MYSORE HIGH COURT

Neminath Appayya Hanamannanavar

Vs

Jamboorao Satappa Kocheri

Appeal No. 257 of 1960

(A.R. Somnath Iyer and D.M. Chandrasekhar, JJ.)

20.08.1964

JUDGMENT

Somnath Iyer, J.

1. An unsuccessful plaintiff who sued for specific performance of an agreement of sale executed by the defendant in his favor on July 20, 1958, under which he agreed to convey to the plaintiff two lands bearing survey Nos. 5 and 12 in the village of Pattihal in the District of Belgaum, measuring 41 acres and 26 guntas in the aggregate for a sum of ₹ 32,000 is the appellant before us. That agreement is Exhibit 32 which recited that out of the consideration for the sale, a sum of ₹ 2,000 was set off against an outstanding liability of the defendant on accounts, and that a postdated cheque for ₹ 5,000 bearing the date September 1, 1958, was also delivered by the plaintiff to the defendant on the date of the agreement. The further recital was that the balance of ₹ 25,000 should be paid at the time of registration. The date fixed for performance was March 9, 1959.

2. The Plaintiff stated that he issued a notice to the Defendant on February 26, 1959 demanding performance but that any such notice was received by the Defendant was denied. However that may be, the suit out of which this appeal arises was brought on March 10, 1959, in which the plaintiff sought a decree for specific performance and possession, and, alternatively, damages of ₹ 10,000.

3. The Defendant resisted the suit on at least two grounds. The first was that there was an abandonment of the agreement by the plaintiff in consequence of the realization that the execution of the sale deed would transgress the provisions of the Bombay Tenancy and Agricultural Lands Act. The Second was that the agreement was a void agreement for the reason that its performance would result in a transgression of the provisions of that Act.

4. The first plea that there was an abandonment of the agreement was repelled by the Civil Judge. But on the second, the Civil Judge pronounced in favor of the Defendant taking the view that the

suit agreement was void.

5. The Plaintiff appeals.

6. While on behalf of the plaintiff, the argument advanced by Mr. Raja Iyer was that the Civil Judge was in error in finding that the suit agreement was void, Mr. V.L. Narasimhamurthy for the Defendant challenged the correctness of the finding that there was no abandonment of the suit agreement. He advanced the further argument that the Civil Judge should have recorded a finding on the first issue that the plaintiff was never ready and willing to perform is part of the agreement.

7. It would be convenient in the first instance to consider the argument directed against the correctness of the finding that there was no abandonment of the agreement of sale. In paragraph 6 of his written statement, what was contended by the defendant was that the suit agreement was cancelled in the presence of a certain Shivaji for the reason that the Plaintiff realised that a sale deed pursuant to the agreement could not be executed as the execution of that sale deed would offend against the provisions of the Bombay Tenancy and Agricultural Lands Act. It was also stated by the Defendant that the agreement was returned to the custody of the defendant by Shivaji who was the mediator between the Plaintiff and the Defendant and that the postdated cheque which was given by the plaintiff to the Defendant was also similarly returned to the plaintiff.

8. The Civil Judge was of the view that that story told by the defendant could not be believed. The main reason assigned by the Civil Judge for reaching that conclusion was that Shivaji did not support the case for the plaintiff (sic) when he was examined on the earlier occasion soon after the summons had been issued to the defendant. It is seen from the record that the Civil Judge adopted a somewhat unusual procedure in recording the evidence in this case. At a certain stage-along with the issue of summons to the defendants, the Civil Judge issued summons to Shivaji to appear before him and his evidence was record-on August 3, 1959, in the absence of the defendant. What was stated by Shivaji on that occasion was that the suit agreement had been misplaced by him and that he did not bring that agreement since there was a breach of the agreement between the parties. Shivaji was then again put into the box on December 11, 1959, and, on that date, he was examined by the Civil Judge who elicited from Shivaji that he obtained two adjournments after he had been previously examined for the production of the document. The Defendant himself gave evidence supporting his own story that there was an abandonment of the agreement by the plaintiff and that Exhibit 32 had been returned to him by Shivaji. The Plaintiff in the course of his evidence denied the truth of that story.

9. It was on these materials that the Civil Judge felt persuaded to record a finding that the story of abandonment was not true. But Mr. Narasimhamurthy has urged that the Civil Judge was not right in placing any dependence at all on the evidence given by Shivaji at a stage when the defendant had not appeared before the Court and therefore had no opportunity to test the evidence given by Shivaji by cross-examination. It is not very clear, however, whether on the second occasion on which Shivaji was examined, the defendant offered to cross-examine him or had the opportunity to do so. It may be that for these reasons, Mr. Narasimhamurthy is right in asking us to exclude from consideration anything that Shivaji stated either on the first occasion or on the second.

10. But the question still remains whether there was an abandonment of the agreement by the plaintiff in manner explained by the defendant. What the Defendant stated in his written statement was that the plaintiff who realized the impossibility of getting a sale deed executed in his favor without transgressing the provisions of the Bombay Tenancy and Agricultural Lands Act, informed the defendant that he would not purchase his property and therefore returned the suit agreement to the defendant who, in his turn, returned to the plaintiff the post dated cheque which had admittedly been received. But, in his evidence, the defendant told a story somewhat at variance with that which he had stated in his written statement. What he stated was that the plaintiff had committed a breach of the agreement. That is what he stated on November 25, 1959, and the evidence given by him reads :-

> "I have produced the suit agreement Exhibit 32. It came into my hands on breach of the contract. It was the plaintiff that committed the breach."

It is no doubt true that when he gave evidence again on February 10, 1960, he stated that the plaintiff informed him that under the provisions of the Bombay Tenancy and Agricultural Lands Act, the purchase of the suit property would make his holding exceed the ceiling area and so did not want to purchase it and that the defendant thereupon returned the cheque to the plaintiff and that the suit agreement was also returned to the defendant.

11. Mr. Narasimhamurthy placed strong reliance upon the fact that the defendant was the person who produced the suit agreement before the Court and that the production of that document to a large extent probabilised the story of the defendant.

