

Govindbhai Gordhanbhai Patel and Others

Vs

Gulam Abbas, Mulla Allibhai and Others

Civil Appeal No. 1860 of 1968

(CJI A.N. Ray, M.H. Beg, Jaswant Singh JJ)

17.12.1976

JUDGMENT

JASWANT SINGH, J. –

1. This appeal by special leave which is directed against the judgment and decree dated January 29, 1968, of the High Court of Judicature at Bombay involves a question of the applicability or otherwise of the doctrine of frustration embodied in Section 56 of the Contract Act which to use the words of Viscount Maugham in Joseph Constantine Steamship Line Limited v. Imperial Smelting Corporation Ltd. (1942 AC 154, 168) "is only a special case of the discharge of contract by an impossibility of performance arising after the contract was made" or to use the language of Mukherjee, J. in Satyabrata Ghose v. Mugneeram Bangur & Co. (1954 SCR 310 : AIR 1954 SC 44) "is really an aspect or part of the law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act".

2. The facts giving rise to this appeal lies in a short compass and may be briefly stated. The respondents who are the owners of four plots of agricultural and admeasuring 7 acres and 13 gunthas and a bungalow standing thereon situate in village Majwade, near Pokhran Talao Road, Thana, having bought the same from Homi D. Dubash under a sale deed dated September 9, 1953 agreed to sell the same to the appellants in lieu of Rs. 25,000 vide agreement dated May 16, 1957, relevant clauses whereof provided as follows :

5. If the purchasers shall insist on any requisitions or objections as to the title, evidence of title, conveyance, possession, receipt of rents or any other matters on the abstract of or this agreement or connected with the sale which the Vendors shall be unable or on any ground unwilling to remove or comply with, the Vendors shall be at liberty notwithstanding any negotiation or litigation in respect of such requisition or objection, to give to the Purchasers or their Solicitors notice in writing of their intention to rescind the contract for sale unless such requisition or objection be withdrawn and if such notice be given and the requisition or objection be not withdrawn within ten days after the day on which the notice was sent, the contract shall, without further notice be rescinded. The Vendors shall thereupon return to the purchasers the deposit but without any interest, costs of investigating the title or other compensation or payment whatever.

6. If the title be not approved by the Purchasers' attorney or if the purchase is not completed within the said period of two months owing to any default on the Vendors'

part, it shall be at the option of the Purchaser to rescind this agreement and in that event the Purchaser shall be entitled to receive back the earnest money from the Vendors, together without of pocket costs incurred in the preparation of this agreement and investigation of title, advertisement, Bataki, correspondence etc. But in case of the endorse' willful default the Vendors shall also pay to the Purchasers interest at 6% per annum on the amount of earnest money from the date hereof till the date of return of the earnest money and all costs of the Purchasers.

7. If the sale is not completed within time provided for completion owing to the fault of the Purchaser, the Vendors shall be entitled to put an end to this contract and to forfeit the earnest money.

3. Pursuant to the aforesaid agreement, the respondents' attorneys delivered the documents of title to the appellants' attorneys on May 17, 1957 for investigation of title and in the third week of May, 1957, the respondents gave possessions of the aforesaid property to the appellants in part performance of the said agreement. On August 2, 1957, the respondents and the appellants made a joint application to the District Deputy, Collector, Thana Prant, under Section 63 of the Bombay Tenancy and Agricultural Lands Act, 1947 (hereinafter referred to as 'the Act') seeking permission to sell and purchase the aforesaid agricultural land. Section 63 of the Act reads :

63. (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 therein, 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 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, on such conditions a may be prescribed.

