

APPELLATE CIVIL

Before D. K. Mahajan, J.

TIRKHA, ETC.,—Appellants

versus

DWARKA PARSHAD, ETC.,—Respondents.

Regular Second Appeal No. 1397 of 1967.

July 12, 1972.

*Custom—Dholi tenure—Alienation by a dholidar—Whether void ab initio—Such alienation—Whether can be impeached by the dholidar or his successors.*

*Held*, that there is a world of difference between a void and a voidable transaction. A void transaction is *non est* whereas a voidable transaction is good so long as it stands, but becomes void when it is impeached by the person who has a right to get the transaction declared void. An alienation of *dholi* tenure by a *dholidar* is void *ab initio* and is, therefore, *non est*. The alienor *dholidar* or his successors can impeach the very alienation which the *dholidar* has made. The office of a *dholidar* is similar to that of a trustee, and it is open to one trustee to impeach the validity of a void alienation made by himself or by his predecessor.

(Paras 4 & 5)

*Regular Second Appeal from the decree of the Court of Shri O. P. Sharma, IInd Additional District Judge, Gurgaon, dated the 30th day of August, 1967, affirming that of Shri Dewan Hukam Chand Gupta, Sub-Judge, 1st Class, Palwal, dated the 29th December, 1966, granting the plaintiff a preliminary decree with costs against defendants No. 1 to 4 for redemption of the mortgage in respect of the land in dispute on payment of Rs. 160 by 31st January, 1967, and thereafter shall obtain final decree and thus get the possession of the land in dispute.*

*The appellate Court passed no order as to costs.*

*Surinder Sarup, Advocate, for the appellants.*

*P. S. Jain, Advocate, for the respondents.*

JUDGMENT

MAHAJAN, J.—This second appeal is directed against the concurrent decisions of the Courts below decreeing the plaintiff's suit.

(2) Plaintiff Dwarka Parshad got the land in dispute on mortgage from Smt. Kasturi, daughter of Jawatri, wife of Kishan Jiwan. The ownership of the land vested in Tirkha and others. Kishan Jiwan held this land as a *dholidar*. He mortgaged the same to the present appellants, i.e., Tirkha and others, on 13th May, 1929 for Rs. 160. On his death, his widow Javitri succeeded him. On her death, which took place 5 or 6 years before the suit, she was succeeded by Kasturi, defendant No. 5, as *dholidar*. Kasturi effected a further mortgage on the said land in favour of Dwarka Parshad, plaintiff, for Rs. 1,000 by registered deed, dated 24th February, 1964. On the basis of this mortgage Dwarka Parshad brought a suit for possession of the land against the previous mortgagees Tirkha and others by redemption of the prior mortgage. This suit was contested by the defendants on the ground that the *dholidar* had no right to transfer the land which formed the subject-matter of *dholi* tenure, by mortgage and the same was invalid. The land, therefore, reverted to the original owners and the *dholi* tenure became extinct. The defendants also denied that Kasturi was the daughter of Kishan Jiwan.

(3) The trial Court found that Kasturi was the daughter of Kishan Jiwan and that the mortgage was void, but this defence was not available to the defendant-appellants for the simple reason that they themselves were holding the land as mortgagees from Kishan Jiwan. Therefore, they could not go behind this mortgage to dispute the right of the subsequent mortgagee to redeem the land. In this view of the matter, the suit was decreed. An appeal by the defendants failed. The defendants have come up in second appeal to this Court.

