

(1983) 03 GUJ CK 0007
In the Gujarat High Court

Punabhai Dhedubhai Baraiya

APPELLANT

Vs

Patel Chhaganbhal Parshotamdas and Another

RESPONDENT

Date of Decision : 03-03-1983

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 32A, 32R, 84C, 84C,
84C(2)
Constitution of India, 1950 — Article 226, 227

Citation : (1983) 2 GLR 1165

Hon'ble Judges : S.B. Majmudar, J

Bench : Single Bench

Judgement

S.B. Majmudar, J.—The petitioner who is a deemed purchaser of agricultural land bearing S. No. 800 admeasuring 3 acres and 34 Gunthas situated at village Mankani in Sankheda taluka of Baroda district has filed this petition under Article 226 of the Constitution which in substance is one under Article 227 thereof, wherein he seeks to challenge the order passed by the Gujarat Revenue Tribunal (GRT for short) in revision application TEN. B.A. 1290 of 1977. The said revision application came to be allowed by the GRT and the orders passed by the lower authorities were set aside. The petitioner submits that the GRT patently erred in law in doing so.

2. In order to appreciate the grievance of the petitioner, it is necessary to glance through a few relevant facts. The petitioner who was the sitting tenant of the land in question was declared to be a deemed purchaser under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 ("the Tenancy Act"). The petitioner, on account of his poverty, was not in a position to pay the purchase price instalments. He, therefore, had to incur debts for payment of these instalments and with a view to raising money for payment of the purchase price, he borrowed the requisite amount from respondent No. 1 who is a professional moneylender. By way of security for the land, he mortgaged the land which was purchased by him under the provisions of the Tenancy Act to respondent No. 1 by an agreement dated 14-3-1980. The said agreement, according to the

petitioner, was a mortgage transaction, but the agreement was not registered. No previous sanction of the Collector u/s 43 was obtained in respect of the said mortgage transaction. It appears that the land in question was handed over in possession to respondent No. 1 by the petitioner by way of security for ensuring repayment of the loan advanced to the petitioner by respondent No. 1. Under the aforesaid circumstances, the petitioner applied to the Mamlatdar and ALT, Sankheda requesting him to initiate proceedings u/s 88-C of the Tenancy Act against respondent No. 1 on the ground that the transaction in his favour was entered into contrary to the provisions of Section 43 of the Tenancy Act and hence the transaction was liable to be declared as invalid. The Mamlatdar and ALT, after issuing notices to the concerned parties, came to the conclusion that the transaction entered into by the petitioner in favour of respondents No. 1 was in breach of Section 43 of the Tenancy Act and hence, it was declared to be invalid. Respondent No. 1 was directed to restore possession of the land to the petitioner as laid down by Section 84-C(2) of the Tenancy Act. Respondent No. 2 thereupon preferred an appeal before the Deputy Collector, Chhota-Udepur being tenancy appeal No. 2076 of 1977. The appellate authority concurred with the reasoning of the Mamlatdar and dismissed the appeal. It is thereafter that the first respondent carried the matter in revision before the GRT u/s 76 of the Tenancy Act. The GRT came to the conclusion that the document dated 14-3-1970 under which possession of the land was given by the petitioner to respondent No. 1 would not amount to a completed mortgage transaction as it was not a registered document. Consequently, the said transaction which was in the realm of mere agreement to create a mortgage was held not to be covered by the provisions of Section 43 of the Tenancy Act. It was, therefore held that the said agreement could not be declared to be invalid u/s 84-C of the Tenancy Act. On the basis of this finding, the GRT set aside the orders passed by the authorities below and directed the first respondent to be restored possession of the land which was taken away from him prior to filing of the revision application before the Tribunal in execution of the orders of the authorities below. The GRT made it clear that it would be open to the competent authority to take action u/s 32-R if deemed fit. It is under these circumstances that the petitioner has come to this Court by way of the present proceedings.