4. It may be mentioned that the conditions alluded to in the proviso to the above quoted Section 63 have been prescribed by Rule 36 of the Bombay Tenancy and agricultural lands, Rules, 1956 (hereinafter referred to as 'the Rules'), the relevant portion whereof is to the following effect :

36. Conditions on which permission for sale, etc., of land under Section 63 may be granted - (1) The Collector or other officer authorised under the proviso to sub-section (1) of Section 63 shall not grant permission for sale, gift, exchange, lease or mortgage of any land in favour of a person who is not either an agriculturist or agricultural labourer or who, being an agriculturist, cultivates personally land not less than the ceiling area whether as owner or tenant or partly as owner and partly as tenant unless any of the following conditions are satisfied.

(f) the land is required for cultivating it personally by a person, who, not being an agriculturist, intends to take to the profession of agriculture and to whom the Collector after having regard to the order of priority mentioned in clause (c) of sub-section (2) of Section 32-P, has give a certificate that such person intends to take to the profession of agriculture and is capable of cultivating land personally;.....

5. By means of communication No. TNC 48 dated December 8, 1958, the Prant Officer, Thana, informed the respondents that their request to sell the aforesaid lands to appellant 1 could not be granted as the intending purchaser had not obtained the certificate from the Collector to the effect that "he intends to take to the profession of agriculture and is capable of cultivating land personally", On January 21, 1959, the respondents' attorneys wrote to the appellants informing them that no effect could be given to the aforesaid agreement of sale dated May 17, 1957 as the permission under the act to sell the suit property had been refused by the Prant Officer by his letter dated December 8, 1958 for appellant 1's failure to obtain the certificate to the effect that the intended to take to the profession of agriculture and was capable of cultivating land personally. The respondents' attorneys also called upon the appellants by means of the said communication to return the title deeds adding that on the return of the title deeds, the earnest money paid by them at the time of execution of the aforesaid agreement would be returned to them. On March 4, 1959, the appellants' advocate wrote to the respondents' attorneys requesting them to authorise the appellants to approach the highest authorities for securing the necessary permission. On March 14, 1959, the respondents' attorneys wrote to the appellant's attorneys evasively replying that no useful purpose would be served by approaching the higher authorities having regard to the provisions of the Act. Out he respondents' refusal to cooperate with the appellants in the matter of obtaining permission or sanction under the act, appellant 1 made an application to the Collector, Thana District, Thana on April 8, 1959, bringing the above mentioned facts to his notice and requesting him to grant him a certificate of an agriculturist and the necessary permission to purchase the aforesaid plots of land from the respondents as required under Section 63 (1) of the Act read with Rule 36 of the Rules. The said order ran as follows :

No. CB/TNC, 1800 Collector's Office, Thana, Thana, June 6, 1959.##

Read : Application of the applicant Shri G. G. Patel, dated April 8, 1959.

Read : Papers ending with Mamlatdar, Thana's No. TNC. SR. 400 dated May 11, 1959.

ORDER

A certificate is hereby granted to Shri Govindbhai Gordhanbhai Patel residing at House No. 404, Majiwade, Taluka Thana on his application dated April 8, 1959 under sub-clause 'C' of Clause 1 of Rule 36 that the intends to take to the profession of agriculture. After having gone through the merits of the priority list mentioned in clause (C) of sub-section (2) of Section 32P, through the Mamlatdar Thana, permission is hereby granted to Shri Govindbhai Gordhanbhai Patel to purchase the land mentioned below from Shri Ibrahim Ismail Jetpurwala etc. under Section 63 (1) read with Rule 36 under the Bombay Tenancy and Agricultural lands (Amendment) Act, 1955 on the conditions as mentioned under :

Village Sl. No. H. No. Area Majiwade 415 Part 6-5 1/4 289 2(Part) 0-36 1/2 280

1(Part) 0-7 280 4 0-5 ----- 7-13 3/4##

Conditions :

Permission to purchase the land mentioned above is granted subject to the condition that if the applicant Shri G. G. Patel ceases to cultivate the land personally or transfers his interest in the said by sale, gift, exchange, lease or mortgage without the previous sanction of the Collector, the permission given under sub-section (1) of Section 63 shall be deemed to have been cancelled.

