therefore the consideration of the mortgage must be held to be unlawful. It is quite clear from the facts stated above that the consideration for the bond exhibit A-2 was the same sum of money which formed consideration of the mortgage. It could not therefore form a valid consideration of the bond exhibit A-2 or of the bond in suit which was executed in renewal of it. The lower court has referred to *Banda Ali v. Banspat Singh* (1), *Suraj Narain v. Sukhu Ahir* (2) and *Bindeshari Bux Singh v. Chandika Prasad* (3) in support of its decision. Although the facts of these cases are different from the facts of the present case yet we think that the principle underlying them also supports the view adopted by it. We can therefore see no sufficient ground to interfere in revision and dismiss the application with costs.

*Application dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge,  
and Mr. Justice Ziaul Hasan*

SHEO RATAN SINGH (PLAINTIFF-APPELLANT) *v.* JAGANNATH AND OTHERS (DEFENDANTS-RESPONDENTS)\*

1936  
September 30

*Evidence Act (I of 1872), as amended by Act (XXXI of 1926), section 68—Mortgage of rent of immovable property—Execution not denied by mortgagor—Necessity of calling attesting witnesses to prove the deed—Suit for arrears of rent for the years during which mortgage subsisted—Mortgagor, whether can maintain suit for rent for years in which mortgage subsisted.*

Where the execution of a registered mortgage deed in respect of the rent of immovable property is not specifically denied by the executant, it is not necessary according to the proviso added by Act (XXXI of 1926) to section 68 of the Indian Evi-

\*Second Rent Appeal No. 2 of 1934, against the decree of Mr. K. N. Wanchoo, I.C.S., District Judge of Fyzabad, dated the 6th of October, 1933, modifying the decree of Saiyid Mohammad Hasan, Assistant Collector, 1st Class, Fyzabad, dated the 9th of November, 1932.

(1) (1882) I.L.R., 4 All., 352.

(2) (1928) I.L.R., 51 All., 164.

(3) (1927) A.I.R., All., 242.