

Topa S/O Dhenu Rathod Vs. Maheshkumar S/O Shankarlal

Topa S/O Dhenu Rathod Vs. Maheshkumar S/O Shankarlal

SooperKanoon Citation : sooperkanoon.com/358206

Court : Mumbai

Decided On : Oct-06-1995

Reported in : 1996(2)BomCR703

Judge : R.M. Lodha, J.

Acts : Bombay Tenancy and Agricultural Lands (Vidharba Region) Act, 1958 - Sections 89; [Specific Relief Act, 1963](#) - Sections 15; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 14, Rule 1

Appeal No. : Civil Revision Application No. 1078 of 1993

Appellant : Topa S/O Dhenu Rathod

Respondent : Maheshkumar S/O Shankarlal

Advocate for Def. : B.N. Mohta, Adv.

Advocate for Pet/Ap. : S.R. Deshpande, Adv.

Disposition : Revision allowed

Judgement :

R.M. Lodha, J.

1. The order passed by the Civil Judge, Junior Division, Washim, on 14-9-1993, rejecting the application filed by the present applicant in the suit for framing of

additional issues, is questioned in the present revision application under section 115 of the Code of Civil Procedure, 1908 (for short 'the C.P.C.').

2. Non-applicant Maheshkumar Shankarlal Agrawal (for short 'the plaintiff') filed the suit for specific performance of agreement of sale against the applicant Topa Dhenu Rathod (for short 'defendant'). The said suit was registered as Regular Civil Suit No. 99 of 1987. According to the averments made in the plaint, the defendant agreed to sell the land comprising of Survey Nos. 29/3 and 29/6 situated at Mouza Shirputi, taluq Washim, for a consideration of Rs. 6,000/-. The plaintiff paid Rs. 3,500/- at the time of agreement of sale and the balance amount of consideration was required to be paid on 31-3-1984. According to the terms of agreement, possession of the lands in question was to be handed over to the plaintiff on the date of execution of the sale-deed. On the basis of the aforesaid pleadings, the plaintiff prayed for a decree for specific performance of agreement of sale dated 27-6-1983, and in the alternative refund of consideration and damages.

3. The defendant traversed the averments made in the plaint and set up the defence, amongst others, that the plaintiff was not an agriculturist and therefore, the agreement of sale was void.

4. The trial Court on 29-6-1993 reframed the issues, which reads as under :

(1) Whether the description of the suit property as given by the plaintiff is false and incorrect?

(2) Whether the defendant had agreed to sell the suit field mentioned in para No. 1 of the plaint for a consideration of Rs. 6000/- on 27-6-1983?

(3) Whether he received Rs. 3,500/- as earnest money and executed an agreement of sale on 27-6-1983 and agreed to execute the sale-deed on 31-3-1984?

(4) Whether the plaintiff was ready to pay the remaining amount of consideration to defendant for execution of sale-deed but the defendant avoided to execute the sale-deed?

(5) Whether the defendant borrowed Rs. 1200/- from plaintiff's father and executed an agreement of sale as a security to the loan amount which was nominal and never to be acted upon?

(6) Whether the defendant had repaid Rs. 1500/- to the plaintiff, but the plaintiff refused to hand over the same dated 27-6-1983 executed by the defendant?

(7) Whether on 18-8-1984 the defendant destroyed some other document in the presence of the plaintiff and his father under the impression that he is tearing of the document pertaining to agreement of sale dated 27-6-1983?

(8) Whether the defendant obtained F.S. No. 29/3 and 29/4 in lieu of F.S. No. 29/6 in the proceeding under Prevention of Fragmentation and Consolidation Act?

(9) Whether the plaintiff is entitled to specific contract of Survey No. 29/3 and 29/4 from the defendant/

(10) Whether the present suit is barred by the provisions of Limitation Act?

(11) Whether the plaintiff is entitled for the reliefs as prayed for?'

5. Thereafter on 3-9-1993 the defendant made an application for framing three additional issues, which, according to the defendant, were material and necessary for the just decision of the case. The three additional issues, which the defendant wanted to be framed, read as under:

'(1) Whether the defendant proves that the suit is barred by limitation?

