

Bai Dosabai

Vs

Mathurdas Govinddas and Others

And

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Vs

Bai Dosabai and Others

Civil Appeal Nos. 1147 of 1978, and 915 of 1980

(O. chinnappa Reddy, R. S. Sarkaria JJ)

21.04.1980

JUDGMENT

CHINNAPPA REDDY, J. –

1. The appellant Bai Dosabai obtained two plots of land in Survey Nos. 59 and 63 of Vastrapur from her father-in-law, Jehangirji, by way of gift. On February 25, 1946, Dosabai executed a deed, styled "a deed of lease", in favour of Indu Prasad Dev Shanker Bhatt, whose successors in interest are the respondents to this appeal. The material terms of the deed were the following : The lease was to be for a period of seven years from January 23, 1946. As a tenant was already in actual possession of the land, the lessee in whose favour the deed was executed was given symbolic possession only. The stipulated rent was Rs. 4357-8-3 per year. Rent for two years was to be paid in advance. In fact it had already been paid on January 23, 1946. The future rent was to be paid in advance every year. If the lessee failed to pay the rent the lessor was to demand the same by giving notice of three months. If the lessee continued to default despite the notice, the lessor was entitled to recover the rent with damages and costs. The rent was to be a first charge on the land as well as the structures that might be constructed on the land, the lessee having been given the right to raise constructions on the land or to use it as an open land. On default of payment of rent even after three months' notice, it was provided by Clause 4 of the deed that the lessor would be further entitled to take steps in the manner provided in Clause 17 of the deed, which we shall presently extract. It was also agreed that the lessor would sell the land to the lessee within the period specified in Clause 15 of the deed, to which we shall refer immediately, for a price of Rs. 1,29,111-8-0 out of which a sum of Rs. 32,277-14-0 being one-fourth of the amount was paid in cash on the very date of the execution of the deed of lease. It was agreed that if the land was acquired under the provisions of the Land Acquisition Act, the lessee should take the entire amount of compensation and pay to the lessor an amount calculated at the rate of Rs. 3-8-0 square yard whether such amount was more or less than the amount of compensation. Clause 15 provided that if at any time after two years and within seven years from the date of execution of the deed the lessee desired to purchase the land for the stipulated price of Rs. 1,29,111-8-0 (calculated at the rate of Rs. 3-8-0, per square yard), the lessor was bound to execute a deed of sale, in favour of the lessee or his nominees. If the lessee, on calculation, was

found to have over paid the rent up to the date of sale he was to get credit for the same. If the lessee got the deed of sale executed within two years, he would have no claim to get credit for any part of the two years' rent paid in advance, the whole of which was to be retained by the lessor. Clause 17 of the deed, the most important clause for our present purpose was as follows :

If the party of the second part fails to get the sale effected within the specified time, after paying the sale price agreed to by the parties of both the parts as mentioned in para 15 herein above, the party of the first part shall after giving three months' notice in writing be lawfully entitled to force the party of the second part to get the sale effected. If in spite of giving the notice, the party of the second part fails to pay the balance of the consideration amount and get sale deed executed, the party of first part shall be entitled to take possession of the said land together with whatever structures the party of the second part may have constructed thereon. After taking such possession, the party of the first part shall be bound to sell the same by public auction at the costs and risk of the party of the second part. If, the amount realised at the public auction mentioned above, is less than the price of the land agreed to in this deed, the party of the first part shall be entitled to recover the deficiency from the (sic party of the) second part, and if the amount realised is more, the party of the first part shall pay the surplus to the party of the second part. In this account Rs. 32,277-14-0 being one-fourth the consideration amount already paid shall be given credit for without interest by one party to other.

2. Thus, a conspectus of the relevant provisions of the deed reveals certain vital terms which may be summarised thus : The lessee was entitled to purchase the land at any time within seven years by paying the stipulated price, a fourth of which was paid in advance. Until the date of sale he was to pay the rent but if the sale took place within two years of the deed, the lessor would not be obliged to return a proportionate part of the advance rent paid by him. If there was default in payment of rent and if the default continued even after three months' notice had been given or if the lessor failed to pay the purchase price and get a sale deed executed in his favour, the lessor was entitled to call upon the lessee, by giving three months' notice, to pay the purchase price and take a deed of sale in his favour. If the lessee failed to comply with the notice the lessor was entitled to take possession of the land along with the structures thereon. After taking possession the lessor was bound to sell the same by public auction at the cost and risk of the lessee. If, at the auction, a price less than the stipulated price was fetched the lessee was bound to make good the deficiency to the lessor. If the price realised was more, the lessor was to pay the surplus to the lessee. The amount of Rs. 32,277-14-0 paid by the lessee to lessor as advance of one-fourth of the consideration was to be given credit to the lessor.

