

## APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge

1937  
September,  
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MUSAMMAT SHIVA NATH KUNWAR (PLAINTIFF-APPELLANT) v. LACHHMI NARAIN (DEFENDANT-RESPONDENT)\*

*Transfer of Property Act (IV of 1882), section 11—Sale of under-proprietary land—Stipulation in sale-deed of payment of certain sum out of profits as rent by vendee—Deed whether perpetual lease—Stipulation for payment of rent, if void and illegal.*

Where a deed transferring under-proprietary rights in certain plots purports to be and is in fact a sale and nothing but a sale, a stipulation in the deed that the vendee will pay a certain sum out of the profits of the property by way of rent is a clear restriction on the enjoyment of the right created absolutely in favour of the vendee. Such a restriction being repugnant to the interest created, it cannot be enforced against the vendee who is entitled to enjoy the profits of the property as if there was no such restriction.

Where a sale-deed of certain property is for a cash consideration and there is further an agreement for payment of a certain sum of money by vendee as annual rent, the agreement for payment of rent is not only illegal but also without consideration. *Basdeo Rai v. Jhagru Rai* (1) and *Avula Charamudi v. Marri-hoyina Raghavulu* (2), distinguished.

Messrs. *M. Wasim and Ali Hasan*, for the appellant.

Messrs. *Ram Bharose Lal and Murli Manohar*, for the respondent.

SRIVASTAVA, C.J.:—This is a second appeal by the plaintiff who has been unsuccessful in both the lower courts.

The admitted facts of the case are that one Musammat Phuljhari who was an under-proprietor of the plots in suit executed a sale-deed in respect of them on the 12th of October, 1914, in favour of Ramadhin, father of the defendant, for a cash consideration of Rs.1,000.

\*Second Civil Appeal No. 405 of 1935, against the decree of Babu Avadh Behari Lal, Civil Judge of Sultanpur, dated the 22nd of September, 1935, upholding the decree of Mr. G. M. Frank Agarwal, Munsif of Musafir-khana at Sultanpur, dated the 26th of February, 1935.

(1) (1924) I.L.R., 46 All., 333.

(2) (1915) I.L.R., 39 Mad., 462.

The sale-deed contained a stipulation to the effect that from 1329 Fasli corresponding to 1922 the vendee will pay Rs.47 per annum as rent to the vendor in respect of the land sold. On the 3rd of March, 1922, Musammat Phuljhari assigned her right to recover the aforesaid rent to the plaintiff. In 1930 the plaintiff made an application to the Record Officer, district Sultanpur, to have this rent of Rs.47 payable to her entered in the village records. The Record Officer having rejected this application, the plaintiff instituted the present suit for a declaration that as a representative of the vendor she was entitled to get Rs.47 per annum rent in respect of the land in suit from the defendant and for a decree for Rs.141 for arrears of rent for three years preceding the suit. Both the lower courts have held that as the sale-deed, dated the 12th of October, 1914, was an absolute transfer of title, the stipulation regarding the payment of rent was invalid and unenforceable.

The learned counsel for the plaintiff-appellant contends that the sale-deed executed by Musammat Phuljhari should on a proper interpretation of all its terms be construed as a perpetual lease and held enforceable as such. He further contends in the alternative that independent of the nature of the transaction the stipulation for payment of Rs.47 per annum is a personal contract which is binding on the parties and their representatives and transferees. In my opinion neither of these contentions can succeed. It is clear beyond all doubt that the deed, dated the 12th of October, 1914, purports to be and is in fact a sale and nothing but a sale. All through the document the parties are referred to as the vendor and the vendee, (*baya* and *mushtari*) and the land transferred as the land sold (*arazi mubaiya*). The sale is described as *bai kamil*. It further provides that the vendee will remain in possession of the land sold with all rights of transfer of every kind from generation to generation like the executant and that thereafter the executant and her

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heirs had no concern of any sort and no right (*haq*) left in the land sold. It is further added that all the rights (*tamam haquq*) in respect of the property sold were transferred in favour of the vendee. Thus on an examination of the terms of the deed there can be no doubt that it was an out and out sale of the property in favour of the vendee. The stipulation relied on by the plaintiff is to the effect that the vendee after payment of Government revenue (shall pay) Rs.47 per annum to the executant and her heirs and would appropriate to himself the balance of the profits. It is further stated that the aforesaid rent (*lagan*) shall be payable from 1329 Fasli. In my opinion this condition for payment of rent is altogether repugnant to the nature of the transaction which, as I have just observed, is an out and out sale. When the vendor who was admittedly an under-proprietor made an absolute conveyance of her under-proprietary rights she was not left with any interest in the property which could entitle her to claim rent. Section 11 of the Transfer of Property Act provides that where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction. In the present case there is no room for doubt that interest was created absolutely in favour of the vendee. The stipulation for payment of a certain sum out of the profits of the property by way of rent is a clear restriction on the enjoyment of the right created absolutely in favour of the vendee. Such a restriction being repugnant to the interest created, it cannot be enforced against the vendee who is entitled to enjoy the profits of the property as if there was no such restriction. It is also clear that the sale-deed was for a cash consideration of Rs.1,000. The agreement for payment of

Rs.47 as annual rent is therefore not only illegal but also without consideration. I have therefore no hesitation in holding that the deed in suit cannot be construed as a perpetual lease, nor can the agreement for payment of rent be made binding on the defendant.

Reliance was placed on the decision of the Allahabad High Court in *Basdeo Rai and another v. Jhagru Rai* (1) and on the decision of the Madras High Court in *Avula Charamudi v. Marriboyina Raghavulu and another* (2). The first of these cases was a suit for pre-emption brought upon the basis of the village *wajib-ul-arz* which evidenced a contract of pre-emption amongst the co-sharers. It was signed by the father of the plaintiff and the grandfather of the vendor. It was held that such a contract was enforceable not only against the co-sharers who had originally signed the *wajib-ul-arz* but also against their transferees with notice of gratuitous transferees. In the Madras case it was held that a contract to convey or reconvey immovable properties whenever demanded for a certain amount is only a personal contract and does not create any interest in immovable property and is therefore enforceable and not void as contravening the rule against perpetuities. Thus it will be seen that neither of these two cases has anything in common with the present case and both of them are clearly distinguishable.

The result therefore is that the appeal fails and is dismissed with costs.

*Appeal dismissed.*

(1) (1924) I.L.R., 46 All., 333.

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