

ALLAHABAD HIGH COURT

Dip Narain Singh

Vs.

Nageshar Prasad

(Sulaiman, J.)

08.11.1929.

JUDGMENT

Sulaiman, J.

1. The principal question of law which arises in this appeal is as to the legal effect of including non-transferable occupancy lands along with other properties, which are transferable, in a registered mortgage deed.
2. There can be no doubt that there is a clear distinction between a contract which still remains to be performed and specific performance of which may be sought, and a conveyance by which title to property has actually passed. Cases of mere contract are governed by the provisions of the Contract Act. Cases of transfer of immovable property are governed by the Transfer of Property Act. A mere contract to mortgage or sale would not amount to an actual transfer of any interest in the immovable property (S. 54, Transfer of Property Act), but a deed of sale or mortgage, if duly registered, would operate as a conveyance of such interest. Once a document transferring immovable property has been registered the transaction passes out of the domain of a mere contract into one of a conveyance. Such a completed transaction would be governed by the provisions of the Transfer of Property Act, and only so much of the Contract Act as are applicable thereto.
3. It is significant that the whole of the Contract Act has not been made applicable to transfer of immovable properties. Section 4, Transfer of Property Act, merely makes certain provisions of the Transfer of Property Act, relating to contracts as part of the Contract Act and not vice versa.
4. It is Section 6(h), Transfer of Property Act, which lays down that no transfer can be made for an unlawful object or consideration within the meaning of Section 23, Contract Act. Sub-clause (i), further provides that nothing in that section would authorise a tenant having an untransferable right of occupancy to assign his right as such tenant.

5. Thus an attempted transfer of an untransferable right of an occupancy tenant is merely declared to be unauthorised and therefore void and ineffectual. Similarly, a transfer for an unlawful object or consideration is declared to be void and ineffective. So far as these sections go they do not lay down the law that if such a non-transferable interest is included among other transferable properties the whole transaction is illegal. It is noteworthy that in order to bring in the operation of Section 6(h), the object or consideration for the transfer should be unlawful. The section would be inapplicable where the object of the consideration for the transfer is itself not unlawful but the transfer may be ineffective on some other ground.

6. Coming to the Agra Tenancy Act, it is also quite clear that the transfer of occupancy lands has been merely declared to be void on the ground of the incompetency of the tenant to make the transfer and has not been actually forbidden or prohibited by law or declared to be otherwise illegal. Section. 20, Agra Tenancy Act (Act 2 of 1901) provided that the interest of an occupancy tenant is not transferable, that is to say, the interest cannot pass from the tenant except in the cases mentioned therein. Similarly Section 21 of that Act made it clear that where the interest of a tenant is not transferable he shall not be competent to transfer his holding. These provisions merely make an attempted transfer absolutely void and incapable of being enforced by a Court of law. The language of these two sections does not justify the inference that such a transfer has been expressly forbidden and prohibited by law. Nor can we widen the scope of the cases which fall under the category of being opposed to public policy.

7. Coming back to the question how much of the provisions of the Contract Act, are to be deemed to have been incorporated in the Transfer of Property Act, I must point out what has in some cases been overlooked that Section 24, Contract Act, has not been made applicable to transfers of immovable property. There is therefore no justification for stating broadly that even if the transfers of several items of properties can be split up and separated, the whole transaction is void because one part of it may be vitiated. Of course where the object of the consideration of the transfer is unlawful, as that word is defined in Section 23, Contract Act, the transfer is not effective.

8. Section 23, Contract Act, makes the consideration or object of an agreement unlawful where (1) it is forbidden by law or (2) is of such a nature that, if permitted, it would defeat the provisions of any law or (3) is fraudulent or involves or implies injury to the person or property of another, or is immoral or opposed to public policy.

9. Leaving out the third category which is not applicable to the case itself, we have to see whether the mortgage was forbidden by law or is of such a nature that if permitted it would defeat the provisions of any law.

10. There is a clear distinction between an agreement which may be forbidden by law and one which is merely declared to be void. In the former case the legislature penalises it or prohibits it.

In the latter case, it merely refuses to give effect to it. If a void contract has been carried out and consideration has passed the promisor may not in equity be allowed to go back upon it without restoring the benefit which he has received. But if the promisee comes to Court to enforce it he would receive no help from a Court of law. As pointed out above the transfer of an occupancy tenancy is not actually forbidden by law but is declared to be void. If the effect of enforcing the contract would necessarily be to defeat the provisions of any law the contract would undoubtedly be void, but if it consists of several distinct parts which can be separated, the whole transaction would not be bad unless the provisions of Section 24, Contract Act, are applicable to it.

