Privy Council Appeal No. 68 *of* 1939
Oudh Appeal No. 16 *of* 1937

Babu Raja Mohan Manucha and others – – – *Appellants*

v.

Babu Manzoor Ahmad Khan and others – – – *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH DECEMBER, 1942

Present at the Hearing:
LORD MACMILLAN
LORD WRIGHT
LORD PORTER
SIR GEORGE RANKIN
SIR MADHAVAN NAIR

[*Delivered by* SIR GEORGE RANKIN]

This is an appeal by the plaintiffs in a suit to enforce a registered mortgage dated 12th August 1919 whereby a village called Mahona Poorab in the district of Sultanpur in Oudh was made security for the sum of Rs.10,000 with interest at 9 per cent. with half-yearly rests. The grantor of the mortgage was Iltifat Ahmad Khan, the defendants' father, and the grantee was the plaintiffs' father Moti Lal Manucha. The deed contained a personal covenant to pay the interest half-yearly and to repay the principal at the end of three years. The suit was brought in the Subordinate Judge's Court at Sultanpur on the 9th August 1934 by which time both of the original parties to the deed had died. The plaint sought relief, both by sale of the mortgaged property and by enforcement of the covenant.

The defendants by their written statement of 30th November 1934 maintained among other defences that the mortgage sued upon was void, having been made in circumstances which brought into operation paragraph 11 of the Third Schedule to the Code of Civil Procedure:

> 11.—(1) So long as the Collector can exercise or perform in respect of the judgment debtors immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment debtor or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector. . . .

The learned trial Judge sustained this contention. He refused the plaintiffs a money decree upon the covenant on the ground that this cause of action had become barred by limitation. By his decree of 2nd August, 1935, he dismissed the suit with costs. An appeal by the plaintiffs to the Chief Court was dismissed on 5th May, 1937, the learned Judges (Thomas and Zia-ul-Hasan JJ.) agreeing with the trial Court on both of the grounds of his decision. They were asked to give the plaintiffs relief under section 65 of the Indian Contract Act.

> 65. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

But the Chief Court refused to entertain this ground of claim because it had not been pleaded and was not taken in the memorandum of appeal. Accordingly they left the plaintiffs to seek this remedy by a separate suit.

The plaintiffs have appealed to His Majesty in Council. By their petition of appeal under Order 45 rr. 2 and 3 and by their case, they contest the findings of the Courts in India both as regards the invalidity of the mortgage and as to their claim on the personal covenant being statute-barred: they also insist upon their right to relief under section 65 of the Indian Contract Act. The defendants have not lodged a case nor have they appeared at the hearing: their Lordships are indebted to learned counsel for the appellants who laid fully and candidly before the Board the matters for consideration on this appeal.

