
(2018) 12 BOM CK 0122
In the Bombay High Court
Case No : Second Appeal No. 118 Of 2018

Babasaheb Dhondiba Kute

APPELLANT

Vs

Radha Vithoba Barde

RESPONDENT

Date of Decision : 17-12-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 21, 31A, 31A(1)(b), 31C, 38, 39, 46
Maharashtra Land Revenue Code, 1966 — Section 36A
Specific Performance Act, 1963 — Section 20

Citation : (2018) 12 BOM CK 0122

Hon'ble Judges : A. M. Dhavale, J

Bench : Single Bench

Advocate : Vikramrao R. Dhorde, R. D. Bhalerao

Final Decision : Dismissed

Judgement

1. A pure question of law raised in this second appeal is: Whether a decree for specific performance of land to be transferred from tribal to non-tribal can be granted subject to obtaining permission u/s 36A of Maharashtra Land Revenue Code?

2. The facts shorn of unnecessary details relevant for deciding this appeal may be stated as follows:

. The appellant herein namely Babasaheb is the original plaintiff and the respondent - Radhu is the original defendant. Radhu Barde belonging to tribal category by agreement dt.31.07.2001 agreed to sell his land of 80R. situated at Block No.41/1, Mandve (Bk.), Tq. Sangamner, to the plaintiff - Babasaheb for Rs.2,25,000/-. The earnest amount of Rs. 1,55,000/- was paid. Accordingly, agreement in the form of deemed conveyance on full stamp duty was executed. Subsequently, in 2003 the possession was also delivered to Babasaheb and since 2003, he is enjoying the possession. On 10.01.2003, additional consideration of Rs. 65,000/- was paid. Thus, out of Rs. 2,25,000/-, amount of Rs. 2,20,000/- was paid. Since there was no compliance of the terms of the agreement by the

defendant, Spl. Civil Suit No. 11/2005 was filed by the present appellant for specific performance of the contract and in the alternative, for refund of earnest money of Rs. 2,20,000/- along with interest @ 6% pa.

3. The defendant took defence of total denial. According to him, the plaintiff practiced fraud upon him and got the said document executed which is a sham and bogus document. The suit land of restricted tenure could not be alienated without the prior permission of the competent authority. The Id. Civil Judge Sr. Divn., Sangamner framed issues. There was no specific issue whether specific performance can be granted in absence of prior permission.

However, while deciding issue No.3 as to whether the plaintiff was entitled for specific performance or not, in para 29 the Id. trial Judge referred to Section 36A of the Maharashtra Land Revenue Code (hereinafter referred to as "MLR Code") and the prohibition on transfer of occupancies and held that, the plaintiff was not entitled for specific performance. He therefore granted decree for refund of earnest amount with interest. The aggrieved plaintiff filed First Appeal No. 1703/2009 before this Court which was eventually transferred to District Court, Sangamner in view of change in pecuniary appellate jurisdiction of the courts. The learned Ad-hoc District Judge-1, Sangamner by judgment dt. 13.12.2017 framed specific issue whether the agreement to sell is enforceable in view of embargo u/s 36A and dealt with in detail in para 48 to 61. He answered the issue in the negative and dismissed the appeal. Besides, he modified the judgment of trial Court and issued directions to the Collector to hold an enquiry. He awarded interest at higher rate of 10% p.a. from the date of the order and 14% p.a. from the date of decree besides past interest @6% upto 18.04.2004. He also issued direction of handing over the possession. Aggrieved plaintiff has preferred this appeal.

4. Mr V. R. Dhorde, learned counsel for the appellant, persuasively argued that there are concurrent findings unchallenged to the effect that there was execution of agreement to sell and the plaintiff was otherwise entitled for specific performance of the contract but for his status as a non-tribal and the status of the defendant as tribal. He relied on Nathulal v Fulchand reported in 1969(3) SCC 120 and argued that, whenever any agreement to sell is executed and it cannot be specifically performed without permission or sanction of any authority, the suit can be decreed and decree for specific performance can be granted subject to obtaining such permission/sanction from the competent authority. He further argued that, the plaintiff has made full payment long back in 2001 and 2003 and he was put in possession. He is enjoying the possession by making full payment. In the circumstances, the decree for specific performance should have been passed with a condition that the plaintiff should obtain necessary permission from the competent authority.

