

and 1900 under section 86 of that Code. It is no answer to say, as does the District Judge, that the decisions were *ex parte* and the plaintiffs did not appear. These proceedings together with the fact that Raghunath Ramchandra and since him the defendants have been the Khátedárs of the lands in suit are evidence of a title in the defendants which must prevail against the failure of the plaintiffs to prove any title.

We reverse the decree and dismiss the suit with costs throughout:

Decree reversed and suit dismissed.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

HARIBHAI HANSJI (ORIGINAL PLAINTIFF), APPELLANT, v. NATHUBHAI RATNAJI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Indian Contract Act (IX of 1872), section 65—Agreement discovered to be void—Compensation, payment of—Bhagdari Act (Bombay Act V of 1862)—Alienation of unrecognised sub-division of a bhag—Valatdana patta.

In 1902, the plaintiff executed a *valatdana patta* of lands forming an unrecognised sub-division of a *bhag*, in favour of defendants who were put in possession. The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (Bombay Act V of 1862); and following the decision of *Jijibhai v. Nagji*⁽¹⁾ ordered that the plaintiff could recover possession on payment of moneys he had received from the defendants. The plaintiff having appealed:—

Held, that the order of compensation against the plaintiff was justified, inasmuch as the agreement was discovered to be void within the meaning of section 65 of the Indian Contract Act (IX of 1872) long after the transaction, and as there was a personal covenant in the agreement.

* Second Appeals Nos. 42 and 43 of 1913.

⁽¹⁾ (1909) 11 Bom. L. R. 693.

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Per Shah, J.—Neither under section 65 of the Indian Contract Act nor under the ruling in *Jijibhai v. Nagji*⁽¹⁾ is the Court bound to award compensation in all cases as a matter of course where a document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case.

SECOND appeal from the decision of Mohanrai Dolatrai, First Class Subordinate Judge with Appellate Powers, at Broach, modifying the decree passed by C. M. Jhaveri, Joint Second Class Subordinate Judge, at Broach.

Suit to redeem a mortgage.

The plaintiff executed a *valatdana patta*, on the 10th June 1902, in favour of the defendants in respect of his lands which formed an unrecognised sub-division of a *bhag*. The deed in question contained a personal covenant whereby the plaintiff undertook to indemnify the defendants in case their possession was obstructed.

In 1910, the plaintiff sued to redeem the *valatdana patta* after taking accounts under the provisions of the Dekkhan Agriculturists' Relief Act, 1879, and to recover possession of the lands.

The Subordinate Judge held that the *valatdana patta* in suit was a mortgage; that it was void under the provisions of the Bhagdari Act (Bombay Act V of 1862); and that the plaintiff was entitled to recover possession of the lands, only on payment of Rs. 367, the amount he had received under the transaction. The amount carried interest at 6 per cent. and was made payable in six equal annual instalments.

On appeal, the lower appellate Court made a variation in the provision about interest, but in other respects, confirmed the decree on the following grounds :—

⁽¹⁾ (1909) 11 Bom. L. R. 693.

Plaintiff's (appellant's) pleader seems, however, to think that this restoration should have been ordered in his favour without his being called upon to pay anything to the contending defendant as the bonds were so void but there the ruling in 11 Bom. L. R. 693 is a clear authority for holding that even in cases of transactions so void *ab initio* the defendant ought not to be ordered to give up the lands without receiving back his moneys.

Plaintiff has himself been a party to the illegality and it is but just that the *status quo* ought to be restored only on equitable terms.

It seems but equitable therefore that the plaintiff must make due amends to the defendant before claiming restoration under his own unlawful act, and I am not prepared to hold therefore that the lower Court was at all wrong in directing the plaintiff to make a certain refund to the defendant as consideration passed to him under the impeached transaction.

The plaintiff appealed to the High Court.

G. N. Thakore, for the appellant :—Section 65 of the Indian Contract Act applies only where the transaction is 'discovered to be void.' It has no application to the present case where the alienation being of an unrecognised sub-division of a *bhag* is void *ab initio*. The cases of *Ramchandra v. Jairam*⁽¹⁾, *Jijibhai v. Nagji*⁽²⁾, *Mohori Bibee v. Dharmodas Ghose*⁽³⁾ and *Dayabhai Tribhovandas v. Lakhmichand Panachand*⁽⁴⁾; referred to.

N. K. Mehta, for the respondent :—This case is fully covered by *Jijibhai v. Nagji*⁽²⁾. The defendant is entitled to compensation either under section 65 of the Indian Contract Act or under the covenant under the mortgage-deed. *Gulabchand v. Fulbai*⁽⁵⁾, referred to.

SHAH, J. :—In this case the plaintiff sued formally to redeem but substantially to recover possession of the property mentioned in the *valatdan patta* dated the 10th of June 1902. Several defences were raised to this suit on behalf of defendant No. 1. It was held by the trial Court that the document called the *valatdan patta*

(1) (1897) 22 Bom. 686 at p. 691.

(3) (1903) 30 Cal. 539.

(2) (1909) 11 Bom. L. R. 693.

(4) (1885) 9 Bom. 358.

(5) (1909) 33 Bom. 411.

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was a mortgage, that the plaintiff was entitled to recover possession, and that he was liable to give certain compensation to the defendant as claimed by him. The decree of the trial Court was confirmed subject to a slight variation as to interest by the lower appellate Court.