12. I am not disposed to accede to the contention that we should dissent from the view taken by the Civil Judge that there was no abandonment. The burden of establishing that abandonment was heavily on the defendant and that burden to my mind was not discharged at all. If according to the story of the defendant, Shivaji, was the person who having the custody of the agreement and that is also the evidence given by the plaintiff it was the duty of the defendant to call Shivaji to give evidence to prove that fact, and, although Shivaji might have been examined on the two occasions to which I have referred, by the employment of a somewhat unusual procedure and even if it could be said that the defendant had no opportunity to cross-examine Shivaji, why Shivaji was not examined by the Defendant has not been explained to us. There is no other evidence in the case save that given by the defendant himself that there was a return of the suit agreement to him in the circumstances stated by the defendant. The Defendant himself, as I have mentioned, made contradictory statements about it. The Plaintiff denied that the suit agreement was returned to the defendant by reason of the realisation by him of the impossibility of implementing the suit agreement except by the transgression of the provisions of the Bombay Tenancy and Agricultural Lands Act. The Civil Judge believed the evidence of the plaintiff and was of the view that the defendant's evidence was not trust worthy, I see no reason to take a different view. In my opinion, we must concur in the finding recorded by the Civil Judge that there was no abandonment of the suit agreement.

13. Mr. Narasimhamurthy, however, contended that even so, the Civil Judge should have recorded a finding on the first issue as to the readiness and willingness on the part of the plaintiff to implement his promise under the suit agreement and that there was good and trustworthy evidence given by D.W. 2 Devappa which demolished the plaintiff's assertion that be was always

ready and willing to perform his own promise to purchase the suit lands.

14. I should have mentioned that the first issue on which the Civil Judge recorded a finding that there was no abandonment of the suit agreement by the plaintiff, did not really present the question whether there was such abandonment. That issue merely posed the question whether the plaintiff was ready and willing to abide by the suit agreement. The Civil Judge appears to have thought that the plea of abandonment raised by the defendant was also involved in the first issue and so it was that he recorded his finding on abandonment on the first issue.

15. However that may be, Mr. Narasimhamurthy is, in my opinion, right in asking us to say that the Civil Judge should have also recorded a further finding as to the readiness and willingness on the part of the plaintiff to perform his promise.

16. Mr. Narasimhamurthy's criticism was that the Civil Judge overlooked the evidence of D.W. 2, and, this criticism is, of course, without an answer since in the Judgment of the Civil Judge there is no allusion at all to the evidence of this witness. D.W. 2 Devappa gave evidence that he was an attestor of the suit agreement Exhibit-32 and that thereafter the Plaintiff resiled from the agreement stating that the purchase by him would make the area of the land held by him exceed the ceiling limit and that therefore he did not wish to make the purchase. The witness added that Shivaji thereupon returned Exhibit 32 to the defendant and that the defendant returned the cheque to the plaintiff and that he was present on that occasion. The one reason why we should, in my opinion, not believe the testimony of this witness is that according to his story, tie was present when all these things according to him, happened, on the invitation of the plaintiff. But, when the plaintiff himself was in the box, no suggestion was made to him that this witness was present when the suit agreement was stated to have been returned to the Defendant by Shivaji. Even in paragraph 6 of the written statement in which Shivaji's name was mentioned as the person in whose presence the suit agreement was cancelled, it was not stated that Devappa was present on that occasion. It appears to me that the story told by D.W. 2 Devappa and that told by the Defendant that in the presence of Devappa there was a return of the suit agreement to the plaintiff and the return of the cheque by the defendant to the plaintiff, are all afterthoughts. I am not disposed to pronounce against the plaintiff on the first issue or even on the question whether there was an abandonment of the suit agreement by him on, the extremely in sufficient and untrustworthy testimony given by D.W. 2.

17. What should next be considered is the correctness of the finding that the agreement of sale was void. The plea of the defendant on this matter was in paragraph 7 of the written statement which reads :

> "As the suit agreement is against the provisions of the Tenancy Act, neither the plaintiff nor the defendant is liable for completing it. The Plaintiff cannot enforce the same against the defendant".

Although the plea was worded in this obscure way, the Civil Judge framed the issue so as to present the question more clearly. That issue was the second issue which reads :

> "Does the defendant prove that the plaintiff cannot ask for specific performance of the

> agreement because if allowed to purchase the lands, the area in the ownership or the plaintiff would exceed the ceiling area ?"

It is however true, as Mr. Narasimhamurthy points out in the context of the plea of abandonment, the defendant did state that if the plaintiff had purchased the suit lands, the total area in his possession would have exceeded the ceiling area permitted by the Bombay Tenancy and Agricultural Lands Act and that the fact that he said so is perhaps the reason why the Civil Judge found it possible to frame the second issue in this manner.

18. The finding of the Civil Judge in effect is that the performance of the suit agreement was impossible without the transgression of the provisions of the Bombay Tenancy and Agricultural Lands Act. His finding was that "the suit contract had been void from its inception." This conclusion was influenced in the main by a purshis Exhibit 148 produced by the Defendant and another purshis produced by the Plaintiff traversing that produced by the Defendant, Exhibit 147.

19. Although no very clear evidence was produced by the defendant that in consequence of the acquisition which the plaintiff proposed to make under the suit agreement, the total or aggregate area of land which would be in his possession or which would be held by him would exceed the ceiling area prescribed by the Bombay Tenancy and Agricultural Lands Act, the Civil Judge formed his conclusion that there would be such excess acquisition, on the basis of these two purshis produced at an inordinately late stage of the suit. The production of evidence in the case was completed by March 3, 1960 on which date the plaintiff made an application for the amendment of his plaint to which I shall advert in due course. That application was dismissed and the case was posted to April 10, 1960, for pronouncement of judgment. But, on that date the Civil Judge directed the parties to produce information about the area of land already in the possession of the plaintiff. On that date, the defendant produced his purshis Exhibit 148 and the plaintiff produced another, Exhibit 147. According to these two purshis what became clear was that both on the date of the suit and on the date of their production, the total area of which the plaintiff would be in possession if the suit lands were also delivered to him, would exceed the ceiling area prescribed by the Bombay Tenancy and Agricultural Lands Act. That in my opinion, is what we should say although an argument was advanced on behalf of the plaintiff before us that there was no such admission in the purshis Exhibit 147 produced by the plaintiff. That purshis makes it clear that the admissions made by the plaintiff in that purshis would have the effect which I have mentioned.

20. It was on the basis of these materials that the Civil Judge found it possible to say that if in addition to the land already in the possession of the plaintiff, he also acquired possession of the suit lands on his success in his suit, the total area of land in his possession would far exceed the ceiling area permitted by the Bombay Tenancy and Agricultural Lands Act and that, for that reason, the suit agreement was liable to be denounced as void.

21. It is the correctness of this postulate that submits itself to our investigation.

22. I shall now refer to the relevant statutory provisions. They are Sections 5, 7, 34, 35, 36, 63 and 64 of the Bombay Tenancy and Agricultural Lands Act and the 23rd Section of the Contract Act.

