

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.2595 OF 2005

Shri Keshav Tukaram Taware.	]	
Age - 43 years, Occupation – Business,	]	
R/at : Bhoiwada, Bhiwandi, Tal. Bhiwandi,	]	
Dist. Thane.	]	... Appellant

Versus

1. Smt. Sulochana Shankar Kolekar,	]	
Age – 41 years, Occupation – Agriculture,	]	
2. Shri Dattatraya Shankar Kolekar,	]	
Age – 31 years, Occupation – Agriculture,	]	
3. Shri Ramesh Shankar Kolekar,	]	
Age – 39 years, Occupation – Agriculture,	]	
All Nos.1 to 3 reside at	]	
Panjarpol, Kambarpada, House No.211	]	
Tal. Bhiwandi, Dist. Thane.	]	... Respondents

Mr. Sandesh D. Patil for Appellant.

Mr. Kashyap Bhalerao i/b Mr. A. A. Garge for Respondents.

CORAM :- K. K. TATED &

SARANG V. KOTWAL, JJ.

RESERVED ON :- 22 JANUARY, 2018

PRONOUNCED ON :- 05 FEBRUARY, 2018

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. This is an Appeal preferred by the Appellant (the original Plaintiff) challenging the Judgment and Order dated 03/09/2004

passed by the Joint Civil Judge, Senior Division, Thane, in Special Civil Suit No.163 of 1993, whereby the Appellant's Suit for specific performance and damages was dismissed but he was granted refund of Rs.3 Lakhs from the Respondents (the original Defendant Nos.1 to 3) with interest at the rate of 6% per annum from the date of filing of the Suit till realization of the amount.

2. The Appellant had filed the above-mentioned Suit for specific performance of the agreement dated 12/03/1990 entered into between the Appellant and the Respondents for development of an agricultural land bearing Survey Nos.52/3/1Pt., 52/3/1Pt., 49/3 Pt. and 49/3Pt. totally admeasuring 1H 05R situate at Taluka Bhiwandi, District Thane. It is the case of the Appellant in the plaint, that, the agreement was entered into on 12/03/1990 pursuant to which the Appellant had paid Rs.3 Lakhs. On 12/03/1990 itself, a Power of Attorney was executed by the Respondents in favour of the Appellant. However, after executing this document, the Respondents did not provide the 7/12 Extract for the purpose of preparing a layout plan and submitting it to the competent authority for conversion to non-agricultural use of the land. It is the case of the Appellant that the Respondent No.2 told him that he had entrusted this work to various persons. It is further pleaded in the plaint that the Respondents had made an application to the Collector of Thane for converting the land into non-agricultural land but it was returned to the Respondents on 08/01/1991 asking for compliance of some queries. The Appellant has further pleaded in the plaint that suddenly he received a copy of

the Caveat Applications dated 22/04/1991 filed by the Respondents in the Court of Civil Judge, Junior Division, at Bhiwandi and in the Court of Civil Judge, Senior Division, at Thane. Therefore, the Appellant, through his Advocate, addressed a notice to the Respondents calling upon them to perform their part of the contract and showed readiness and willingness of performance of his own part. However, vide a reply dated 19/05/1991, the Respondents refused to do so and on the contrary, claimed that the contract in question be treated as cancelled and non-existent. In this background, the Appellant filed the suit in the year 1993 for various prayers including directions to the Respondents to perform their part of the contract vide the agreement dated 12/03/1990, in the alternative, the Appellant prayed that the Respondents be directed to pay damages to the tune of Rs.2,38,49,000/-.

3. The Respondents entered their appearance and filed their Written Statement denying most of the contentions of the Appellant made in the plaint. The main pleading in the Written Statement was that the Appellant had not performed his part of the contract. The Appellant had not obtained various permissions which was the obligation cast on him in the agreement itself. It is further averred in the Written Statement that the Appellant had entered into the agreement with the Respondents with *mala fide* intentions of not fulfilling it but only to pressurize the Respondents in order to obtain more money from them. The main contention of the Respondents was that they belong to the caste 'Malhar-Koli' and hence *Adivasis* and the

land transaction could not be completed without the permission of the Collector and the State Government.

