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been seriously challenged. We cannot accede to that application because if we were to do so, we would uphold an order which declares the second opponent elected, whereas the law requires that there should be a by-election at which the voters should have a right to go to the election again and to vote for a person in whom they have confidence.

We must, therefore, set aside the order of the District Judge. The rule will be made absolute with costs. Opponent No. 2 to pay the petitioner the costs of this petition. He must also pay the costs of the election petition. No order as to costs against the Municipality.

Rule absolute.

M. W. P.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Vyas.

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 Nov. 27

GOVIND WAMAN SHANBHAG (ORIGINAL DEFENDANT NO. 3), APPELLANT v. MURLIDHAR SHRINIVAS SHANBHAG AND OTHERS (HEIRS OF ORIGINAL PLAINTIFFS NOS. 2 AND 3 AND DEFENDANT NO. 1), RESPONDENTS.*

Transfer of Property Act (IV of 1882), s. 10—Term in compromise decree restraining alienation—Term contrary to law—Whether decree becomes nullity.

A compromise decree which contains a term contrary to law is not for that reason a nullity.

Where, therefore, one of the terms of a compromise decree is opposed to the provisions of s. 10 of the Transfer of Property Act, 1882, in that it imposes an absolute restraint on alienation, the decree notwithstanding the term is binding between the parties unless it is set aside by appropriate proceedings.

Lakshmanaswami Naidu v. Rangamma,⁽¹⁾ and *Rai Kumar Singh v. Abhai Kumar Singh*,⁽²⁾ dissented from.

C. H. Kinch v. E. K. Walcott,⁽³⁾ *Pirojshah v. Manibhai*,⁽⁴⁾ *Cowasji v. Kisandas*,⁽⁵⁾ *Chhaganlal v. Bai Harkha*,⁽⁶⁾ *Basangouda v. Basalingappa*,⁽⁷⁾ and *Waman Vishwanath v. Yeshwant Tukaram*,⁽⁸⁾ referred to.

Great North-West Central Railway v. Charlebois,⁽⁹⁾ and *Kishandas Shivram Marwadi v. Nama Rama Vir*,⁽¹⁰⁾ distinguished.

* Second Appeal No. 874 of 1949.

⁽¹⁾ (1902) 26 Mad. 31.

⁽²⁾ [1929] A. I. R. P. C. 289.

⁽³⁾ (1911) 13 Bom. L. R. 649.

⁽⁴⁾ (1935) 38 Bom. L. R. 593.

⁽⁵⁾ [1899] A. C. 114.

⁽²⁾ [1948] A. I. R. Pat. 362.

⁽⁴⁾ (1912) 36 Bom. 53.

⁽⁶⁾ (1909) 11 Bom. L. R. 345.

⁽⁸⁾ (1947) 50 Bom. L. R. 688, (F.B.).

⁽¹⁰⁾ (1911) 35 Bom. 190.

SECOND APPEAL from the decree passed by N. S. Shrikhande, Esquire, District Judge of Kanara at Karwar reversing the decree passed by M. M. Shirkol, Esquire, Civil Judge (Junior Division) at Kumta.

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Suit for possession.

In 1926, Dasa Rama and Manjya Rama (defendants Nos. 1 and 2 respectively) filed a suit for accounts of the management during their minority of their properties by (1) Mahadev, (2) Shrinivas and (3) Yeshwant (all predecessors of plaintiffs) and also for possession. That suit ended in a compromise which provided that the property in suit, viz., a piece of land in which the plaintiffs predecessors had only a mulgeni right and a building thereon should, be delivered to defendants Nos. 1 and 2. The compromise decree then went on to say:—

“It is declared that the plaintiffs and their descendants alone shall enjoy the said land and the building, that they should not alienate the same by lease etc., and that they should let it out only to their caste people. If in contravention of these conditions the plaintiffs or their descendants alienate, then defendants Nos. 2 and 3 or their descendants shall be entitled to recover possession of the suit land and the house.”

