

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.416 OF 2020

WITH

CIVIL APPLICATION NO.8154 OF 2020

Chamelibai Baburao Nhavi

Since deceased through legal representatives -

- 1 Rajaram Baburao Nhavi,
Age 59 yrs., Occ. Agri.,
R/o Purnad, Tq. Muktainagar,
Dist. Jalgaon.
- 2 Vimalbai Bhaskar Nhavi,
Age 49 yrs., Occ. Household,
R/o Shingadi, Tq. Raver,
Dist. Jalgaon.
- 3 Kamalbai Ramesh Nhavi,
Age 44 yrs., Occ. Household,
R/o Rasalpur, Tq. Raver,
Dist. Jalgaon.
- 4 Alka Kailas Nhavi @ Aamodkar,
Age 42 yrs., Occ. Household,
R/o Sukali, Tq. Muktainagar,
Dist. Jalgaon.
- 5 Rekha Bandu Nhavi @ Rode,
Age 38 yrs., Occ. Household,
R/o Khamani, Tq. Burhanpur,
Dist. Khandwa (Madhya Pradesh).

... Appellants

... **Versus** ...

- 1 Brijlal Eknath Patil,
Age 64 yrs., Occ. Agri.,
 - 2 Vimalbai Brijlal Patil,
Age 56 yrs., Occ. Household,
- Both are r/o Uchande, Tq. Muktainagar,
Dist. Jalgaon.

... **Respondents**

...

Mr. P.R. Katneshwarkar, Advocate for the appellants

Mr. Pavan Pawar, Advocate h/f Mr. H.P. Randhir, Advocate for respondent
Nos.1 and 2

...

CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 11th FEBRUARY, 2021.

PRONOUNCED ON : 09th APRIL, 2021.

JUDGMENT :

1 Present appellants are the original defendants and present respondents are the original plaintiffs. Present appellants challenge the concurrent findings in the Second Appeal.

2 Heard learned Advocate Mr. P.R. Katneshwarkar for appellants and learned Advocate Mr. Pavan Pawar holding for learned Advocate Mr. H.P. Randhir for respondent Nos.1 and 2.

3 Before the rival contentions are considered the background is

take a note of, original plaintiffs had filed Regular Civil Suit No.29/2006 before Civil Judge Junior Division, Muktainagar, Dist. Jalgaon for specific performance of contract and permanent injunction. They had come with a case that the defendant No.1's husband and defendant No.2 to 6's father deceased Babu Lahanu Nhavi was the owner of land Gat No.9/1 admeasuring 02 H 64 R and barren land admeasuring 01 H 76 R, that is, in all 04 H 40 R situated at village Purnad, Tq. Muktainagar, Dist. Jalgaon. The said land could not have been sold without obtaining prior permission from the competent authorities. Plaintiffs contended that Babu had entered into agreement, to sell the said suit land to them and a written registered agreement was executed on 27.08.2001 for a consideration of Rs.78,000/-. On the date of the agreement the plaintiffs had paid amount of Rs.55,000/- as earnest to Babu. It was decided that the remaining amount of Rs.23,000/- would be paid at the time of execution of the sale deed. It was also agreed to bring the permission required under Section 43 of the Bombay Tenancy and Agricultural Lands Act (hereinafter referred to as "B.T. and A.L. Act") from the competent authority. Plaintiffs further contend that no efforts were made by Babu in his life time to get the said permission, however, at the time of executing the said agreement possession of the land was parted with the plaintiffs by Babu. Each and every time plaintiffs used to make inquiry with Babu about the permission but he used to avoid by saying that there is no

hurry. Babu expired on 21.03.2005 and the land got mutated in the name of defendant Nos.1 to 6. Plaintiffs were ready and willing to perform their part of the contract, that is, by giving remaining amount of Rs.23,000/-. They were ready to get the sale deed executed, and therefore, they asked defendant Nos.1 to 6 to bring the permission, but defendant Nos.1, 3 to 5 changed their statement before the Sub Divisional Officer and stated that permission should not be granted. Under such circumstance, the said application came to be disposed of. Thereafter, defendant Nos.1 and 2 obstructed the possession of the plaintiffs over the suit land on 16.06.2006, and therefore, they filed the suit for specific performance of the contract and permanent injunction.