4. The learned Trial Judge framed various issues on 25/07/1997. In the support of his case, the Appellant examined himself as the Plaintiff's Witness No.1 and supported his contentions and pleadings in the plaint. One Yashwant Khanderao Mhatre was examined as the Plaintiff's Witness No.2 who claimed to have prepared the concerned agreement dated 12/03/1990 which was produced at Exh.57. According to him, the necessary information for preparing the said document was supplied to him by the Defendant No.2 and the document was signed by the parties in his presence. He had also prepared the Power of Attorney and declaration. One Ganesh Pundlik Kotharkar, who was a commission agent, was examined as the Plaintiff's next witness. This witness has deposed about the negotiations between the parties. The Appellant further examined one Mohd. Iqbal Yasim as Plaintiff's Witness No.3 who deposed about how the Defendant No.2 had refunded the earnest money to one Jayant Tipnis before it was decided between the parties to deliver the suit property for development to the Appellant. The Plaintiff's Witness No.4 was one Ravish Abdul Rehman Duru who was an Architect. He deposed that the Defendant No.2 had come to him for making layout of his land. On behalf of the Respondents, Mrs. Sulochanabai Shankar Kolekar, the Respondent No.1, gave her evidence and was cross-examined on behalf of the Appellant.

5. After recording the evidence and hearing the parties, the learned Judge passed his Judgment and Order as mentioned earlier. The learned Judge answered in all 10 issues. The Respondents had taken a defence that the Appellant had caused the Respondents to entered into the agreement dated 12/03/1990 by playing fraud and by exercising undue influence. However, the learned Judge recorded his finding that no such defence was taken anytime earlier by the Respondents and no such case was made out. The learned Judge also held that the Suit filed by the Appellant was not pre-mature. The learned Judge observed that since the Respondents – Defendants themselves had filed Caveat Applications on 12/04/1991, it meant that the only recourse available to the Appellant was to file a Suit. The learned Trial Judge further held that another contention of the Defendants – Respondents that the said agreement Exh.57 was hit by the Bombay Tenancy and Agricultural Lands Act, 1948 was not acceptable because the mutation entry brought on record vide Exhibit Nos.38, 39 and 40 did not show that the Suit lands were acquired by the original owner under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948.

6. However, the two important points raised by the Respondents found favour with the learned trial Judge and on the basis of these two points, the Suit was not decreed in favour of the Appellant for specific performance. The first of these was the contention of the Respondents that they being of the caste '*Malhar-Koli*', they were *Adivasis* and under Section 36A of The Maharashtra

Land Revenue Code, 1966 (for short, 'the Code'), such transaction of the land of which they were in possession, could not take place with the non-tribals in the absence of the previous sanction of the Collector and the State Government. The learned Judge referred to the 7/12 Extract produced on record vide Exhibit Nos.41 to 44 wherein column for 'Other Rights' clearly mentioned that the land was subject to Section 36 and 36A of the Code thereby meaning that no further transaction in respect of the said land could take place without the previous sanction envisaged under Section 36A of the Code.

7. The second contention of the Respondents which found favour with the learned Trial Judge was that the Appellant has failed to obtain the necessary permissions; and the said obligation having not been fulfilled by the Appellant, the Appellant was not entitled for a decree of specific performance.

8. We have heard Mr. Sandesh D. Patil, learned Counsel for the Appellant and Mr. Kashyap Bhalerao, learned Counsel for the Respondents. After hearing both the sides and going through the record and proceedings and carefully considering the impugned Judgment, the following points arise for our consideration.

SR. NO.	POINTS	FINDINGS
1	Whether the Appellant has made out any case for interference with the impugned Judgment and Order ?	No
2	What Order ?	As per the Final Order

REASONS

9. The learned Counsel for the Appellant submitted that the Caste Certificates of the Respondents produced on record vide Exhibit Nos.112, 113 and 114 were issued by the Sub-Divisional Magistrare, Bhiwandi but they were not scrutinized by the Scrutiny Committee as required under The Maharashtra Scheduled Casters, Scheduled Tribes, Denotified Tribes (*Vimukta Jatis*), Nomadic Tribes, Other Backward Classes and Special Backward Category (Regulation of Issuance and Verification of) Caste Certificate Act, 2000 (for short, 'the said Act'). He further submitted that the Appellant was always ready and willing to perform his part of the agreement and in fact it was the duty of the Defendants – Respondents to get the sanction if it was required for such transfer. In support of his contention, Mr. Patil relied on the Judgment of the Hon'ble Supreme Court in the case of ***Natuhlal Vs. Phoolchand***¹ wherein it was held that, where the statute property is not transferable without the permission of an authority, an agreement to transfer the property must be deemed subject to the implied condition that the transferor will obtain the sanction of the authority concerned. Similar view was expressed by this Court in the case of ***Balu Baburao Zarole Vs. Shaikh Akbar Shaikh Bhikan and Others***². Therefore according to Mr. Patil, the sanction, if it was required, should have been obtained by the Respondents themselves.

