

ant be ordered to re-convey the property in suit to the plaintiff and put him in possession thereof. The plaintiff must have all his costs after the remand. Up to remand the parties must bear their own costs.

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Decree reversed.

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APPELLATE CIVIL.

Before Mr. Justice Beaman and Mr. Justice Hayward.

SHRIDHAR BALKRISHNA (ORIGINAL PLAINTIFF), APPELLANT, v. BABAJI MULA (ORIGINAL DEFENDANT), RESPONDENT.⁶

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July 2.

Khoti Settlement Act (Bom. Act I of 1880), sections 9 and 10⁽¹⁾—Khoti Takshim—Resignation of occupancy rights—Transfer—Lease for a term of years—Expiration of the lease—Suit to recover possession—Impeachment of plaintiff's title—Consent of khots necessary for transfer—Resignation accompanied by consideration—Parties in pari delicto—Estoppel.

The defendant resigned his occupancy rights in a khoti takshim to the plaintiff, who was one of the Khots, in the year 1905. Synchronously with

⁶ Second Appeal No. 706 of 1913.

⁽¹⁾ Sections 9 and 10 of the Khoti Settlement Act (Bom. Act I of 1880) are as follows :—

9. The rights of khots, dharekaris and quasi-dharekaris shall be heritable and transferable.

Occupancy-tenants' rights shall be heritable, but shall not be otherwise transferable, unless in any case the tenant proves that such right of transfer has been exercised in respect of the land in his occupancy, independently of the consent of the khot, at some time within the period of thirty years next previous to the commencement of the revenue year 1865-66, or unless in the case of an occupancy-right conferred by the khot under section 11, the khot grants such right of transfer of the same.

10. If a privileged occupant resign the land or any portion of the land in his holding, or if any such occupant's land lapse for failure of heirs, or other persons entitled thereto, or is forfeited on the occupant's failing to pay the rent due in respect thereof, the land so resigned, lapsed, or forfeited, shall be at the disposal of the khot as khoti land free of all encumbrances, other than liens or charges created or existing in favour of Government.

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this resignation a lease for a term of five years was executed and the defendant attorned to the plaintiff in respect of the lands. The defendant's resignation was accompanied by consideration.

After the expiration of the term of the lease, the plaintiff sued to recover possession of the lands and the defendant impugned the plaintiff's title.

Held, dismissing the suit for recovery of possession, that the foundation of the plaintiff's title in 1905 was illegal, that the resignation and lease having been made at the same time and having formed part of what was virtually one transaction, if the transfer which the resignation was held to amount to were tainted with any illegality as being in contravention of the statute law, namely, the Khoti Settlement Act (Bom. Act I of 1880), the letting must go with it, that under section 9 of the said Act the consent of the Khots including the plaintiff was necessary to the validity of the transfer and it was not shown that such consent had been obtained, that accordingly the conditions stated in section 9 being not complied with there was no transfer under that section, nor could the transaction be regarded as a resignation under section 10 of the said Act because it was accompanied by consideration.

Held, further, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing the illegality of his title, nor was there any estoppel against any Act of Parliament or in India against an Act of the Legislature.

SECOND appeal against the decision of V. G. Kaduskar, Additional First Class Subordinate Judge of Ratnagiri with appellate powers, modifying the decree of J. A. Samant, Subordinate Judge of Chiplun.

The plaintiff sued to recover from the defendant possession of the thikans in suit together with Rs. 93 as arrears of rent for three years and future mesne profits. The plaint alleged that the defendant executed a rent note in plaintiff's favour on the 29th April 1905 and took the thikans for cultivation for a period of five years and that, instead of restoring possession of the same to the plaintiff as agreed in the rent note, the

But it shall not be competent to a privileged occupant at any time to resign a portion only of his entire holding except with the consent of the khot; and no privileged occupant shall be deemed to have forfeited his land on failure to pay rent unless such forfeiture is certified by the Collector.

defendant wrongfully continued to cultivate the thikans and to receive profits. Hence the suit.

The defendant admitted the rent note sued on and contended that the lands belonged to him and that he passed the rent note because the plaintiff gave him to understand that if he passed the rent note, the plaintiff would fix the rent payable by him once for all.

The Subordinate Judge found that the defendant did not prove that he passed the rent note for getting the rent payable by him as occupancy tenant fixed once for all and not for giving any right to the plaintiff to eject him as an ordinary tenant and in view of the provisions of section 92 of the Evidence Act the defendant could not raise any such contention, that the release relied on by the plaintiff as passed by the defendant was proved and the same was legal and that the plaintiff was entitled to recover possession and Rs. 52-2-3 as mesne profits for three years. He, therefore, passed a decree accordingly and directed inquiry into the amount of mesne profits from the date of the suit till delivery of possession to the plaintiff or till the expiration of three years.

On appeal by the defendant the appellate Judge found that the defendant possessed occupancy rights in the lands in suit, that the sale by him of those rights to the plaintiff was not legal and valid and that the transfer relied on by the plaintiff was a sale and not a resignation. The decree of the first Court was therefore modified by rejecting the plaintiff's claim for possession and the defendant was directed to pay only Rs. 62 to the plaintiff.

The plaintiff preferred a second appeal.

D. A. Khare and P. D. Bhide, for the appellant (plaintiff):—The document evidencing a transfer in our favour is a deed of release or resignation and is covered

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by section 10 of the Khoti Act. It is worded as a deed of release and the intention of the parties becomes quite apparent thereby.

Assuming that it is, as held by the lower Court, a deed of sale, section 9 of the Khoti Act of 1880 as amended by Act VIII of 1912 makes the khoti lands transferable with the consent of the khot and here the sale-deed passed in plaintiff's favour implies his consent to it. Therefore, the sale deed is valid.

