

(2013) 07 BOM CK 0235

In the Bombay High Court

Case No : Appeal From Order No. 275 of 2013 with Civil Application No. 331 of 2013

Shri Ramesh H. Jain and Another

APPELLANT

Vs

V/s. Shri Arunkumar S. Maini and Others

RESPONDENT

Date of Decision : 24-07-2013

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 2(2), 2(5), 2(6)(b), 63, 70

Transfer of Property Act, 1882 — Section 3

Citation : (2013) 5 ALLMR 813 : (2014) 1 MhLj 826

Hon'ble Judges : Roshan Dalvi, J

Bench : Single Bench

Advocate : V.A. Thorat, instructed by P.P. Jadhav,s in AO No. 275 of 2013 and CA No. 331 of 2013, D.D. Madon, assisted with Aditya Thakkar, instructed by Ms. Tanu Khatri,s in AO No. 264 of 2013 and CA No. 315 of 2013. and Sandesh Patil, instructed by Amol Sonawane,s in 274 of 2013 and CA No. 330 of 2013, for the Appellant; Aspi Chinoy, A/w. Agnel Carnerrio, Rohan Malani and S.J. Patel, Advocates instructed by . Mulla and Mulla and CBBC for Respondent Nos. 1 to 8 in AO No. 275 of 2013 and P.S. Dani, instructed by . Mulla and Mulla and CBBC, for Respondent Nos. 1 to 8 in AO No. 264 of 2013 and AO No. 274 of 2013, for the Respondent

Final Decision : Disposed Off

Judgement

Roshan Dalvi, J.—Rule. Made returnable forthwith. These are three appeals filed by two sets of Defendants in the suit against the order of the learned 8th Civil Judge, S.D., Thane dated 3rd January, 2013 in the interim application taken out by the Plaintiff in Special Civil Suit No. 515 of 2012.

2. All the parties claimed through one Waman Mhatre who was the original owner of the suit lands. He left behind a widow, three sons and 6 daughters. The Plaintiff has sued all his heirs and the heirs of the deceased heirs. These heirs have created certain third party rights in favour of further Defendants who seek

to develop the suit property.

3. The widow, two sons of Waman Mhatre in the suit and another son executed a conveyance in favour of one Bhupendra Pandya (Pandya) who in turn executed a conveyance in favour of some of the Plaintiffs who then executed further agreements in favour of other Plaintiffs.

4. The parties to the suit can, therefore, be sufficiently identified as Plaintiff and Defendant being the successors-in-title of Waman Mhatre and or his heirs in a series of transactions.

5. The Plaintiff has sued for declaration that certain documents executed in favour of Plaintiffs are legal and valid, for specific performance of certain other agreements and that the conveyance executed ultimately in favour of the Defendant are illegal and void. Accordingly the Plaintiff claims the relief of injunction against the Defendant from acting upon those documents and creating any third party rights in the suit property. The Plaintiff has set out how the property has come to be transferred initially from the widow and three sons of Waman Mhatre to Pandya and thereafter to Plaintiff Nos. 1 to 4 and then to Plaintiff Nos. 7 & 8. This was under a conveyance dated 23rd February, 1988 registered on 23rd March, 1988. Pandya was to be in possession pursuant to the conveyance and became an absolute owner. A mutation entry (ME) being entry No. 5170 was made in the revenue records showing the conveyance. Six daughters thereafter claimed their share. The Plaintiff entered into certain agreements with them and claimed to have paid off their entire share and hence claimed to have been given an irrevocable Power of Attorney (POA) by them. The Plaintiff accordingly claims to develop the suit plot.

6. The Defendant claims to have been conveyed the suit property under a later conveyance executed by all the heirs of Waman Mhatre.

7. It is the Plaintiff's case that having conveyed the land to Pandya, Defendant Nos. 1 and 2 could not have entered into any conveyance with any other. It is also the case of the Plaintiff that the other daughters and their heirs who have executed agreements and irrevocable POA in favour of the Plaintiff could not have conveyed the property to any other. The Plaintiff claims to be the owner and claims that the Defendants are the trespassers, since the Defendant claims title through persons who did not have title more specially Defendant Nos. 1 & 2. None can transfer a better title than what he has and since the title came to be transferred under the registered conveyance of 1988, Defendant Nos. 1 and 2 had no title in them to transfer to any other party. Similarly, the daughters of Waman Mhatre and their heirs would be bound by the agreement with the Plaintiff and the irrevocable POA granted to the Plaintiff and hence could not enter into any transaction with any other party.