The first question is whether paragraph 11 of the Third Schedule applied to render Iltifat Ahmad Khan incompetent on 12th August, 1919, to mortgage Mahona Poorab. He was one of the six sons of a deceased taluqdar of Mahona named Ewaz Ali Khan who had mortgaged to the Allahabad Bank in 1908 the whole taluqa consisting of twenty-six villages, and had in 1909 executed deeds of gift transferring six of these villages to his wife and certain of his sons. Mahona Poorab was given to his son Iltifat, Gadaryadih to his wife Safuran Bibi and Deokali to Bashir Ahmad Khan, another of his sons. The Bank had on 12th April, 1915, obtained a preliminary decree for sale upon its mortgage, in a suit (No. 76 of 1914) wherein the donees under the deeds of gift had been impleaded as persons interested in the equity of redemption. That decree was made absolute on 17th June, 1916, by which time Ewaz Ali had died and had been succeeded as taluqdar by his son Yar Muhammad. On 3rd February, 1917, the Subordinate Judge had transferred the decree for execution to the Collector under section 68 of the Code. On Yar Muhammad's application a sum of Rs.1,50,000 was with the Collector's permission raised by mortgage of the taluqa in January, 1919, leaving some Rs.77,000 outstanding. On 15th February, 1919, the Collector ordered the sale of the six villages which had been transferred by Ewaz Ali to his wife and sons. Both Iltifat and Safuran Bibi applied for leave to mortgage their respective villages but this was refused; and on 14th June, 1919, it was ordered that a sale should be held on 21st July; that the village Gadaryadih should be sold as the first lot and the village Mahona Poorab as the second lot, and that the other villages should only be sold if these two had not produced sufficient to discharge the debt. " As soon as by the last bid the full amount of demand is secured the auction will be closed." On the 18th July Iltifat made an application for leave to mortgage Mahona Poorab and another village so as to avoid a sale of the former; but this application was adjourned until the day of sale (21st July), and on that date was disallowed together with a similar application by Safuran Bibi. At the sale on 21st July the terms of the order of 14th June were departed from: village Deokali was first sold for Rs.45,000 and Gadaryadih next for Rs.60,000. The order of 21st July recording the sale stated that " as the amount due to the decree holder was satisfied so the remaining four villages were discharged from sale." The Nazir was directed to take one-fourth of the sale price (plus commission) from the auction purchasers, who were to deposit the remaining three-fourths within 15 days—that is, by 5th August, 1919. The date on which the balance was in fact paid by the auction purchasers is not proved but it may well have been paid within the time limited. On the 16th August a petition by Safuran Bibi and Bashir-ud-din was filed purporting to be under section 89 of Order 21 of the Code which is in the same terms as Rule 996 of the rules made by the Government of the United Provinces under section 70 of the Code. It asked that the sale of the villages Gadaryadih and Deokali be set aside on the petitioners bringing into court Rs.95,250 being an amount sufficient to satisfy the decree and to provide the necessary solatium of five per cent. to the auction purchasers for the loss of their bargain. By order dated 10th September, 1919, this application was allowed and the sale was cancelled. This order fixed the exact sums to be returned to the disappointed purchasers; noted that a question remained to be decided by the civil Court as to the exact amount of interest due to the decree

holder; and stated that the money in court would be paid out in full or in part according to the civil Court's decision. By the same order the papers were directed to be returned to the Subordinate Judge's Court. The execution case in that Court (No. 110 of 1916) continued until 31st May, 1920, the dispute as to the exact balance if any payable to Yar Muhammad out of the money in court having been determined on the 8th May, 1920.

Now, the crucial date for the purposes of this appeal is the 12th August, 1919, when the mortgage in suit was executed by Iltifat. That deed recited the proceedings in execution of the Bank's decree and the sale of the villages Gadaryadih and Deokali: it stated that the sum of Rs.10,000 was being borrowed by Iltifat from Moti Lal Manucha because Iltifat had to pay a proportionate share of the decretal amount. It has been suggested in argument that the money thus obtained may have been needed to make up the sum brought into court on 16th August in order to set aside the sale. Whether this be so or not, the mortgage was in itself an open honest and reasonable transaction. The parties and their advisers would appear to have known of the provisions of paragraph 11 of the Third Schedule and it is quite probable, so far as their Lordships can judge, that they thought that the Collector's duties had come to an end as regards Mahona Poorab, or that by the sale on 21st July of the two other villages it had been exonerated under the order of the Collector from all claim in the execution proceedings.

Argument on these lines has been addressed to the Board, as it was to the Courts in India, and their Lordships have given it the careful consideration which it deserves. They are not however of opinion that on the 12th August, 1919, the Collector could no longer exercise or perform in respect of Mahona Poorab any of his powers or duties under paragraphs 1 to 10 of the Third Schedule, and they are not of opinion that any written permission of the Collector has been shown. On the first point, under Rules 996 to 1,000 (which correspond to Order 21 rr. 89 to 94 of the Code) time has to be allowed after the sale for applications to set it aside, either (as in the present case) by way of allowing to the judgment debtor a last chance to save his property or by reason of irregularity or fraud in the conduct of the sale. Not until this time has expired—it is 30 days from the date of sale under Art. 166 Limitation Act, 1908—can an order be made confirming the sale even if no application be made to set it aside: the sale only becomes absolute when the Collector confirms it (Rule 998 Order 21 r. 92): and it then becomes the Collector's duty to issue the sale certificate which is the purchaser's document of title (Rule 1,000 Order 21 r. 94). These duties and powers of the Collector all arise to him in the case of a mortgage decree out of paragraphs 1 and 10 of the Third Schedule to the Code which authorise him to sell the property in whole or in part and in one or more lots. Under paragraph 9 he has other duties in addition, e.g.: as to holding the sale proceeds at the disposal of the civil Court which has ordered execution. As is shown by the terms of section 70 of the Code and by their subject matter, the rules which have been referred to are made for regulating the procedure of the Collector and his subordinates and for investing them with the necessary powers to carry out a judicial sale. They are not extraneous to his duty to conduct the sale.

