

(1972) 02 GUJ CK 0008
In the Gujarat High Court
Case No : Second Appeal No. 756 of 1968

Barot Chhabaji Mohanji and Others	Vs	APPELLANT
Patel Joitaram Umedram and Others		RESPONDENT

Date of Decision : 11-02-1972

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 40

Citation : AIR 1973 Guj 173 : (1973) 14 GLR 84

Hon'ble Judges : C.V. Rane, J

Bench : Single Bench

Advocate : S.S. Majumdar, for the Appellant; N.H. Bhatt, for the Respondent

Judgement

1. This appeal is directed against the decree passed by the learned District Judge, Mehsana in Civil Appeal No. 187 of 1966 by which he confirmed the decree passed by the Civil Judge. Junior Division . Vijapur, in Civil Suit No. 34 of 1963. The facts of the above suit were in the brief as under:

Barot Kedarji Sankalhi and his brother Barot Mohanji had mortgaged the filed described in the plaint to Umed Jividas and his brother Shivram by executing a mortgage deed in their favor on 3-6-1925. Shivram Jividas sold his right in the mortgaged properties to his brother Umed on 17-6-1949. As the mortgage was with possession Umed Jividas was in possession of all the filed from 17-6-1974., Defendant No. 1 Chhabaji Mohanji who is the son of Mohanji Sanklaji filed an application fro adjustment of debts and redemption mortgage under the provisions of the Bombay Agriculture Debtors Relief Act (hereinafter referred to as the Act). Deceased Umed Jividas and his heirs had also filed application under the above Act for the adjustment of debt and possession of 1/2 share in the fields; During the pendency of the above application, defendant Nos. 6 who is the son of Barot Kedarji Sankalji sold 1/2 share of the family in the mortgaged fields to Umed Jividas on 31-1-1950. The B. Act. D. R. Court held that nothing was found due on the mortgage and that the mortgage could be redeemed only as a whole an d hence it directed that the possession of the all fields should be

handed over to defendants Nos. 1 to 5 who are the heirs of original co-mortgagor Barot Mohanji. The plaintiffs who are the legal representatives of Umed Jividas filed the above suit for the partition and recovery of possession of their 1/2 share in the suit filed and also for mesne profits. The suit was resisted by defendants Nos. 1, 2, 3, and 5. Barot Ishwarji Kedarji who had sold 1/2 share of Kedarji's family in the suit fields to Umed Jividas was defendant No. 6 in the suit. Defendant No. 4 Manilal, who is the grandson of Mohanji Shanklaji, and defendant No. 6 did not come forward to contest the suit which was therefore heard ex parte against them.

2. The learned Civil Judge allowed the plaintiff's suit and passed a preliminary decree for redemption and partition of the suit fields. He directed that defendants Nos. 1 to 5 should give one half share in the suit fields to the plaintiffs by effecting partition and in case they failed to do so, liberty was given to the plaintiffs to apply to for final decree for partition though the Coll. Mesne profits from 21st June 1961. onwards were also awarded to the plaintiffs.

3. Being aggrieved by the above decree defendant 1 to 5 preferred an appeal to the court of the District Judge at Mehsana. The learned District Judge dismissed the appeal and confirmed the decree passed by the trial Court. Being aggrieved by the above decree. defendants No. 1 to 5 have come in appeal.

(Paras. 4 to 7)

4. The learned advocate for the appellant however vehemently argues that, the sale deed Exh. 43 executed by defendant No. 6 Ishwarji Kedarji (respondents No. 9) on 31-1-1950) is not valid in view of provisions of Section 40 of the Act . The plaintiffs base their claim for one half share in the suit filed on the above sale deed. Under these circumstance the most important question to be decide in this appeal is whether by virtue of the above sale deed the plaintiffs ever derived any title to the suit fields. Section 40 of the Act runs as under:

"Notwithstanding any law or contract but subject to the provisions of Section 41 and 53 no alienation of any property belonging to a debts to who is a party to any proceedings under this Act or the an award registered under this Act. made by him before all his debts are discharged shall be valid. except with the provision sanction of the Court".