4 Defendant Nos.1, 2 and 5 filed written statement at Exh.23 and defendant Nos.3, 4 and 6 adopted the said written statement by filing a pursis. All of them have denied the execution of any such document by their predecessor Babu. It is denied that plaintiffs had paid earnest amount of Rs.55,000/- to Babu. It has been contended that plaintiffs lend money to the needy persons, and therefore, Babu had approached the plaintiffs in August, 2021. He demanded amount of Rs.20,000/- on interest, however, as the plaintiffs were not having money lending licence, they got the said document in the form of agreement to sell executed from Babu. The said document was

hollow and not to be implemented. Babu had repaid amount of Rs.30,000/-, which was inclusive of the interest amount; yet, plaintiffs demanded amount of Rs.50,000/- more. Defendant No.1 never applied for permission to sale to Sub Divisional Officer, Bhusawal. That application has been falsely filed by the plaintiffs. The suit property is from the tenancy laws, and therefore, without taking prior permission it cannot be put to sale, and therefore, specific performance cannot be granted.

5 On the basis of these pleadings issues came to be framed, both the parties have led oral as well as documentary evidence on record. After considering the evidence on record the learned Lower Court held that the plaintiffs have proved that Babu had entered into an agreement to sell on 27.08.2001 and agreed to sale the suit land for a consideration of Rs.78,000/- to the plaintiffs. Plaintiffs have also proved that they had paid earnest amount of Rs.55,000/- to Babu. Plaintiffs were ready and willing to perform their part of the contract, and therefore, they are entitled to get specific performance of the contract. It was also held that prior permission to effect sale is necessary and it should be brought by the defendants. The suit, therefore, came to be partly decreed. It will not be out of place to mention here that during the pendency of the suit defendant No.1 expired and defendant Nos.2 to 7 are her legal representatives. Defendant Nos.2 to 7

were directed to bring the permission from Government within three months from the date of the decree and then by accepting the remaining amount of Rs.23,000/- from the plaintiffs, she should execute the sale deed, in respect of suit land, in favour of the plaintiffs. It was also decreed that if defendants failed to execute the sale deed as directed, then plaintiffs may deposit the remaining amount and get the sale deed executed through Court. The prayer of permanent injunction was rejected.

6 Original defendant Nos.2 to 6 then filed Regular Civil Appeal No.50/2016 before District Judge-3, Bhusawal, Dist. Jalgaon, challenging the said Judgment and Decree passed by learned Civil Judge Junior Division, Muktainagar. After hearing both sides the appeal has been dismissed by the learned First Appellate Court. Hence, this Second Appeal.

7 Learned Advocate Mr. P.R. Katneshwarkar appearing for the appellants vehemently submitted that it is not in dispute that the suit property was covered under Section 43 of the B.T. and A.L. Act, that is, land was belonging to the tenant and there was restriction on its transfer. It is also agreeable to the plaintiffs that prior permission was required from the competent authority to sell the suit land. When no such permission was taken, then said tenant or his successors cannot be dictated nor the Collector can be dictated to grant requisite permission. Even the Civil Court has no

such jurisdiction to give such directions to the Collector, who is the competent authority under the B.T. and A.L. Act. Both the Courts below have ignored the position of law concerning Section 43 of the B.T. and A.L. Act. Under such circumstance, when the lands belonging to the tenant are required to be protected, the suit ought not to have been decreed. He has placed reliance on various decisions.

7.1 In **Dnyanoba Sukhdeo Lande and another vs. Shrirang Mahataraji Dhurwade** decided by this Bench, reported in **1981 SCC OnLine Bom 209**. The facts were similar. There was also an agreement that was entered into and it has been observed thus -