8. The suit land is agricultural land. Pandya hails from Rajasthan. The suit land could have been transferred only to an agriculturist. It is not shown whether Pandya was an agriculturist. Similarly, when the Plaintiff claims further transfer of

title it could only be to agriculturists. The Plaintiff has not shown how any of them were agriculturists. The parties would be governed by the Bombay Tenancy and Agricultural Lands Act, 1948 (BATALA). Agriculturist is defined U/s. 2(2) of the Act as the person who cultivates the land personally. The term "to cultivate" is defined U/s. 2(5) as to till or husband the land for raising agricultural produce.

9. Counsel on behalf of the Defendant pointed out that U/s. 2(6)(b) which defines the term "to cultivate personally". The agriculturists must cultivate the entire land within a village or lands not separated by distance of more than five miles therein which is sought to be purchased. Since Pandya hails from Rajasthan and has no other land in Maharashtra, it is argued that he would not be an agriculturist under BATALA. Consequently it is argued that the very seminal conveyance of 1988 would be void U/s. 63 of BATALA which bars the transfers of agricultural land to non agriculturists so that no sale would be valid in favour of person who is not an agriculturist.

10. However, the Plaintiff contends that he is agriculturist. He must first show that the Pandya was an agriculturist. Mr. Chinoy on behalf of the Plaintiff argued that U/s. 70 of the BATALA the only person who can decide whether the person is an agriculturist is a Mamlatdar who, amongst others has the duty to so decide U/s. 70(a) of the Act. Neither party has applied for a declaration as to whether or not Pandya and/or any of the Plaintiffs is an agriculturist.

11. The Plaintiff further contends that Pandya has shown by 7/12 extracts of the State of Rajasthan that he is an agriculturist and since it is contended that the agriculturist must possess land within five miles radius from the suit property which is been conveyed to him or must have land in the same village, the Defendant contends that Pandya is not an agriculturist, the 7/12 extract notwithstanding.

12. The Defendant contends that the Sub Divisional Officer (SDO) conducted suo moto enquiry in September, 1993 u/s 257 of the Maharashtra Land Revenue Court (MLRC) and passed an order that the ME No. 5170 made in respect of the suit property showing the conveyance in favour of Pandya and the Plaintiff is not as per law. That law would be BATALA. The enquiry under BATALA has to be conducted for determining whether a person is an agriculturist or not by the Mamlatdar and not SDO. The enquiry made by the SDO U/s. 257 is under the power of the State Government and of certain revenue and certified officers to call for and examine records and proceedings of subordinate officers. The record that has been examined is ME No. 5170 regarding the purchase of the suit property made by the Circle Inspector. In the enquiry the widow and the three sons of Waman Mhatre as also Pandya were shown as opponents since they were parties to the conveyance. One advocate is shown to have appeared on behalf of the them. He himself would is shown to have pleaded that the ME is not as per law. The widow and the three sons of Waman Mhatre were the vendors in the conveyance. Pandya was the purchaser. They had conflicting, different interests. They could not have been represented by a single advocate. The order has been

passed in September-1993 several years after the registered conveyance remained on record and constituted notice to all U/s. 3 Explanation I of the Transfer of Property Act, 1882. Notice to Pandya who was conveyed the property is not shown to have given. The ME has been changed upon observing that Pandya was not an agriculturist which observation came to be made upon the advocate pleading that fact. In any event it is inconceivable that the purchaser in the conveyance would himself state that the ME made showing the conveyance is not as per law. The order records that the purchaser made an application for entering his name in the record of rights as purchaser upon producing the sale deed and POA but not the 7/12 extracts of village Bhayander which did not prove that he was an agriculturist and the circle inspector certified the ME without verifying the record of his being an agriculturist and hence the SDO concluded that the ME was not as per law and allowed suo moto revision application and cancelled the ME.

13. It is upon this cancellation that the Defendant claims to have been transferred good title of the agricultural suit land in accordance with law.

14. Mr. Chinoy argued on behalf of the Plaintiff that SDO could not decide whether Pandya was an agriculturist; only the Mamlatdar could decide U/s. 70(a) of BATALA. Though U/s. 257 the SDO would have the powers to correct a revenue entry upon examining the records, and of course, upon notice to the party being affected thereby, the SDO could not decide whether Pandya was an agriculturist merely upon the presence of 7/12 extract of village Bhayander not being reflected in the ME.

15. If the SDO would have no power to determine the status of Pandya as an agriculturist, the ME could not have been cancelled. If the ME would remain it would show the conveyance as also POA in favour of Pandya which would be notice to the subsequent purchasers (the Defendant). In fact it would show that the vendors under transaction being the heirs of Waman Mhatre had no title which they could convey to the other Defendants. Once that is seen, the Plaintiff would be taken to have made out prima facie case for the grant of usual injunctions against creation of third party rights in the suit property.