(2) Whether the defendant proves that due to the mortgage of field S. No. 29/6 to Seva Sahakari Society, Shirputi, the transaction is void ab initio?

(3) Whether the plaintiff is an agriculturist? and whether the provisions under section 89 of B.T. & A.L. Act are binding on the plaintiff?'

6. The plaintiff filed the say to the application submitted by the defendant for framing of the additional issues and stated that the issue regarding limitation has already been framed and no such issue needs to be framed again. The plaintiff

also submitted that as regards the proposed additional issue No. 2, the subject-matter of the suit property did not relate to field Survey No. 29/6 and though initially in the plaint number of field survey was wrongly typed as '29/6', instead of field Survey No. 29/4 but later on by amendment the field Survey No. 29/4 has been pleaded and therefore, the proposed additional Issue No. 2 was neither necessary nor material. As regards proposed additional Issue No. 3, the plaintiff submitted that a decree for specific performance of agreement of sale can be granted subject to permission under section 89 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 and therefore it was not necessary. Thus, the plaintiff submitted that the application filed by the defendant for framing the additional issues has no merit and deserves to be rejected.

7. The trial Court by an order dated 14-9-1993 rejected the application filed by the defendant on 3-9-1993 by observing that the issue regarding limitation has already been framed and other two additional proposed issues were not necessary to decide the controversy in the suit.

8. Shri S.R. Deshpande, the learned Counsel for the applicant/defendant, pressed this revision application for framing proposed additional issue No. 3 only and submitted that this issue is very material and necessary, because, if the plaintiff is not an agriculturist, he shall not be entitled to a decree for specific performance of that contract by virtue of section 89 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958 (for short 'the Tenancy Act, 1958.'). In support of his contention, Shri Deshpande relied upon the decision of the Apex Court in *Gundaji Satwaji Shinde v. Ramchandra Bhikaji Joshi* 1979 Mah.L.J. 283.

9. Shri B.N. Mohta, the learned Counsel for the non-applicant/plaintiff, on the other hand, submitted that the proposed additional Issue No. 3 was not required to be framed at this stage and the stage of examining the effect of section 89 of the Tenancy Act of 1958 would only arise after the decree for specific performance is passed and at the time of execution of the sale-deed and, therefore, the trial Court did not commit any error in rejecting the application filed by the defendant on 3-9-1993. Shri B.N. Mohta placed strong reliance upon the decision of this Court in *Nariman Sorabji Parekh v. Ramchandra Janu Mhatre and others* 1981 Mah. L.J.

400 and the unreported judgment of this Court in Second Appeal No. 262 of 1977, Baban Shioram Kakad v. Smt. Anusayabai Shamrao Nimkhede, decided by this Court on 9-7-1991.

10. It may be observed here that the case of the defendant in the written statement was that the plaintiff was not an agriculturist and, therefore, he could not purchase any agricultural land and any sale relating to agricultural land in his favour shall not be valid. The plaintiff in the reply to the application filed by the defendant on 3-9-1993 for framing the additional issues did not dispute the defendant's contention that the plaintiff was not an agriculturist. Shri B.N. Mohta, on the basis of the say filed by the plaintiff on 14-9-1993 also submits that from the said say it is not revealed that the plaintiff disputed the contention of the defendant that he was not an agriculturist. The question, therefore, is whether in the suit for specific performance of agreement of sale relating to agricultural land, the issue needs to be framed as to whether the plaintiff is an agriculturist or not, on the basis of the plea set up by the defendant in the written statement that the plaintiff is not an agriculturist, and the effect of section 89 of the Tenancy Act of 1958 in the suit for specific performance of contract relating to agricultural land.

11. Section 89 of the Tenancy Act, 1958, reads as under :--

'89. (1) Save as provided in this Act :--

(a) no sale (including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue), gift, exchange or lease of any land or interest thereon, or

(b) no mortgage of any land or interest therein, in which the possession of the mortgaged property is delivered to the mortgagee, shall be valid in favour of a person who is not an agriculturist or who being an agriculturist will, after such sale, gift, exchange, lease or mortgage, hold land as tenure-holder or tenant or partly as tenure-holder and partly as tenant exceeding two-thirds of the ceiling area determined under the Maharashtra Agricultural Lands (Ceiling on Holdings) Act, 1961, or who is not an agricultural labourer :

Provided that the Collector or an officer authorised by the State Government in this behalf may grant permission for such sale, gift, exchange, lease or mortgage, in such circumstances and subject to such conditions as may be prescribed.

