

BOMBAY HIGH COURT

Pravin

Vs.

State of Maharashtra

First Appeal No. 366 of 1992

(H.W. Dhabe and M.B. Ghodeswar, JJ.)

26.04.1995

JUDGEMENT

H.W. Dhabe, J.

1. The plaintiff has preferred the instant appeal against the judgment and decree of the learned Civil Judge, Senior Division, Nagpur, in Special Civil Suit No. 569 of 1988 dismissing the said suit filed by him for declaration that the sale deed dated 23-8-1976 obtained from the plaintiff by the defendants in respect of the suit property is null and void and, therefore, for the relief that a decree for possession of the suit property be passed against the defendants on refund of consideration of Rs. 2,60,000/to them.

2. Briefly the facts are that the plaintiff was the lawful owner of the house property standing on Nazul Plot No.120 measuring 16,500 sq. ft. bearing M.H. No. 128 situated in Ward No. 73, Ramdaspath, Nagpur, which is described in the Schedule forming part and parcel of the plaint. The plaintiff was duly recorded as the owner of the suit house in the relevant Nazul and Corporation records. It is the case of the plaintiff that the Nazul Plot No.120 belonging to him was outside the purview of the Urban Land (Ceiling and Regulation) Act, 1976 (for short the "ULC Act") and that he was not holding any land in excess of the ceiling limit prescribed under the said Act. According to him, he was, therefore, not under obligation to file return under Section 6(1) of the ULC Act before the Competent Authority U.L.C., Nagpur.

3. It is then the case of the plaintiff that he wanted to sell the suit property to his relations and business acquaintance M/s. Kothari Brothers, with whom he entered into an agreement of sale on 31-3-1976. The consideration agreed to between the parties for the sale of the suit property was Rupees 2,60,000/-.

4. It may be seen that the ULC Act came into force in the State of Maharashtra with effect from

17-2-1976. Section 27(1) of the said Act required the plaintiff and the prospective purchaser to obtain the permission from the Competent Authority under the ULC Act i.e. the defendant No. 2. An application was, therefore, submitted to him for permission to sell the suit property as per the agreement dated 31-3-1976. The said application was registered as ULC Case No. 74 of 76. The defendant No. 2 by his order dated 26-5-1976 rejected the permission for sale of the suit property to the aforesaid prospective purchaser and further by the same order communicated his option to the plaintiff to buy the said property on behalf of the State of Maharashtra.

5. The defendants offered the same consideration which was offered by the prospective purchaser and accordingly in pursuance of the aforesaid order dated 26-5-1976 passed under Section 27(1) of the ULC Act, a sale deed was executed between the parties on 23-8-1976 which was registered at Sr. No. 2363 in the office of the Sub-Registrar, Nagpur. The possession of the suit property was also taken over by the defendant No. 3 i.e. Dy. Commissioner, Sales Tax, Eastern Division, Nagpur on the date of the sale deed. Since then the suit property is in possession and occupation of the defendant No. 3. The defendants are thus the owner of the suit property from the date of the aforesaid sale-deed dated 23-8-1976.

6. At this stage it is necessary to notice that the validity of the ULC Act was challenged in the Supreme Court in the case of *Bhim Singhji v. Union of India*¹, The validity of the ULC Act was upheld except Section 27(1) thereof in so far as it imposed a restriction on transfer of any Urban or urbanisable land with a building or of a portion of such building, which was within the ceiling limit. In other words, the provision of sub-section (1) of Section 27 of the said Act was held invalid in so far as it sought to affect the citizen's right to dispose of his urban property within the ceiling limit.

7. Since the provision of Section 27(1) of the ULC Act in so far as it imposed restriction upon the right of the owner to dispose of his property within the ceiling limit was declared invalid in *Bhim Singhji's* case cited supra, according to the plaintiff, the sale deed dated 23-8-1976 executed by him in favor of the defendant No. 2 was void because it was executed by the plaintiff out of the legal compulsion arising because of the requirement of Section 27(1) of the ULC Act to apply for permission of the Competent Authority for sale of immovable property to a prospective purchaser even though the said property was within the ceiling limit and the right of pre-emptive purchase conferred upon the Competent Authority under sub-section (5)(a) of Section 27 of the ULC Act when such an application for permission was made under sub-section (1) thereof. The plaintiff, therefore, served upon the defendants a statutory notice under Section 80 of the Civil Procedure Code claiming that he was entitled to declaration that the said sale deed was void and consequently to the possession of the suit property also on refund of consideration of Rs. 2,60,000/- to the defendants paid by them to him for purchase of the suit property. Since there was no response from the defendants, the plaintiff preferred the instant suit in the Court of the Civil Judge; Senior Division, Nagpur registered as Special Civil Suit No. 569 of 1988.