“Now, it is well-settled that the provisions of section 53A would not apply to an invalid or a void contract of an agreement of sale. The question in this case is as to whether any transfer in contravention of the provisions of section 50-B will be a valid or a void contract and where a person who is put in possession in pursuance of such a contract is entitled to protect his possession. The answer to such question is positively no. Section 23 of the Indian Contract Act, 1872, lays down that 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 the Court regards it as immoral or opposed to public policy. It further lays down that in each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is, void. Under the land reforms, a protected tenant has

been bestowed with a right of ownership in respect of held by him. Section 38-E specifically provides that the ownership of land held by protected tenant which they are entitled to purchase from their landholders in such area under any provision of the Chapter shall stand 'transferred' to and vest in the protected tenant holding them and from such date the protected tenant shall be deemed to be the full owner of such a land. Under sub-section (2) of the said section, a certificate in the prescribed form is to be issued. Such a certificate shall be conclusive evidence of protected tenant having become owner of the land with effect from the date of the certificate as against the landholder and all other persons having any interest therein. The legislature by enacting the said provisions intended that the protected tenant should become owner of the land and he should enjoy and take the benefit of such land or which he had been declared owner. A restriction has been imposed on him not to transfer or deliver possession of the land to any one else except with the previous sanction of the Collector. Section 50-B of the Hyderabad Tenancy Act clearly lays down that land purchased by a tenant under section 38-E shall not be transferred by sale etc., without the previous sanction of the Collector. Sub-section (2) further makes it clear that any transfer of such land shall be invalid. If an agreement of sale in respect of a land of which a tenant has been declared an owner, even his possession is transferred under an agreement, it will be deemed to be invalid under sub-clause (2) of the said section. The contract for sale of such land of which the tenant has become the owner will be invalid in view of the provisions of section 23 of the Indian Contract Act, because it contravenes the provisions of section 50-B of the Hyderabad Tenancy Act. It is, therefore, an agreement of sale on which the appellant-defendant relies is illegal by virtue of sub-section (2) of section 50-B of the Hyderabad Tenancy Act and it is, therefore,

he is not entitled to the protection of section 53A of the Transfer of Property Act.”

It was clearly observed that a party cannot be allowed to override the provision of auction 50B by a device such as an agreement of sale and continue in possession thereof claiming right under Section 53A of the Transfer of Property Act. It would amount to defeating the provisions and, therefore, the said agreement should be declared to be invalid and not enforceable at law. It is submitted here also the provisions of law cannot be defeated and, therefore, the said agreement even if it is accepted that was executed by Babu cannot be put to execution.

7.2 Learned Advocate for appellants has further relied on **Himatrao Ukha Mali and others vs. Popat Devram Patil and others, AIR 1999 Bom 10**, wherein also the agreement of the sale of the tenancy land by tenant in 1961, for which the certificate of deemed purchase was issued in 1971, was opposed by the heirs of the tenant, on the ground that the permission of the Collector under Section 43 of the B.T. and A.L. Act was not obtained; the Court held that the tenant acquired the proper title to the land in 1971; but permission of the Collector was still necessary under Section 43 of the Act, as he had not become the absolute owner of the land. Therefore, the sale by him was ineffective.

7.3 Further, in **Nathulal vs. Phoolchand, 1969 (3) Supreme Court Cases 120**, which was a case from Madhya Pradesh. Tenancy laws creating a similar bar for transfer. It was held that -

“That is is well settled that where by statute property is not transferable without the permission of the 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. Hence, Nathulal as vendor has necessarily to get the prior sanction of the State Government made under Section 70(4) of the Madhya Bharat Land Revenue and Tenancy Act. This he has to fulfil before he can claim payment from Phoolchand notwithstanding the absence of such a clause in the agreement.”

In this case Hon’ble Apex Court contended that there is no sale as it was only an agreement, but then according to the learned Advocate for appellants this proposition will not apply to the facts of the present case. He submitted that Courts cannot interpret those words which are not interpreted by Legislature.

7.4 Further, reliance has been placed on the decision in **Parshuram Kathod Gaikar vs. Pandu Mahadu Hard and another, 1993 Mh.L.J. 1570** and **Lotan Ramchandra Shimpi and others vs. Shankar Ganpat Kayasth and others, 1995(1) Mh.L.J. 80**. In both these cases this Court had held that there is complete bar on alienation of the agricultural land in question

without the previous sanction of the Collector under Section 43 of the B.T. and A.L. Act. This protection was granted to the tenants/agriculturists who were not only poor but invariably illiterate and, therefore, extremely valuable to all sorts of methods. When the condition precedent is made to obtain the prior permission then such intention of the legislature cannot be allowed to be defeated, by saying that still the permission can be obtained even after the decree of the suit. As regards the law of precedent is concerned, as it was pointed out that later on this Court in **Balu Baburao Zarole and others vs. Shaikh Akbar Shaikh Bhikan and others, 2001 (3) Bom.C.R. 255 : AIR 2001 Bom 364** has taken a note of earlier decisions and submitted that agreement for purchasing property is not prohibited in view of Section 43 of the Act and no impediment for granting specific performance, subject to grant by Collector. It was submitted that the latest contrary version will not prevail but the earlier decision of this Court would prevail.

