

(1923) 07 BOM CK 0020
In the Bombay High Court

Ardeshir Framji Ghasvalla

APPELLANT

Vs

Tricamdas Gordhandas

RESPONDENT

Date of Decision : 27-07-1923

Acts Referred:

Cantonments Act, 1924 — Section 11, 6

Citation : AIR 1924 Bom 253 : 85 Ind. Cas. 442

Hon'ble Judges : Mulla, J

Bench : Single Bench

Judgement

Mulla, J.—This is an originating summons taken out by the plaintiff for the determination of the questions (1) whether the defendant is not bound to comply with the requisitions of the Cantonment Authorities set forth in the plaint, (2) whether the said requisitions are arbitrary and illegal, and (3) whether the defendant should not specifically perform the contract of sale and complete the purchase.

2. By an agreement constituted by three, letters the defendant agreed to buy from the plaintiff his land and bungalow situated at Wanowrie Lines, Poona, for Rs. 40,000. The defendant paid Rs. 5,000 as earnest.

3. One of the terms contained in the letter dated October 17, 1921, addressed by the plaintiff to the defendant, was as follows:

Tenure Cantonment land. You will have to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to your name.

4. Subsequent to the date of the agreement the plaintiff applied to the Cantonment Magistrate, Poona, for leave to sell and transfer the said property to the defendant. On November 26, 1921, the Cantonment Magistrate wrote to the plaintiff stating that the General Officer Commanding would be moved to allow the plaintiff to sell the property if the purchaser gave beforehand an undertaking in writing in these terms: "That the bungalow will always be available for occupation by a Military Officer on duty at this station and that he will not claim

to live in it as owner." The plaintiff sent a copy of this letter to the defendant's attorneys. On December 1, 1921, the defendant's attorneys wrote to say that the undertaking asked for was an attempt to get round Section 11 of the Cantonments (House Accommodation) Act, 1902. To that letter the plaintiff replied on December 7, stating that the plaintiff had expressly informed the defendant that he would have to execute an undertaking in the form required by the Cantonment Authorities. The plaintiff's attorneys communicated the contents of the defendant's letter of December 1, to the Cantonment Magistrate. On December 10, the Cantonment Magistrate wrote to the plaintiff's attorneys asking them to inform the defendant's attorneys that under the conditions of the grant of building sites in Cantonments the Military Authorities had the power to veto the contemplated sale of any property and that the General Officer; Commanding Poona District would not exercise this right in the case of the proposed sale if the purchaser gave the required undertaking. On December 22, the defendant's attorneys wrote to the plaintiff stating that the plaintiff knew that the defendant was purchasing the property for his own use and occupation, and that unless, the proposed condition was waived, the defendant would not complete the purchase.

5. Further correspondence ensued, and, on June 24, 1922, the defendant wrote to the plaintiff to the effect that the question whether the Cantonment Authorities had power to require an undertaking in the above form would come up for consideration in the Bombay Legislative Council in the autumn session, and suggested that the matter might stand over until then. The plaintiff, agreed to this, but as no such question came up before the Council, he took out the present summons on April 3, 1923.

* * * * * 6. The only other, question is whether the undertaking required by the Cantonment Magistrate was legal. It was contended for the defendant that though he agreed to, comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name, he did not agree to comply with any unlawful requisition, and that the undertaking asked for was unlawful. This contention was based on Sections 6 and 11 of the Cantonments Act. On the other hand, it was urged for the plaintiff that the Act did not apply, and "that the case was, therefore, governed by Cantonment Rules 1938, 1939 and 1999. It was also argued that even if the Act applied the undertaking asked for was not unlawful.

7. It appears from Ex. A, that the site of the property in question was occupied by a bungalow shown in the map of 1828. The site was granted on certain conditions of tenure which are set out in Ex. B. Condition No. 1 provides that Government retain the power of resuming the land at any time on giving one month's notice. Condition No. 2 is as follows:

The ground being the property of Government, cannot be sold by the grantee. The right of occupancy alone can be sold by the grantee, but not without the sanction of His Excellency the Commander-in-Chief obtained through the Officer

Commanding the station. The fact of registering such deed of sale does not legalize it, if it is otherwise contrary to regulations.

8. The sections of the Cantonments Act material to the present inquiry are Sections 4, 6 and 11. Section 4 is as follows:

Nothing in this Act shall affect the provisions of any written instrument executed by or on behalf of the East India Company or the Government, unless the other party entitled and the Secretary of State for India in Council consent in writing to be bound by the terms of this Act.

