

(1965) 07 GUJ CK 0014
In the Gujarat High Court
Case No : Second Appeal No. 251 of 1960

Mohanlal Khushalbhay and Others

APPELLANT

Vs

Yakubkhan Pirkhan and Another

RESPONDENT

Date of Decision : 06-07-1965

Acts Referred:

Bombay Agricultural Debtors Relief Act, 1947 — Section 10, 8
Contract Act, 1872 — Section 65

Citation : AIR 1967 Guj 46 : (1965) GLR 817

Hon'ble Judges : N.M. Miabhoy, J

Bench : Single Bench

Advocate : N.G. Shah, for the Appellant; N.V. Karlekar, for the Respondent

Judgement

(1) This is a Second Appeal by the heirs of the original defendant, one Khushaldas Makandas. Respondents Yakubkhan Pirkhan and Parshottam Gopal were plaintiffs who brought Regular Civil Suit No. 44 of 1954 in the Court of the learned Civil Judge (Junior Division), Vyara, from out of which this Second Appeal arises. The main question which requires to be decided in the present appeal is whether S. 65 of the Indian Contract Act is or is not applicable to the facts of the present case. Those facts may be stated at first. On 17th September 1948, Yakubkhan, plaintiff No. 1 executed a Khata for Rs. 2,701 in favour of Kushaldas, defendant. The parties were the residents of Vyara, which was then a part of the former Baroda State. After the State merged with the State of Bombay, the Bombay Agricultural Debtors Relief Act, 1947 (hereinafter called "the Relief Act") was applied to the aforesaid territory sometime in 1950. Thereafter, Khushaldas made an application under the Relief Act for adjustment of the debt of Yakubkhan, however, at the same time, contending that he did not admit that Yakubkhan was a debtor within the meaning of the Relief Act and further stating that he had made the application for adjustment of Yakubkhan's debts only out of caution. The finding recorded by the learned appellate Judge is that Yakubkhan did not know that such an application had been made at the time when the settlement, presently to be referred to was, made between him and

Khushaldas. On 22nd May, 1951, when the aforesaid application was pending in the B.A.D.R. Court, a settlement was arrived at between Khushaldas, Yakubkhan and Parshottam, plaintiff No. 2, as a result of which the debt of Rs.2,701 due from Yakubkhan to Khushaldas was settled at Rs. 2,125 and, in consideration of a Khata executed by Parshottam for that amount in favour of Khushaldas, Khushaldas discharged Yakubkhan and the entry on the credit side of that Khata evidences the aforesaid settlement. Ex. 63 is the new writing which Parshottam executed in favour of Khushaldas. Parshottam paid the amount due under that writing after the aforesaid settlement had been arrived at between the parties. Khushaldas did not appear in the B.A.D.R. Court and consequently his application was dismissed for non-prosecution. The present suit was thereafter brought in 1954 by Yakubkhan and Parshottam for recovering the payment which Parshottam had made under the new writing, Ex. 63. The suit was based mainly on the ground that the settlement arrived at between the three parties was void under S. 10 of the Relief Act; that therefore, the payment was made under a void transaction and that, therefore, Khushaldas was bound to repay the amount which he had received under that transaction. Khushaldas resisted the claim on a number of grounds, all of which need not be stated in the Second Appeal. The learned trial Judge accepted the contentions of Yakubkhan and Parshottam and repelled those of Khushaldas and decreed the claim of Yakubkhan and Parshottam. Aggrieved by this decision, Khushaldas preferred an appeal to the District Court at Surat, the appeal being Regular Civil Appeal No. 26 of 1956. The appeal was decided by a learned Assistant Judge on 31st October 1957. He found that Yakubkhan was a debtor within the meaning of the Relief Act, and that the settlement aforesaid was procured by keeping Yakubkhan and Parshottam in darkness about Khushaldas having made an application under the Relief Act. He also found that the settlement was void and that, under S. 65 of the Indian Contract Act, Khushaldas was bound to refund the amount of Rs. 2,125 received by him from Parshottam. The present Second Appeal is directed against that decree of the learned Assistant Judge.