3. Three peculiar features of the agreement were : (1) Though the lessor was entitled to obtain possession of the lands from the lessee on his committing default, she was not entitled to retain possession of the lands but was under an obligation to sell the lands by public auction, (2) the lessor was to be entitled to the originally stipulated sale price of Rs. 1,29,111-8-0 neither more nor less, under any circumstances, and (3) the amount of Rs. 32,277-14-0 which was paid by way of advance of one-fourth of the consideration was never to be forfeited. Nor was it to be refunded to the lessee. It was to be given credit to the lessee even if he had defaulted in any respect.

4. On October 25, 1950 the lessor gave a notice to the lessee (when we use the expression lessee hereafter we include the successors-in-interest of the original lessee also within that term) demanding payment of rent for the year 1950-51 which was payable in advance but was in default. On March 7, 1951, the lessor gave a second notice to the lessee demanding payment of rent due for the years 1950-51, and 1951-52. The lessee was informed that if the rent demanded was not paid a

suit would be instituted to recover possession of the property in terms of Clauses 15 and 17 of the deed and the property would be sold thereafter by public auction at the cost and risk of the lessee. On June 19, 1952, the lessor issued a third notice to the lessee demanding payment of rent for the three years 1950-51, 1951-52 and 1952-53 and also calling upon the lessee to pay the balance of price within three months from the date of receipt of the notice, and get a deed of sale executed and registered in his favour. The lessee was further informed that if he failed to do so, a suit would be instituted to recover possession of the property and to sell it by public auction at the cost and risk of the lessee. Thereafter, on November 21, 1952, the lessee (sic lessor) filed a suit in the Court of Small Causes at Ahmedabad to recover rent for the period from January 23, 1950 to January 22, 1953. The plaint was, however, returned for presentation to the proper court and it was then filed in the Court of the Civil Judge, Senior Division, Ahmedabad. The lessor with the permission of the court, amended the plaint so as to include a claim for possession as well as damages in lieu of rent from January 22, 1953 onwards. The present plaintiff, the successor-in-interest of the original lessee who was defendant 4 in the suit filed a written statement pleading that he was a tenant as defined by the Bombay Tenancy and Agricultural Lands Act, 1948, that his possession could not be disturbed and that the civil court had no jurisdiction to pass a decree for possession or for mesne profits. This plea was based on the circumstance that an amendment which came into force on January 1, 1953 made the provisions of the Bombay Tenancy and Agricultural Lands Act applicable to the suit lands. We may also mention here that the Act ceased to be applicable to the suit lands on August 11, 1958, when the suit lands came to be included within the limits of the Ahmedabad Municipality. To continue the narration, the suit filed by the lessor for possession was decreed on December 30, 1955. It must be mentioned here that the lessee himself had filed a suit for possession against the tenant who was in actual occupation of the lands and obtained possession from him on April 30, 1955. The lessee filed an appeal to the High Court of Bombay which was dismissed on March 19, 1958 and a further appeal to the Supreme Court which was also dismissed on March 8, 1965.

5. In execution of the decree obtained by her, the lessor obtained possession of the lands on December 22, 1960. Immediately on the lessor obtaining possession, the lessee, on January 16, 1961, instituted the suit out of which the present appeal arises seeking (a) specific performance of the agreement dated February 25, 1946 by directing the lessor-defendant to execute a sale deed in his favour after receiving from the plaintiff the balance of sale price of Rs. 96,833-10-0, and, (b) in the alternative, to direct the defendant to sell the land by public auction to retain a sum of Rs. 96,833-10-0 out of the sale price and to pay the excess amount to the plaintiff. The first relief sought was subsequently given up. The lessor who had in the meanwhile entered into an agreement of sale in favour of Patel Singhvi & Co. filed a written statement contesting the suit on various grounds. The City Civil Court dismissed the suit on July 16, 1965, but on appeal by the plaintiff, the judgment of the trial Court was reversed and it was decreed that the suit land should be sold by public auction, or by private treaty if the parties so agreed, in one lot or by consent of the parties in several lots within six months from the date of the decree. Out of the sale price fetched the defendant was first to reimburse herself to extent of the balance of the original purchase price of Rs. 96,833-10-0 with interest at 9 per cent from January 23, 1953 and thereafter the remaining amount was to be equally divided between the plaintiff and the defendant. If the price fetched at the sale was less than Rs. 96,833-10-0, the defendant was to recover the deficit from the plaintiff. The decree in these terms was so granted by the High Court as it was thought that both parties had committed default and that the decree if granted in those terms would meet the ends of justice. On the basis of the English equitable doctrine of 'conversion' which they held applied in India also, the High Court took the view that the deed dated February 25, 1946 had created an equitable interest in the land in favour of the plaintiff. The High Court also expressed the view that neither the provisions of the