8. The defendants 1 to 3 resisted the claim of the plaintiff in the instant suit by filing their written statement. The description of the suit property was admitted. It was also admitted that the suit property was recorded in the name of the plaintiff in Nazul and Corporation records before the execution of the sale deed of the suit property in favor of the defendants/Government. Allegations that the Nazul Plot No.120 on which the suit house stood was outside the purview of the ULC Act and that the plaintiff was not holding any land in excess of the ceiling limit prescribed in the ULC Act were denied. As regards the effect of the invalidity of Section 27(1) in so far as it imposed restriction upon the right of

¹ AIR 1981 SC 234

the owner to dispose of his property within the ceiling limit as declared by the Supreme Court in Bhim Singhji's case cited supra, it was stated in the written statement that the plaintiff and the prospective buyer had voluntarily made an application for permission under Section 27(1) of the ULC Act and further, as the land and the building of the plaintiff could be used for a public purpose, the option was communicated by the defendant No. 2 to the plaintiff to purchase the land with building thereon for and on behalf of the State.

8-A. It was then stated in the written statement that there was voluntary and free discussion with the plaintiff about the price of the suit property and the same price i.e. Rs. 2,60,000/- which the prospective purchaser under the agreement of sale with the plaintiff had agreed to pay was also agreed to be paid by the defendant No. 2 as according to him the said price was the prevailing market price at that time. It was further submitted in the written statement that after going through the necessary formalities of consulting the other department/s, the sale deed was executed between the parties on 23-8-1976 after the full consideration was received by the plaintiff. The sale deed was then duly registered on the same day under the Registration Act. It was thus submitted that the suit property vested in the State Government and the plaintiff had no right whatsoever over the suit property.

9. The learned trial Court framed necessary issues on the basis of the pleadings of the parties. Parties led evidence before it, oral as well as documentary. In particular, the plaintiff deposed that he was forced to execute the sale deed in favor of the Government and that the Government took forcible possession of the suit property from him. The learned trial Court, on the basis of the evidence on record and the submissions of the parties, held that the plaintiff was not the lawful owner of the suit property after it was sold to the defendants as per the sale deed dated 23-8-1976. It, however, held that the plaintiff did not possess any land in excess of the ceiling limit under the ULC Act and that the suit was not barred by time. It also held that on the basis of the aforesaid sale deed dated 23-8-1976, the defendants had proved their title to the suit property and that the plaintiff had no title to the same after the sale deed dated 23-8-1976 was executed in favor of the defendants. It then held that the plaintiff had failed to prove that the sale deed dated 23-8-1976 obtained by the defendants in pursuance of the order dated 26-5-1976 passed in ULC case No.74/76 was null and void. It thus dismissed the suit filed by the plaintiff. Feeling aggrieved, the plaintiff has preferred this appeal to challenge the above judgment and decree of the learned trial Court.

10. It is pertinent to see that the dispute in the instant case is not so much of fact but is mostly of the legal effect of the declaration by the Supreme Court of the invalidity of the provisions in Section 27(1) of the ULC Act in so far as it imposed a restriction upon the owner in disposing of his property within the ceiling limit. The other issues which arise for consideration are whether the suit is barred by time and whether the plaintiff is entitled to obtain the declaration that the sale deed of the suit property dated 23-8-1976 is void and that the possession of the suit property should be restored to him on refund of the consideration of Rs. 2,60,000/- to the defendants received by him from them.

11. Before considering the question of legal effect of the declaration of invalidity given by the Supreme Court regarding provision of Section 27(1) of the ULC Act in so far as it imposed restrictions upon the right of the owner to dispose of his property within the ceiling limit, it is first necessary to consider the question whether the plaintiff possessed vacant land in excess of the ceiling limit prescribed under the ULC Act. In appreciating the submission of the parties upon the said question, it is necessary to see that the ceiling prescribed under the ULC Act and the restriction imposed upon holding land in excess of the ceiling limit is in respect of "vacant land" as provided in Section 3 of the said Act. The expression "vacant land" is defined in Section 2(q). The said definition shows that it does not include land on which there are buildings constructed and the land appurtenant to such a building. In answering issue No. 2 relating to the same in para 19 of its judgment, the learned trial Court has referred to the area occupied by Kamgar Bhavan belonging to the plaintiff as also the shops in Nagpur merchant market-cum-housing society belonging to him. It found that the total built-up area in Kamgar Bhawan was 12,000 sq. ft. and the total built-up area occupied by the shops was 1,000 sq. ft. However, since built-up area has to be excluded, it ultimately held that the plaintiff possessed vacant land within the ceiling limit prescribed under the ULC Act. It is not shown to us how the above finding arrived at by the learned trial Court is illegal and erroneous. The said finding thus deserves to be and is affirmed.

