

(1956) 02 BOM CK 0001
In the Bombay High Court
Case No : A.F.O.D. No. 675 of 1950

Pandu Aba Chaugule and Others

APPELLANT

Vs

Laxman Dhondi Patil and Others

RESPONDENT

Date of Decision : 24-02-1956

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 63, 64, 64(3), 89(2)
Specific Relief Act, 1963 — Section 19

Citation : AIR 1956 Bom 707 : (1957) 59 BOMLR 255

Hon'ble Judges : Vyas, J;Shah, J

Bench : Division Bench

Advocate : K.S. Daundkar, for the Appellant; S.A. Desai, N.V. Phadke, P.T. Patil and M.V. Paranjape, for the Respondent

Judgement

Shah, J.—Survey No. 47 of Shiwara Taluka, Shahuwadi, in the former Kolhapur State originally belonged to Ramchandra Balvant Shirolkar who will hereafter be referred to as "the first defendant. The first defendant agreed to sell the land for Rs. 6,300/- to the plaintiffs by agreement, dated 10-12-1945. The plaintiffs paid Rs. 300/- as earnest and agreed to pay the balance within a month from the date of the agreement.

On 30-1-1946 the first defendant sold the land for Rs. 6,000/- to defendants 2 and 5. The plaintiffs then filed Special Civil Suit No. 1 of 1946 in the Court of Shrimant Himmat Bahadur, F. C. Sub-Judge against defendants 1 to 5 for a decree for specific performance of the agreement, dated 10-12-1945. The plaintiffs alleged in the plaint that they had offered to pay the balance due by them within the time stipulated but the first defendant refused to accept the same and that the first defendant sold the property to defendants 2 to 5 who had notice of the agreement of sale.

The learned "trial Judge on a consideration of the evidence held that defendants 2 to 5 were not "bona fide purchasers without notice of the agreement, dated 10-12-1945," that the balance of the consideration of Rs. 6000/- payable by the

plaintiffs to the first defendant under that agreement was not payable at Kolhapur and the plaintiffs did not fail to pay the amount within the stipulated period and that the plaintiffs were entitled to enforce specific performance of the agreement.

On 26-7-1950, the learned Civil Judge Senior Division, at Kolhapur passed a decree for specific performance of the agreement against the first defendant and also passed a decree in favour of the plaintiffs in ejectment against defendants 1 to 5. Against that decree defendants 2 to 5 have appealed to this Court.

2. The suit was originally filed on 19-2-1946, in the Court of Shrimant Himmat Bahadur. During the pendency of the suit the Kolhapur State merged with the Indian Union and the jurisdiction which was exercised by the Court of Shri Himmat Bahadur devolved upon the Court of the Civil Judge, Senior Division, Kolhapur. The suit was then renumbered as Suit No. 191 of 1949 and was tried by the Civil Judge, Senior Division.

The Bombay Tenancy and Agricultural Lands Act, 1948, was made applicable to the former Kolhapur State territory as from 1-5-1949. It was contended before the learned trial Judge that the Bombay Tenancy and Agricultural Lands Act having been made applicable to the land in dispute, a decree for specific performance of the agreement could not be passed in view of the provisions of Sections 63 and 64 of that Act. The learned trial Judge was of the opinion, having regard to Section 89 (2) (b) (ii) of the Act, that the rights acquired by the plaintiffs under the agreement as also the jurisdiction of the Civil Court to decide the suit were preserved notwithstanding the enactment of the Bombay Tenancy and Agricultural Lands Act.

It was also urged before the learned trial Judge that the second defendant was a protected tenant of the suit land and was entitled to apply to the Tenancy Court for a declaration that he could not be evicted in execution of a decree of the Civil Court. The plaintiffs conceded that liberty in that behalf may be reserved in the decree. The learned Judge, therefore, by his decree provided that if the second defendant made an application to the Tenancy Court-concerned that he was not liable to be evicted from the suit land, the plaintiffs will not execute the decree for possession and in a manner inconsistent with the final result of the application.

3. In this appeal filed by defendants 2 to 5 only one contention is advanced in support of the appeal. It is urged that since the application of the Bombay Tenancy and Agricultural Lands Act to the land in dispute the Court could not pass a decree for specific performance in violation of the terms of Ss. 63 and 64 of the Act. In our view, that contention must be accepted.

Section 63, Bombay Tenancy and Agricultural Lands Act, which save as provided in the Act renders void all sales, gifts, exchanges or lease of any land or interest therein in favour of a person who is a non-agriculturist, prevents the Civil Court from passing a decree for specific performance of the agreement to sell in favour

of a non-agriculturist. Section 64 (3) of the Act declares all sales in contravention of Section 64, void, and the Court cannot pass a decree for specific performance which violates that provision.