5. Per contra, Mr R. D. Bhalerao, learned advocate for respondent submitted that, transfer of land belonging to tribal to a non-tribal is not only banned but is against the Government policy of development of weaker section. U/s 36A of

Maharashtra Land Revenue Code, what is banned is not only transfer of property but even transfer of occupancy rights of tribal which includes transfers as contemplated under the Transfer of Property Act. The words 'or otherwise' appearing at the end indicates that even transfer of possession without transferring any interest in the property is also prohibited. The agreement to sell itself is void ab initio and in such cases, decree cannot be granted as sought.

6. Mr R. D. Bhalerao, learned counsel for respondent, relied on following rulings:

(i) Murlidhar Dayandeo Kesekar v. Vishwanath Pandu Barde 1995 (Supp.) 2 SCC 549

(ii) Atul Projects India Ltd. vs. Babu Dewoo Farle and others 2011 (6) Mh.L.J. 351

(iii) Rama Narayan Mali vs. Additional Collector, Thane and others 2008(3) Mh.L.J. 300

7. The substantial question of law framed with my findings are as follows:

(i) Whether both the lower courts erred in not granting a decree for specific performance subject to obtaining previous sanction from the Collector u/s 36A? In the negative.

(ii) What order? ... The appeal is dismissed with costs.

REASONS

8. It is not disputed that the occupancy of the suit land was allotted to the defendant by the Government in view of the fact that

he was belonging to Bhil community (Scheduled Tribe). Section 36A of Maharashtra Land Revenue Code reads as under:

4[36A: Restrictions on transfers of occupancies by Tribals:- (1) Notwithstanding anything contained in sub-section (1) of Section 36, no occupancy of a tribal shall, after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974, be transferred in favour of any non-tribal by way of sale (including sales in execution of a decree of a Civil Court or an award or order of any Tribunal or Authority), gift, exchange, mortgage, lease or otherwise, except on the application of such non-tribal and except with the previous sanction (a) in the case of a lease, or mortgage for a period not exceeding 5 years, of the Collector; and

(b) in all other cases, of the Collector with the previous approval of the State Government:

Provided that, no such sanction shall be accorded by the Collector unless he is satisfied that no tribal residing in the village in which the occupancy is situate or within five kilometres thereof is prepared to take the occupancy from the owner on lease, mortgage or by sale or otherwise.

(2) The previous sanction of the Collector may be given in such circumstances and subject to such conditions as may be prescribed.

(3) On the expiry of the period of the lease or, as the case may be, of the mortgage, the Collector may, notwithstanding anything contained in any law for the time being in force, or any decree or order of any court or award or order of any Tribunal or Authority, either suo motu or on application made by the tribal in that behalf restore possession of the occupancy to the tribal.

(4) Where, on or after the commencement of the Maharashtra Land Revenue Code and Tenancy Laws (Amendment) Act, 1974, it is noticed that any occupancy has been transferred in contravention of sub-section (1), 1[the Collector shall, notwithstanding anything contained in any law for the time being in force, either suo motu or on an application made by any person interested in such occupancy, within thirty years] from the date of the transfer of occupancy hold an inquiry in the prescribed manner and decide the matter.

(5) Where the Collector decides that any transfer of occupancy has been made in contravention of sub-section (1), he shall declare the transfer to be invalid, and thereupon, the occupancy together with the standing crops thereon, if any, shall vest in the State Government free of all encumbrances and shall be disposed of in such, manner as the State Government may, from time to time direct.

