

Sindav Hari Ranchhod

Vs

Jadev Lalji Jaymal

(S.B.Majmudar, D.P.Wadhwa JJ)

23.07.1997

ORDER

1. This appeal is moved by original defendant No.15 in Special Civil Suit No.20 of 1968 filed by the respondents plaintiffs in the court of the learned Civil Judge, Senior Division, Surendra Nagar, for a declaration that the sale deeds executed by their father defendant No.1 were null and void and are not binding on them as defendant No.1, their father was addicted to bad habits and the transactions entered into by him in favour of the purchasers concerned were tainted with illegality and immorality. Learned trial Judge recorded evidence offered by the parties and came to the conclusion that there was nothing illegal or immoral about the said transactions and they were binding on the plaintiffs as their father out of necessity had entered into those transactions. So far as the present appellant, defendant No.15 is concerned, he is said to have purchased two pieces of agricultural lands being Survey Nos.1292/2/3. This sale transaction in his favour was of January 27,1965. Similar sale transaction was entered into by Defendant No.1 relating to survey No.803 on May 4, 1965 in favour of the respondent No.16 herein. By amendment to the plaint the original plaintiffs introduced paragraph 15- A as under :

"15-A. Further it is submitted that whereas defendant No.1 executed sale deeds in favour of the defendants at that time, there was a liability of charge in favour of Rampara Seva Sahakari Mandali and on the dates of the sale deeds defendant No.1 had not repaid the loan taken by him so there was a prohibition under law to sell the said lands or to transfer in any manner and so also the sale deeds in favour of defendants were null and void under law and so the defendants have not acquired any right on the suit lands by virtue of such sale deeds."

2. The averments in the said paragraph were contested by the present appellant and other contesting defendants contending as under:

"3. Further it is to be submitted that whatever the debt of Rampara Seva Sahakari Mandali were paid up and so there is no charge of Rampara Seva Sahakari Mandali remained.

4. We deny the contention of the plaintiff that there was a prohibition under law from selling or transferring in any other manner, to the father of the plaintiff and so the sale deed executed by him is void. And further we submit that only Rampara Seva Sahakari Mandali and at the best Jaymal Deva have right to raise such disputes i.e. to cancel the said sale deeds. But the sons, daughters of the said Jaymal Deva i.e. to the plaintiffs have no right to raise such disputes and so plaintiffs are not entitled to raise such disputes.

5. Further when no amount is due to Rampara Seva Sahakari Mandali now no question remains regarding whether sale is void or not."

3. In the light of the aforesaid pleadings of the parties an issue was struck by the trial court being Issue No.6A which reads as under :

"Whether the Plaintiffs are legally entitled to take the contention averred in para 15A of the Plaint ? If yes, whether the Plaintiffs prove the averments made in para 15A of the Plaint? If yes, what is its effect ?"

4. After recording evidence on this issue learned trial Judge came to the conclusion that the plaintiffs were legally entitled to take up the contention averred in paragraph 15A. However, on the second part of the issue, it was held that the plaintiffs could not prove the averments made in paragraph 15A of the plaint and consequently, the third part regarding the effect of the decision on the said issue of the suit was found to be not surviving. In this connection, the learned Judge after noting Section 49(l) (d) & (e) of the Gujarat Co-operative Societies Act, 1961, observed as under :

"It is for the Cooperative institutions concerned to take up this dispute that even after the alienations were made, the evidence on record does show that from the two alienees, the Defendant No.12 and the Defendant No.15, the Rampara Cooperative Society had accepted the payment of the part of the debt due to it from the Defendant No.1 and, therefore, the society has not taken any exception to the alienation made by, the Defendant No.1. which it could have taken, under section 49 of the Gujarat Cooperative Societies Act. It is just possible that the Rampara Cooperative Society might have allowed the Defendant No.1 to make a variation in the declarations made by him prior to the various alienations covered in this suit and under the said circumstances, it might have accepted the part payment of the debt due from the defendant No.1 to it, which was made by the Defendants Nos.12 and 15. There is no clear evidence on record as regards the non-variation of this declaration made by the Defendant No.1 and the burden to prove the same is on the Plaintiffs who have alleged these documents to be void on this count and hence under circumstances, it is not possible to decide whether the Suit alienations are hit by the provisions contained in Section, 49(l) (e) of the Gujarat Cooperative Societies Act, 1961."

5. As a result of the findings reached by the learned Judge on all the issues against the plaintiffs, the suit was dismissed. The plaintiffs carried the matter in appeal before the High Court in First Appeal No.14 of 1974. A Division Bench of the High Court after hearing the parties came to the conclusion that the finding@s reached by the trial court on the question of legality and validity of the sale transactions in the light of the alleged illegality and immorality underlying these transactions remained well sustained on record and called for no interference. On these findings, the suit of the plaintiffs against the defendants-purchases qua whose transactions Section 49 was not attracted was held to be rightly dismissed and the plaintiffs appeal qua them was dismissed. However, so far as the sale deeds executed by the defendant No.1 in favour of Defendant No.15 and Defendant No.10, respondent No.16 herein, were concerned, the High Court found that there was no clear evidence as to whether Section 49 can be attracted on the facts of the case as there was nothing to indicate how the society referred to in Section 49(2) is said to have advanced loans to defendant No.1 in connection with which Section 49 could be attracted. In the light of the said conclusion to which the High Court reached it was thought fit by the High Court to remand the suit for a fresh decision on the limited question of applicability of Section 49(l) of the Gujarat Co-operative Societies Act, 1961

so far as the suit against the defendant Nos.15 and 10 was concerned. It is this remand order dated July 17,1979 which has been brought in challenge by defendant No.15 in this appeal. Now, it must be appreciated that the grievance made by Defendant No.15, the appellant herein is on similar lines as earlier contended before the High Court not only by him but also by Defendant No.10 respondent No.16 herein as the question involved is common to both of them.