¹ 1969 (3) Supreme Court Cases 120

² 2001 0 AIR (Bom) 364 : 2001 3 ALL MR 95 : 2001 3 BomCR 255 : 2001 0 Supreme (Mah) 124

10. As against these submissions, Mr. Kashyap Bhalerao, the learned Counsel for the Respondents, submitted that the said Act did not contemplate that the Caste Scrutiny Committee's certificate was necessary. He further submitted that the 7/12 Extract on record amply shows that the transfer was always subject to the provisions of Section 36A of the Code. He further invited our attention to the clauses of the agreement at Exh.57 which, according to him, cast obligation on the Appellant to obtain all the necessary permissions. He further submitted that on their part, the Respondents had executed the Power of Attorney at Exh.58. Therefore, it was the duty of the Appellant alone to obtain all the necessary permissions and the Appellant having failed to do so, he was not entitled for a decree of specific performance.

11. For deciding whether the bar of Section 36A of the Code is concerned, the learned Trial Judge has relied on the 7/12 Extract at Exhibit Nos.41 to 44 wherein the last column mentions that the transaction was subject to the provisions of Section 36A. There is no specific cross-examination of the Defendant No.1 by the Plaintiff as to exactly how those entries were made. There is only a reference that the entries were made at the instance of the Defendant No.2. However, the line of cross-examination was not pursued further and therefore the Appellant cannot derive any benefit to contend that the said entry was wrongly made at the instance of the Defendant No.2. If Section 3 of the said Act is perused carefully, it deals with the case where any person belonging to any of the Scheduled Castes,

Scheduled Tribes, De-notified Tribes (*Vimukta Jatis*), Nomadic Tribes, Other Backward Classes of Special Backward Category is required to produce a Caste Certificate validated by the Scrutiny Committee (under Section 4), if he has to enter into a transaction with a tribal land owner. The said Section 3 does not appear to cover the case of the present nature where a non-tribal like the present Appellant is taking shelter to Section 3 for shifting the onus on the Respondents to obtain Validity Certificate from the Scrutiny Committee. However, we need not go into the said issue for decision of the present Appeal because on the first principle itself, the Appellant has failed to prove that he was ready and willing to perform his part of the contract.

12. Mr. Bhalerao, learned Counsel for the Respondents, invited our attention to Clause 4(E) of the said agreement dated 12/03/1990 at Exh.57. The said Clause 4(E) clearly mentions that all the permissions viz. plans from the Municipal Corporation, N.A. permissions and other permissions removing other objections were to be obtained by the party of the second part who was the Appellant herein. The evidence shows that even for N.A. permission, the Appellant had not taken any steps. On the contrary, the Respondents had executed the Power of Attorney giving the power to the Appellant to take all the steps to obtain such permissions. The said Power of Attorney was executed on the same day i.e. 12/03/1990. There is nothing to show that the Appellant had taken any such steps to fulfill the obligation cast on him by the said agreement dated 12/03/1990 at Exh.57.

13. Mr. Patil relied on the two Judgments mentioned earlier to contend that it was the duty of the transferor to obtain all the sanctions. However, those Judgments themselves mention that such duty of the transferor is there only in the absence of any specific clause dealing with the same. In the present case, as pointed out in Clause 4(E), there is a specific mention that the said duty was cast on the Appellant herein and therefore, it is clear that the Appellant has not fulfilled his obligation. Therefore, the learned Trial Judge has rightly held that the Appellant was not entitled for the decree of specific performance. The learned Trial Judge has also properly recorded his finding and valid reasons as to why he was not awarding any damages. The learned Trial Judge has observed that the Appellant had not fulfilled his part of the contract and has not made out a case as to how he is entitled for any damages and therefore, the learned Trial Judge has restricted his order to the refund of the amount with interest which was accepted by the Respondents. Hence, we find no error in the impugned Judgment and Order.

14. With the result, we find no merit in the Appeal and hence the Appeal is accordingly dismissed.

(SARANG V. KOTWAL, J.)

(K. K. TATED, J.)