

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.331 OF 2021
WITH
INTERIM APPLICATION NO.3809 OF 2019**

Shri. Khajasaheb s/o. Shiraj Momin
since deceased through legal heirs
Firoz Khajaso Momin & Ors. ...Appellants
Versus
Smt. Ujwala Udaysinha Shinde
through her Power of Attorney
Shri. Udaysinha Vasantrya Shinde ...Respondent

Mr. P. D. Pise, for the Appellants/Applicants.

Mr. P. D. Dalvi a/w. Ms. Priya Dalvi, for the Respondent.

**CORAM : MADHAV J. JAMDAR, J.
DATED : 4th JANUARY 2023**

P.C. :

1. Heard Mr. P. D. Pise, learned counsel appearing for the Appellants and Mr. P. D. Dalvi, learned counsel appearing for the Respondent.
2. The Appellants are original Defendants and the Respondent is the original Plaintiff.
3. Mr. Pise submitted that following two substantial questions of law are involved in this Second Appeal :-

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- i. Whether the evidence on record shows that the Plaintiff has failed to prove the execution and contents of agreements dated 8th August 1995?
- ii. Whether sale transaction is hit by Section 43 of the Maharashtra Tenancy and Agriculture Lands Act, 1958?

4. The factual position on record shows that on 8th August 1995, two agreements were executed between the Appellants and the Respondent. The first agreement which is at Exhibit 114 is a registered document by which, suit property has been agreed to be sold by the Defendants in favour of the Plaintiff. The heirs of Defendants are the present Appellants and the Plaintiff is the present Respondent.

5. As far as the registered agreement dated 8th August 1995 is concerned, the learned First Appellate Court has recorded the finding that the Plaintiff has proved that on 8th August 1995, the Defendant had executed a registered agreement of sale in favour of the Plaintiff by appreciating the evidence on record. The learned First Appellate Court held that in the evidence of Defendant No.1, the Defendant No.1 has accepted the execution of the agreement as well as the contents of the agreement. The relevant findings are found in paragraph 25 of the impugned Judgment and Decree of the learned First

Appellate Court, which reads as under:-

“25. The defendant in rebuttal has examined Zairabi Khajaso Momin as D.W. 1 at Exh. 144. The evidence by way of affidavit of this witness is the replica of the written statement of defendant. This witness was cross-examined by the learned counsel for the plaintiff. During cross-examination she admitted that the land Gut No.404/1 is the tenancy land. She further admitted that on 8/8/1995 a registered agreement was taken place in between her husband and plaintiff. She further admitted that in the registered agreement, the sale consideration was mentioned as Rs.1,00,000/-. She further admitted that she was present in the Sub-Registrar Office at the time of execution of registered agreement of sale in favour of the plaintiff. She also admitted her thumb impression upon the registered agreement of sale dt.8/8/1995. She further admitted that after receipt of permission under section 43 of the Bombay Tenancy Act to sell land Gut No.404/1 the defendant was required to execute sale deed of the said land in favour of the plaintiff.”

6. It is the contention of the Appellants that the second document is not proved. The learned First Appellate Court has relied on notice issued by Defendants' Advocate dated 14th March 2000. In the said notice, the Appellants have admitted execution of agreement dated 8th August 1995 and the Plaintiff was asked to pay Rs.4,50,000/-. In the first agreement at

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Exhibit 114, which is registered document, the consideration is shown as Rs.1,00,000/- and Rs.50,000/- was mentioned as earnest money therefore, balance amount is Rs.50,000/-. As far as the second agreement at Exhibit 124 is concerned, the consideration is shown as Rs.4,00,000/-. Thus, aggregate of balance consideration comes to Rs.4,50,000/-. On the basis of the notice which has been issued by the Appellants seeking balance consideration of Rs.4,50,000/-, learned First Appellate Court held that the second agreement is also with respect to the property bearing Gat No.404/1 and the total consideration is Rs.5,00,000/- out of which, Rs.50,000/- were paid. Therefore, the learned First Appellate Court has held that the Plaintiff had proved the execution and contents of registered agreement with respect to land admeasuring 40 R at Gat No.404/1 as well as of another agreement and therefore, directed that Plaintiff should deposit an amount of Rs.4,50,000/- in the Court within one week.