Explanation - For the purpose of this sub-section the expression 'agriculturist' includes any person who as a result of the acquisition of his land for any public purpose has been rendered landless, for a period not exceeding ten years from the date possession of his land is taken for such acquisition.

(1A) Where any condition subject to which permission to transfer was granted is contravened, then the land in respect of which such permission was granted shall be liable to be forfeited in accordance with the provisions of section 122-A.

(1B) Where permission is granted to any transfer of land under sub-section (1) any subsequent transfer of such land shall also be subject to the provisions of sub-section (1).

(2) Nothing in this section shall be deemed to prohibit the sale, gift, exchange or lease of a dwelling house or the site thereof or any land appurtenant to it in favour of an agricultural labourer or an artisan.

(3) Nothing in this section shall apply to a mortgage of any land or interest therein effected in favour of a co-operative society as security for the loan advanced by such society.

(4) Nothing in section 90 shall apply to any sale made under sub-section (1).'

12. In *Gundaji Satwaji Shinde's*, case (cited supra), the Apex Court considered section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, which is identical and *pari materia* with the present aforesaid section 89, and in para 6 the Apex Court observed thus :---

'6. There is no controversy that the land purported to be sold by the contracts for sale of land Exs. 82 and 83 is land used for agricultural purposes and is covered by the definition of the expression 'land' in section 2(8)(a). The plaintiff thus by the contracts for sale of land Exhibits 82 and 83 purports to purchase agricultural land.

Section 63 prohibits sale of land, inter alia, in favour of a person who is not an agriculturist. If, therefore, the plaintiff wants to enforce a contract for sale of agricultural land in his favour he has of necessity to be an agriculturist. The defendant intending vendor has specifically contended that the plaintiff not being an agriculturist he is not entitled to specific performance of the contract. Therefore, in a suit filed by the plaintiff for specific performance of contract, on rival contentions a specific issue would arise whether the plaintiff is an agriculturist because if he is not, the Civil Court would be precluded from enforcing the contract as it would be in violation of a statutory prohibition and the contract would be unenforceable as being prohibited by law and, therefore, opposed to public policy.'

13. From the aforesaid judgment of the Apex Court in Gundaji Shinde's case (cited supra), it can easily be held that section 89 of the Tenancy Act of 1958 prohibits sale of agricultural land, inter alia, in favour of a person who is not an agriculturist. It can further be said that if in a suit for specific performance of contract, the plaintiff wants to enforce an agreement of sale of agricultural land in his favour, he must be an agriculturist. Thus, when the defendant set out the plea in the written statement that the plaintiff was not an agriculturist, obviously in a suit filed by the plaintiff seeking specific performance of agreement of sale of agricultural land, he was required to show that he was an agriculturist and a decree for specific performance could only be passed if he was agriculturist, and not otherwise. The judgment of the Apex Court is thus clear and on the basis of the said judgment, it has to be held that when such a plea was set out by the defendant in the written statement that the plaintiff was not an agriculturist, in a suit for specific performance of contract filed by the plaintiff, seeking enforcement of the contract and sale of the agricultural land, the issue whether the plaintiff is an agriculturist or not, was necessarily required to be framed and by not doing that, the trial Court failed to exercise jurisdiction vested in it under law. It is the duty of the Court to cast issues arising out of the pleadings of the parties and the relevant material, and since there is a pleading of the defendant in the written statement that the plaintiff was not an agriculturist, in view of the controversy involved, such an issue was necessary to be framed.

