

APPELLATE CIVIL.

Before Sir Basil Scott, Chief Justice, and Mr. Justice Batchelor.

CHHAGANLAL KISHOREDAS (ORIGINAL PLAINTIFF), APPELLANT, v.
BAI HARKHA (ORIGINAL DEFENDANT No. 2), RESPONDENT.*

1909.

March 23.

Civil Procedure Code (Act XIV of 1882), sec. 13—Res judicata—Plea of res judicata can prevail even where its effect is to sanction what is illegal—Bhāgdāri and Narwādāri Tenures Act (Bombay Act V of 1862), sec. 3.†

A plea of estoppel by *res judicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute.

SECOND appeal from the decision of Chimanlal Lallubhai, First Class Subordinate Judge, with appellate powers, at Ahmedabad, confirming the decree passed by B. G. Desai, Subordinate Judge at Kaira.

Suit to recover rent.

The property, with respect to which the suit was brought, belonged to Govind and Gokul. It formed a portion of a bhāg or share; any alienation, assignment, &c., of which was prohibited by the Bhāgdāri and Narwādāri Tenures Act (Bombay Act V of 1862), sec. 3.

The lands in dispute which formed an unrecognised sub-division of a bhāg, were mortgaged by Govind and Gokul to Chhaganlal Kishoredas (plaintiff) with possession on the 3rd February 1893. On the same day Govind passed a lease to the plaintiff for a term of five years. There were many other subsequent leases, the last of which was passed by Govind for a period of one year on the 10th September 1902. Even after the

* Second Appeal No. 244 of 1908.

† The section runs as follows:—

3. It shall not be lawful to alienate, assign, mortgage or otherwise charge or incumber any portion of any bhāg or share in any Bhāgdāri or Narwādāri village other than a recognised sub-division of such bhāg or share, or to alienate, assign, mortgage or otherwise charge or incumber any home-stead, building-site (gabhān) or premises, appurtenant or appendant to any such bhāg or share, or recognised sub-division, appurtenant or appendant thereto, apart or separately from any such bhāg or share or recognised sub-division thereof.

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expiry of this period, Govind remained in possession of the lands till his death which took place in June 1905. After his death, his widow Bai Harkha (defendant 2) cultivated the lands on behalf of herself and her minor son Ambalal (defendant 1).

During Govind's life-time, he was sued by the plaintiff for rent for the years 1902-03 and 1903-04 and an *ex parte* decree was passed against him.

The plaintiffs now sued the defendants to recover from them rent for the years 1904-05 and 1905-06.

Defendants contended (*inter alia*) that the land in suit was Narwā land, and that the sale or mortgage thereof in favour of any person other than a Narwādār was invalid and that it could not be dismembered, and that as the plaintiff could not get possession of the land under the Bhāgdāri Act he could not claim the rent thereof.

The Court of first instance held that the mortgage in favour of the plaintiff was illegal, and the lease of the land on the basis of the said mortgage was invalid, and that the plaintiff could not recover damages in lieu of rent.

On appeal, the only issue raised in the lower appellate Court was: "Are the defendants-respondents estopped from denying the title of the plaintiff-appellant and are they liable for the amount claimed by the plaintiff-appellant?" This issue was found in the negative.

The plaintiff appealed to the High Court.

H. C. Coyaji (with *L. A. Shah*), for the appellant:—We concede that the mortgage in our favour is void under the Bhāgdāri Act, 1862; but the lease which has been passed to us is not on that account void. The lessee Govind paid to us rent for a number of years, and even allowed an *ex parte* decree for rent to be passed against him. Refers to *Rungo Lall v. Abdool Guffoor*⁽¹⁾; *Venkatesh Narayan Pai v. Krishnaji Arjun*⁽²⁾; *Balaji v. Ramchandra*⁽³⁾; *Patel Kilabhai v. Hargovan*⁽⁴⁾; *Morton v. Woods*⁽⁵⁾; *Seshamma Shettati*

(1) (1878) 4 Cal. 314.

