

**(1953) 07 BOM CK 0020**

**In the Bombay High Court**

**Case No :** Second Appeal No's. 461 and 462 of 1951

Himatsing Dhansing Rajput

APPELLANT

Vs

Sonu Devsing Rajput

RESPONDENT

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**Date of Decision :** 24-07-1953

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 64  
Transfer of Property Act, 1882 — Section 52, 53, 65

**Citation :** (1954) 56 BOMLR 69

**Hon'ble Judges :** Gajendragadkar, J;Chainani, J

**Bench :** Division Bench

**Final Decision :** Dismissed

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## **Judgement**

Gajendragadkar, J.—The point of law which arises in these two appeals is whether the sale-deeds passed in favour of the appellant by the respondent are valid in view of the provisions of Section 40 of the Bombay Agricultural Debtors Relief Act.

2. The property in suit consists of two fields, S. Nos. 114 and 30 of Aundanecha Pada in Baglan taluka. These survey numbers originally belonged to the defendant. They were sold by him to the plaintiff by two sale-deeds executed on April 6, 1948, for Rs. 2,000 and Rs. 4,000 respectively. The plaintiff's case was that he was put in possession of the properties conveyed to him and that he was subsequently dispossessed. That is why on March 2, 1949, he has filed the present suits to obtain possession of the said two fields.

3. The defence was that the sale-deeds executed in favour of the plaintiff are invalid and convey no title to him and this defence is raised u/s 40 of the Bombay Agricultural Debtors Relief Act. It appears that an application for the adjustment of debts of the defendant had been made before the Court u/s 4 of the Bombay Agricultural Debtors Relief Act. That application was ultimately disposed of on August 31, 1950, and it was held that the defendant was liable to pay Rs. 27-6-6 to his creditors. This amount was determined after scaling down

the debts of the defendant under the provisions of the Bombay Agricultural Debtors Relief Act. The defendant, therefore, contended that the sales in favour of the plaintiff fell within the mischief of Section 40 of the Act. Both the Courts below have held that the sale-deeds are invalid. That is how the only question which we have to consider in the present appeals is, what is the effect of the provisions of Section 40 of the Bombay Agricultural Debtors Relief Act? Section 40 provides that-

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

4. It is common ground that the defendant is a debtor, that an application was pending against him for the adjustment of his debts under the provisions of this Act and that at the time when the sale-deeds were executed in favour of the plaintiff the debts of the debtor had not been discharged, Mr. Gokhale, however, contends that in construing the provisions of Section 40 we should bear in mind the policy underlying the said provisions. According to Mr. Gokhale the policy underlying the section is to protect the creditors' claims and that is why limitation has been imposed upon the powers of the debtor to alienate his properties until his debts are discharged. It is, of course, clear that if an alienation is made by a debtor after his debts are discharged, this section cannot come into operation. Mr. Gokhale, therefore, suggests that we should construe the provisions of this section so as to make the impugned transaction not binding against the creditors alone. In other words, if a transaction is made by a debtor contrary to the provisions of Section 40, it may not bind the creditors and they may ignore it, but it would nevertheless bind the parties to the transaction.

5. Now, the argument based upon the policy underlying a section or an Act must be accepted with caution. If the words used in the section are clear and unambiguous and they admit of only one meaning, it is the duty of the Court in interpreting the said section to give the words their plain grammatical meaning. If it appears to the Court that the literal construction of the words might lead to wholly unreasonable and undesirable results, perhaps the Court may be justified in considering the policy underlying the section with a view to adopt a non-literal and liberal meaning of the words used. If the words used are not clear and are ambiguous, consideration of the policy underlying the section may become relevant. In the present case it seems to us that the words used in this section are so clear that it would be difficult to accept Mr. Gokhale's argument that the meaning of the words should be limited, because according to him the policy is to protect only the interests of the creditors. 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.

