

Bakhsh), are not the same. The authority *Muhammad Shafiqullah Khan v. Mohd. Samiullah Khan* (1) upon which the appellant's counsel relied is distinguishable on this score.

The appeal fails on all points and is dismissed with costs

P. S

Appeal dismissed.

FULL BENCH.

Before Tek Chand, Abdul Rashid and Rangil Lal, JJ.

LABH SINGH (PLAINTIFF) Appellant
versus

JAMNUN AND ANOTHER (DEFENDANTS)
Respondents.

Letters Patent Appeal No. 37 of 1931.

Punjab Tenancy Act, XVI of 1887, Section 60: Mortgage by occupancy tenant—without landlord's consent—set aside at the instance of the landlord—Mortgagee—whether entitled to sue mortgagor for refund of mortgage money—Indian Contract Act, I of 1872, Section 65.

Held, that where an occupancy tenant has alienated the occupancy tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord in a suit brought under section 60 of the Punjab Tenancy Act, the mortgagee is entitled to sue the mortgagor for refund of the mortgage money.

Satgur Prasad v. Har Narain Das (2), and *Bassu Kuar v. Dhum Singh* (3), relied upon.

Kulla Mal v. Umra (4), and Letters Patent Appeal No. 131 of 1921, overruled.

Other cases referred to.

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| (1) (1930) I. L. R. 52 All. 139. | (3) (1899) I. L. R. 11 All. 47, 56 (P. C.). |
| (2) (1932) I. L. R. 7 Luck. 64, 70 (P. C.). | (4) (1921) 61 I. C. 604. |

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Letters Patent Appeal from the judgment of Jai Lal J. passed in C. A. No. 255 of 1931, on 6th May, 1931, affirming that of Lala Dwarka Parshad, Senior Subordinate Judge, with special appellate powers, Hoshiarpur, dated 8th November, 1930 (who affirmed that of Malik Fateh Khan, Subordinate Judge, 3rd Class, Hoshiarpur, dated 25th March, 1930), dismissing the plaintiff's suit.

FAKIR CHAND, for Appellant.

NAND LAL, for Respondent.

The order of Tek Chand and Abdul Rashid JJ., dated 9th April, 1934, referring the case to a Full Bench, was delivered by :—

TEK CHAND J.

TEK CHAND J.—The defendant-respondents are the occupancy tenants of a certain holding. By a registered deed, dated the 8th of May, 1923, they mortgaged their occupancy rights to the plaintiff-appellant for Rs. 760. The mortgagee paid the consideration in full and entered into possession of the land in accordance with the terms of the deed. This alienation, however, had been effected without the consent of the landlords, and under section 60 of the Punjab Tenancy Act the transaction was "voidable" at their instance.

In June, 1928, the landlords brought a suit to have the mortgage set aside, and on the 23rd of August, 1928, a decree was passed in their favour declaring that the mortgage was void and directing that the mortgagee be dispossessed. It was specifically stated in the decree that this decision "shall not affect the rights of the mortgagors as occupancy tenants and that they shall remain in possession as before." It appears, however, that after the decree,

the landlords somehow or other managed to obtain possession of the land.

On the 23rd of July, 1929, the present suit was brought by the *quondam* mortgagee against the mortgagors for refund of the mortgage money, together with interest. The defendants pleaded that the plaintiff was not entitled to a refund because (1) at the time of entering into the contract the plaintiff was, or must have been, fully aware of the provision in the statute that the alienation was voidable at the instance of the landlords whose consent had not been obtained and, therefore, the principle of *caveat emptor* applied, and (2) the possession of the land had been taken by the landlords, and the defendants were still out of possession. In reply the plaintiff urged that the rule of *caveat emptor* did not apply to such cases, which are governed by section 65 of the Indian Contract Act, according to which "when * * a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or to make compensation for it, to the person from whom he had received it." As to the second plea it was pointed out that in the decree by which the mortgage had been set aside, it was specifically provided that possession shall remain with the occupancy tenants, and if the landlords had entered into possession their action was unlawful and the defendants could recover it from them in due course of law.