6. Learned counsel for the appellant vehemently contended before us in support of this appeal that despite the averments made by the plaintiffs in paragraph 15-A of the plaint which were contested by the defendants, no clear evidence was led by the plaintiffs in support, of their plea about the transactions being void under section 49(1)(e) of the Gujarat Cooperative Societies Act and only value allegations were made therein and there was no clear evidence to support the said plea for voiding the sale transaction of the appellant. It was also contended that such a contention could not have been gone into in the absence of the Co-operative society concerned as under the Act the Co-operative society itself as per the proviso to Section 49(1) could in a given case, vary or waive the whole or any part of the obligation of the debtor who had agreed to create a charge in favour of the Society. That the section was meant for the benefit of the Society and not for any one else, such benefit could have been waived by the society in a given case. In any case in the absence of the society concerned on the record of this proceeding it was not open to the plaintiffs, a third party, to urge on behalf of the society by holding a brief for it and to call in question the sale transactions executed by their father in favour of the appellant as early as in 1965 and pursuant to which the defendant No.15 had entered into possession as owner and has continued through thereafter as such. It was, therefore, submitted that the order of remand passed by the High Court was clearly uncalled for on the facts of the present case and consequently, the order of remand be set aside and the suit of the plaintiffs should be dismissed also against the remaining defendants.

7. Learned counsel for the respondents-plaintiffs on the other hand submitted that the plaintiffs had already raised such a contention in the trial court by amending the plaint and the learned trial court itself had found that the impugned transactions were of 1965 and the society's money appeared to have been paid thereafter and thus on the date of the sale transactions there was outstanding debt of the society and therefore, the said society could legitimately contend that the transaction was a void transaction and even though the society was not joined as a party in the proceedings, the plaintiffs could not be stopped from raising this pure question of law only on that ground and this plea was rightly directed to be re-examined on remand as ordered by the High Court. It was further contended that plaintiffs did not claim any relief against society and therefore, there was no occasion for the plaintiffs to array the society as a defendant.

8. In our view, this submission on behalf of the learned counsel for the respondents cannot be sustained. It is true that no relief was claimed by the plaintiffs against the society but the grievance made by the plaintiffs in substance was of course on behalf of the society and whether such society was covered by Section 49 or not and whether such society had waived its statutory right or not in favour of the original defendant No.1 were all questions which could have been thrashed out only in presence of the society which conspicuously was not joined as at least a proper party. It is also pertinent to note that the society has not challenged these sale deeds executed by Defendant No.1 at any time. The plaintiffs also failed to lead evidence for showing how Section 49(2) got attracted on facts of the present cases despite having full opportunity before trial Court to prove their case on this issue. They could not be given a second innings just for asking as is done in the impugned order. Consequently the plaintiffs could not legitimately and their father in favour of the alienees namely Defendant Nos.15 and 10 on the ground of violation of Section 49(1) of the Act. In our view on the facts of the present case, therefore, there was no occasion for the High Court for ordering any

remand as on the main issue the plaintiffs had failed, hence the suit ought to have been dismissed against all the defendants instead of only against some of them as ruled by the High Court. Consequently, this appeal is required to be allowed and the plaintiffs' suit against appellant Defendant No.15 also is liable to be dismissed as on merits the plaintiffs had failed to effectively challenge the sale transactions entered into by their father in favour of Defendant No.15.

9. However, this leaves out one ancillary question. The High Court by the impugned judgment has also remanded the proceedings for considering the legality of the sale transactions in favour of Respondent No.16, Defendant No.10 on the very same ground of applicability of Section 49(2) of the Gujarat Cooperative Societies Act in connection with the dues of the same society against Defendant No.1. It is true that Respondent No.16 has not filed any appeal before us. But our decision in favour of the appellant will have a direct bearing on the question of remand of the suit for considering the challenge of the plaintiffs against the transactions in favour of the Defendant No.10. Respondent No.16 herein based on same set of facts. In fact, the case of the appellant and the respondent No.16 is identical and involves common defence to the plaintiffs' case on this issue. When the appellant and the respondent No.16 sail in the same boat and have common defence against the plaintiffs' case it can very well be visualised that the grievance of the appellant once upheld would enure for the benefit of Respondent No.16 who is identically situated. We may in this connection, profitably refer to Order 41 Rule 4 C.P.C. which provides that where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants, may appeal from the whole decree, and thereupon the appellate court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be. In our opinion, it is a fit case to exercise our power under Order 41 Rule 4 C.P.C. read with Article 142 of the Constitution in favour of Respondent No.16 Defendant No.10) so that inconsistent situations and possibility of incongruous orders may not arise. In view of our finding that the plaintiffs' case based on Section 49 for voiding the impugned sale transactions is not sustained on merits, and on that ground once we grant relief to the Defendant No.16, no useful purpose would be served by sustaining the remand order of the High Court for deciding the very same question on same set of facts by the trial court so far as the sale transaction of Defendant No.10- Respondent No.16 herein is concerned.

10. Hence while allowing this appeal the suit of the plaintiffs will stand dismissed not only against defendant No.15 but also against defendant No.10 and the net result would be that the order of remand passed by the High Court will stand wholly set aside and the order of the trial court dismissing the suit will get confirmed. The appeal is allowed accordingly. There would be no order as to costs.