

(1993) 09 BOM CK 0021

In the Bombay High Court

Case No : First Appeal No. 624 of 1992 (Bombay No. 457 of 1980)

Narayan Kisan Gade

APPELLANT

Vs

Machchindranath Kundlik Tarade and Another

RESPONDENT

Date of Decision : 17-09-1993

Acts Referred:

Contract Act, 1872 — Section 65

Citation : (1994) 2 BomCR 61 : (2011) 113 BOMLR 2059

Hon'ble Judges : A.A. Halbe, J

Bench : Single Bench

Advocate : D.A. Gursahani, for the Appellant; P.R. Deshmukh, for the Respondent

Final Decision : Allowed

Judgement

A.A. Halbe, J.—In Special Civil Suit No. 49 of filed in the Court of Civil Judge, Senior Division Ahmednagar by the respondent-plaintiff Machchindranath Kundlik Tarade against the respondent-defendant No. 1 and appellant-defendant No. 2 for possession of agricultural land Survey No. 30 admeasuring 15 acres 17 gunthas in Block Nos. 84 and 85, the Court was pleased to decree the claim of possession of the suit land in favour of the plaintiff. It was contended that in order to meet the pecuniary difficulties, the plaintiff had taken a loan of Rs. 5,000/- from his son-in-law i.e. defendant No. 1 Dhamane and executed a sale deed dated 2nd November, 1971. The defendant No. 1 Dhamane in turn, sold 10 acres out of Survey No. 30 to defendant No. 2 for Rs. 30.000/- under the sale deed dated 15.7.1992. It was further claimed that the plaintiff was the member of Kandal (Bk) Vividh Karyakari Seva Sahakari Society Ltd. (Society for short) and had obtained a loan. The amount of loan was outstanding at the time when the first sale deed for Rs. 5,000/- was executed on 2.11.1971. The said society is a Resource society and majority of the members are agriculturists, as required u/s 48 (Explanation) read with section 2(25) of the Maharashtra Co-operative Societies" Act (Act for short). The suit land was given in charge in order to

secure the loan as early as on 9th September 1969 for which there was mutation entry No. 3346.

2. The plaintiff contended that the sale deed in favour of defendant No. 1 and another sale deed by defendant No. 1 in favour of defendant No. 2 were void in view of the prohibition contained in section 48 Clauses (d) and (e) and that the same was void and, therefore, the plaintiff was entitled to possession of the land. The further pleadings were that the bar of Prevention of Fragmentation and Consolidation of Holdings Act was also operative in Kandal village prior to 1971 and on that count also, the transaction could not survive. As stated above, the plaintiff asked for possession of that land.

3. This was resisted by defendant No. 2 who is now the appellant before this Court. In the written statement at Exh. 24 and another at Exh. 39, which was in regard to the amendment sought by the plaintiff during the pendency of the suit, the defendant No. 1 did not contest the suit obviously because he could not dispute the alienation in his favour as being hit by section 48 of the said Act. The defendant No. 2, however, contended that plaintiff had ostensibly sold the land to defendant No. 1 for Rs, 5,000/- and defendant No. 1 sold it to the defendant No. 2 for Rs. 30,000. He also contended that the suit was filed by the plaintiff in collusion with his son-in-law i.e. defendant No. 1 in order to grab the land. It was further contended that both the sale deeds were duly registered. However, as the plaintiff was in possession of large area of land and that part of the land was likely to be taken over under the Ceiling Act as surplus land, he sold this land to defendant No. 1 for valuable consideration.

4. The defendant No. 2 further contended that he has spent large amount to the tune of Rs. 31,000/- for development of the land. He has spent for digging well. He has also spent for surfacing the well from inside. Further he had to spend for manure of the goats, levelling of the land and the total expenses, therefore, were to the tune of Rs. 42,000/-. Since receipt of possession, he has been cultivating sugarcane . He also contended that the plaintiff was not the member of the above society; that he was not indebted to that society on the relevant date; that the charge was invalid as the same was not registered; that the sale deeds are not against the public policy and that they would be deemed to be void only against the society but not between the plaintiff and defendant Nos. 1 and 2. It was further contended that the plaintiff could not be allowed to take advantage of his own wrong. He kept defendant No. 2 in dark. Defendant No. 1 also did not enlighten him on the question of charge of the society and, therefore, his sale deed should not be deemed as illegal and void. The other contentions were raised about jurisdiction of the Court and also about the bar to the proof to the contents of the sale deed under sections 91 and 92 of the Evidence Act. Defendants No. 2 also claimed to be the bona fide purchaser for value without notice.