(6) Where an occupancy vested in the State Government under sub-section (5) is to be disposed of, the Collector shall give notice in writing to the tribal transferor requiring him to state within 90 days from the date of receipt of such notice whether or not he is willing to purchase the land. If such tribal transferor agrees to purchase the occupancy, then the occupancy may be granted to him if he pays the prescribed purchase price and undertakes to cultivate the land personally; so however that the total land held by such tribal transferor, whether as owner or tenant, does not as far as possible exceed an economic holding.

9. There is no dispute that, the defendant had agreed to sell the suit land to the plaintiff for Rs. 2,25,000/- and has paid Rs.1,55,000/- at the time of agreement and Rs. 65,000/- later on, total Rs. 2,20,000/-. It is also not in dispute that, in or around 2003, the plaintiff was put in possession of the suit land and since then he is cultivating the same. There is no dispute that, if the issue of transfer of land from tribal to non-tribal was not there, the decree for specific performance could have been granted.

10. Mr V. R. Dhorde, learned counsel for appellant relied on Nathulal Versus Phoolchand (supra), wherein it is held that u/s. 70(8) of the Madhya Bharat Land Revenue & Tenancy Act, the execution of the sale deed was compulsory. There was no sale but only agreement to sell. The issue was: whether the doctrine of part performance was applicable. It was observed in para 5 of the said judgment as follows:

5. Again by virtue of Section 70(4) of the Madhya Bharat Land Revenue and Tenancy Act 66 of 1950, Phoolchand not being an agriculturist the land could not be sold to him without the sanction of the State Government. In the absence of any specific clause dealing with this matter, a condition that Nathulal will secure the sanction under Section 70(4) after paying the appropriate fee must be implied for it is well settled that where by statute property is not transferable without the permission of the authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned : see *Motilal and Others v. Nanhelal and Another and Mrs. Chandhee Widya Vati Madden v. Dr. C. L. Katial and Others*.

(ii). In *Tanaji Shinde v. Mahadev Pisal* 2016(2) Bom.C.R. 109 The trial Court refused to grant decree for specific performance. The first appellate Court granted decree for specific performance subject to obtaining permission from the competent authority under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, within the stipulated period. This was approved.

12. The bar of Section 36(A) for transfer of land belonging to tribal to non-tribal person has some peculiar features and the prior sanction required u/s 36A in this regard is not like any other permission or consent required under the other Acts.

(iii) In *Murlidhar Kasekar v. Vishwanath* (supra), in para 21, it is observed thus:

21. Economic empowerment to the poor, Dalits and Tribes, is an integral constitutional scheme of socio- economic democracy and a way of life of political democracy. Economic empowerment is, therefore, a basic human right and a fundamental right as part of right to live, equality and of status and dignity to the poor, weaker sections, Dalits and Tribes. The State has evolved, by its legislative and executive action, the policy to allot lands to the Dalits and tribes and other weaker sections for their economic empowerment. The government evolved two pronged economic policies to render economic justice to the poor. The Planning Commission evolved policies like DRDL for economic empowerment of the weaker sections of the society; the Dalits and tribes in particular. There should be short term policy for immediate sustenance and long term policy for stable and permanent economic empowerment. All the State governments also evolved assignment of its lands or the lands acquired under the ceiling laws to them. Appropriate legislative enactments are brought on statute books to prevent alienation of the assigned lands or the property had under the planned schemes, and imposed prohibition there- under of alienation, declaring any conveyance in contravention thereof as void or illegal and inoperative not to bind the State or the assignee. In case the assignee was disqualified or not available, on resumption of such land, the authorities are enjoined to resume the property and assign to heir or other eligible among the Dalits and tribes or weaker sections in terms of the policy. The prohibition is to effectuate the constitutional policy of economic empowerment under Articles 14, 21, 38, 39 and 46 read with the Preamble of the Constitution. Even in respect of private sales of the

lands belonging to tribes, statutes prohibit alienation without prior sanction of the competent authority.

