APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Batty.

1904. *March* 16.

NARSINDAS TULSIRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* RAHIMANBAI, WIDOW OF GHASIMIYA, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Indian Evidence Act (I of 1872), section 115—Estoppel, requirements of—Acquiescence—Question of legal inference—Plea of estoppel appearing for the first time in issues in appeal.

Acquiescence is not a question of fact, but of legal inference from facts found. This principle applies also to estoppel.

To create an estoppel it is not sufficient to say that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. It must be found that the plaintiff would not have acted as he did. It must be found that the defendants by their "declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief."

A plea of estoppel should not be given effect to in appeal when it was not suggested in the written statement, nor made one of the issues in the first Court, nor one of the grounds of appeal, and only appears for the first time in the issues raised by the lower Appellate Court. In such a case the High Court can interfere in second appeal.

SECOND APPEAL from the decision of J. J. Heaton, District Judge of Násik, confirming the decree of G. R. Gokhale, Subordinate Judge of Pimpalgaon.

Suit to recover a mortgage-debt by sale of the mortgaged property.

In the year 1739, the then Emperor of Delhi conferred the hereditary office of Kázi of the Chandwad Pargana and one *chahur* of land in *inám* for the expenses of that office on Mahamad Kamrudin valad Mahamad Hussein, the ancestor of Ghasimiya valad Kamamodin, deceased, the husband of defendant 1, and Javavodin *alias* Javer Saheb valad Jamamodin, defendant 6, who was the officiating Kázi. In 1885, defendant 6 entered into an agreement with two other members of the Kázi family, namely, the above-mentioned Ghasimiya and one Dadamiya, by which it was provided that leases for the land should be taken in the names of all three persons and that Ghasimiya

* Second Appeal No. 460 of 1903.

should receive a moiety, and Dadamiya and Javavodin should each receive a fourth of the rents. Thereafter the three sharers dealt with the shares very much as if they were their private property, but without any intention to divide the vatan property irrevocably. On the 18th July, 1892, Ghasimiya mortgaged his joint half share in the land to the plaintiff. The mortgage purported to be with possession, but it was not so in fact. In the year 1899 the plaintiff brought a suit on his mortgage to recover Rs. 1,935, alleging that defendants 2 and 3 were joined because they were the heirs of the deceased mortgagor, and defendants 4 and 5 were joined because they had purchased a part of the mortgaged property. The plaintiff prayed for a decree enabling him to recover the amount in suit and costs by sale of the mortgaged property and the other property of the deceased mortgagor.

Defendants 2 and 3 denied the mortgage in suit and contended that the property comprised in the mortgage was the hereditary Kázi vatan of their family and therefore inalienable and, presuming that Ghasimiya had a right to mortgage it, the mortgage became null and void after his death.

Defendant 6 pleaded similar defences and added that he was the officiating Kázi.

The remaining defendants, namely, defendants 1, 4 and 5, were absent.

The Subordinate Judge found that the deceased Ghasimiya executed the mortgage bond in suit and received consideration under it; that the mortgaged property formed part of the Kázi vatan of the Kázi of Chandavad and as such was inalienable; that the deceased Ghasimiya had no authority to alienate the said property beyond his lifetime; that he was never in possession of the property, and that the plaintiff was not entitled to recover the mortgage-debt by sale of the property in suit. He therefore passed a decree in the following terms:—

I, therefore, reject the plaintiff's claim so far as he prays for recovery of the debt sued for out of the land in suit, and order him to recover the amount claimed and his costs out of the estate of the deceased defendant No. 1 Ghasimiya, except the Chandavad Kázi vatan property. The plaintiff should pay the costs of defendants Nos. 2, 3 and 6.

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On appeal by plaintiff the Judge raised four issues, namely :—

1. Is the property in suit alienable or inalienable ?
2. Had Ghasimiya power to alienate it beyond his lifetime ?
3. Is defendant No. 6 estopped from contending that Ghasimiya had not such power ?
4. Is the watan a wakf ?

The findings were :—1, Inalienable. 2, He had the power to alienate it during the life of, or tenure of office as Kázi by, defendant 6. 3, In the affirmative. 4, In the negative. The Judge confirmed the decree. The following are extracts from his judgment :—

Is the mortgage good against the Kázi if all considerations of public policy be excluded ? I think it is. It is true the Kázi agreed that Ghasimiya should take half the rents of the vatan lands intending that the agreement should hold good during Ghasimiya's lifetime only and that there should be no permanent alienation of a share in the rents. This was held by the Subordinate Judge, and though the proposition was to some extent contested in appeal I have no doubt as to its correctness. But the Kázi had also mortgaged his share to the plaintiff at a date prior to Ghasimiya's mortgage (Exhibit 61).