6. Even the argument as to the policy on which Mr. Gokhale relies cannot be of much assistance to him, because if the policy has to be considered, we must consider the policy of the Act as a whole. It is well known that this Act was enacted for the protection of the debtors as defined by it. The statutory relief which is granted to the debtors under the provisions of this Act is based upon the policy of scaling down their debts. Section 27 of the Act requires the Court to determine the particulars of the property belonging to the debtor, the value of the said property, the particulars of any incumbrances on the said property, and the paying capacity of the debtor. This section, therefore, requires the Court to take into account the value of all the properties belonging to the debtor in order to decide how equitably his debts could be scaled down. Section 29 lays down the manner in which the value of the property has to be determined. Section 30 similarly provides for the mode of determining the paying capacity of the debtor. It is only after these relevant facts are found that the Court sets upon the task of adjusting the debts under the provisions of Section 31. Clearly, therefore, the policy underlying the Act is, first, to determine the value of all the assets of the debtor and, then, scale down his debts. If that be so, the provisions of Section 40 fit in with the policy of the Act. Once an application is made against a debtor for the adjustment of his debts, Legislature desires that all his property should remain intact available for the purpose of discharging his debts. That is why Section 40 prohibits alienations without the sanction of the Court. If we were to accept Mr. Gokhale's argument that the alienations which offend against the provisions of Section 40 are binding as between the parties, but cannot be enforced against the creditors' claims, that would make the task of adjusting the debts of the debtor more difficult and certainly more complicated. The transferees claiming under such transfers would have to be brought on the record and their rights may have to be recognised after the creditors' debts are adjusted. This would naturally retard and postpone the early adjustment of the debts. We are, therefore, disposed to take the view that even if we were to take into account the policy underlying the provisions of this Act, the construction for which Mr. Gokhale contends would be inconsistent with the said policy. The prohibition against alienations seems to us to require that all the properties of the debtor should be available for the adjustment of his debts under this Act.

7. Mr. Gokhale has then referred us to the provisions of Section 28 of the Act, and he has argued that an alienation made by the debtor until an award is passed should be dealt with u/s 28 and not u/s 40 of the Act. It is only alienations made subsequent to the award, says Mr. Gokhale, that fall within the mischief of Section 40. We do not think that this contention is well founded. In our opinion Section 28 refers to the alienations made before the application for adjustment of the debts is presented u/s 4. All alienations made subsequent to the presentation of the application fall to be considered u/s 40. Section 28 lays down that if in the course of the hearing of an application made u/s 4, the Court finds that the debtor has alienated his property or created an incumbrance upon it with a fraudulent intention, the Court shall proceed to inquire into the matter

and if it is satisfied that the alienation was fraudulent it shall declare that the said alienation or incumbrance is void. The proviso to this section safeguards the rights of an alienee or the holder of an incumbrance in good faith and for valuable consideration. It would be noticed that this section aims only at fraudulent alienations. In other words, it is not all alienations that can be declared to be void u/s 28; it is only such alienations as were effected by the debtor in order to defeat or delay his creditors that can be declared to be void. This, in our opinion, more appropriately applies to alienations made prior to the presentation of the application u/s 4. Until an application is made u/s 4, the debtor is entitled to deal with his property as he likes. But this right is subject to the rule of the law, corresponding to the provisions of Section 53 of the Transfer of Property Act, that a debtor cannot defraud his creditors by entering into fraudulent transfers. Section 28 gives effect to this rule and protects the creditors against fraudulent alienations made by the debtor. On the other hand Section 40 does refer to the fraudulent intention of the debtor at all. The disability Imposed by Section 40 upon the debtor to alienate his properties is general subject of course to the provision general, subject of course to the provisions that he can make the alienation with the permission of the Court. A transferee u/s 40 would not be permitted to raise the plea that he has acted bona fide or has paid valuable consideration or that the transfer in his favour was not fraudulent. There is in a sense an absolute prohibition against transfers until the debts of the creditor are fully discharged. We, therefore, think that the reasonable way to reconcile the provisions of Sections 28 and 40 is to hold that Section 28 deals with alienations made before the proceedings commence u/s 4 of the Act, and the provisions of Section 40 apply to all alienations made subsequent to the commencement of the proceedings under the Act until the debts due by the debtor are discharged. Alienations falling u/s 40 may be made either before the award is made or thereafter. The prohibition enacted by Section 40 comes into operation as soon as an application is made u/s 4 and its operation continues until the debts due by the debtor are discharged.

8. In regard to the question of construing the words used in Section 40 it may be permissible to point out that if the Legislature had intended to make the impugned transactions voidable at the option of the creditors and to leave them as binding as between the parties to the transaction, Legislature could have used appropriate words to convey that intention. Section 64 of the CPC affords an illustration of such a provision. Private alienations of property made subsequent to an attachment are declared by Section 64 to be void as against all claims enforceable under the attachment. Legislature could have used similar words in Section 40 if it was the intention of the Legislature that though the offending transaction may not be binding against the creditors, it should be binding as between the parties to the transaction.