(iv) In *State of Maharashtra v. Janabai* 1990(1) Mh.L.J. 541, while determining the constitutional validity of restoration of lands to Scheduled Tribe Act in the light of article 31(A) and second proviso to Section 31(C) of the Constitution, the Division Bench of this Court (P. A. Mohta & M.S. Deshpande, JJ.) observed in para 21 as under:

21. In view of the Supreme Court decision in *Godavari Sugar Mills* AIR 1975 SC 1193, insertion of section 5-A, after the inclusion of the Maharashtra Restoration act in the 9th Schedule, would not be protected by Article 31-B. Under clauses (b) and (c) of Article 39, which falls in Part IV of the Constitution the State shall, in particular, direct its policy towards securing that the ownership and control of the material resources of the community are so distributed as best to subserve the common good, and the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment. Article 46 mandates the State to promote with special care the educational and economic interests of the weaker sections of the people, and in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. The Restoration Act, including section 5-A, answers this test, and since the obvious purpose of the vesting of the land in the State is to distribute it amongst members of the Scheduled Tribes, section 5-A of the Restoration act would be protected by Article 31-C, notwithstanding that adequate compensation may not be provided by sub-section (2) of section 5-A which limits the compensation to 48 times the assessment of the land.

13. Consistent with directive policy of the State, the following laws were enacted to achieve the object;

(i) The Maharashtra Land Revenue Code.

(ii) The Maharashtra Land Revenue (Transfer of Occupancy by Tribals to Non-tribals) Rules, 1975.

(iii) The Maharashtra Land Revenue Restoration of Occupancy (Unauthorizedly transferred by Occupants Belonging to Scheduled Tribes) Rules, 1969.

(iv) The Maharashtra Tribal Economic Condition (Improvements) Act, 1976.

14. The scheme of the Act is that, the lands allotted to the tribal people should be cultivated by them. The object of this policy, Act, Rules and implementation thereof is to see that the tribal people get source of income in the form of agriculture land which they should personally cultivate and only in exceptional cases, they should be permitted to transfer the right of occupancy to others with the permission of the Collector or with the approval of the Government.

(i) In *Dattatraya Sakharam Kabadi vs. Raghu Luma Bhalerao and others* reported in 2003(1) Mh.L.J. 174, it was held that if the transfer of land by tribal

is found to be without permission u/s 36A of MLRC, the Collector is required to restore the land to the tribal and permission obtained from the Collector u/s 43 of the Bombay Tenancy and Agricultural Lands Act, was inconsequential.

(ii) In *Tulsiram Adku Marape vs. State of Maharashtra* reported in 2011(1) Mh.L.J. 182, it is held that, there can be no transfer without previous sanction.

(iii) In *Raoji Baliram Urkude vs. State of Maharashtra* reported in [1985 Mh.L. J. 843], it is held that, if illegality is committed in respect of transfer of land by tribal to non-tribal, Section 36A of MLRC is a prohibition, penal in nature and is covered by Article 31A(1)(b). A person when chooses to enter into a invalid transaction, cannot make a grievance on the basis of Article 31(A) or about losing property without receiving any market value. Relying on *Bamanlal Gulabchand Shah vs. State of Gujarat* AIR 1969 SC 168, it was held that, here is a reasonable provision which warns concerned persons from effecting certain transactions in future excepting in certain manner and further provides for certain penal consequences for committing breach. If despite this, any person chooses to enter into an invalid transaction, the grievance based on Article 31 or about losing property without receiving market value cannot lie in his mouth.

