

BOMBAY HIGH COURT

Dnyanu Baba Chobe

Vs.

Gulab Eknath Bhais

Civil Revision Application No. 2014 of 1958

(S.M. Shah, J.)

26.07.1960

JUDGMENT

S.M. Shah, J.

1. Two very interesting questions of law have arisen on this application, firstly, as to whether a person who having been a tenant of an agricultural land under the Bombay Tenancy Act, becomes the purchaser thereof by virtue of Section 32 of that Act, can be said to be claiming through or under the owner-transferor of that land so that a charge on that land declared by a decree of a Court to the extent of the amount of earnest paid by a person to the owner of that land under an agreement of sale can be enforced against that land in the hands of the tenant-purchaser, and secondly, as to whether the transfer of such land to the tenant under the provisions of the Tenancy Act during the pendency of a suit filed by a person to whom that land was agreed to be sold for a declaration of a charge on that land to the extent of the earnest money paid by him to the owner of that land and recovery of that amount is hit by the doctrine of *Us pendens* so that the transfer to the tenant would be subject to the decision in the suit. These questions do not appear to have been raised in any of the two lower Courts and they have been raised for the first time in this Court in this revision application.

2. It appears that survey No. 302/10 measuring 1 acre and 2 gunthas originally belonged to one Kashinath Ganpat. The petitioner in this application was in possession of this land as a protected tenant. On July 12, 1952, Kashinath agreed to sell this land to Gulab Eknath for ₹ 2,300 under an agreement of sale and received ₹ 1,000 by way of earnest. It was agreed that the sale-deed was to be passed in favour of Gulab after evicting the tenant and obtaining possession of the land. On April 15, 1953, Kashinath sold this land to another person altogether, namely, Ganpatsing Gulabsing by a registered sale-deed for ₹ 1,250. Thereafter, Gulab Eknath filed regular civil suit No. 218 of 1953 against Kashinath Ganpat and Ganpatsing Gulabsing for the return of the earnest money in Sangola Court on August 19, 1953. During the pendency of the suit, it appears,

Kashinath Ganpat and the petitioner Dnyanu Balam made an application to the Mamlatdar of Malsiras for determining the reasonable price of the suit land. This application apparently was made under Section 32 of the Tenancy Act. The Mamlatdar determined the reasonable price of the land at ₹ 1,200. Thereafter it appears, Kashinath Ganpat sold the land in question to the petitioner Dnyanu Balam for ₹ 1,200 by a registered sale-deed dated October 18, 1954.

3. On February 21, 1955, a decree was passed in Gulab's regular civil suit No. 218 of 1953 for the return of the earnest money against Kashinath Ganpat and Ganpatsing Gulabsing. By that decree a charge for the decretal amount was also created on the land in question. The decree-holder thereafter filed regular Darkhast No. 193 of 1955 against the judgment-debtors Kashinath and Ganpatsing. He also impleaded the petitioner Dnyanu as a party to the execution proceeding as judgment-debtor No. 3 and claimed the decretal amount by the sale of the charged property.

4. Out of these three opponents in the execution proceedings only the petitioner Dnyanu filed his written statement. He contended that the regular civil suit No. 218 of 1953 was only for recovering the earnest amount and survey No. 302/10 was not the subject-matter of that suit at all. He further contended that the sale-deed in his favour dated October 18, 1954, was not affected by the doctrine of lis pendens. He submitted that on February 21, 1955, the day on which the decree was passed in Gulab's suit, Kashinath had no interest left in the land and that, therefore, no charge could be validly created on that land by a decree passed in that suit. He stated that he had purchased that land free from all in Cumbrances and that for that reason also no charge could be created on that land. According to him, it was Kashinath alone who was responsible to pay the decretal amount to Gulab. He was not a party to the decree and that survey No. 302/10 should not be sold in execution of that decree. The trial Court held that the property in dispute was liable for sale in execution of the decree in civil suit No. 218 of 1953 and, accordingly, sale warrant and proclamation were ordered to be issued by the Court. Against that order of the trial Court Dnyann, the petitioner, took an appeal to the District Court at Sholapur. In that appeal the question that was argued, was as to whether the charge in respect of the decretal amount created by the decree passed in regular suit No. 218 of 1953 could be enforced against survey No. 302/10 in the hands of Dnyanu. The learned Assistant Judge agreed with the conclusion of the trial Court holding that the charge under Section 55(6)(h) of the Transfer of Property Act was a statutory charge and that, the petitioner Dnyanu who claimed the property through Kashinath was bound by that charge. The learned Assistant Judge was also of the view that the transfer in favour of Dnyanu was effected during the pendency of the suit filed by Gnlab against Kashinath and that, therefore, it was affected by the doctrine of Us pendens. Accordingly, in the view of the learned Assistant Judge, the transfer in favour of Dnyanu was subject to the result of the suit between Gnlab and Kashinath and, inasmuch as that suit had resulted in a decree declaring a charge upon the property in question, the transfer in favour of Dnyann was subject to the charge on that property as declared by the decree passed in that suit. In the result, the appeal filed by Dnyanu was dismissed. It is against the order dismissing his appeal that Dnyanu has filed this revision application in this Court.

