

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 224 OF 2001

Eknath Namdev Kalal,
Age : 41 yrs., Occu. Agriculture,
R/o. Shirpur, Tal. Shirpur,
Dist. Dhule.

**....Appellant.
(Plaintiff)**

Versus

Lotan Chahala Patil,
Age : 86 yrs., Occu. Nil,
R/o. Adhe, Tal. Shirpur,
Dist. Dhule (Died)

1. Latkanbai w/o. Lotan Rajput
(died) Since deceased through
respondent No. 2.

2. Dalpat Lotan Rajput,

Both Resident of Aadhe,
Taluka – Shirpur, Dist. Dhule.

**....Respondent
(Ori. L.Rs. Of Defendant)**

Mr. S.P. Shah, Advocate for appellant/plaintiff.

Mr. B.R. Warma, Advocate for respondent No. 2.

CORAM	: ARUN R. PEDNEKER, J.
CLOSED ON	: 22/06/2023
DELIVERED ON	: 26/07/2023

JUDGMENT :

1) By the present second appeal, the appellant/original plaintiff has challenged the judgment and order passed by the learned Additional District Judge, Dhule in Civil Appeal No. 184/1984, dismissing the appeal and confirming the dismissal of the Regular Civil Suit No. 47/1981 by the learned Civil Judge, Junior Division, Shirpur, Dist. Dhule, which was filed for specific performance of the contract and in alternatively for refund of the

earnest money.

2) The brief facts giving rise to the present second appeal can be summarized as under :-

That the respondent/original defendant is the owner of the land bearing Survey No. 39, which is corresponding to Gat No. 159, admeasuring 93 R. situated at village Aadhe, Taluka Shirpur. It is the case of the plaintiff that the defendant agreed to sell the suit land in favour of the plaintiff on 21.4.1975 for consideration of Rs.11,500/- and executed agreement to sell. Rs. 8000/- was also paid as earnest money to the defendant and possession of the suit land was given to the plaintiff on the same day. Since the suit land was tenure land, the defendant was required to obtain permission for its sale and such terms and conditions had already been incorporated in agreement of sale. Further obligation was casted upon the plaintiff/appellant to pay an amount of Rs.1,000/- to the defendant on 20.6.1975 as he was required to pay the remaining consideration at the time of execution of the sale deed. The appellant/plaintiff has contended that the plaintiff has paid additional amount of Rs.2,000/- to the defendant from time to time. However, the defendant did not obtain the permission for sale of the suit land as required and agreed for. The appellant/plaintiff has shown his readiness and willingness to to perform his part of contract, but the defendant/respondent intentionally avoided to perform his part of the contract inspite of the notice calling upon him to perform the same. Thus, the appellant/plaintiff has filed the suit for relief of specific performance of the contract and in alternatively, prayed for the refund of the earnest amount and damages of Rs.22,000/-.

3) The defendant/respondent contested the suit by filing the written

statement. The respondent categorically denied the case of the plaintiff in entirety and submitted that the document of agreement to sell was security loan transaction, but it was never intended to be acted upon. It is the case of the respondent/defendant that after the March 1981 defendant demanded the possession of the suit land from the appellant, but the appellant denied to give the same. The respondent/defendant claimed that the suit is not within the limitation and prayed for dismissal of the suit.

4) The Trial Court framed the issues and recorded answer against each issue, as follows :-

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|--|-----|-------------|
| 1) Does plaintiff prove that on 21/4/75 defendant agreed to sell suit land to him for Rs.11,500/-, accepted earnest amount of Rs.8,000/- and parted with possession by executing a document of agreement of sale ? | ... | Yes. |
| 2) Does defendant prove that he obtained Rs.8000/- from plaintiff and delivered land to him for cultivation till March 1981 in satisfaction of the amount ? | ... | No. |
| 3) Does plaintiff prove that he paid Tagai and levy of suit land ? | ... | No. |
| 4) Does plaintiff prove that he paid Rs.2000/- to defendant from time to time after agreement ? | ... | Partly yes. |
| 5) Is plaintiff ready and willing to perform his part of the contract ? | ... | No. |
| 6) Is the suit barred by limitation ? | ... | No. |
| 7) Does defendant prove that suit transaction is illegal and not enforceable in law ? | ... | Yes. |
| 8) Is the plaintiff entitled to specific performance of contract ? | ... | No |
| 9) Is the plaintiff alternatively entitled to refund of | ... | No |

earnest amount with damages Rs.22000/- ?

