

(2005) 06 BOM CK 0033
In the Bombay High Court
Case No : Second Appeal No. 286 of 2005

Janardan Bute

APPELLANT

Vs

Ganapati Devasthan

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Bombay Public Trusts Act, 1950 — Section 36, 36(1)
Transfer of Property Act, 1882 — Section 5
Urban Land (Ceiling and Regulation) Act, 1976 — Section 10

Citation : (2006) 1 ALLMR 592 : (2006) 2 MhLj 181

Hon'ble Judges : S.T. Kharche, J

Bench : Single Bench

Advocate : R.D. Bhuibhar, for the Appellant; Sandeep Marathe, for the Respondent

Final Decision : Dismissed

Judgement

S.T. Kharche, J.—Heard Mr. Bhuibhar, learned Counsel, for the appellant and Mr. Sandeep Marathe, learned Counsel, for the respondent finally.

2. This second appeal has been filed by the original defendant challenging the judgment dated 17-2-2005 and decree passed by the learned District Judge in Regular Civil Appeal No. 89 of 2001 whereby the judgment dated 3-4-2001 passed by the learned Civil Judge, Sr. Dn., in Special Civil Suit No. 275 of 1996 has been set aside.

3. The learned Counsel for the defendant contended that the trial Court has rightly decreed the counter-claim of the defendant directing the plaintiff to execute the sale-deed of the suit field in favour of the defendant after obtaining necessary permission from the Charity Commissioner by receiving the balance amount of consideration of Rs. 7,500/- with further direction to the plaintiff to apply to the Charity Commissioner within one month from the date of the decree. He contended that the appellate Court has committed an error of law in interpreting the provision of Section 36 of the Bombay Public Trusts Act, 1950

(for short the Act) and wrongly set aside the judgment and decree passed by the trial Court. He contended that the substantial question of law that is involved in this appeal is, whether prior sanction of the Charity Commissioner as envisaged u/s 36 of the Act is required to be sought by the Trustee while entering into the agreement for sale of the trust property. In support of these submissions he relied on the decision of the Apex Court in the case of *Rajosara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* AIR 1986 SC 1912 and also on the decision of this Court in (i) *Shantabai Vs. Manakchand Ratanchand Raka*, and (ii) *Suburban Education Society and Another Vs. Charity Commissioner of Maharashtra State and Others*, .

4. The learned Counsel for the plaintiff has supported the impugned judgment and decree passed by the Appellate Court and contended that the counter-claim for specific performance filed by the defendant has been rightly negated by the appellate Court and no substantial question of law is involved in this appeal, as prior permission of the Charity Commissioner was not obtained for entering into the alleged transaction of sale dated 28-4-1968.

5. This Court has given thoughtful consideration to the contentions canvassed by the learned Counsel for the parties. The defendant had filed counterclaim for specific performance of the contract and the Appellate Court has observed in para 12 of the judgment as under :

The learned Counsel for appellant at the same time opposed this contention and placed reliance on provision of Section 36 of the Bombay Public Trusts Act wherein it is specified that no sale shall be valid without the previous sanction of Charity Commissioner, if it pertains to immovable property of the public trust. It shall be enforceable despite anything contained in the instrument of trust. The learned Counsel for the appellant therefore submitted that in view of this provision there cannot be even the agreement for sale in favour of third person and therefore the finding given by the trial Court that on obtaining permission from Charity Commissioner, the sale-deed be executed is illegal. For a moment if it is assumed that the appellant is not entitled to file a suit even though he can resist the counter-claim filed by the respondent. It was submitted that the Civil Court cannot direct the Charity Commissioner to give permission. Section 36 of the said Act contemplates previous sanction of the Charity Commissioner and therefore the whole finding is illegal. The permission should be in existence when a decree is to be passed. He submitted that if the respondent can obtain permission from Charity Commissioner after a decree then why the appellant cannot obtain the same even after filing of the suit if the contention raised by the learned Counsel for respondent requires consideration.

6. The aforesaid argument was considered by the Appellate Court and in para 21 it was observed as under :

The learned Counsel for the appellant relied upon *Chandrabhan Chunnihal Gour Vs. Shrawan Kumar Khunnolal Gour and Another*, to support the contention that

ex post facto sanction obtained after the sale transaction is not a sanction at all in the eye of law and transaction would not be valid. It was therefore submitted that it is not a purely technical or procedural aspect but it affects the very right of the trust and the public who have interest in that property. It is not a mere technicality and therefore contract cannot be valid unless there is previous sanction.

