APPELLATE CIVIL.

Before Falshaw and Kapur, JJ.

GURDIT SINGH AND OTHERS,—*Plaintiffs-Appellants.*

versus

BABU AND OTHERS,—*Defendants-Respondents.*

1953

May, 28th

Regular Second Appeal No. 920 of 1948.

Transfer of Property Act (IV of 1882) Section 10—Family settlement imposing restrictions on sale and mortgage—Whether such restrictions hit by section 10 of the Transfer of Property Act.

A gifted the suit property to F, his *pichhlag* son, in 1879. G. S. and other collaterals of A objected to the gift and in the revenue department a compromise was arrived at between A, F and the collaterals, to the effect that F or his descendants will not sell or mortgage the property but will only be entitled to its usufruct. On 31st August 1944, the descendants of F mortgaged a portion of the land. Collaterals of A challenged the mortgage as being against the compromise. Both courts below dismissed the suit on the ground that the condition imposed by

the compromise was void as it was hit by section 10 of the Transfer of Property Act. Plaintiffs appealed to the High Court.

Held, that a dispute between members of a family if settled by compromise between the parties, such a compromise cannot be called a transfer within the meaning of section 10 of the Transfer of Property Act, and, therefore, any restraint on alienation which is imposed by such a compromise is not hit by this Section of the Transfer of Property Act, nor would it for the same reason offend against perpetuities.

Held further, that the compromise did not place an absolute restraint on alienation but was merely a limitation imposed on the mode of alienation. Thus it is not in any way contrary to any principle of equity nor is it contrary to any provision of law.

Regular second appeal from the decree of Shri M. R. Bhatia, District Judge, Ludhiana, dated the 3rd August, 1948, affirming that of Shri Gopal Dass, Sub-Judge, 1st Class, Ludhiana, District Ludhiana, dated the 24th April, 1947, dismissing the plaintiff's suit with costs.

H. S. GUJRAL, for Appellants.

N. L. WADHERA, for Respondents.

JUDGMENT.

Kapur, J. KAPUR, J. This is a plaintiffs' appeal against an appellate decree of District Judge, M. R. Bhatia, dated the 3rd August, 1948, confirming the decree of the trial Court, whereby the suit of the plaintiffs was dismissed.

The plaintiffs in this case are the collaterals of one Amrika who in 1879, made a gift of the property in dispute in favour of his *pichhlag* son Fauja. This gift was objected to by the collaterals of Amrika but in the revenue department a compromise was arrived at between Amrika, Fauja and the then existing collaterals that the donee or his descendants will have no right to effect a sale or mortgage of the land and that they will be entitled only to its usufruct. In 1935 the descendants of Fauja made an exchange of a portion of the land which was challenged by the collaterals, but the exchange was upheld by the High

Court by judgment, dated the 9th July, 1943, as the exchange was neither a sale nor a mortgage.

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On the 31st August, 1944, the descendants of Fauja mortgaged a portion of the land and the collaterals challenged this alienation and sued for possession of the whole of the land gifted on the ground that there was a breach of the terms of the compromise. Both the Courts below dismissed this suit holding that such a condition which was imposed in the gift was contrary to section 10 of the Transfer of Property Act, and was void. The plaintiffs have come up in appeal to this Court.

In order to decide this case it has first to be determined as to what was the effect of the compromise which was arrived at between the original donee, the donor and the then collaterals of the donor. Exh. P.2 is a *fard badar* dated the 31st December, 1879. On the record we have the statements of parties which were made before the order in Exh. P.2 was passed. Although those statements would be part of the proceedings before the revenue officer, that document has for some reason or the other been held to be unproved and was ordered to be returned to the appellants although it was never actually returned. It is, therefore, not a document which is unproved nor is it a document which is not on the record because it forms a part of the proceedings on which the order of the Superintendent, dated the 31st of December, 1879, was passed. The parties there stated that the collaterals had agreed to the mutation of the land in favour of Fauja on the condition that he will not have the power to sell or mortgage and that he will be entitled only to the usufruct of the land. Then the reasons are given why they were agreeing to this compromise and upon this the mutation was made in favour of the donee Fauja who had accepted the terms of the compromise that neither he nor his descendants will have the power to sell or mortgage the land gifted to him.

Transactions such as these are only compromises and are not transfers to which section 10 of

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the Transfer of Property Act applies. This was held by Lord Moulton, in *Mussammat Hiran Bibi* v. *Mussammat Sohan Bibi* (1). At page 932 his Lordship described such a compromise as a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties. "Reliance was then placed on another judgment of their Lordships of the Privy Council in *Lala Khunni Lal* v. *Kunwar Gobind-Krishna Narain* (2). In this case the statement of the law in *Lala Oudh Beharee Lall* v. *Ranee Mewa Koonwer* (3), was approved of, which was as follows :—

> "The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others as they had previously asserted it to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arrangement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement."

A similar view was taken by Sir Montague E. Smith *in Rani Mewa Kuwar* v. *Rani Hulas Kuwar* (4). As has been stated in Mulla's Transfer of Property Act, at page 93 a compromise such as this operates not as a transfer but as an admission that the party has no right to alienate. The title if so admitted may be restricted interest which under section 6 is not transferable. This was explained in *Basangowda* v. *Irgow datti* (5).