10) What order, relief and decree ? ... As per final order.

5) After answering the issues accordingly, the Trial Court has dismissed the suit.

6) The plaintiff challenged the judgment and order of the Trial Court before the Appellate Court. The appellate Court framed points for determination and given answers against those points, which are as follows :-

Points	Findings
1. Whether the appellant proves that the agreement of sale dated 31.4.75 is valid and legal ?	: In the negative.
2. Further he proves that an amount of Rs.8000/- were paid to the respondent as an earnest amount towards total consideration of Rs.11,500/- ?	: In the negative.
3. Whether the appellant proves his readiness and willingness to perform his part of contract ?	: Does not arise.
4. Further he proves that alternatively he is entitled for the refund amount with damages as claimed for ?	: In the negative
5. What order ?	: As per final order.

7) The Appellate Court has held that the transaction is invalid in view of section 43 of the Bombay Tenancy Act and the consideration of objects of an agreement is unlawful and forbidden by law. The Appellate Court held that if such transaction is permitted to be executed, it would certainly defeat the provisions of section 43 of the Bombay Tenancy Act. The Appellate Court

further examined whether the permission of sale with the delivery of the possession of the land can be said to be transfer or otherwise. The scope of word 'transfer' referred in section 43 is very wide and it covers the transaction of sale too. Thus, the Appellate Court held that although the agreement of sale is proved by the appellant, it is invalid for want of necessary and requisite permission of the Collector and therefore, the contract cannot be said to be enforceable in law.

8) On the aspect of readiness and willingness to perform the contract, the Appellate Court held that the appellant has not taken any efforts to persuade the respondent for a period of six years, the appellant could have issued notices to the respondent, calling upon him to obtain the necessary permission, but there is no single instance or evidence on record showing the same. The Appellate Court further held that no prudent purchaser would like to keep silence for such a long period, after departing the huge amount of Rs.8000/- and this circumstance is sufficient to show that the appellant was not keen to perform his part of contract. In view of this, the Appellate Court held that the appellant has failed to prove his readiness and willingness to perform his part of contract.

9) As regards point No. 4 that whether the appellant is entitled for the refund of amount with damages, the Appellate Court has held that since the agreement is invalid in view of section 43 of the Bombay Tenancy Act, any consideration paid towards any illegal transaction cannot be refunded. Thus, the Appellate Court has dismissed the appeal filed by the appellant.

10) Being aggrieved and dissatisfied by the judgments and orders of the Courts below, the plaintiff has filed the present second appeal. The second appeal is admitted on ground Nos. 3, 4, 5 and 8 of the Memorandum of

Appeal and those grounds are treated as substantial questions of law, which are as under :-

"3] It ought to have been held by both the Courts below that the permission from the Collector could be secured before completing the transfer by executing the sale deed.

4] Both the Lower Courts should have taken into consideration that the restraint claimed under Section 43 of the Tenancy Act against the transfer does not take in its fold the agreement of sale simpliciter, short of transferring the ownership in favour of the purchaser.

5] In any event, it ought to have been appreciated by both the courts below that the restriction imposed under section 43 of the Tenancy Act have lost its force as well as propriety by lapse of time. The said restraints were clamped way back in the year 1957. A period of more than three decades has intervened in between and hence, there is no propriety in continuing with the fetters imposed against the transferability of the property acquired by the tenant by operation of law.

8] In any event, the Trial Court ought to have awarded refund of the amount paid by way of earnest to the defendant."

11) The learned Single Judge of this Court had referred the matter to the larger bench vide order dated 17.1.1994. The said order reads as under :-

"Heard learned counsel for the appellant as well as the learned counsel for the Respondents. The appeal is admitted as it involves substantial question of law duly formulated in grounds No. 3, 4, 5 and 8 of Memorandum of Appeal.