23. Section 5 of the Bombay Tenancy and Agricultural Lands Act states that for the purposes of the Act, the ceiling area referred to in the Act shall be either 48 acres of Jirayat land of 24 acres of seasonally irrigated land or paddy or rice land, or 12 acres of perennially irrigated land. Sub-Section (2) of this Section prescribes a formula for equivalence.

24. Section 7 confers power on the Government to vary the ceiling area.

25. The twin Sections which are the really important Sections are Sections 34 and 35 which read :

> "34. Maximum land that can be held by a person :-
> (1) Subject to the provisions of Section 35, it shall not be lawful, with effect from the appointed day, for any person to hold, whether as owner or tenant or partly as owner and partly as tenant, land in excess of the ceiling area.
> * * * * *"
> "35. Provision of Section 34 to apply to-land, coming into possession of person on gift, etc :-

Where on account of gift, purchase, assignment, lease, surrender or any other kind of transfer inter vivos or by bequest except in favor of recognized heirs, any land comes into the possession of any person and in consequence thereof, the total land held by such person exceeds the area, which he is authorized to hold under Section 34, the acquisition of such excess land shall be invalid.

> * * * * *"

26. The 36th Section which is in the nature of an exception to the 35th Section authorizes, if permitted the retention of a small area called a fragment even if it be in excess of the ceiling area.
27. Section 63 prohibits the sale of a land in favor of one who is not an agriculturist or in favor of an Agriculturist who does not cultivate less than the ceiling area. The proviso to that Section, however, authorizes the Collector to permit an acquisition prohibited by the Section.

28. Section 64 otherwise regulates sales of agricultural lands and creates a right of pre-emption in favor of the tenant occupying it. Sub-Section (8) of that Section invalidates a sale made in contravention of the provisions of that Section.

29. In his discussion, the Civil Judge based his conclusion entirely upon Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act. It is not disputed that the lands with which we are concerned in this appeal are jirayat lands referred to in Section 5(1) of the Bombay Tenancy and Agricultural Lands Act. According to the plaintiffs purshis Exhibit 147, he was already in possession on the date of the suit of 11 acres and 1 gunta of jirayat land and in possession of only 1 acre of such land on the date on which he produced it. The defendant asserted in his purshis Exhibit 148 that if the suit lands were also acquired by the Plaintiff, he would be in possession of 16 acres and 38 guntas of jirayat land in excess of the ceiling area.

30. Although there was no discussion by the Civil Judge of the particulars of the information furnished by the Plaintiff and the Defendant in their purshises, the Civil Judge thought that even according to the plaintiff s own purshis, there would be a contravention of Section 35 of the Bombay Tenancy and Agricultural Lands Act if he got possession of the suit lands also. So it was that he pointed out that the acquisition of the suit lands in that way would transgress the provisions of Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act, and that the Agreement was therefore, void under Section 23 of the Contract Act.

31. The first criticism made by Mr. Baja Iyer of this view was that it was overlooked by the Civil Judge that there was no evidence that on the date of the suit agreement, the plaintiff was in possession of any extent of land at all or that even if he was holding some land on that date, the area of that land if added to the area of the suit lands would exceed 48 acres of jirayat land. That the material date for the determination of the illegality or otherwise of the suit agreement was the date of the agreement and not either the date of the institution of the suit or the date on which both the parties produced their purshis and that the conclusion based entirely upon the information made available on April 1, 1960, rested upon irrelevant data and therefore could not be supported, was the argument maintained before us. It was pressed on us that if the agreement of sale was a good agreement when it was made, no subsequent possibility can make it void. It was also said that the requisition for material as to the area of land in the possession of the plaintiff in manner in which it was made by the Civil Judge was made at a remarkably late stage and that it was the duty of the defendant on whom lay the burden of establishing the illegality of the agreement to produce before the adjournment of the case for pronouncement of judgment, materials supporting his plea.

32. As to the criticism of the procedure adopted by the Civil Judge, it will be observed that the propriety of what he did becomes immaterial by reason of the plaintiff's admissions in his purshis Exhibit 147, and surely no complaint can be made as to the employment of that admission by the Civil Judge for the conclusion reached by him, whatever may be the stage at which that admission was secured. But the real question is whether the agreement of sale was void.

33. Section 23 of the Contract Act which influenced the Civil Judge's view that it was, reads :

> "23. What considerations and objects are lawful, and what not :-

The consideration or object of an agreement is lawful, unless, - it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or

> ** ** **"

34. It was not disputed in this Court that the effect of the Civil Judge's finding was that the agreement invited the reproach that if permitted it would defeat the provisions of Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act and was therefore void under the third paragraph of Section 23 of the Contract Act. That, in my opinion, is how we should understand the finding of the Civil Judge although his reasoning in this context is enveloped in obscurity.

35. While it was maintained for the plaintiff that what is relevant for the purpose of Section 23 of

the Contract Act is the area of land in the possession of the plaintiff on the date of the agreement of sale and no other, it was asserted for the defendant that a future acquisition in excess of that permitted by the Bombay Tenancy and Agricultural Lands Act made possible by the decree sought by the plaintiff, brings the agreement into the 23rd Section of the Contract Act and makes it void. It was also maintained by Mr. Narasimhamurthy that although the Civil Judge did not say so, it was clear that the agreement was void for other reason. We were asked to say that the very purpose of the agreement was the circumvention of the provisions of the Bombay Tenancy and Agricultural Lands Act and the acquisition of property in excess of the ceiling area. It was further urged that the impugned agreement was either expressly or impliedly forbidden by that Act and therefore also fell within the second paragraph of the 23rd Section of the Contract Act which invalidates agreements forbidden by law. So, the question is whether as argued for the plaintiff, the agreement was a good agreement when it was made and was therefore not void or whether as urged for the defendant, it was an illegal agreement whose object was the commission of an illegal act prohibited by the Bombay Tenancy and Agricultural Lands Act or the agreement of sale was forbidden expressly or impliedly by that Act.
36. There is no evidence as to the area of land in the possession of the plaintiff on the date of the suit agreement. There is also no evidence that the purpose of the agreement was the acquisition of property in excess of the ceiling area in disobedience to the provisions of the Bombay Tenancy and Agricultural Lands Act. It was stated by Mr. Narasimhamurthy, that the statutory provisions which according to his argument were intended to be disobeyed or which prohibited the agreement of sale or which would in any event be defeated were Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act.
We cannot accede to the argument that there is anything in the plaint from which such intention could be deduced. The averment in the defendant's written statement that there was a subsequent discovery made by the Plaintiff that the acquisition of the suit lands would transgress the provisions of the Bombay Tenancy and Agricultural Lands Act in consequence of which there was an abandonment of the agreement is wholly destructive of the argument directed against the purpose or object of the agreement of sale. We must, in my opinion, negative the submission that the aim of the agreement even when it was made was an illegal acquisition and that it was, therefore, void. Indeed, the Civil Judge recorded no finding to the contrary.