11. The general rule which prevails in England as stated by Wallis, J., in *Pickering v. Ilfracombe Railway*¹

Where you cannot sever the illegal from the legal part of a covenant the contract is altogether void, but where you can sever them, whether the illegality be created by statute or any law, you may reject the bad part and retain the good.

12. Now contracts may be invalidated either by the illegality of the object or the consideration itself or by the incapacity of the promisor to enter into such contracts. In cases of the inherent illegality, it is sometimes impossible to say whether the legal or the illegal portion of the consideration affected the mind of the promisor most. But if we take the case of a contract only partly beyond the competence of the promisor, there is no good ground why the promisee, who has paid good consideration should not be allowed to enforce that part of the promise which the promisor was competent to make.

13. In the case before us the consideration passing from the mortgagee was hard cash. That in itself was not unlawful. The difficulty came in from the side of the mortgagor inasmuch as he was not competent to mortgage a part of the property. It would therefore follow that if without defeating the provisions of the Transfer of Property Act or the Tenancy Act part of the mortgage could be enforced, the whole transaction cannot be bad.

14. Taking the case of an out-and-out sale it can hardly be contended that if a vendor has purported to sell his zamindari property along with certain occupancy lands and has received full consideration agreed upon, the title to the transferable property has not legally passed. Under the Transfer of Property Act both sales and mortgages are transfers and are governed by similar principles. The only distinction is that the mortgagee may have to come into Court to enforce the covenants entered into by the mortgagor but he does so not under the provisions of the Specific Relief Act or the Contract Act but under the statutory right given to him by the Transfer of Property-Act. If that Act does not debar him from claiming partially I fail to see why he should be completely thrown out of Court.

15. In most cases of simple mortgages there is a primary undertaking to repay the loan and there

is a collateral security offered for the realization of the amount in case of failure of payment. If the security offered includes non-transferable properties there is nothing to prevent the creditor from giving up the security altogether and claiming repayment of his money by enforcement of the personal covenant. Such a personal covenant is by no means illegal. On the other hand in most usufructuary mortgages the primary obligation is to put the mortgagee in possession and the right to recover the loan only accrues after there is a failure to deliver possession. If the mortgagor has promised to mortgage non-transferable properties, which promise cannot be enforced in a Court of law, the creditor cannot be allowed to say that the mortgagor has broken his contract because he has failed to perform that which he was by law not bound to perform. If there has been no such failure, the creditor's claim to recover his money on the ground of such a supposed failure cannot be entertained.

16. It seems to me that if the mortgagee's right to recover his money is under the terms of
13 C.P. 250

the document dependent only on the failure of the mortgagor to hand over possession of his occupancy lands which are non-transferable, the right cannot be enforced because the law cannot recognize that there has been any breach. A man cannot be deemed to have broken a contract which is void in law. But if the right to recover the money is based on a primary undertaking to repay the loan and is independent and separable from the collateral security offered, such a promise may be enforced if it is contained in a deed of transfer which actually affects transfer of some property not disallowed by law; for such a case would be governed by the Transfer of Property Act, and not the Contract Act. But if the mortgaged property consists wholly of tenancies which are not transferable in law, the transfer as such is absolutely void and there is no mortgage transaction governed by the Transfer of Property Act. The transaction is merely one of a contract between the parties evidenced by a registered document, which would be governed exclusively by the provisions of the Contract Act and Section 24 of the Act may apply, unless the security offered can be separated from the personal covenant.

17. The previous cases of this Court have been discussed at length by Mukerji, J., and as none of them is a Full Bench case I do not propose to discuss them afresh. But I should like to refer to two cases decided by Benches of which I was a member.

18. In the case of *Tulshi Ram v. Sat Narain*², the main purpose of the mortgage deed was to mortgage the occupancy holdings and to put the mortgagee in possession and it was provided that in the event of the mortgagee not obtaining possession he would be entitled to recover, his mortgage money with interest by sale of three groves and a well. We held that the alternative promise to pay was incapable of being separated from the agreement to deliver possession and that the right to recover the amount was dependent on the failure of the mortgagor to put the mortgagee in possession of the occupancy holdings. The right to recover the money by the sale of the groves and the well did not accrue till there had been a failure to deliver possession of the occupancy lands. We distinguished the two previous cases of this Court on the ground that in the

case before us the mortgage was primarily one of the occupancy holdings only and it was only in the event of their possession not being delivered that a right was given to realize the money by sale of the other property which right could only come into force on the failure of the mortgagor to carry out his illegal contract.

