

(1942) 11 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 148 of 1940

Saburdas Mahasukhram Gandhi

APPELLANT

Vs

Gopalji Nandas Patel

RESPONDENT

Date of Decision : 30-11-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64
Registration Act, 1908 — Section 17(lb)

Citation : AIR 1943 Bom 283 : (1943) 45 BOMLR 526

Hon'ble Judges : Lokur, J; Divatia, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Lokur, J.—This is a first appeal by the plaintiff from the decree dismissing his suit for a declaration that the twenty-three decrees obtained by defendants Nos. 7 to 26 against defendants Nos. 1 to 6 were null and void, as they had been obtained illegally and improperly by means of fraud and collusion. The circumstances which led the plaintiff to file the suit are these :-On April 13, 1931, the plaintiff filed Panch Mahals Special Jurisdiction suit No. 3 of 1931 against the defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6 for the recovery of Rs. 8,857-7-6 due to him: on a; promissory note of Rs. 8,439-2-9 with future interest at nine per cent. per annum. On the very next day-on April 14, 1931-he obtained an interim order for attachment before judgment of fifty-five lots of land out of seventy which belonged to defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6. Before the interim order was confirmed defendants Nos. 7 to 26 managed to obtain twenty-three awards for the recovery of their dues from defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6. They referred their disputes to Panachand and Mahasukh between June 12, 1931, and June 21, 1931, and all the twenty-three awards were passed by them in that period. The interim order for attachment against the plaintiff was confirmed on July 16, 1931, and the awards of the defendants were filed in Court and made decrees between July 11, 1931, and August 18, 1931. These awards

and the decrees passed on them created a charge on all the seventy lots of land belonging to defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6, in some decrees twenty-six lots of land were charged and in others the remaining forty-four. All the awards provided that the amounts realised should be subject to rateable distribution among all the creditors under the awards. The awards were not registered, although they purported to create charges for amounts * exceeding Rs. 100. After these awards were made decrees, the plaintiff entered into a compromise with defendants Nos. 1 to 6 and a compromise application was put in on December 5, 1931, whereby the fifty-four lots of land which had been attached, as well as the remaining forty-four lots, were charged with the amount due to the plaintiff. The rate of interest was reduced from nine to four and a half per cent. Two decrees were separately passed on the awards, one for Rs. 4,300 in which twenty-six lots were charged and the other for a similar amount in which the other forty-four lots of land were charged. These decrees were passed on December 12, 1931, and the plaintiff filed darkhast No. 12 of 1933 for the execution of his award decree. In that darkhast defendants Nos. 1 to 6 put in a written statement on March 27, 1934, contending that the properties had already been charged by the award decrees in favour of the defendants Nos. 7 to 26. When the plaintiff came to know this, he filed this suit on April 1, 1934, for a declaration that the award decrees obtained by defendants Nos. 7 to 26 were null and void. The defence was that the suit was barred by limitation, that it was not open to the plaintiff to challenge the awards obtained by the defendants and the decrees passed on them, and that the awards and the decrees were not fraudulent and collusive, but were made in good faith in respect of genuine debts.

2. The learned Judge held that the suit was time-barred under Article 95 of the first schedule of the Indian Limitation Act. That article provides a period of three years for the institution of a suit to set aside a decree obtained by fraud and for other reliefs on the ground of fraud. The fraud contemplated by that article is fraud practised upon a party to the decree or a party to the transaction in which the fraud was committed. *Chunder Nath Chowdhry v. Tirthanund Thakoor*. ILR (1878) Cal. 504 In *Tallapragada Sundarppa v. Boorugapalli Sreeramulu* ILR (1907) Mad. 402 a Hindu widow who had succeeded to her son's estate got up a money bond in favour of her relative, as though it had been executed by her son before his death, and collusively allowed a consent decree to be passed against her for the amount of the bond. A suit by a reversioner to have the decree set aside was held to be governed by Article 120 and not Article 95. The reason is obvious. When the parties to a decree choose not to challenge it, they are bound by it, and the decree cannot be said to be void. A stranger who is intended to be defrauded by it cannot seek to have the decree set aside, but all that he can sue for is to have it declared that his interest cannot be affected by such a collusive decree. A suit for such a declaration does not come within the purview of Article 95. The prayer clause in the plaint in this suit is unfortunately loosely worded and misleading, and the learned Counsel for the appellant frankly admits that the