37. What should next be considered is the postulate that the agreement was expressly or impliedly forbidden by Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act and was therefore void. We are not shown any thing in those two Sections which can support this submission. The 34th Section prohibits a person from holding land with effect from June 15, 1955, which is referred to in that Section as the appointed day, land in excess of the ceiling area. That is what Sub-Section (1) states. Sub-Section (2) excepts ownership in excess of the .ceiling area under personal cultivation out of Sub-Section (1). But what is of importance is that Section 34 is made subject to Section 35 which regulates acquisitions by any of the processes referred to therein in consequence of which possession of land in excess of the ceiling area is acquired. Section 36 is in the nature of an exception to Section 35, and, under its provisions if the excess acquisition referred to in Section 35 is in the nature of a "fragment" as defined by Section 2(6B) of the Act, the retention of that fragment may be permitted by the Collector.

38. It was said that the language of Sections 34 and 35 was similar to that of Sections 63 and 64 and that although in terms neither Section 34 nor Section 35 prohibited an agreement of sale in consequence of which the holding of land or acquisition of possession thereof of an area in

excess of the ceiling area may become possible, there was an implied prohibition against such agreement of sale.

39. I find nothing either in Section 34 or in Section 35 which expressly or impliedly prohibits any such agreement of sale. While Section 34 prohibits a person from holding land in excess of the ceiling area, what Section 35 in effect forbids is possession in excess of the ceiling area. What it declares is that where the area of land in the possession of a person exceeds the ceiling area in consequence of an acquisition made by any of the modes or processes referred to by it, the excess acquisition is an invalid acquisition. The nullification of only the excess acquisition which is the limited aim of the Section does not fit into the theory that it prohibits an agreement of sale whose implementation might assist the purchaser to be in possession of land exceeding the ceiling area. Section 2(21) of the Bombay Tenancy and Agricultural Lands Act incorporates the definitions in the Bombay Land Revenue Code of words and expressions not defined by the Bombay Tenancy and Agricultural Lands Act. The word 'hold' occurring in Section 34(1) of the Bombay Tenancy and Agricultural Lands Act is not defined by that Act and must therefore receive the meaning given to it by the Bombay Land Revenue Code, and Section 3(11) of the latter enactment which defines the words "to hold land" makes it clear that the word "hold" occurring in Section 34 of the Bombay Tenancy and Agricultural Lands Act has reference to the act of possession.

40. If the 34th Section prohibits the holding of land in excess of the ceiling area in that sense, and, the 35th Section forbids the possession at any point of time of an area in excess of the ceiling area and incorporates an ancillary provision that if such possession is attributable to any of the processes specified in that Section, what stands invalidated is only the excess acquisition, the suggested construction that in these two Sections there is an express or implied prohibition against an agreement of sale such as the one with which we are concerned or for that matter any agreement of sale, is to my mind difficult.

41. Far from supporting that construction, Sections 63 and 64 seem to negative it. While the 63rd Section expressly prohibits a sale to a person who is not an agriculturist or who does not cultivate land measuring less than the ceiling area and expressly declares that such sales shall not be valid, Sub-Section (8) of Section 64 states in terms that a sale made in contravention of that Section shall be invalid. Far from there being any similarity between the language of these two sections and the language of Sections 34 and 35, there is a striking contrariety. Section 34 does not concern itself with any acquisition or transfer by any process and Section 35 invalidates that part of the acquisition which exceeds the ceiling area.

42. It is not also argued in this court that the prohibition under Sections 63 and 64 has any relevance to the question before us. It is not disputed that the plaintiff is and was an agriculturist and there is no evidence that on the date of the agreement of sale or at any other relevant point of time he was cultivating not less than the ceiling area.

43. Mr. Narasimhamurthy is therefore not on firm ground when he depends upon any express or implied prohibition against the agreement of sale.

44. So, what remains to be considered is the ground on which the decision of the Civil Judge really depended. The Civil Judge thought that the agreement assists an illegal acquisition and

would therefore transgress the provisions of Sections 34 and 35 of the Bombay Tenancy and Agricultural Lands Act and the question is whether this view can be supported.

45. If nothing else could be said about this matter, what follows from the plaintiffs purshis Exhibit 147 is that he was, on the date of the suit, in possession of 11 acres and 1 gunta of jirayat land. If to this area, the area of the suit lands which measure 41 acres and 26 guntas of jirayat land is added, the plaintiff would be in possession of 52 acres and 27 guntas of jirayat land which, of course, would exceed the ceiling area.

46. But it was pressed upon us by Mr. Raja Iyer that the process adopted by the Civil Judge for deducting illegality was faulty. He urged that the Civil Judge overlooked the provision in Section 34 which made that Section subject to the provisions of Section 35 and that what was material for the purpose of Section 35 was not whether the plaintiff would be entitled in consequence of the decree which he sought, to an area of land exceeding the ceiling area but whether he "comes into" possession of the larger area in consequence of that decree.

47. Section 34 which prohibits the holding of land in excess of the ceiling area has no relevance to the case before us since the plaintiff admittedly does not yet hold any such excess area. So, what is really material is the prohibition contained in Section 35. For the Plaintiff, we were asked to say that the 35th Section far from imposing any restriction on the acquisition or transfer of land in excess of the ceiling area, by necessary implication authorizes such acquisition, and, sustenance for this submission was derived from that part of the Section which invalidated in such a case only the excess acquisition and not the whole of it. It was, therefore, pressed on us that even if the plaintiff obtained delivery of possession of the entire area of the suit lands and he "comes into" possession of 52 acres and 27 guntas of jirayat land, the acquisition of only 4 acres and 27 guntas would become invalid and not the entire acquisition. That the agreement of sale under which a substantial part of the acquisition would, even under the, provisions of Section 35 be a good acquisition, cannot be denounced void, was the argument preferred.

48. There is no evidence that the plaintiff was the holder of a land in excess of the ceiling area on the date of the agreement; nor was he holding such excess area of land on the date of the suit or even on the date of Exhibits 147 or 148 as those two purshis themselves disclose. So, the 34th Section can have no relevance.

49. That the statutory provisions relevant 1966 for the purpose of this appeal are only those contained in Section 35 of the Bombay Tenancy and Agricultural Lands Act cannot be doubted. The 35th Section which is thus the relevant Section provides that if by any of the processes to which that Section refers a person "comes into" possession of land, and, in consequence the aggregate area of land in his possession exceeds the ceiling area, the excess acquisition shall be invalid. So, no question can arise under its provisions whether there was an invalid acquisition by the plaintiff until the plaintiff obtained a decree in his favor, executed it and obtained delivery of possession of the suit lands since until all these steps were taken, there would in effect be no disobedience to Section 35. The question is whether the Civil Judge was right in thinking that the enforcement of the agreement of sale would defeat the provisions of that Section. That, is the only limited investigation to be made since it is not suggested that the provisions of any other law would thereby be defeated.