Bombay Tenancy Agricultural Lands Act nor the scheme made under the provisions of the Bombay Town planning Act stood in the way of the plaintiff. The defendant has preferred this appeal by special leave of this Court.

6. Shri Vakil learned counsel for the appellant raised several contentions before us. He contended that the English Equitable doctrine of conversion of realty into personalty had no application in India. He submitted that the plaintiff was disentitled to specific performance of any term of agreement as he had done everything that was possible to prevent the defendant from obtaining possession on the lands thereby clearly indicating that he had resiled from and was not ready and willing to perform his part of the agreement. It was further argued that the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, and the provisions of the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienations) Act, 1972, and the Urban Land (Ceiling and Regulation) Act, 1976, were a bar to the sale by public auction of the lands by defendant.

7. We do not wish to go in any detail into the question whether the English Equitable doctrine of conversion of realty into personalty is applicable in India. However, we do wish to say that the English doctrine of conversion of realty into personalty cannot be bodily lifted from its native English soil and transplanted in statute-bound Indian law. But, we have to notice that many of the principles English equity have taken statutory form in India and have been incorporated in occasional provisions of various Indian statutes such as the Indian Trusts Act, the Specific Relief Act, Transfer of Property Act etc. and where a question of interpretation of such equity based statutory provisions arises we will be well justified in seeking aid from the equity source. The concept and creation duality of ownership, legal and equitable, on the execution of an agreement to convey immovable property, as understood in England is alien to Indian Law which recognises one owner i.e. the legal owner : vide, Rambaran Prasad v. Ram Mohit Hazra ((1967) 1 SCR 293 : AIR 1967 SC 744) and Narandas Karsondas v. S. A. Kamtam ((1977) 2 SCR 341 : (1977) 3 SCC 247 : AIR 1977 SC 774). The ultimate paragraph of Section 54 of the Transfer of Property Act, expressly enunciates that a contract for the sale of immovable property does not, of itself, create any interest in or charge on such property. But the ultimate and penultimate paragraphs of Section 40 of the Transfer of Property Act make it clear that such a contract creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property, but which obligation may be enforced against a transferee with notice of the contract or a gratuitous transferee of the property. Thus the equitable ownership in property recognised by equity in England is translated into Indian law as an obligation annexed to the ownership of property, not amounting to an interest in the property, but an obligation which may be enforced against a transferee with notice or a gratuitous transferee.

8. If we now turn to the Indian Trusts Act, we find "trust" defined as,

an obligation annexed to ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner,

and "beneficial interest" defined as the interest of the beneficiary against the trustee as owner of the trust-property. Chapter IX of Trusts Act enumerates in section after section cases where obligations in the nature of trust are created. Section 94 finally provides :

In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein, he must

hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

9. We may now examine some of the provisions of the Specific Relief Act, 1877, which though repealed and replaced by Act 47 of 1963, is the statute with which we are concerned. "Trust" was defined in Section 3 of the 1877 Act as having "same meaning as in Section 3 of the Indian Trusts Act" and as "including an obligation in the nature of a trust within the meaning of Chapter IX of that Act". Section 12(a) of the Act of 1877 provided :

Except as otherwise provided in this Act, specific performance of contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

The other clauses of Section 12 and Sections 13 to 18 enumerated the other contracts which might be specifically enforced. Section 21 specified when contracts were not specifically enforceable. Section 16 is of some relevance. It said :

When part of a contract which, taken by itself can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part.