prayer for a relief based on fraud is misconceived, that what the plaintiff really wants is a declaration that the twenty-three award decrees were brought about by the defendants in order to defraud him and that the award decrees and the charge created by them will not affect his interest, both because they were based on awards which were not registered and were therefore inadmissible in evidence, and also because they were collusive and not genuine. A suit for such a declaration is governed by Article 120 and the time began to run either when the awards were made in June 1931, or when the decrees were passed on these awards in July and August, 1931. This suit filed within, six years thereafter is, therefore, in time.

3. All the twenty-three awards are unregistered, and each of them purports to create a charge on Immovable property for an amount exceeding Rs. 100. Hence u/s 17(1b) of the Indian Registration Act, 1908, they were compulsorily registrable. It was, therefore, not competent for the Court to file them and pass decrees on them in contravention of the provision of Section 49 of the Indian Registration Act. Chimanlal Girdhar Ghanchi Vs. Dahyabhai Nathubhai Ghanchi, This proposition is not disputed, but it is urged for the defendants that a stranger who is not a party to the decrees has no right to impeach them, on the ground that they were founded on awards which ought not to have been admitted without registration. This contention is supported by the two recent decisions of this Court. In Arvi Co-operative Credit Society, Limited v. Dhondiram Navalchand [1940] Bom. 526 an unregistered award which created a charge on Immovable property for more than Rs. 100 was filed and a decree was passed on it. Thereafter another creditor of the judgment-debtor, a, co-operative society, got the same property sold by auction and purchased it, and then brought a suit to obtain a declaration that the prior award decree was illegal, void and not binding on the Society. Dismissing the suit, Wassoodew J. distinguished it from Chimanlal's case as follows (p. 433):-

The question of the legality of the decree based on the award arose between the parties to it in an appeal from that decree. It was not agitated between a stranger on the one hand and one of the parties to, the decree on the other, as it" is in this case. It is true that the decree in. that case purported to endorse the award whose ?contents could not be proved except by the award itself, and the admission of the award in evidence offended against the provision of Section 49 of the Indian Registration Act which precludes the admission of a document which is compulsorily registrable u/s 17 of the Act. But the principle of finality of a decree will be undermined if a decree could be opened up for review by a stranger to it in an entirely different proceeding on the ground that the decree was founded upon evidence which was inadmissible. The observations in Chimanlal v. Dahyabhai were not intended to serve as an authority, in support of such a view.

4. It is urged for the plaintiff that in this case he was not a, stranger at the date of the suit since he had acquired a charge on the property affected by the

decree. But a stranger means a stranger to the decree sought to be impeached, i.e. one who is not a party to the decree. He does not cease to be a stranger merely because he is affected by the decree or is interested in challenging it. Even in the Society's case cited above, the Society had purchased the property and was interested in impugning the charge created by the award decree. In the more recent case of *Krishnaji Kondo v. Narayan Anant* (1941) 44 Bom. L.R. 158 Wassoodew J. further clarified the position by holding that the decree based on an unregistered award creating a charge on Immovable property is valid though it is unregistered, unless it is impeached in a proper proceeding, such as an appeal, review or revision. A stranger to the proceeding cannot challenge its validity or underrate its effect on the ground that the decree was founded upon an award which ought not to have been admitted in evidence. We, therefore, hold that the plaintiff, who was not a party to the defendants' award decrees, cannot assail them on the ground that they were founded on unregistered awards which ought not to have been admitted in evidence.

5. Finally it is argued that u/s 64 of the CPC the charge created by the defendants' award decrees cannot affect at least the plaintiff's claim against the properties which he had got attached before judgment by an interim order on April 14, 1931, before the defendants referred their disputes to arbitration. Section 64 of the Code provides :-

Where an attachment has been made, any private transfer or delivery of the property attached or of any interest therein and any payment to the judgmentdebtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment.

