

(1916) 07 AHC CK 0037
In the Allahabad High Court

Musammat Bhagwan Dei

APPELLANT

Vs

Pandit Murari Lal and Others

RESPONDENT

Date of Decision : 10-07-1916

Acts Referred:

Contract Act, 1872 — Section 23

Citation : AIR 1917 All 462 : 36 Ind. Cas. 259

Hon'ble Judges : Henry Richards, C.J;Walsh, J;Rafique, J

Bench : Full Bench

Final Decision : Allowed

Judgement

Henry Richards, C.J.—This appeal arises out of a suit brought by the plaintiff to realise the amount of a mortgage dated the 13th of July 1912. The plaintiff alleged that the mortgage was assigned to her on the 29th of August 1912. Various pleas were taken and amongst others, that the real assignee of the bond was Jamna Prasad, a patwari in Government service, and that consequently the assignment was void. Both the Courts below have found that the assignment was taken in the name of the plaintiff for the benefit of her son the patwari, and have dismissed the suit on the ground that the assignment was against public policy. Section 234" of the Land Revenue Act provides that the Board may, from time to time, subject to the sanction of the Local Government, make rules consistent with the Act for various purposes set forth in the section. Clause (b) is as follows: "regulating the appointment of kanungos and patwaris, their salaries, qualifications, duties, removal, punishment, suspension and dismissal." Certain rules were made by the Board purporting, I assume, to be under the powers conferred by the Act. Rule 10 is as follows: Every patwari is forbidden to engage in trade or money-lending under any circumstances, to borrow money from any land-holder or cultivator of his circle; and to own or cultivate any land on any tenure within this circle". It is not by any means free from doubt whether Clause (b) of Section 234 authorized the making of this rule and I do not think that the taking of this assignment of a mortgage can be said to be engaging in trade or money-lending". It has not been contended that the rule in itself rendered the

assignment void. The, next question is whether apart from this rule the assignment to the plaintiff was absolutely void as being against public policy. In this connection I think it is not immaterial to remark that the present suit is not a suit to enforce any contract in connection with the assignment of the mortgage to the plaintiff. It is a suit by the transferee of a mortgage against the mortgagor to enforce payment of the mortgage debt. The contract between the transferor and the transferee was completed long ago and the mortgage-debt was transferred by a person competent to make the transfer. To succeed the defendant must get the Court to hold that the deed of transfer was absolutely void and that no interest was transferred. I cannot hold this. Apart from this view it seems to me that the contract to assign the mortgage cannot be said to be contrary to public policy. If there were no rules prohibiting a patwari from taking an assignment of a mortgage, I think no Court could possibly hold that his doing so was contrary to public policy." I am deciding this as a question of law. I quite recognise the objection to a patwari having money-lending transactions or acquiring property or any interest in property in his circle. The Courts below have relied upon the case of *Shiam Lal v. Chhaki Lal* 22 A. 220 : A.W.N. (1900) 30 and also on the case of *Sheu Narain v. Mata Prasad* 27 A. 723 : 1 A.L.J. 412. Both these cases are undoubtedly in favour of the respondents but I confess that I am unable to agree with the judgment in either of the two cases.

2. I would allow the appeal, set aside the decrees of both the Courts below and remand the case to the Court of first instance. It is quite clear that the patwari must have known that in taking the assignment he was violating the conditions at his appointment and I would, therefore, allow no costs in this Court or in the lower Appellate Court.

Rafique, J.

3. The point raised by this appeal is whether an assignment of a mortgage to a patwari is void u/s 23 of Act IX of 1872 as opposed to public policy. The point is not a new one. There are at least two reported cases of this Court where a similar transaction was held to be void because opposed to public policy. Vide *Shiam Lal v. Chhakki Lal* 22 A. 220 : A.W.N. (1900) 30 and *Sheo Narain v. Mata Prasad* 27 A. 723 : 1 A.L.J. 412.

4. The appeal came up for hearing originally before a Bench of two Judges, when during the course of argument doubts were expressed as to the soundness of the said two decisions. The case was, therefore, referred to a larger Bench. It appears that one Murari Lal executed a simple mortgage on 13th July 1912 in favour of Jagmohan Lal, Brij Mohan Lal and Kanwar Girwar Krishna in respect of a house in lieu of Rs. 1,200. On a partition between the three mortgagees the mortgage fell to the share of Girwar Krishna.

5. On the 29th August 1912, he executed a deed of assignment in respect of the mortgage in favour of the plaintiff, whose son is a patwari.

6. On 19th November 1913, the plaintiff instituted the suit out of which this

appeal has arisen for the recovery of the money due on the mortgage of the 13th of July 1912 by sale of the mortgaged house. The claim was brought against the mortgagor and one of the mortgagees and the legal representatives of the other mortgagees. It was resisted on various pleas two of which were that the assignment in favour of the plaintiff was fictitious, the real assignee being her son, the patwari, and that the suit was not maintainable on the contract of assignment, as it was void u/s 23 of Act IX of 1872. The latter objection was urged on two grounds. It was said that the assignment in question was void for considerations of public policy and for the reason that it was forbidden by law, inasmuch as under the rules framed by the Board of Revenue u/s 234 of Act III of 1901 which have the force of law, a patwari may not engage in trade or money-lending under any circumstances.