(1) 18 C.W.N. 929
(2) I.L.R. 33 All. 356 (P.C.)
(3) 3 Agra H.C.R. 82, at p. 84
(4) 1 I.A. 157
(5) I.L.R. 47 Bom. 597

There in a dispute regarding her husband's property a Hindu widow arrived at a compromise with the reversioners. Thereby she agreed to keep the property for life and undertook not to sell or mortgage the same and it was held that the compromise was family arrangement and did not amount to a transfer of property within the meaning of section 10 of the Transfer of Property Act.

These judgments show that where there is a dispute between members of a family and that dispute is settled by compromise between the parties, such a compromise cannot be called a transfer within the meaning of section 10 of the Transfer of Property Act, and, therefore, any restraint on alienation which is imposed by such a compromise is not hit by this section of the Transfer of Property Act, nor would it, therefore, offend against perpetuities.

In this view of the law the compromise which was arrived at between the parties, in 1879, would not in any way be void.

On behalf of the appellants it was submitted that this was not an absolute restraint on alienation but was merely a partial restraint and so far as the effect of this condition imposed in 1879 was not an absolute limitation restraining the transferee from parting with or disposing of interest in the property but was a limitation imposed on the mode of alienation, that is on sale or mortgage, and he relied upon a judgment of their Lordships of the Privy Council in *Muhammad Raza* v. *Abbas Bandi Bibi* (1). In this case there was a compromise between two Shia Muhammadans which provided for a marriage between the parties and by which the female party became a permanent owner (*Malik mustaqil*) of a moiety of the immovable property. It was further provided that she could not transfer to a stranger but that the ownership was to devolve as family property. The lady alienated her moiety to persons outside the family and it was contended that the alienations were valid because the contract constituted her

(1) I.L.R. 7 Luck. 257

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absolute owner and the restriction was void. It was held by their Lordships of the Privy Council that the alienations were invalid and that section 10 of the Transfer of Property Act, recognized the validity of a partial restriction upon a power of disposition in the case of a transfer *inter-vivos*. Delivering the judgment of their Lordships, Sir George Lowndes, said at page 268—

> "Judging the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title through a direct breach of this agreement, could hardly support their claim by an appeal to these high sounding principles, and it must be remembered in this connection that family arrangements are specially favoured in courts of equity."

Continuing his Lordship, said—

> "It was said by Lord Hobhouse in *Waghela Rajsanji* v. *Shekh Masludin* (1), that the expression "equity and good conscience" was generally interpreted as meaning English Law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would not be regarded as repugnant even in the case of a testamentary gift. So in *In Re Macleay*, (2), Sir George Jessel, M. R., upheld a condition attached to a devise in fee that the devisee should "ever sell out of the family" pointing out that this had been the law from the time of Coke, and in *Doed. Gill* v. *Pearson* (3),

(1) I.L.R. (1887) 11 Bom. 552
(2) (1872) L.R. 20 Eq. 186
(3) (1805) 6 East. 173=103 E.R. 1253

> Lord Ellenborough in the King's Bench affirmed the validity of a similar restriction."

In *Kuldip Singh* v. *Khetrani Koer* (1), a Hindu widow entered into an agreement with her husband's cousins and one of the conditions agreed upon was that neither of the parties could execute a lease without getting the consent and signatures of the other party without which such a lease would be null and void. The widow granted the lease and it was held that such a provision as was contained in the original agreement of compromise did not fall within sections 10 or 15 of the Transfer of Property Act, nor any principle underlying them was applicable to it and that there was no absence of equity in an arrangement such as that and effect was given to it. At page 871 the learned Judges observed—

> **** and we are unable to see any principle underlying those sections which can be applied to the present case, or that there was any sort of absence of equity in an arrangement of this kind. This was a settlement of a dispute, and effect should be given, as far as possible, to every portion of it. It is not at all an unreasonable provision that reversioners giving up their claim and allowing a Hindu widow to remain in possession of their property should wish to retain supervision over it and to prevent any acts on her part which might cause injury to their reversionary rights. A provision of this kind is not only not contrary to law, but is one which might reasonably be made in common prudence by reversioners. There being admittedly nothing in law to show that this covenant is illegal, effect must be given to it."

This is a case which very aptly applies to the facts of this case. Amrika could not make a gift

(1) I.L.R. 25 Cal. 869

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to his *pichhlag* son and the collaterals had the power to object to such a gift but in order to put an end to the dispute between themselves and Fauja the donee, the collaterals agreed to let Fauja and his descendants have the usufruct of the land and to this agreement Amrika was a party. It cannot be said that agreement such as this in any way is contrary to any principle of equity, nor is it contrary to any provision of law. It was a reasonable compromise made in "Common prudence by reversioners" and Amrika and Fauja. Nor can it be said that the defendants who are seeking to make out a title "through a direct breach of the agreement that their predecessor-in-title entered into, can support their claim by an appeal to these high sounding principles."

I am, therefore, of the opinion that the learned judge was in error in applying the principles of section 10 of the Transfer of Property Act to the facts of this case and I would therefore allow this appeal, set aside the judgment and decree of the Courts below and would decree the plaintiffs' suit but only with regard to that portion which has been transferred. The plaintiffs are not entitled to the portion which has not been alienated, and is in possession of the descendants of Fauja.

The appeal is allowed to this extent and in the circumstances of this case the parties will bear their own costs throughout.

Falshaw, J.

FALSHAW, J.—I agree.