19. In the case of *Sital Rai v. Ram Khelawan Panday*³, the usufructuary mortgagee, whose right to recover money was dependent on the failure to deliver possession, was retaining possession of the occupancy lands which could not have been transferred and was trying to recover the other property mortgaged. Had the claim been decreed the result would have been to enforce the whole of the contract part of which was admittedly unenforceable. As the mortgagee did not offer to restore the occupancy lands taken possession of by him in an unauthorized manner we declined to decree, his claim.

20. In the case before us the document in suit is a registered deed for ₹ 399-15-6/- and provides that the executant's would pay on the 30th of every Jeth ₹ 36/- as interest on the principal amount, but if they failed to pay the amount to the creditors they would put

² AIR 1921 All 392 : (1921) ILR 43 All 81 : 57 Ind. Cas. 445

³ AIR 1925 All 543

them in possession of properties consisting of certain sir lands, mortgaged lands and tenancy holdings if the executant's or their cosharers dispossessed the creditors of the zamindari plots and the plots sub-mortgaged to them the executant's would be liable therefore and in case they did not take upon themselves the liability for such dispossession, the creditors would have power to realise from them in a lump sum the principal amount of the mortgage together with interest at the rate of ₹ 1-8-0/- per cent per mensem and costs. The deed again repeats covenant that the creditors were at liberty to realize ₹ 36/- as interest and in lieu of it to be entitled to enter into possession and occupation of the plots. As regards the sub-mortgaged lands it was provided that whenever that original proprietors paid that amount the creditors would have to redeem the plots.

21. It is quite clear from the terms of this deed that the first obligation was to pay interest regularly and the second was to put the creditors in possession of the mortgaged lands in case of failure of payment, and lastly if there was any dispossession of the creditors from the zamindari plots and the plots sub-mortgaged to them (not the occupancy plots) the creditors had a right to realise the principal and interest in a lump sum. The right to recover the whole amount with interest was in no way dependent only on the failure to deliver possession of the occupancy lands. It accrued after the creditors were dispossessed from the zamindari plots or from the plots previously mortgaged.

22. It is an admitted fact before us that the mortgagors have appropriated the mortgage money relating to the lands previously mortgaged and have failed to deliver the possession of the zamindari property. I have therefore no hesitation in saying that the claim to recover the principal

amount ought to prevail because in giving such a decree we are enforcing the mortgagee's rights under Section 68, Transfer of Property Act and not enforcing the contract to mortgage the occupancy lands and therefore not defeating the provisions of any law.

23. The creditors have thought fit to give up the entire security and are suing for money. There is much less reason for disallowing such a claim. I would therefore dismiss this appeal.

Mukerji, J.

24. This appeal has been referred for decision to a Full Bench. No particular question has been framed for decision but the learned Judges who made the reference found that there was some conflict of opinion in this Court and were anxious that a definite answer might be given. The facts of the case briefly are these. Defendant 1 who is the appellant in the case, along with the husband of defendant-respondent 3 who has since died executed the deed in suit on 28th May 1905 in favour of the plaintiff-respondents to secure a sum of ₹ 399-15-6/- borrowed by them. It was agreed that the borrowers would pay interest at the rate of ₹ 36/- per annum on the 15th of Jait Sudi every year and in default they would put the lenders in possession of certain properties which they mortgaged by the deed in question. The deed covers an area of between three and four bighas of land out of which only 12 biswas are an occupancy holding. The rest of the property consists of zamindari lands and lands over which the borrowers had possession as mortgagees. These last mentioned plots were also zamindari property. The plaintiffs came to Court on the allegation (after amendment of the plaint) that after a certain period the borrowers stopped paying the annual interest and they failed to put the plaintiffs in possession of the mortgaged property. Subsequently, they executed a bond for arrears of interest. The lenders received payment from their own mortgagors and released the lands that had been mortgaged to them, although they were bound to hand over the money received by them to the plaintiffs. The plaintiffs, security having thus diminished, by the default of the borrowers themselves, the plaintiffs were entitled to recover the money lent by them. The plaintiffs' claim is, therefore, based under the provisions of Section 68, Transfer of Property Act.