Sd/- For Additional Collector, Thana.##

6. On June 25, 1959, the appellants' attorneys addressed a communication to the respondents' attorneys forwarding therewith a copy of the aforesaid order No. CB/TEC/1800 dated June 6, 1959, made by the Additional Collector, Thana granting permission to appellant 1 for the purchase of the aforesaid plots of land and requesting the respondents to let them know as to when their clients would desire to complete the sale and further asking them whether they had got the property transferred to their names in the records of the Collector of Thana, whereupon the respondents' advocate by his letter dated June 30 1959 addressed to the appellants' attorneys replied saying that his clients could not take notice of the aforesaid permission. Thereafter the respondents served a notice on the appellants on August 25, 1959 calling upon them to return the title deeds and to restore possession of the aforesaid property. Thereupon, the appellants advocate wrote to the respondents' attorneys on November 24, 1959 pointing out to them that appellant 1 having obtained the requisite sanction from the Collector, the respondents were bound to complete the sale and to execute the conveyance in favour of appellant 1 and that the aforesaid agreement could not be put an end to in the manner in which the respondents were attempting to do. Not heeding the aforesaid communication of the appellants dated November 24, 1959, the respondents filed a civil suit, being suit 36 of 199 on November 17, 1959 in the Court of the Civil Judge, Senior Division, Thana, for declaration that the aforesaid agreement dated May 1, 1957 was void in law and of no legal effect and for possession of the aforesaid property as also for compensation at the rate of Rs. 150 per mensem for wrongful retention of the property from June, 1957 till delivery of possession thereof. In spite of the stout resistance put up by the appellants, the trial Court decreed the suit in favour of the respondents subject to their paying to the appellants or depositing in Court the earnest money of Rs. 5,000 and the compensation amount of Rs. 882.25, holding inter alia that the aforesaid agreement dated May 16, 1957 which was void ab initio being violative of Section 63 of the Act was discovered by the respondents to be void in June, 1957 when they found that the permission under Section 63 of the Act was necessary. Aggrieved by the judgment and decree of the trial Court, the appellants took the matter in appeal to the High Court of Bombay but their appeal remained unsuccessful. The High Court held that the aforesaid agreement to sell was not void ab initio as Section 63 of the Act itself envisaged sale etc. in favour of a non-agriculturist with the permission of the Collector or an officer authorised by the State Government in that behalf subject to the conditions which may be prescribed and Rule 36 of the Rules prescribed only a certificate by the relevant authority to the effect the intending purchaser intended to adopt the profession of an agriculturist. The High Court, however, opined that the aforesaid agreement became incapable of being performed on December 8, 1958 when the Prant Officer declined permission to the respondents to sell the property to the appellants. Rejecting the connection advanced on behalf of the appellants to the effect that the aforesaid letter dated January 21, 1959 written by the respondents to the appellants did not terminate or rescind the agreement, the High Court further held that the said letter amounted to cancellation of the agreement.

7. Appearing in support of the appeal, Mr. Bhatt, counsel for the appellants, has vehemently urged that the aforesaid order passed by the Prant Officer refusing permission to the respondents to sell the lands did not make the contract impossible of performance; that the said order was merely administrative in character and did not bar the making of the second application by the appellants under Section 63 of the Act; that the said agreement was subsisting on June 25, 1959 when the appellants obtained the requisite permission and the certificate from the Additional Collector, Thana, and that Section 56 of the Indian Contract Act was not attracted in the present case as the contract had not become impossible of performance.

8. Mr. Sachin Chaudhary, counsel for the respondents, has, on the other hand, contended that the agreement became impossible of performance and as such void on December 8, 1958, when the Prant Officer refused to permit the respondents to sell the suit property to the appellants, and that the Prant Officer who had co-ordinate jurisdiction with the Collector under Section 63 of the Act having refused to grant permission to the respondents to sell the suit property by his order dated December 8, 1958, which was of quasi-judicial character and had not been set aside either in appeal or revision, it was not open to the Collector to grant the permission to the appellants.

