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MADAPPA GANAPPA v. JAKI GHOSAL.

tion for the smaller sum shall be entered on the decree" contained in Order XXI, rule 19 (*b*). The respondents were entitled, on the other hand, to the larger sum, consisting of their costs, but were only entitled to recover "so much only as remains after deducting the smaller sum" as prescribed in the said order. The respondents, therefore, were the only parties entitled to take out execution at all and that execution could only be for the balance "after deducting the smaller sum." It cannot, therefore, be said that recovery of the part of their costs set off against that smaller sum was time-barred, because no application could have been made in respect of that part at all. But it can be said that recovery of the balance would be time-barred under the ordinary rule of limitation applicable to the execution of decrees. In fact it has been admitted that recovery of the balance would be time-barred under article 182 of the schedule to the Indian Limitation Act.

Appeal dismissed.

R. R.

APPELLATE CIVIL.

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

1915.

July 21.

NAZARALLI SAYAD IMAM (ORIGINAL PLAINTIFF) APPELLANT *v* BABAMIYA DUREYATIMSHA (ORIGINAL DEFENDANT) RESPONDENT.[*]

Indian Contract Act (IX of 1872), section 23—Forest Act (VII of 1878)—License—Agreement to enter into partnership contravening the terms of the license—Agreement not unlawful.

[*] Second Appeal No. 836 of 1914.

1915.

NAZARALLI SAYAD IMAM v. BABAMIYA DUREYATIM-SHA.

An agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee is not forbidden by law, nor would it defeat the provisions of any law.

Raghunath Lalman v. *Nathu Hirji Bhate*[1] distinguished.

SECOND appeal against the decision of E. Clements, District Judge of Khandesh, reversing the decree passed by B. G. Phatak, Subordinate Judge of Shirpur.

Plaintiff alleged that on the 19th August 1912 grass from nine coups within Chopda Range were sold by auction at Jalgaon by the forest authorities; that both the plaintiff and defendant had been to Jalgaon to bid for and secure the coups at the auction sale; that it was agreed that the coups should be secured in partnership between the parties but in the name of defendant alone; that they were to contribute half the sum each towards the deposit and to share equally in the resulting profit or loss; that the plaintiff offered his share in the deposit of Rs. 261 made by the defendant but the latter declined to accept the same and denied the partnership agreement. The plaintiff, therefore, sued to have it declared that he was entitled to recover half the share in the profit and loss made by the defendant in the grass contract for nine forest coups and recover the sum falling to his share as damages.

The defendant denied the partnership agreement and contended that the agreement was contrary to rule No. 2 of the license issued by the forest authorities. The terms of the rule being: "Without previously obtaining the permission of the Divisional Forest Officer, this contract in whole or part of it or any interest in it should not be sublet or assigned to any one." That the suit being based on such an agreement was void under section 23 of the Indian Contract Act (IX of 1872).

[1] (1894) 19 Bom. 626.

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The Subordinate Judge on a preliminary issue found that the agreement was not unlawful under section 23 of the Indian Contract Act 1872 and held that the suit for damages was maintainable. He observed as follows :—

"To turn now to the agreement as given above, I have to see whether the consideration or object of it was unlawful. From what I have given above it will be seen that the parties never intended that the partnership shall come into existence without any permission of the Divisional Forest Officer. Plaintiff has expressly stated in the plaint that the agreement was reduced to writing and every step, to legalize it, was to be taken in time to come. It cannot, therefore, be said that the object or consideration of the agreement was unlawful so as to render it void under section 23, Indian Contract Act. The rules also do not absolutely forbid any such partnership as was contemplated by the parties. They only state that no such partnership shall be recognised by the forest authorities, unless their permission in writing for the same is secured and a fine is prescribed to the ostensible contractor if any such partnership is formed and the sub-contractor allowed to work independently. The test to be applied to such agreements to determine whether they are void under section 23, is laid down on page 117, Second Edition, of Pollock and Mullas' Indian Contract Act. That which has been forbidden in public interest cannot be made lawful by paying the penalty for it, but an act which is in itself harmless does not become unlawful merely because some collateral requirements, imposed for reasons of mere administrative convenience has been omitted. Applying this test to the agreement in hand I find that the same cannot be unlawful between the parties to it though the forest authorities do not recognize it unless their permission is secured."

The District Judge on appeal reversed the decree, holding that the agreement of partnership in suit was unlawful and unenforceable.

The plaintiff preferred a second appeal.