50. While the criticism for the plaintiff was that the Civil Judge reached a premature conclusion, even when he was asked to make a decree, that there would be such disobedience, Mr. Narasimhamurthy maintained that since it was possible for the plaintiff to obtain delivery of possession of all the 41 acres and 26 guntas which the suit lands measure, and, since that area when added to the area already in his possession on the date of the suit, would exceed the ceiling area, there would undoubtedly be an illegal acquisition to the extent of the excess and it is the possibility of such illegal acquisition which defeats the 35th Section of the Bombay Tenancy and Agricultural Lands Act, that renders the agreement void under the 23rd Section of the Contract Act.

51. Section 23 of the Contract Act and the other seven Sections following it incorporate among others three well settled principles. The first is that an agreement or contract whose purpose is the commission of an illegal act is void; the second is that an agreement or contract expressly or impliedly prohibited by law is similarly void; and the third is that an agreement or contract whose performance is not possible without disobedience to law is again void.

52. That these are the true principles by the application of which the enforceability or otherwise of an agreement or contract should be determined was explained in *Waugh v. Morris*[1], and *ST. John Shipping Corporation v. Joseph Rank Ltd. 1957-1 QB 267.*

53. In 1873-8 QB 202, Blackburn, J., said this :

> "We agree that a contract, lawful in itself, is legal if it be entered into with the object that the law should be violated; if as it is expressed in *Pearce v. Brooks*[2], it is done for the very object of satisfying an illegal purpose, or, as it is expressed in *McKinnell v. Robinson*[3], for the express purpose of a violation of the law.' ***
>
> "We quite agree, that, where a contract is do a thing which cannot be performed without violation of the law it is void, whether the parties knew the law or not." (pages 207-208).

In 1957-1 QB 267, there was a fuller elucidation of the first two principles by Delvin, J., who observed :

> "There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it. ** **

the second principle is that the Court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class you have only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, you have to consider not what acts the statute prohibits, but what contracts it prohibits; but you are not concerned at all with the intent of the parties; if the

parties enter into a prohibited contract, that contract is unenforceable." (page 283).

54. It is the combined effect of these two pronouncements which yields the third principle to which I have referred which is applicable to cases where the performance of a contract though not illegal at the inception, cannot be performed except by the

[1](1873) 8 Q. B. 202 [3](1838) 3 M. and W. 434 at page 442

[2](1866) 1 Ex. 213

violation of the law. In St. John Shipping Corporation's case, 1957, 1 QB 267, although Delvin, J., referred to the first two principles Blackburn, J., referred to the third in (1873) 8 QB 202.

55. The argument resting on the first and second principles has already been repelled. What is under discussion is the third principle which, in my opinion, is what the third paragraph of the 23rd Section of the Contract Act incorporates.

56. The discussion of the Civil Judge did not make it very clear whether in his view the performance of the agreement necessarily entails disobedience to the 35th Section of the Bombay Act 67 of 1948 or whether in his opinion there is no more than mere possibility of such disobedience.

57. Now, Section 23 of the Contract Act speaks of three matters; it speaks of consideration for the agreement, the object for the agreement and the agreement. Although considerable argument was expended on the question whether the pronoun "it" occurring before the words "would defeat the provisions of any law" in the third paragraph of this Section refers to the consideration or the object of the agreement itself, the submission made for the defendant was that the agreement of sale in the case before us was void since its performance would defeat the provisions of the 35th Section of the Bombay Tenancy and Agricultural Lands Act.

58. The third paragraph of the 23rd Section of the Contract Act reads :

> "23. What considerations and objects are lawful and what not :-

The consideration or object of an agreement is lawful, unless................. is of such a nature that, if permitted, it would defeat the provisions of any law; or

> ** ** **"

It was submitted for the defendant that the consideration and object of the agreement of sale were both unlawful since the performance of the agreement was not possible without violating the law. If this submission is sound, it is clear that the agreement is void, and, Mr. Raja Iyer's submission that it was not demonstrated to be a void agreement when it was made cannot assist the plaintiff if we find it possible to say that its performance would defeat the provisions of any law.

59. In my opinion, we should understand the words "if permitted, it would defeat the provisions of any law" occurring in the third paragraph of Section 23 of the Contract Act as referring to performance of an agreement which necessarily entails the transgression of the provisions of any

law. I am not prepared to accede to the view suggested by Mr. Narasimhamurthy that those words mean that even a possibility of such transgression is sufficient to denounce the agreement as void. What in my opinion makes an agreement which is otherwise legal void is that its performance is impossible except by disobedience to law.
60. A bare possibility of such transgression, if there be also a possibility of performance without such transgression does not invalidate the agreement. It is a familiar principle that the presumption of law is in favour of the legality of a contract and that if it reasonably admits of two meanings or two modes of performance one legal and the other not, the interpretation which the Court should prefer is one which supports it and makes it operate, the burden being on the person who impeaches its validity to establish illegality.

61. In *Bennett v. Clough*[4], it was observed :

> "Illegality is never presumed; on the contrary everything must be presumed to have been legally done till the contrary is proved."

In *Lewis v. Davison*[5], Lord Abinger, C.B. said this :

> "I fully assent to the general proposition which has been urged, that an agreement to do an unlawful act cannot be supported in law. But it docs not appear to me that that is necessarily the effect of the agreement in the present case; and when the act which is the subject of the contract may, according to the circumstances, be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference. . . . The contract, therefore is not necessarily unlawful, and cannot receive such a construction."
> "I also think that this contract is not necessarily unlawful. * * * * * And if it will bear a legal construction, that should certainly be put upon it."

In *Archbolds (Freightage) Ltd. v. Spanglett Randall*[6], Devlin, L.J. said this :

> "it is a familiar principle of law that if a contract can be performed in one of two ways, that is, legally or illegally, it is not an illegal contract, though it may be unenforceable at the suit of a party who chooses to perform it illegally. That statement of the law is meaningful if the contract is one which is by its terms open to two modes of performance; otherwise, it is meaningless."

