

(1959) 04 MP CK 0025

In the Madhya Pradesh High Court

Case No : Second Appeal No. 666 of 1956

Kirodimal Ganeshlal Bani

APPELLANT

Vs

Haji Suleman Haji Wali Mohd. and Another

RESPONDENT

Date of Decision : 06-04-1959

Acts Referred:

Administration of Evacuee Property Act, 1950 — Section 40, 40(1), 41, 46, 50(2)
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1960 MP 136 : (1958) ILR (MP) 391 : (1960) JLJ 96 : (1960) 5 MPLJ 46

Hon'ble Judges : T.C. Shrivastava, J

Bench : Single Bench

Advocate : R.S. Dabir and P.R. Padhye, for the Appellant;

Final Decision : Allowed

Judgement

T.C. Shrivastava, J.

This second appeal has been filed by the plaintiff against the dismissal of his suit by the Court below for specific performance of a contract of sale of a house.

The house in suit belonged to respondent No. 1 Haji Suleman, who was impleaded as defendant No. 1. Haji Suleman migrated to Pakistan before the smt. The house in suit was declared as evacuee property on 1-8-1952. The Custodian of Evacuee Property, Raigarh, was irnpleaded as defendant No. 2 in the suit.

The plaintiff's case is that on 18-1-1949 the defendant No. 1, Haji Suleman, agreed to sell the house in suit to him for Rs. 3100/- only. He executed a sale-deed but it could not be registered. Rupees 1000/- were paid by the plaintiff as part consideration of the safe and Rs. 2100/- are still due. The plaintiff claimed that he was entitled to specific performance of the contract On payment of the amount of Rs. 2100/- and prayed the Court to order the defendant No. 2 (Custodian) to execute the necessary sale-deed. In the alternative, he prayed for

refund of the amount paid by him to the defendant No. 1.

The defendant No. 1, Haji Suleman did not appear to contest the suit. On behalf of the defendant No. 2 Custodian, it was pleaded that the agreement to sell was void under Sections 40 and 41 of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as the Act).

The trial Court held that Haji Suleman (defendant No. 1) had entered into a contract with the plaintiff for selling the house in suit as alleged by him. The question whether the agreement was void under Sections 40 and 41 of the Act was not considered by it. The suit was decreed for specific performance,

The lower appellate Court held that the agreement was invalid u/s 40 of the Act and could not therefore be specifically enforced. It also held that the jurisdiction of the Civil Court was barred u/s 46(d) of the Act and therefore no decree for specific performance of the agreement could be passed. The decree of the trial Court was therefore reversed and the suit was dismissed, so far as the relief for specific performance was concerned, but the claim of the plaintiff against the defendant No. 1 for refund of the consideration was decreed.

None has appeared on behalf of the Custodian of Evacuee Property to contest the appeal. It was, therefore, heard ex parte in the absence of both the respondents.

In the grounds of appeal it is stated that as the vesting of the property took place on 1-8-1952, i. e. after the suit was filed, Section 40 of the Act had no application to the case. This ground was, however, not pressed on behalf of the appellant in view of the specific provision in that section that it affects all transfers made after 14-8-1947.

The only point which has been argued by Shri R.S. Dabir, for the appellant, is that the provisions in Sections 40 and 41 of the Act affect only transfers actually made but do not place any restrictions on agreements to transfer. He contends that these two sections being restrictive of normal rights should be strictly construed and the jurisdiction of the Civil Courts to enforce the contracts or the transfers should not be inferred, except where there are express words in the sections to that effect.

Sub-section (1) of Section 40 of the Act which is relevant to the argument is reproduced below:

"No transfer made after the 14th day of August, 1947, (but before the 7th day of May, 1954) by or on behalf of any person in any manner whatsoever of any property belonging to him shall be effective so as to confer any rights or remedies in respect of the transfer on the parties thereto or any person claiming under them or either of them, if, at any time after the transfer, the transferor becomes an evacuee within the meaning of section 2 or the property of the transferor is declared or notified to be evacuee property within the meaning of this Act, unless the transfer is confirmed by the Custodian in accordance with the provisions of this Act."

The words "but before the 7th day of May, 1954" have been introduced by amending Act 42 of 1954. I shall consider the section as it was before the amendment, and deal with the amended part later.