In these circumstances it is impossible to hold that the time referred to in paragraph 11 had expired on the 12th August, 1919. It lasted until the 10th September, 1919, at least, and as the relevant date in this case is the 12th August, it is not necessary to say when the period ended. These conclusions are in accordance with a previous decision of the Board arising out of the same execution sale where the relevant date was the 14th August, 1919. [*Babu Nisar Ahmad Khan* v. *Babu Raja Mohan Manucha* (1940) L.R. 67 I.A. 431.]

The claim to have had the Collector's written permission for the mortgage of 12th August, 1919, rests on the terms of the order of 21st July, 1919, recording the sale of that date. It had been directed by order of 14th June that so soon as the full amount of the demand had been

secured, the auction should be closed; and a recital, as part of the sale proceedings that when a sufficient sum had been bid for the two villages sold first (Deokali and Gadaryadih), " the remaining four villages were discharged from sale " means only that they were not put up for sale. At that time it still remained to be seen whether the auction purchasers would deposit three-fourths of the purchase price within 15 days: other contingencies lay still further ahead.

For these reasons there is no escape from the conclusion that on 12th August, 1919, Iltifat was, in terms of paragraph 11, " incompetent to mortgage " Mahona Poorab. It becomes necessary to consider the effect of this conclusion upon the rights of the parties.

In *Babu Nisar's* case already cited it was held by the Chief Court of Oudh and by the Board that the disability imposed by paragraph 11 affected the judgment debtor's right to deal with his immoveable property or part thereof, but did not take away his personal liability to repay the loan. In that case two mortgages were held to have been obtained by undue influence, and one of these—namely exhibit 5, dated 14th August, 1919—was also held to have been granted in violation of paragraph 11. The borrower's liability to repay the sum lent upon this latter mortgage remained notwithstanding its invalidity as a charge; but judgment had been given in the Chief Court, not for the full contractual sum, but in view of the finding of undue influence upon the footing of a refund with simple interest at 6 per cent. under section 65 of the Contract Act. This was also treated as a term which equity would impose as a condition of setting aside a transaction on the ground of undue influence. The claim upon the covenant to repay was not barred by limitation, and there was no occasion to consider whether the lender, finding that he had no security, could repudiate or rescind the contract of loan and demand his money back; or whether if he did not do so he could claim both upon the covenant to repay and also under section 65 as if these were co-existing or cumulative rights. When the Board negatived the defence of undue influence it gave decree upon the basis of the borrower's contractual liability to repay the loan with interest at 8 per cent. with half-yearly rests.

The decision in *Babu Nisar's* case was given by the Board in July, 1940, after the present case had been decided by the Chief Court. As this appeal must to some extent be governed by the Board's previous decision Mr. Roxburgh, for the appellants, guided himself by it in presenting his argument. While insisting upon the validity of the charge created by the deed of 12th August, 1919, over Mahona Poorab, he abandoned his claim under the personal covenant, and asked that if his security be held invalid he should be given relief under section 65 of the Indian Contract Act. A formal minute has been tendered to that effect by direction of the Board. Their Lordships, being of opinion, for the reasons already stated, that the security is invalid, have now only to consider whether there is upon that footing any sufficient reason why the estate of the deceased mortgagor should not be ordered to restore the money received under the transaction of 12th August, 1914. Endeavouring to give full consideration to all objections which would appear to be open to the absent respondents, their Lordships are of opinion that the course taken by learned counsel for the appellants showed a proper appreciation of the difficulty of insisting on the personal covenant and put the right of his clients to relief upon a safer ground.