62. The true rule embedded in the third paragraph of the 23rd Section of the Contract Act is that only those agreements whose performance necessarily entails disobedience to the law are void and its clear exemplification was made in (1839) 4 MandW 654 by Lord Abinger, C.B., who had no doubt that unless the performance of the unlawful act was "necessarily the effect of the agreement" no question of illegality can arise. Alderson B. also pointed out that if the contract was not "necessarily unlawful" there was no illegality. This rule stands fortified by what Lord Wright observed in *Vita Food Products Incorporated Ltd. v. Unus Shipping Co., Ltd*[7]. The noble Lord observed :

"Each case has to be considered on its merits. Nor must it be forgotten that the

[4](1818) 1 B. and A 461 : 106 EB 169 [6]1961-1 QB 374

[5] (1839) 4 M and W 654 : 150 ER 1583 [7](1939) AC 277

rule by which contracts not expressly forbidden by statute or declared to be void are in proper cases nullified for disobedience to a statute is a rule of public policy only, and public policy understood in a wider sense may at times be better served by refusing to nullify a bargain save on serious and sufficient grounds." (page 293).

So, the question is whether the performance of the agreement of sale except by unlawful performance was impossible.

63. Although the discussion of the Civil Judge is not as full or adequate as it should have been, the exposition made by Mr. Narasimhamurthy of his finding was that the defendants could not have sold and the plaintiff could not have purchased the suit lands without the contravention of the 35th Section of the Bombay Tenancy and Agricultural Lands Act. It was submitted that since the plaintiff was in possession of 11 acres and 1 gunta of jirayat land on the date of the suit and the sale of a further area of 41 acres and 26 guntas of jiyarat land which was the purpose of the bargain would enable the plaintiff to be in possession of more than the ceiling area, and since the acquisition of such possession is what contravenes the Section, and since performance in any other manner was not possible and the only mode of performance was unlawful, the agreement was void.

64. It should not be overlooked that the emphasis of the 35th Section is on prohibition against possession of more than the ceiling area whatever may be the process to which such acquisition is attributable. It does not prohibit the purchase of a larger area of land if such purchase is not reduced to possession. No purchase or acquisition could fall within that Section unless there is an acquisition by one of the many processes referred to therein and in consequence of such acquisition, possession of the land acquired or transferred is also obtained and the aggregate area exceeds the ceiling area. So, the mere fact that on the date of the suit or even on the date of the production of the purshis the plaintiff was in possession of an area of land which when added to the area of the suit lands would exceed the ceiling area would not be a relevant factor. What is really relevant is whether the inevitable consequence of the decree sought by the plaintiff is that the aggregate area of land in his possession after obtaining delivery of possession of the suit lands would exceed the ceiling area.

65. That such is not the necessary consequence of the decree is to my mind clear for more reasons than one.

66. The Civil Judge did not consider in all its aspects the impact of the decree he was asked to make on the relevant statutory provisions, which he thought would be defeated. Whether obedience to that decree without disobedience to law was possible was not investigated by him for the reason that his conclusion was influenced by the apparent possibility of the contravention of Section 34 of that Act. And, it was overlooked that that Section is not contravened save when in consequence of obtaining possession of the suit lands, the aggregate area in plaintiff's possession becomes larger than the ceiling area.

67. The plaintiff made on March 3, 1960, an application for the amendment of his plaint. In the event of the Court coining to the conclusion that a decree could not be made in his favor in respect of the entire suit property, he asked for permission to seek a decree for only that area of land which would not in addition to the land already in his possession exceeds the ceiling area. Although in one part of the application the plaintiff wanted to amend the relief portion so as to incorporate a prayer for a corresponding abatement of the price, he sought permission to make a prayer that that decree should be made on payment of the entire purchase money without abatement. If this amendment had been granted and a decree for specific performance had been made in respect of the smaller area on payment of the entire consideration there would have been no transgression of the provisions of Section 35 of the Bombay Tenancy and Agricultural Lands Act at any stage unless the plaintiff very unwisely made a further acquisition between the date of the decree and the date of delivery of possession or at any other relevant stage.

68. It is equally clear that even if a decree was made in favor of the plaintiff in terms of the plaint without its amendment, it was possible for him before asking for delivery of possession to alienate or part with possession of the excess area of his own lands so as to fall outside the prohibition of the 35th Section. Then again, it was possible for the plaintiff when executing the decree or when asking for possession of the suit properties to ask only for that area of land which when added to the land already in possession would not exceed the ceiling area.

69. Mr. Raja Iyer also suggested the further possibility of as assignment of the decree in favour of a stranger to whom the suit lands could be delivered without the infringement of Section 35 provided the assignee of the decree was an agriculturist and the assignment was not a mere subterfuge for the benefit of the plaintiff.

70. All these possibilities demonstrate that the performance of the agreement does not necessarily involve the transgression of the 35th Section of the Bombay Tenancy and Agricultural Lands Act, it being plain that performance of that agreement otherwise than by disobedience to the law is equally possible. If that be the true position, the suit agreement does not fait within the 23rd Section of the Contract Act and cannot, therefore, be pronounced void.

71. But Mr. Narasimhamurty contended that it was not possible for the plaintiff to ask for delivery of possession of a smaller portion of the land than that which he agreed to buy under Exhibit 32 and asked us to say that there was something in *Graham v. Krishna Chander Dey*[8], and *Abdul Aziz Saheb v. Abdul Sammad*[9], supporting that postulate.

72. I do not agree.

73. In 52 Ind App 90 : AIR 1925 PC 45 in an appeal arising out of a suit for specific performance, the High Court of Calcutta remitted the suit to the Subordinate Judge with a direction for a decree for specific performance of only some items of property

[8] 52 Ind App 90 : AIR 1925 PC 45

[9] AIR 1937 Mad 596

after the ascertainment of the extent to which there should be an abatement of the price in respect of the property excluded. The Privy Council vacated that direction explaining that the High Court could not alter or re-write the contract between the parties. The principle expounded in AIR 1937 Madras 596 was that where the agreement of sale was by one member

of a Hindu joint family, no decree for specific performance could be made for the sale of only his share of the property on payment of a smaller price.

74. Neither of these two decisions is an authority for the proposition that although a Plaintiff may obtain a decree for specific performance of the entire property which he had agreed to buy, he could not after the execution of the sale deed in his favour in obedience to the decree on payment of the entire consideration, ask for delivery of possession of a smaller area. Nor do those decisions support the view that there could be no decree for specific performance in respect of a smaller area on payment of the entire price. In my opinion, so long as the plaintiff does not ask for an abatement of the price, there is nothing in law which can preclude him from asking for the execution of a sale deed for a smaller area or for delivery of possession of an area less than the area in respect of which specific performance has been decreed or a sale deed has been executed.