2. The appellant in this second appeal is the original plaintiff. The plaintiff filed regular Civil Suit No. 47 of 1981 in the Court of Civil Judge, Junior Division, Shirpur for specific performance of the suit contract and in alternatively for refund of earnest money. The Trial Court has dismissed the suit. The First Appellate Court has dismissed the appeal preferred by the original plaintiff. Both the courts below have taken a view to the effect that suit agreement could not have been entered into without previous sanction of the Collector and the same is hit by Section 43 (1) of Bombay Tenancy and Agricultural Lands Act 1948. Section 43 (1) of the said act reads as under :-

"43 (1) No land purchased by a tenant u/s 32, 32F (321, 320 (33C or 43-1D)) or sold to any person u/s 32P or 64 shall be transferred by sale, gift, exchange, mortgage, lease or assignment.... Without the previous sanction of the Collector (such sanction shall be given by the Collector in such circumstances and subject to such conditions, as may be prescribed by the State Government.

Provided that no such sanction shall be necessary where the land is to be mortgaged in favour of Government or a society registered or deemed to be registered under the Bombay Cooperative Societies Act, 1925, for raising a loan for effecting any improvement of such land."

3. To my mind the said sanction imposes restrictions on transfer of the land and not on entering into of mere agreement to sale. In my opinion the agreement of sale can be entered into by the statutory purchaser of the land without previous sanction of the Collector but such sale cannot be completed by execution of sale without the requisite sanction. Section 54 of the Transfer of Property Act provides that;

"A contract for sale of immovable property does not, or itself, create any interest in or charge on such property".

4. The learned counsel for the Respondent has invited attention of the Court to the observations made by brother Justice Salddanha in Parsuram Kathod Gaikwad v. Pandu Mahadu reported in 1993 MLJ 1570. In this case the learned Judge has made observations to the effect that Section 43 of the Act creates a bar on entering into of an agreement of sale also. With respect I take a different view of this aspect. In my opinion the agreement of sale cannot be equated to alienation. In this view of the matter, I recommend, that this Second Appeal be placed before the Honourable Division Bench to resolve the difference of opinion on the subject.

5. I direct that the Registrar, High Court, Appellate Side do place the papers before the Hon'ble the Chief Justice for passing such orders as the learned Chief Justice deems fit.

6. Issue of certified copy is expedited."

12) The larger bench (Coram : R.M. Borde & V.L. Achaliya, JJ) by order dated 7.8.2012 has answered the issue raised by the learned Single Judge of this Court that the bar created under section 43 is applicable only for the

sale deed and that the agreement to sell is not affected by the bar of section 43. Section 43 would be attracted at the stage of execution of conveyance in respect of the land since upon execution of the sale deed the property is transferred by sale and the agreement to sale does not create any interest in the property.

13) Thus, the basic issue on which the Trial Court and the Appellate Court proceeded that the agreement of sale is hit by section 43 and consequently, there cannot be any direction even to refund the consideration amount is answered by the larger bench.

14) As regards the lower Courts findings on the readiness and willingness on the part of the plaintiff is concerned, the agreement to sale is dated 21.4.1975 and the suit was filed in the year 1981. The plaintiff contends that both the parties were closely connected to each other and were in friendly relations and that no immediate steps are ordinarily taken for filing suit and there were assurances and there is not a huge gap between the date of the suit and the date of the agreement to sell. Cause of action arises from the date of refusal to perform the agreement. The Courts below were largely influenced from the invalidity of the agreement to sale being hit by section 43. However, the larger bench has held in the instant case that the agreement to sale is not hit by section 43. In view of the same the matter is remitted back to the appellate Court to decide the appeal afresh excluding the issue of violation of section 43.

15) I have not expressed anything on merits of the case and the

appellate Court to decide the appeal without being influenced by any observations made by this Court in this order. Record and proceedings be sent back.

16) Second appeal is disposed of with above directions.

[ARUN R. PEDNEKER J.]

SSC/