On February 5, 1941, the defendants Nos. 1 and 2 sold the mulgeni rights in the property to Govind (defendant No. 3) for Rs. 400. In 1942, the plaintiffs filed a darkhast against the defendants claiming back possession of the property as the term in the compromise decree restraining its alienation had been contravened. The execution proceedings were carried up to High Court which ultimately held on September 12, 1946, that the decree was not executable. But instead of dismissing the Darkhast on that ground, the High Court ordered it to be converted into a suit and remanded the matter to the original Court for trial. In the suit the cause of action for possession was based upon the unauthorised alienation to defendant No. 3 contrary to the terms of the consent decree.

Defendants Nos. 1 and 2 remained *ex-parte*. Defendant No. 3 *inter alia* contended that the condition in the decree restricting alienation was void under s. 10 of the Transfer of Property Act.

The trial Court upheld the contention of defendant No. 3 and dismissed the suit on October 18, 1947.

On appeal, the learned District Judge was of the view that the consent decree bound the parties till it was set aside. He, therefore, allowed the appeal and decreed the suit on March 31, 1949.

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The defendant No. 3 appealed to the High Court.

G. P. Murdeshwar, for the appellant.

N. M. Shanbhag, for respondents Nos. 1 to 3.

Gajendragadkar J. The short question of law which this appeal raises for our decision is whether a compromise decree which contains a term contrary to the provisions of s. 10 of the Transfer of Property Act is a nullity and can be ignored without setting it aside. This question arises in this way. In Civil Suit No. 341 of 1926, a claim was made by the present defendants Nos. 1 and 2 against the predecessors of the present plaintiff for accounts. Their allegation was that the defendant to that suit was their guardian and had not rendered accounts. Between the guardian and his wards, a compromise decree was passed and by this decree the guardian conveyed to the wards certain immovable property. The compromise decree provided that it is declared that the plaintiffs, meaning the wards, and their descendants alone shall enjoy the said land and the building, that they should not alienate the same by lease etc. and that they should let it out only to their caste people. If in contravention of these conditions the plaintiffs or their descendants alienate, then defendants Nos. 2 and 3 or their descendants shall be entitled to recover possession of the suit land and the house. It is clear that this clause amounts to an absolute restraint on alienation and is void under s. 10 of the Transfer of Property Act. Despite this clause, defendants Nos. 1 and 2 to whom the property had been delivered by their guardian sold the property to defendant No. 3 on February 5, 1941. Thereupon, the successor-in-title of the guardian who had been sued in 1926 filed Darkhast No. 522 of 1942 for restoration of possession of the said property. The darkhastdar contended that the property had been sold by defendants Nos. 1 and 2 contrary to the provisions of the consent decree and he was, therefore, entitled to claim back possession of the said property. This darkhast proceeding came to this High Court in Second Appeal No. 588 of 1944. The High Court held that the execution application as such was incompetent, but allowed the darkhastdar to convert his application into a suit. Thus converted, the suit was sent back for trial in accordance with law. It is this suit which has given rise to the present appeal.

The substantial defence raised by the predecessors was that the material clause in the compromise decree which prohibited alienation of the property was void and the decree which con-

tained that clause thereby itself became a nullity. This plea prevailed in the trial Court with the result that the plaintiff's suit was dismissed. On appeal, the learned District Judge has taken a contrary view. He has held that, though absolute prohibition against alienation in itself may offend against s. 10 of the Transfer of Property Act, since the said prohibition has been incorporated in a compromise decree, the compromise decree cannot be treated as a nullity and the only remedy open to the party aggrieved by the said term in the compromise decree is to get the said decree set aside by a proper proceeding. On this view, the learned District Judge has decreed the plaintiffs' suit. Mr. Murdeshwar for defendant No. 3 has challenged the correctness of the decree passed by the District Judge before us in the present second appeal and his contention is that the compromise decree passed in Civil Suit No. 341 of 1926 is a nullity and so the transfer made by defendants Nos. 1 and 2 in favour of his client should stand as good and valid.

As I have already mentioned, there can be no doubt that the absolute restraint on alienation is clearly inconsistent with the provisions of s. 10 of the Transfer of Property Act. But the question is whether, when this restraint had been imposed upon defendants Nos. 1 and 2 by a compromise decree, they could ignore the decree treating it as a nullity and proceed to sell the property contrary to the terms of the decree with impunity. If the decree is a nullity, it need not be set aside and the enforcement of its provisions can be resisted by defendant No. 3 or defendants Nos. 1 and 2. If on the other hand the decree is not a nullity, but is merely contrary to law, proper proceedings must be taken to set aside the decree and unless the decree is set aside, it would be binding as between the parties.