5. The trial Court recorded the evidence of the plaintiff and his witness Asaram Tarade respectively at Exh. 99 and Exh. 171. As against this from the side of

defendant No. 2, the evidence of defendant No. 2 was only recorded at Exh. 184.

6. The learned trial Judge, by his judgment dated 27th March, 1980, found that the transaction was void u/s 48 of the Act; that the defendant had miserably failed to prove expenses incurred for improvement. The trial Court further held that defendant No. 2 had failed to prove that he was the bona fide purchaser for value without notice. However, on the question of bar under the Prevention of Fragmentation and Consolidation of Holdings Act the trial Court found that the alienation was in pursuance of the certificate granted under the Act and that the entire transaction between the parties was void as it contravened section 48 of the Act. In the result, the trial Court decreed the suit by directing the defendants to hand over possession of the suit land to the plaintiff. It may be stated that during the course of pendency of the suit, defendant No. 1 reconveyed the land to the plaintiff.

7. It may also be stated that plaintiff in his amendment application, had contended that the deed of reconveyance was executed by defendant No. 1 alongwith the first sale deed and on that point, there was no finding by the trial Court.

8. This judgment was considered by the Single Judge of this Court and the learned Judge, in his judgment dated 14th October, 1988, found that the trial Court had not raised issues as to whether the Kandal (Bk) Vividh Karyakari Seva Sahakari Society Ltd. was a registered society; whether majority of its members were agriculturists; whether the object of the society was to obtain credit for its members and whether the society was a Resource society or in the alternative, a society or a class of societies specified in this behalf by the State Government by its general or special order.

9. The matter was thus remanded to the trial Court and the trial Court considered the evidence on these four issues only and submitted its findings on 28-4-1989. The trial Court examined (PW 3) Narsingh Sadashivrao Sonar at Exh. 212; (PW 4) Karbhari Raghunath Shete at Exh. 213; (PW 5) Ramkrishna Deorao Hapse at Exh.231 and defend witness Eknath Haribhau Tarade at Exh. 248.

10. The trial Court found that the said society was a Resource Society having majority of its members as agriculturists. The Court also found that the said society was sub-classified as "Service Resource Society."

11. Those findings were submitted before the High Court and the same learned Judge, by final order dated 1-12-1989, answered all the issues in affirmative. As the transaction was held to be void the learned Judge dismissed the appeal and confirmed the Judgment and decree of the trial Courts.

12. As it was evident that several questions were raised at the time of first argument before this Court, the same were seen as not being considered in the final judgment of this Court dated 1-12-1989. Letters Patent Appeal No. 1 of 1990 was preferred and the Division Bench of this Court, by its order dated 16th

February, 1992, was pleased to set aside the judgment of the Single Judge and directed reconsideration of all issues for final decision. One review Application No. 5499 of 1992 was filed for seeking clarification as to whether the Court could consider all issues and whether the argument could be advanced only on those issues which have been decided in the judgment on 1-12-1989 and that findings on other issues stand concluded. The said review application was rejected and it was further submitted that the said argument was available to the respondent plaintiff. This Court, by its order dated 3-2-1993 clarified in extenso that the wordings in the Letters Patent Appeal judgment was explicit and that this Court can consider all the issues. It seems that the matter has not been carried again in the Letters Patent Appeal and the concluded position is that the appeal has to be considered on all the issues and not only those issues which have been decided in the judgment dated 1-12-1989.

13. The appellant-defendant No. 1 has, therefore, contended that the matter opens up on several issues and the salient amongst them are whether the plaintiff can seek assistance of the Court when the plaintiff is himself guilty of the wrongful acts; whether the alienation is void only against the society or is void in rem; whether the society could act on the unregistered charge and claim the preferential treatment of challenging the alienation u/s 48 of the Maharashtra Co-operative Societies Act. It is also a matter of controversy as to whether majority of the members are agriculturists. It may be stated that during the course of arguments, no serious dispute was raised as regards the above society being the Resource Society u/s 2(25) of the above Act.