9. Section 52 of the Transfer of Property Act affords another illustration where the Legislature has expressed a similar intention. This section prohibits the transfer of property pending a suit relating thereto and it provides that if a

transfer is made except under the authority of the Court and on such terms as it may impose, it would not affect the rights of any other party to the suit. Legislature could have adopted this phraseology if the intention of the Legislature was as Mr. Gokhale suggests. We must accordingly hold that if a transfer is made contrary to the provisions of Section 40, it is void and conveys no title to the transferee.

10. It is necessary to consider another argument which has been urged before us by Mr. Gokhale in support of the construction which he seeks to put on the words of Section 40. Mr. Gokhale has invited our attention to a passage from Maxwell in which it is observed (p. 94) :

...a conveyance of property, knowingly made solely to give a vote contrary to Section 7, 7 and 8 Will. III, C, 25, which declared such conveyances Void and of none effect", was void so far as to prevent the right of voting being acquired which was the whole aim of the Act, but it was in other respects valid between the parties so as to pass the property.

11. In support of this statement Maxwell refers to a decision of the English Court in *Phillpotts v. Phillpotts* (1850) 20 L. J. C. 11 : 46 Bom. L.R. 170. When we turn to this judgment we find that the 7th and the 8th Statutes of William III. which fell to be construed had provided that all conveyances of properties mentioned in the section which had been brought about merely to multiply voices or to split and divide the interest in any houses or lands among several persons to enable them to vote at elections of members to serve in Parliament were declared to be void and of none effect and that no more than one single voice shall be admitted for one and the same house or tenement. Jervis C. J. put his decision more upon the consideration of estoppel than upon the construction of the section itself. Maule J. based his decision upon the construction of the section. He held that the section did not say that the deed was void but it only said that the conveyance was void. It did not say that it was void to all intents and purposes. It only said that the conveyance was void and no more than one voice was to be allowed. Therefore, the learned Judge came to the conclusion that the spirit of the Act did not require him to go further nor did the words. The words applied to avoiding conveyances so far as regards their fraudulent effect. It would thus appear that Maule J. adopted a limited construction of the words used in the section supported the said construction and also the specific provision contained in the section itself that despite the prohibited transfer no more than one single voice shall be admitted for one and the same house or tenement, led to the same construction. We do not think that the reasoning adopted by the learned Judges in construing the particular section with which they were concerned can be legitimately invoked in construing the words of Section 40 of the Bombay Agricultural Debtors Relief Act. Heading the section as a whole we feel no doubt that this section intends to make the impugned transfers void.

12. In the alternative Mr. Gokhale has claimed a decree for the refund of the amount which he has paid to the defendant under the (sic) port of this claim Mr.

Gokhale has invited our attention to the decisions of the Privy Council in *Babu Raja Mohan Manucha v. Babu Manzoor Ahmad Khan* (1942) L.R. 70 and *Nisar Ahmad Khan v. Mohan Manucha*, *Mohan Manucha v. Nisar Ahmad Khan* (1940) 43 Bom. L.R. 465.. It must, however, be remembered that the Privy Council gave the benefit of Section 65 to the transferee in both these cases because the receipt of consideration was not in dispute. It was admitted by the alienor that the consideration had been received by him and the only ground on which he had resisted the alienee's claim was that the alienation was void. In the present case, the position is substantially different. The transferor does not admit to have received the whole of the consideration as set out in the two deeds of conveyance and Mr. Gokhale is not prepared to take a decree only in regard to the amount the receipt of which the transferor has admitted. If the transferor wants to challenge the receipt of consideration in respect of both the \* transactions and desires also to raise other pleas against the plaintiff's alternative claim, we do not think we would be justified in entertaining those pleas in the present suit for the purpose of giving the plaintiff relief u/s 65. That, in any case, is not the effect of the judgments to which Mr. Gokhale has referred. If the pleas which the transferor wants to raise against this alternative claim are allowed to be raised, we would virtually be trying a new suit between the parties. The plaint would have to be amended; the defendant would have to be given an opportunity to raise his contentions against the amended claim and issues which would arise on these amended pleadings would have to be tried. In our opinion, the decisions on which Mr. Gokhale relies would not warrant the adoption of such a course at this stage.

13. The result is that the appeals fail and must be dismissed.

14. In dealing with the question of costs, however, we would be entitled to take into account the fact that out of the consideration alleged to have been paid by the transferee to the transferor the receipt of Rs. 2,000 is admitted by the transferor. Even so he is taking advantage of the provisions of Section 40 of the Bombay Agricultural Debtors Relief Act in disputing the title of the plaintiff. Therefore, we think the fair order as to costs would be that parties should bear their own costs of these appeals.