

(1957) 06 BOM CK 0011
In the Bombay High Court
Case No : A.F.A.D. No. 478 of 1952

Rayagonda Anna Patil

APPELLANT

Vs

Jankibai and Another

RESPONDENT

Date of Decision : 27-06-1957

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 63, 64, 73
Civil Procedure Code, 1908 (CPC) — Section 34
Interest Act, 1839 — Section 1
Limitation Act, 1908 — Article 113, 97
Specific Relief Act, 1877 — Section 19

Citation : AIR 1959 Bom 468 : (1958) 60 BOMLR 788 : (1959) ILR (Bom) 1168

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

Bench : Division Bench

Advocate : R.A. Jahagirdar and T.S. Jahagirdar, for the Appellant; G.R. Madbhavi, for the Respondent

Judgement

Vyas J.

1. This is plaintiff's appeal and it is filed against the judgment and decree passed by the learned Joint Civil Judge, (Senior Division) at Kolhapur in Special Civil Suit Ni. 17 of 1951. By this decree the learned Judge has ordered the suit of the plaintiff to be dismissed. The learned Judge has made no order as to costs.

2. The plaintiff has filed the present suit, being Special Civil Suit No. 17 of 1951, for specific performance by execution of a sale-deed of an agreement which was arrived at between himself (plaintiff) and defendant No. 1 on 30th December 1945, and for possession of the suit properties or in the alternative to recover a sum of Rs. 32,840-10-0 as damages together with future interest and costs of the suit.

3. A few facts leading up to the present litigation may be stated. On 30th December 1945, an agreement took place between the plaintiff and defendant No. 1, which agreement was reduced to writing and was to the effect that

defendant No. 1 would sell the properties referred to in the present suit to the plaintiff for a sum of Rs. 25,000 within four months from the date of the agreement. That agreement is at exhibit 123. It may be noted that prior to the date of this agreement defendant No. 1 had filed suit No. 19 of 1941 for partition and possession against his nephew Dasarath and certain other persons. On the 31st July 1945, defendant No. 1 obtained the decree in that suit and it was a decree for possession. On the date of the present suit agreement namely dated 30th December 1945, defendant N. 1 passed a receipt of Rs. 22,500 in favour of the plaintiff. It was on that date (30th December 1945) that in pursuance of the agreement. Which was arrived at on that day, the plaintiff paid a sum of Rs. 22,500 to defendant No. 1. The agreement was to the effect that the balance of Rs. 2,500 was to be paid by the plaintiff to defendant No. 1 on the date upon which the sale-deed was executed. On the 26th April 1946, another agreement took place between the plaintiff and defendant No. 1. That agreement it at exhibit 124. This agreement referred to the prior agreement of the 30th December 1945 and also made a reference to the receipt exhibit 125 for Rs. 22,500 which the defendant No. 1 had passed in favour of the plaintiff. It was stated in this agreement that defendant No. 1 would execute the sale deed within four months of obtaining possession dated 30th December 1945, defendant No. 1 had undertaken to pass a document of sale within four months from the date of the said agreement that is to say, before the 30th April 1946. That time limit was extended by the subsequent dated 26th April 1946, exhibit 124, by which it was agreed that defendant No.1 would execute the sale-deed within four months of obtaining the possession of the property. On 1st July 1946 a compromise application was filed in the Darkhast proceedings which were going on between defendant No. 1 and Dasarath. It may be noted that in the meantime the appeal which Dasarath had filed from the decree which was passed on the 31st July 1945 in the suit which was filed by defendant No. 1, had been dismissed. On the 12th July 1946 the compromise was sanctioned by the court. On the 16th April 1947, defendant No. 1 applied by Miscellaneous Application No. 4 of 1947 to the court to have the compromise arrived at in the Darkhast proceedings set aside on the ground of fraud. On 12th August 1949, the said miscellaneous application of defendant No. 1 was dismissed. Thereafter the present suit as filed by the plaintiff on the 19th February 1951, alleging that he (plaintiff) had come to know of defendant No. 1's having obtained possession of the properties towards the end to August 1949. AS we have stated above, the suit is for specific performance of the agreements dated 30th December 1945 and 26th April 1946, whereby defendant N. 1 had agreed to sell the suit properties to the plaintiff or in the alternative for the refund of the amount paid by the plaintiff to defendant No. 1 or for recovery of the said amount from the defendant No. 1 by way of damages.