Granting that the sale deed is invalid, the parties to it entered into a contract of tenancy treating the sale as legal and valid and the vendor-defendant admitted the title of the vendee-plaintiff. It is, therefore, not open to the defendant under section 116 of the Evidence Act to turn round and deny plaintiff's title. The defendant is estopped from denying the plaintiff's title. Estoppel by conduct also bars the defendant's contention: *Shyama Charan Bhattacharya v. Mokhuda Sindari Debi*⁽¹⁾, *Ayenuddin Nasya v. Srish Chandra Banerji*⁽²⁾, Caspersz on Estoppel, pp. 269-271, Halsbury's Laws of England, Vol. 13, pp. 369, 370.

V. B. Virkar, for respondent (defendant):—We submit that the deed relied on by the plaintiff is not a release or resignation but it is a deed of transfer or sale. Although it is worded as a deed of release or resignation, still, having regard to its substance, it is virtually a deed of sale. Besides, it was accompanied with consideration, therefore, the transaction is a sale under section 54 of the Transfer of Property Act. It has also been held that where a transaction is accompanied with consideration it is a sale: *Ramchandra v. Dattatraya*⁽³⁾, *Badeshah v. Narayan*⁽⁴⁾. The Khoti Act,

(1) (1911) 15 Cal. W. N. 703.

(2) (1906) 11 Cal. W. N. 76.

(3) (1907) 31 Bom. 267.

(4) (1907) 9 Bom. L. R. 829.

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as it was in form before the amendment of 1912, applies to the facts of this case. The deed of sale and the rent note were passed on the 29th April 1905 and they were part and parcel of the same transaction. Section 9 of the Khoti Act as amended by Bombay Act III of 1894 applies. Since the plaintiff has not proved either of the exceptions provided for by section 9 of the Khoti Act, the transfer of the occupancy land by the defendant, who is an occupancy tenant, to the plaintiff, who is one of the khoti sharers, is void and inoperative: *Badeshah v. Narayan*⁽¹⁾, *Mahadev v. Mahadaji*⁽²⁾. The contract contained in the sale deed is therefore void. The consent of the khot does not make the transfer of the khoti lands valid unless and until either of the two exceptions provided for by section 9 is proved.

Assuming that the consent of the khot makes the transfer valid independently of the exceptions in section 9 of the amended Khoti Act of 1904, the transfer of the lands is void for want of the consent of the khot. The consent of the plaintiff alone is not sufficient because under section 3, clause (2) of the Khoti Act the term "khot" includes "all co-sharers in a khotki". The plaintiff is not the only khot of the village. There are other khoti sharers who, along with the plaintiff, hold the village in joint possession. Those khoti sharers must be shown to have consented to the transfer, and that is not done.

The doctrine of estoppel cannot apply. Both the documents were executed between the same parties and at one and the same time. They were one transaction. Therefore if the sale deed falls, the rent note also must fall with it. Section 116 of the Evidence Act is, therefore, not applicable.

(1) (1907) 9 Bom. L. R. 829.

(2) (1911) 13 Bom. L. R. 1157.

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Khare, in reply.

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BEAMAN, J.:—In this suit the defendant purported to resign his occupancy rights in a Khotki to the plaintiff, who was one of the Khots, in the year 1905. Synchronously with this resignation a lease for a term of five years was executed, and the defendant attorned to the plaintiff in respect of these lands. It is found as a fact that the proposed resignation was accompanied by consideration. After the expiration of the term the plaintiff has sued the defendant upon the lease, and the question of greatest difficulty which has arisen in the appeal is, whether the defendant is entitled to impugn the plaintiff's title?

We pass over the nice point whether the estoppel mentioned in section 116 of the Evidence Act survives the term upon which the lands may have been demised. This difficulty would arise upon a construction of the words "during the continuance of the tenancy"? We think it unnecessary to give any decision upon that point, because we entertain no doubt but that the defendant is not estopped from challenging the legality of the plaintiff's title. There is no estoppel against an Act of Parliament or in this country against an Act of the Legislature. It is to be remembered that the transfer or resignation and the lease were made at the same time and formed parts of what is virtually one transaction. If the transfer is found to be tainted with any illegality as being in contravention of any provision of the Statute law the letting must go with it. We entertain no doubts in the state of the authorities but that this alleged resignation must be now regarded as a transfer. That has already been decided in more than one case in this Court, and must be regarded as settled law. Then, if a transfer, it could only be legal under section 9 of the Khóti Act, provided that the conditions set forth in that section have been complied with. The

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essential condition which we have to consider is whether the consent of the Khot was obtained, for it is not alleged that this transfer could be validated on the ground of any custom proved, authorising a tenant so to alienate his occupancy rights without the consent of the Khot. It is not seriously contended that the consent of the Khot within the full meaning of that term has been obtained. One Khot, the man in whose favour the void resignation was made, has of course consented. It is admitted that there are other Khots whose consent would also be necessary, and it is not suggested that that consent has been obtained. In these circumstances there could be no transfer under section 9. That section expressly makes occupancy rights of this kind non-transferable unless the conditions stated in the section have been complied with; nor, as we said, in the state of authorities could it be regarded as a resignation under section 10 since it was accompanied by consideration. Therefore the foundation of the plaintiff's title in 1905 is shown to have been illegal. It was, moreover, a contract between the plaintiff and the defendant here, so that both parties may be said to have been *in pari delicto*, and the plaintiff is not entitled to estop the defendant from showing the illegality of the title so founded. We must, therefore, confirm the decree of the Court below and dismiss this appeal with all costs upon the appellant.

Appeal dismissed.

G. B. R.