3. Mr. Mehta, learned Advocate for the petitioner raised the following three contentions in support of this petition:

1. The GRT had patently erred in law in holding that Section 43 of the Tenancy Act did not hit the transaction in question.
2. In any case, the provisions of Section 43 as amended by Gujarat Act 30 of 1977 could have been applied to the facts of the present case and the impugned agreement to transfer land by way of mortgage was required to be treated as invalid under the amended provisions of Section 43(1) of the Tenancy Act.
3. He lastly contended that in any view of the matter, the petitioner who was a deemed purchaser was duped by respondent No. 1 and was made to part with

possession of the land which was purchased by him under the Tenancy Act and consequently, the competent authority should have been directed by the GRT to take proper steps u/s 32-R of the Tenancy Act.

4. Mr. J.M. Patel, learned Advocate for respondent No. 1, on the other band, supported the reasoning and the final conclusion of the GRT and stated that if any proceedings u/s 32R got initiated against the concerned party, respondent No. 1 will make, in defence, his submissions in these proceedings. But he had no objection if any direction was issued by this Court in connection with initiation or these proceedings.

5. Mr. M. A. Trivedi, learned Assistant Government Pleader for respondent No. 2 submitted that looking to the express language of Section 43 of the Tenancy Act and the nature of the agreement entered into between the parties on 14-3-1970, the agreement could not have been held to have been hit by Section 43 of the Act in the light of the well settled legal position. However, proceedings u/s 32-R were required to be initiated in the present case as the petitioner being a deemed purchaser had failed to cultivate the land personally on his own submission and consequently, the Collector, Baroda should have initiated proceedings u/s 32-R against petitioner as well as against respondent No. 1 and that the land should have been held to have vested in the State of Gujarat. In short, Mr. Trivedi submitted that this Court may direct the Collector, Baroda to initiate proper proceedings in this connection.

6. I shall deal with the submissions raised by Mr. Mehta in support of the petition in the same sequence in which they were raised before me. So far as the first contention of Mr. Mehta is concerned, it must be appreciated that by the agreement dated 14-3-1970, the petitioner who was a deemed purchaser handed over possession of the land to respondent No. 1 who had advanced him loan for making payment of instalments and had agreed to get a pucca mortgage deed executed after obtaining permission of the Collector. The aforesaid agreement is an unregistered agreement. The petitioner's contention is that in substance, the agreement operates as a usufructuary mortgage as the petitioner had parted with possession of the land in favour of respondent No. 1 with a view to securing his dues and to get himself paid off from the usufruct of the land. It is not possible to agree with the aforesaid contention of Mr. Mehta for the simple reason that before the transaction can operate as a usufructuary mortgage, it has to comply with the legal requirement of Section 59 of the Transfer of Property Act. Under the said provision, it has been clearly laid down that where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds, can be effected only by a registered instrument signed by the mortgagor and attested by atleast two witnesses. In the present case, it is an admitted position between the parties that the petitioner had borrowed Rs. 15,000/- in cash from respondent No. 1 in order to pay up the instalment of purchase price. Thus, the principal money secured were more than Rs. 100/-. If for that purpose, the land was handed over

in possession of respondent No. 1, the transaction cannot be treated a usufructuary mortgage unless the document was registered as per the requirement of Section 59. The agreement in question is admittedly an unregistered document. Thus, it cannot operate as a completed mortgage transaction. Section 43 of the Tenancy Act as applicable at the relevant time in 1970 when the impugned transaction took place provided as under:

(1) No land or any interest therein purchased by a tenant u/s 17B, 32, 32F, 32I, 32O, 32U or 43D or sold to any person u/s 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine: and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector.