12. Proceeding thus on the footing that the plaintiff possessed the vacant land within the ceiling limit the next question to be considered is about the effect of declaration of invalidity of Section 27(1) of the ULC Act in so far as it imposed restriction upon the right of the owner to dispose of his whole property within the ceiling limit. Section 27(1) of the ULC Act is as follows :-

"27(1) Notwithstanding anything contained in any other law for the time being in force, but subject to the provisions of sub-section (3) of Section 5 and sub-section (4) of Section 10, no person shall transfer by way of sale, mortgage, gift, lease for a period exceeding ten years, or otherwise, any urban or urbanisable land with a building (whether constructed before or after the commencement of this Act) or a portion only for such building for a period of ten years of such commencement or from the date on which the building is constructed, whichever is later, except with the previous permission in writing

of the competent authority."

12-A. It is clear from the language of Section 27(1) of the ULC Act that it is not restricted to the lands within the ceiling limit only. In understanding its scope and ambit, perusal of Section 5(3) of the ULC Act to which it refers would show that restriction is placed therein upon the person holding land in excess of the ceiling limit to transfer any such land or part thereof by way of sale, mortgage, gift, lease or otherwise unless and until he has filed a return under Section 6 of the said Act about his holdings and a notification regarding the excess land held by him is published under Section 10(1) of the said Act, any transfer made in contravention of the said provision is deemed to be null and void.

13. Perusal of Section 10(4) of the ULC Act referred to in Section 27(1) of the said Act then shows that there is restriction placed thereunder upon the transfer by way of sale, mortgage, gift, lease or otherwise of any excess vacant land specified in the notification issued under Section 10(1) of the said Act during the period commencing on the date of the publication of the said notification under Section 10(1) and ending with the date specified in the declaration made under Section 10(3) of the said Act; if any transfer is made in contravention of the said provision, it is deemed to be null and void.

13-A. Considering the effect of the above provisions of sub-section (3) of Section 5 and sub-section (4) of Section 10 of the ULC Act upon the construction of Section 27(1) of the said Act, it is held by the Supreme Court in the case of *State of Madhya Pradesh v. Surendrakumar*², that it is open to the intending seller to make an application for permission to dispose of his property when the proceedings for determination of his excess land are pending, in which event the State Government may exercise its right of pre-emption under sub-section (5)(a) of Section 27 or it may return the said application to the intending seller and the purchaser since the proceedings for determination of excess land are not finalised. It is thus clear that Section 27(1) is not restricted to the lands within the ceiling area and, therefore, in that sense the declaration of invalidity of the said Section 27(1) is limited only to the lands which are within the ceiling limit. However, the said question need not detain us any more because as held by us above and also the learned trial Court the plaintiff has in his possession land within the ceiling limit and in fact no proceedings are initiated for determination of his excess land under the ULC Act. It is, therefore, clear that since no permission was required to sell the suit property to its prospective purchaser under the agreement of sale dated 31-3-1976, the impugned order dated 26-5-1976 rejecting the permission for sale of the said property and exercising option to purchase the said property passed under sub-section (5)(a) of Section 27 of the ULC Act was thus invalid.

13-B. It may be seen that if there was no obligation upon the intending seller or the purchaser to obtain the permission of the Competent Authority before effecting transfer of the property by way of sale, mortgage, gift, lease, or otherwise as required by Section 27(1) of the ULC Act, there was no question of the Competent Authority rejecting such permission or exercising its option to purchase such property. It cannot be said that the plaintiff had voluntarily made an

application under Section 27(1) of the ULC Act. On the other hand, in order to execute the valid sale deed in favor of the prospective buyer, before the said provision was declared invalid it was a legal requirement which he had to comply with before executing the valid sale deed in favor of the prospective purchaser. The legal compulsion to make such an application is obvious because at the time the said application was made since there was no declaration of its invalidity, the plaintiff had no other alternative but to comply with its requirement.

