

APPELLATE CIVIL.

Before Mr. Justice Abdul Rao'f and Mr. Justice Harrison.

1921

May 21.

NATHU (DEFENDANT)—*Appellant,*

versus

ALLAH DITTA (PLAINTIFF)—*Respondent.*

Civil Appeal No. 1372 of 1917.

Government Tenants (Punjab) Act, III of 1893, section 8—Agreement by a Government tenant to share whatever might accrue to him with his brother without obtaining the Financial Commissioner's consent—Tenant subsequently granted proprietary rights—whether the agreement can be enforced against those rights—Indian Contract Act, IX of 1872, sections 23, 24—Contract forbidden by law—Transfer of Property Act, IV of 1882, section 43—Specific Relief Act, I of 1877, section 18.

Two squares of land were allotted to S. (father of N.) and D. in the Lyallpur Colony under the Government Tenants (Punjab) Act. They induced their brothers to come and help them to reclaim the land, and promised to give them one half of whatever they might obtain. The brothers abandoned their homes and came and settled in the new Colony, and shared all the labour and expenses of reclaiming the virgin soil. Instead of taking one-half of the land for their own they occupied the portions now in suit, namely, one-third in the case instituted by F., one of the brothers, and $11/25$ ths in the case instituted by J., the other brother. No attempt was made to obtain a recognition from Government of their private agreement. The brothers continued to live at peace with each other and to cultivate their respective shares until proprietary rights were conferred on the tenants by Government. The defendants thereupon tried to eject F. and J. on the ground that they were tenants under them. This compelled F. and J. to institute the present declaratory suits to establish their shares in the proprietary rights. It was contended for the defendants that the agreement was forbidden by law and opposed to public policy and therefore void.

Held, that the original agreement was that the grantee would give one-half of whatever rights accrued to him. He gave a portion of the produce as he could not give one-half of the title in the tenancy as Government forbade him (section 8 of Punjab Act III of 1893). When the proprietary rights were added he could give a share in the same to any one he chose and the plaintiffs could then insist upon their bargain being enforced against the subsequent interest, and that the Court was therefore

bound to give the brothers the shares which they claimed in the proprietary rights.

Transfer of Property Act, IV of 1882, section 43, and Specific Relief Act, I of 1877, section 18, referred to.

Moti Chand v. Ikram-Ullah Khan (1), *Radha Bai v. Kamod Singh* (2), *Ismalji Yusufalli v. Raghunath Lachiram* (3), *Sisram v. Asghar Ali* (4), *Vir Singh v. Kala Singh* (5), *Ali Mardan v. Bakar Khan* (6), *Hussain Khir v. Jahan Khan* (7), distinguished; also *Gopalray Hanmart v. Kallappa* (8), *Alice Mary Hill v. William Clarke* (9), and *Mussimmat Roshni v. Muhammad Rahnawaz Khan* (10).

Second appeal from the decree of S. S. Harris, Esquire, District Judge, Lyallpur, dated the 24th day of March 1917, reversing that of Lala Ganga Ram, Subordinate Judge, 1st Class, Lyallpur, dated the 3rd day of February 1917, and decreeing the plaintiff's claim.

AZIZ AHMAD, for Appellant.

NIJAZ MUHAMMAD, for Respondent.

The judgment of the Court was delivered by—

Harrison, J.—We take appeals Nos. 1372 and 1373 together as they are from the same judgment of the District Judge and the facts are similar.

In appeal No. 1372 one Jhandu sued his nephew Nathu for a declaration that he was in possession as a proprietor of 11/25ths of a square of land in the Lyallpur District.

Similarly in No. 1373 Fattu sued Dulla, his brother, for the same declaration regarding 1/3rd of the square which had been originally allotted. In the course of the hearing of this case, the defendant succeeded in ousting the plaintiff, and the prayer has accordingly changed to one for possession.

The suit of Jhandu was dismissed while that of Fattu was decreed by the same Subordinate Judge. Appeals were presented against both the decisions and the District Judge in one judgment accepted the appeal

(1) (1916) I.L.R. 39 All. 173 (P.C.).

(2) (1907) I.L.R. 30 All. 38.

(3) (1909) I.L.R. 33 Bom. 636.