A mere look at the said provisions shows that transactions which are hit by Section 43(1) if they are not entered into after obtaining previous sanction of the Collector, are all completed transactions like sale, gift, exchange, mortgage etc. which by themselves will operate as fully completed and legally operative transfers. In the present case, the alleged transaction is a transaction under which the petitioner is said to have created a usufructuary mortgage on the land in question in favour of respondent No. 1. As I have already shown above the agreement dated 14-3-1970 by itself cannot operate as a completed usufructuary mortgage transaction as it is unregistered. If that is so, it cannot be said that the petitioner had mortgaged the land in favour of respondent No. 1 on 14-3-1970 as envisaged by Section 43(1). Consequently, the said transaction cannot be said to have been hit by Section 43 as previous sanction of the Collector was not obtained before the petitioner entered into the agreement in question in favour of respondent No. 1. If any authorities were needed to highlight the interpretation of various clauses of Section 43(1), they are supplied by two decisions of this Court in *Kuberdas Inamdar v. Lilaram* 13 G.L.R. 343 and *Patel Chhotabhai v. Patel Shanabhai* 16 G.L.R. 247. Consequently, it must be held that the GRT was right when it took the view that Section 84-C proceedings could not have been initiated against the petitioner on the ground that the agreement dated 14-3-1970 entered into by him in favour of respondent No. 1 was a completed mortgage transaction which was violative of the provisions of Section 43(1) of the Act and consequently the said transaction was liable to be declared as invalid. The first contention of Mr. Mehta for the petitioner, therefore, fails and stands rejected.

7. That takes me to the second and an alternative contention raised by Mr. Mehta. He submitted that as Section 43(1) stood in 1970" the transactions of transfer by way of sale, gift, exchange, mortgage, lease or assignment were sought to be governed by the procedure laid down by the said section. But by Gujarat Act 30 of 1977, Section 43(1) underwent a substantial amendment and after the said amendment, the section reads as under:

43(1). No land or any interest therein purchased by a tenant u/s 17B, 32, 32F, 321, 320, 32U or 43-ID or sold to any person u/s 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, therein shall be partitioned without the previous sanction of the Collector.

Mr. Mehta contended that as per the aforesaid amendment, even agreements in writing to transfer by way of sale, gift, etc. have also got covered by the sweep of Section 43(1). Thus, even if the agreement entered into by the petitioner in favour of respondent No. 1 is treated to be a mere agreement to execute a mortgage at a future date, even then, it would be hit by Section 43(1) as amended. The aforesaid contention of Mr. Mehta is correct to the extent that even written agreements to enter into completed transfers, in future are now covered by the provisions of Section 43(1) as amended, but the said amendment of 1977 cannot be of any avail in the present case as the transaction in the present case took place 7 years before on 14-3-1970. At that time, Section 43(1) as it stood did not hit such a transaction. It must be noted that while the legislature amended Section 43(1) by Gujarat Act 30 of 1977, it did not think it fit to amend it retrospectively. There is not even an implied indication on the part of the legislature to operate the said amendment retrospectively. It is trite to say that this amendment seeks to affect substantive rights of parties as it tries to invalidate even agreement to transfer the concerned land in favour of third parties. As per the legal interpretation of Section 43(1) which held the field prior to its amendment by Gujarat Act 30 of 1977, such agreements were not hit by the sweep of Section 43. In order to plug this lacuna and loophole, the legislature intervened and brought about the aforesaid amendment in 1977. Thus, in 1977 the legislature wanted to affect those transactions between the parties which earlier were immune from the operation of Section 43(1). Such an amendment which affected substantive rights of parties has to be treated as prospective unless it is made expressly or by necessary implication retrospective by the legislature. In the present case, there is neither any express nor any implied indication to make the amendment retrospective. Consequently, it must be held that sweep of Section 43(1) as amended in 1977 cannot retrospectively invalidate written agreements to transfer agricultural lands by way of sale, gift, exchange, mortgage, assignment, etc. which when executed, were not hit by the then existing provisions of Section 43(1). The second contention of Mr. Mehta, therefore, also has to be repelled.