This section affords protection to an attaching creditor only against a "private transfer ", but not against an enforced transfer in obedience to a decree of a Court. The charge created by a decree passed on an award is not a private transfer which can be treated as ineffective u/s 64, as against the claim enforceable against the charged property under a prior attachment,. *Narayana Ayyar v. Biyari Bivi*. ILR (1921) Mad. 103 In *Mahammad Ajzal Khan v. Abdul Rahman* (1932) L.R. 59 IndAp 405 the Privy Council made it clear that a decree would not be a private transfer even if it was passed on an award and the matters in difference were referred to arbitration without intervention of the Court as in the present case. Hence prima facie the defendants' award decrees would not be affected by the interim attachment previously obtained by the plaintiff. But if there were no disputes between defendants Nos. 1 to 6 and defendants Nos. 7 to 26 and the reference to arbitration was collusive and sham, then the award would be only a camouflage to disguise the private character of the transaction, and in that case although the awards be filed and decrees passed on them, they would be treated as "private transfers" for the purpose of Section 64 of the Civil Procedure Code. It was so held in *Damodar.v. Kashinath* (1938) 41 Bom. L.R. 473 where the facts were somewhat peculiar. In that case there were three money decrees against the same judgment-debtors, the Patils.

The first decree-holder had got some properties of the Patils attached before judgment and the attachment was confirmed by the decree. All the three decree-holders then applied for execution of their respective decrees, and in the case of the third decree attachment was levied in the darkhast on the same properties. The Court then transferred execution proceedings of the first decree to the Collector and the other two were kept pending before it for rateable distribution of the assets. When the proceedings were pending before the Collector, the first and second decree-holders applied to the Court that the parties had come to a settlement that a charge should be created on the properties attached for the amount due to the decree-holders, and an award be made through arbitrators. But as a matter of fact the award had already been made on the previous day, and it had been filed along with the application. Instead of treating the application as made under Order XXI, Rule 2 of the Code, the Court treated the application as under paragraph 20 of the second schedule, Civil Procedure Code. Accordingly it was separately numbered as a suit and a formal decree in terms of the award was drawn up. The darkhasts of these two decree-holders were then struck off. In execution of the third decree the same properties were sold and purchased by the decree-holder himself. The first and second decree-holders sued for a declaration that the properties were subject to their charge, and it was held that the transaction by which the properties were charged in favour of the plaintiff was essentially a private transfer within the meaning of that expression in Section 64 of the Civil Procedure Code. This decision was based on the special facts of that case. It was stated in the application made to the Court that the parties had reached at a settlement that the property should be charged and wanted permission of the Court to obtain an award. In the course of the argument it was conceded that the parties to the award had already settled their disputes and decided that the properties should be charged, and Norman J. observed (p. 478):-

If this is correct, then the charge on the Patils' property which it is now sought to enforce was an act of the parties themselves and not of the arbitrators.

Broomfield J. observed in the same case as follows (p. 480):-

In every case, I think, the Court must look at the substance of the transaction. If in reality there has been a transfer by the private act of the parties, it does not cease to be a private transfer by being given the appearance of a public adjudication.

Hence the burden of proving that the twenty-three awards in this case are not genuine, but were made collusively only as a device to invest a private arrangement with the appearance of a public adjudication lay heavily on the plaintiff. To discharge that burden the plaintiff has relied upon the facts that there was no dispute between the parties, that all the twenty-three creditors came together and got up the awards with the common object of defeating the plaintiff's claim under his attachment, that in all the awards the creditors were allowed rateable distribution, and that the charges were placed on all the