5. On behalf of the petitioner Dnyanu it was contended by Mr. Bhasme, his learned advocate,

that it was incorrect to say in the circumstances of the case that his client claimed the suit land through Kashinath who was the original owner of the land. He urged that before the decree was passed in Gulab's suit, Dnyanu had moved in the matter with a view to purchase the land in his possession as a protected tenant under Section 32 of the Tenancy Act which had given a right to protected tenants to purchase the land in their possession if they so desired and made an application to the Mamlatdar for fixing the reasonable price of the land and that it was by virtue of the certificate issued by the Mamlatdar who had fixed the price at ₹ 1,200 that he became entitled to purchase the property at that price from Kashinath and accordingly, Kashinath irrespective of his wish in the matter executed the sale-deed in his favour under which he became the full owner of the land. Accordingly, Mr. Bhasme submitted that Dnyanu could not be said to be claiming 'under' Kashi-nath, because that expression would apply only in cases where inter alia a transferor voluntarily transferred the property to the transferee. In this case, however, according to him, Kashinath was compelled to transfer the land to Dnyanu by virtue of the special privilege given by the Legislature to agricultural tenants. On the other hand, it was contended by Mr. Sawant, the learned advocate for the opponent, that the decree which was passed in Gulab's suit could be executed against the land in enforcement of the charge declared by the decree, because, Dnyanu in view of the sale-deed in his favour could not be said to claim otherwise than through or under Kashinath. According to him, it was a fortuitous circumstance that Section 32 came to be enacted in the Tenancy Act giving right to the tenants to purchase lands in their possession as tenants. But even in the absence of this provision, Mr. Sawant argued, Kashinath could well have sold the land to Dnyanu for the price for which it was actually sold of his own volition. It was accordingly submitted by Mr. Sawant that Dnyanu could not resist the execution of the decree against the land in his possession.

6. In my opinion, the contention raised by Mr. Bhasme should be accepted. In the first place, Kashinath, who was the owner of the land, agreed to sell to Gulab an agricultural land which was in the possession of a protected tenant. Now, in view of the provisions of Section 64 of the Tenancy Act Kashinath could not possibly have sold this land to any one except after following the procedure laid down in that section.; In this case, Dnyanu, the petitioner, was undoubtedly in possession of the land as a protected tenant and, therefore, the first person whom Kashinath should have consulted about his proposal to sell the land was Dnyanu himself. Having failed to consult him in the first instance Kashinath could not in law sell the land to anybody else, and if he sold it, the sale would be void. Besides, under the agreement which Kashinath entered into with Gulab, Kashinath had agreed to execute a conveyance in favour of Gulab only if and after he got possession of the land from his protected tenant. It appears, however, that Kashinath was not able to secure the possession from the protected tenant Dnyanu. Accordingly, Kashinath could not and was not in a position to execute the sale-deed in favour of Gulab as stipulated in the agreement of sale. In these circumstances, I wonder if Gulab could have any lien upon the land for the amount of earnest that he had paid to Kashinath. Section 55(5)(b) would come into operation, in my opinion, only when it is possible for the vendor to give possession of the property to the purchaser and yet he fails to deliver it. In that case, undoubtedly the purchaser would have a statutory charge over the property for the money he had paid either as part of the

price or as earnest. But where the contract depends for its performance upon the vendor recovering possession of the property from the protected tenant, the purchaser can very well be said to be aware of the contingency of the vendor being unable to secure the possession. In my opinion, therefore, unless and until the vendor secured the possession of the land and was in a position to deliver it to the purchaser, the statutory lien under Section 55(6)(h) of the Transfer of Property Act would not be created in favour of the purchaser in respect of the money that he might have paid under the contract of sale. In the suit that was filed by Gulab against Kashinath this aspect of the matter seems to have been completely overlooked. Firstly, the agreement of sale itself would be void under Section 64 of the Tenancy Act. Assuming, however, that it could have any effect in law, in the circumstances of the case, the purchaser was not entitled to any lien for the money that he had paid under Section 55(5)(b) of the Transfer of Property Act. On either of these considerations, the decree declaring a charge for the money that was advanced by Gulab to Kashinath upon the land in question should not really have been passed. Inasmuch as, however, the decree has in fact been passed and it has not been set aside in appeal or in any other proceeding, we must proceed upon the footing that a valid executable decree was passed in favour of Gulab.

