
(2008) 09 BOM CK 0008
In the Bombay High Court
Case No : Second Appeal No. 634 of 1991

Ambadas Khanderao Hagvane and Others	APPELLANT
Vs	
Shaikh Razaq Shaikh Yakub and Others	RESPONDENT

Date of Decision : 25-09-2008

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63
Limitation Act, 1963 — Article 54
Urban Land (Ceiling and Regulation) Act, 1976 — Section 26

Citation : (2009) 1 BomCR 194 : (2009) 1 CivCC 553

Hon'ble Judges : Bhatia J.H., J

Bench : Single Bench

Advocate : C.P. Deogirikar and A.V. Anturkar, for the Appellant; G.R. Agrawal, instructed by R.M. Agrawal, for the Respondent

Judgement

Bhatia J.H., J.—This appeal is filed by the original defendants challenging the decree passed by the Joint Civil Judge, Junior Division, Nashik in Regular Civil Suit No. 174 of 1984 in favour of the plaintiff/respondents and confirmed by the learned 6th Additional District Judge, Nashik while dismissing Regular Civil Appeal No. 31 of 1986 filed by the defendants.

2. Admitted facts are that original defendant No. 5 Khanderao was owner of the land Survey No. 24/12 admeasuring 30 Gunthas situated at Mauje Vihitgaon, Taluka Nashik which is now part of Municipal Corporation, Nashik. Defendant No. 5 Khanderao had got the land mutated in the nature (sic name) of his four sons, who are defendant Nos. 1 to 4. The plaintiffs, who are brothers inter se, filed suit for specific performance of contract against the defendants. According to them the defendants had agreed to sell the suit land to them for consideration of Rs. 15,000/- and amount of Rs. 6,000/- was paid as earnest money and balance amount was to be paid at the time of execution of sale deed. Accordingly, an agreement for sale was executed on 17.7.1978. As per terms of the contract the defendants were to obtain permission for sale under Urban Land Ceiling Act as well as u/s 63 of the Bombay Tenancy and Agricultural Lands Act (Tenancy Act, in

brief). According to the plaintiffs, the cost of obtaining the permission from both the Competent Authorities was to be borne by the defendants while cost of getting the sale deed registered would be borne by the plaintiffs. Permission under the Urban Land Ceiling Act was obtained on 24.8.1978. However, the defendants did not take any steps to secure permission u/s 63 of the Tenancy Act and thus, they committed breach of the contract. The plaintiffs firstly issued firstly public notice and thereafter, they issued notice to the defendants in the year 1983. However, the defendants avoided and finally refused to execute sale deed. The plaintiffs contended that they have been always ready and willing to perform their part of the contract, that is to pay the balance amount and to get the sale deed executed, however, the defendants were not ready. Therefore, they filed the suit for specific performance of the contract. Alternatively, they also contended that if the decree for specific performance cannot be granted, the amount of Rs. 6,000/- be directed to be refunded by the defendants with interest thereon.

3. The defendants contested the suit by filing written statement wherein they denied to have entered into any agreement for sale with the plaintiffs and to have received any amount from them as earnest money towards the alleged transaction. They also denied that they were to obtain any permission which would be necessary for execution of sale deed. According to them, the market value of the land was more than Rs. 40,000/- and therefore, it was not possible for them to enter into an agreement for sale of the suit land for meager amount of Rs. 15,000/-. According to them, defendant No. 5 was in need of money to meet certain expenses and therefore, he approached one Haroon Seth, who is said to be brother-in-law of the plaintiffs. Haroon Seth agreed to advance the amount however, he wanted defendant No. 5 to execute some documents as security of the said amount. Defendant No. 5 received the amount of Rs. 6,000/- from Haroon Seth as a loan and also signed on blank paper, and handed over the same to Haroon Seth. It was agreed that on repayment of the amount, the said paper bearing signature of defendant No. 5, would be returned to him. Later on, defendant No. 5 approached Haroon Seth and offered to repay the amount of Rs. 6,000/- and demanded the said signed document but Haroon Seth avoided to receive the amount and to hand over the document saying that he had to search out the said document and that when the document would be traced out, he would return to him. Due to sharp increase in the prices as a result of passage of time, Haroon Seth got prepared the false deed of agreement in favour of the plaintiff and they have filed the suit falsely misusing that document. It was further contended that defendant No. 4 Tulshiram was a minor at the time of alleged agreement and no permission was obtained from the Competent Court for sale of his share in the suit property. By making an amendment to the written statement, they also pleaded that the land was a Patil Inam land and could not be transferred without obtaining necessary permission and without depositing 50% of the market price of the land with the Government. On all these grounds, the suit was contested. According to them, because of these reasons, the suit is

liable to be dismissed.

