
(1959) 03 BOM CK 0025

In the Bombay High Court

Case No : Letters Patent Appeal No. 82 of 1957

Rakhama Sitaram Ghadge

APPELLANT

Vs

Laxman Sitaram Ghadge and Another

RESPONDENT

Date of Decision : 31-03-1959

Acts Referred:

Specific Relief Act, 1877 — Section 21
Transfer of Property Act, 1882 — Section 14, 54

Citation : AIR 1960 Bom 105 : (1959) 61 BOMLR 1170

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

Bench : Division Bench

Advocate : S.J. Jadhav, for the Appellant; G.R. Madhavi, R.G. Madhavi and B.O. Thatte, for the Respondent

Judgement

Shah, J.

(1) The dispute in this appeal relates to two lands - Survey Nos. 155/5 and 155/6 of the village of Kandali, Taluka Junnar, district Poona. the lands originally belonged to the plaintiff. By a conveyance, dated 17-1-1951 the plaintiff sold these lands to the first defendant for Rs. 500. The first defendant then executed an agreement in favour of the plaintiff, who it may be noted is his full brother, whereby he contracted to re convey the lands to the plaintiff at any time on repayment of Rs. 500. On 13-11-1954 the plaintiff served a notice calling on the first defendant to re convey the property pursuant to the agreement., dated 17-11-1951, but the first defendant declined to carry out the requisition. The plaintiff then filled Civil Suit No. 16 of 1955 in the court of the Civil Judge, Junion Division, Junnar, for a decree for specific performance of the agreement. To that suit, Krishanabai - wife of the first defendant - was impleaded as the second defendant on the allegation that she was managing the property on behalf of the first defendant. The suit was resisted by the first defendant who contended that the condition relating to reconveyance to the property at any time was fraudulently incorporated in the agreement. The first defendant submitted that it

was agreed between the parties that the condition relating to re conveyance of the property was to be enforced within one year only from the date of the agreement. The learned trial judge negatived the contentions raised by the first defendant and decreed the plaintiffs, claim for specific performance. In appeal to the District court at Poona, the decree passed by the trial court was confirmed. A second appeal against that decision was summarily dismissed by Mr. Justice Datar. But Mr. Justice Datar thereafter granted leave to the first defendant to appeal under clause 15 of the Letters Patent.

(2) Mr. Jadhav who appears on behalf of the first defendant contends that the agreement to reconvey the property to the plaintiff on demand at any time after 17-1-1951 infringes the rule against perpetuity enunciated in Section 14 of the Transfer of property Act and on that account the covenant to reconvey the property is void. In support of his contention Mr. Jadhav relies upon a judgment of Division Bench of this court in *Dinkarrao Ganpatrao v. Narayan* 24 Bom LR 449 : AIR 1922 Bom 84 But under the Transfer of property Act an agreement to sell Immovable property does not, of itself create any interest in or charge on such property. the rule against perpetuity prohibits the creation of certain remote interest in Immovable property. It is then difficult to appreciate how by an agreement, which does not create an interest in or charge on Immovable property, the rule against perpetuity can be regarded as infringed.

(3) In *Dinkarrao's case*, 24 Bom LR 449: AIR 1922 Bom 84 a plot of land was agreed to be sold under a deed of sale, dated 18-9-1878, and there was a covenant in the sale deed that if the vendee or his heirs desired to sell the plot the same was to be resolved to the vendor at the price mentioned in the sale deed. Relying upon this covenant, the heirs of the vendor took out an Originating Summons for determining the rights of the heirs of the vendee. It was held by Mr. Justice Pratt, that the covenant contained in the sale deed was a personal contract and created no rights in rem affecting the title of the vendee, and that no declaration of the rights under a personal contract could be made. Against the decision of Mr. Justice Pratt an appeal was preferred and it was held in appeal that the covenant in question was void and the heirs of the vendee were entitled to a declaration to that effect. The court expressly held that prior to the Transfer of Property Act, 1882, which was applied to the Bombay presidency as from 1-1-1893, a contract for sale of Immovable property created an equitable interest in the property and made the purchaser the owner in equity and the covenant for pre-emption in the sale deed was void as infringing the rule against perpetuities. Macleod C.J. also claimed to approach the case from another angle. He observed that although contracts for the sale of land which can be specifically enforced immediately or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. He