14. Now the undisputed position could be elucidated as follows. The plaintiff sold the land Survey No. 30 admeasuring 15 acres 17 gunthas for Rs. 5,000/- vide Exh. 88 to defendant No. 1 Dhamane, who is admittedly the son-in-law of the plaintiff and at the relevant time, was residing with the plaintiff. The voters' list is on record and can be well relied upon. It is also not in dispute that defendant No. 1 sold 10 acres from Survey No. 30 to defendant No. 2 for Rs. 30,000/- under the registered sale deed dated 15-7-1972 vide Exh. 90. Likewise, it also does not seem to be in dispute that plaintiff was a member of the Kandal (Bk) Vividh Sewa Sahakari Society right from 1956-57 and that he had executed charge Exh. 153 creating the charge on the land.

15. The land Survey No. 30 has been divided now into Survey Nos. 30/1 admeasuring 10 acres now recorded as Block No. 85 and Survey No. 30/2 admeasuring 5 acres 17 gunthas which now stands as Block No. 84. The certificate under the Fragmentation Act is to be found at Exh. 147 and the Ramram Patra (Deed of Reconveyance) is to be found at Exh. 150 which has been exhibited after payment of fine on being impounded. The other important notable facts are that the appellant applied to the society for release of the charge which was denied in the first instance by the society vide Exh. 156 dated 27-8-1973. But it has to be further noted that vide resolution Exh. 157 dated 27-8-1973, the land covered by the sale deed has been released by the society

from its charge. It would be thus obvious that soon after institution of the Suit No. 49 of 1973 on 20th February, 1973, the land came to be released from charge.

16. The first argument which has been vehemently canvassed on behalf of the appellant is that the plaintiff can not take advantage of his own wrong. It is stated that at the time of the sale deed, defendant No. 1 was residing with the plaintiff. He became the son-in-law prior to the first date and that both of them knew that the land was under charge of the society. Plaintiff's witness Ramrao Tarade at Exh. 171 has stated that the plaintiff became the member of the society on 20-4-1956; that on 2-11-1971 he was liable to pay sugarcane loan of Rs. 14,700/-. The said statement is to be found at Exh. 174 and the initial agreement is at Exh. 153. Exh 155 is the certificate given by the society in regard to the outstanding loan. Although in the cross examination, it is sought to be solicited that he came in charge of the affairs of the society in 1977, all the same he has produced the relevant record and the same need not be suspected. The inevitable conclusion is that on the date of the sale deeds, Exh. No. 88 and Exh. No. 90 between the parties, the plaintiff was indebted to the society to the tune of amount indicated above. Under charge Exh. 153, the said land Survey No. 30 was subject to operation of section 48 of the Maharashtra Co-operative Societies Act.

17. The next question which can be briefly discussed is as to whether the plaintiff and the defendant No. 2 were aware of these restrictions. The plaintiff has tendered the evidence which would unhesitatingly go to show that when the plaintiff sold the land to defendant No. 1, the same was under charge. A feable attempt is made to show that the same was under reconveyance vide Exh. 150 and it should be, therefore, held that it was not a sale. Now in this regard, the plaintiff has categorically admitted that although the sale deed Exh. 88 was written by regular scribe, the deed of reconveyance was written by defendant No. 1 himself. It is on a separate paper and, therefore, not on the stamp. It must also be observed that the plaintiff requested the Tahsildar to mutate this reconveyance in the 7/12 extract but the same was not done. No further steps of approaching the Tahsildar were taken. Likewise, it is also not on record that the plaintiff made grievance to anybody else in authority that although the land was covered under reconveyance, the entry was not effected. Even defendant No. 1 did not apply for mutation and I, therefore, feel that the said reconveyance is nothing but a fake document, which defendant No. 2 executed in favour of the defendant No. 1.

18. It can not be lost sight of that the defendant No. 1 is the son-in-law of plaintiff. He himself has not stepped into the witness box to support this Ramram Patra. The fact that the said document is on a separate paper, although ostensibly said to have been recorded on the same day of the sale deed, would go a long way to show that the same is not reliable and can not, therefore, be availed of by the plaintiff in order to say that the sale deed is not genuine. I,

therefore, hold that the story about the reconveyance contained in Exh. 150 does not sustain and is clearly after thought and, therefore, deserve to be rejected.