Section 5 of the Transfer of Property Act defines "Transfer of Property" to mean an Act by which a living person conveys property. It should be some conveyance. The person who had executed the alleged agreement was in fact not entitled to deal with it unless there was previous sanction and therefore as submitted by the learned Counsel for the appellant, the same does not become an agreement, muchless he had no authority to promise the transfer of this property.

7. In Rajosara Ramjibhai Dahyabhai's case, cited supra, the Apex Court held that the respondents therein were entitled for the decree of specific performance of contract. The allegation that the appellant had an imperfect title is without any basis whatever. With the extinction of the title of "RS" and the conferral of the rights of an occupant on the appellant under the Saurashtra Land Reforms Act, 1951, the property became transferable by him. It cannot, thereafter, be said that the contract between the parties, the appellant and the respondents, was a contingent contract, the performance of which was dependent upon fulfilment of the condition under the earlier agreement by which the appellant's vendor "RS" had undertaken upon himself the obligation of procuring the necessary sanction from the Collector. As such occupant, it is undisputed that the appellant made an application to the revenue authorities permitting the conversion of the disputed land into village site. Thereafter there was no legal impediment in the way of the appellant in executing a sale deed.

8. This Court in Shantabai's case, cited supra, held that about the legal position in this behalf, there need not be much dispute. The position, should be the same as under the Tenancy Act and the Land Revenue Code in which cases a conditional decree is passed by the Courts. Even in the present case, a conditional decree can be passed by this Court requiring the plaintiff to make suitable application to the Competent Authorities under the Urban Land Ceiling Act: (a) for directing the defendant to file a revised return excluding this land from the category of land shown as excess vacant land because he could not cause loss to the plaintiff by making a choice of the suit land to be the excess suit land, or (b) for an application for exemption of suit land from the provisions of Section 10 and other allied provisions of the Urban Land Ceiling Act.

9. This Court in Suburban Education Society's case cited supra, observed as under :

From the perusal of Section 36(1)(a), it is very clear that the Trust is supposed to make an application to the Charity Commissioner after complying with various formalities. It is not expected that the Trust would approach the Charity

Commissioner without first issuing the advertisement and receiving offers from the various purchasers. If the submission of the learned Counsel appearing on behalf of the Charity Commissioner is accepted, it would mean that the entire procedure of sale would commence after the application is made to the Charity Commissioner. In our view, the provisions of Section 36(1)(a) are very clear and such an interpretation cannot be given to the said provision. It is obvious that the monies, if any, which are received in advance by the Trust are subject to final permission which is granted by the Charity Commissioner and in the event such permission is rejected, the Trust will be under a legal obligation to return the said amount which it has received from the purchaser.

10. The field in question belongs to Deosthan temple which is a Public Trust and to which the public have access and rights therein and when the Appellate Court has exercised the discretion judicially in refusing to grant specific performance and held that the agreement cannot be enforced in law, there is no reason for this Court to take a different view of the matter as the Appellate Court is the final Court for facts finding and in such circumstances the decisions on which reliance is placed by the learned Counsel for the defendant cannot be made applicable to the present case.

11. Perusal of the agreement for sale would reveal that no reason is mentioned in that agreement of sale as to why the property of the Trust is being sold to the defendant and the appellate Court has rightly observed that the agreement of sale has been executed by the then sole trustee of the plaintiff-trust, namely Vinayak Madhavrao Tembhekar, father of the present sole trustee Madhukar and the execution of the said agreement is duly proved by the evidence of one of the attesting witness, namely Nagorao Ingole. The plaintiff has avoided to mention in the plaint as to since when the defendant is in wrongful possession of the suit filed, though the plaintiff claims that the defendant is a trespasser in the suit filed. The oral evidence in relation to delivery of possession is quite contrary to the recitals mentioned in the agreement of sale wherein it has been mentioned that the possession would be delivered at the time of execution of the sale-deed and in such circumstances the appellate Court was right in holding that the said agreement of sale is not enforceable in law.

12. On careful consideration of the evidence available on record, this Court is of the considered view that no substantial question of law is involved in this case because the property in respect of which the agreement of sale is said to have been executed belongs to public trust and ex post facto sanction obtained after the sale of the property is not a sanction at all in the eyes" of law and the transaction would not be valid as it is not a purely technical or procedural aspect but it affects the very right of the trust and the public who have interest in that property. Therefore, the agreement of sale which is said to have been executed on behalf of the trust without obtaining sanction from the Charity Commissioner cannot be said to be valid. In such circumstances, the appeal is dismissed.