(2) Before I mention the main point urged by Mr. Shah in support of this appeal, I may dispose of a few subsidiary points which were urged by him. The first contention of Mr. Shah was that the finding of the learned Assistant Judge that Yakubkhan was a debtor within the meaning of the Relief Act was not supported by any evidence on record. In my judgment, there is no merit in this contention. From the judgment of the learned Assistant Judge, it appears that both the sides had adduced oral evidence on the subject. It is true that, on the side of plaintiffs, Yakubkhan alone went into the witness box. But, as against this, Khushaldas, who, according to the learned Judge, had personal knowledge on the subject did not go into the witness box, but examined instead, his son and one witness. The learned Assistant Judge has considered the oral evidence on both the sides and recorded a finding that the evidence given by Khushaldas's son and his witness is not worthy of credence. The learned Judge then went on to consider the documentary evidence in support of Yakubkhan's claim that he was personally

cultivating a land during the relevant period. The documents considered by the learned Judge are Exs. 92, 93 and 94 which are extracts from the combined register in respect of the relevant years. Two of those exhibits showed that some lands stood not in the name of Yakubkhan, but they stood in the name of his father. The learned Judge has held that, though this was so and the lands belonged to Yakubkhan's father, an inference can be drawn that Yakubkhan was personally cultivating the lands belonging to his father. Mr. Shah made some comments about this inference. He urged that the learned Judge had confounded the practice prevailing amongst Hindu families and thought that the same practice applies to a Mahomedan family. There is some force in this criticism of Mr. Shah. However, the finding of the learned Judge is not merely based upon the aforesaid practice. The learned Judge has also taken into account Ex. 94 and has interpreted the document to mean that, in the relevant years, Yakubkhan was personally cultivating a piece of land with one Ayubkhan. Having regard to the aforesaid materials which the learned Judge had before him, it is impossible to accept the contention of Mr. Shah that the aforesaid finding of the learned Judge was not supported by any evidence or record.

(3) Before I mention the other points which Mr. Shah urged in support of the appeal, I may first refer to S. 10 of the Relief Act on which the case of the two plaintiffs is based. That section enacts that "Every settlement of a debt due from a debtor to any creditor which is not certified by the B.A.D.R. Court under S. 8 or in terms of which no award has been made under S. 9 shall be void and shall not be recognised by any Court for any purpose whatsoever." On the facts found in this case, there is no doubt whatsoever that the aforesaid settlement was not certified under S. 8 of the Relief Act. Section 8 requires a debtor or a creditor to make an application within thirty days from the date of a settlement for the recording of such settlement and provides for an enquiry to be made on the subject and, on the Court being satisfied about the points mentioned therein, enjoins on the Court to issue a certificate of settlement. There is also no doubt whatsoever that an award was not passed under S. 9 in terms of the aforesaid settlement. Therefore, it cannot be denied, and Mr. Shah does not deny this, that the aforesaid settlement came within the mischief of S. 10 and was void on account of the contravention of that section. Mr. Shah conceded that if Mr. Parshottam had not honoured the writing, Ex. 63, and if Khushaldas was required to file a suit to enforce the writing, then, having regard to the fact that the settlement was void, the suit of Khushaldas would be dismissed. He conceded that, because of the void nature of the transaction, no relationship of debtor and creditor ever came into existence between Parshottam and Khushaldas. He also conceded, that in law, Yakubkhan, would still be the debtor of Khushaldas and that, if Khushaldas had pursued his application for adjustment of debt, then the debt of Rs. 2,701 would have been required to be adjusted in accordance with the law. However, Mr. Shah, contended, and this was his second contention that, whilst all this was true when the settlement remained in an executory state, once Parshottam discharged his obligation under the aforesaid writing., Ex. 63 and

made a payment, then, different considerations would arise and no resort needs to be made to S. 10 of the Relief Act. His argument was that, there being a novatio between Parshottam and Khushaldas, even if Parshottam made a payment under such a new transaction, Parshottam had legally no remedy whatsoever for recovering back the amount paid under the void document. In my judgment, in advancing this argument, Mr. Shah ignores the provision contained in S. 65 of the Indian Contract Act. That section has been enacted to provide exactly for a contingency of this type. Therefore, if S. 65 applies to the facts of the present case, there is no merit in the aforesaid contention of Mr. Shah I shall consider the arguments advanced by Mr. Shah against the application of section 65 just in a moment.

(4) The next contention of Mr. Shah was that Yakubkhan must be deemed to have knowledge that he was a debtor and that, therefore, the fact that the settlement was void could give no benefit whatsoever to Yakubkhan. In my judgment, the argument is irrelevant. The void character of settlement does not depend upon the knowledge of Yakubkhan that he was a debtor. I am assuming that Mr. Shah is right in making the assumption that Yakubkhan knew that he would be held to be a debtor even if he were to raise a contention before the Special Court appointed under the Relief Act. Even supposing that Yakubkhan had such a knowledge and that knowledge would have the consequence which Mr. Shah contends for, it is obvious that, at that date of the settlement, Yakubkhan could have no knowledge about the void character of the document because Khushaldas had thirty days within which to make an application and obtain a certificate under S. 8 and it is quite clear that, as and when the certificate is obtained under that section, the settlement would be valid and binding upon the parties. Therefore, in my judgment, there is no substance also in the third contention of Mr. Shah.