7.5 Further reliance on the decision in **Vasant Ganpat Padave (dead) by Legal Representatives and others vs. Anant Mahadev Sawant (dead) through Legal Representatives and others, (2019) 19 Supreme Court Cases 577**, wherein the golden rule of interpretation was considered and after taking note of catena of Judgments it has been observed -

“The Court may also in such a case read into the statutory provision a

condition which, though not expressed, is implicit as constituting the basic assumption underlying the statutory provision.”

Therefore, taking into consideration this aspect case is made out for admitting the Second Appeal, as substantial questions of law are arising in this case.

8 Per contra, the learned Advocate representing the respondent Nos.1 and 2-original plaintiffs vehemently submitted that the point, which the appellants intend to raise, is no *res integra*. Though in **Parshuram Gaikar** (supra) and **Lotan Shimpi** (supra) this Court had taken a view that when law requires prior permission to be obtained under Section 43 of the B.T. and A.L. Act for sale of such restricted land, then the possession that was parted with earlier without there being any prior permission will have to be held as illegal. So also, for such illegal contract the discretionary relief of specific performance cannot be granted, as it would be against the public policy. However, later on in **Balu Zarole** (supra) by taking note of both these two cases and also the case in **Nathulal** (supra) and **Chandnee Widya Vati Madden vs. C.L. Katial**, AIR 1964 SC 978 this Court held that -

“Section 43 of the B.T. and A.L. Act would be attracted at the stage of the execution of the conveyance since upon the execution of the sale deed, the property is transferred by sale. An agreement to sell does not create any Interest in property. Reliance was placed on the

decision by D.K. Deshmukh, J., delivered on 1st October, 1997, in Appeal from Order No.713 of 1997 and it was held that -

“Before the conveyance is executed in pursuance of a decree for specific performance the previous sanction of the Collector under Section 43 would have to be sought and the execution of the conveyance can only take place after and subject to the grant of sanction by the Collector.”

Similar view was then taken in **Kalandi Baburao Raut and others vs. Dattu Damu Thakare**, 2008 (6) All M.R. 327 : 2009 (1) AIR Bom R 42.

These two subsequent pronouncements definitely take note of the decision in **Parshuram Gaikar** (supra) and **Lotan Shimpi** (supra) and in view of the decision in **Nathulal** (supra) as well as in **Vishwa Nath Sharma vs. Shyam Shanker Goela and another**, (2007) 10 Supreme Court Cases 595, it is absolutely not necessary to bring prior permission at the time of grant of specific performance. When this Court had relied on the decisions by Supreme Court, which are binding in nature, the earlier decisions of this Court, which were contrary to the decision of the Supreme Court cannot be relied upon. No substantial question of law is arising in this case to admit the Second Appeal.

9 The facts of the case are very much clear and when the present appeal is under Section 100 of the Code of Civil Procedure, we may not go

much into the facts, that is, whether the plaintiffs have proved execution of the agreement to sell or not. Both the Courts below have given concurrent findings in that respect. Further, the said agreement to sell was registered document and in order to prove the said document plaintiffs have led oral evidence, that is, plaintiff No.1 himself and produced the agreement to sell at Exh.123. One more aspect, that is, required to be noted is that when evidence was led by present appellants i.e. original defendant Nos.1 and 2 before Sub Divisional Officer, he had made a statement that earlier to the agreement to sell dated 27.08.2001 there was an agreement to sell executed by Babu in favour of plaintiffs on 01.06.1999, but that was cancelled and then the agreement dated 27.08.2001 has been executed. Further, two notices were issued by the present appellants-original defendants to plaintiffs, in which they have admitted execution of such a document. Under such circumstance, without going much into further details, it can be seen that the execution of the said agreement to sell has been duly proved by the plaintiffs. In the said registered document itself there is a statement that earnest amount has been paid by the plaintiffs to Babu.