The trial Court dismissed the suit on the authority of a Single Bench decision of Martineau J. reported as *Kulla Mal v. Umra* (1), where, following the rule of *caveat emptor*, the learned Judge had dismissed the claim in a case, the facts of which were

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very similar to those of the case before us. This decision was affirmed on appeal by the Senior Subordinate Judge. The plaintiff preferred a second appeal to this Court which was heard by Jai Lal J. sitting in Single Bench. The learned Judge expressed the opinion that section 65 of the Contract Act appeared to entitle the plaintiff to the relief claimed, but having regard to the fact that the mortgagors had not taken back possession of the mortgaged land and in view of the previous decision of this Court in *Kulla Mal v. Umra* (1) he "felt hesitation in setting aside the decree of the Senior Subordinate Judge." He accordingly dismissed the appeal, but granted a certificate to the plaintiff for lodging an appeal under clause 10 of the Letters Patent.

It may be stated at the outset that the attention of the learned Judge does not appear to have been drawn to the fact that the judgment of Martineau J. in *Kulla Mal v. Umra* (1) had been affirmed on appeal by the Letters Patent Bench in Letters Patent Appeal No. 131 of 1921, decided on the 28th of July, 1921. The decision of the Courts below in this case, therefore, has the support not only of a former Single Bench of this Court but also that of a Division Bench.

It seems to us that the circumstance that the defendants (occupancy-tenants) have not yet recovered possession of the mortgaged land has no real bearing on the case. It is not denied that in a case like this the unauthorised alienation of occupancy rights by the tenant does not entail forfeiture of the tenancy, and the effect of a successful suit by the landlord under

(1) (1921) 61 I. C. 604.

section 60 is to restore the landlord and the tenant to their original position. If after the avoidance of the alienation the landlord has managed to put himself in possession of the land, the tenant has a clear right to obtain re-entry of the holding, *Khuda Bakhsh v. Fazul Din* (1). In the present case the matter was put beyond dispute by the terms of the decree passed by the Revenue Courts in the landlords' suit under section 60. As already stated, the decree was merely for the dispossession of the mortgagee and it was specifically stated that "the rights of the mortgagors as occupancy tenants shall remain unaffected by this decree and they shall continue to be in possession as before: only Labh Singh (mortgagee) shall be dispossessed." The possession of the landlords appears, therefore, to be unlawful and the defendants can, by taking appropriate proceedings against them, obtain re-entry. This seems to us to be a matter between the landlords and the tenants *inter se*, and the circumstance that the possession is with the landlords cannot be pleaded in bar of the *quondam* mortgagee's suit for refund of the mortgage money.

On the main point the defendants rely on the rule of *caveat emptor* which, as already stated, was applied by Martineau J. to a similar case, following two old rulings of the Chief Court in *Hira Nand v. Mahia* (2) and *Wazira v. Shadi Khan* (3). As against this the appellant's learned counsel has drawn our attention to the fact that two years later the same learned Judge, sitting in Division Bench with Zafar Ali J., had held that the rule of *caveat emptor* had become obsolete by reason of the provisions contained

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(1) 17 P. R. 1892 (F. B.).

(2) 90 P. R. 1876.

(3) 67 P. R. 1881.

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in section 55 (2) of the Transfer of Property Act, the principles of which have been applied to this province. In this last case the earlier Single Bench decision in *Kulla Mal v. Umra* (1) was not referred to, but a number of other cases were cited in support of the contrary view.

For the appellant reliance has been placed principally on section 65 of the Contract Act, which appears to support his contention. In Letters Patent Appeal No. 131 of 1921 Harrison J. who delivered the judgment of the Letters Patent Bench, expressed the opinion that section 65 was inapplicable to such a case as the words "when a contract becomes void" were intended to apply to those cases only in which the contract, which was valid at the time it was made, "became void at a later stage by the occurrence of some unexpected event" and that "this section did not cover a contract which was voidable at the instance of the third party who had the option of interfering or not as he chose."

We are aware that this view of the law has been taken in some other cases in this province, but it seems to us that the authority of these cases has been considerably shaken by the *dicta* of their Lordships of the Privy Council in the recent case of *Satgur Prasad v. Har Narain Das* (2) where it was observed that the words "when a contract becomes void" in section 65 are sufficient to cover the case of a voidable contract which had been avoided. It is no doubt true that these observations of their Lordships were made in connection with a contract which had been found to have been procured by undue influence and fraud.

