APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

LAXMANLAL KANAKKIRTI PANDIT (ORIGINAL DEFENDANT), APPELLANT, v. MULSHANKAR PITAMBARDAS VYAS (ORIGINAL PLAINTIFF), RESPONDENT.* *1908. April 1.*

Contract Act (IX of 1872), section 24—Criminal Procedure Code (Act V of 1898), section 513—Criminal Prosecution—Bail for appearance—Nominal sale-deed and rent-note passed to indemnify bail—Suit for recovery of rent—Sale-deed void as opposed to public policy—Rent-note and sale-deed part and parcel of same transaction—Rent-note void.

While a criminal prosecution was pending against the defendant his pleader entered into a bail bond for his appearance. To indemnify the pleader against any loss which he might suffer under the bail bond, a nominal sale-deed and a nominal rent-note were passed by the defendant to the plaintiff.

The plaintiff having subsequently brought a suit to recover two years' rent with interest on the strength of the rent-note the defendant met the claim by a denial that the property belonged to the plaintiff.

Held, dismissing the suit that the consideration for the sale-deed was opposed to public policy. The sale-deed was therefore void under section 24 of the Contract Act (IX of 1872).

Herman v. *Jeuchner* (1) referred to.

Held, further, that as the sale-deed and rent-note, which latter was merely intended to secure interest on the principal sum, were part and parcel of one single transaction, the rent-note was tainted with the same illegality which affected the sale-deed and was therefore also void.

Part of a single consideration for one object being unlawful, the whole agreement is void under section 24 of the Contract Act (IX of 1872).

SECOND appeal from the decision of R. Knight, District Judge of Ahmedabad, reversing the decree of N. V. Samant, Additional Joint Subordinate Judge of Ahmedabad.

The plaintiff sued to recover two years' rent of certain houses and interest alleging that the houses originally belonged to the defendant who sold them to the plaintiff for Rs. 8,000 under a deed, dated the 5th October 1901, and was continued in possession as a tenant under a rent-note passed on the same day.

* Second Appeal No. 279 of 1907.

(1) (1885) 15 Q. B. D. 561.

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The defendant denied the plaintiff's ownership and stated as follows :—A criminal prosecution was launched against him and he had to give security for his appearance in the Criminal Court. His pleader Laxmishankar stood surety for him. In order to ensure the safety of Laxmishankar, the defendant passed a sale-deed and a rent-note to the plaintiff who was Laxmishankar's near relation and in whom the defendant had confidence. He was subsequently discharged from the criminal prosecution and the bail bond passed by Laxmishankar was consequently cancelled. The plaintiff was never put in possession. There was no consideration for the sale-deed and that deed as well as the rent-note were void. The plaintiff had brought a suit against the defendant in the Court of Small Causes at Ahmedabad for the recovery of rent, but that Court dismissed the suit. Subsequently the plaintiff brought a possessory suit in the Mámlatdár's Court but that suit also was dismissed.

The Subordinate Judge found that the sale set up by the plaintiff was a mortgage by conditional sale, that the consideration for it was Rs. 3,000, that the rent note was a nominal transaction and that the defendant did not occupy the premises as plaintiff's tenant. He therefore dismissed the suit with costs and directed the defendant to bear his own costs.

On appeal by the plaintiff the District Judge held that under section 92 of the Evidence Act (I of 1872), it was not competent to the defendant to adduce evidence of a contemporaneous oral agreement varying the terms of the sale-deed. He therefore reversed the decree and allowed the claim but directed the plaintiff to bear costs throughout.

The defendant preferred a second appeal and the plaintiff presented cross-objections under section 561 of the Civil Procedure Code (Act XIV of 1882).

G. S. Rao for the appellant (defendant).

Branson (with *T. R. Desai*) for the respondent (plaintiff).

The appeal was argued on the 17 July 1907 before a Division Bench composed of Chandavarkar and Heaton JJ., who agreed with the District Judge that parol evidence was not

admissible to prove a contemporaneous oral agreement varying the terms of the deed, but relying on the maxim *ex turpi causa non oritur actio* sent down the following issues for trial :—

"(1) Did the defendant execute the sale-deed, Exhibit 49, and the rent-note for the purpose and consideration mentioned in his written statement, *viz.*, 'to ensure the safety of Laxmishankar for his having stood bail' and for further advances?