9. Two questions arise for determination in this Case : (1) whether the order of the Prant Officer dated December 8, 1958, rendered the aforesaid agreement dated May 16, 1957 impossible of performance and as such void under Section 56 of the Indian Contract Act and (2) whether in view of the aforesaid order of refusal by the Prant Officer, Thana dated December 8, 1958, the Additional Collector, Thana, was not competent to grant the sanction and the certificate under Section 63 of the Act and Rule 36 of the Rules. The answer to the first question depends on the construction of the expression 'impossible of performance' occurring in Section 56 of the Indian Contract Act which lays down :

56. An Agreement to do an act impossible in itself is void. -A contract to do an act which after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or, which reasonable diligence, might have known, and which the promise did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise.

10. The meaning of the aforesaid expression 'impossible of performance' as used in the above, quoted section would be clear from the following observations made by Lord Loreburn in *Tamplin Steamship Co. Ltd. v. Anglo-Mexican Petroleum Products Co. Ltd.* (1916) 2 AC 397, 403) which is generally considered to contain a classic and terse exposition of the law relating to frustration :

The parties shall be excused if substantially the whole contract becomes impossible of performance or in other words impracticable by some cause for which neither was responsible.

11. We find ourselves in complete accord with this view which also finds support from the decisions of this Court in *Satyabrata Ghose v. Mugneeram Bangur and Co.* (supra) and *Sushila Devi v. Hari Singh* (1971) 2 SCC 288) where it was held that the performance of a contract becomes impossible if it becomes impracticable from the point of view of the object and the purpose which the parties

had in view and if an untoward event or change of circumstance totally upsets the very foundation upon which the parties rested their bargain, it can very well be promised dot do. It would be advantageous at this stage to refer to the following observations made by Mukherjee, J. in *Satyabrata Ghose v. Mugneeram Bangur and Co.* (supra) which is a leading authority on the subject of frustration :

The first paragraph of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done. The wording of this paragraph is quite general and though the illustrations attached to it are not at all happy, they cannot derogate from the general words used in the enactment. This much is clear that the word "impossible" has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation upon which the parties rested their bargain, it can very well be said that at the time the promisor found it impossible to do the act which he promised to do.

Although various theories have been propounded by the Judges and jurists in England and regarding the judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based is that of impossibility of performance of contract : in fact impossibility and frustration are often used as interchangeable expressions. The changed circumstances, it is said, make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility.

12. In the instant case, there is no term or condition in the agreement in question which stipulates that the agreement would be tested as having become impracticable on the refusal of the Prant Officer to grant the permission under Section 63 of the Act. The parties are, therefore, governed purely by Section 56 of the Contract Act according to which a contract becomes void only if something supervened after its execution which renders it impracticable. On the contention advanced on behalf of the respondents, the question that arises is whether the above quoted order of the Prant Officer, Thana prant, dated December 8, 1958, rendered the contract impracticable. The answer to this question is obviously in negative. The said order, it will be noted, was not of such a catastrophic character as can be said to have struck at the very root of the whole object and purpose for which the parties had entered into the bargain in question or to have rendered the contract impracticable or impossible of performance. A careful perusal of the order would show that it was neither conclusive nor was it passed on the merits of the aforesaid application. The permission was refused by the Prant Officer only on the technical ground the appellants had not obtained the requisite certificate as contemplated by Rule 36(f) of the Rules. It did not in any way prohibit the appellants from making a fresh application to the Collector, Thana prant, who in view of the phraseology of Section 63 of the Act read with clause (f) of rule 36 of the Rules appears to be the only authority competent to grant the requisite certificate. The said order also did not put any fetter on the appellants to apply to the Collector or the Additional Collector for grant of the requisite permission for sale and purchase of the land after obtaining the aforesaid certificate. We, are, therefore clearly of the opinion that no untoward event or change of circumstances supervened to make the agreement factually or legally impossible of performance so as to attract Section 56 of the

Contract Act.