10. We may now consider the deed dated February 25, 1946, the important and relevant terms of which we have either summarised or extracted earlier. We have also pointedly mentioned some peculiar features of the deed. From the terms of the deed we gather that the right of the lessor, basically is to get the full sale price of Rs. 1,29,111-8-0 either from the lessee or by selling the property by public auction if the lessee does not himself want to buy, the lessee however, making up any deficit. The lessor is under an obligation to sell the land to the lessee if the latter so desires within a period of seven years and pays the purchase price and, if he does not so desire, to sell the land by public auction and to recoup the balance of the stipulated price. The lessor is under an obligation to pay the excess price, if any, realised by the sale by public auction to the lessee. To sell, the property by public auction is thus both a right and an obligation. The obligation of the lessee is to pay one-fourth of the stipulated price in advance and to pay the balance if he desires to purchase the property or to pay the deficit, if any, if the lessor is obliged to sell the property consequent on his failure to purchase. His right is to obtain a sale deed by paying the balance price or to get any excess amount realised at the public auction. Whatever happens, he is not entitled to get a refund of the advance of one-fourth of the purchase price paid by him, and whatever happens, the lessor is bound to sell the property either to the lessee or by public auction.

11. We do not have any doubt, on a consideration of the terms of the deed and the relevant statutory provisions earlier referred, that the obligation of the lessor to sell the land by public auction and pay the excess price to the lessee is an obligation annexed to the ownership of the property, not amounting to an interest in the property, that it is an obligation in the nature of a trust, and, therefore, an obligation which may be specifically enforced.

12. It was contended that the plaintiff could be compensated in terms of money and therefore, the contract should not be specifically enforced. It is obvious from the very nature and the terms of the contract and the facts and circumstances of the case that compensation or damages is not determinable. In fact the defendant, apart from not raising an appropriate plea, did not offer any

evidence to prove what would be suitable compensation.

13. It was argued that the defendant had throughout committed default first by not paying the balance of the purchase price and taking the sale deed in his favour and next by resisting delivery of possession to the plaintiff. It was submitted that the defendant was thus never ready and willing to perform his obligation under the contract. We find no force in these submissions. As already observed by us the defendant had the option to purchase the property if he so desired but he was under no obligation to do so. The contract itself provided for the eventuality of the defendant ultimately not desiring to purchase the property himself. It cannot therefore, be said that the defendant committed any default in not paying the balance of the purchase price and taking a deed of sale in his own favour. Regarding resistance to delivery of possession, it is true that he claimed the benefits given to a tenant under the Bombay Tenancy and Agricultural Lands Act and resisted giving possession to the plaintiff. If under a bona fide mistaken belief that the statute had stepped in to give him higher rights than under the contract the defendant refused to deliver possession to the plaintiff until it was found by the court that he had no such higher rights, the defendant cannot later be denied even the rights under the contract on the ground that he had claimed higher statutory rights. We do not subscribe to the proposition that a person claiming the benefits of a beneficent social legislation should be denied his contractual rights if he is found not to be entitled to the legislative benefits.

14. It was said that the contract became void as soon as the Bombay Tenancy and Agricultural Lands Act, became applicable to the suit lands and that it could not be revived after the Act ceased to apply to the suit lands. We do not see any force in this submission either. The defendant became entitled to demand that the property should be sold by public auction only when the plaintiff obtained possession and since on the date when the plaintiff obtained possession of the property the Act was not applicable to the lands in question, we see no impediment in the defendant seeking to enforce the contract. Similarly the Gujarat Vacant Lands in Urban Areas (Prohibition of Alienations) Act, 1972, was in force for a limited period of one year only. While it prohibited alienation of land during that period it did not render the contract which was earlier in point of time void so as to render it incapable of being performed after the Act itself expired.

15. Shri Vakil finally submitted that the contract had become impossible of performance as a result of the enactment of the Urban Land (Ceiling and Regulation) Act, 1976. It is true that Section 5(3) of the Act prohibits every person holding vacant land in excess of the ceiling limit before the commencement of the Act from transferring such land or part thereof by way of sale, mortgage, gift, lease or otherwise until he has furnished a statement as prescribed by the Act and a notification has been published after the prescribed procedure has been gone through. The Act came into force subsequent to the passing of the decree by the High Court. The question for our consideration is what is the effect of the Urban Land (Ceiling and Regulation) Act, 1976 on the decree passed by the High Court. While it is true that events and changes in the law occurring during the pendency of an appeal require to be taken into consideration in order to do complete justice between parties and so that a futile decree may not be passed, it is also right and necessary that the decree should be so moulded as to accord with the changed statutory situation. The right obtained by a party under a decree cannot be allowed to be defeated by delay in the disposal of the appeal against the decree, if it is possible to save the decree by moulding it to conform to the statutes subsequently coming into force. These propositions emerge from the decisions of the Court in *Pasupuleti Venkateswarlu v. The Motor & General Traders* (AIR 1975 SC 1409 : (1975) 1 SCC 770 : (1975) 3 SCR 958), and *Rameshwar v. Jot Ram* ((1976) 1 SCR 847 : (1976) 1 SCC 194). The question, therefore, is how the decree passed by the High Court can be saved and given effect. Section 21 of the Urban Land