8. That takes me to the consideration of the last contention canvassed by Mr. Mehta. He submitted that deemed purchasers who were tillers of the soil were exploited by money-lenders who acquired possession of these lands from deemed purchasers who sometimes fell prey to the machinations and temptations offered by money-lenders and other persons in the locality who were

out to grab the lands from poor deemed purchasers. Consequently, the legislature has provided a safety valve by enacting Section 32-R. Mr. Mehta submitted that Sections 43 and 32-R represented a wholesome, well-knit, and comprehensive scheme providing immunity against transfer by deemed purchasers of their lands or their parting with possession of these lands to third parties without proper clearance from the competent authority either u/s 43 or Section 32-R. Mr. Mehta contended that if a deemed purchaser enters into a completed transfer without following procedure of Section 43(1) and without obtaining previous sanction of the Collector, his transaction would be hit by Section 43(1) and would be liable to be declared invalid u/s 84C. If on the other hand, it is held that the transaction by the deemed purchaser was not a completed transaction of transfer as laid down by Section 43(1), then the very fact that the deemed purchaser parted with possession and failed to cultivate the land personally and gave its possession to third party, would bring in its wake the sanction of law as envisaged by Section 32-R. Thus, combined operation of Section 43(1) on the one hand and Section 32-R, on the other sought to protect unwary deemed purchasers from certain unforeseen circumstances in which they might be tempted to fall prey to the trickery or temptation offered by third parties who might dupe the deemed purchasers and prompt them to part with possession of their lands which the legislature, after having made them deemed purchasers, thereof wanted them to retain and cultivate personally. Mr. Mehta, therefore, submitted that even if provisions of Section 43(1) are held not to have applied to the given transaction, if it is found that the deemed purchaser had parted with possession of his land which was purchased by him under the provisions of the Tenancy Act, proper steps u/s 32-R were required to be taken by the competent authority. He made it clear that even though this submission may directly go against the interest of the petitioner, if the petitioner as well as respondent No. 1 had played with fire, they must take the consequence as laid down by the legislature and if these consequences are not visited upon the concerned parties, the entire scheme of deemed purchase legislation would be frustrated and would be rendered otiose. The legislature, on the one hand, made the tiller of the soil a deemed purchaser thereof so that he could better cultivate his own land, and if on the other hand, he is permitted to part with the possession of the said land with impunity in favour of third parties who may have nothing to do with agricultural operations and who may be able to deprive the deemed purchaser of his land. Only by use of stronger power of purse, the legislative scheme of giving land to the tiller of the soil would be rendered completely nugatory. He, therefore, contended that competent authority cannot ignore such deliberate lapse on the part of deemed purchasers and if Section 43 does not take care of such situations, Section 32-R which is a complimentary provision has got to be enforced with full vigour. There is a lot of substance in the aforesaid contention of Mr. Mehta. Section 32-0 provides that in respect of any tenancy created after the tiller's day, notwithstanding any agreement or usage to the contrary, a tenant cultivating personally shall be deemed to have purchased on the date of expiry of one year from the commencement of such