(2) If the first issue is found in the affirmative, did defendant execute the sale-deed and the rent-note in the name of the plaintiff at Laxmishankar's request and did plaintiff take the deed in his name with knowledge of the said consideration and purpose and merely for Laxmishankar's accommodation?

(3) Whether both the sale-deed and the rent-note or either are or is wholly or partially void or illegal?

(4) Did the defendant receive moneys or other benefit under the sale-deed and is he entitled to be relieved from it upon any and what condition?

(5) Is the defendant estopped from contending that the transactions represented by the sale-deed and rent-note are illegal?

Parties are at liberty to give evidence on these issues. Findings to be returned within four months."

The District Judge (Dayaram Gidumal) sent the case down to the Subordinate Judge to record additional evidence and to certify his findings on the said issues. The findings of the Subordinate Judge (Chimanlal Lallubhai) were to the following effect:—

(1) In the affirmative.

(2) In the affirmative.

(3) Both the sale-deed and rent-note were wholly illegal.

(4) The defendant received Rs. 912-4-0 under the sale-deed and he was entitled to be relieved from it on payment of the said sum with interest at the rate agreed, but not in the present suit.

(5) In the negative.

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The District Judge recorded the following findings :—

(1) In the affirmative.

(2) The documents were executed at Laxmishankar's request and plaintiff took the sale-deed in his name with knowledge of the said consideration and purpose. But he did not take the deed *merely* for Laxmishankar's accommodation. He took it for Laxmishankar's accommodation to the extent of Rs. 5,000.

(3) The documents were wholly illegal (section 24 of the Contract Act).

(4) The defendant did receive moneys under the sale deed. He was entitled to be relieved from the deed, but was bound to pay back (in a suit properly framed for the purpose) the money received with interest (section 65 of the Contract Act). The present suit was, however, not based on the sale-deed but upon the rent-note. It was also not for money had and received. Hence it was not necessary to determine the precise amount received. The suit being for rent the necessary materials for such determination had not been placed before the Court.

(5) In the negative.

The plaintiff preferred objections against the said findings.

G. S. Rao for the appellant (defendant).

G. K. Parekh for the respondent (plaintiff).

BATCHELOR, J.:—This was a suit for rent claimed by the plaintiff for a period of two years with interest. The claim was met by a denial that the property belonged to the plaintiff, and the defendant explained that, while a criminal prosecution was hanging over his head his pleader Laxmishankar stood bail for his appearance in the Criminal Court; and that to indemnify Laxmishankar against any loss which he as bail might suffer, a nominal sale-deed and a nominal rent-note were passed to Laxmishankar's relative, the plaintiff.

Various issues were raised and decided and ultimately in July 1907, the case came before a Divisional Bench of this Court and an interlocutory judgment was delivered remanding the case back for a trial of certain issues which had arisen. The District Judge's findings upon these issues have now been

returned to us, and for present purposes it will be sufficient to notice three of these findings; they are:—

(1) That the defendant executed the sale-deed, Exhibit 49, and the rent-note to ensure the safety of Laxmishankar against any loss which he might suffer under his bail bond and for further advances.

(2) That the defendant executed the sale-deed and the rent-note in the name of the plaintiff at Laxmishankar's request, and the plaintiff took the deed in his name with knowledge of the said consideration and purpose.

(3) That both the sale-deed and the rent-note are void and illegal.

Now it will be seen that the first two findings from which the third finding is merely an inference, are findings of fact which neither can be nor have been questioned before us. We must assume the correctness of these findings of fact, and upon that assumption it appears to us clear that the legal consequence follows that the sale-deed and the rent-note upon which this suit is based are void. The Hon'ble Mr. Gokuldas in endeavouring to avoid this conclusion has suggested that the English law as laid down in *Herman* v. *Jeuchner*[1] is not the law in India, inasmuch as under section 513 of the Criminal Procedure Code, when a person is required to execute a bond with or without sureties, the Court may in most cases permit him to deposit a sum of money in lieu of executing such bond; and this provision Mr. Gokuldas suggests, indicates that the policy of the English law as expounded in *Herman* v. *Jeuchner*[1] has been abandoned by the legislature in India. But it appears to us that no such inference can properly be drawn from section 513, for, the deposit there allowed is allowed in substitution only of the bond which the principal himself would otherwise execute, not in substitution of any bond which his surety executes.

