
(2004) 06 BOM CK 0083

In the Bombay High Court

Case No : Second Appeal No. 187 of 1986

Malhari Gangaram Kale deceased through LRs. and Babu Kale
and Others

APPELLANT

Vs

Shenfad Namdeo Tayade and Others

RESPONDENT

Date of Decision : 25-06-2004

Acts Referred:

Citation : (2004) 4 ALLMR 746 : (2004) 4 MhLj 577

Hon'ble Judges : A.H. Joshi, J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; S.R. Deshpande, for the Respondent

Final Decision : Allowed

Judgement

A.H. Joshi, J.—This appeal arises out of the judgment and decree passed by the appellate Court wherein the first appellate Court dismissed the appeal confirming the decree of the trial Court where the plaintiff's suit for delivery of possession of suit land admeasuring 4 acres 13 gunthas out of Survey No. 77, was decreed.

2. The plaintiff filed the suit for setting aside the alienation made by father. The findings of facts being concurrent on the point of alienation being done for legal necessity and as to the deceased father of the plaintiff not being addicted to vices and, therefore, the debts not being immoral, etc., are held in favour of the defendant concurrently.

3. The alienation was set aside only on the ground of being violative of Section 47 of the Maharashtra Co-operative Societies Act. The concurrent findings of facts as to alienation being for legal necessity, was not challenged by the plaintiff in first appellate Court, as well consequently before this Court. The concurrent finding on the question of the alienation being illegal due to Section 47 of the Maharashtra Co-operative Societies Act, is challenged by the aggrieved defendant in the present second appeal.

4. The substantial question of law which is raised is in relation to effect of Section

47 of the Maharashtra Co-operative Societies Act. The learned counsel for the appellants has placed reliance on the following four Judgments :

(i) Ram Pyare Vs. Ram Narain and Others, . (ii) 1994 M.L.J. 558 , Narayan Kisan Gade v. Machhindranath Pundalik (iii) Sindav Hari Ranchhod Vs. Jadev Lalji Jaymal and others, (iv) Dhurandhar Prasad Singh Vs. Jai Prakash University and Others, .

These Judgments are relied upon by the learned counsel in order to demonstrate :

(i) That Sections 47 and 48 contained in Maharashtra Co-operative Societies Act lay down a scheme for protecting the interest of the co-operative societies and the alienor or his legal heirs are not entitled to challenge the alienation on the ground of the transaction being in violation of Section 47.

(ii) That a transaction which is regarded void by law has to be construed for advancing the mischief sought to be remedied by the rule of law concerned, and a person voluntarily entering into a transaction ought not, later on, be permitted to rescale from his promise by taking shelter of the provisions of law denoting it to be mandatory in nature for annulling the transaction so entered to be void.

(iii) The distinction between (i) the transactions, decrees etc. which are "void ab initio" and those can be avoided without aid or assistance of the Court, (2) such transactions or decrees, which need to be avoided by adopting legal remedies only. The transaction of the first category is void ab initio while the transaction falling in the second category is not ipso facto or ab initio void and requires to be so declared and that transaction in question falls in later category.

5. In the contrast, the learned counsel for the respondent placed reliance on reported judgments and attempted to show that once the law denotes or declares a particular transaction to be void, is void ab initio and no further classification is permissible. The learned counsel also sought to persuade to disagree from the judgment delivered by this Court (Aurangabad Bench) Narayan's case and prayed for matter to be placed before the Chief Justice for reference to larger bench. He cited the following judgments:

(i) 1950 Nag LJ 598, Pratapmal Raghunath v. Laxman and Ors. (ii) 1965 M.L.J. 694 , Laxmibai and Ors. v. Ramrao Mhatarji and Ors. (iii) Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi,

All the Judgments relied upon by Mr. Deshpande are on the question as to the transaction being void in view of violation of mandatory provisions of law. Reported judgments in 7950 Nagpur Law Journal 598 and 1965 M.L.J. 694 are under C.P. and Berar Relief of Indebtedness Act, 1939, wherein a prohibitive clause has been incorporated in Section 15(2) of the said Act. The very aim and object of that Section was against the usurious money lending and it is in this background, notwithstanding whether the debt is satisfied, the transaction entered in violation of the said Section has been held to be void.