4. The suit has been resisted by defendant No.1 upon the contention that the amount of Rs. 22,500 was not received by him. His further contention is that neither of the two agreements dated 30th December 1945 and 26th April 1946

bears his genuine signature. In other words, his contention is that those are not genuine agreements. His further contention is that the suit is barred by limitation as he (defendant No.1) had obtained possession of the suit properties in 1946.

5. The learned Judge has taken the view that both the agreements dated 30th December 1945 and 26th April 1946, are genuine agreements; that the signatures which appear at the foot of these agreements are the signatures of defendant Ni. 1; and that defendant No. 1 had received an amount of Rs. 22,500 from the plaintiff on 30-12-1945. But he has come to the conclusion that as defendant No. 1 had obtained possession of the suit properties on 6-12-1946, the suit of the plaintiff for specific performance of the said agreements was barred by limitation. He has to also come to the conclusion that as the cause of action for the relief of specific performance of the agreements and also for the relief of refund arose on the same day, namely 1st April 1947, the claim for refund was also barred by limitation. Consistently with this view of the matter, which he took on the point limitation, the learned Judge ordered the suit of the plaintiff to stand dismissed. It is from this decree of dismissal that the plaintiff has filed the present appeal.

6. It may be noted that since the institution of the present suit, a new aspect which would govern the decision of this case, has come into being and it has come into being by reason of a decision of a Division Bench of this court in Pandu Aba Chaugule and Others Vs. Laxman Dhondi Patil and Others, . It is to be noted that even according to the view of the learned Judge, the defendant No. 1 had obtained possession of the properties on 6th December 1946. The four months" period within the sale-deed was to be executed, therefore, ended on the 6th April 1947. We have already stated above that under the agreement dated 26th April 1946, defendant No. 1 was to execute the sale-deed within for months of his having obtained possession. It is therefore clear that the four months period within which clear that the four months period within which defendant No. 1 was to execute the sale-deed expired on the 6th April 1947. In view of this circumstance, having regard to the provisions of Article 113 of the Limitation Act, the last date for filing the suit for specific performance of the agreement would be 6th April 1950. It is to be noted, however that before that date the Bombay Tenancy and Agricultural Lands Act, 1948 was made applicable to the Kolpur District on 1st May 1949. It is in the context of these facts and circumstances that we may now turn to the decision of this court in Pandu Aba Chaugule and Others Vs. Laxman Dhondi Patil and Others, . It was held by this court in that case a sale in contravention of Sections 63 and 64 of the Act being, void an agreement to sell property which if carried out would result in a sale did not give rise to any liability to sell property enforceable at law. In the body of the Judgment of the Bench, which Mr. Justice Shah delivered, His Lordship observed: "If, therefore, the sale takes place in contravention of the provisions of Section 63 or Section 64 of the Act even in pursuance of a decree of 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 purchase." It is clear that under the provisions of