tenancy from the landlord the land held by him or such part thereof as will raise the holding of the tenant to the ceiling area. If a deemed purchaser enters into a completed transfer of the land purchased by him under the deemed purchase provision, in favour of third parties, without obtaining previous sanction of the Collector, his transaction would be hit by Section 43 (1) which would in its wake attract the machinery of Section 84-C. But in such a case, there would be a locus paenitentiae available to the erring parties vis-a-vis transferees and the former may get a chance of being restored back possession u/s 84-C (2). If the transaction entered into is not a completed transaction of transfer and if it is not hit by Section 43(1), as in the present case, Section 32-R would still stare the contracting parties in their faces as a deemed purchaser i. e. present petitioner admittedly can be said to have failed to cultivate the land personally moment he handed it over to respondent No. 1 who is a professional money-lender. In that contingency, however, the provisions of Section 32-R read with Section 84-C will create a more stringent position for both the parties who are involved in the transaction in question. As the locus paenitentiae available u/s 84-C would not be available and unless failure to cultivate the land personally by the deemed purchaser is condoned by the Collector, the land would vest in the State Government and would be liable to be disposed of u/s 84-C. However, in either case, machinery of Section 84-C would get attracted all the same subject to the difference pointed out above. On the facts of the present case, there is no doubt whatsoever that the petitioner parted with possession of the land which was purchased by him as a deemed purchaser, in March 1970 when he executed the written agreement in favour of respondent No. 1. Under that agreement, he handed over possession of the land to respondent No. 1. Thus, the petitioner failed to cultivate the land personally even though he was made the deemed purchaser of that land under the provisions of the Tenancy Act. Unless the Collector, for sufficient reasons, condones this failure, the petitioner is required to be evicted from the land in question. It is obvious that respondent No. 1 who claims through the petitioner cannot have a better right against the competent authority i. e. the Collector and he is equally liable to be evicted alongwith the petitioner and the land has to be disposed of under the provisions of Section 84-C as having vested in the State. It may be noted in this connection that provisions of Section 53-A of the Transfer of Property Act which might have been available to respondent No. 1 against the petitioner for protecting his possession cannot be available to respondent No. 1 against the competent authority while facing the proceedings u/s 32-R. The passive equity u/s 53-A of the Transfer of Property Act is available against transferor and not against third parties. The Collector as competent authority u/s 32-R functions as a statutory authority empowered by the legislature to exercise his powers advisedly entrusted to him by the legislature with a view to seeing that deemed purchase legislation does not become a dead-letter and it does not cease to serve its intended purpose of getting tiller of the soil effectively made a deemed purchaser so that he can more efficiently cultivate agricultural land of which he is made the owner. It is, therefore, obvious that the provisions of Section 53-A cannot be pressed in service by

respondent No. 1 against the competent authority viz. the collector. It may be noted that even the GRT in para 7 of its judgment has made it clear that it would be open to the authority, u/s 32-R, to take action under the said section, if deemed fit. On the facts of the pre-sent case, there is no doubt whatever that the Collector, Baroda is required to initiate proceedings u/s 32-R. It is, therefore, directed that the Collector, Baroda shall initiate proceedings u/s 32-R against the petitioner as well as respondent No. 1 who claims through him and shall proceed to exercise his powers u/s 32-R in connection with the transaction in question and shall pass proper order as required by Section 32-R and if he comes to the conclusion that there is no sufficient reason to condone the failure on the part of the petitioner to cultivate land personally, the Collector shall order eviction of the petitioner as well as respondent No. 1 who is claiming through him and shall dispose of the land u/s 84-C. The Collector shall initiate the aforesaid proceedings u/s 32-R within a period of eight weeks of the receipt of writ of this Court at his end. The third submission of Mr. Mehta, therefore, accordingly stands accepted.

9. Before parting with this judgment, I may note one factual aspect of the matter. The GRT in para 6 of its revisional judgment has noted that the applicant before the GRT (present respondent No. 1) that is the transferee of the land has been deprived of the land prior to the expiry of period of limitation for filing a revision application. The GRT has accordingly directed the concerned authority to restore possession of the land to the said applicant viz. respondent No. 1.

10. In view of the direction issued by me in this judgment requiring the competent authority that is-Collector, Baroda to initiate proceedings u/s 32-R, it would be proper to direct the petitioner as well as respondent No. 1 to maintain the status quo as to possession as obtaining today till final decision of the Collector, Baroda in 32-R, proceedings. If it is ultimately decided in the said proceedings by the Collector, Baroda or by any higher authority that the petitioner as well as respondent No. 1 are liable to be evicted u/s 32-R and that the land in question is required to be disposed of-under Section 84-C, then in that eventuality, it would not be necessary to restore possession of the land to respondent No. 1 pursuant to the direction contained in the revisional order of the GRT, as it would be exercise in futility. But if in case, it is ultimately held in 32-R proceedings that the petitioner is not liable to be evicted from the land and the failure on his part to cultivate personally the land purchased by him as a deemed purchaser is condoned, then in that eventuality, respondent No. 1 would become entitled to be restored possession of the land pursuant to the direction issued by the GRT in the present case. Subject to the directions contained in this judgment and the aforesaid modification in the order of GRT in connection with handing over of possession of the land to respondent No. 1 rule issued in this petition is ordered to be discharged. In the facts and circumstances of the case, there will be no order as to costs.