The plaintiff has now appealed and has urged that the order of the lower Court allowing compensation to the defendant is wrong, firstly because the bond is void under section 257A of the Code of Civil Procedure of 1882, and secondly because the bond is void in virtue of the provisions of the Bhagdari Act. It is contended that no compensation under section 65 of the Indian Contract Act should be allowed, as it must be assumed, in the absence of any evidence to the contrary, that at the time when the agreement was entered into, the parties were aware of the real nature of the transaction.

As to the first point, from the recitals in the document, the amount of the bond does not appear to be in excess of the decretal amount. There is no evidence in the case to show that at the date of the bond the amount due under the decree was less than the amount of the bond. The appellate Court has observed that in this case the bond appears to have been taken for 'far shorter amount.' Under these circumstances I am of opinion that the bond is not proved to be void in virtue of section 257A in this case. It is not necessary, therefore, to consider the question whether compensation under section 65 of the Contract Act could be allowed, if the bond were void under section 257A.

As regards the second point the facts are that the defendant obtained possession of the property from the date of the bond and continued in possession up to the date of the suit. The plaintiff brought the suit in 1910 to recover possession of the property. Until then it appears that no obstruction was caused to the defend-

ants' possession under the bond. The plaintiff thought of recovering possession on the ground that the mortgage of an unrecognized portion of a *bhag* was void in this suit. There is nothing to show that the defendant was aware of the fact that the bond was void under the Bhagdari Act at the date of the bond. It is clear that the bond was discovered to be void after the suit was brought. Assuming for the sake of argument that the plaintiff's contention that section 65 of the Contract Act has no application to a case, in which the parties are aware at the time of the transaction that it is void, is good, I am of opinion that in this case the agreement is discovered to be void within the meaning of section 65 of the Contract Act long after the transaction. It is clear that if the agreement is discovered to be void, it is open to the Court to allow compensation to the person to the extent of the advantage received under such agreement by the other side. In this case we have the additional circumstance that there is a personal covenant in the bond to give compensation in case there is any hindrance caused to the possession of the defendant under the bond. I am of opinion that even under this covenant the order of compensation against the plaintiff would be justified. This view is supported by the ruling in *Jijibhai v. Nagji*⁽¹⁾. The lower appellate Court appears to have thought that in view of *Jijibhai's* case, the defendant ought not to be ordered to give up the lands without receiving back his moneys. It is necessary, however, to remember that neither under section 65 of the Indian Contract Act nor under the ruling in *Jijibhai's* case is the Court bound to award compensation in all cases as a matter of course where the document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agree-

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ment is discovered to be void and whether any person has received any advantage under such agreement as required by section 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined with reference to the circumstances of each particular case. In the present case there is no dispute about the amount. The parties were agreed in the lower Courts that if the compensation could be awarded to the defendant, the amount should be that which is allowed by the lower Courts. Under the circumstances of this case I feel satisfied that both under section 65 as also under the covenant contained in the bond the order as to compensation is correct.

Lastly, having regard to the variation in the terms of the decree of the Court of first instance made by the lower appellate Court, the effect of which is not quite clear to us and which is likely to lead to complication in calculation, I am of opinion that it is desirable to restore the decree of the trial Court. That decree allows interest in a manner which under the circumstances of this case, I think, is fair. The difference between the decree of the trial Court and that of the appellate Court, as I understand it, is not of a very substantial character, and even in the absence of any cross-objection on the part of the defendant, I think under the circumstances it would be proper to restore the decree of the trial Court.

I, therefore, modify the decree of the appellate Court by restoring that of the trial Court subject to the proviso that the first instalment, if not paid, should be paid by the 31st of December 1913, the time for the payment of other instalments being the same as fixed by the decree of the trial Court.

The appellant should pay respondent No. 1's costs of this appeal and of the appeal in the District Court.

HEATON, J. :—I concur in the decree which is to be made and I have very little to add. I do think it necessary to point out that apparently on the strength of the case of *Jijibhai v. Nagji*⁽¹⁾ there is a tendency to assume that because an agreement is in fact void, it follows without more ado that it is discovered to be void within the meaning of section 65 of the Contract Act. Personally I do not think that any such thing necessarily follows. As my learned colleague indicates, in every case the circumstances of the case have to be looked to, and it has to be determined whether in that particular case section 65 of the Contract Act can properly be applied.

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Decree modified.

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ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Chandavarkar.

S. AMERCHAND & Co. (APPELLANTS AND 2ND DEFENDANTS) v. RAMDAS
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AND

CHHAGANLAL PITAMBER (APPELLANTS AND 2ND DEFENDANTS) v.
RAMDAS VITHALDAS DURBAR (RESPONDENT AND 1ST DEFENDANT).†

*Contract Act (IX of 1872), sections 4, 61 and 103—Transfer of Property Act
(IV of 1882), section 137—Stoppage in transit—Instruments of title—
Railway receipts, effect of assignment of.*

A, from Bagalkote, consigned to B at Bombay certain consignments of bales of cotton. These consignments A entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay, which was effected

* Suit No. 668 of 1911 : Appeal No. 4 of 1912.

† Suit No. 670 of 1911 : Appeal No. 7 of 1912.