4. The trial Court framed several issues and after the hearing the evidence of both the parties, rejected the contentions of the defendants and passed the decree for specific performance of the contract in favour of the plaintiffs.

5. Being aggrieved by the Judgment and Decree passed by the trial Court, the defendants preferred Regular Civil Appeal No. 31 of 1986. The learned Appellate Court also rejected the contentions of the defendants that they had not entered into an agreement for sale with the plaintiffs; that they had not received earnest money and that it was only a loan transaction between defendant No. 5 and Haroon Seth. The lower Appellate Court also came to the conclusion that it was responsibility of the defendants to obtain necessary permission for sale of the land under Urban Land Ceiling Act as well as Tenancy Act. The learned lower Appellate Court also rejected the contention that the contract is not enforceable due to any provision of Inam Abolition Act or the Tenancy Act. However, the learned Appellate Court came to the conclusion that at the time of the agreement for sale, respondent No. 4 Tulshiram was a minor and his mother Housabai was not competent to enter into an agreement to sell the share of the minor in the land. With this finding, the Appellate Court modified the decree passed by the trial Court and as a result of the same, the decree was passed in favour of the plaintiffs in respect of 3/4th share of the suit land with direction to the plaintiff to deposit balance amount of Rs. 5,250/- towards that share. The decree passed by the trial Court was set aside to the extent of 1/4th share of defendant No. 4 in the suit land. The Appellate Court directed defendant Nos. 1 to 3 to secure the necessary permission u/s 63 of the Bombay Tenancy and Agricultural Lands Act within the period of three months for which the plaintiffs would bear expenses. The Appellate Court also directed that in case of defendants failing to obtain permission, the plaintiff would secure the permission through the Court and thereafter, the sale deed could be executed. Being aggrieved, the defendants have filed this second appeal.

6. Heard learned Counsel for both the parties. The appeal was admitted on 29.11.1991 by following order:

The nature of the suit transaction and the discretion exercised raised substantial question of law.

7. The second appeal can be admitted and heard only on the substantial question of law which may be raised. As pointed out above, at the time of admitting the appeal, substantial questions of law were not formulated. Therefore, before formulating the questions of law, it will be necessary to note down the admitted facts and concurrent findings of facts given by the courts below.

8. Admittedly, the suit land originally belonged to defendant No. 5 Khanderao. However, before the suit transaction, he had got the land mutated in the names of his 4 sons, who are defendant Nos. 1 to 4. Defendant No. 4 Tulsiram was aged 12 years when the alleged agreement took place in 1978 and on his behalf, the

agreement was signed by his mother as a guardian. In fact, in the presence of the father i.e. defendant No. 5 Khanderao, the mother could not be legal guardian of defendant. Admittedly, no permission was obtained from the District Court for the purpose of sale of the property belonging to defendant No. 4. In view of this, the lower Appellate Court refused specific performance of contract to the extent of 1/4th share of defendant No. 4 and passed the decree in respect of 3/4th share belonging to defendant Nos. 1 to 3, who were themselves signatories of the agreement. The plaintiffs have also preferred cross objections in respect of dismissal of their suit to the extent of 1/4th share of defendant No. 4. I find that the trial Court had not given any reason on this aspect and the Appellate Court has given valid reasons while refusing specific performance to the extent of 1/4th share of defendant No. 4. Therefore, I find no substance in the cross objection and therefore, the cross objection is liable to be rejected.