Looking to the language of Section 40 it becomes evident that. alienation of property belonging to a debtor who is a part to the proceedings under the Act is prohibited. The question whether the sale executed in contravention of Section 40 of the Act was void was been considered by the Division Bench of the High Court of Bombay in the Case of Himatsing Dhansing Rajput Vs. Sonu Devsing Rajput, . on which reliance has been placed by the learned advocate for the appellants. In the above case, the defendants has sold two fields by two sale deeds executed on April 6, 1948 for Rs. 2000/- and Rs. 4000/- respectively. The plaintiff case was that he was put in possession of the properties conveyed to him and that he was subsequently dispossessed. He therefore filed two suits to

obtain possession of the said two fields. He therefore filed two suits to obtain possession of the said two fields. It was the defence in the above suits that the sale deeds executed in favour of the plaintiff were invalid and conveyed no title to him in view of the provisions of Section 40 of the Act. The above, sale deed were executed during the pendency of the proceedings u/s 4 of the Act. When the matter went on appeal to the High Court, the Division Bench took the view that, "This section in terms declares that no transaction which is made contrary to its provisions shall be valid. In the context this expression must mean that the offending transactions are invalid altogether". and that if a transfer is made contrary to the provisions of Section 40 it is void and conveys no title to the transferee. Thus, according to the above decision a transaction in contravention of Section 40 of the Act was void for all purposes irrespective of the question as to whether its validity was challenged by the vendor himself or his credit or any other person having interest in the property.

5. The learned District Judge took the view that the validity of sale can be challenged only by the vendor and the looking to the facts of the case, the suit was governed by the decision in the case of *Asaram Bapu Waghmode and Another Vs. Bhanudas Dhondiba Patil and Others*, and not by the decision in the case of *Himatsingh Dhansing (supra)*. According to him Vyas J. has taken the view in the case of *Asaram v. Bhanudas* that the validity of sale on the above ground cannot be challenged by any person other than the vendor himself. In the case of *Asaram v. Bhanudas* in which the decision in the case of *Himatsingh Dhansing Rajput Vs. Sonu Devsing Rajput*, has been considered, one Dhondiba the manager of an undivided Hindu family had made an application to the court established under the Act for the adjustment of his debts. Later on he took an additional amount from the credit and passed a sale deed of property in his favour. Three minor sons of Dhondiba then filed a suit against their guardian Dhondiba for a declaration that the sale deed passed by Dhondiba was void as it was hit by the provisions of Section 40. Throughout the above litigation the application filed by the Dhondiba was pending. Vyas J. held in the above case that the suit has been filed by the plaintiff in respect of a matter pending before the court established under the Act and hence, u/s 51 (1) (a) of the Act, the Civil Court had no jurisdiction to entertain it. He also held :

"Now, if we come to the conclusion, as I think we must, upon a reading of the application Exh. 48 made by Dhondiba before the court established under the B. A. D. R. Act, that the said application was made by the Dhondiba in his individual capacity, then the property belonging to the debtor within the meaning of Section 40 of the Act would be only one-fourth share in the suit property and a challenge under the provisions of Section 40 of the Act could be made only in respect of that share (one-fourth) in the suit property and that too by Dhondiba himself and not by his sons. The son's share in the suit property would be to the extent of three-fourths, but that share would not be the property of the debtor Dhondiba. Therefore so far as the three-fourths share of the sons in the suit property is concerned, that at any rate would not be hit by the provisions of Section 40. B.

A. D. R. Act. Even if it be held that the application Exh. 48 was made by Dhondiba on behalf of the undivided Hindu family of which he was a manager, even so I must uphold Mr. Tarkunde's contention that. so long as Dhondiba is alive, the suit must be filed by him and not by his sons. It is Dhondiba who received the monies under all the three transactions. For the first possessory mortgage. it was Dhondiba who obtained Rs. 400; under the second possessory mortgage it was Dhondiba who received a sum of Rupees 300/-; and under the sale-deed in question it was Dhondiba who conveniently got for himself Rs. 900/-. Having regard to all these circumstances even if the application Ex. 48 be deemed to have been made by Dhondiba on behalf of the undivided Hindu family. I fail to see how the present suit filed by Dhondiba's sons and not by Dhondiba himself could be maintainable. For this reason also I am of the view that Mr. Tarkunde's objection must prevail."