(1) (1921) 61 I. C. 604.

(2) (1932) I. L. R. 7 Luck. 64, 70 (P. C.).

But under section 19 such a contract is "voidable" at the option of the party, whose consent had been so procured. It follows, therefore, that according to this *dictum* of their Lordships, section 65 is not limited in its scope to those cases only in which the contract had become void at a later stage by the occurrence of an unexpected event, but includes in its purview cases in which a contract is voidable at the instance of a particular person and has in fact been avoided.

Similarly in *Nand Ram v. Parshotam Dass* (1), section 65 was held applicable to a case in which a contract was voidable at the instance of a stranger to the contract and he had exercised the option and avoided the contract. In this connection reference may also be made to the observations of Frizelle and Rivaz JJ. in the referring order in *Khuda Bakhsh v. Fazal Din* (2), which indicate that in their opinion the alienee of occupancy rights will, in the event of the alienation being set aside at the instance of the landlord, have a right to claim a refund of the money advanced by him.

In view of this conflict of authority and having regard to the general importance of the matter, we think that it should be settled authoritatively by a larger Bench.

We accordingly refer the following question to the Full Bench.

"Where an occupancy tenant has alienated the occupancy-tenancy without the consent in writing of the landlord and the alienation has been set aside at the instance of the landlord, in a suit brought under

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(1) 1933 A. I. R. (All.) 203.

(2) 17 P. R. 1892 (F. B.) p. 82.

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section 60 of the Punjab Tenancy Act, is the mortgagee entitled to sue the mortgagor for refund of the mortgage-money?"

The papers will be laid before the learned Chief Justice for constituting a Bench to hear the reference. As this appeal is an old one, it is desirable that a very early date be fixed.

THE ORDER OF THE FULL BENCH.

TEK CHAND J.

TEK CHAND J.—The facts of the case, which has given rise to this reference, and the question of law on which the Full Bench has been invited to express its opinion, are set out in detail in the referring order and it is not necessary to repeat them at length here.

The defendants-respondents were the occupancy tenants of certain land and had mortgaged the occupancy tenancy to the plaintiff, without the consent in writing of the landlord. This alienation was "voidable" at the instance of the landlord under section 60 of the Punjab Tenancy Act. Some time after the mortgagee had entered into possession, the landlord sued to avoid the mortgage and eject the mortgagee. This suit was decreed and the mortgagee ejected. He has now brought a suit against the mortgagor for refund of the mortgage-money and the question for consideration is, whether such a suit is maintainable in view of the fact that the mortgagee was, or must have been, aware from the very beginning that the mortgage in his favour was voidable at the instance of the landlord. For the respondents reliance is placed on *Kulla Mal v. Umra* (1) decided by Martineau J. sitting singly, and the judgment of the

Letters Patent Bench on appeal in that case (Letters Patent Appeal No. 131 of 1921). Martineau J. dismissed the alienee's suit relying on the doctrine of *caveat emptor*, which he held to be applicable to the case. On appeal it was contended by the alienee that that doctrine did not apply in view of the provisions of section 65 of the Contract Act. That section runs as follows :—

“ When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.”

The Letters Patent Bench repelled this argument, holding that the expression “ when a contract becomes void ” in this section was intended to refer to those cases only in which “ the contract, which was valid at the time it was made, became void at a later stage by the occurrence of some unexpected event.” It was accordingly held that this section did not cover a contract which was voidable at the instance of a third party, who had the option of interfering or not as he chose. This interpretation of section 65, however, can no longer be supported in view of the clear pronouncement of their Lordships of the Privy Council in *Satgur Parshad v. Har Narain Das* (1). In that case their Lordships observed that “ they had no difficulty in holding that the words ‘ when a contract becomes void ’ are sufficient to cover the case of a voidable contract which had been avoided.” This decision is conclusive of the matter and it must be held that section 65 governs the case before us.

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In this connection reference may also be made to an earlier decision of the Privy Council in *Bassu Kuar v. Dhum Singh* (1), where section 65 was held applicable to an agreement which, though valid at the time it was executed, subsequently became unenforceable because a decree had been passed by a competent Court after the execution of the agreement, which brought about a new state of affairs. It was accordingly held that the promisor was bound to refund the amount which he had received under the agreement.