9. Both the courts below have given concurrent findings that the defendants had entered into an agreement to sell the suit land to the plaintiffs for consideration of Rs. 15,000/- and they had received amount of Rs. 6,000/- as earnest money and they had executed an agreement for sale. Both the courts below also held that the defendants were to obtain necessary permission u/s 26 of the Urban Land Ceiling Act and u/s 63 of the Bombay Tenancy and Agricultural Lands Act from the Competent Authorities before executing sale deed. Both the courts below found that permission u/s 26 of the Urban Land Ceiling Act was obtained by the defendants on 30th August, 1978. Only the permission u/s 63 of Tenancy Act was not obtained. There is a concurrent finding of fact from both the courts below that the defendants had failed to prove that defendant No. 5 Khanderao had obtained loan of Rs. 6,000/- from Haroon Seth and that he had not entered into any agreement for sale with the plaintiffs. There is no material on record to show that the concurrent findings of facts on these points are either per se wrong or perverse in view of the oral or documentary evidence on record and therefore, no substantial question of law can be raised in respect of these findings.

10. The learned Counsel for the defendants/appellants contended that as per the terms of the alleged contract, the sale deed was to be executed within six months from 17.7.1978 when the agreement was entered into and the last date for execution of sale deed was 17.1.1979 and the permission was to be obtained from both the authorities under the Urban Land Ceiling Act as well as Tenancy Act within the said period. The plaintiffs were bear the expenses of obtaining permission as well as to execute the sale deed. The plaintiffs took a stand later on that they were not liable to bear the expenses of obtaining permission and therefore, no steps were taken for the purposes of obtaining the permission u/s 63 of the Tenancy Act and as a result, permission was not obtained within the period. The suit was filed on 17.2.1984 and thus, the suit is barred by limitation. The learned Counsel also contended that because of the said stand taken by the plaintiff in respect of expenses of obtaining permission, it must be held that they were not ready and willing to perform their part of the contract. Decree for

specific performance could not be passed with condition to obtain permission under Tenancy Act. It is further contended that the defendants are the small cultivators holding a small piece of land. If the decree for specific performance is granted, they would be deprived of their land. Further, value of the land has increased many folds from the year 1978 to 2008. If the discretion is used in favour of the plaintiffs in granting the decree for specific performance, the defendants would be put to great financial loss and therefore, it will not be in the interest of justice to pass a decree for specific performance in the favour of defendants to the plaintiffs.

11. In view of the above arguments advanced by the learned Counsel for the defendants/appellants, following substantial questions of law may be formulated:

(i) Whether the courts below, in the face of the pleadings and evidence, committed error in holding that the suit was within limitation?

(ii) Whether the courts below, in face of documentary and oral evidence and the pleadings, committed error in holding that the plaintiffs were always ready and willing to perform their part of the contract?

(iii) Whether the courts below committed error in using discretion in favour of the plaintiffs while granting the decree for specific performance of the contract?

(iv) Whether the courts below committed error in passing the decree for specific performance subject to obtaining permission u/s 63 of the Bombay Tenancy and Agricultural Lands Act?

12. To appreciate the arguments advanced on behalf of the appellants and the counter arguments advanced on behalf of the respondents/plaintiffs, it will be necessary to state the terms of the agreement between the parties. The agreement for sale reveals that the defendants had agreed to sell the suit land for consideration of Rs. 15,000/- and they had received amount of Rs. 6,000/- as earnest money at the time of executing the agreement for sale and the balance amount of Rs. 9,000/- was to be paid by the plaintiffs to the defendants at the time of execution of sale deed before the Sub-Registrar. The period of completing the transaction was fixed to be six months from 17.7.1978 to, 17.1.1979. It also provides that as a land was situated within the area of Municipal Corporation, Nashik, it was necessary to obtain permission from the competent authority under the Urban Lands Ceiling Act and after obtaining that permission, further permission would be required to be taken from Assistant Collector, Nashik u/s 63 of the Tenancy Act. It is specifically provided that the vendors, i.e. the defendants were to secure the permission at the cost of the plaintiffs. It further provided that after obtaining permission u/s 63 of the Tenancy Act, the sale deed would be executed. In case, the above referred both the permissions could not be secured within the specified period, the period for execution of sale deed could be extended till both the permissions were obtained and further by period of one month beyond the date of obtaining the permission.