(3) (1902) 27 Bom. 262.

(2) (1875) 8 Bom. 160.

(4) (1894) 19 Bom. 133.

(5) (1869) L. R. 4 Q. B. 293.

v. *Chickaya Hogade*⁽¹⁾. The decree in the previous suit operates as *res judicata*: *Dwarka Das v. Akhay Singh*⁽²⁾; *Jamadar Singh v. Serazuddin Ahmad Chaudhuri*⁽³⁾.

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Ratanlal Ranchhodas for the respondent:—We submit that not only is the mortgage void under the Bhagdári Act, 1862; but the lease also shares the same character, it being an alienation of an unrecognized division of a bhág under section 3 of the Act.

The decree against Govind being *ex parte* cannot operate as *res judicata*: *Modhusudun Shaha Mundul v. Brae*⁽⁴⁾. Further, where the effect of *res judicata* is to validate what has been specifically prohibited by statute the plea should not be allowed to prevail; otherwise, it would be open to the parties to effect transactions in an indirect way, which they cannot do in face of the statute.

SCOTT, C.J. :—On the 3rd of February 1903 a possessory mortgage of certain Bhagdári land was executed by Govind Khodabhai and his brother in favour of the plaintiff. On the same day Govind passed a tenancy agreement to the plaintiff whereby he took the land as lessee for five years. Further agreements of a similar nature were subsequently executed by Govind in the plaintiff's favour the last being of the 18th September 1902 for one year. After the expiry of that year Govind continued in possession of the land until his death in June 1905. On his death his widow the second defendant cultivated the land on behalf of herself and the first defendant her minor son. This suit has been brought by the plaintiff to recover the rent of the land for two years namely 1904-5 and 1905-6. No objection has been taken that rent accruing due in the life-time of Govind is not claimable against the defendants personally in this suit. The plaintiff comes here in special appeal having failed in both the lower Courts.

The land the subject of the mortgage and of the tenancy agreements is Bhagdári land, part of a Narwa, but not a recognised sub-division of a share or Bhág: the mortgage is therefore unlaw-

(1) (1902) 25 Mad. 507.

(2) (1908) 30 All. 470.

(3) (1908) 35 Cal. 979.

(4) (1889) 16 Cal. 300.

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ful and void under section 3 of the Bhagdári Act (Bombay Act V of 1862). It is argued on behalf of the defendants that the tenancy agreements, whether express or implied under which the mortgagor Govind and his heirs have remained in possession are void as being alienations tainted with the same vice as the principal transaction and that rent is therefore not recoverable. For the plaintiff it is contended that not only are these arguments unsound but also that they are no longer open to the defendants because the plaintiff's right to recover rent has been established by an *ex parte* decree against Govind obtained by the plaintiff for rent in respect of the years 1902-3 and 1903-4. It is argued that the questions now raised by the defendants might and ought to have been raised in the suit in which the decree was obtained and must be taken to have been decided against the plaintiff since they claim title merely by virtue of their heirship to Govind. It cannot be disputed that if the points now raised by the defendants are good they would have been equally good for the purposes of defence in the previous suit; they ought therefore to have been raised. It was however suggested by the pleader for the defendants that a plea of estoppel by *res judicata* cannot prevail where the result of giving effect to it will be to sanction what is illegal. This however is not the law. No such limitation is contained in section 13 of the Code of 1882. If the legality of an act is a point substantially in dispute it may be a fair subject of compromise in Court like any other disputed matter and thus become *res judicata*: see *Great North-West Central Railway v. Charlebois* ⁽¹⁾; similarly if it is abandoned or not put forward by a defendant it must, having regard to the provisions of section 13, be deemed to have been decided against him. The defences raised are therefore not now open to the defendants and the plaintiff is entitled to the rent claimed.

We reverse the decree of the lower Courts and pass a decree for the plaintiff for the amount claimed with costs throughout.

Decree reversed.

R. R.

(1) [1899] A. C. 114 at p. 124.