13-C. It cannot thus be said that the sale of the suit property by the plaintiff to the defendants was thus his voluntary legal act. As shown hereinbefore, there was legal compulsion upon the plaintiff under Section 27(1) of the Act to seek permission of the competent authority under Section 27(1) of the ULC Act to sell his immovable property to the prospective purchaser and further there was legal compulsion upon him to sell it to the State when, upon such application seeking its permission being made, the State could exercise and had in fact in the instant case exercised its right of pre-emptive purchase under sub-section (5)(a) of Section 27 of the ULC Act. When Section 27(1) of the ULC Act was struck down as invalid in so far as it was made applicable to the immovable property within the ceiling limit, there was not only no question of seeking any permission to sell from the competent authority but there was no right of pre-emptive purchase in the State in respect of such property within the ceiling limit. The sale deed executed in favor of the State by the plaintiff under its right of preemptive purchase cannot thus be said to be valid. It may be seen that once the competent authority had

²1995 (1) SCALE 350

decided to exercise its right of pre-emptive purchase under Section 27(5)(a) of the ULC Act, even if there was no agreement arrived at between the parties about the consideration for the suit property, the said Section 27(5)(a) of the ULC Act itself provided that the price would be calculated in accordance with the provisions of the Land Acquisition Act, 1894 or any other corresponding law for the time being in force. The fact that the State offered the same consideration which was agreed to between the plaintiff and the prospective purchaser and that the plaintiff accepted the same is thus of no consequence. The compulsion upon the plaintiff is thus writ large in the aforesaid provisions of Section 27(5)(a) of the ULC Act.

14. It may then be seen that, in Bhim Singhji's case cited supra the Supreme Court has not taken recourse to doctrine of prospective repealing in the sense that the provisions of Section 27(1) of the ULC Act which it declared *ultra vires* would be invalid from the date of judgment of the Supreme Court. When without any reservation a provision is declared as invalid, it would mean that it is void *ab initio* i.e. since its inception in the ULC Act. As the provision of Section 27(1) of the ULC Act in so far as it imposed restriction upon the right of a person to dispose of his immovable property within the ceiling limit is declared invalid, its effect is that there is no provision to support the compulsive pre-emptive purchase of the suit property by the State. As regards the right of pre-emption, the Supreme Court has observed in para 13 of its judgment in the case of *Radhakishan v. Shridhar*³, that there are no equities in favor of preemptor whose sole object is to disturb a valid transaction by virtue of the rights created in him by statute. It has then

held that to defeat the law of pre-emption by any legitimate means is not fraud on the part of either the vendor or the vendee and a person is entitled to steer clear of the law of pre-emption by all lawful means. In this regard it has relied upon its earlier judgment in the case of *Bishan Singh v. Khazzan Singh*⁴, It has also observed that the right of preemption is a weak right and is not looked upon with favor by Courts and, therefore, the Courts could not go out of their way to help the pre-emptor. See in this regard para 2 of the judgment of the Supreme Court also in the case of *Mohd. Noor v. Mohd. Ibrahim*⁵, The sale deed obtained from the plaintiff by the defendants in the exercise of their statutory rights of pre-emptive purchase under Section 27(5)(a) of the ULC Act on 23-8-1976 pursuant to the order passed by the competent authority thereunder is thus clearly void.

15. The next question which needs consideration is whether when the sale deed is void, we should exercise our discretion to grant relief of possession of the suit property to the plaintiff. The learned counsel for the defendants has urged before us that the equitable relief of the declaration that the sale deed is void and the consequential relief of possession should not be granted to the plaintiff because he has not come with clean hands and that there was mistake of law committed by both the parties. He has submitted before us that the averments in the plaint as also the evidence of the plaintiff contain improvements, embellishments, distortion and twisting of the facts and circumstances and taking the same and the background of the transaction in question into consideration, it cannot be said that the plaintiff has come with clean hands in the instant case.

16. In support of his plea that such an equitable relief should be refused to him, the learned counsel for the defendants has relied upon the judgment of this Court in the case

³ AIR 1960 SC 1368

⁵1994 (5) JT (SC) 429

⁴ AIR 1958 SC 838

of *Kamarbai Ahmed v. Badrinarayan*⁶, Although the facts in the above case are not given in the above report, it appears from the last para in the head-noting in the said report that according to this Court it was difficult to hold in the facts of the said case that the agreement or the consideration for the sale deed executed by the plaintiff in favor of defendant and which was challenged as void by him in the said case was future co-habitation. This Court further held in the said case that, even if, it was held that future co-habitation was incidental and consequential to the intimate relations which were established between the plaintiff and the defendant, the said consideration was immoral and, therefore, the Court would not assist the plaintiff by granting relief acting on the principle of the maxim 'in pari delicto potior est conditione defendantis'. The ratio of the said case is thus distinguishable.