19. The defendant No. 2, in his evidence, has also stated in that behalf. There is also no correspondence between the plaintiff and the society about this reconveyance and I, therefore, feel that the land was clearly sold by the plaintiff to the defendant No. 1. A circumstance is sought to be raised to cast suspicion on the transaction and that is although this land was worth Rs. 30,000/- or more at the time of sale deed Exh. 88 of 1971, the same was sold for Rs. 5,000/- which is disproportionately low and thus reflects upon the genuineness of the transaction. At the same time, one can not ignore a very salient fact and that is, it is a sale by the father-in-law in favour of son-in-law and that the defendant No. 1 had to discharge the loan taken by the plaintiff on this land. On that count also, the story does not appear to be credible.

20. Now regarding the another sale deed, the plaintiff has stoutly denied its knowledge but defendant No. 2 in his evidence has stated that he purchased the land for Rs 30,000/- and there is an endorsement in the sale deed Exh. 90 that the amount of Rs. 30,000/- was paid in cash in front of the Registrar. There is nothing in the cross examination to suggest that no payment was made. The learned Trial Judge, in his elaborate judgment in 1980, has embarked upon various assumptions to conclude that this transaction was fake; that it could be stage managed about the payment of Rs, 30,000/- before the Registrar but I feel that the evidence on record does not warrant such conclusion.

21. On the other hand, in the cross examination of the defendant No. 2 at Exh. 184, he has stated that the amount was paid but he did not verify the record or the title of the property. To this aspect, I shall come later while dealing with the bona fide purchase for value without notice, as canvassed by defendant No. 2. Suffice it to say at this stage that the second transaction vide Exh. 90 was a fact. The ignorance on the part of the plaintiff appears to be unlikely. The mutation entry in favour of defendant No. 2 has been made in 7/12 extract. There are also other documents namely Exh. Nos. 143 and 91. The registration of the sale deed also becomes a public notice under the law. I also find the notice given by the plaintiff to the society about the sale deed at Exh. 116.

22. It would be thus found that both the plaintiff and defendant No. 2 were aware of these sale deeds and this is inspite of the fact that the land was under charge of the society. Copious case law has been cited on behalf of the appellant-defendant to show that this is a fit case where the assistance should be defined to the plaintiff by way of decree in the suit. It is also contended that the plaintiff has really no right to challenge the voidness of the charge when the same affects the society. He himself stands clearly excluded from the transaction. It is for the society to say and enforce the alienation as void but the plaintiff can not be allowed to do so.

23. My attention is drawn to the case of Bhaskarrao Jageshwarrao Buty and

Others Vs. Saru Jadhaorao Tumble and Others, . In that case, the plaintiff was the money lender having valid money lending licence. He had advanced the loan in the form of foodgrains to the defendant and had complied with the requirements of the Money Lending Act. As the defendant did not repay the loan of grains either in form of grains or in cash, the plaintiff brought the suit. The defendant raised the plea that the claim could not be enforced by reason of the Maharashtra Scheduled Foodgrains (Stock Declaration and Procurement and Disposal, Acquisition, Transport and Price Control) Order, 1966. It would be seen that although under the Money Lending Act, such a deal was legal, the same was void under the above Order of 1966. The Court found that the provisions of section 65 of the Contract Act could not be enforced as both the parties were guilty. The Court observed:-

"Imputation of the knowledge of an illegality where the illegality flows from operation of the Law, I think, has to be imputed to a party because ignorance of a statutory provision can not be set up as a defence. Besides, as has been pointed out, the Court will not assist a party, who in assisting the other party, would be a perpetrator of an illegality or to continue an illegal conduct or fraud of the parties."

24. The High Court in the above case, relied on the observations of the Supreme Court in *Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. and Others*, in the case of *Kuju Collieries Ltd. v. Jharkhand Mines Ltd.*, and AIR 1955 Hyd 69 in the case of *Budhulal v. Deccan Banking Co. Ltd.* The ratio, which can be deduced from these decisions is that where the unlawful purpose of an agreement was known to the parties or the fact of unlawful purpose of an agreement could be imputed to them, then the agreement would be outside the scope of section 65 of the Contract Act and the Court would refuse to assist such parties when that would tantamount to perpetration of an illegality or continuation of an illegal conduct or a fraudulent conduct of the parties.