Pendse with *H. G. Kulkarni* for the appellant :— The lower Court erred in holding that the agreement was void under section 23 of the Indian Contract Act. It is not opposed to public policy. The condition in the license that no partner shall be admitted in the contract without the written permission of the Forest

Officer is imposed merely for administrative purposes, *i.e.*, the convenient collection of the revenue. The terms of the license cannot override the statutory provisions of law and the licensee cannot be prevented from assigning part of his rights to a third party. There is nothing to show that the terms of the license have the full force of a statutory enactment. In this case the partnership was in the nature of financing the contractor and was, therefore, in no way opposed to public policy.

P. B. Shingne for the respondent :—There is nothing on the record of the case to show that the terms of the license are framed in accordance with the power to frame rules under section 31 of the Forest Act (VII of 1878), but they should be presumed to be so framed. The alleged partnership is in the nature of sub-letting and hence it contravenes the 2nd clause of the terms of the license. Any such sub-letting is also made penal and thus the agreement should be held void under section 23 of the Indian Contract Act, 1872.

SCOTT, C. J. :—The plaintiff sues the defendant to have it declared that he is entitled to recover half the share in the profit and loss made by the defendant in the grass contract for nine forest coups, and to recover the sum falling to his share as damages and costs. The defendant denied the alleged partnership in the terms set up in the plaint, and contended that the suit was bad as being based on an agreement, if there was such an agreement, which was void under section 23 of the Indian Contract Act.

The learned Subordinate Judge found that the agreement was not unlawful under section 23 of the Indian Contract Act. Therefore, he directed that a preliminary decree should be drawn up on that issue.

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The learned District Judge reversed the preliminary decree and remanded the case to the lower Court. The appellant has appealed to this Court on the ground that the lower Court erred in holding that the agreement of partnership was unlawful. But notwithstanding the pendency of the appeal it appears that the suit has been tried in the first Court on the basis of the judgment of the District Court being correct. That, however, need not prevent us from disposing of this appeal. We are of opinion that the judgment of the District Court is not correct. The section of the Indian Contract Act which is relied upon is section 23 which says :—" The consideration or object of an agreement is lawful, unless it is forbidden by law ; or is of such a nature that, if permitted, it would defeat the provisions of any law ;" and it is contended that because the license given by the Forest Officer prohibits the assignment of a share or interest in the lisense, therefore, this agreement to pay half the profits to the plaintiff falls within the words of section 23 above referred to. We have examined the Forest Act, and we have heard all that can be said by the pleader for the respondent in support of the judgment of the Court below. We are unable to find any provision of statute law which makes it obligatory upon the parties to observe the conditions of the license. Of course the license can be revoked by the Forest Officer if the licensee disregards the terms of it. It does not follow from that that an agreement to share profits, which would contravene the terms of the license as between the Forest Officer and the licensee, is forbidden by law, or would defeat the provisions of any law. The learned District Judge has relied upon the case of *Raghunath Lalman* v. *Nathu Hirji Bhate*,[1] which, however, is distinguishable. That was a case under the Opium

[1] (1894) 19 Bom. 626.

Act, under which the sale of opium was only permitted subject to such conditions as the Commissioner might, from time to time, prescribe. Therefore, the sale of opium by partners, who could not enter into partnership without contravening the condition prescribed, would violate the provisions of the Opium Act. We set aside the decree of the District Judge upon the preliminary issue, and direct the Judge of the lower Court to dispose of the case on the merits. The respondent must pay the costs in this Court and the lower appellate Court upon the preliminary issue.

Decree reversed.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice Beaman.

GANGABAI WIDOW *v.* SONABAI COWASJI GHEEVALA AND ANOTHER.[*]

1915. December 16.

Vendor and purchaser—Conveyance of property by an administratrix having a beneficial interest therein—No words of limitation in the agreement to convey specifying whether it was qua *administratrix or* qua *beneficial owner—Principle to be applied in ascertaining in what capacity the administratrix acted.*

Where a person has two estates, one larger and the other smaller, and purports to convey the entire property without any words of limitation, he must be taken to be conveying the highest estate he has ; that is to say, if an executor having a one-third personal beneficial interest in the estate purports to convey the whole of it without qualification or limitation, he must be taken to be conveying, in his character as executor and not in that of one having a beneficial interest only in a fraction of the whole estate purported to be conveyed.

In re Venn & Furze's contract[1] followed.

No distinction can be maintained in principle between actual conveyances and agreements to convey for the purposes of applying this general rule.

[*] O. C. J. Suit No. 397 of 1914.

[1] [1894] 2 Ch. 101.