In dealing with this question, we cannot overlook the fact that the Court which dealt with the dispute between the parties in 1926 had jurisdiction to deal with the matter. The compromise on which the decree was ultimately based was between persons all of whom were majors and the Court ultimately passed the decree on this compromise. It is a decree passed by a Court of competent jurisdiction and, in our opinion, merely because one term of the decree is opposed to the provisions of s. 10, it would not make the decree a nullity. It is some times said that Courts have jurisdiction to decide rightly as well as wrongly and errors which may be committed by Courts may be errors of facts as well as errors of law. This may apparently

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sound cynical; but it emphasises the principle that judicial decisions are final and binding as between the parties unless they are effectively challenged by way of appeal or otherwise. If a Court with jurisdiction passes a decree which is based upon an error of law, it would be difficult to take the view that the decree is for that reason a nullity. If in the present case the Court had decided the matter on the merits and had introduced the impugned term in the decree erroneously, parties would have been bound by it unless it was set aside in appeal. It may be that when a compromise decree is passed, the Court does not decide the dispute on the merits; but even so, it is bound to consider whether the compromise is lawful; and if, through oversight or error, an unlawful compromise is allowed and a decree is passed, it can be challenged by a suit; but until it is set aside, it must be held to be binding between the parties. It was observed by the Privy Council in *Charles Hubert Kinch v. Edward Keith Walcott & Others*,⁽¹⁾ that

“an order by consent, not discharged by mutual agreement and remaining unreduced is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose.”

With respect, we think that these observations would apply to the point which we are deciding in the present case.

Mr. Murdeshwar has however contended that there is judicial authority in support of his argument that the decree which contains some clauses which are contrary to law should be regarded as a nullity. The first case to which he has invited our attention is the decision of the Madras High Court in *Lakshmanaswami Naidu v. Rangamma*.⁽²⁾ Dealing with a compromise decree which permitted the sale of an office attached to a temple, their Lordships of the Madras High Court hold that the said decree is a nullity. According to the learned Judges, when a decree is based upon an agreement of compromise and when there is nothing more on the part of the Court than a mere adoption of the contract, the Court must be taken to have adopted the contract with all its incidents. If a part of the contract is unlawful, this infirmity of the contract would make the decree itself infirm in effect. With respect, if this view is correct, it would always be open to the judgment-debtor to resist execution by challenging the legality

⁽¹⁾ [1929] A. I. R. 289, P. C.

⁽²⁾ (1902) 26 Mad. 31.

or validity of the decree in execution proceedings. In our opinion, such pleas cannot be raised and entertained in execution. It is only if the decree is a nullity that the executing Court may refuse to execute it. This limited jurisdiction is however exercised where decrees are passed by Courts without jurisdiction or are otherwise patently illegal or e.g., when they are passed against a dead person. In this connection, it is necessary to distinguish between decrees which are illegal and void and those that are contrary to law. In our opinion, the decrees falling in the latter category are binding between the parties unless they are set aside in proper proceedings.

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In *Rai Kumar Singh v. Abhai Kumar Singh*⁽¹⁾ similar view has been taken by the Patna High Court. A compromise decree in a partition suit had provided that parties would not claim any share which would otherwise have accrued to them on the death of either of the parties. It was held that this provision in the decree was invalid in view of s. 6 (a) of the Transfer of Property Act. According to this decision, a party can show that the said term should not be enforced and he need not sue to set aside the decree for that purpose. The learned Judges were impressed by the fact that the validity of the impugned term was not the subject-matter of the dispute. In other words, the said term was outside the subject-matter of the suit and was improperly made a part of the decree.

Mr. Murdeshwar has also relied upon another decision and that is the judgment of Mr. Justice Bennet in *Raj Dev Rai v. Bradumdeo Rai*⁽²⁾. Mr. Murdeshwar himself has however fairly invited our attention to the fact that this decision does not assist him because the compromise which was held to be invalid by Mr. Justice Bennet had not matured into a decree. If a decree had not been drawn in terms of compromise in the present case and the matter had remained merely at the stage of a compromise between the parties, Mr. Murdeshwar undoubtedly would have succeeded. But the difficulty in his way arises by reason of the fact that to the compromise of the parties a command of the Court has been superimposed; and that makes all the difference.