9. Section 6 runs thus:

Where the Cantonment Authority, on application, made to it as hereinafter provided by Section 8 and subject to the requirements of that section, considers that the liability imposed by Section 5 should be enforced on behalf of a Military Officer, it may, if the house is not already occupied by a Military Officer, by notice

(a) require the owner to let the house to the Military Officer named in the notice, and

(b) require the existing occupier (if any) to vacate the same.

10. Section 11 provides that "no notice shall be issued u/s 6 if the house...(c) is occupied by the owner.

11. On the strength of these sections it was argued for the defendant that if an intending purchaser gave an undertaking as required by the Cantonment Magistrate, it would be to contravene the provisions of Section 11, and that the contract implied in the undertaking would, therefore, be void u/s 23 of the Indian Contract Act, 1872, as defeating the provisions of the law, and that the transfer would be void for the same reasons u/s 25 of the Transfer of Property Act. It was also argued that Section 11 conferred upon the owner of a house in a Cantonment the right of not being evicted by a notice u/s 6, and that he cannot contract himself out of that right, and reliance was placed on *Kashi Prasad v. Kedar Nath Sahu* 20 A. 219 : (1898)A.W.N. 47 : 9 Ind. Dewc.. I am unable to, accede to these contentions. The Act does not contain any prohibition against a transfer by an owner of his right to continue in occupation of the house. All that the Act says is that no notice shall be issued u/s 6 if the house is occupied by the owner. The owner, therefore, may agree that if the house is required by the Military Authorities, he would deliver possession thereof to them. The Cantonment Magistrate is not prohibited from entering into any such agreement with an intending purchaser or even* an owner in possession. Such an agreement would not, in my opinion, defeat the provisions of the Cantonments Act. The decision in *Kashi Prasad's* case 20 A. 219 : (1898) A.W.N. 47 : 9 Ind. Dewc., rested on the provisions of Section 9 of the N.-W.P. Rent Act XII of 1881. That section is in these terms:

The right of tenants at fixed rates may devolve by succession or be transferred.

No other right of occupancy shall be transferable in execution of a decree or otherwise than by voluntary transfer between persons in favour of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein.

12. There is no prohibition, express or implied, in Section 11 of the Cantonments Act. I hold, therefore, that the undertaking required by the Cantonment Magistrate is not illegal or arbitrary.

13. But the matter does not rest there. The land in this case is held subject to the terms contained in the written instrument Ex. B executed on behalf of Government. That it is executed on behalf of Government is clear from condition No. 1 which reserves to Government the right of resuming the land. By virtue, therefore, of Section 4, the provisions of the Cantonments Act do not apply to this land. If the Act does not apply, Cantonment Rules, 1938, 1939 and 1999 apply. Rule 1938 provides that "in the event of a house in Cantonments occupied by a non-Military resident being required for an officer, a formal notice should be served on the occupant requiring him to vacate by a certain date." Rule 1939 provides that "the owner of any house, in a Military Cantonment, not occupied by a person belonging to the army, may be required to rent the same to any Military Officer belonging to the station who may require it to reside in, if the Officer Commanding the station is satisfied that there is no other suitable house available." Rule 1999 provides that "no ground will be granted except on the following conditions, which are to be subscribed to by every grantee, as well as by those to whom his grant may subsequently be transferred." Then follow the conditions. The first condition is in almost the same terms as condition No. 1 in Ex. B. The second condition is that "the ground being the property of Government cannot be sold by the grantee." This corresponds with the first part of condition No. 2 in Ex. B. By the latter part of condition (b) provided that "the sale or transfer of any house in Cantonments must first receive the sanction of the Local Military Authorities." This corresponds with the second part of condition No. 2 in Ex. B.

14. According to Rule 1939 an owner may be required to rent his house to a Military Officer even if it is occupied by the owner. The undertaking required by the Cantonment Magistrate does not go beyond this rule. The obligation to vacate and to rent the house to a Military Officer is an incident of land held on Cantonment tenure. The letter of October 17, 1921, expressly stated "tenure-Cantonment land". The defendant knew what the tenure was. He must, therefore, be held to have bought the land subject to the incidents of that tenure, and having undertaken to comply with all the requisitions of the Cantonment Authorities for the transfer of the property to his name, he is bound to sign the undertaking in the form required by the Cantonment Magistrate.

15. My answers to the questions will, therefore, be: No. 1 The defendant is bound. No. 2 No. No. 3 He is bound. No. 4 The defendant should pay the costs of the summons and the hearing. Counsel certified.