6. It will appear from the above decision that Dhondiba had filed the application for the adjustment of his debts in his individual capacity and as he had only 1/4th share in the suit property. it was held that the challenge under the provisions of Section 40 of the Act could be made only in respect of that share and that too by Dhondiba himself and not by his sons. The above view seems to have been based on the ground that as long as Dhondiba was alive. his sons had no interest in his 1/4th share in the property. As regards the 3/4th share of Dhondiba's sons, it was held that, it would not be hit by the provisions of Section 40 of the Act because it was not the property of the debtor. It has also been made clear in the above case that. even if it be held that. the application for adjustment of debts was made by Dhondiba on behalf of undivided Hindu family of which he was a manager. the suit must be filed by him and not by his sons as long as he was alive. It will appear from what is stated above that. no proposition has been laid down in the above case that. no person other than the alienator himself can challenge the sale on the ground that it is hit by Section 40 of the Act. even if. such person has an interest in the property affected by the sale and also a capacity or legal competency to raise such a plea or take an action. I therefore find that learned District Judge has committed an error in construing the decision in the case of Asaram Bapu Waghmode and Another Vs. Bhanudas Dhondiba Patil and Others, in the manner in which he has done. It may also be pointed out that in view of the clear decision of the Division Bench in the case of Himatsing Dhansing Rajput Vs. Sonu Devsing Rajput, there is no justification for taking any other view in the matter.

7. In the present case. the appellants have one-half share in the suit properties and it is not disputed that as they have redeemed the entire suit properties, they have acquired the same rights as the original mortgagees had in those properties as contemplated by those properties as contemplated by Section 92 of the Transfer of Property Act. Under these circumstances. they have genuine interest in the entire suit properties and hence. it is open to them to challenge the validity of the sale on the ground that. it is in contravention of Section 40 of the Act. Looking to the object of Section 40 of the Act it appears that. all the persons

having interest in the property affected by the sale. are entitled to challenge its validity on the ground that. it is hit by Section 40 of the Act especially when. as held in the case of Himatsing Dhansing Rajput Vs. Sonu Devsing Rajput, a sale of the property in contravention of the provisions of Section 40 of the Act is void ab initio and it confers no title on the transferee. It is therefore open to the appellants to challenge the validity of the sale.

8. The learned advocate fro the respondents Nos. 1 to however. relying on the decision in the case of East India Co. v. O. L. Raj Ratna. (1970) 11 G LR 457 . argues that the sale of 1/2 share in the suit fields would be void only against the transferor and that as respondent No. 9 Ishwarji has supported the plaintiffs" claim for partition on the basis of the sale deed. the appellants have no right to challenge the validity of the sale. The decision in the above case mainly related to the effect of the order passed by a court or tribunal against the person who has not been given an opportunity of being heard before passing the order in question. The principle of audi alteram partem was considered in the above case and it was held that "a decision given in breach of audi alteram partem rule would therefore be void as against the party affected but it would be valid as against the rest of the world". In the present case. however. as held in the case of Himatsing Dhansing Rajput Vs. Sonu Devsing Rajput, the sale is void ab initio in view of the fact that. it is in contravention of the mandatory provisions of Section 40 of the Act. The principle laid down in the case of East India Company which has nothing to do with a case like the present one would not therefore apply to this case. The view that the sale in the instant case is void, even against the appellants, is further supported by the decision in the case of Bapurao Khusal Vs. Baliram Kolbaji, .

9. For the reasons stated above, I hold that the sale in respect of 1/2 share in the suit fields being in contravention of Section 40 of the Act is void and that it does not confer any title on the plaintiffs (respondents Nos. 1 to 8) and in that case they are not entitled to any of the reliefs claimed in the suit which is, therefore. allowed and the decrees passed by the trial Court and the District Court are set aside and the suit is dismissed. As the plaintiffs have paid proper consideration for one half share of Ishwarji in the suit fields. it would be just and fair to order that the parties should bear their own costs throughout.

10. Appeal allowed.