The principle underlying section 65 is that a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation. If it be settled law that the incapacity imposed on a judgment debtor by paragraph 11 of the Third Schedule is an incapacity to affect his property and not a general incapacity to contract, it follows that the covenant to repay is not made void by the mere operation of the paragraph. But the lender who has agreed to make a loan upon security and has paid the money, is not obliged to continue the loan as an unsecured advance. The bottom has fallen out of the contract and he may avoid it. If he does so avoid the contract, he brings himself within the terms of section 65 and within the principle of restitution

of which it is an expression—whether for all purposes adequate or exhaustive need not here be considered. In the present case the loan was not to be repayable until after three years. It can hardly be thought that if the invalidity of the security had been established at the end of six months, the lender would have been obliged to allow his money to remain outstanding without security for the whole three years. Ordinarily, if the invalidity of the security is not suspected until after the time for repayment has arrived, the lender will have nothing to gain and something to lose by repudiating the contract at that stage. But that will not always be his position. In India the bar of limitation for a suit to enforce the security is imposed at the end of twelve years, and for a suit on the personal covenant at the end of six years. Not uncommonly it happens that a mortgagee relying upon ample security has incautiously allowed his claim on the covenant to become time-barred. That may or may not be the appellants' position: the Courts in India have thought it was. But while the appellants' lack of precaution would not increase their rights, it would not take away from them their right, if they think it to their advantage to refuse to be bound by the contract of loan when the basis of the contract has gone. They can refuse to be bound by the contract and rely upon the right to recover their money which arises to them, not under any contract, but as a matter of restitution by reason that no contract subsists. Unless and until they do so, however, they can have no right to recover on the footing of section 65. They cannot have at one and the same time a right to insist that they have a valid subsisting special contract governing the transaction of loan and entitling them to a specific rate of interest and a right to say that their money was advanced under a void agreement.

On this view two matters require consideration by way of defence. Can it be said that the claim under section 65 is barred by limitation, or that the appellants having adhered to the contract cannot now claim to repudiate? And if neither of these defences can be made out, ought the appellants to be refused restitution in this suit by reason that section 65 was not pleaded as a separate ground of claim in the plaint?

In *Mussamat Basso Kuar* v. *Lala Dhum Singh* (1888), L.R. 15, I.A. 211-218, it had been held in a specific performance suit brought by the vendor that a sale deed was ineffectual there being certain unwritten terms which occasioned dispute, and the Board considered that the deed was " discovered to be void " at the date of the decree declaring it to be so.

In *Harnath Kuar* v. *Indar Bahadur Singh* (1922), L.R. 50, I.A. 69, a Hindu during the lives of the widows of a deceased taluqdar in Oudh sold his rights as prospective reversioner to certain villages of the taluqa in which he had no more than an expectancy. The Board took the view that there were materials from which it might fairly be inferred in the peculiar circumstances of the case that there was a misapprehension as to his private rights and that the true nature of those rights was not discovered till his demand for possession was resisted.

In *Annada Mohan Roy* v. *Gour Mohan Mullick* (1923), L.R. 50, I.A. 239, 244, however, the appellant had abandoned in the High Court his right to contend that an agreement was discovered to be void at a date later than the date at which it was entered into. The agreement was for the sale of the rights of certain persons as prospective reversioners to the estate of a deceased Hindu who was survived by two widows. The Board in refusing to reopen the question, noticed that in *Harnath's* case there were special circumstances and said that " there has been no suggestion anywhere in the course of the present proceedings that any such facts occurred as could alter the view which must normally be taken of the meaning of the word ' discovery ' and of the time at which that discovery must be held to have occurred." In *Hansraj Gupta* v. *Official Liquidators, Dehra Dun-Mussoorie Electric Tramway Co.* (1932), L.R. 60, I.A. 13, 24, it was said: " In the absence of special circumstances (and none exist here) the time at which an agreement is discovered to be void within the meaning of section 65 is the date of the agreement "; and *Annada's* case (*supra*) was cited as authority. But in *Babu Nisar's* case (*supra*), which

arose out of the same execution proceedings as the present case and upon very similar facts, section 65 of the Indian Contract Act was referred to and the Chief Court's view was approved, that the mortgage was not " discovered to be void " at the time it was entered into. The Chief Court's view had been that the mortgage was not discovered to be void until the trial Judge held it to be so or at the earliest until a plea to that effect was taken in the suit.

