

BOMBAY HIGH COURT

Vishweshwar Narsabhata Gaddada

Vs.

Durgappa Irappa Bhatkar

Letters Patent Appeal No. 10 of 1939

(John Beaumont Kt., C.J. and Sen, J.)

29.02.1940

JUDGMENT

John Beaumont, Kt., C.J.

1. This is an appeal under the Letters Patent from a decision of Mr. Justice Lokur, as he then was, in second appeal. The plaintiff is suing to recover the suit property from defendant No. 1, and the material facts are these.

2. The suit property at one time belonged to the father of the plaintiff, and he sold it in 1901 to the father of defendant No. 2. The father of defendant No. 2 died prior to 1926, leaving three sons, the eldest of whom was named Mahableshtar. On August 8, 1926, Mahableshtar, as the manager of the family, sold the suit property to defendant No. 1 for a sum of L 600. On August 10, that is two days later, defendant No. 1 granted a permanent lease of the property to Mahableshtar, which lease, the learned Subordinate Judge says, came to an end for non-payment of rent, and nothing turns upon that. On the same day defendant No. 1 granted to Mahableshtar an option to repurchase the property at the price of L 600, the option being contained in exhibit 48, to which I will refer more particularly in a moment. Mahableshtar and the third brother died in or prior to 1930, leaving defendant No. 2 as the sole surviving coparcener. In 1933 defendant No. 2 assigned his right to repurchase under exhibit 48 to the plaintiff for L 400. On September 2, 1933, the plaintiff filed this suit, claiming redemption on the basis that the transaction was really a mortgage, but subsequently the plaintiff was amended by adding a claim for reconveyance under exhibit 48, and thereafter the plaintiff abandoned the claim that the transaction was a mortgage. On December 4, 1933, the plaintiff deposited L 600 in Court, being the purchase money payable under exhibit 48. The learned Subordinate Judge of Sirsi dismissed the plaintiff's suit on; the ground that the option of repurchase in exhibit 48 was not assignable. The learned District Judge of Kanara in appeal reversed that decision and decreed the plaintiff's suit. In appeal to this Court Mr. Justice Lokur reversed the decision of the lower appellate Court and restored the decree of the trial Court, holding that the option of repurchase was not assignable, and the question is whether that decision is right.

3. There can be no doubt that both under the common law and under Section 23 (b) of the Specific Relief Act an option to repurchase property is prima facie assignable, though it may be

so worded as to show that it was to be personal to the grantee and not assignable. Under Section 23 (b) of the Specific Relief Act, 1877, it is provided that the specific performance of a contract may be obtained by the representative in interest, or the principal, of any party thereto: provided that, where the learning, skill, solvency or any personal quality of such party is a material ingredient in the contract, or where the contract provides that his interest shall not be assigned, his representative in interest or his principal shall not be entitled to specific performance of the contract, unless where his part thereof has already been performed.

4. The question, therefore, is whether on the true construction of exhibit 48 the option to repurchase is made non-assignable. That document is addressed to Mahableshtar, manager of the family, and recites:

You sold your malki lands to me on August 8, 1926, for L 600 and gave into my possession the said lands which you asked me to give back, to you in permanent tenancy which I did on August 10, 1926; and I have given them into your possession; but as you asked me earnestly to execute an agreement to give back the properties if the amount of L 600 which is the consideration for the sale is paid in a lump sum after five years and within fifteen years from this date, I consented and have now executed the agreement for reconveyance on the conditions mentioned below. Therefore, if in future after five years and within fifteen years from this date the amount of L 600 being the consideration of the sale is paid at any time, I shall, without making any objection, recover your properties to you.

Then lower down it provides that:

If the amount of the sale is not paid within the abovementioned period and get the properties released, neither you nor your successors-in-title have any right to claim a reconveyance of the property subsequently.

It seems to me in the first place that on the true construction of that document the option to repurchase was part of the original contract for sale. I mention that point, because in the trial Court an issue was raised as to whether there was any consideration for the option, and the learned trial Judge held that it was a case of mutual promises, each constituting consideration for the other, as in the case of a contract for sale. That is clearly wrong. There is no special consideration given for the option, and, as there is no obligation on the grantee to exercise the option, if the option stood by itself, it would be without consideration. But I feel no doubt on; the wording of the document, particularly the use of the past tense in the expressions " you asked me earnestly to execute an agreement" and " I consented," that the whole transaction for purchase and repurchase was one. Therefore, there was consideration for the grant of the option. In the lower appellate Court, and in second appeal, the only question argued was whether the exercise of the option was confined to the grantee and to members of his family, or whether it could be assigned to a stranger. Upon the construction of the document I can see no reason for holding that the grantee was not to be at liberty to assign the benefit of the contract to anyone he chose. I would note in passing that in England a contract of this sort creates an equitable estate in the land which would bind a purchaser with notice, but, as equitable estates are not recognised under

Indian law, the rights of the parties have to be dealt with *ex contractu*. However, as the original grantor of the option is before the Court, this point is not material.