13. The answer to the second question turns on the answer to two subsidiary questions (i) whether in according or declining to accord permission under the proviso to Section 63 (1) of the Act, the Collector or the officer authorised by the State Government in that behalf act in an administrative capacity or a judicial or quasi-judicial capacity and (ii) whether the aforesaid order dated December 8, 1958 passed by the Prant Officer Thana, was one on merits or otherwise, Turning to question (i), it has to be observed that there is nothing in Section 63 of the Act to indicate that in exercising his jurisdiction under the proviso to sub-section (1) of the Section, the Collector or the or the authorised officer has to act judicially or in conformity with the recognised judicial norms. There is also nothing in the aforesaid section of the act requiring the Collector or the authorised officer to determine any question affecting the right of any party. The function which the Collector or the authorised office discharges under the aforesaid proviso is, therefore, an administrative one and not judicial or quasi-judicial. It will be apposite to advert to a few decisions bearing on the matter. In *A. K. Bhaskar v. Advocate General* (AIR 1962 Ker 90 : 1961 Ker LJ 1068), a full Bench of the Kerala High Court held that the decision of the Advocate General granting or refusing to grant the sanction under Section 92 of the Civil Procedure Code was neither judicial nor quasijudicial notwithstanding the fact that he has to form and opinion and come to conclusion one way or the other. To the similar effect are the decisions of Allahabad and Rajasthan High Courts in *Shantanand Saraswati v. Advocate General* (AIR 1955 All 372) and *Shrimali Lal Kasliwal v. Advocate General* (AIR 1955 Raj 166). In *Abdul Kasim v. Md. Dawood* (AIR 1961 Mad 244 : (1961) 2 MLJ 77) it was held the in granting or withholding sanction to file a suit under Section 55(2) of the Muslim Wakfs Act, 1954, the Wakf Board does not act in a judicial or quasi-judicial capacity but only in an administrative capacity. In *the State of Madras v. G. P. Sarathy* (AIR 1953 SC 53 : (1953) 1 LLJ 174) it was held by this Court that the act of the Government in making a reference under Section 10 of the Industrial Disputes Act was merely an administrative act and the fact that the Government before making a reference under Section 10 (1) of the Act had to satisfy itself on the facts and circumstances brought to its notice that an industrial dispute existed did not make the act juridical or quasi-judicial.

14. In regard to question (ii), it may be stated that although the Prant Office may have been exercising concurrent jurisdiction with the Collector, Thana Prant, he did not pass any orders on the merits of the previous application made by the respondents and endorsed by the appellants seeking permission to sell and purchase the suit property. The order, as already stated, was passed by him on the ground that the intending purchaser had not obtained the certificate required under Rule 36 (f) of the Rules. It is well recognised the dismissal of a proceeding by an authority not on merits but merely on account of a formal defect will not attract the applicability of the general principles of res judicata and will not debar the authority exercising concurrent jurisdiction from entertaining the subsequent proceedings for the same relief and passing proper order on merits. (See *Putali Meheti v. Tulja*(ILR 3 Bom 233)) where the rejection of a pervious suit for the plaintiffs omission produce a certificate of the Collector under Section 6 of the Pensions Act was held not to bear a second suit on the same cause of action and *Pethaperumal. v. Murugandi* (18 Mad 466 : 5 MLJ 189) here the rejection of the first suit for recover of money for plaintiffs failure to produce succession certificate was held not to bar a second proceeding for he same relief. We are, therefor of the opinion that the previous order passed by the Prant Officer being merely an administrative order and not having been passed on the merits of the case, it did not, in the absence of a statutory prohibition, impair the power of the Collector to pass the impugned order on the merits of the matter under proviso to Section 63 (1) of the Act on the grant of the requisite certificate under Rule 36 (f) of the Rules.

15. For the foregoing reasons, we allow the appeal, set aside the judgments and decrees passed by the Courts below and dismiss the respondents' suit but in the circumstances of the case without any order as to costs.

</html