Section 64 prescribes the procedure to be followed by a landlord" who Intends to sell agricul tural land. The section also sets out the sequence of different classes of agriculturists to whom the land must be offered for purchase and at the price fixed as reasonable price by the Tribunal appointed in that behalf. It is provided by Sub-section (3) that "any sale made in contravention of this section shall be void". Evidently, the Legislature having by Ss. 63 and 64 rendered sales in contravention of those sections void, the sale must be regarded as void whether it is in pursuance of a decree passed by the Civil Court or in fulfilment of an obligation under an agreement between the parties.

Section 63 in terms provides that a sale (including a sale in execution of a decree of a Civil Court) in favour of a non-agriculturist shall be invalid. If, therefore, the sale takes place in contravention of the provisions of Section 63 or 8. 64 of the Act even in pursuance of a decree of a Civil Court, that must, in view of the provisions of the Act, be regarded as void and such a sale confers no title upon the purchaser. A sale in contravention of Sections 63 and 64 being void, an agreement to sell property, which if carried out would result In a sale, would not give rise to any liability to sell property enforceable at law.

4. But Mr. S.A. Desai, who appears on behalf of the plaintiffs, contends that Sections 63 and 64 of the Act do not apply to this suit in view of the provisions contained in Sub-section (2) of Section 89. That sub-section, in so far as it is material, provides:

"But nothing in this Act or any repeal effected thereby -- (b) shall save as expressly provided in this Act, affect or be deemed to affect (i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or (ii) any legal proceeding or remedy in "respect of any such right, title interest, obligation or liability or anything done or suffered before the commencement of this Act, and any such proceedings shall be continued and disposed of, as if this Act was not passed."

Relying upon this provision Mr. Desai contends that the right to obtain specific performance, and the liability to sell property became enforceable against the first defendant before the Act was made applicable to the area & the provisions of the Bombay Tenancy and Agricultural Lands Act could not deprive the plaintiffs of their right to claim specific performance of the agreement.

Mr. Desai also urged that in any event the legal proceeding for enforcement "of the right in favour of the plaintiffs and for enforcement of obligation undertaken by the first defendant to sell the property to the plaintiffs having arisen before the date on which the Act was made applicable to the land in dispute, the suit had to be decided in the light of the law unaffected by the provisions of the Bombay Tenancy and Agricultural Lands Act.

5. The argument of Mr. Desai proceeds on the assumption that under an agreement of sale of land a party acquires a right to insist that the land shall be conveyed to him in pursuance of the agreement. Normally where a breach of contract by a party thereto is committed the liability of the defaulting party is to pay damages. It is true that in exercise of its equitable jurisdiction the Court may decree specific performance of the agreement and compel the defaulting party to carry out the agreement specifically and compel him to convey the land. But there is no right in a litigant to obtain specific performance of an agreement. His right to an action may ultimately result in fixing liability for damages or to render Specific performance.

If the plaintiffs have no right to claim specific performance it is difficult to appreciate how Clause (b) (i) of Sub-section (2) of Section 89 can avail the plaintiffs. For the same reasons even though the proceedings instituted before the date on which the Act is applied have to be continued by the Court as if the provisions of the Act had not been passed, what is protected is the legal proceeding in respect of the action for breach of contract and nothing more.

Indisputably a legal proceeding or remedy in respect of a right, title, interest, obligation or liability which has been suffered before the commencement of the Act has to be proceeded with and continued and disposed of as if the Act had not been passed. But there being no right in a person to claim specific performance, the mere continuance of the legal proceeding as if the Act had not been passed does not, in our judgment, compel the Court to ignore the provisions of Sections 63 and 64, Bombay Tenancy and Agricultural Lands Act if, at the date when the decree is being passed, those provisions are in force.

6. We may now refer to the cases which were cited at the Bar. In -- Appa Ganpat Sathe and Others Vs. K.B. Wassoodew and Others, , an agreement to sell agricultural land was entered into on 17-12-1948. Thereafter the Bombay Tenancy and Agricultural Lands Act was applied to the area in which the land was situate on 33-12-1948, and on 20-4-1949, a registered deed selling the land was executed. The tenant of the vendor did not deliver possession of the property.

The vendee then called upon the tenant to deliver possession and on his failure to do so, an application was filed under the Bombay Tenancy and Agricultural Lands Act, 1943 in the Court of the Mamlatdar to recover possession of the land, In that case this Court held that the sale having taken place after the Bombay Tenancy and Agricultural Lands Act was applied to the land in dispute, the sale was in contravention of Section 64, Bombay Tenancy and Agricultural Lands Act and was not saved by Section 89 (2) even though the agreement to sell was executed prior to the coming into operation of the Act.