Mr. Murdeshwar has then relied upon the observations made in the judgment of Lord Hobhouse in *Great North West Cent-*

⁽¹⁾ [1948] A. I. R. Pat. 362,

⁽²⁾ [1937] A. I. R. All, 235,

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ral Railway v. Charlebois,⁽¹⁾. This is what Lord Hobhouse said (p. 124):

"It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done. Such a judgment cannot be of more validity than the invalid contract on which it was founded."

Mr. Murdeshwar argues that these observations support his contention that merely because a decree has been passed by the Court, it would not make the impugned term of the decree valid; this term in the decree would be as invalid as it would have been if it had not been included in the decree itself. But, in appreciating the effect of the observations of Lord Hobhouse, we must remember that they were made in proceedings which had been started expressly for the purpose of impeaching the compromise decree. In other words, a compromise decree which contained an invalid clause was challenged by proper proceedings and in an appeal which arose from those proceedings, Lord Hobhouse had to consider whether the decree was valid or not. If defendant No. 3 or his predecessors had adopted the proper procedure and commenced an action for setting aside the compromise decree, the argument which is urged before us now would have had much greater validity. Since the decree is allowed to stand unchallenged, the observations made by Lord Hobhouse cannot in our opinion be pressed into service by Mr. Murdeshwar because Lord Hobhouse was not really called upon to consider whether the decree could be treated as a nullity. On the contrary the proceedings in which the observations were made had arisen on a claim to set aside the invalid compromise decree itself.

Mr. Murdeshwar has also relied upon the observations made by Mr. Justice Chandavarkar in *Pirojshah Bhikaji Vandrivalla v. Manibhai Nichhabhai*⁽²⁾. By a compromise decree, property which was ordinarily partible was treated as impartible and Mr. Justice Chandavarkar observed that impartibility must arise out of some special tenure or by some general, family or local custom. Parties cannot make an estate impartible which is partible. That is opposed to public policy. Mr. Murdeshwar says that these observations lend considerable support to his contention before us and that is true to some extent. But it must be noticed that these observations are clearly obiter. The compromise decree which had converted partible property into impartible property had been passed in

⁽¹⁾ [1899] A. C. 114.

⁽²⁾ (1912) 36 Bom. 53.

a suit to which a minor was a party without obtaining the sanction of the Court and under the provisions of s. 462 of the Civil Procedure Code of 1882 which correspond to the provisions of O. XXXII, r. 7 of the present Code, absence of sanction necessarily made the said compromise void against the minor. In that view, it was not really necessary to consider whether the compromise decree would be bad for any other reason. But, apart from that, the earlier decision of this Court in *Cowasji Temulji v. Kisandas Tricumdas*⁽¹⁾ was not cited before the Bench and apparently the question was not fully argued before them.

Lastly we may refer to a decision of this Court in *Kisandas Shivram Marwadi v. Nama Rama Vir*,⁽²⁾ on which Mr. Murdeshwar has relied. In this case, a compromise was tendered before the Court and the Court was asked to pass a decree in terms of the compromise. The learned trial Judge felt doubt as to the validity of the compromise and referred for opinion two questions to this Court. One of these questions was whether the compromise was lawful although it provided that in default of the payment of two instalments the plaintiff should realise the whole of the balance due by sale of the entire mortgaged property, such provision being opposed to s. 15B, cl. (2) of the Dekkhan Act; Mr. Justice Batchelor who delivered the judgment of the Bench held that this term was illegal. This decision however can be of no assistance to Mr. Murdeshwar because the matter had come to this Court at a stage when a compromise decree had yet to be passed and undoubtedly before a decree is passed under O. XXXIII, r. 3, it would be competent to the Court to consider whether any of the terms of compromise is unlawful. If the terms are unlawful, the Court may well refuse to pass a compromise decree. But, if a decree is passed by a Court of competent jurisdiction and it appears that it contains a term which is opposed to law, whether such a decree becomes a nullity or did not fail to be considered in this case.