13. Under Article 54 of the Limitation Act for a suit for specific performance of contract, the period of limitation is three years and when the date of performance is fixed, the period of limitation begins to run from that day and when no such date is fixed, the period of limitation begins to run when the plaintiff has knowledge of refusal of performance. In the present case, the period was specified in the agreement. In view of the terms of the contract noted above, it is clear that the parties had agreed that the sale transaction should be completed within six months i.e. by 17.1.1979 but this period was subject to condition of obtaining permission for sale from the competent authorities under both the Acts. If the permission would have been obtained within that period, the transaction was to be completed on or before 17.1.1979 and in that case the period of limitation would begin to run from 17.1.1979 and would come to an end on 17.1.1982. Admittedly, the permission u/s 26 of Urban Lands Ceiling Act was obtained by 30th August 1978 i.e. well within time. However, permission u/s 63 of the Tenancy Act was not obtained. There is nothing to show that the defendants had filed any application before the competent authority for obtaining their permission. As per the terms of the contract it was the responsibility of the defendants to obtain that permission and then both the parties were to complete the sale transaction. As the defendants had failed to move an application for permission u/s 63 of the Tenancy Act, naturally, the permission was not secured and as long as that permission was not secured, the period for completing the transaction would automatically get extended under the terms of the contract. Mr. Deogirakar, learned Counsel for the defendants/appellants vehemently contended that it was the responsibility of the plaintiffs to approach the competent authority u/s 63 and to obtain permission. However, he could not point out any legal provision under which the application for that permission to be made only by the purchaser of the land. The application could be moved by either of the party and as per terms of the contract it was responsibility of the defendants to secure the permission. It means it was their responsibility to file an application before the competent authority for obtaining permission u/s 63 of the Tenancy Act. Mr. Deogirakar contended that it was necessary for the competent authority to be satisfied that the permission could be granted under the provisions of Section 63 of the Tenancy Act and the relevant rules and unless the purchasers appeared before that authority with necessary evidence, the competent authority could not come to the conclusion that the plaintiffs deserve that permission. However, in my considered opinion, if the application would have been filed by the defendants, the plaintiffs could be called upon to appear before the competent authority and to produce necessary oral and documentary evidence to satisfy the concerned authority that under the provisions of law and the rules they could be allowed to purchase the land. Unless the application was made, that stage would not come. The defendants failed to perform their part of the contract by filing the application before the Competent Authority to secure that permission. In view of these circumstances, it must be held that the suit was not barred by limitation.

14. Mr. Anturkar, who also argued on behalf of the defendants after completion of arguments by Mr. Deogirikar, vehemently contended that if the conduct of the plaintiffs and their stand is looked into in the face of the terms of the contract, it would appear that they were not willing to perform their part of the contract. The learned Counsel pointed out that in the notice dated 25.11.1983 issued by the plaintiffs through their Advocate to the defendants, they had contended that the defendants had to bear the costs of obtaining permission and in the plaint also the plaintiffs had pleaded that the defendants had to bear cost of obtaining permission. He pointed out that this stand taken by the plaintiffs in the notice and in the plaint was contrary to the specific term of the contract that the defendants would secure the permission at the costs of the plaintiffs i.e. the purchaser. Mr. Anturkar contended that this indicated that the plaintiffs were not willing to bear the cost of obtaining permission and if it is so, it must be held that they were not ready and willing to perform their part of the contract. It is true that this stand taken by the plaintiffs, in the said notice which was issued before filing the suit as well as in the plaint, is contrary to the specific terms of the contract in respect of the cost of obtaining the permission. However, it is material to note that in the reply to that notice or in the written statement filed by the defendants, while they had denied the contract and they had contended that it was the loan transaction between defendant No. 5 Khanderao and Haroon Seth, they had not specifically contended that as per the terms of the contract the plaintiffs were to bear the cost of obtaining permission and as they were not willing to bear that cost, the permission could not be obtained. If they would have taken such a stand, they would be perfectly justified but it appear that while denying the whole agreement and all the pleading of the plaintiffs in their statement generally, they did not take any specific plea in respect of the cost of taking permission. It appears that on this aspect even the plaintiff was not challenged in the cross-examination. The trial Court came to the specific finding that the plaintiffs were always ready and willing to perform their part of the contract. It is material to note that in the appeal memo filed before the lower Appellate Court as well as in the appeal memo of the second appeal filed before this Court, no ground has been taken in respect of the costs of obtaining permission. The learned lower Appellate Court simply noted that the trial Court had come to the conclusion that the plaintiffs had been always ready and willing to perform their part of the contract. It appears that as this finding was not challenged before the Appellate Court, the Appellate Court did not consider this aspect at all. This ground was not taken in the appeal memo nor there is anything on record to show that this ground was raised even at the time of arguments before the lower Appellate Court. As pointed out earlier, the second appeal was admitted on merely observing that the nature of the suit transaction and the discretion exercised, raised substantial questions of law. It must be presumed that the questions of law would be only those which were actually raised in the grounds taken by the appellant in the appeal memo but the appeal memo clearly shows that the appellant did not raise this ground and for the first time this arguments was advanced before this Court by Mr. Anturkar. In view of