further observed that the principles which underlie the rule of perpetuities applied to this class of contractgs. Mr. Justice Kanga who delivered a supplementary judgment observed that the law laid down in *London and South Western Railway co. v. Gomm*, (1882) 20 Ch. D. 582 applies to a contract for sale of Immovable property in India even where the Transfer of Property Act is in force. But *Gomms* case was expressly decided on the ground that under the law applicable to real property in England a contract of sale creates an executory interest or estate and is therefore subject to the rule against perpetuities.

(4) The observations made by Maceleod C.J. and By Mr. Justice Kanga as to the effect of a contract to sell Immovable property made after the Ransfer of Property Act was applied to the area in which the land is situate were evidently obiter and were not necessary foor the decision of the case.

(5) In a later division Bench judgment of this court delivered by Mr. Justice Fawcett and Mr. Justice Madgavkar in *Harkisandas Bhagvandas and Others Vs. Bai Dhanu*, the view which was expressed in *Dinkarrao* case 24 Bom LR 449 : AIR 1922 Bom 84 was not approved. In dealing with the contention that an agreement to sell Immovable property was void as offending against the rule against perpetuity, Mr. Justice Madgavkar expressed concurrence with the judgment of Mr. Justice Sulaiman in *Basdeo Rai v. Jhagru Rai* ILR 46 All 333 : AIR 1924 all 400. The allahabad High Court in *Basdeo Rais* case had taken the view that agreements for sale of land or of preemption of an obligation arising out of a contract and annexed to the ownership of the land were not void as infringing the rule against perpetuity. Macleod. C.J. in *Dinkarraos* case expressed the opinion that even though by a contract of sale no interest in land which is the subject matter of the agreement is created. because the contract is capable of specific performance against third parties in certain cases the result is that the law in England and India is substantially the same with regard to the enforcement of the contract He observed:

The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no much result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England.

But the possibility of a contract of sale being enforced against a thrid person acquiring interest in the subject matter of the agreement does not attract the rule against perpetuity which is restricted in its application to transfers of immoevable property. No is the court on alleged grounds of public policy entitled to extend a statutory rule to classess of property which are not expressly within its purview. If under the statute law of India an agreement to sell immoevable property does not create an interest in that property, it is difficult to hold that because under an agreement one person agrees to sell to another of demand by the latter immoevable property at some indefinite time in future the agreement is impressed with incidents which it does not possess. It is also difficult to

appreciate how a contract to sell property in future when demanded by another person purports to do by indirect means what the law forbids to be done directly.

(6) We are unable to hold that a bare agreement to sell Immovable property in future on demand by a party to the agreement infringes the rule against perpetuities.

(7) Mr. Jadhav then contended that the agreement in question was void on the ground that there was absence of mutuality and he sought to rely upon the judgment of their Lordships of the privy council in *Mr. Sarwarian v. Fakhruddin Mahomed* on 39 I A 1. That was a case in which the guardian of a minor had entered into a contract to purchase immovable property, and it was held that on the ground of absence of mutuality the contract could not be specifically enforced. We fail to appreciate, how this case can have any application to the facts how this case can have any application to the facts of the present case. In that case it was held that because the contract was not enforceable against the minor it could not be enforced at the instance of the minor. In the present case, the first defendant has solemnly agreed to reconvey the property on payment of Rs. 500 and that was one of the covenants which formed consideration for the sale; and we are unable to see any ground of enquiry relying on which the first defendant may be entitled to evade his obligation to sell at the property. Section 21 of the Specific Relief Act sets out certain contracts which cannot be specifically enforced and a contract which may be enforced at a time to be selected by one of the parties thereto and not at the instance of the other is not enumerated as one which is incapable of specific performance. We are therefore, of the view that there is no substance in this alternative contention also.

(8) The appeal therefore, fails and is dismissed with costs.

(9) Appeal dismissed.