(4) (1912) 16 Indian cases 422.

(5) 3 P.R. (Rev.) 1915

(6) 13 P.R. 1913.

(7) 58 P.R. 1913.

(8) (1901) 3 Bom. L.R. 164.

(9) (1904) I.L.R. 27 All. 266.

(10) 45 P.R. 1887.

1921

NATHU

v.

ALLAH DITTA.

of Jhandu and dismissed that of Dulla, and gave the plaintiff in both cases the decrees they sought. The defendants in both cases have presented second appeals.

The facts are that two squares were allotted to Sultana (father of Nathu) and Dulla in the Lyallpur Colony. Both of them induced their brothers to come and help them to reclaim the land and promised to give them one-half of whatever they might obtain. The brothers abandoned their original homes and came and settled in the new Colony, and shared all the labour and expense of reclaiming the virgin soil, cleared it and cultivated it in common with their brothers, the grantees. Instead of taking one-half of the land for their own they occupied the portions which are now in suit, namely, $1/3$ rd in the case instituted by Fattu and $11/25$ ths in the case instituted by Jhandu. No attempt was made to obtain a recognition from Government of this private arrangement, and the tenancies continued to be held by the original grantees. Jhandu appears to have had some trouble with his brother in consequence of which a *Panchayat* was called in to arbitrate, and they decided that he should remain in possession of 11 *killas* or $11/25$ ths of the whole. The brothers continued to live at peace with each other and to cultivate their respective shares until the unexpected boon of proprietary rights was conferred by Government on the tenants. Jhandu's brother, Sultana, died in 1915, and his son, the present defendant, Nathu, tried to eject his uncle on the ground that he was a tenant. In the same way Dulla tried to eject his brother Fattu and the two brothers were forced to bring these suits. They have both succeeded in the Court of the District Judge, and the original grantees now contend that the agreement being illegal cannot be enforced, and that in spite of the fact that full consideration has been paid in the shape of continuous labour for over 20 years, they are now entitled because of the essential illegality of those original agreements to deprive their respective uncle and brother of any sort of reward.

It is argued that section 23 of the Contract Act governs the case, that the agreement was made with the object of defeating a legislative enactment, and that the transfer of a portion of the rights in the squares is

opposed to public policy and the following rulings are quoted, *viz.*—

Moti Chand v. Ikram-Ullah Khan (1), *Radha Bai v. Komod Singh* (2), *Ismalji Yusufali v. Raghunath Lachiram* (3), and *Sisram v. Asghar Ali* (4). *Vir Singh v. Kala Singh* (5), has also been quoted but not as an authority.

The respondents rely on *Ali Mardan v. Bakar Khan* (6), *Hussain Khan v. Jahan Khan* (7), section 43 of the Transfer of Property Act, section 18 of the Specific Relief Act, section 24 of the Contract Act and Pollock's Commentary on the same.

Section 8 of Punjab Act III of 1893 runs as follows :—

“The rights or interests vested in a tenant by or under this Act shall not be capable of being attached or sold in execution of a decree or order of any Court, or in any insolvency proceedings, nor shall they, or any of them, without the previous consent in writing of the Financial Commissioners, be transferred or charged by any sale, gift, mortgage or other private contract;”

and the contention is that the agreement being one to share a tenancy its object was illegal in that it defeated the provisions of an enactment. There is a distinct conflict between the view taken by this Court and that taken by the Financial Commissioner as to the exact effect of this section Counsel for the appellant has urged that for the reasons given at length in *Vir Singh v. Kala Singh* (5) the two division Bench decisions of 1913 are not sound law, and has urged that the matter might be referred to a Full Bench. In this case however, we are of opinion that the facts are different from those recited in any of these three judgments.

In *Vir Singh v. Kala Singh* (5) the question before the Financial Commissioner was a plain and simple agreement to divide a tenancy, and the suit was decided while the tenancy was still in existence. In *Hussain Khan v. Jahan Khan* (7) there was an

1921

NATHU

9.

ALLAH DITTA.

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(2) (1907) I.L.R. 30 All. 33. (5) 3 P.R. (Rev.) 1915.

(3) (1909) I.L.R. 33 Bom. 636. (6) 13 P.R. 19.3.

(7) 58 P.R. 1913.