25. The learned Advocate for the appellant also relied upon the case of *Sundara Gownder Vs. Balachandran*, . In that case, the plaintiff was an Abkari contractor. He was a defaulter of Toddy Welfare Fund and, therefore, was not eligible to participate in the auction of Abkari shops in view of the provisions of Rule 5(4A) under the Abkari Shops (Disposal in Auction) Rules. However, to circumvent this disqualification, he entered into an agreement with the defendant that some of the shops out of the shops bid by defendant, will be transferred to him. He paid a consideration for the same to defendant. The defendant, having failed to perform his part of the agreement, the plaintiff filed a suit for realisation of the amount. It was held by the Court that:

"The said agreement could only be viewed as one with the object of defeating the provisions of law. As the object of the agreement patently comes within the mischief of section 23 of the Contract Act, the agreement can not be but void. Any action to realise the amount pursuant to the agreement can not be entertained by the Court of law."

"The Maxim "In Pari Delicto Potior Est Conditio Possident is" has its basis on the principles of public policy that the plaintiff, who paid money or handed over property pursuant to an illegal or immoral contract, can not recover it as the courts will not assist an illegal transaction in any manner."

27. In the decision, the Court also held that:

"The plaintiff was not entitled to claim any relief u/s 65 of the Contract Act as there was no occasion for him to have been under any kind of ignorance of Rule 5(4A). Section 65 has no application when the contract is void from its inception and the plaintiff was aware of it. In such a case, it can never be held that the agreement was discovered to be void at a latter stage. The correct legal position is that when a contract is entered into between the parties to circumvent any statutory provision, it is not a case of contract "becoming" or of being "discovered to be" void. Certainly it will not be a case coming within the purview of section 65 of the Contract Act."

28. He has also relied upon the judgment of Krishna Menon Vs. Narayana Ayyar and Others, . It is a Full Bench judgment on the same ratio. In Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. and Others, in the case of Kuju Collieries v. Jharkhand Mines Ltd., it is observed that when the agreement is void ab initio within the knowledge of the parties, the Court would not assist the parties. It is a case under the Mines and Minerals (Regulation and Development) Act, 1948. The relevant observations are that where a mining lease in favour of the plaintiff was contrary to the provisions of the Act of 1948 and the Rules thereunder and void-ab-initio and there was proof to show that the plaintiff could not have been in ignorance of the legal position, the necessary conclusion is that the case would not be covered by section 65 or even section 70 or 72 of the Contract Act and that the plaintiff was not entitled to claim refund of the sum paid in pursuance of the lease under that provision. It was further observed that when both the parties namely the transferor and the transferee are in pari delicto, it can not be overlooked that the courts do not assist a person who comes with unclean hands. In such cases, defendant possesses an advantage over the plaintiff-in pari delicto potior est conditio defendentio.

29. In Kanuri Sivaramakrishnaiah Vs. Vemuri Venkata Narahari Rao (Died), in the case of Sivaramakrishnaiah v. Narhari Rao, it is held by the Court:

"The courts will not render any assistance to a person who induces innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong."

The judgment reported in Ramagya Prasad Gupta and Others Vs. Murli Prasad and Others, in the case of Ramagya Prasad v. Murli Prasad, would not be of much relevance because the contract was discovered to be void later and section 65 could be enforced.

30. As against this, the learned advocate for the respondents-plaintiffs has relied

upon Waman Shrinivas Kini Vs. Ratilal Bhagwandas and Co., in the case of Waman Shrinivas Kini v. Ratilal Bhagwandas, wherein the Court found that the premises let in contravention of section 13(1)(e) and section 15 of the Bombay Rents, Hotel and Lodging House Rates Control Act would not preclude the landlord from recovering the possession and that the plea of *Pari Delicto* would not disable the plaintiff from enforcing the action. It was observed by the Court that:

"When the suit is filed on the rights flowing from the breach of the statute and not right flowing from the agreement, the parties letting out the premises in contravention of the Rent Control Act would be entitled to possession."

31. The learned Advocate for appellant has contended that in this case, there was a remedy provided in the Act for recovery of possession. The Act itself provided remedy of eviction sequel to breach of the provisions and hence, this ratio can not be applied to the facts of this case. Under the Maharashtra Co-operative Societies Act, there is no provision that the possession could be recovered. He also cited *Kakubhai and Co. Vs. Nathmal Kisanlal*, in the case of *M/s Kakubhai v. Nathmal Kisanlal*. In that case also, the premises were let out in contravention of Clause 22 of C.P. and Berar Letting of Houses and Rent Control Order, 1949. The Court held that the plea of *Pari Delicto* can not be pressed with success; that the lease was void and that the landlord was entitled to recover possession. However, it is pertinent to observe that the suit was filed on the basis of the title. The prayer was that the tenant was the trespasser as he was not issued any allotment by the District Magistrate under the above Order and hence the Court found that the landlord was entitled to recover possession.