10 The role of the plaintiffs was then limited to the extent of giving remaining amount at the time of execution of the sale deed. However, prior to that Babu was supposed to bring the necessary permission. Definitely, it

appears that there was an application moved before Sub Divisional Officer, but then it is stated that after death of Babu defendants changed their stand and gave statement that the agreement to sell has become barred by limitation, and therefore, permission should not be given. Now, the objection is raised that in view of bar for transfer of the tenanted land under Section 43 of the B.T. and A.L. Act, the agreement itself is void. It is tried to be contended that unless the prior permission is obtained, such transaction for transfer is not legally permissible. Though the learned Advocate appearing for the appellants has relied on the cases **Parshuram Gaikar** (supra) and **Lotan Shimpi** (supra) and also in respect of interpretation to be made of the words of a provision, the point is not *res integra*. The subsequent decisions in **Balu Zarole** (supra) and **Kalandi Raut** (supra) are clear enough in stating that the legal position explained by the Hon'ble Apex Court in **Nathulal** (supra) should be considered. It is to be noted that Section 70(4) of Madhya Bharat Land Revenue and Tenancy Act was almost on the same line, as it has been referred to in para No.5 of the said Judgment. In that case Phoolchand was not an agriculturist and, therefore, the stand was taken that without the sanction of the State Government land cannot be sold to him. There was no such specific clause in that case that Nathulal will secure the sanction under Section 70(4) of the said Act after paying the appropriate fee, but then it was held that, "*Where by statute property is not transferable without the permission of*

the 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.” In that case also, there was an agreement of sale and it was specifically observed that it does not amount to sale and, therefore, there is no hurdle when the person is willing to perform his part of the contract, to grant specific performance. But then it was stated that before such ultimate execution is made the necessary requirements under the Act should be fulfilled. Therefore, in view of **Nathulal’s** case (supra) in **Balu Zarole** (supra) after taking note of decision by learned Single Judge of this Court D.K. Deshmukh, J. delivered on 01.10.1997 in Appeal from Order No.713 of 1977 it was observed that Section 43 of the Act would be attracted at the stage of execution of the conveyance, since upon the execution of the sale deed, the property is transferred by sale. An agreement of sale does not create any interest in the property. Further in **Kalindi Raut** (supra) this Court observed by taking all the earlier decisions of this Court that the Judgment in the matter of **Parshuram Gaikar** (supra) is *per incuriam* and has no binding force in view of the decision in **Balu Zarole** (supra). In **Kalindi Raut** (supra) it was observed that, “*What is prohibited in view of Section 43 of the Act is transfer by sale, gift, exchange, mortgage, lease or assignment, without previous sanction of the Collector*”. In that case also the parties had entered into an agreement to sell and, therefore, it was held that, *there is no creation of any*

interest in favour of vendee and the proprietary title does not validly pass from the vendor to the vendee.

11 Further, note of the decision in **Chandnee Widya Vati Madden vs. C.L. Katial**, AIR 1964 SC 978 was taken, wherein it has been laid down that, “It has been laid down that it is permissible for the Court to get enforces the terms of contract and to join upon the vendor to make necessary application for the permission. In the event of permission being refused, the vendee shall be entitled to the damages.” Therefore, the law of precedent also makes it obligatory now on this Court to rely upon the decisions in **Nathulal** (supra), which has been then followed in **Balu Zarole** (supra) and **Kalindi Raut** (supra).

12 Further, the decision in **Vishwa Nath Sharma** (supra) is also very much clear on that point. The only difference was the previous permission to be obtained from the development authority as the plot was situated in Delhi. Prior permission was necessary in that case also, as there was impediment on the transfer of the plot, in absence of the prior permission. After taking note of **Chandnee Madden** (supra) and other decisions, Hon’ble Apex Court has reiterated that obtaining such permission prior to the execution of such sale deed can be incorporated in the decree as a condition precedent.

13 Therefore, in view of this legal position no illegality or error of any sort can be found in the Judgment passed by both the Courts below. No case is made out to admit the Second Appeal, as it is not giving rise to any substantial question of law as contemplated under Section 100 of the Code of Civil Procedure. Hence, the Second Appeal stands dismissed as not admitted. The Civil Application for stay also stands dismissed.

(Smt. Vibha Kankanwadi, J.)

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