properties belonging to defendants Nos. 1 to 6. There is nothing to show that defendants Nos. 7 to 26 were made aware of the plaintiff's suit or attachment which he had obtained against the fifty-four lots of land. Unfortunately none of defendants Nos. 7 to 26 was examined, nor either of the two arbitrators. There is no doubt that defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6 must have known of the order of interim attachment obtained by the plaintiff, but it does not follow that they communicated it to the other creditors. It is equally possible that defendants Nos. 1 to 6, seeing that a good deal of their property had been attached at the instance of the plaintiff, may have thought of giving priority to their other creditors, defendants Nos. 7 to 26, and got them together for that purpose. That does not mean that these creditors intended any fraud. Defendant No. 1 does say that they had not given him any notice, but he asserts that they were demanding their dues from him. If defendants Nos. 7 to 26 did not know that the property of defendants Nos. 1 to 4 and the father of defendants Nos. 5 and 6 had already been attached when they agreed to refer their claims to arbitration and obtained award decrees, there is nothing to show that before the reference was made the parties had settled their disputes or agreed that the properties of the debtors were to be charged by the awards. It is pointed out that defendant No. 1 admits in his deposition that he had no dispute with the creditors, but the creditors had made demands of their money. What he really means is that he did not dispute his liability under the promissory notes passed by him, but in cross-examination he says that the creditors were demanding interest at nine per cent. but he was willing to pay interest at two per cent. and that there was a dispute regarding the vata also. In the reference deeds it is stated that there was a dispute regarding the charging of properties. These matters had to be decided by the arbitrators and defendant No. 1 says that the arbitrators did ask him regarding the rate of interest which he was willing to pay, about the instalments and also about the charge on properties. Thus after hearing the parties the arbitrators decided what remission should be given, what future interest should be: allowed, what properties should be charged and by what instalments the decree-holders' amounts should be made payable. A comparison of the various award decrees shows that the remission was not given uniformly at the same rate in the case of all the creditors. At least in one case the full amount claimed, was awarded and in several cases a very slight remission was allowed. It is true that future interest at a uniform rate of two per cent. per annum was allowed in all cases, and the dues were made payable by instalments within ten years. That shows that the arbitrators placed some principles before themselves and applied them to the claims of all the creditors. This shows that they did apply their minds to the disputes and settled them after hearing both the sides. The awards, therefore, cannot be said to be illusory or bogus. It is not alleged that there were no debts due to defendants Nos. 7 to 26. The plaintiff admits that to his own knowledge defendants Nos. 15, 17 and 23 were creditors of defendants Nos. 1 to 6, and that he made no inquiries about the other defendant, and had no knowledge of their dues. Defendant No. 1 asserts that he owed genuine debts and that the awards were

made by the arbitrators in good faith. It is difficult to believe that the plaintiff was not aware of these arbitration proceedings. The plaintiff is a resident of the village Vejulpore and most of the creditors belong to the same place. It is a small village with a population of 2,000 or 3,000 and all the deeds of reference and the awards were written out in the village itself. But it seems that as the plaintiff had already obtained the attachment of several lands in his suit, he did not care to join the other creditors. In his own suit he got a more advantageous decree than what the arbitrators would have given him. There was practically no remission and interest was allowed at annas four and pies six per month. A charge was placed on all the seventy lots of land instead of fifty-four lots which he had got attached before judgment. At least at that time he must have come to know of the award decrees obtained by defendants Nos. 7 to 26. Naginlal, the son of defendant No. 14, says that a copy of the award decree obtained by his father was: given to the plaintiff on November 20, 1931, and was returned on November 26, 1931. He says that the plaintiff wanted to see the decree in order to find out a list of the survey numbers which had been charged. It is noted in the "kachha mela" book on November 20, 1931, that a copy of the decree was given to the plaintiff and there is a marginal note that it was returned on November 26, 1931. There is no reason to make such a false entry at that time. But whether the plaintiff had come to know of the award decrees or not, and whether defendants Nos. 1 to 6 were acting fraudulently to defeat the plaintiff's claim or not, there is nothing to show that defendants Nos. 7 to 26 were not acting in good faith. The fact that the arbitrators allowed them to have a rateable distribution under all the awards does not lead to any conclusion. The same arbitrators were creating a charge on the debtors' properties in favour of several creditors, and they must have thought it just that no one of them should be given a priority over the others. This does not indicate that there was any collusion between the defendants. As there was a genuine dispute between the parties and that dispute was settled by the arbitrators and their awards were made decrees of the Court, they cannot be regarded as private transfers. It is true that the arbitrators are related to each other and also related to some of the defendants. One of them Panachand is related to the plaintiff, as the plaintiff has given his daughter to Panachand's son. It is not clear from the evidence when this marriage took place. It is quite natural that in a small village relatives should be appointed as arbitrators to settle such disputes. These facts take the present case out of the principle laid down in Damodar's case, where it was held that the awards and the decrees following them were private transfers as contemplated by Section 64 of the Civil Procedure Code.

6. The plaintiff is, therefore, not entitled to a declaration that his prior attachment is not affected by the defendants' award decrees. No other ground is urged for declaring the decrees to be null and void. We, therefore, dismiss the appeal with costs, in one set.