(Ceiling and Regulation) Act, 1976, provides that where a person holds any vacant land in excess of the ceiling limit and such person declares within the prescribed time and in the prescribed manner before the competent authority that the land is to be utilised for the construction of dwelling units, for accommodation of the weaker section of the society in accordance with any scheme approved by the specified authority, then the competent authority may after due enquiry declare such land not to be excess land and permit such person to continue to hold the land for the said purpose subject to the prescribed terms and conditions. The Government of Gujarat by various orders has prescribed the terms and conditions subject to which exemption will be granted under Section 21. The last circular dated October 25, 1979 of the government also specifies that the value of the land for the purpose of Section 21 and the scheme should not exceed Rs. 50 per square meter. The last date for submitting a scheme under the rules made by the Government of Gujarat was January 31, 1980. Realising that all would be lost and none would be the gainer if no scheme was submitted before January 31, 1980, the respondent filed Civil Miscellaneous Petition No. 183 of 1980 for the appointment of a Receiver of the suit land "with power to apply for seeking exemption from the operation of the said Act under Section 20 and/or Section 21 of the Act, by taking help of an organiser and/or builder to build residential premises for weaker sections of the Society, and/or by joining with the cooperative society in applying for an exemption under the said Act, and in the process after getting necessary permission, allow buildings to be built, and then permission to sell the tenements, so built either collectively and/or individually and/or to a cooperative society and in the process realize price of suit land at a price not lesser than Rs. 50 per meter and to invest the same when realized at prevailing bank rate, in Fixed Deposit, in a nationalised bank". By our order dated January 18, 1980, we appointed Shri R. L. Dave, Additional Registrar of the Gujarat High Court as Receiver and charged him with the duty of submitting a building scheme and other necessary documents to the competent authority under Section 21 of the Urban Land (Ceiling and Regulation) Act, before January 31, 1980. He was directed to do so in consultation with the parties or their counsel. The order was made without prejudice to the application said to have been made by the appellant under Section 20 of the Act. As directed by us the Receiver submitted a scheme to the competent authority. He also entered into an agreement with a builder as the scheme would not be otherwise received by the competent authority. Various objections have been filed before us by the defendant and some other parties. We do not desire to adjudicate upon the objections raised by the plaintiff and other parties. We, however, affirm the action taken by the Receiver in submitting a scheme to the competent authority. All further directions in this matter may be obtained from the trial Court to whom all the relevant records will be forwarded. We think that the decree of the High Court should be modified in the following manner in order to bring it in conformity with the provisions of the Urban land (Ceiling and Regulation) Act, 1976. In the place of the direction to the lessor to sell the land by public auction or by private treaty and to reimburse himself from the sale price the sum of Rs. 96,833-10-0 with interest at 9 per cent from January 23, 1953 and the balance to be equally divided between the lessor and the lessee, a direction will issue for the appointment of a Receiver to take all necessary steps to seek exemption from the operation of the act, under Section 20 and/or Section 21 of the Act by taking the help of an organiser and/or builder to build residential premises for weaker sections of the society, and/or by joining with the cooperative society in applying for an exemption under the said Act and in the process after getting necessary permission, allow buildings to be built, and then permission to sell the tenements, so built either collectively and/or individually and/or to a cooperative society and in the process realize price of suit land at a price not lesser than Rs. 50 per meter and to invest the same when realized at prevailing bank rate, in fixed deposit, in a nationalised bank. The receiver appointed by us in C.M.P. 183 of 1980 by us will continue to act as Receiver under the decree. Out of the sum realised after deducting the expenses involved, a sum of Rs. 96,833-10-0 together with interest at 9 per cent per annum from

January 23, 1953 up to the date of payment, will be paid in the first instance to the defendant and the balance will be divided equally between the plaintiff and defendant. If the amount realised by the Receiver after deducting the expenses falls short of sum of Rs. 96,833-10-0 with interest at 9 per cent per annum from January 23, 1953, the plaintiff shall make good the amount to the defendant. The appeal is dismissed but the decree is modified as indicated above.

16. Special Leave Petition 4023 of 1980 filed by the defendant is allowed, leave granted and the appeal disposed of in the same terms as Civil Appeal 1147 of 1978. Delay is condoned. There will be no order regarding costs in both the appeals.

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