The learned Chief Justice in delivering the Judgment of the Court pointed out at p. 519 (of Bom LR) (at p. 512 of AIR) that the only right which the vendee had when he entered into a contract to sell was a "right of action" and that the vendor had a right to file a suit for specific performance if the contract was not

completed by the vendor, but specific performance being a "discretionary remedy", "the Court was not bound to grant specific performance to the vendee" & therefore, the right that the vendee had was not a right to obtain a sale-deed but a right to file a suit in which the proper relief would have been granted by the Court." The learned Chief Justice then observed:

"Though it is perfectly correct that the contract when it was entered into on 17-12-1948 was valid, the Legislature made the performance of it void; and, therefore, to a suit for specific performance the answer that could have been properly given by the vendee would have been he could not perform the contract because the performance of it was rendered void by the Legislature. Further Section 64, Sub-section (3), is unequivocal in the expression used by the Legislature, and any sale made subsequent to the passing of the Act has been rendered void. If we were to accept the contention of Mr. Parulekar on behalf of the petitioners, we would be importing into the section something which the Legislature has not thought" fit to introduce. Sub-section (3) in that case would read that any sale made in contravention is void, excepting such sales in respect of which an agreement of sale has been entered into before the Act was passed."

7. It is clear, from those observations that in adjudicating upon the validity of the sale in the light of the Bombay Tenancy and Agricultural Lands Act, the Court had to apply the law prevailing not at the date when the agreement was entered into but at the date on which the sale-deed was executed. It is also clear from the agreement that the breach of an agreement to sell Immovable property gives rise to a right of action and not to a right to obtain a sale-deed.

By parity of reasoning the right of action must be held protected by Section 89 (2) (b) (ii), but there being no right to obtain specific performance before the date of the Act the protection cannot exclude the operation of Ss. 63 and 64 to a suit for specific performance of an agreement to sell land when at the date of the decree the Act is in force.

8. This judgment was approved in a Full Bench judgment of this Court in -- Bhima Balu Vs. Basangouda Mamgouda, . In that case the agreement to sell was entered into on 12-10-1948, and the sale-deed was executed on 6-1-1949, and the Bombay Tenancy and Agricultural Lands Act was brought into operation in this area on 28-12-1949, and it was held that the sale was void.

9. It is true that in neither of these two cases there was a suit filed before the date on which the Act applied for specific performance. The vendor voluntarily carried out his obligation and executed the sale-deed but, in our judgment, there is no difference in principle between that class of cases and the class of cases where after the agreement is entered into the vendor fails to carry out his obligation and he has to be compelled by the Court to sell the land.

10. In second Appeal No. 583 of 1951 (C), decided by me on 9-7-1953 there was an agreement to sell agricultural land dated 17-12-1943, and the defendant having failed to execute a conveyance a suit was filed for specific performance of

the agreement on 7-3-1949. The trial Court decreed the plaintiff's suit and that decree was confirmed in appeal to the District Court.

In second appeal it was held that if the decree passed by the Courts below for specific performance were to be carried out, there would result a sale of the land in suit in favour of the plaintiffs who were non-agriculturists and such a sale being prohibited by law, this Court could not confirm the decree, for "to do so would be to permit something to be done which was expressly prohibited by statute." It was then observed:

"A Court will not normally pass a decree which would be either futile or which would permit a thing to be done under its force which is Illegal. In the circumstances the Court will not pass a decree for specific performance of the agreement to sell the land."

The decree passed by me in Second Appeal No. 583 of 1951 (Bom) (C), was confirmed in -- "Bhausahab V. Vithal", L.P.A. No. 24 of 1953, D/- 27-7-1955 (Bom) (D), by Gajendragadkar J. and my learned brother. The judgment of the Court in that case was delivered by Gajendragadkar J., who observed that "the right which is protected u/s "89 (2) is a right which is independent of the sale" and, therefore, it could not be regarded as protected by reason of the provision contained in Section 89 of the Act.

11. Mr. Desai, who appears on behalf of the plaintiffs, has sought to support the decree of the Courts below by relying upon certain decisions of this Court in which the view has been taken that to suits instituted, before the date on which the Bombay Tenancy and Agricultural Lands Act of 1948 came into operation the provisions of that Act by virtue of Section 89 (2) do not apply.

In "Rajesab Vallad Imamsab Bagwan v. Hari-shchandra Honnavar", 56 Bom LR 638, it was held that a decree passed in a suit which was instituted before the date on which the Bombay Tenancy and Agricultural Lands Act was enacted can be executed by the Civil Court notwithstanding the provision of Section 29 of the Act. That view was continued in -- "Prithviraj Chunilal v. Hari Ganesh", 56 Bom LR 1076.