1921

—
NATHU
v.
ALLAH DITTA.

equally clear agreement to divide a tenancy and also the proprietary rights which must accrue in the course of a few years to the capitalist grantee. Here the relief sought is a share in the proprietary rights and nothing else. It is true that these proprietary rights were preceded by a tenancy and that they resulted from the tenancy, but there is a great difference between proprietary rights in a colony and the tenancy which gives rise to the same, in that the former may be alienated or divided at will whereas a transfer of a share in the tenancy is forbidden. Counsel urges that what has to be seen is whether the agreement as originally made was legal or not and he further contends that if any portion of the object or consideration was illegal at the time the whole transaction is vitiated and void. In these cases we have to see what actually happened. The original grantees being unable to cope with the situation and to reclaim the land unaided induced their brothers to come to their assistance. They made agreements not knowing exactly what the value of the same might turn out to be that they would give half of whatever they might obtain to those brothers. It is true that neither of them anticipated the possibility of getting proprietary rights inasmuch as Government had not contemplated the conferring of the same. There was no definite agreement in so many words to do any illegal act but inasmuch as the title in the tenancy conferred could not be transferred the grantee brother was unable to share this portion of what he had acquired, and therefore he allowed his brother to take half the produce and to build a house and later on to treat as his own a definite portion of the land. It was after the lapse of some 15 years that an additional asset accrued to each grantee in the shape of the right to acquire full unfettered proprietorship. The brothers now come forward and say that inasmuch as there is no condition excluding them from participation in the same they are entitled to their shares. The agreement therefore was one in which part of the consideration proved to be illegal, in the sense that it was forbidden by law and it has to be seen whether under section 24 of the Contract Act, that part can be separated. Counsel urges that inasmuch as the proprietary rights were not in existence at the time the agreement,

was made it is impossible to say that what did not exist can be severed from what did. They were in existence in the sense that they were held by Government. They had not been conferred and if the agreement had been that the grantee was to give half of what he obtained at the time of receiving his grant it would be impossible to hold that the division of these rights formed any part of the consideration. The agreement however was that the grantee would give half of whatsoever right accrued to him. He gave a portion of the produce, but he could not give half of the title in the tenancy as Government forbade him. When the proprietary rights were added he could give a share in the same to any one he chose and the fact that these had been preceded by the inalienable tenancy in no way affected or fettered his rights. The position though not the same is similar to that contemplated in section 43 of the Transfer of Property Act, and section 18 of the Specific Relief Act. The grantee could not give a portion of what he doubtless contemplated giving at the time he made the agreement. He gave what he could and when he subsequently acquired a fresh interest his brother was in much the same position as the transferee in section 43 of the Transfer of Property Act, who insists on his bargain being enforced against the subsequent interest. Counsel urges that the object of the agreement was illegal and has cited *Gopalray Hanmant v. Kallappa* (1), *Alice, Mary Hill v. William Clarke* (2) and *Mussammat Roshan v. Muhammad Rabnawaz Khan* (3). These cases are in our opinion all distinguishable from the present case. There the object or the natural result of the fulfilment of the agreement was the defeating of a provision of law or the fulfilment of an immoral object. For instance, in the Allahabad case a man made an ostensibly harmless agreement the effect and object of which was an immoral union between a man and a woman. Here the object appears to us to have been throughout the reclamation of the land. The consideration on one side was the labour given by the imported brother and on the other the conferring of whatever the grantee might secure in consequence of his grant. This included the title in the tenancy and

1921

NATHU

v.

ALLAH DITTA

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1921
—
NATHU
v.
ALLAH DITTA

so far was not only inoperative but actually forbidden by a Government enactment. In spite of this the agreement was acted upon so far as possible and no Government enactment was in any way transgressed because the imported brother did not even attempt to secure a share in the title as against Government the landlord. The object of the agreement was achieved and the land was reclaimed, and when in the fullness of time the grantee was given proprietary rights he was bound to make good his promise to the brother who had waited many years for his reward. Instead of this he tried to eject him and we are of opinion that he must be held to his original agreement, and that we are bound to give the brother the share which he claims in the proprietary rights.

We therefore dismiss both the appeals with costs.
A. R.

Appeals dismissed.