Section 64 of the Act the landlord has to approach the Tribunal under the Act for the determination of the reasonable price of the lands proposed to be sold by him. Thereafter the Tribunal ascertains the reasonable price. After the ascertainment of the reasonable price the landlord has got to offer the land to the tenant, in case there is any tenant on the land, at the said reasonable price and only in case the tenant refuses to purchase the land at the said reasonable price the land can be sold to others. That being the position in law, it is clear that the agreements, as they stand namely the agreements dated the 30th December 1945 and 26th April 1946 are unenforceable. The suit properties could not be sold by the landlord (defendant No. 1 in this case) to the Plaintiff without first approaching the Tribunal under the Act, without the determination of the reasonable price and without offering the properties in the first instance, to the tenant upon the land. It appears clear from the record of this case that defendant Nos. 11 and 12 are tenants upon this property. Therefore, the position in this case is that both the agreements, of which specific performance is sought by the plaintiff, become unenforceable on the application of the Act to the Kolhapur District, i.e. on 1st May 1949. In this connection it may be noted that even in *Pandu Aba Chaugule and Others Vs. Laxman Dhondi Patil and Others*, the suit in respect of the agreement, whose specific performance was sought, had been filed on the 19th February 1946, and there also the Act was made applicable to the area on 1st May 1949. Mr. Jahagirdar contends and we see considerable force in that contention that a claim for refund of the monies paid by the plaintiff to defendant No. 1, which claim was made in the suit filed on the 19th February 1951, was a claim which was made within three years of the date upon which the agreements became incapable of specific performance and was therefore in time. As I have just stated it was on 1st May 1949 that the agreements whose specific performance is sought by the plaintiff, became unenforceable. Mr./ Jahagirdar contends, that the period of limitation would begin to run from that date, i.e., 1st May 1949 that the period of limitation is a period of three years (appropriate Article being Article 97 of the Limitation Act); and that as the claim for refund was made well within three of 1st May 1949, his client, the plaintiff is entitled to have this claim decreed. In our view, the contention of Mr. Jahagirdar is irresistible and must succeed. In *Amma Bibi v. Udi Narain Misra* ILR All 68 which is a Privy Council case it was held by the High Court on 30th April 1903, that the terms of the agreement to sell not being satisfactorily proved, no decree for specific performance could be made; that the plaintiff was, therefore, entitled to recover the money which he had paid under the agreement; and that following the case of *Bassu Kuar v. Dhum Singh*, ILR All 47, the plaintiffs alternative claim for a refund on failure of consideration was governed as to limitation by Article 97 of Schedule II of the Limitation Act 1877, and was not barred by lapse of time, inasmuch as limitation only began to run from the date of the High Court decree declaring the agreement to sell to be unenforceable. This decision of the High Court was confirmed by Their Lordships of the Privy Council and the defendant's appeal in that case was dismissed. Upon this decision of the Privy Council the conclusion is inevitable that in the present

case the limitation would begin to run only from the date upon which the agreements, whose specific performance is sought by the plaintiff, became unenforceable. In ILR All 47 also, in contemplation of a sale of land by the debtor to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed on the ground that no effectual agreement had been made. It was held by the Privy Council that "the decree brought about a new state of thing and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of Article 97." In the present case also, a new state of things was brought about by the coming into force of the Bombay Tenancy and Agricultural Lands Act in the Kolhapur District on 1-5-1949. Having regard to this fact namely, the coming into existence of a new state of things defendant No. 1 would not be absolved from the obligation of having to return the amount paid to him by the plaintiff, namely the sum of Rs.22,500.

7. The learned Advocate Mr. Madbhavi appearing for the respondent has contended before us that the provisions of Section 63 of the Bombay Tenancy and Agricultural Lands Act would not apply in this case, since the plaintiff is an agriculturist and has not shown that he holds land more than the ceiling area i.e. more than 48 acres. Even if it be assumed for a moment, that Section 63 does not apply to the facts of the case there still remain the provisions of Section 64 of the Act. As was pointed out in Pandu Aba Chaugule and Others Vs. Laxman Dhondi Patil and Others, a sale effected in contravention of the provisions of Section 64 of the Act would also be void and an agreement to enter into any such sale would not be enforceable at law. No other contention has been raised by Mr. Madbhavi before us. In the result, the plaintiff's claim to the refund of Rs. 22,500 must be decreed.

8. Mr. Jahagirdar next contends that on the abovementioned amount of Rs. 22,500, which was paid by his client to defendant No. 1 on 30th December 1945, his client is entitled to interest at 6 per cent annum. On the other hand attention is invited on the other hand to a decision of the Privy Council in AIR 1938 67 (Privy Council), in which it was held by Their Lordships that "interest would not at common law be awarded by way of damages for wrongful detention of a debt, and accordingly it would not be awarded by virtue of Section 73 of the Act." It may be noted in this case that Mr. Jahagirdar's contention is that the plaintiff is entitled to interest by way of damages because defendant No. 1 had wrongfully detained the amount of Rs. 22,500.