16. The learned Judge in the impugned order has set out the transfer of title from the widow and sons of Waman Mhatre to the Plaintiff as also Defendant and considered the purport of Section 257 of MLRC as also BATALA and the powers of the SDO as also the enquiry contemplated under BATALA. The learned Judge has correctly considered in paragraph 41 of the order that the enquiry about the status of an agriculturist is contemplated under BATALA and the SDO would have no power to determine that factor in an enquiry U/s. 257 of MLRC and consequently that enquiry is beyond the scope of BATALA.

17. The Defendant relied upon the provisions of BATALA and Judgment in the case of Jogibhai Mangaibhai Tandel Vs. Mamlatdar & Agricultural Land Tribunal, Pardi, 1994 DGLS (Soft) 858 which related to property in Gujarat and which held

that the person who purchased the property has to possess agricultural land within a radius of five miles of the purchased property. It is contended on behalf of the Defendant that BATALA enacted in 1948 applied to the State of Bombay, as it then was, prior to its reorganisation in 1960 into the States of Maharashtra and Gujarat and hence the Act applicable in Gujarat is the same and consequently the Judgment would apply. Be that as it may, it would have to be applied by the authority under the Act and that is the Mamlatdar, so that the declaration of whether Pandya was an agriculturist or not an agriculturists had to be obtained by either party who sought it.

18. This not done. The learned Judge has considered the registered conveyance in favour of Pandya and the consequent title and the possession of Pandya which has been passed on to the Plaintiff. The learned Judge has also considered that though the ME, which is only for fiscal purpose was cancelled, the right in the property was not extinguished since the conveyance remained.

19. It is unnecessary to go into the tracing of title of the Defendant thereafter. The seminal aspect to be considered is the determination of whether or not Pandya was an agriculturist in the correct forum and by the right authority. Upon such declaration only the conveyance in favour of Pandya could be declared to be invalid. If that is done, the Plaintiff's right would seize. Until that is done, the Defendant right cannot be effectuated. Consequently the suit property would require protection against third party interests.

20. It is argued on behalf of the Defendant that two sets of Defendants have constructed upon the suit property. Certain photographs are shown to Court showing the construction. The learned Judge has considered such construction also and observed that the FSI belonging to the Plaintiff on the suit plot of land could not be used so as to make it irreversible. The learned Judge has observed that the construction is carried on up to 4th floor in respect of only one of the buildings and the other piece of land is vacant and that part could be saved by preventing further construction.

21. It is argued that third party rights have already been created and would be created for further construction because the Plaintiff's suit has been long delayed. A lot of construction has been carried out. A building with ground + 8 upper storeys is shown to be constructed. There is another building which is constructed as market in view of reservation for such market. The court has been informed that construction could be carried on over the building reserved as market. However, if it is allowed to be carried on by the Defendant the Plaintiff's FSI would be completely used up.

22. The learned Judge has relied upon the photographs of the construction showing a single building up to 4 th floor. The impugned order has been passed in January, 2013. The learned Judge has specified at least three places that the construction is up to the 4th floor in paragraph Nos. 54 and 57 of the order. Construction up to 8 th floor is now shown to the Court. It is not known whether

the construction from 5th floor onwards is in breach of the impugned order restraining the Defendants from creating third party interest and further construction on the suit property.

23. Further third party interest stated to be created is also considered by the learned Judge in paragraph 54 of the order. The Defendant is stated to have produced allotment letters showing even the 8th and 10th floors sold to prospective purchasers even though the sanctioned plan does not specify permission for construction beyond the 6th floor. Such construction would, therefore, be wholly illegal construction in excess of the sanctioned plans and which cannot allowed or regularised as held in the case of Esha Ekta Apartments Co-Op. Hsg. Soc. Ltd. & Ors. Vs. Municipal Corporation of Mumbai & Ors., Civil Appeal No. 7934 of 2012 arising out of SLP (C) No. 33471 of 2011 by the Supreme Court.

24. It may be mentioned that it is impertinent for a party to construct without any authority of law and without any title, claiming title from persons without any title and claiming equities in a court of law. Consequently even the balance of convenience claimed by the Defendants must elude them.

26. Consequently the impugned order cannot be at all faulted. The injunction against creation of third party rights as also further construction and use of the FSI that arises on the suit property is confirmed.

27. Further the injunctions against Defendant Nos. 2 and 3 in the suit who is the Commissioner of local Municipality against the grant of further permissions and sanctions to any of the Defendants pending the suit is perfectly in order and is a necessary corollary to the injunction against the other Defendants. That order also deserves to be and is confirmed.

28. Parties may apply for such declarations as they may deem fit under BATALA which would be considered, if obtained, in the suit.

29. The Appeals from Order are disposed off accordingly. In view of the order passed in Appeals from Order Civil Applications are disposed off.