25. The defence, inter alia, was that the transaction in suit was illegal, because a part of the land mortgaged was occupancy holding which could not be transferred by law. The learned Munsif dismissed the suit on the ground that the transaction was illegal and could not be enforced by a suit. On appeal, a learned Subordinate Judge held, on the *authority of Rajendra Prasad v. Ram Jatan Rai*⁴ that the transaction was not illegal and decreed the suit for recovery of the principal amount of mortgage money and interest for six years at 9 per cent per annum, being the rate originally agreed upon.

26. Defendant 1 has appealed and it has been contended on his behalf that the transaction was an illegal one and the suit must be dismissed.

27. The argument for the appellant is based on Section 23, Contract Act. It lays down that the consideration or object of an agreement shall be deemed to be lawful, unless, inter alia, it is forbidden by law or unless it is of such a nature that if permitted it would defeat the provisions of any law. It is pointed out that under Section 20, Agra Tenancy Act, the interest of an occupancy tenant is not transferable except under certain circumstances (which have not arisen in this case) and that Section 21 of the same Act, an occupancy tenant is declared to be incompetent to transfer his holding. It is urged that these two provisions of law, read with Section 24, Contract Act, make the transaction in suit entirely void. 8. 24, Contract Act, reads as follows:

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful the agreement is void.

28. We have to see how far this argument is valid.

29. It has not been denied before us that the transaction in question was, to start with, one of mortgage, though it was agreed that possession was not to be delivered to the lenders till there was a default in the payment of the annual interest. A mortgage is defined in Section 58, Transfer of Property Act as the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced... by way of a loan...

30. The present case therefore is one of a transfer of immovable property. Section 5, Transfer of Property Act defines what "transfer of property" means. It says that a "transfer

⁴[1917] 39 All. 539

of property" is an act by which a living person conveys property in present or in future to one or more other living persons...." It further says that "to transfer property" is to perform such an act. If we read the definition of the expression "transfer of property" and compare it with the definition of a contract, we shall see at once that a transfer of property, although it may be based, initially, on a contract, is not, in its essence, any longer a contract, after the transfer has become an accomplished fact. In other words, if a transfer of property takes place in pursuance of an agreement to transfer, the agreement would be an agreement within the meaning of the Contract Act, but after the transfer has actually taken place, the matter is no longer "a contract." The title to or an interest in the property has passed and there remains nothing, by way of a contract, to be enforced in a Court of law. A contract (see Section 2, Contract Act) is an agreement enforceable by law. An agreement is defined as, "every promise and every set of promises forming the consideration for each other."

31. To understand the nature of an agreement, we have to see what a promise is. A promise is a proposal when it has been accepted. And a proposal takes place when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence. When all these definitions are read together, it will

be found that, in a contract, there must be something which is capable of being enforced in a Court of law. But in the case of a transfer of property, which has been completed in the manner directed by the law, (e.g., by execution of a registered deed, attested or unattested as the case may be) the title to or an interest in the property has passed to the transferee, and there is nothing to enforce. A suit may be necessary, for example, to obtain possession or to sell a property, but such suits would be based not on contract, but on the rights or titles conveyed by the transfer. It is significant that while by Section 4, Transfer of Property Act, the chapters and sections of the Transfer of Property Act, which relate to contracts are to be taken as a part of the Contract Act, it is nowhere laid down that the provisions of the Contract Act are to be read into the Transfer of Property Act. My opinion, therefore, is that there is an essential difference between a mere contract" and a transfer of property."

32. My view finds support from two cases decided in this Court. One is *Bajrangi Lal v. Ghura Rai*⁵ decided by Richards, C.J., and Rafique, J. The other is *Rajendra Prasad v. Ram Jatan Rai*⁶ decided by the same learned Chief Justice and Walsh, J. In the former case, a tenant who had both a fixed rate holding and an occupancy holding, sold both to the defendant. Thereafter, he sought to have the sale set aside on the ground that the transaction was illegal and did not convey any title to the transferee. It was held that the title to the fixed rate holding had passed to the transferee and that the title was a good one. The learned Judges say at p. 234 as follows:

In considering the force of the contention we must bear in mind that we are not dealing with a case in which the Court is asked to decree specific performance or even to enforce a contract.

33. Again at p. 235 their Lordships say:

⁵[1916] 38 All. 232

⁶[1917] 39 All. 539

It thus appears that a contract of sale is one thing and a deed of transfer another, and it does not necessarily follow that because the contract was unenforceable that the transfer is void.