17. It is, however, difficult to see what improvements, embellishments, distortion and twisting of facts and circumstances are contained in the averments in the plaint and in the evidence of the plaintiff because the material facts in the instant case referred to above lie within a narrow compass and are undisputed and the whole question depends upon the effect of the declaration of invalidity of Section 27(1) of the ULC Act made in the judgment of the Supreme Court in *Bhim*

Singhji's case in so far as it imposed restriction upon the right of a person to dispose of his immovable property within the ceiling limit. It cannot thus be said that there are any improvements made or there are any distortions of material facts in the instant case. It cannot, therefore, be held that the plaintiff has not come to the Court with clean hands and, therefore, should be denied the relief claimed by him as equitable considerations.

18. As regards the question of equity, as observed by the Supreme Court in the case of *Radhakishan v. Shridhar* (cited supra), there are no equities in favor of a pre-emptor whose sole object is to disturb a valid transaction by virtue of the rights created in him by Statute. Further as observed in the said case as well as in the recent judgment of the Supreme Court in the case of *Mohd. Noor v. Mohd. Ibrahim* (cited supra), a right of pre-emption which operates as a clog on the right of the owner to alienate his property has not been looked upon favourably by the Courts and to defeat the law of pre-emption by any legitimate means was not fraud on the part of either the vendor or the vendee and a person was entitled to steer clear of the law of pre-emption by all lawful means. The question of equity has thus to be answered in favor of the plaintiff and not in favor of the defendants.

19. As regards the plea raised on behalf of the defendants that there was mistake of law committed by both the parties in execution of the sale deed, and therefore, the relief should not be granted to the plaintiff, it may first be seen that the principle of Section 21 of the Contract Act according to which the contract is not voidable, because it is caused by mistake as to any law in force in India is not attracted because there is no contract in the instant case in the sense in which it is understood in Section 10 of the Contract Act as one of its basic requirements is that it must be made by free consent of the parties. Perusal of Section 13 of the Contract Act would then show that consent according to it means consensus ad idem. In the instant case, the sale deed is executed by the plaintiff in favor of the defendant not as a result of any agreement with them. In fact the facts in the instant case would show that the plaintiff had arrived at an agreement of sale dated 31-3-1976 with M/s. Kothari Brothers and it is out of legal compulsion arising out of the preemptive

⁶1977 Mah LJ 115

right of purchase created in favor of the State by Section 27(5)(a) of the ULC Act that the plaintiff was required to sell the suit property to the defendants, since the State exercised the option of pre-emptive purchase of the suit property as per the order of the competent authority dated 26-5-1976. It is thus not a case of common mistake in arriving at a contract covered by Sections 20 and 21 of the Contract Act. It is a case where in the exercise of a statutory right of pre-emption, the purchase is made and when the said provision is no more available to support the purchase, the purchase has to be held as void.

20. Secondly, even as regards the question of common mistake of law, it is well settled that where the mistake is so fundamental as to prevent any real agreement "upon the same thing" "in the same sense" from being formed, as envisaged by Section 13 of the Contract Act, it is

immaterial of what kind the mistake is or how it is brought about. It is observed by Pollock and Mulla in their Book on Indian Contract and Specific Relief Acts, Eleventh Edition Volume-I at page 300, that it is not accurate to say that relief can never be given in respect of the mistake of law placing reliance upon the following cases :

(i) *Allcard v. Walker*⁷, per Stirling, J.

(ii) *Kiriri Cotton Mills Ltd. v. Dewani*⁸,

It has further observed that in India it does not seem that the present section was intended to give validity to apparent Agreement not satisfying the conditions of real consent as laid down in Sections 10 and 13 of the Contract Act. It is also observed therein that the existence of particular private rights is a matter of fact, though depending upon the rules of law and for most civil purposes ignorance of civil right is ignorance of fact. It is thus, clear that, if there is a fundamental error in arriving at an agreement where it cannot be said that there is consensus ad idem within the meaning of Section 13 of the Contract Act, even though there is a common mistake of law, the contract is void. The relief cannot therefore be refused to the plaintiff on the ground that both parties have committed a mistake of law in executing the sale-deed.

21. It is however, true that there is discretion conferred upon the Court under Sections 31 and 32 of the Specific Relief Act, 1963 in cancellation of the instrument as void or voidable or in granting the relief of declaration that the instrument is void or voidable, but in the instant case since the sale deed dated 23-8-1976 is void ab initio, the suit is in truth and substance a suit for possession of the suit property since when the sale-deed is void ab initio, there is no need to set it aside and the same can be ignored. What has however, to be seen is that the exercise of discretion by the Court in granting the equitable relief must be upon sound principles and considerations. It cannot be gainsaid that when the defendants have obtained the possession of the suit property under a void sale-deed, there is reasonable apprehension of the substantial injury to the plaintiff within the meaning of Section 31 of the Contract Act.