75. It is not possible to sustain the argument advanced by Mr. Narasimhamurthy that in a case where the plaintiff asks for delivery of possession of a smaller area, in a case like the one to which I have referred, the Court alters the contract between the parties or substitutes a new contract for the old.

76. At one stage, Mr. Narasimhamurthy depended upon two pronouncements of the High Court of Bombay in *Pandu Aba Chaugule v. Laxman Dhondi Patil*[10] and *Rayagonda Anna Patil v. Jankibai*[11], Those cases have no resemblance to the case before us for the reason that the question which arose in each one of them was whether the provisions of Sections 63 and 64 of the Bombay Tenancy and Agricultural Lands Act would be defeated.

77. In AIR 1956 Bombay 707, the suit was for specific performance of an agreement of sale executed by defendant 1. Defendant 2 claimed to be a person in possession of the property as a tenant. The suit was resisted on the ground that since the procedure prescribed by Section 64 of the Act had not been complied with before there was an agreement of sale executed in favour of the plaintiffs, and since a sale without compliance with the requirements of that Section was invalid as expressly provided by Sub-Section (3) of that Section which corresponded to Sub-Section (8) of Section 64 of that Act after its amendment in 1956, no specific performance could be decreed.
Shah, J. upheld the contention that if it was true as contended by defendant 2 that he was a tenant of the land and the plaintiffs were not agriculturists, the agreement of sale in favour of the plaintiffs could not be allowed to be made the basis of a suit for specific performance since the sale when completed, would defeat the provisions of Section 64(3). The case, therefore, was one in which the contract according to Shah, J. was one expressly prohibited by Section 64(3) and that the assistance of the Court

[10] AIR 1956 Bom 707
[11] AIR 1959 Bom 468

for the completion of a sale which was so prohibited, could not be sought.

78. Although Mr. Raja Iyer pressed upon us the view that that view taken by Shah, J. did not consider the pronouncement of the Privy Council in *Motilal v. Nanhelal*[12], in which the Board expressed the view that in a case where a sale could not be made without the permission of the authority specified in a statute, it should be presumed that the person who agrees to sell covenants with the other party that he would do all things necessary to effect such transfer which

would include an application to the concerned authority for sanction of the sale, it does not appear to my mind necessary for us to consider the question whether the view expressed in AIR 1956 Bombay 707 stands weakened by reason of that factor. We are not concerned in this case, as already pointed out, with a case where the contract or the agreement was expressly or impliedly prohibited by the law. This is a case in which all that was prohibited as already explained was the acquisition of possession of property which when added to the property already in possession would exceed the ceiling area.

79. In AIR 1959 Bombay 468 which arose out of a suit for specific performance again, the defendant agreed to sell in favor of the plaintiff a land of which he was not in possession but which came to his possession subsequently. It was established that the defendant was the landlord and that there was a tenant on the land, and, for the same reasons for which Shah, J. held in AIR 1956 Bombay 707 that the agreement was void. Yyas, J. reached the same conclusion on the ground that Section 64(3) of the Bombay Tenancy and Agricultural Lands Act as it then stood, would be defeated since the sale when completed would be an invalid sale and a decree for specific performance compelling such sale could not be made.

80. The decision of the Supreme Court in *Waman Shrinivas v. Ratilal Bhagawandas and Co*[13]*.,* which is the next decision on which Mr. Narasimhamurthy depended, was a case in which there was a subletting by a tenant in contravention of the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, and the Supreme Court pointed out that the tenant could not be permitted to assert in a Court of Justice any right founded upon or accruing out of that illegal transaction.

81. In *Pujari Narasappa v. Shaik Hazrat*[14]*,* a suit was brought for specific performance of an agreement of sale of a land, the alienation of which was governed by Section 4 of the Hyderabad Prevention of Agricultural Land Alienation Act. That Section prohibited an alienation of agricultural land except with the permission of the Talukdar or the Collector. When a suit was brought on an agreement of sale which was entered into between the owner of the land and the plaintiff for specific performance on the basis of that agreement, that suit was resisted on the ground that the decree sought by the plaintiff could not be made and this Court upheld that contention pointing out that since there was a prohibition created by Section 4 of the Hyderabad Prevention of Agricultural Land Alienation Act, against the alienation of an agricultural land except with the permission of the Talukdar or the Collector, the agreement on which the suit was founded was unenforceable. Here again, it would be enough to say that there is no resemblance whatsoever between this

[12] AIR 1930 PC 287
[14] AIR 1960 Mys 59
[13] AIR 1959 SC 689

pronouncement of this Court and the case before us in which there is nothing in either Section 34 or Section 35 of the Bombay Tenancy and Agricultural Lands Act corresponding to the relevant provisions of Section 4 of the Hyderabad Prevention of Agricultural Land Alienation Act.

82. The essential distinction between some of these cases on which Mr. Narasimhamurthy depended and the case before us is that whereas in the case on which he relied there was an express prohibition against the contract or the agreement as the case may be such as the one on which dependence was placed imposed by a law, no such express prohibition is to be found in either of Section 34 or Section 35 of the Bombay Tenancy and Agricultural Lands Act. There is

no such implied prohibition either.

83. In the view that we should in my opinion take, it follows that the argument advanced that every agreement of sale executed in favour of a person for the sale of property the area of which when added to the area already in the possession of the person in whose favour the agreement of sale stands, would exceed the ceiling area must necessarily result in transgression or disobedience to the provisions of Section 34 or Section 35 of the Bombay Tenancy and Agricultural Lands Act cannot therefore succeed. We should not, in my opinion, accede to the argument that in, every such case there would necessarily be an illegal acquisition to which Section 35 refers. The agreement would fall within the third paragraph of Section 23 of the Contract Act only if it was possible to say that such illegal acquisition was the inevitable and necessary consequence of the performance of the agreement. If, as already demonstrated, such is not the position and by reason of many things which are possible the plaintiff who wishes to sue on the agreement can ask for delivery of possession of the property which had been agreed to be sold to him without such delivery of possession producing any illegal acquisition to which Section 35 refers, the performance of the agreement would not defeat the provisions of the law.

84. In my opinion, we should therefore say that for none of the reasons upon which Mr. Narasimhamurthy relies can we denounce the suit agreement as void. There was no intention on the part of the plaintiff or the defendant or both, to commit an illegal act prohibited by the statute; nor did they enter into a contract expressly or impliedly prohibited by the law; nor was the agreement between them or its consideration or object such as would defeat the provisions of any law.

85. We must, therefore, in my opinion, dissenting from the finding recorded by the Civil judge say that the suit agreement was not void and that it was capable of enforcement.