The Judgment reported in *Gundaji Satwaji Shinde Vs. Ramchandra Bhikaji Joshi*, is under the provisions of Bombay Tenancy and Agricultural Lands Act.

It shall be needless to discuss about ratio of these judgments in details inasmuch that any transaction in violation of prohibition of transfer of tenanted property is void u/s 63 of the said Act and is a concluded preposition of binding precedent. All these judgments have been rendered in the background of remedying the mischief sought to be deprecated by concerned policy legislations relating debt relief and land reform laws. The reliance on these Judgments is placed by the learned counsel in order to focus on a plea that the sale transaction in the present case as well being one which violates the mandatory provisions of law, same is liable to be regarded as such and hence the decree passed by the trial Court which is confirmed by the first appellate Court, cannot be faulted with. It will have to be examined if the ratio laid down therein de-hors governs the interpretation of Sections 47 and 48 of the Maharashtra Cooperative Societies Act even by applying the very rule of remedying the mischief for which policy legislation concerned was enacted.

6. It is necessary to examine as to what is exact ratio of judgment of this Court in *Narayan v. Machhindranath* (supra).

There were various questions which had fallen for consideration of this Court while examining Narayan's case. Dealing with the question as to the transactions being void, this Court has recorded and observed in paragraph Nos. 40 and 49 which read as follows :

"40. The next argument which has been submitted on behalf of the appellant is that the appellant is the bona fide purchaser for value without notice u/s 53 of the Act but this argument is also devoid of substance inasmuch as the encumbrance of the society is to be found in 7/12 extract for the relevant years. The appellant in his deposition has clearly admitted that he did not make any search in that behalf and that he had not gathered as to whether such charge existed. On the other hand, it is to be noticed that he had written to society about the removal of the charge. The 7/12 extracts also clearly mentioned the charge of the society and if the appellant is taken at his face value that he did not verify the charge, I feel that he commits lapse of serious nature and is not entitled to any protection u/s 53 of the Transfer of Property Act. It will have to be stated that even according to the appellant, the respondent No. 1 had actively associated himself with the deed in his favour and, it is therefore, unlikely that respondent No. 1 would not acquaint him about his relationship with the society". Even the appellant seems to be the member of the said society. Indifference in this behalf rather removes the protection u/s 53 of the Transfer of Property Act to the present appellant."

"49. The learned advocate for appellant relied on the second proviso to Clause (d) which enunciates that :

"The society may release from charge the land with the approval of the Central

Bank after the application in that behalf is filed by the member, this should arise only if the amount borrowed by the member is paid."

It is suggested that this proviso provides for an inbuilt machinery which impliedly suggests that the alienation is not void but at best, it can be treated as avoidable one. However, it will have to be held that Section 48 is based on public policy inasmuch as the co-operative societies mentioned in Section 48 must be protected against the defaults in the matter of recoveries. The societies are brought into existence to cater to the financial needs of the parties namely the farmers and if defaults are large in numbers amongst the members, the existence of the society may be jeopardised and ultimately the larger good of the farmers would be adversely affected. Hence once the alienation is made, it should be deemed to be void and, therefore, the question of feeding the grant or the question of bona fide purchase would not survive."

True it is that after quoting the submissions, this Court did not in very eloquent term record its approval to the said argument as aid to repel the challenge on the ground of sale being in violation of Section 48 of the Maharashtra Co-operative Societies Act. This Court has very specifically accepted the mandatory character of Section 48 for perfecting interest of societies. This Court also did not grant the declaration in favour of the person challenging the alienation on the ground of it being in violation of Section 48. This Court did not accept the submissions of the vendor of the property, that the transaction was liable to be avoided or declared null and void on the ground that the same was violative of Section 47/48 of the Maharashtra Co-operative Societies Act, as can be read as sum effect of the judgment, however, there is no specific finding recorded by this Court.