22. As regards the question of exercise of discretion Section 27(2) of the Specific Relief Act, 1963, relates to rescission of contract provides for certain guidance in exercising the discretion by the Court. The said Section 27(2) is as follows :

⁷(1896) 2 Ch 369, 381

⁸(1960) ACI All England Reporter 177 (sic)

"Section 27(2) : Notwithstanding anything contained in sub-section (1), the Court may refuse to rescind the contract

(a) where the plaintiff has expressly or impliedly ratified the contract, or

(b) where owing to the change of circumstances which has taken place since the making of the contract (not being due to any act of the defendant himself), the parties cannot be substantially restored to the position in which they stood when the contract was made; or

(c) where third parties have, during the subsistence of the contract, acquired rights in good faith without notice and for value; or

(d) where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

22A. It is material to see that the defendants have not brought the case in any of the circumstances referred to in sub-section (2) of Section 27 of the Specific Relief Act. In particular, there is no case made out that the third party's right or interest has come into being upon the suit property and therefore, there is hindrance in granting the relief of possession to the plaintiff. In fact, according to the case of the defendants the said property is in possession of the defendants because it was purchased for housing the office of the defendant No. 3. No other change of circumstances have also been proved since the date of pre-emptive purchase because of which the defendants are not in a position to substantially restore the possession of the suit property to the plaintiff. In these circumstances when the sale-deed is void because there is no provision to support the preemptive purchase by the defendants and more-over as held by the Supreme Court in the case *Radhakishan v. Shridhar* (cited supra), there are no equities in favor of the State, then there is no reason why the discretion should not be exercised in granting the relief of possession of the suit property to the plaintiff since the sale-deed executed between the parties is void ab-initio.

23. It is however, clear from Section 33 of the Specific Relief Act, 1963 or Section 65 of the Contract Act that on sale-deed being held as void the plaintiff is entitled to the relief of possession subject to the condition that he must return to the defendant the benefit of the consideration which he has received for the sale transaction from them. As we shall show hereinafter the defendants cannot claim any interest upon the said amount, because they have up till now enjoyed the possession of the suit property. The relief of possession of the suit property can thus be granted to the plaintiff subject to the condition that he would return within the stipulated time the amount of consideration of Rs. 2,60,000 paid to him by the defendants in the instant case.

24. The next question which needs consideration is whether the suit filed by the plaintiff is barred by time. The relevant dates for considering the said question are that pursuant to the permission granted by the defendant No. 2 on 26-5-1976, the sale-deed was executed between the parties on 23-8-1976. The declaration of invalidity of Section 27(1) of the ULC Act in so far as it imposed restrictions upon the right of the owner to dispose of the property within the ceiling limit was given on 13-11-1980 when the Supreme Court rendered the Judgment in Bhim Singhji's case. However, the said Judgment was reported in the Law Journal i.e. All India Reporter in 1981 as shown above. The suit is filed by the plaintiff on 22-8-1988 on the strength of the above Judgment of the Supreme Court in Bhim Singhji's case.

25. The learned Counsel for the defendants has urged before us that the main relief which is sought in the suit is of declaration that the order passed by the defendant No. 2 under the ULC Act on 26-5-1976 exercising option to purchase the suit property is void and consequently the sale deed executed pursuant to the same on 23-8-1976 is also void. The submission thus is that it

is Article 58 of the Limitation Act, 1963 which would be applicable to the said declaration and since the period of limitation prescribed therein is 3 years from the date the right to sue accrues i.e. when the said sale deed which is void is executed by the parties, the suit is barred by time as it is filed beyond a period of 3 years from the date of the sale-deed i.e. 23-8- 1976. Even if the period of limitation is reckoned from the date of the Judgment of the Supreme Court in Bhim Singhji's case or its publication in law reports in 1981. It is urged that the suit is still beyond 3 years and is thus barred by time.

26. The learned counsel for the plaintiff, on the other hand, has urged before us that the suit is basically a suit for possession of the suit property based upon title and when it is urged that the sale-deed is void *ab initio* since the order dated 26-5-1976 exercising option for pre-emptive purchase of the suit property is without jurisdiction and is a nullity, a plea about its invalidity can be raised in any proceedings and it is not necessary to claim any declaration in that regard. He has thus urged before us that it is Article 65 of the Limitation Act, 1963 which is applicable wherein the period of limitation for suit based on title is 12 years from the date the possession of the defendant becomes adverse to the plaintiff. He has therefore submitted before us that the suit is within limitation not only from the date of the declaration by the Supreme Court in Bhim Singhji's case of invalidity of Section 27(1) of the ULC Act in so far as it imposed restriction upon the owner of the property to dispose of his property within ceiling limit but also from the date of the sale-deed itself. A period of limitation of 12 years is pleaded by the plaintiff in para 10 of the plaint regarding the cause of action in the suit.