He had also become the tenant under the plaintiff of Kázi service lands mortgaged to the plaintiff by the members of the Kázi family (Exhibit 71). So that not merely by his dealings generally, but by his dealings with the plaintiff himself, the Kázi gave him ample reason to believe that the lands could properly be mortgaged and were a good security. Seeing that prior to Ghasimiya's mortgage to the plaintiff the Kázi had himself mortgaged his share in certain of the vatan lands to the plaintiff (Exhibit 61), it must be assumed that the latter had received that assurance of title which in some countries is obtained by scrutiny of the title-deeds. And this assurance of title was due to the acts of the Kázi himself ; had he not acted as he did *it may well be doubted* whether the plaintiff would have advanced money on Ghasimiya's mortgage. That being so, it seems to me that the Kázi may not now contend that Ghasimiya had not authority to mortgage the lands. It follows that as between him and the plaintiff only, the claim is good ; that is, if all questions of public policy be set aside.

It is true there is nothing to show, and it is not to be presumed from the facts disclosed, that Ghasimiya ever was given, or that it was intended to give him, anything beyond a life interest in the lands. It is true also that by their tenure the lands are inalienable and that by due inquiry the plaintiff could have discovered the nature of the tenure, for in the mortgage deeds the lands are described as Kázi vatan lands. Nevertheless by the Kázi's own conduct in mortgaging some of the service lands to the plaintiff the latter was absolved as against the Kázi from making that inquiry into title, which otherwise

would be properly required of him ; and this consideration applies to the lands mortgaged by Ghasimiya, though the Kázi did not consent to or acquiesce in that particular mortgage. Both the law of estoppel and equitable considerations apply here. The Kázi who has, when it suited him, dealt with service lands as if they were alienable private property, cannot be heard purely on his own behalf, in favour of the proposition that the lands are inalienable service lands. I cannot find an authority precisely in point ; but the principles on which the authorities have proceeded apply to this case with the effect I have stated.

The conclusions I have arrived at are these :—That the lands being service lands to which each Kázi succeeds in virtue of his office ordinarily cannot lawfully be alienated beyond the term of office of the Kázi officiating at the time of the alienation ; but that in this case the Kázi is estopped from contending that the alienation is invalid. In other words, the plaintiff is entitled to recover his debt from the mortgaged lands so long as the present Kázi holds office. What, then, is the appropriate decree? The Court should not order a sale of the lands, for to do so would be to give effect absolutely to an unlawful alienation which is good only as against the Kázi now officiating. It cannot be in accordance with public policy to do this ; no Court would be justified in bringing about a final alienation of such property. To do so would be to encourage the misappropriation of service lands ; in other words, to encourage fraudulent dealing. This point seems to me to be absolutely clear. Nevertheless the plaintiff is entitled to some relief and the appropriate relief would seem to be to place him in possession of the mortgaged lands until the debt is paid off out of the profits of the land or until the defendant No. 6 shall die or cease to officiate as Kázi, whichever of these events first happens.

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It seems to me that the plaintiff is entitled to some relief, though he is not entitled to have the lands sold. The appropriate relief would be to place him in possession ; but this has not been previously suggested and I am not prepared to act on the suggestion until the parties have been heard regarding it.

I must, therefore, set down the case for further hearing on the basis of the conclusions stated in this judgment. * * * * *.

Násik, 29th May 1903. (Signed) J. J. HEATON,
District Judge.

This question of possession has led to the consideration of a number of points, the result of which is that I do not think that I can properly award possession in this suit to the plaintiff. In the first place he did not obtain possession at the time of the mortgage, though it purports to be for possession and recites that the mortgagee has taken possession. If he chose to neglect his own interests to this extent he is not now entitled to any particular consideration at the hands of a Court. In the next place it is urged on behalf of the Kázi that if the question of possession had been raised whilst the suit was in progress, the evidence would have been looked at from a different point of view

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and other evidence might have been adduced which would have had a material bearing on the matter. This is true. Various questions do arise; for example, whether Ghasimiya's interest in the property mortgaged to any extent survived his death and became vested in his widow: whether the conduct of the Kázi can properly be held to have had any real influence in inducing in the mind of the mortgagee a belief that he would have a hold, over the property after Ghasimiya's death, or whether this belief was independent of anything which the Kázi did. Such questions would involve a reconsideration of the evidence and possibly its amplification; and though this would not change the essential nature of the suit, which is in substance a suit to recover the mortgage-debt, it would import into the suit considerations of an entirely new kind, and would necessitate a fresh consideration of the evidence from an entirely new point of view. Bearing in mind these considerations and the fact that possession was not asked for by the plaintiff, I must confirm the decree of the lower Court. At the same time it must be understood that I have not decided as a point in issue that possession could not be legally awarded. The decree of the lower Court is confirmed. * * * * * * *

Násik, 22nd June 1903.