14. Now, the two judgments cited by Shri B.N. Mohta, the learned Counsel for the non-applicant, may be examined. In Nariman Sorabji Parekh's, case (cited supra), the Single Judge of this Court, with reference to the provisions of section 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, did held as under :--

'12. The terms of section 63 speak of sale being invalid and permission being granted by the Collector. Though it does not say in so many terms that permission in case of a non-agriculturist and person not an agricultural labourer must be sought before the sale is effected, the propriety and object of the section is clear. The permission, therefore, must be secured by a 'non-agriculturist' and a person not an agricultural labourer before the sale takes place. To the extent, therefore, the Tribunal and the Assistant Collector held that permission must be obtained before the sale takes place, in view of the provisions of section 63 of the Bombay Tenancy and Agricultural Lands Act, are right.

13. The question, however, is whether in a 'Court sale', the 'sale' takes place when the third bid is accepted by the Court or the officer conducting the sale, or whether it takes place when the sale is confirmed and become absolute. If in the case of a Court sale, the sale becomes absolute only when it is confirmed and, therefore, at that time becomes a sale in the real sense of the term, then a permission can be had and obtained between the time of offering the third bid and its confirmation by the Court. The most material and crucial question, therefore, in the present case is as to whether in a Court sale, sale takes place no sooner a third bid is offered and accepted, as held by the authorities below, or otherwise. Before, proceeding to deal with that question, in passing I may refer to Rule 36 of the Rules made under the Bombay Tenancy and Agricultural Lands Act. That rules does not throw any further light in regard to the matter of time when the application has to be made. That rule says that the Collector shall grant the permission when he is satisfied that the conditions which are mentioned in the rule are satisfied. For purposes of Court sales, sub-rule (h) says that where a land is being sold in execution of a decree of a Civil Court, the Collector must be satisfied that no agricultural labourer or 'agriculturist holding land less than the ceiling area is prepared to bid at such sale'. Therefore, under Rule 36, the Collector will grant permission if he is satisfied in the case of a Court sale in execution of a decree of a Civil Court, that no

agricultural labourer or an agriculturist holding land less than the ceiling area, is prepared to make any each bid. That is the only condition which must be satisfied before the Collector can grant permission. In the present case, the Collector has not addressed himself to that question. As I shall presently indicate the nature of the enquiry and the circumstances and conditions of which he must be satisfied are only those as appearing in Rule 36, Sub-rule 1(h) and none others.

14. In order, therefore, to find out in the case of execution sales as to the time when the sale becomes a 'sale', we have to turn to the provisions of the Civil Procedure Code. One obvious answer and result of those provisions is, as has been found by the authorities below is that in the case of a sale in execution of a decree before a Court, the sale takes place when the third bid is offered and accepted. Reliance for that purpose was placed upon the provisions of section 65 of the Civil Procedure Code and the scheme of 'sale' as is to be found in the provisions of Order 21, Rule 66, and the following rules in that behalf upto Rule 90. I shall presently refer to these rules. But it may be pointed out that the authorities below were considerably influenced by the argument based on the provisions of section 65 of the Civil Procedure Code. Section 65 in these terms:

'Purchaser's title'65. Where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.'

It will be seen from the marginal note to that section and the fiction which is created thereunder also that a purchaser acquires title to the property and the property vests in him when it is sold in execution of a decree where the sale has become 'absolute' from the date the property is sold and not from the time when the sale becomes 'absolute'. The occasion for operation of section 65 arises only when and after the sale has become 'absolute'. The vesting of the time and the vesting of the property relates back to the time of sale 'only when the sale has become absolute'. It follows, therefore, from the above that where the sale has not become absolute, the property neither vests nor the title to it is acquired, even though it might have been sold. The clear intention and object of the section,

therefore, is that there is an interregnum or intervention of time between a sale taking place and the sale becoming absolute. It is this distinction which seems to have been overlooked by the authorities below. A sale of immoveable property may take place in execution of a decree. But unless the sale has become absolute, there is no vesting of property and passing of title. A sale becomes absolute as I shall presently point out, under the provisions of the Civil Procedure Code, not when the sale takes place but only when certain matters and events which intervene and when they may intervene have ceased to have effect. The Tribunal erred in my opinion in slipping over the distinction and thinking that the 'sale' is complete when the bids are accepted.'