In view of the clear statutory provision in section 65, it must be recognized that in this respect the law in India differs materially from that in England, and Courts in this country are not free to apply the rules of English Law to cases covered by that section. I do not, therefore, wish to discuss here, whether the doctrine of *caveat emptor* would have been applicable to a case of this kind, even according to the English authorities. It will be sufficient to say that in England, the doctrine is not enforced now with the same strictness as was the case formerly. Indeed, as observed by Lord Campbell in *Sims v. Marryat* (2) "the rule is beset with so many exceptions that they may be said to have well-nigh eaten it up." The tendency of modern cases is to restrict the application of the doctrine within narrow limits, and with regard to the type of cases with which we are concerned, it will be interesting to refer to *Eichholz v. Bannister* (3) where Erle C. J. expressed the hope that "the

(1) (1889) I. L. R. 11 All. 47, 56 (P. C.) (2) (1851) 17 Q. B. D. 281; 85 R. R. 462.

(3) (1864) 17 C. B. (N. S.) 724; 142 R. R. 594, 598.

notion which has so long prevailed (about the universal applicability of the rule of *caveat emptor*) will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he had parted with upon a consideration which has failed."

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The appellant's counsel also referred us to clause (c) of section 68 of the Transfer of Property Act, as it stood before the recent amendment, and clause (d) of sub-section (1) of the section as now amended which, though not in force in the Punjab, embody general principles of law which have been uniformly followed in this province. It is laid down in the amended section, and was so held under the section as it stood before, that where a mortgagee, being entitled to possession of the mortgaged property, is dispossessed by a person claiming under a title superior to that of the mortgagor, the mortgagee has a right to sue for the refund of the mortgage money. Instances of the application of this rule will be found in *Ram Surat Misra v. Gur Prasad* (1) and *Nand Ram v. Purshotam Das* (2), where on dispossession by a person having a better title than the mortgagor, the mortgagee has been allowed to recover the mortgage money from the mortgagor. That the alienee in such cases has the right to claim a refund is also clear from the observation of the learned Judges who decided *Subbaroya v. Rajagopala* (3), *Mussammat Lakhpat Kuer v. Durga Prasad* (4) and *Multanmal v. Budhumal* (5), though in each of these cases the actual point for decision was one of limitation.

(1) (1921) I. L. R. 43 All. 484. (3) (1915) I. L. R. 38 Mad. 887.

(2) 1933 A. I. R. (All.) 203. (4) (1929) I. L. R. 8 Pat. 432.

(5) (1921) I. L. R. 45 Bom. 955.

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DEK CHAND J.

After careful consideration, I am constrained to hold that *Kulla Mal v. Umra* (1) and Letters Patent Appeal 131 of 1921 do not lay down the law correctly and must be overruled.

I would accordingly answer the question referred to the Full Bench in the affirmative, and hold that on the facts as stated the mortgagee is entitled to sue the mortgagor for refund of the mortgage-money.

ABDUL RASHID J.—I agree.

RANGI LAL J.—I agree.

A. N. C.

*Question answered
in the affirmative.*

ABDUL
RASHID J.

RANGI LAL J.

SPECIAL BENCH.

Before Monroe, Bhide and Din Mohammad JJ.

MUBARIK AHMED AND OTHERS

versus

FAQIR AHMAD AND ANOTHER.

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May 24.

Civil Reference No. 7 of 1934.

*Indian Stamp Act, II of 1899, Sections 57 (1), 61 (2):
Question of proper stamp duty on a document—referred by
Collector to District Judge—High Court—whether can inter-
fere with decision of District Judge—the word ‘Case’ in
Section 57—meaning of.*

An award of arbitrators, who were appointed to divide the immoveable property of one S. A. was filed in a Civil Court insufficiently stamped and a decree was granted thereon. The insufficiency of the stamp being brought to the notice of the Collector, the Collector made a reference under section 61 of the Indian Stamp Act to the District Judge. The latter held that the document was an instrument of partition and determined the stamp duty in accordance with section 61 (2) of that Act. The Financial Commissioner, thinking that the District Judge had made an under-assessment, made a reference to the High Court under section 57 (1).