27. In considering the rival submissions, it may be seen that it is well settled that if the order passed is without jurisdiction and is a nullity then it is non est i.e. non existent in the eye of law and it is not necessary to set it aside. A plea about its invalidity can therefore be raised in any proceedings and it is not necessary to claim a separate declaration that such an order is void. The suit for possession thus would be governed by Article 65 of the Limitation Act. See *Ajudh Raj v. Moti*⁹, para 25. The same view is also taken by the learned single Judge of this Court in the case of *Indira Bhalchandra v. Union of India*¹⁰, See also the Judgment of the Privy Council in the case of *Kalyandappa v. Chabasadappa*¹¹, and in *Paadamakar v. Fakra*¹² PC and of this Court in *Bhagirathibai v. Appa Dada*, 1934 (58) ILR Bom 280 in relation to the declaration about adoption in a suit for possession by an adopter. The instant suit is thus governed by Article 65 of the Limitation Act, 1963 and the period of limitation for filing the instant suit is thus 12 years. The suit is thus within time even from the date when the possession of the suit property was taken on the date of the sale deed executed on 23-08- 1976.

28. Even otherwise, it is necessary to see that if there is a mistake, Section 17(1)(c) of the Limitation Act provides that the limitation would start from the date the mistake is noticed. In the instant case, the mistake is the mistake of law and can be said to be noticed

⁹ AIR 1991 SC 1600

¹¹48 Bom 411

¹⁰1990 Mah LJ 1056

¹²12 PLT 653 (sic)

on the date when the provision is declared as invalid. In this view of the matter, we are supported

by the Judgment of the Supreme Court in the case of *Mahabir Kishore v. State of M.P.*¹³, and also in the case of *Salonah Tea Company Ltd. v. Supdt. of Taxes, Nowgang*¹⁴, From the said date of declaration of invalidity, the instant suit for possession is clearly within a period of limitation of 12 years. We cannot, therefore, accept the submission made on behalf of the defendants that the suit is barred by time. The finding of the learned trial Court on the question of limitation thus deserves to be affirmed.

29. The learned Counsel for the defendants has then urged before us that as in the case of *Surendrakumar v. Lilawati*¹⁵, of M.P. High Court, it is the prospective purchaser M/s. Kothari Bros. under the agreement of sale dated 31-3-1976 who should have filed the suit being adversely affected since it was deprived of the right to purchase the suit property because of the preemptive purchases by the defendants. At any rate, the submission is that the suit is not maintainable at the instance of the plaintiff alone and that the said prospective purchaser should have been made a party to the suit. In appreciating the above submission made on behalf of the defendants, it may be seen that there was no right, title or interest created in the suit property in favor of the prospective purchaser merely by entering into an agreement of sale. The only right it had was to file a suit for specific performance of contract against the plaintiff seller in which perhaps it could possibly raise the plea about the invalidity of pre-emptive purchase by the defendants but then it would not mean that the seller i.e. the plaintiff could not challenge the pre-emptive purchase made by the defendants. In fact the title in the suit property continued to vest in him even after the agreement of sale was entered into by him with the prospective purchaser. It is his property which is purchased by compulsory pre-emptive purchase by the defendants. It is his freedom of contract which is affected by the said purchase. He had, therefore, every right to challenge the said pre-emptive purchase by the defendants by filing the instant suit in which the prospective purchaser was not a necessary party as no relief was sought against it.

30. In fact, the above Judgment of the M.P. High Court does not support the above plea of the defendant as it is observed in para 12 of its Judgment cited supra that one of the reasons given in para 12 of the Judgment in the said case for refusing the Writ of Mandamus in the said case is that the seller had not come forward to challenge the pre-emptive purchase by the State in the said case. Further, while reversing the view taken by the M.P. High Court in the above case, the Supreme Court has observed in para 5 of its Judgment in the case of *State of M.P. v. Surendrakumar*¹⁶, cited supra that the respondent before it (i.e. the original petitioner before the High Court) was only an intending purchaser and therefore, he could not complain that until the draft proceedings are finalised and the declaration under Section 10(3) of the ULC Act is published, the State cannot exercise its option to purchase the property. The above submission made on behalf of the defendants cannot thus be accepted.