Moreover the fact here is that Laxmishankar, the surety, bound himself by a bond to answer for the defendant's appearance, and then endeavoured by obtaining this indemnity to deprive the public of the security afforded by the bond. Although, no doubt, public policy as Lord Davey has observed is always an unsafe and treacherous ground for legal decision (*Janson* v. *Driefontein Consolidated Mines, Limited*)[2], yet, here this definite

(1) (1885) 15 Q. B. D. 561. (2) (1902) A. C. 484 at p. 500.

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principle of public policy has been admitted in England and depends upon considerations affecting the administration of public justice, which have certainly not less force in India than they have in England. We think, therefore, that under section 23 of the Contract Act we are bound to regard the consideration of this agreement as opposed to public policy and to hold that the agreement is in consequence void.

Then it was said, that whatever illegality might attach to the sale-deed, yet the rent-note was a seperate transaction and the suit under the rent-note ought not therefore to suffer. But the sale deed and the rent-note were part and parcel of one single transaction, and though indeed the document is spoken of as a rent-note, yet it appears that its real object was to secure interest on the principal sum. We have no doubt, therefore, that the rent-note is tainted with the same illegality which affects the sale-deed, and cannot stand on any separate footing.

Next it was urged that the defendant was estopped under section 116 of the Evidence Act from pleading the true facts, inasmuch as he was a tenant of the plaintiff. But this, it seems to us, begs the whole question which is simply whether there was a valid tenancy or not.

Finally, it was urged that even if part of the consideration for the rent-note failed, yet part of it should be held not to fail, and to the extent of the part held good relief should be allowed to the plaintiff in this suit. It is, however, clear to us that the agreement was an indivisible agreement. Part of a single consideration for one object was unlawful, and therefore the whole agreement is void under section 24 of the Contract Act. As was said by Mr. Justice Chitty in *Baker* v. *Hedgecock*[1], it is not possible for the Court to "create or carve out a new covenant for the sake of validating an instrument which would otherwise be void". The suit is a suit for rent, and is based upon a rent-note which is void.

It follows that the suit must be dismissed and no relief can be awarded to the plaintiff. As to whether the defendant, if the plaintiff seeks to enforce the sale-deed, should be put upon any,

(1) (1888) 39 Ch. D. 520 at p. 523.

and if so what terms, that is a matter which does not arise before us now, but which will be considered at the proper time and place if the question is agitated. The result is that the District Judge's decree must be reversed and the decree of the Court of first instance must be restored. Costs throughout on the plaintiff except as to the defendant's costs in the Court of first instance which he himself will bear.

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Decree reversed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Heaton.

PAWADEWA KOM CHANBASAPPA MULLAH AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 3), APPELLANTS, *v.* VENKATESH HANMANT KULKARNI AND OTHERS (ORIGINAL PLAINTIFFS 1 AND 3, AND DEFENDANTS 3 AND 4), RESPONDENTS.*

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April 14.

Hindu law—Inheritance—Exclusion from inheritance—Deaf and dumb son—Vesting of the estate in the widow of the last male holder—Subsequent birth of a son to one of the disqualified sons—Divesting of estate.

M., a Hindu, died leaving him surviving a widow and three sons C. and two others, all of whom were born deaf and dumb. His widow succeeded to the estate, the sons being disqualified from inheriting. Later on C. married and a son was born to him. The widow thereafter sold the property to plaintiffs who now sued to recover possession from the wife and son of C. It was contended for the defendants that the widow succeeding to her husband, took only a widow's estate and that that estate was divested by the after-born son of C.

Held, that the plaintiffs were entitled to succeed. Both in fact and in contemplation of law C.'s son had no existence when the estate vested in the widow; and his subsequent birth could not divest the estate.

Held, further, that C.'s son stood in no better position than would have been occupied by his father C. if the latter's disqualification had been removed after the widow had succeeded to the inheritance; and in that case, the widow's title would prevail inasmuch as it was superior to C.'s while his disqualification endured.

* Second Appeal No. 530 of 1907