7. The learned Munsif in whose Court the suit was filed held that the assignment in favour of the plaintiff was benami and the real assignee was her son, the patwari. He also held that the contract of assignment being in favour of a patwari was void for two reasons, viz., because it offends the rules made by the Board of Revenue relating to the conduct and guidance of the patwaris which rules have the force of law and because it was opposed to public policy. The claim was accordingly dismissed. The decree of the first Court was affirmed on appeal. In her second appeal to this Court the plaintiff challenges the findings against her both as regards the benami character of the assignment and its invalidity u/s 23 of Act IX of 1872. The finding as to the assignment in favour of the plaintiff being benami is, in my opinion, one of fact and cannot be questioned in second appeal. I must, therefore, take it for the purposes of this appeal that the real assignee is the son of the plaintiff, the patwari. The question then for determination is whether the assignment of 19th November 1913 is void for the reasons given by the Court below. It is conceded for the respondents that the rules framed by the Board of Revenue have not the force of law and hence the assignment in question cannot be said to be a contract forbidden by law. But they strenuously contend that it is void on the ground that such a transaction is opposed to public policy. They rely on the two cases of this Court already mentioned above in support of their contention as also on the case of *Vithal v. Shea* 15 Ind. Cas. 933 : 8 N.L.R. 82. In view of the admission for the respondents it is unnecessary to express an opinion as to the effect of the rules framed by the Board of Revenue relating to the conduct of the patwaris on the assignment of a mortgage to a patwari. I would, however, remark that the assignment of a mortgage to a patwari would hardly fall under the prohibition, "to engage in trade or money-lending." Nor do I think that such a transaction can be said to be opposed to public policy. I take it that the law in this country as to what is opposed to public policy follows the English Law on the subject. And according to English Law the rule is that in considering whether an agreement is void as opposed to public policy regard must be had to the principles of public policy recognised by the Law as illustrated by decided cases. The doctrine of public policy will not be extended beyond the classes of cases already covered by it. No Court can invent a new

head of public policy or condemn an agreement, because in its opinion it is not consistent with public interest. Vide *Janson v. Driefontein Consolidated Mines Ltd.* (1902) A.C. 484 : 71 L.J.K.B. 857 : 87 L.T. 87 : 372 : 51 W.R. 142 : 7 Com. Cas. 268. The cases decided by the English Courts on the point have been examined and classified by Sir William Anson under seven heads, viz.-

1. Agreements tending to injure the public service.
2. Agreements which injure the State in its relation with other States.
3. Agreements which pervert the course of justice.
4. Agreements which tend to abuse pf legal process.
5. Agreements which affect the freedom or security of marriage.
6. Agreements in restraint of trade.
7. Agreements which are contra bonos mores.
8. It cannot for a moment be urged that an assignment to a patwari of a mortgage falls under any of these agreements. The three cases relied upon by the respondents are at variance with the rule of English Law on the subject and with due deference to the learned Judges who decided those cases I am unable to follow them.
9. In my opinion the contract in suit is not opposed to public policy. I would, therefore, allow the appeal.

Walsh, J.

10. I agree. It is only because we are expressing our dissent from two two-Judge decisions of this Court, that I think it necessary to add a word or two to the judgments of my Lord the Chief Justice and Mr. Justice Rafique. The question of the validity or otherwise of this contract depends upon the terms of Section 23 of the Contract Act. The words "opposed to public policy add nothing to, and detract nothing from, the common law, and must, therefore, be interpreted accordingly, but in my view, the fallacy underlying the two previous decisions of this Court, and, therefore, the decision of the lower Appellate Court in this case, which was bound to decide it as it did having regard to those two previous decisions, was that they overlooked the language of the section, and the distinction between the conduct of a person and the subject-matter of a contract. The section provides for cases where the consideration or subject of the agreement is illegal or opposed to public policy. There can be no question, having regard to the regulations governing his appointment, that the conduct of the patwari in this case was opposed to public policy. That is not the test. The consideration or object of the agreement was the assignment of the mortgage. It is impossible, in my view, to hold that that is opposed to public policy and I doubt whether any case can be found at common law in which a contract has been held to be opposed to public policy because it was entered into by a particular individual

subject to particular restrictions. An examination of the large number of illustrations given to Section 23 of the Contract Act makes it perfectly clear that it is the subject-matter alone which is in question.

11. With regard to the rules, I think it very doubtful whether the power to make rules relating to the appointment, dismissal and so forth, of a patwari, u/s 234, confers any right to qualify the general law with regard to contracts or anything else, and I think the draftsman, who drew up these rules, knew his business too well and, therefore, omitted to do any such thing. In my view a rule declaring contracts void would have been ultra vires, but that no such intention was ever contemplated is, I think, clearly indicated by the penalty provided by Rule 11 which immediately follows the prohibition in Rule 10. If the rules are intra vires they have "the force of law" in their application to the patwari whether they say so or not, but that does not mean that they qualify the general law.

12. I only desire to add that I entirely agree with what my Lord the Chief Justice has said with regard to the finding about money-lending.

13. The order of the Court is that the appeal is allowed, the case is remanded to the Court of first instance through the lower Appellate Court with directions to re-admit the case on its original number on the file and to proceed to hear the same according to law. The parties will bear their own costs in this Court and in the lower Appellate Court. All other costs will be costs in the cause.