31. The learned counsel for the plaintiff has also, for claiming the relief in the instant suit, relied upon the Judgment of the Madhya Pradesh High Court in the aforesaid case of *Surendrakumar v. Lilawati*¹⁷, In particular, he has urged that had the above Writ Petition been filed before the M.P.

High Court by the seller i.e.

13 AIR 1990 SC 313

¹⁵ AIR 1982 Mad Prad 49

¹⁷ AIR 1982 Mad Prad 49

14 AIR 1990 SC 772

¹⁶(1995) 1 SCALE 350

the owner of the suit property instead of its prospective purchaser under the agreement of sale, the relief of declaration that the sale deed in the said case is void would have been granted to him. Perusal of the said Judgment shows that the M.P. High Court was of the view that in view of the ban imposed by Section 5(3) of the ULC Act and since the provisions of Section 27(1) were subject to the provisions of Sections 5(3) and 10(4) of the said Act, the application for permission to sell the property was itself not maintainable in the said case and, therefore, the order exercising option to purchase the said property under sub-section (5) (a) of Section 27 was void. The above view of the M.P. High Court is no more a good law since the Judgment in the said case is reversed by the Supreme Court in the case of *State of Madhya Pradesh v. Surendra Kumar*¹⁸, (cited supra) . The above Judgment of the M.P. High Court is thus of no assistance to the plaintiff. However, the facts in the instant case narrated above are different from the facts in the above case before the M.P. High Court because in the instant case no proceedings for determination of excess land were pending under Section 5(3) of the ULC Act and as held hereinabove the plaintiff possessed the vacant land below the ceiling limit whereas in the above M.P. case as is clear from para 5 of the Judgment of the Supreme Court the owner was in possession of vacant land more than the ceiling area. The ratio of the Judgment of the Supreme Court in the above case is thus not attracted in the instant case.

32. Considering next the case of the plaintiff for decree for mesne profits at the rate of Rs. 5,000/- per month from 23-8-1976 i.e. the date of execution of the sale deed on which date possession of the suit property is taken by the defendants to the date of the suit, it may be seen that just as the defendants had the use of the suit property, the plaintiff had also used the consideration of Rs. 2,60,000/- paid for the same. It may further be seen that the above consideration is the same which the plaintiff would have received from his prospective purchaser M/s. Kothari Brothers under an agreement of sale dated 31-3-1976 with it, if the permission had been granted to him to sell the suit property to the said prospective purchaser. It may be seen that if the said amount of consideration of Rs. 2,60,000/- had been invested in fixed deposit in any of the nationalised bank, it would have received substantial income on account of interest upon the said amount. Except the bare word of the plaintiff, there is no material placed on record to show that the suit property would fetch an amount of Rs. 5000/- p.m. for its use and occupation. In the circumstances, balancing the equities arising in favor of the plaintiff and the defendants since the plaintiff enjoyed the consideration received by him for the suit property and the defendants the suit property itself, we do not think there should be a decree for past mesne profits in favor of the plaintiff as claimed by him.

33. As regards the question of future mesne profits the said claim will arise if after deposit of the amount of Rs. 2,60,000/- in the trial Court by the plaintiff payable to the defendants as directed by this Court, the defendants do not restore the possession of the suit property to the plaintiff.

34. In the result, the instant appeal is partly allowed. The Judgment and decree of the learned trial Court is set aside, and the suit of the plaintiff is partly decreed as follows :

(a) The decree for possession, of the suit property, as described in the Schedule which is a part and parcel of the plaint, is passed against the defendants on the

¹⁸1995(1) SCALE 350

condition that within 2 months from the date of this order the plaintiff shall deposit in the trial Court an amount of Rs. 2,60,000/- which amount shall be paid to the defendants.

(b) Claim for damages in the amount of Rs. 7,20,000/- is rejected.

(c) On an application being made under Order 20, Rule 12, Civil Procedure Code there shall be an inquiry into the future mesne profits from the date of deposit of the amount of Rupees 2,60,000/- by the plaintiff in the trial Court till the date the possession is delivered to him if within one week from the date of the deposit of the consideration of Rs. 2,60,000/- in the trial Court by the plaintiff the possession of the suit property is not restored to him by the defendants.

(d) In the circumstances, however, the costs shall be as incurred by the parties.

35. The learned Counsel for the respondents has requested that the implementation of our Judgment should be stayed for a period of two months for moving and for bringing the stay from the Supreme Court of the Judgment and decree passed by this Court. The learned Counsel appearing for the appellant has vehemently opposed the above request made by the learned counsel for the respondents. However, taking facts and circumstances of the instant case into consideration, we direct that the implementation of our Judgment and decree shall remain stayed for a period of one month from the date of this order.

Appeal partly allowed.