The plaintiff preferred a second appeal and defendants 2 and 6 filed cross-objections.

Scott (Advocate General) with *D. A. Khare*, for the appellant (plaintiff):—The Judge found as a fact that defendant 6 was estopped from pleading the inalienable nature of the lands in suit. That finding, being a finding of fact, is binding in second appeal. On the said finding the Judge should have allowed our claim against the lands in suit.

[JENKINS, C. J., referred to *Lala Beni Ram* v. *Kundan Lall.*[1]]

Branson (with *R. R. Desai*), for the respondents (defendants):—Estoppel is not a question of fact. It is a question of legal inference to be drawn from the facts as found. We, therefore, contend that the present case clearly falls within the principle laid down in *Lala Beni Ram* v. *Kundan Lall.*[1] It is an admitted fact that the mortgage in suit was not brought about by any act or declaration on the part of the defendants. What the Judge found was that the plaintiff would not have acted in the manner he did, but for the way the defendants had acted. This circumstance is not sufficient to create an estoppel.

Scott, in reply.

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JENKINS, C. J. :—The plaintiff has brought this suit to realize the amount due to him on a mortgage by sale of the property comprised in it and by recovering personal judgment against the mortgagor.

The Subordinate Judge rejected the claim so far as the plaintiff prayed for recovery of the debt out of the land in suit, but ordered the plaintiff to recover the amount claimed and his costs out of the estate of the deceased Ghasimiya.

The ground of his decision was that the property in suit forms part of Kázi vatan and that Ghasimiya, the mortgagor, had no authority to alienate the property beyond his life.

Ghasimiya was dead when the suit was brought.

From that decree an appeal was preferred to the District Judge, who delivered his first judgment on the 29th May, 1903, and he therein agreed that the property was inalienable, and that Ghasimiya had power only to alienate it during the life of, or tenure of office as Kázi by, defendant No. 6. However, he held that defendant No. 6, who is the real defendant in the suit, is estopped from contending that Ghasimiya had no power of alienation beyond his lifetime.

Still for all that, in a further judgment delivered by the District Judge on the 22nd June, 1903, he confirmed the decree of the lower Court.

The Advocate General, representing the appellant before us, has contended that this decree of the District Judge is manifestly wrong, and if we were able to hold there was an estoppel, we think the Advocate General's argument would have been irresistible.

But in support of the decree it has been contended by Mr. Branson for the defendants, who have filed cross-objections, that the finding of estoppel cannot be supported.

The Advocate General has suggested that it is not open to us to go into this question in second appeal.

But I think that argument cannot prevail, because it has been held in *Lala Beni Ram* v. *Kundan Lall*,[1] that acquiescence is not a question of fact, but of legal inference from the facts found, and what is there said of acquiescence is equally

(1) (1899) 26 I. A. 58.

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applicable to estoppel. It is, we think, clear on the Judge's own findings that no case of estoppel has been established.

The law of estoppel is defined by section 115 of the Evidence Act, and all the Judge is able to say is that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. That is not sufficient. It must be found as a fact that the plaintiff would not have acted as he did. It must be found that the defendant by his "declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief," and the Judge has come to no finding which approaches this requirement.

The Judge himself in a later part of his judgment says that the Kázi, *i.e.*, the sixth defendant, did not consent to, or acquiesce in, a particular mortgage in respect of which he is said to be estopped, and when we come to the supplemental judgment of 22nd June, 1903, it is obvious that the Judge's mind was not convinced of the existence of those conditions which we have described as being imperative for the application of the doctrine of estoppel. But apart from this we think we could have interfered on second appeal, inasmuch as the plea of estoppel was not suggested in the written statement; it was not made one of the issues in the first Court; it was not made a ground of appeal to the District Judge, and it for the first time makes its appearance in the issues raised for decision in the lower Appellate Court.

We think in these circumstances it was wrong for the Judge to have entertained the plea at that stage.

For these reasons we think that the decree must be confirmed with costs.

Decree confirmed.