34. In the second case, the suit was for sale of a fixed rate holding and was based on a mortgage, by which, besides the fixed rate holding, an occupancy holding had been mortgaged. It was held that the suit was maintainable. Richards, C.J., is reported to have said at p. 241:

In the present case, we are not concerned with the validity or invalidity of the original contract, nor need we deal with this case in the way we might have had to deal with it, if the present suit had been a suit by the mortgagee for specific performance of a contract to transfer certain property by way of mortgage. The transaction has long since passed the stage of contract.

35. With this remark I most respectfully agree. On principle, there is no difference between a sale

and a mortgage. By both, an interest in an immovable property is transferred from one party to another. Such transactions are to be considered, having regard to the law enacted in the Transfer of Property Act, as already pointed out in an earlier portion of this judgment. In this view, the plaintiffs are entitled to maintain their suit and the decree of the Court below must be affirmed. In this case, three kinds of property were transferred, out of which a portion was an occupancy holding. From the fact that a mortgage of the occupancy holding could not take effect because the property was not transferable, it would not follow that the mortgage of the remaining property was bad. The mortgagees, the plaintiffs, were entitled to be put in possession of this property and if, owing to the default of the mortgagors, any portion of the property was lost or the mortgagees were not put in possession, the mortgagees are entitled to maintain a suit for recovery of the mortgage money, as provided for in 8. 68, Transfer of Property Act.

36. Before this judgment can be concluded, it is necessary to examine some cases and to find out whether in view of those cases, the law laid down above is good.

37. In *Kanhai v. Tilak*⁷ there was a mortgage of an occupancy holding and the mortgagee claimed possession of the holding and in default asked for a decree for the mortgage money. Chamier, J., after stating that it had been conceded before him that the mortgagee was not entitled to possession, remarked as follows:

The only question is whether he is entitled to a money decree against the mortgagor... To accede to the appellant's request would be equivalent to enforcing an agreement, part of the consideration of which was unlawful. Under Section 24, Contract Act, the whole contract must be considered to be void.

38. It will be noticed that the transfer by virtue of which the plaintiff was seeking relief conveyed no title as mortgagee to the plaintiff and there being no mortgage in existence, no suit based on Section 68, Transfer of Property Act, could be maintained. In this view, the decision of the learned Judge may have been right, though I am unable to agree with him as to the reasons on which he based his judgment. As I have already pointed out, a

⁷[1912] 16 I.C. 542

mortgage or a sale is essentially different in their nature from a mere contract.

39. The case of *Puran Singh v. Jai Singh*⁸ is another decision by the same learned Judge (Chamier, J.) and he expresses more or less the same opinion as in the earlier case, though the expression of opinion in this particular case was a pure obiter dictum. It was held that no second appeal lay and the appeal was accordingly dismissed and the decree in favour of the plaintiff stood.

40. The case of *Ram Partap Rai v. Ram Phal Teli*⁹ is a decision by a single Judge of this Court (Piggott, J.). There the property mortgaged was wholly an occupancy holding and the suit was decided on the basis of Section 24, Contract Act. In view of my remarks with respect to the case

of *Kanhai v. Tilak*¹⁰ any further remark on this case is not called for.

41. The case of *Mohammad Shakur v. Gopi*¹¹ was decided by Sunder Lal, J., and the facts were these. A simple mortgage of an occupancy holding was executed to secure some money lent and there was a promise to pay. It was held by the learned Judge that although the mortgage was invalid, there was no bar to the plaintiff recovering on the personal covenant. The case need not be considered at all, because the facts are entirely different from those of this case. Besides, it does not discuss the law on the point. The case of *Lachman Das v. Yusuf Khan*¹² was decided by a single Judge of this Court (Tudball, J.). It appears that the plaintiffs in the suit purchased the defendants' house in execution of a decree. There being some difficulty in obtaining possession, he exchanged the house with the defendants for the latter's occupancy holding. On that holding there stood a grove. That grove, on a suit by the defendants was restored to them. The plaintiffs thereupon sued to recover the house. It was held that the transaction could not succeed because it was impossible to replace the opposite party in the same position in which he was before the transaction was carried out. The case does not profess to discuss any law and is no authority for any proposition of law other than that laid down in the case.

42. The case of *Jarbandhan v. Badri Narain*¹³ was a decision by two learned Judges of this Court. They simply re-affirm the decision by Sunder Lal, J. in the case of *Mohammad Shakur v. Gopi*¹⁴. No law is discussed. The case has no application to the present one as already pointed out in discussing the decision of Sunder Lal, J.