This contention of Mr. Jahagirdar is met by the respondent by inviting our attention to the above decision of the Privy Council. It is to be noted however that it was observed by Their Lordships of the Privy Council in the course of

their judgment that "under the Interest Act, XXXII of 1839 the court may allow interest to the plaintiff, if the amount claimed is a sum certain which is payable at a certain time by virtue of a written instrument." The Interest Act, as Their Lordships pointed out however contained a proviso that "interest shall be payable in all cases in which it is now payable by law."

Their Lordships pointed out that his proviso in the Interest Act applied to cases in which the court of equity exercised jurisdiction to allow interest. Mr. Jahagirdar is right in contending that cases where the court exercise equitable jurisdiction or cases in which the equitable jurisdiction of court is invoked are excluded from the dictum laid down by Their Lordship of the Privy Council in the aforesaid case. Their Lordships referred to the observations in *Maine and New Brunswick Electrical Power Co. v. Hart*, 1929 AC 631: AIR 1929 PC 185, and the observations are:

"In order to invoke a rule of equity it is necessary in the first instance the existence of a state of circumstances, which attracts equitable jurisdiction, as, for example, the non-performance of a contract of which equity can give specific performance.""

There is no doubt that when the plaintiff files a suit for specific performance of a contract, he invokes the equitable jurisdiction of the court. The present case is a fit case in which the court should exercise equitable jurisdiction. It is to be noted that on 6th December 1946 defendant No. 1 got possession of the suit lands. It is therefore undisputed that from that date, i.e. 6th December 1946 defendant No. 1 has been enjoying the use and usufruct of the lands.

Not only has he been enjoying the usufruct of the lands, but he has also been having the use of a large sum of money, namely, Rs. 22,500, from the date upon which it was paid to him by the plaintiff i.e. from 30th December 1945. It is clear that defendant No. 1 cannot do both the things, namely, the enjoyment of the usufruct of the lands and also the retention of a large sum of money paid to him by the plaintiff. In this connection, it would not be out of place to refer to the provisions of Section 19 of the Specific Relief Act, 1877. Section 19 lays down that if in any suit for the specific performance of a contract, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justices of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

It is clear, therefore, that even in a case where specific performance of a contract might be granted, if the court comes to the conclusion that it is not sufficient to satisfy the justice of the case and if the court thinks that some compensation for the breach of the contract should also be paid to the Plaintiff, the court shall award him such compensation. In the circumstances pointed out above, we are of the view that the Plaintiff is entitled to interest on the amount of Rs. 22,550, paid by him to defendant No. 1, by way of compensation.

9. Mr. Madbhavi for defendant No. 1 has invited our attention to a decision of the Nagpur High Court in Dwarkaprasad Poddar v. Miss Kathleen Florence Burns, AIR 1955 Nag. 38. In that case, it was held that ""on breach of a contract for sale of immovable property owing to the defect in the vendor's title, the vendor is bound to refund the amount of earnest money to the vendee but no interest is allowed thereon merely because money due was withheld."" It is to be noted, however, with respect that the aspect of the case considered by Their Lordships of the Privy Council in AIR 1938 67 (Privy Council) , does not appear to have been considered in the Nagpur Case. In our view, therefore, the Nagpur case would not assist Mr. Madbhavi's client.

10. For the reasons stated above, we would pass a decree, that the plaintiff do get from defendant No. 1 the refund of the amount of Rs. 22,500 paid by him to defendant No. 1. We direct further that the defendant No. 1 shall pay to the plaintiff interest at 6 per cent per annum on the abovementioned amount of Rs. 22,500 from 1st May 1949 to the date of the institution of the suit and thereafter at the rate of 4 per cent per annum. The amount decreed above is directed to be recovered from the estate of the deceased defendant No. 1 in the hands of his heirs. As to costs, the plaintiff will get his costs from the defendants in proportion to his claim decreed by this court. The defendants will bear their own costs of the appeal. So far as the costs of the trial court are concerned, we make no order.

11. Order accordingly.