the conduct of the defendants in not challenging the findings of the trial Court about the readiness and willingness of the plaintiffs either before the first Appellate Court or before this Court on this specific ground, in my considered opinion it is too late for the defendants to raise this ground. The plaintiffs had paid the earnest amount of Rs. 6,000/-. As per the terms of the contract, after obtaining the permission from the competent authorities the defendants were to inform the plaintiffs and thereafter, the sale deed to be executed and registered. The defendants never approached the competent authorities u/s 63 of the Tenancy Act and therefore, the question of even bearing the cost never arose nor it was the stand of the defendants that they could not approach the competent authority for that permission because the plaintiffs were not willing to bear that expenditure. It is possible that if they would have replied the notice issued by the plaintiffs, pointing out the contradiction in their stand and the terms of the agreement, the plaintiffs would have rectified their stand and there would be no difficulty about the bearing of the cost of the sale. In view of this, I am unable to accept the contention of the learned Counsel for the defendants that the plaintiffs were not ready and willing to perform their part of contract.

15. The learned Counsel for the defendants also contended that the agreement for sale itself could not be entered into without obtaining permission. It is difficult to accept this contention. Section 63 of the Tenancy Act provides that no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue) gift, exchange or lease of any land or interest therein, or no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee shall be valid in favour of person who is not an agriculturist without obtaining necessary permission from the Collector. Of course, certain conditions in Section 63 as well as in the rules there under, have to be satisfied before the Collector may grant the permission. The sale of the land to non-agriculturist shall not be valid without obtaining permission. The sale does not take place unless the sale deed is executed. Agreement of the sale and the sale cannot be equated. The agreement clearly states that the sale transaction was to be completed only after obtaining necessary permission u/s 63. Therefore, the agreement could not be invalid. The courts below passed the decree for specific performance subject to condition of obtaining necessary permission u/s 63 and directed the defendants to obtain that permission as per the terms of the contract. It is difficult to find any fault with the conditional decree passed by the courts below. It goes without saying that if the Competent Authority refuses the permission u/s 63 the sale deed cannot be executed. Mr. Agarwal, learned Counsel for the plaintiffs rightly relied upon Balu Baburao Zarole and Others etc. Vs. Shaikh Akbar Shaikh Bhikan and Others etc., wherein the learned Single Judge of this Court held in the similar circumstances that the decree for specific performance granted subject to sanction of Collector is not improper. This authority is squarely applicable to the facts of the present case. Therefore, it cannot be held that the conditional decree passed by the Court subject to

obtaining permission of the authority u/s 63 of the Tenancy Act is not valid.