43. The case of *Tulshi Ram v. Satnarain*¹⁵ was this: a certain occupancy holding belonging to the defendants was usufructuarily mortgaged by these to the plaintiffs. The plaintiffs got possession and were dispossessed. Then they sought to recover the mortgage money by sale of certain other properties which had been given by way of security as it were, and it was held that the right to recover the money by sale was a subsidiary agreement to the main one which was illegal. This Court therefore (Sulaiman and Gokul Prasad, JJ.) upheld the decree by which this suit had been dismissed. It is clear that this case has no direct bearing on the facts of the present case before us and the two cases of *Bajrangi Lal v. Ghura Rai* [1916] 38 All. 232 and *Rajendra Prasad v. Ram Jatan Rai*¹⁶ were distinguished by the learned Judges themselves.

44. The case of *Har Prasad Tewari v. Sheo Gobind Tewari*¹⁷ was

⁸[1912] 17 I.C. 522

¹⁰[1912] 16 I.C. 542

¹²[1915] 13 A.L.J. 783

⁹[1913] 18 I.C. 9

¹¹[1916] 35 I.C. 202

¹³ A.I.R. 1924 All. 80

¹⁴[1916] 35 I.C. 202

¹⁶[1917] 39 All. 539

¹⁵[1920] 18 A.L.J. 703

¹⁷ A.I.R. 1922 All. 134

decided by two learned Judges of this Court and the facts were these:

45. There were three mortgages covering partly an occupancy holding and partly fixed rate tenancy holding. The plaintiffs could not get possession over the entire portion of the holdings and, therefore, purported to bring the suit for recovery of the mortgage money under Section 68, Transfer of Property Act. They failed in the Courts below on the ground that the entire transactions were void being in contravention of the provisions of the Agra Tenancy Act. Thereupon it was argued before the learned Judges of this Court that there was a personal covenant in each of these mortgages and the plaintiff was entitled to resort to them and ask for a simple money decree. The learned Judges did not accede to this request, but professing to follow the decision of Chamier, J., viz., the transactions were void under Section 24, Contract Act, dismissed the appeal. With all respect, Section 24, Contract Act, was not applicable to the cases of mortgages as already discussed.

46. In the case of *Sital Rai v. Ram Khilawan Pandey*¹⁸, there was an usufructuary mortgage of occupancy and fixed rate holding. The plaintiff alleged that he had been put in possession of both, that he was in possession of the occupancy holding but had been ousted from the fixed rate holding. He sued for possession over the fixed rate holding. The suit failed ultimately in this Court on the short ground that the plaintiff being in possession of lands over which he had no right to keep possession should not be allowed any relief in a Court of justice.

47. The case of *Rajendra Prasad vi Ram Jatan Rai* [1917] 39 All. 539 already mentioned was relied on before the learned Judge, but they thought that the case did not require consideration, in view of the peculiar facts of the case.

48. In the case of *Daya Ram v. Thakuri*¹⁹, the question was whether the plaintiff who was an usufructuary mortgagee of an occupancy holding, having been dispossessed therefrom, could succeed on a personal covenant to recover the money? Daniels, J., was of opinion that he could not. On commenting on the case decided by Sunder Lal, J., I have said that the facts of the case before that learned Judge, which are very similar to the facts of the case of *Daya Ram v. Thakuri*²⁰, have no bearing on the facts of the present case. I need not express any opinion on it.

49. Lastly comes the case of *Bhusi Rai v. Ganesh Rai*²¹, in this case, there was a mortgage of an occupancy holding alone and it was held that the subsidiary contract to pay the money could not be enforced, as its effectiveness depended on the main contract of a mortgage of usufructuary holding which was illegal. This case has obviously no application to the facts of the present case.

50. In the result, I find that the decisions in this Court, have not been so constantly one way, as to lead one to suppose that the view of the majority of the learned Judges of this

¹⁸ AIR 1925 All 543

²⁰ AIR 1924 All 668 : (1924) ILR 46 All 622 : 83 Ind. Cas. 21

¹⁹ AIR 1924 All 668 : (1924) ILR 46 All 622 : 83 Ind. Cas. 21

²¹ AIR 1927 All 499 : 103 Ind. Cas. 160. I

Court is against the view expressed in the two Division Bench cases, reported in *Bajrangi Lal v. Ghura Rai*²² and *Rajendra Prasad v. Ram Jatan Rai*²³ My opinion is, therefore, what I have expressed above (p. 7) and I would dismiss the appeal with costs.

King, J.

51. I agree.

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²²[1916] 38 All. 232

²³[1917] 39 All. 539