(iv) In *Atul Projects India Ltd. vs. Babu Dewoo Farle and others* reported in 2011 (6) Mh.L.J. 351, Dr. D. Y. Chandrachud, the Judge of this Bench as then was observed:

12. Section 36A prohibits the transfer of an occupancy of a tribal in favour of non tribal except with the previous sanction of the Collector (where the period of lease or mortgage does not exceed five years) or with the previous sanction of the Collector and the previous approval of the State Government (in other cases). The transfer of occupancy may be by way of a sale, gift, exchange, mortgage, lease "or otherwise". The legislature has designedly used broad language so as to incorporate all the five recognised modes by which property may be transferred under the Transfer of Property Act, 1882. Significantly the legislature has expanded the ambit of the modes in which property can be transferred by using the words "or otherwise". The plain object of the legislature was to reach out to all modes by which the occupancy of a tribal may be conveyed to a non tribal. The legislature was conscious of the fact that devious methods may be employed to divest tribals of their occupancy and the modes of transfer which are taken recourse to may not conform to the conventional modes for the transfer of property such as by sale, gift, exchange, mortgage or lease. Whatever be the mode of transfer, if the consequence is to effect a transfer of the occupancy of a tribal to a non tribal, the requirement of prior permission would be attracted. The Collector, even when he grants his sanction is empowered to do so subject to such conditions as may be prescribed. A transfer in violation of the provisions of Sub Section (1) of Section 36A would be invalid and of no legal consequence.

17. Section 2(22) defines an 'occupancy' to mean a portion of land held by an

occupant. Section 2(23) defines an 'occupant' to mean a holder in actual possession of unalienated land, other than a tenant or Government lessee provided that where a holder in actual possession is a tenant, the land holder or the superior landlord as the case may be shall be deemed to be an occupant. Section 2 (12) defines the expression 'to hold land' to mean to be lawfully in possession of land, whether such possession is actual or not. Possession of land is the essence of occupancy. Section 2(24) defines 'occupation' to mean possession. A prohibition on the transfer of occupancy must therefore mean what it says namely that it is a prohibition on the transfer of possession. No possession consequently can be transferred from a tribal to a non tribal without the prior sanction of the Collector or as the case may be the prior sanction of the Collector with the previous approval of the State Government. This interpretation which follows from the plain language of the provisions of the MLRC is also a purposive or socially beneficial interpretation which must be adopted by the Court. The legislation has been enacted with a view to protect tribals against exploitation. Legislative interpretation must facilitate the fulfillment of the objects contained in the Directive Principles of State policy. Any interpretation which would dilute or water down the ambit of Section 36A should therefore not be countenanced. Tribal populations would otherwise be displaced from their traditional habitats by unchecked urbanisation. They are susceptible, to exploitation.

(v) In *Keshav Tukaram Taware v. Smt. Sulochana Shankar Kolekar & Ors.* reported in 2018 (3) AIR Bom R (NOC 37) 20, in the similar facts it was observed;

13. In the present case, as pointed out in Clause 4(E), there is a specific mention that the said duty was cast on the Appellant herein and therefore, it is clear that the Appellant has not fulfilled his obligation. Therefore, the learned Trial Judge has rightly held that the Appellant was not entitled for the decree of specific performance.

(vi). In *Rama Narayan Mali vs. Additional Collector, Thane and others* reported in 2008(3) Mh.L.J. 300, it is observed that thus, Section 36A of the Maharashtra Land Revenue Code puts a complete prohibition upon an occupancy of a tribal being transferred in favour of any non-tribal by way of sale, gift, exchange, mortgage, lease or otherwise. It may be seen that there are 5 modes of transfer contemplated under the Transfer of Property Act, section 36A has specified all the five modes of transfer, and then contemplated further modes of transfer by addition of the words "or otherwise". Entering into a partnership deed by bringing in the land as a capital or entering into a tenancy agreement with a non- tribal by virtue of which the occupancy and possession of the land would necessarily be transferred to the tenant constitutes breach of section 36A. It falls within the mischief of the term "or otherwise" as an additional mode of transfer.