On the other hand, there are several decisions of this Court which are against Mr. Murdeshwar's contention. In *Cowasji Temulji v. Kisandas Tricumdas*,⁽⁶⁾ a Division Bench of this Court has held that a consent decree would operate as an estoppel until it is set aside. The same principle has been enunciated in *Chhaganlal Kishordas v. Bai Harkha*⁽³⁾ where

⁽¹⁾ (1911) 13 Bom. L. R. 649.

⁽²⁾ (1911) 35 Bom. 190.

⁽³⁾ (1909) 11 Bom. L. R. 345.

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Chief Justice Scott has observed that 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. In this case, the decree on which the plea of estoppel was based was *ex parte*. But, in our opinion, that would not make a material difference. The contention that in giving effect to a part of the decree breach of the law is being enforced was as much relevant in the case of an *ex parte* decree as it would be in the case of a compromise decree. Mr. Justice Broomfield, who delivered the judgment of the Bench in *Basangouda Giriyeppagouda Patil v. Basalingappa Mallangouda Patil*,⁽¹⁾ has expressed the same view. It is true that the observations made by Mr. Justice Broomfield to the effect that the consent decree would act as an estoppel until it was set aside by a proper suit, even though the effect of it might be to sanction the alienation of watan and watan rights which was prohibited by s. 5 of the Hereditary Offices Act, 1874 were obiter. As it happened in this particular case, the alienation was made to a watandar of the same watan and the breach of s. 5 had not really occurred. Even so, the learned Judge considered this question exhaustively and in his judgment he has cited several authorities bearing on this question. His conclusion was that unless a consent decree is set aside by taking proper proceedings, it is effective as a decree and it cannot be treated as a nullity on the ground that a part of it is contrary to law.

We think that a consent decree passed by a Court of competent jurisdiction cannot be treated on the same footing as a contract between the parties. It is true that before a court passes a consent decree, it can and should examine the lawfulness and validity of the terms of the proposed compromise. But once that stage is passed and a decree follows different considerations arise. Indeed, Mr. Murdeshwar has not cited before us any decision of this Court which actually decided that a compromise decree, which contains a term contrary to law is for that reason a nullity. On the contrary, as we have just pointed out, a large number of reported judgments of this Court have taken a contrary view. Therefore, in our opinion, the lower appellate Court was right in coming to the conclusion that despite the fact that one of the terms of the compromise decree is opposed to the provisions of s. 10 of the Transfer

⁽¹⁾ (1935) 38 Bom. L. R. 593.

of Property Act, the decree is still binding between the parties and cannot be said to be a nullity. If it is not a nullity, its terms must be enforced and the plaintiff would be entitled to claim possession of the property.

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Mr. Murdeshwar then sought to argue that the term which is now being enforced amounts to a penalty and his client should be relieved against this penalty. In fact, before us Mr. Murdeshwar seemed to lay more stress upon this alternative plea. The argument is that even if the decree be not treated as a nullity, in our equitable jurisdiction we should refuse to enforce the penalty clause; in support of this contention Mr. Murdeshwar wanted to rely upon several decisions of this Court where this equitable jurisdiction has been recognised. We may refer to the recent Full Bench decision in *Waman Vishwanath Bapat v. Yeshwant Tukaram*,⁽¹⁾ where this question has been exhaustively considered. The difficulty in Mr. Murdeshwar's way however is that this plea was not made in any of the Courts below and no such point has been taken even in the memo. of appeal before us. There can be no doubt that, in granting relief on equitable grounds, several relevant facts would have to be considered. For instance, it would be necessary to consider whether defendant No. 3 purchased this property with or without knowledge that alienation in his favour was contrary to the provisions of the compromise decree; whether he paid full consideration and acted *bona fide* or whether he has merely purchased litigation. These and other material facts would have to be taken into account before the equitable jurisdiction of the Court is allowed to be invoked in favour of defendant No. 3. Besides, relief against penalty is not claimed by defendants Nos. 1 and 2 before us. In fact, they have taken no active part in the present litigation at all. This relief is claimed by a purchaser and if he did not make a plea for obtaining this relief in the trial Court, we do not see any circumstances which would persuade us to entertain this plea for the first time in second appeal.

The result is the appeal fails and must be dismissed with costs.

Appeal dismissed.

M. W. P.

⁽¹⁾ (1947) 50 Bom. L.R. 688, F.B.