32. I, therefore, feel that the authority cited by the learned Advocate for the respondent-plaintiff can not be of any assistance to him. It has to be held that both the parties were aware of the charge; that they entered into the transactions and were, therefore, not entitled to any assistance. The learned Advocate for the appellant-defendant No. 2 has contended that all along he has been in possession of the land and that he should not be dispossessed under the Court decree and that at the time of decision, there was no charge of the society on the suit land.

33. The next point which has been urged on behalf of the appellant-defendant No. 2 is that as soon as there was an alienation which is found to be void, it is the society who is aggrieved. It is not for the plaintiff to say that the said sale is void. He has no locus in such a transaction. It is a privity of dispute between defendant No. 2 and the society. The plaintiff can not say that the sale is void. The Court would not entertain such a cause and for that purpose, reliance is placed on *The State of Gujarat and Another Vs. Shri Ambica Mills Ltd., Ahmedabad and Another*, in the case of *The State of Gujarat v. Shri Ambica Mills Ltd.* In that case, it was contended that the company was being denied the fundamental right under Article 19(1)(g) and that the Bombay Labour Welfare Fund Act of 1953, which enabled the Government to take over the un-

accumulated collections from the employer to the employee was ultra vires the Constitution. It was argued that the Government can not take over such un-accumulated payments payable by the employer; that was deprivation of their rights and that such deprivation was void and unconstitutional. The Court held that the Mill was the non-citizen and could not challenge fundamental rights accorded to the citizens.

34. On the basis of the judgment of the Supreme Court in the case of Tata Engineering and Locomotive Co. Ltd. Vs. State of Bihar and Others, , the Supreme Court in Ambica Mills case held that the pre-constitution laws, therefore, operated even against the non-citizens although inspite the enactment of Article 13 of the Constitution. The rule that was supported by Supreme Court in para No. 22 is that :

"One to whom the application of a statute is constitutional will not be heard to attack the statute on the ground that it must also be taken as applying to other persons or other situations in which its application might be unconstitutional."

35. The Supreme Court reproduced the observations made in Corpus Juris Secundum Vol. 16, page Nos. 236-237 as follows :-

"A person ordinarily is precluded from challenging the constitutionality of Governmental action by invoking the rights of others and it is not sufficient that the statute or administrative regulation is unconstitutional as to other persons or classes or persons; it must affirmatively appear that the person attacking the statute comes within the class of persons affected by it ."

If, therefore, these observations are read in juxta-position with the present facts, it would be seen that when the society has not taken steps to declare the alienation void; when the society did not think that the alienation was prejudicial although based on public policy, the plaintiff could not be the person who could question the sale deed. In this case, what is to be noticed is that during pendency of the suit or even much earlier than that or after institution of the suit, the society has removed its charge on the property. The plaintiff is, therefore, rather incompetent to make a grievance which could legitimately be made by the society against the defendants Nos. 1 and 2. The same has not been done and, therefore, I feel that this is a case which can not be entertained both on the ground of the charge not coming within the scope of section 65 as the parties being equally guilty and further the plaintiff having no proper locus to agitate the question at this stage.

36. The learned Advocate for appellant has also relied upon Shankerlal Gupta Vs. V. Jagadishwar Rao, in the case of Shankarlal Gupta v. Jagdishwar Rao, wherein the Court held:

"Agreement of lease entered into between the landlord and tenant in contravention of section 3(3) of the Hyderabad Rent Control Act or section 3(5) of the Andhra Pradesh Rent Control Act will not be illegal and void inter-se

between the parties either on the ground that it is forbidden by law or on the ground that it is opposed to public policy in terms of section 23 of the Contract Act."

It may be void against the Rent Control Order. Inter-se parties, therefore, can not absolve themselves of the application flowing from the transfers, lease and alienations.

37. The learned Advocate for appellant has also contended that the charge created by the plaintiff can not be construed as a charge because the same is not registered u/s 17 read with section 19 of the Indian Registration Act. u/s 17 of the Indian Registration Act, all non testamentary instruments, which purport or operate to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest of the value of Rs. 100 or more, the same needs to be registered and in absence of registration, the property covered under the charge shall not be affected. He has, therefore, urged that in that light of the situation, the present alienation can not be rendered void u/s 48 of the Act of 1960. The charge Exh. 153 is on a simple printed form.