15. In Baban Shioram Kakad's case (cited supra) the Single Judge of this Court relied upon the aforesaid decision of this Court in Nariman Sorabji Parekh's case (cited supra), and held as under --

'10. So far as the point under section 89 of B.T. & A.L. Act is concerned, there is a direct authority of this Court See 1981 Mah.L.J. 400; Nariman v. Ramchandra, though under section 63 of B.T. & A.L. Act 1943 (Bombay), wherein it has been clearly held that an auction purchaser at Court sale can obtain permission from the Collector before the same is confirmed as till confirmation of sale, there is no transfer of title. In the present case also, plaintiff will have to obtain permission of the Collector before the sale-deed is executed in her favour and actual possession delivered but that does not mean that the agreement of sale in her favour under which there was no transfer of title was itself void being against the provisions of section 89 of B.T. & A.L. Act, 1958. Therefore, there is equally no substance in this point as well.'

16. In none of the aforesaid decisions of this Court, the question involved was whether in a suit for specific performance of contract relating to agricultural land, if the defendant sets out the defence that the plaintiff was not an agriculturist, an issue needs to be framed with regard to that or not. This Court in Nariman Sorabji's case (cited supra) was concerned with the question whether an application by a person, who is not an agriculturist, for grant of permission as provided by the proviso to section 63(1)(a) of the Bombay Tenancy and

Agricultural Lands Act, 1948, or such an application by an agricultural labourer to purchase at Court's sale was maintainable even after the auction was held, but prior to the confirmation of sale or not and, therefore, the decision of this Court in Nariman Sorabji's case (cited supra) has no relevance to the controversy involved in the present revision application. Similarly, in Baban Shioram Kakad's case (cited supra), this Court was seized of the second appeal, where a decree for specific performance of contract passed by the two courts below was under challenge and one of the questions was whether grant of such decree was violative of section 89 of the Tenancy Act, 1958, and the learned Single Judge relying upon the judgment in Nariman Sorabji's case (cited supra) held that the plaintiff shall have to obtain permission of the Collector before the sale-deed is executed in her favour and actual possession delivered, but that did not mean that the agreement of sale in her favour under which there was no transfer of title, was itself void being against the provisions of section 89 of the Tenancy Act of 1958 and, therefore, it is clear that the question involved in the present revision application was not the subject-matter of consideration in the matter before the learned Single Judge in Baban Shioram Kakad's case (cited supra).

17. Besides that, it would be seen that in none of the aforesaid decisions, this Court referred to the decision of the Apex Court in Gundaji Satwaji Shinde's case (cited supra). In the present case, the observations made by the Apex Court in para 6 of Gundaji Satwaji Shinde's case (cited supra) squarely apply to the controversy involved in the present revision application, and on the basis of the law laid down by Apex Court in Gundaji Satwaji Shinde, (cited supra) and the discussion made above, it follows that section 89 of the Tenancy Act, 1958, prohibits sale of land, inter alia, in favour of a person, who is not an agriculturist, and in the present suit when the plaintiff wants enforcement of the contract for sale dated 27-6-1983 relating to agricultural field Survey Nos. 29/3 and 29/4, he has to be necessarily an agriculturist and if, on trial, it is found that the plaintiff is not an agriculturist, he is not entitled to sale of agricultural land and, therefore, the issue whether the plaintiff is an agriculturist or not and if he is not an agriculturist, the effect of section 89 of the Tenancy Act, 1958 is very material and needs to be framed. The trial Court thus failed to exercise jurisdiction vested in it under law in not framing the proposed additional Issue No. 3, and if the impugned order is

allowed to stand, it would definitely occasion failure of justice and cause irreparable loss to the present applicant.

18. Consequently, this civil revision application is allowed. The order passed by the Civil Judge, Junior Division, Washim, on 14-9-1993 is quashed and set aside, to the extent it refused to frame proposed additional Issue No. 3 in the application dated 3-9-1993 made by the defendant. The Civil Judge, Junior Division, Washim, is directed to frame the following additional issue :

'Whether the plaintiff proves that he is an agriculturist?

And if the finding is in the negative, the effect of section 89 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958.'

No costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com