(4) The contention of Mr. Surinder Sarup, learned counsel for the defendant-appellants, is that the transaction of mortgage is void and, therefore *non est*. The defendant-appellants are the original owners of the land and, therefore, the defendants could impeach the validity of the mortgage and it is immaterial whether they themselves are the mortgagees. The question whether the *dholi* tenure exists or not is a question between the *dholidar* or his successors and the proprietors of the village, but so far as the mortgagee is concerned, he gets no rights under the mortgage. This contention appears to be sound in view of the clear pronouncement

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of Sir Shādi Lal in *Sewa Ram v. Udegir* (1). The learned Chief Justice, after setting out the nature of the tenure, observed:—

“It is beyond dispute that tenure of this kind cannot be alienated by sale or mortgage, and there can be little doubt that any alienation of that character, if made by the *dholidar*, would be absolutely void. This being the case, we are not prepared to accept the contention that the present *dholidar*, who is the son of the alienor, is precluded by any rule of law from impeaching the alienation made by his father. As the transaction was altogether void, we consider that even the alienor would have successfully pleaded in answer to the plaintiff’s suit that the latter could not enforce it in a Court of law. There is, therefore, no reason, why the defendant should not be able to impeach the alienation, more especially, when we remember that the office of a *dholidar* is similar to that of a trustee, and that it is open to one trustee to impeach the validity of an alienation made by his predecessor.”

(5) There is a world of difference between a void and a voidable transaction. A void transaction is *non est* whereas a voidable transaction is good so long as it stands, but becomes void when it is impeached by the person who has a right to get the transaction declared void. The observations of the learned Chief Justice are clear on the point that the alienation of *dholi* tenure is void *ab initio*. If it is void, it is *non est*. On the other hand if it is voidable the alienor could not challenge it. Whereas according to the learned Chief Justice a *dholidar* can impeach the very alienation he has made. Thus the alienation is void and not voidable. Therefore, it must be held that the defendants could defeat the redemption suit on the short ground that there was no mortgage in favour of the plaintiff.

(6) Mr. Jain, learned counsel for the respondents, contends that it is the *dholidar*’s successors, who alone can impeach the alienation, but this contention cannot be accepted in view of the clear pronouncement of the learned Chief Justice, to which a reference has already been made. In this view of the matter, it appears to me that the Courts below were in error after holding that the mortgage in

(1) I.L.R. 2 Lah. 312.

favour of the plaintiffs' was void that it could be redeemed. This conclusion runs counter to the decision in *Sewa Ram's Case*.

(7) For the reasons recorded above, I allow this appeal, set aside the judgments and decrees of the Courts below and dismiss the plaintiffs' suit. In the circumstances of the case, there will be no order as to costs.

K. S. K.

REVISIONAL CRIMINAL

Before *Pritam Singh Pattar, J.*

RAMJI LAL,—Petitioner

versus

THE STATE OF HARYANA,—Respondent.

*Criminal Revision No. 188 of 1971.*

July 17, 1972.

*Indian Penal Code—Section 420—Contract Act (IV of 1872)—Section 23—Fraudulent contract against public policy—Offence of cheating for the breach of such contract—Whether committed—Accused agreeing to give his daughter in marriage in consideration of pecuniary gain—Some other girl given in marriage—Accused—Whether guilty of the offence under section 420.*

*Held*, that a contract against public policy is void under section 23 of Contract Act, 1872. Such a contract cannot be enforced in a civil Court. A party to the contract, even though fraudulent, cannot be allowed to prosecute for cheating the other party alleged to be guilty of its breach when he is not entitled to obtain any relief from a civil Court. A contract for receiving pecuniary gain by a father of the groom or bride in consideration of giving his son or daughter in marriage is opposed to public policy and repugnant to morals. Such an agreement is hit by section 23 of the Act as opposed to public policy and, therefore, not enforceable in a Court of law. Hence if an accused agreeing to give his daughter in marriage in consideration of pecuniary gain, gives some other girl in marriage, commits no offence under section 420 of the Indian Penal Code.

*Petition under section 435/439 Cr. P. C. for revision of the order of Shri P. R. Aggarwal, Additional Sessions Judge, Gurgaon Camp at Narnaul, dated 16th February, 1971, modifying that of Shri R. P. Bajaj, Judicial Magistrate, 1st Class, Charkhi Dadri, dated 28th February, 1970; convicting the petitioner.*