Their Lordships have already expressed in this judgment their view that the transaction in question in the present case was an open and honest transaction and think that its invalidity was at the time obscured by the difficulty in applying paragraph 11 of the Third Schedule correctly to the particular facts of the execution proceeding and to the terms of the orders as recorded. For ten years payments of interest were made and received thereunder. In these circumstances they are of opinion that in the special circumstances of the case the security of 12th August, 1919, was not discovered to be void until after the present suit was instituted on 7th August, 1934.

On this view no question of limitation can arise under section 65 since the circumstances giving rise to their right to rescind did not come to the plaintiffs' knowledge until after action brought.

Again, their Lordships think that it would be unreasonable in this case to regard the appellants as having affirmed the contract of loan as subsisting, by reason of any arguments addressed to the Courts in India hypothetically, or by way of alternative to their main contention, which has throughout been that the transaction of 12th August, 1919, is not hit by the provisions of paragraph 11. Neither Court in India gave the appellants a decree upon the personal covenant and the Chief Court would not permit section 65 to be entertained as a basis for relief. In the circumstances it cannot be said that there has been an omission to repudiate within a reasonable time which evidences an election to affirm the personal covenant or that the appellants have by their acts and conduct treated the contract as subsisting after the facts grounding the right to rescind came to their knowledge. " Election to affirm must, if to be gathered from action, be gathered from unequivocal acts " [per Lord Dunedin: (*Abram Steamship Co.* v. *Westville Shipping Co.* [1923] A.C. 773 at 779)].

With all due respect to the Chief Court, their Lordships think that their attitude towards the question of pleading was unduly rigid. A defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restore what he received thereunder. What defence the respondents can have desired to make on this aspect of the case is not revealed by anything in the judgment of the Chief Court, apart from the question of limitation with which their Lordships have already dealt and from the contention that section 65 cannot apply where there is a transfer of property and not a mere agreement. This last contention is a pure point of law and one which the Chief Court rightly regarded as without substance and contrary to authority. There is no reason to apprehend that by allowing the appellants to obtain relief under section 65 any injustice to the respondents can result. On the contrary, *prima facie* it is hardly just that the rights of the parties in respect of the transaction of 12th August, 1919, should be dealt with in part and in part postponed. Though a matter of discretion, a result so inconvenient needs to be justified by solid reason and their Lordships see no sufficient reason to prevent restitution being ordered in this case.

Their Lordships are of opinion that this appeal should be allowed; that the decrees of 2nd August, 1935, and 5th May, 1937, passed by the trial Court and by the Chief Court respectively should be set aside; and that the plaintiffs appellants should have a decree for payment out of the property of Iltifat Ahmad Khan deceased of Rs.10,000 with simple interest at six per cent. per annum from 12th August, 1919, until the date of the Order in Council to be made on this appeal provided always that the defendants respondents shall be entitled to set off all payments made by the said Iltifat Ahmad Khan deceased or by themselves in respect of the advance mentioned in the plaint as on the dates when such payments

were made: the Chief Court to take or cause to be taken any account which may be necessary to ascertain the sum payable under the direction hereinbefore given; and the total sum so payable to carry interest from the date of the said Order in Council at six per cent. per annum until payment. Their Lordships will humbly advise His Majesty accordingly.

The respondents must pay the appellants' costs of this appeal but each party will bear its own costs in the Courts in India.

(23159) Wt. 8026—13: 160 1/43 D.L. G. 338

In the Privy Council

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