The contention that the restrictions imposed by this section operate upon transfers only and not on agreements to transfer is borne out by the language of the section itself. Another thing to be noticed is that the transfers made by evacuees are not declared void absolutely; they are only declared ineffective for certain purposes, unless they are confirmed by the Custodian. It is obvious that confirmation by the Custodian would make the transfer valid and effective from the date on which it was made. Shri Dabir contends that the stage of confirmation of a transfer arises only after it has actually been made.

In the instant case, there is only an agreement to transfer which is sought to be specifically enforced, and the question of the power of the Custodian whether the transfer should be confirmed or not will arise only after the transfer is completed. By not granting a decree for specific performance, the appellant is being deprived of the opportunity of approaching the Custodian for confirmation of the transfer, as it is not possible for him to request him to confirm a mere agreement. I find that there is much substance in this argument.

Section 40 of the Act, by itself, does not impose any disability on the power to contract. Such contracts would be valid and binding on the evacuee personally. As the Custodian represents the interest of the evacuee after he has taken over his property, it appears that he would also be bound by the contract and should perform it. It could be argued on behalf of the Custodian that the specific performance of such a contract, if permitted, would defeat the provisions of the Act and the contract is hit by section 23 of the Indian Contract Act. As I have said, there is no prohibition regarding agreements; and as regards transfers actually made, the only prohibition is that they shall not take effect unless confirmed by the Custodian. It is open to the Custodian to confirm transfers on certain conditions as laid down in Sub-section (4) of section 40 of the Act being satisfied. This stage comes only after the actual transfer has been made. The specific performance of the contract for sale does not, therefore, defeat the provisions of section 40 and there is nothing in section 23 of the Contract Act to come in the way of the enforcement of the contract.

Section 41 of the Act as introduced in 1953 declares that:

"....every transaction entered into by any person in respect of property declared to be evacuee property shall be void unless entered into by or with previous approval of the Custodian."

The language of this section is wide enough to affect agreements of sale. However, it appears to me that this section does not operate retrospectively. The reason is that unlike section 40 which mentions a retrospective date after which the transfers made are declared to be ineffective, this section does not do so. The difference in the language of section 41 from that of section 40 appears to

be intentional. Another reason why section 41 cannot be considered to be retrospective is that it refers to "the previous approval of the Custodian". Such approval can be given only in cases of transactions taking place after the insertion of this section.

I am, therefore, of opinion that section 41 does not affect contracts which had already been entered into prior to 1953.

I now turn to the amendment made in section 40 of the Act by introducing the words "but before the 7th day of May, 1954" by the amending Act 42 of 1954. The effect of the amendment is that the restrictions imposed upon transfers do not operate after the 7th day of May, 1954. In other words, transfers made after that date are not ineffective and any confirmation by the Custodian of such transfers is not needed. In the instant case, so far there is only an agreement to transfer the house in suit. The transfer will come into effect after a decree for specific performance has been passed. It cannot relate back to the date on which the agreement was made. Therefore, it would be a transfer made after the 7th day of May, 1954. In the light of this subsequent change in law, confirmation by the Custodian would not be necessary. Accordingly, there is nothing in the Act now to act as an impediment to a decree for specific performance of the contract being passed.

The lower appellate Court has relied upon Sub-section (d) of section 45 of the Act for holding that the jurisdiction of the Civil Court is barred. That sub-section bars the jurisdiction of the Civil Court "in respect of any matter which the Custodian-General or the Custodian is empowered by or under this Act to determine". The Custodian is not entitled to determine anything about the validity of a contract for sale. His powers are restricted to determining the existence of facts on which he can confirm or refuse to confirm a transfer actually made.

Even that power no longer exists in case of transfers made after 7-5-1954.

As this appeal has been heard *ex parte*, I may briefly refer to other pleas which were raised on behalf of the Custodian in appeal before the Court below and which could be urged in second appeal. So far as the findings about the existence of the contract or its consideration are concerned, they are findings of fact. A plea was raised on behalf of the Custodian that a notice u/s 80 of C. P. C. was necessary before the suit could be maintained. The property in the suit was declared, evacuee property after the suit had already been filed in this case and it was in pursuance of the special powers contained in Section 50(2) of the Act that the Custodian was added as a party at a subsequent stage of the suit. No question of notice therefore, arises.

In view of the above discussion, I hold that the plaintiff is entitled to specific performance of the contract. Accordingly, the appeal is allowed, the decree of the first appellate Court is set aside and that of the trial Court is restored. The defendant no. 1 shall pay the costs as incurred by the appellant throughout,