5. Mr. Justice Lokur decided that the option was not assignable on the strength of a decision of this Court in *Vithoba Madhav v. Madhav Damodar*¹ and a later decision of this Court, following that case, in *Harkismdas v. Bai Dhanoo*² In *Vithoba Madhav v. Madhav Damodar* the contract of resale was worded differently to the contract in the present case, and therefore the case is not an authority binding upon us; but it is argued that we should follow and apply the reasoning upon which the decision was based. The reasons are stated by Mr. Justice Beaman in the following terms (p. 349):-

The sentiment of the agricultural classes in this country towards their land is well-known to every Judge of experience; and we can well understand that the creditor may have so far relented as to have given his debtor this *locus poenitentiae* after the lapse of ten years and so enable him to get back his family land. Founding the motive of the whole contract in this sentiment, it would be apparent that the vendee would have had no like inducement to allow any stranger to buy this land from him after the lapse of ten years at the price he had paid for it. There may have been a very good and sufficient reason why he should have made this concession to the original owner of the land and his descendants, meaning by that term his family, but we can see no reason whatever why the vendee should have bound himself in like manner to sell to anyone who had no previous connection with or interest in the land. That being my view of the true nature of the sale-deed of 1903 and the intention of the parties when the reservation clause was made, it follows that assignees outside the family could not enforce the contract specifically.

This would then be a case of personal quality mentioned in Section 23 of the Specific Relief Act.

Mr. Justice Heaton also recognized that the decision turned on the terms of the particular contract with which the Court had to deal. But he says in the course of his judgment (p. 351):-

In England a right of this kind would be assignable unless it were shown not to be so. But in India I think the sentiment of the people as regards ownership of land is altogether antagonistic to the English idea of assignability. In the first instance, one would assume that where there was an agreement to sell back family land to a member of the family, that agreement was intended to subsist only for the benefit of the members of that family.

The actual decision may have been justified by the terms of the particular contract in question; but I must confess that I have great difficulty in following the reasoning on which it was based. The principle enunciated by the learned Judges seems to come to this, that the agricultural classes in India have a sentimental regard for their land, that the Court will take judicial notice of such sentiment and will assume it to exist without any evidence and notwithstanding the fact that the particular agriculturist concerned has shown a desire to sell his land to a stranger, that this sentimental regard is a personal quality of an agriculturist within Section

23 of the Specific Relief Act, and accordingly a contract to resell land to an agriculturist must be construed differently to a contract to resell land to anyone else, in the former case the presumption being that the contract is intended to be personal, whereas in the latter case the presumption is that it is assignable. If any such rule as that is to be enacted, it should be by the Legislature and not by the Courts. It is obvious that without definitions there would be difficulty in working such a rule; who is to be an agriculturist within the meaning of the rule ? and what land is to be affected by it: is it to be only ancestral land, or is it to include self-acquired property ? Moreover, the learned Judges do not seem to have appreciated that the benefit which they sought to confer on the grantor of the option by restricting its exercise to the original grantee and his family is largely illusory, because, if the grantee desired to sell the land to a stranger, he need only exercise the option himself, and the next day sell the land to the stranger. In the particular case, with which we have to deal, the period of the option has not yet expired. If Mr. Justice Lokur's view that the option could not be assigned to the plaintiff is right, there is nothing to prevent defendant No. 2 from exercising the option himself, paying L 600 under it to defendant No. 1, and then selling the land to the plaintiff for L 1,000, in which case precisely the same result would be arrived at as if the option were assignable.

6. In my view, the reasoning of the learned Judges in *Vitkoba Madhav v. Madhav Damadar* cannot be supported on principle, and I think also that it is inconsistent with the decision of the Privy Council in *Sakalaguna Nayudu v. Chinna Munuswami Nayakar*³. In that case the property in suit was a village, and on the sale of the village an option had been given to the vendor to repurchase within a period of thirty years. The option had been assigned to the plaintiff, and the Privy Council, confirming the decision of the High Court of Madras, held that the option was assignable. No suggestion was made that in dealing with options for repurchase of land in India any special presumptions should be called in aid. I can see no reason why a man, should be presumed to have less sentimental regard for his ancestral village than for his ancestral field. In the judgment of Mr. Justice Ramesam, one of the learned Judges of the High Court of Madras who decided the case, this argument is referred to at p. 400, and the learned Judge says:

Mr. Varadachari has conceded that the family of Subrahmanya Ayyar was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it.

So that the actual point, that the option was limited to the grantee and his family, was raised in the High Court, and the argument found no favour there, or in the Privy Council. It seems to me that that case is inconsistent with the principle that there is some special rule applicable to options for repurchase given to members of the agricultural classes in India. The other case on which Mr. Justice Lokur relied, *Harkisandas v. Bai Dhanoo*, may also have been justified as a decision on the particular contract there in suit, but I think that the reasoning, which followed that in *Vithoha Madhav v. Madhav Damodar*, cannot be supported. If parties desire that the exercise of an option to repurchase land is to be

confined to the original grantee, or to him and his family, they must so provide in the document creating

³ AIR 1928 PC 174 : 1928-28-LW 51 : (1928) L.R. 55 I.A. 243

the option. There is no such provision, express or implied, in exhibit 48.

7. In my opinion, there is no ground in this case for saying that the option contained in exhibit 48 is not assignable, and I think that the decision of the learned District Judge was right.

8. The appeal, therefore, must be allowed with costs both of the hearing in this Court and before Lokur J. and the order of the District Judge restored.

Sen, J.

9. I agree.

Appeal dismissed.