7. The next question then would be as to whether in execution of such a decree Gulab could recover the amount of his decree by enforcing the charge against the land in possession of Dnyanu. The question here would be as to whether Dnyanu could be said to be claiming under Kashinath who was the owner of the land. The second question that would require consideration is whether the sale in favour of Dnyanu by Kashinath pending the suit filed by Gulab against Kashinath was hit by *us pendens*, so that the sale would be subject to the result of that litigation.

8. Now, in regard to both these questions, it is pertinent to note that the Transfer of Property Act was passed as far back as in 1882 and one can say without any fear of contradiction that in that year of grace the Legislature never thought that a day would arrive in this country when landlords would by law be compelled to part with their properties in favour of their tenants. The whole of the Transfer of Property Act, to my mind, deals with voluntary transfers and consequently, when any section of that Act speaks of a person claiming under an owner of a particular property, it can only mean either a person who has inherited that property on the death of the owner or a person in whose favour a transfer of that property has been validly and voluntarily effected by the owner. Accordingly, turning to Section 52 of the Transfer of Property Act which deals with the doctrine of *us pendens*, the transfer of any immovable property which is the subject-matter of a suit by any of the parties to the suit as contemplated by that section is a transfer which is voluntarily effected by such party during the pendency of the suit. Likewise, Section 55(5)(b) of that Act which deals with the statutory charge in favour of a purchaser of an immovable property in respect of the money paid by him in anticipation of delivery thereof as against the seller and all persons claiming under him contemplates *inter alia* such person to whom the seller has transferred the property of his own volition and not under the compulsion of any statute or authority, so that such person can be said to be claiming under the seller. If I am right in the view that I am taking of these two sections of the Transfer of Property Act, and if I am right in my opinion as regards the general scheme of the Transfer of Property Act, evidently

the sale-deed executed in favour of Dnyanu by Kashinath can by no stretch of imagination be said to be a voluntary act on the part of Kashinath. The Bombay Tenancy Act to all intents and purposes is a social legislation. Its primary aim and object is to protect the rights of tenants to the utmost possible length and eventually even to make them owners of the lands in their possession as tenants. With this end in view provisions have been made in that Act which in certain respects have reduced the position of a landlord or the owner of an agricultural land to one of a man having no voice in the matter of his own property. By virtue of Section 32 of that Act, a tenant has been given a right to call upon the landlord to transfer the land in his possession to him not at the price the owner might demand but at the price either the tenant might offer or the Mamlatdar might fix. In view of such a provision, it is impossible to say that the owner of the land parts with his ownership in favour of his tenant of his own free will. There may be exceptions where the owner of a land in possession of a tenant might be inspired by the instinct of a social service even to his own tenant and accordingly might not grudge transferring the ownership of the land to the tenant at a price that might be offered by the tenant himself, but such cases would naturally be very rare. In such a case, therefore, it is impossible to say that the tenant-purchaser in the eye of the law would claim the land through the owner. As observed already, Section 55(6)(h) of the Transfer of Property Act refers to a person claiming under a seller either as a result of the death of the seller or as a result of a voluntary transfer on the part of the seller in favour of such person, but it does not contemplate a case of a person who becomes the owner of the property by sheer force of law. In my opinion, therefore, the charge created by the decree passed in favour of Gulab cannot be enforced against the land in possession of Dnyanu as its owner and the decree-holder, I am afraid, shall have to be content by executing the decree only against Kashinath personally and his other property, if any.

9. Likewise, the transfer in favour of Dnyanu, the petitioner, by Kashinath during the pendency of the suit filed by Gulab against Kashinath cannot be said to have been hit by Section 52 of the Transfer of Property Act. Kashinath was undoubtedly a party to that suit, but it was not of his own volition and free will that he transferred the land to Dnyanu pending the litigation. In such a case, therefore, the doctrine of *Us pendens*, in my opinion, becomes entirely helpless and can render no assistance to any of the parties to the suit during the pendency of which the property which is the subject-matter of the suit is dealt with by either of the parties.

10. As observed at the outset, the points discussed above were not urged before either of the two lower Courts, and I should myself have been reluctant to allow them being raised for the first time in this Court. But, as stated above, the Tenancy Act is a piece of social legislation, and I feel that it is the duty of this Court to give effect to it as best as it can. The application will, therefore, be allowed, the orders passed by both the lower Courts shall be set aside and the rule shall be made absolute. In view of the fact that the contentions I have dealt with in course of this judgment were raised for the first time in this Court, the fairest order for costs that I should make is that each party should bear its own costs throughout.

Application allowed.