7. The learned counsel for the appellant has placed reliance on the *Sindav Hari Ranchhod Vs. Jadev Lalji Jaymal and others*, on the ground that the provisions contained in Section 49(1)(e) of Gujarat Co-operative Societies Act, which are *pari materia* of the scheme contained in Sections 47 and 48 of the Maharashtra Co-operative Societies Act, were under consideration of the Hon'ble Supreme Court. Their Lordships of the Supreme Court found in said case that the Society has not challenged the sale deed being violative of the prohibition. The Court further observed that the sons of the vendor could not be given a second inning, and challenge the sale transaction entered into by their father in favour of the alienees on the ground of violation of Section 49(1) of the Gujarat Co-operative Societies Act. Their Lordships also found that the case at hand did not call for re-examination of the matter upon remand on the said ground. The ratio of the dictum of the judgment of the Supreme Court is rather that the transaction cannot be avoided by getting it declared void except at the behest of the society. Though finding of Hon'ble Supreme Court referred to above is in the nature of observation, it has effect of laying down the law and sufficiently governs the interpretation of Sections 47 and 48 of the Maharashtra Co-operative Societies Act as well.

8. The contention of the learned counsel for the appellants that the provisions will have to be interpreted for advancement of the object and the scheme of the statute, is well founded. Moreover, in view of the ratio as laid down by the Supreme Court in *Dhurandhar Prasad Singh Vs. Jai Prakash University and Others*, , the effect that the transaction though denoted by law to be void is not per se or ipso facto void. It will have therefore to be held that if at all it be so void it is so only as against the society whose interest is sought to be protected by said provision of law and if need be, society can avoid such transaction as void without any declaration, however, said protection is unavailable to those who wish to use said provision in disguise and their true intentions are to avoid liability incurred under solemn promise. The transaction which violates Section 48, has to be viewed in the light of the scheme of Sections 47 and 48 together. These Sections are placed under the title "prior claim of society". Though the transactions which violate these Sections have been declared void, those being void, will have to be construed to be void qua the society. It shall never be allowed to lie in the mouth of the person (or his heir) entering into the said transaction and committing of an open act of violating it and transferring the interest in the property adverse to the interest of the society, to say that transaction is void on account of mandatory prohibition contained in Section 48. If allowed, this would amount to be abuse of law by granting incentive and bonus on commission of illegality.

9. The ratio laid down in *Ram Pyare Vs. Ram Narain and Others*, , therefore, squarely applies to the present case where the transaction which is declared by law to be void, was not declared by Supreme Court to be void though it was falling within the tooth of the prohibitive mandate of law. In the case of *Ram Pyare* (supra), the provisions contained in Section 43 of Transfer of Property Act of "feeding the title" was held to apply. Said doctrine does not have the de hors application to the present case, yet the said principle is still available for being applied. Admittedly, the debt payable to the society, in the facts of the present case which created fetters on transferability, has been discharged and this fact has not been disputed by the respondents/original plaintiffs. Since the debt on account of which the transaction is sought to have been hit by virtue of Section 47/48 of the Maharashtra Co-operative Societies Act, gets discharged and the deficiency in the title, or the fetter on the transferability of title. If any, under which the vendor was, gets cured and the purchaser's title gets perfected, as if Section 43 of Transfer of Property Act was applicable.

10. In view of this situation, the answer as to the question whether the transaction which was declared null and void by the trial Court and first appellate Court concurrently being violative of Section 47 of the Maharashtra Co-operative Societies Act, is liable to be answered in negative, and therefore, the second appeal succeeds.

11. In the result, second appeal is allowed and judgment and decree passed by the Additional District Judge, Buldhana, in Regular Civil Appeal No. 61 of 1984,

on 4/8/1986, and passed by Joint Civil Judge, Jr. Dn., Buldana in Regular Civil Suit No. 44 of 1982, on 17-2-1984, is set aside and Regular Civil Suit No. 44 of 1982 is dismissed with costs throughout.

12. It is seen that this Court had, while passing the interim order on 6-1-1986, granted stay on the condition of the appellants paying to the respondents a sum of Rs. 500/- per annum until disposal of the appeal. The learned counsel for the appellants has stated that the appellants have already paid the amount regularly, in view of the fact that the appeal has been allowed and the suit is dismissed, the amount paid by the appellants to the respondents is liable to be refunded by the respondents. If they do not voluntarily refund, the appellants are free to recover the same as a decree of Court, if the amount is not paid voluntarily within a period of one month from the notice to be given by the appellants, the amount shall carry interest " 6% p. a. from the actual date of payment to the respondents.