38. It is indeed true that vide Exh. 153, the suit land has been put in charge of the society and the amount secured is more than Rs. 200/-. Apparently, therefore, the same needs to be registered but this lacuna is made up u/s 48 itself which starts :-

"Notwithstanding anything contained in this Act or in any other law for the time being in force, the Act contemplates that such a charge need not be registered."

Indian Registration Act is an Act being in force, can not supersede the provisions of section 48 and in that context, Exh. 153 remains a valid document.

39. However, when this situation has been pointed out to the learned Advocate for the appellant, he has put his finger on Article 254 of the Constitution of India. He has stated that the registration is mentioned in Entry No. 6 List III Concurrent List of Constitution and under Article 254, if there is existing law made by the Parliament, the law made by the Legislature of the State is repugnant to the law made by the Parliament, the same shall be rendered void. He has stated that in that context also, the provision contained in section 48 is void. But when one looks to Article 254 sub-clause (2), it is provided that :

"Where a law made by the Legislature of the State with respect to one of the matters enumerated in concurrent list contained any provision repugnant to the provisions of an earlier law made by the Parliament or an existing law with respect to that matter, then the law so made by the Legislature of such State shall, if it has been reserved for consideration of the President and has received his assent, would prevail in that State."

It is not in dispute that section 48 has been the part of the original Maharashtra Co-operative Societies Act, 1960 and the said Act received the assent of the President on 4th May, 1961. The condition contained in Article 254 sub-clause (2)

is, therefore, satisfied and the argument of the learned Advocate for the appellant in this behalf shall have to be rejected.

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 in as much as the incumbrance 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.

41. The other argument which has been canvassed on behalf of the appellant is that even the respondent No. 1 has pleaded that the sale in favour of respondent No. 2 i.e. son-in-law was nominal; that there was an agreement for reconveyance Exh. 150. The transaction is, therefore, Benami and the appellant would not be able to act on that transaction in view of the ratio laid down by the Supreme Court in AIR 1969 S.C. 1247 in the case of Om Prakash and another Vs. Jai Prakash, in the case of Omprakash v. Jaiprakash. However, this is a case where there is a registered sale deed in favour of defendant No. 1 Dhamane and there is also a registered sale deed in favour of the appellant-defendant No. 2 and there have been mutations. The ratio laid down in the above cases can not be pressed into service so far as the claim of the plaintiff is concerned.

42. Now that takes us to the four issues which have been referred to the trial Court. The trial Judge examined four witnesses in that behalf. Before advertng upon the evidence of those witnesses, it must be made clear that the membership register of the society was called for. The same was produced for perusal of this Court. There is one common register for the period commencing from 1943 and the same is maintained upto 30th June, 1991. There is a running list of 855 members and it has to be mentioned that majority of the members are shown as agriculturists by profession. Some of them are shown as labourers but it will have to be highlighted that about 90% 95% of members are shown as agriculturists. The enquiry contemplated u/s 11 of the Maharashtra Co-operative Societies Act need not be invoked in this case. Section 11 has its limited scope and such an enquiry becomes relevant for admission of a member to the society. In this case, such an enquiry need not be now instituted in view of production of

the original register of society. The same need not be doubted and I feel that the requirement laid down in Explanation to section 48 is fully justified. It is no doubt true that the society is a Resource society with majority of the members as agriculturists. It would be also seen that the object of the society is to secure credit for its members. There is produced on record the bye-laws at Exh. 2 and if the Clause (2) of the said bye-laws is studied, it would clearly mean that the dominant object of the society is to secure loans and credit for the purposes of members for furtherance of their agricultural operations. Apart from that, the evidence which has been discussed in remand, also takes the affirmative view on all the issues.

43. The plaintiff has examined Narsing Sadashiv Sonar, who is employed as Assistant Registrar, Co-operative Societies at Rahuri. He has deposed that the society was registered on 15-11-1911 and since then, there has been no change in the name of the society. The said society was grouped as a Resource society and was sub-classified as Service Resource Society. The same was done in pursuance of notification. Narsing Sonar has produced the audited reports of the society. The object of the society is to provide crop finance to the members. It enrolls agriculturists as the members. The agreements are recorded u/s 48 and that the mutation is made in 7/12 extracts about the charge laid down by the society. Sonar also deposed that the said society offered loans to farmers for sugarcane plantation, for the purposes of purchasing hybrid cows, electric pumps and for raising crops. He has given certificate of registration to the plaintiff.