12. These cases, in our Judgment, have no application to the facts of the present case. Those cases fell expressly within the terms of Section 89 (2) (b) (ii) of the Act. The legal proceeding in respect of the right, title, interest, obligation or liability already acquired, accrued, or incurred before the date on which the Act was enacted had to be dealt with in the light of the law prevailing before the Act came into operation.

If a tenancy was terminated or a right had accrued in favour of the plaintiffs to obtain possession, the enforcement of the right by execution of a decree of the Civil Court could not be prevented by relying upon the provisions of the Bombay Tenancy and Agricultural Lands Act, but, as we have already pointed out in a suit, in which the cause of action is founded on a breach of contract to sell land,

the plaintiff cannot claim a decree for specific performance as a matter of right. No such right having been conferred upon the litigant, it cannot be regarded as preserved either by the provision of Clause (b) (i) or (ii) of Section 89 (2). The two cases which have been relied upon have, therefore, no application to the facts of the present case.

13. Reliance was also sought to be placed upon a judgment of this Court in -- "Umaji Mahadu v. Vishnu Gunaji Bharati", Second Appeal No. 1250 of 1953 (Bom) (G). That was a case in which in a suit instituted on 7-3-1847, for specific performance of an agreement of sale of agricultural land a decree was passed on 30-6-1950, and that decree was sought to be executed. In execution it was contended by the judgment-debtor that the decree could not be enforced in view of the provisions of Section 63, Bombay Tenancy and Agricultural Lands Act.

Gajendragadkar J., and my learned brother, who constituted the Bench, held that the decree was liable to be executed. It may be pointed out, that the Court held in that case that the decree-holder was an agriculturist within the meaning of the Bombay Tenancy and Agricultural Lands Act and that there was no bar to the execution of the decree in his favour arising out of Section 63. Again it does not appear to have been contended before the Court that the decree sought to be executed was a nullity. It was urged that the decree could not be executed contrary to the provisions of the Bombay Tenancy and Agricultural Lands Act.

It negating that contention Gajendragadkar J., who delivered the judgment of the Court observed that the suit clearly fell within the category of the proceedings instituted before the commencement of the Act and contemplated by Section 89 (3) (b) (ii). He also observed that .

"If the suit was Instituted before the Act was applied, the suit had "to be decided without reference to the provisions contained in. the Act. It is now well settled that an execution proceeding for the purpose of this Act is regarded as a continuation of the suit and the immunity from the application of the provisions of the Act which the suit enjoys continues to be enjoyed by an execution proceeding which merely purports to continue the suit."

The observations made in that case can, in our judgment," have no application to a case where the Court is called upon to consider whether it will pass a decree in violation of the express provisions of Sections 63 and 64, Bombay Tenancy and Agricultural Lands Act. In "Umaji Mahadu's case (G)", the Court was called upon to consider whether it will execute a decree already passed and the validity of which was not challenged, whereas, in this case we are called upon to consider whether the Court will pass a decree for specific performance contrary to the provisions of the Act.

14. In our view, the Court below was in error in holding that Sections 63 and 64, Bombay Tenancy and Agricultural Lands Act must be ignored in deciding whether a decree for specific performance should be passed in favour of the plaintiffs. The learned Judge has not decided the question whether the second defendant was a

tenant as claimed by him nor did he decide the question whether the plaintiffs were agriculturists within the meaning of Section 63 of the Act.

Unless the claim of the plaintiffs to be agriculturists and the second defendant's claim that he was a protected tenant be adjudicated upon in the light of the provisions of Sections 63 and 64 respectively, it would be impossible to adjust the rights of the parties in this suit. Even if the Court holds that the plaintiffs are not entitled to a decree for specific performance the Court will have to decide whether the plaintiffs are entitled to damages for breach of the contract.

The plaintiffs have, it is true, not claimed a decree for damages but Section 19, Specific Relief Act requires that the Court shall award damages to the plaintiff if the breach of contract by the defendant is established and the Court is of the view that a decree for specific performance should not be passed in favour of the plaintiff. That decree passed by the Court below will, therefore, be set aside and the case will be remanded to the trial Court. We direct that the trial Court do proceed to ascertain on evidence whether the plaintiffs are agriculturists within the meaning of Section 63, Bombay Tenancy and Agricultural Lands Act and whether the agreement of sale in favour of the plaintiffs is valid.

The learned trial Judge will also ascertain whether the sale in favour of the plaintiffs is in contravention of Section 64 of the Bombay Tenancy and Agricultural Lands Act. If the learned trial Judge is of the view that the agreement of sale is not capable of being specifically enforced, he will proceed to ascertain the amount of damages, if any, payable by the first defendant to the plaintiffs. The cross-objections filed by the second defendant are dismissed. The costs of this appeal and the cross-objections will be costs in the suit.

15. Case remanded.