86. But Mr. Narasimhamurthy at one stage contended that there was no jurisdiction in the Civil Court to pronounce upon the validity or the enforceable character of the agreement of sale and that that jurisdiction was confided to the tenancy authorities by Sections 70 (mb) and 85 of the Bombay Tenancy and Agricultural Lands Act.

87. It does not appear to me that this contention can be accepted as sound. Section 70(mb) provides that one of the duties and functions to be performed by the Mamlatdar is to decide under Section 84B or 84C whether a transfer or acquisition of land is invalid and to dispose of land as provided in Section 84C. Section 85 is :

** ** **"

The argument proffered was that since the jurisdiction to decide the validity or invalidity of a transfer or acquisition resides in the Mamlatdar as provided by Section 70(mb) and that jurisdiction was taken away from the Civil Courts, the Mamlatdar alone had the jurisdiction to decide the question and not the Civil Court.

88. At one stage that this argument should have been advanced before us caused me a little surprise since, if accepted, that argument would be sufficient to displace the finding recorded by

the Civil Judge which had been recorded in favour of the defendant since that finding would be a finding recorded by the Civil Judge without jurisdiction. But, it is obvious that the object of the argument was to save the defendant from the consequence of an adverse finding on the question whether the suit agreement was an enforceable agreement so that the question might still be an open question to be agitated before the Mamlatdar. However that may be I have no doubt in my mind that the challenge to the jurisdiction of the Civil Court cannot succeed,

89. Section 70(mb) authorises and empowers the Mamlatdar to decide the validity of a transfer or acquisition and to make that decision under Section 84B or Section 84C. Section 84B among other matters authorises a Mamlatdar when he has reason to believe that a transfer or acquisition made on or after June 15, 1955, contravenes Sections 63 or 64 of the Act as it stood before the commencement of the amending Act, 1955, to make an enquiry and decide whether the jurisdiction or acquisition was or was not valid.

90. Section 84C empowers the Mamlatdar to hold an enquiry by the option of the procedure prescribed in Section 84B whether a transfer or acquisition made after the commencement of the amending Act, 1955, was valid.

91. Since the agreement of sale in the case before us was made after the commencement of the amending Act, 1955, the relevant statutory provision under which the Mamlatdar can make the enquiry authorised by Section 70(mb) is Section 84C. But, what is authorised by Section 84C is an enquiry into the validity of a transfer or acquisition made after the commencement of the amending Act 1955. So, the condition precedent for the exercise of jurisdiction by the Mamlatdar is a transfer or acquisition made in that way and that jurisdiction is unavailable until the transfer or acquisition actually comes into being.

92. In this case, no such transfer or acquisition had yet been made by any one. The acquisition which the plaintiff wanted to make was an acquisition which he could make only after he obtained a decree for specific performance and the invalidity of the acquisition if it was in contravention of Section 35 would attach itself to the acquisition only after delivery of possession to the plaintiff of an area of land in excess of what is permitted by the law.

93. In that view of the matter, the jurisdiction exercisable for the determination of the enforceability of the agreement of sale clearly resided in the Civil Court which alone had the jurisdiction to make an adjudication on that question. Surely, the Mamlatdar could not have at a stage when the acquisition or transfer had not yet been made and all that the plaintiff wanted to do was to enforce an agreement of sale so that he could make the acquisition or obtain a transfer under the terms of the agreement exercised power under Section 70(mb) or under Section 84C and made any adjudication on that matter. If he made one he would have exercised his jurisdiction prematurely and that adjudication would have invited the criticism that it was one without competence.

94. In my opinion, when a question arises in a suit for specific performance whether the agreement on which that suit is based is void on the ground that any acquisition made pursuant thereto would contravene or transgress the provisions of Section 35 of the Bombay Tenancy and Agricultural Lands Act, the Civil Court is the only forum in which an adjudication is possible and the Mamlatdar cannot make any such adjudication. The power to make any adjudication

under Section 84C arises and accrues to the Mamlatdar only after the acquisition or the transfer as the case may be is completed and' not before.

95. In the view that I take, the argument which Mr. Raja Iyer at one stage advanced on the basis of the provisions contained in Sections 14 to 17 of the Specific Relief Act does not, therefore, require to be considered.

96. This appeal therefore should be allowed, and, in reversal of the decree of the Civil Judge we should now make a decree for specific performance.

97. We have been informed by Mr. Mandagi and that information has not been contravened by Mr. Krishnaswamy Rao that the sum of ₹ 2,000 which had been deposited by the defendant at one stage during the suit in Court towards the amount due to the plaintiff on accounts is still lying in Court. That being so, the balance of the consideration payable by the plaintiff to the defendant is ₹ 30,000. The decree for specific performance that we should now make is to say that if the plaintiff deposits in the Court below that sum of ₹ 30,000 within one month from this date, the defendant shall execute in favour of the plaintiff a sale deed conveying to him the suit properties in accordance with the terms of the agreement Exhibit 32. That sale deed which the defendant is directed to execute shall be executed by him within one month from the date on which the defendant receives notice through Court of the deposit made by the Plaintiff of the sum of Rupees 30,000 as directed. On the defendant neglecting to do so, the Court shall execute that sale deed in favour of the plaintiff as prescribed by the law. In the event of the plaintiff depositing the sum of ₹ 30,000 that sum of ₹ 30,000 together with ₹ 2,000 in deposit already in Court will be paid to the defendant towards the consideration for the sale. The decree shall also provide that on compliance by the plaintiff with these directions and after the execution of the sale deed either by the defendant or the Court as the case may be and its registration, the defendant shall deliver possession of the suit lands to the plaintiff.
98. A decree will be made as above.

99. The plaintiff has asked for mesne profits. Since he has not yet made the deposit of the entire consideration amount, he cannot get any decree for mesne profits. If the plaintiff becomes entitled to any subsequent mesne profits, it is for him to enforce that claim in the way in which it is permissible.

100. In regard to costs, it seems to me that there should be no direction as to costs either in this court or in the court below.

101. Before concluding, I should notice a submission made by Mr. Krishnaswamy that we should make an elucidation in this judgment that the decree for specific performance made in this .appeal shall not affect the jurisdiction of the Mamlatdar such as may be exercised by his under Section 84C or Section 70(mb) of the Bombay Tenancy and Agricultural Lands Act. It is obvious that that jurisdiction remains unaffected by the decree made by us if that jurisdiction can otherwise be exercised.

102. It is also made clear that it should not be understood that we have recorded any finding as to

the actual area of jirayat land in the possession of the plaintiff at any point of time either on the date of the suit or on April 1, 1960, when the plaintiff produced his purshis in answer to the purshis filed by the defendant. That question is left open and this we say as desired by both sides.

Chandrashekhar, J.

103. I agree.

Appeal allowed.