(5) That brings me to the main contention of Mr. Shah. That contention is that both the lower courts have erred in holding that S. 65 of the Indian Contract Act applies to the facts of the present case. Now, that section deals with an agreement and a contract. I am not concerned with the provision contained in that section relating to a contract. The relevant part of the section which deals with an agreement is as follows:

"When agreement is discovered to be void,... any person who has received any advantage under such agreement is bound to restore it or to make compensation for it to the person from whom he received it. Now the first contention which Mr. Shah raised was that the aforesaid section is not applicable to a transaction which is void ab initio. In Mr. Shah's submission, the section applies only to a transaction which is discovered to be void, meaning thereby that it applies to a transaction which acquires its void character after a valid agreement has come into being. This contention of Mr. Shah is opposed to a decision of their Lordships of the Privy Council in AIR 1922 403 (Privy Council) . In that case, their Lordships at page 75, after noting the distinction between the

two expressions (i) agreement, and (ii) contract, as used in the Indian Contract Act and pointing out that Section 65 deals with (a) agreements enforceable by law, and (b) agreements not so enforceable, proceed to decide the point regarding the applicability of Section 65 by making the following observations:-

"An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void."

But Mr. Shah contended that, even if this was so, the section would be inapplicable to those transactions which were void *ab initio simpliciter* and which transactions cannot be stated to have been discovered to be void at some later stage. In support of this, Mr. Shah cited a number of authorities specially those arising under Ss. 23 and 24 of the Indian Contract Act, in which it was held that the mere fact that a transaction is void *ab initio* u/s 23 or Section 24 would not attract the provisions of Section 65 and entitle the party to refund the advantage under that section. It was held in those cases that where a party is entitled to refund an advantage or not would depend upon whether the party was or was not in *pari delicto* or similar other principles which are applied by Courts. In fact, Mr. Shah urged that in the case of AIR 1922 403 (Privy Council) already referred to, their Lordships themselves had, after making the aforesaid observations, proceeded to further observe that, in the case before them, the agreement had been discovered to be void. In view of the aforesaid series of authorities, some of which are found to be collected by Pollock and Mulla in their commentary, Eighth Edition, from page 390 onwards, I do not propose to examine in detail for the present, unless it is necessary to do so, the contention of Mr. Karlekar that, having regard to the language used in Section 65, equitable principles have no place whatsoever in the application of that section. In my judgment, though the aforesaid settlement was void *ab initio*, it could be said also to be discovered to be void. It is quite clear that settlement would be void u/s 10 only under two contingencies: firstly the debtor whose debt is being settled is a debtor within the meaning of the Relief Act, and, secondly, that the settlement is not certified u/s 8. Even assuming that two of the aforesaid parties, namely, Yakubkhan and Khushaldas, did know that Yakubkhan was a debtor and the fact that Parshottam did not know the fact is of no legal consequence, it is quite clear that all the aforesaid three parties including Yakubkhan and Khushaldas would not come to know that the transaction was void until thirty days expire, which is the period of limitation prescribed for making an application u/s 8 or until, if such an application comes to be made, the same comes to be rejected by a competent Court. It is only if any one of the last two contingencies happens that the transaction would become void *ab initio*. Therefore, in my judgment, having regard to the aforesaid facts and law, it can be with great justification postulated of the aforesaid transaction that it was, after the expiration of thirty days, discovered to be void within the meaning of Section 65, and, therefore, that section applies in terms and was rightly so held applicable by the two lower

Courts.

(6) But Mr. Shah, has one more objection. He contends that Section 65 is applicable only to those transactions which are still at an executory stage and does not apply to executed contracts. In my judgment the argument has no merit whatsoever in any case so far as agreements which are void ab initio are concerned. The argument is opposed to both the express language used in Section 65 and the scheme of the Contract Act. If an agreement is void ab initio then, it has no legal existence from the commencement and, therefore, when an action is brought u/s 65 for enforcing the right conferred in respect of a void agreement, it is quite clear that the action is brought on the basis that the agreement had never ripened into a contract. Though the parties purported to enter into a contract in the sense that one had made a promise which the other had accepted, in the eye of law, in the case of such a transaction, there is no valid contract which can be enforced by one or the other party to the contract. In that view of the matter, in my judgment, it is not necessary that when a suit is based upon the first part of Section 65, already reproduced, the agreement must be at an executory stage and that it does not apply when the agreement has been exhausted. In fact, in terms, the section provides that when any benefit is received under such a void agreement, the same must be refunded.

(7) For the aforesaid reasons, in my judgment, there is no substance in any of the contentions raised by Mr. Shah and the appeal deserves to be dismissed with costs.

(8) Appeal dismissed with costs.

(9) Appeal dismissed.