16. The learned Counsel for the defendants/appellants vehemently contended that the consideration for the suit transaction was only Rs. 15,000/- and a meager amount of Rs. 6,000/- was paid as per the terms of the agreement. The learned Counsel contended that the relief of specific performance of the contract is discretionary and in view of the facts that the defendants are poor persons, holding a small piece of land and further, the prices of land have increased manifold and therefore, it will not be in the interest of justice to grant decree for specific performance. It is contended that if 30 years after the agreement, the defendants are required to execute the sale deed as per the price fixed in the year 1978, they would be practically deprived of their property. Mr. Agarwal, learned Counsel for the plaintiffs vehemently contended that merely because long time has lapsed in the litigation, the decree for specific performance cannot be refused to the plaintiffs because they were not at fault. It is pointed out that the plaintiffs were required to file the suit because the defendants had taken a false stand of loan transaction. The suit was filed in 1984 and it was decreed on 9.8.1985 i.e. within almost one and a half year. Against that decree the defendants had preferred an appeal and that appeal was decided on 6th June 1991, confirming the decree for specific performance in respect of 3/4th share. That judgment was challenged in the present appeal and this appeal is pending for last about 17 years. All this period has been lost only because the defendants filed the appeals. He also relied upon number of authorities in support of his contention that normally the decree for specific performance of the contract should be granted unless there are specific circumstances against the same. He also contended that merely because the prices are increased, the decree cannot be refused now. In support of this, he placed reliance upon *Mrs. Chandnee Widya Vati Madden Vs. Dr. C.L. Katial and Others*, , *P.S. Ranakrishna Reddy Vs. M.K. Bhagyalakshmi and Another*, , *P.C. Varghese Vs. Devaki Amma Balambika Devi and Others*, , *P. D'Souza Vs. Shondriilo Naidu*, , and *Gobind Ram Vs. Gian Chand*, . In all these cases, it was held that merely because of the lapse of time, if there was escalation of prices, the decree for specific performance cannot be refused unless the purchaser was taking undue or unfair advantage. It may be noted that in the case of *Gobind Ram v. Gian Chand*, in January 1973 an agreement for sale of immovable property had taken for consideration of Rs. 16,000/- and amount of Rs. 1,000/- was paid as earnest money, balance amount was to be paid at the time of sale deed. In 1976, the suit was decreed and the plaintiff was directed to pay the balance amount. When the appeal was before the High Court, the High Court directed the respondent/plaintiff to pay further sum of Rs. 1,00,000/- to compensate the vendors. When the matter finally went to the Supreme Court, Their Lordships directed the purchasers to deposit further sum of Rs. 3,00,000/- in addition to the agreed price so that the vendors could be substantially compensated though he could not get the full market price of that value. In the present case, the decree has been passed only in respect of 3/4th share. Thus, the value of the 3/4th land as per the terms of the contract is

only Rs. 11,250/-, out of which an amount of Rs. 6,000/- was paid at the time of agreement, therefore, the lower Appellate Court directed the plaintiffs to pay balance amount of Rs. 5,250/-. It may be noted that when the learned Counsel for the defendants vehemently argued about the price escalation and the financial loss to which the defendants would be put to, the learned Counsel for the plaintiffs/respondents after obtaining instructions from his clients made a statement that the plaintiffs are willing to deposit further amount of Rs. 5,00,000/- in addition to the balance amount of consideration. In my considered opinion, this offer is substantial and now inspite of the balance amount of Rs. 5,250/-, the defendants would be paid further amount of Rs. 5,00,000/-. It is possible that the price of the land today may be much more than the amount offered. As the agreement had taken place in 1978 and not in 2008, the defendants cannot expect the market price of the land prevailing in the year 2008, particularly, when the delay has been caused by the defendants themselves and not by the above plaintiffs.

17. Taking into consideration all the circumstances, I do not find any substance in the appeal. However, as per the statement made by the learned Counsel for the plaintiffs/respondents, they shall deposit the balance amount of consideration of Rs. 5,250/- and in addition to that, further amount of Rs. 5,00,000/- before the trial Court within two months from this date. The learned Counsel for the plaintiffs/respondents makes a statement that the necessary permission u/s 63 of the Tenancy Act has already granted by the competent authority on an application made by the Court Commissioner in exemption of the decree. If the permission is already obtained, within one month after depositing the amount, the defendant Nos. 1 to 3 shall execute the sale deed as per the decree passed by the first Appellate Court. In case, the permission u/s 63 is not yet granted, the defendant Nos. 1 to 3 shall approach the competent authority within two months from this date to secure permission for sale of the land u/s 63 of the Tenancy Act, under intimation to the plaintiffs. The sale deed shall be executed after the permission is granted. After execution and registration of sale deed, the defendant Nos. 1 to 3 shall be at liberty to withdraw the amount deposited with the trial Court.

18. The defendants shall co-operate the plaintiffs in securing that permission. The appeal is disposed of accordingly.