44. The evidence has been assailed on the ground that the notification has not been produced. However, looking to the record tendered by Narsing Sonar as the Assistant Registrar, Co-operative Societies at Rahuri, the same need not be doubted. On the other hand, it will have to be observed that Narsing Sonar is an independent witness, an employee of the Government and there appears to be no reason for disbelieving him.

45. The second witness examined on behalf of respondent No. 1 is Karbhari Raghunath Shete, who was the Chief Secretary of the society from 1969 to 1985. He has also referred to the bye-laws and according to him, there are about 613 members of the society out of which 75% are farmers. He has also testified to the fact that the society provides loans for development of lands and for agriculture. The loans were given for cultivating crops, purchasing electric motors, Gobar-Gas plants, pipelines and also for purchasing hybrid cows. He has further stated that the society runs a fair price shop of foodgrains at village Kandal. He has also adverted upon the procedure for creating charge and for advancing loans and he has stated that Exh. 153 is the charge created by the plaintiff on the suit land. He has further deposed that the society has the turnover of Rs. 25 Lakhs to Rs. 30 Lakhs in a year and that the accounts are audited by the Government auditors. In the year 1986-87, the different types of loans amounted to Rs. 16,15,000/-. The society is classified as Resource Society having the main object of providing credit facility to the members for purchasing

fertilisers, pesticides, seeds and agricultural tools and for development of agricultural crops. The audited reports tendered by him are at Exh. 221. His evidence also should be accepted.

46. The third witness Ramkrishna Hapse was working as the secretary of the society between 1969 to 1977 and he has also testified to an important fact that majority of the members are farmers. He has also referred to the objects of the society which are similar to those referred by other witnesses.

47. As against this, defendant No. 2 has examined Eknath Haribhau Tarade, who was the Chairman of the society between 1971 to 1974. He has tried to suggest that majority of the members were labourers and not agriculturists. The agricultural labourers can be classified as farmers as has been observed by the trial Court but apart from that, when one refers to the membership register tendered at this stage, one can certainly hold that majority of the members are agriculturists. It would thus appear that the society is a Resource Society and majority of its members are agriculturists and in that light, the charge created under Exh. 153 would certainly render void the alienation by the plaintiff in favour of the defendant No. 1 and corresponding alienation of the suit land by defendant No. 1 to defendant No. 2.

48. The learned Advocate for the appellant has also contended that the appellant is a bona fide purchaser for value and that in case respondent No. 1 is held to be incompetent to alienate but acquires authority to alienate later on, the same should be allowed u/s 43 of the Transfer of Property Act, which spells out the doctrine of "Feeding the grant". The discussion here before has clearly shown that the appellant had notice of charge and that the charge u/s 48(e) renders any alienation made in contravention of Clause (d) of section 48 as void. Clause (d) of the said provision requires that :

"No member shall alienate whole or any part of the land or interest therein, specified in the declaration made under Clause (a) or (b) until the loan amount borrowed by the member together with the interest thereon is repaid in full."

Proviso 1 to Clause (d) is not relevant.

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 voidable one. However, it will have to be held that section 48 is based on public policy in as much 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.

50. However, reverting back to the main proposition, it has to be observed that this is a case where the assistance of the Court can not be rendered. In the foregoing paragraphs, it has been clearly stated that both the parties are guilty and that section 65 of the Contract Act would not be applicable to this transaction. It also can not be lost sight of that the property has been released from the charge soon after institution of the suit and this would impliedly bring about the status-quo ante in the relationship of the parties. Vide Exh. 157 dated 23.8.1973, the suit property was released from the charge and, therefore, the proper course would be that the parties should be left where they are. The parties do not deserve any assistance from the Court. This would, therefore, bring about an inevitable result that the appeal shall have to be allowed and the judgment and decree of the trial Court shall have to be set aside. Accordingly, the following order.

51. The appeal is allowed. The judgment and decree passed by the trial Court is hereby set aside and the suit is dismissed. However, in the circumstances of the case, there shall be no order as to costs.