15. After carefully considering the facts of the present case and the arguments advanced in the light of the aforesaid case law, it is crystal clear that, in case of a

land of tribal, the permission of Collector with or without the approval of the Government as required u/s 36A is mandatory before entering into even agreement to sell wherein the possession is agreed to be transferred or is transferred under such agreement. If without prior sanction there is transfer of possession by tribal to a non-tribal under agreement to sell, it is void ab initio. In other matters, the permission is required for execution of only sale deed. The permission required for transfer of land of tribal cannot be equated with the permissions or sanction required for execution of sale deed under other Acts. The facts disclose that, the defendant, a tribal, transferred by agreement to sell his land in the year 2001 and delivered possession in the year 2003, which was a transaction contrary to the directive principles, the national goal and the prohibition u/s 36A of MLRC. There are provisions which casts obligation on the Collector to restore the land to the tribal and also to see that the land is used only for the benefit of the tribals. In the situation, the arguments of Mr. V. R. Dhorde that a decree for specific performance can be granted subject to conditions obtaining sanction from the Collector u/s 36A cannot be accepted. It will be not only contrary to the spirit of National Goal and the public policy of upliftment of weaker class of tribal set, it will also some sort of recognition to the illegal transfer which is void ab initio for which there are provisions for restoration of earlier status. In addition, it will put some pressure on the authorities of the fact that, the courts have approved the transaction and requested them only to consider whether sanction should be granted or not. Such a course is not permissible. The Id. appellate Court has given sound, elaborate reasons and both the courts below have committed no error in refusing the decree for specific performance of the contract.

16. I may further say that, in such a suit, the discretion under Section 20 of Specific Performance Act also could not have been exercised in favour of the grant of specific performance. In the result, the substantial question of law is answered in the negative.

17. The appeal therefore should have been simply dismissed, however, the learned appellate Court has committed certain errors while dismissing the appeal. He has issued certain directions vide judgment & order dt. 13.12.2017, which are as follows.

(1) The Regular Civil Appeal No. 84/2012 is dismissed with costs.

(2) The impugned Judgment and decree dated 18.04.2009 passed by the learned trial Court is modified and altered as follows.

(a) It is ruled that the plaintiff is not entitled for specific performance of agreement to sell dated 31.07.2001 (Exh.40) and 10.01.2003 (Exh.39) in view of contravention of section 36A of the Maharashtra Land Revenue Code, 1966.

(b) The Collector, Ahmednagar shall hold an inquiry as contemplated under section 36A within period of three months from the receipt of copy of this Judgment and take appropriate decision in the light of sub clause (5) and (6) of

the Maharashtra Land Revenue Code, 1966.

(c) The defendant shall refund Rs. 2,20,000/- to the plaintiff within period of three months from the date of this order with interest @6% p.a. from the date of agreement to sell dated 31.07.2001 till date of impugned decree dated 18.04.2009. Thereafter, from the date of impugned decree i.e. 18.04.2009 till date of this order, he shall pay interest @ 10% p.a. On failure of the defendant to refund the amount within three months from the date of this order as directed above the said amount shall carry interest @ 14% p.a. from the date of impugned decree till actual payment.

(d) The plaintiff shall handover possession of the suit property to the defendant after receipt of Rs. 2,20,000/- along with interest as stated above. This possession of the defendant will be subject to outcome of an inquiry by the Collector as stated above. His possession will not be in the capacity of owner till decision of the inquiry. 4 & 5. Not relevant."

18. He has awarded higher interest when there was no appeal or cross-objection preferred by the plaintiff. In fact, when the plaintiff was enjoying possession, there was no necessity of grant of interest on the earnest money. There was no necessity for the Id. District Judge to issue directions to the Collector. Considering the facts, without saying that those directions are wrong, I set aside those directions and record that, the copy of the judgment of district Court as well as of this judgment be forwarded to the Collector for taking appropriate action as per his duties and obligation. The order of increase of interest is set aside. The directions issued in para 2A of the order are set aside.

19. With these observations, the appeal is dismissed. Parties to bear their own costs.

20. Mr Shaikh, learned advocate h/f Mr Dhorde, counsel for the appellant, requests for stay of the instant judgment for a period of eight weeks. Since there is no executable decree, the request for stay of this judgment is rejected.