7. The second substantial question of law submitted by Mr. Padmanabh Pise is that the transaction is illegal as sanction was not obtained as contemplated under Section 43 of the

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Maharashtra Tenancy and Agricultural Lands Act, 1948 (“hereinafter “M.T.A.L. Act” for short). In this behalf it is to be noted that agreement is dated 8th August 1995. Original Defendant himself applied for getting sanction under Section 43 of the M.T.A.L. Act and same was obtained on 6th March 2000. In spite of obtaining sanction, Defendant was not executing the sale deed and therefore, present suit was filed on 19th August 2000. Therefore, this is not a case where there is no sanction obtained. The agreement dated 8th August 1995 at Exhibit 114, which is registered document contemplates that the sanction would be obtained by the Defendant and accordingly, the Defendant has obtained the sanction.

8. This Court in the decision of **Balu Baburao Zarole & Ors. vs. Shaikh Akbar Shaikh Bhikan & Ors.**¹ has held that decree for specific performance could be granted subject to the condition of the sanction being obtained to the sale from the Collector under Section 43 of the M.T.A.L. Act. In that case, it has been held that in the event of the Collector not granting sanction, the Plaintiff would be entitled to a refund of the purchase price together with interest only as in the absence of

1 AIR 2001 Bom 364

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sanction under Section 43 of the M.T.A.L. Act sale cannot be concluded. In the said case decided by this Court, reliance was placed on the decision of Supreme Court in **Nathulal vs. Phoolchand**² as well as decision of the Privy Council reported in **AIR 1930 PC 187** and the decision of the Supreme Court reported in **AIR 1964 SC 978**. The relevant discussion reads as under:-

“3.....In so far as the requirement of taking the sanction of the Collector under the provisions of Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948 is concerned, the **Trial Court and the Appellate Court** correctly held that the decree for specific performance would be subject to the condition of the sanction being obtained to the sale from the collector under Section 43. In the event of the Collector not granting sanction, the Plaintiff would be entitled to a refund of the purchase price together with Interest only as. In the absence of sanction under Section 43 the sale cannot be concluded. In taking this view, no error has been committed by the Trial Court and by the appellate Court. In **Nathulal v. Phoolchand** reported in AIR 1970 SC 546, a Bench of the Supreme Court, consisting of Mr. Justice J.C. Shah (as the Learned Chief Justice then was) and Mr. Justice K.S. Hegde held that **where by a statute property is not transferable without the permission of an authority, an agreement to transfer the property must be deemed to the subject to the implied condition that the transferor will obtain the sanction of the authority concerned**. While laying down the aforesaid proposition in paragraph 5 of its

2 AIR 1970 SC 546

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Judgment, the Supreme Court referred to the judgment of the Privy Council in AIR 1930 PC 187 and the judgment of the Supreme Court in AIR 1964 SC 978.”

4. Section 43 of the 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.....”

(Emphasis added)

9. It has been held that an agreement to sale does not create any interest in the property and therefore, Section 43 would be attracted at the stage of execution of decree of specific performance since at that stage property would be transferred by sale.

10. It is significant to note that in the present case, the sanction is already obtained and the sanction was obtained by the Defendant on 6th March 2000 and suit was filed on 19th August 2000. Reliance of Mr. Pise on the decision of the Supreme Court in **Narayanamma & Anr. vs. Govindappa & Ors.**³ is misconceived. In the said case, the Supreme Court was considering Section 61 of the Karnataka Land Reforms Act, 1961. As far as Section 61 of the said Karnataka Land Reforms

3 (2019) 19 SCC 42

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Act Act is concerned, there is complete ban for 15 years for transfer of land by sale, gift, mortgage, lease or assignment from the date of final order passed by the Tribunal. In the present case, Section 43 of the M.T.A.L. Act prohibits transfer by sale, gift, exchange, mortgage, lease or assignment for the land which are covered by the said Section, however the said prohibition is not absolute prohibition, but the land can be transferred by obtaining previous sanction of the Collector. Therefore, the above referred decision of the Supreme Court is not applicable to the present case.

11. As far as the decision of the Gujarat High Court in **Vijaybhai Shambhubhai Patel vs. Sushilaben Dayalbhai**⁴, in that case, the plaint was rejected on the ground that there was no sanction. In the present case, sanction was obtained on 6th March 2000 and thereafter, suit was filed. Therefore, said decision is not applicable to the present case.

12. As far as, decision of the Aurangabad Bench of this Court in **Himatrao Ukha Mali & Ors. vs. Popat Devram Patil & Anr**⁵. is concerned, the same will also have no application as in this

4 First Appeal No.1556 of 2021 decided on 21st June 2021

5 1998(3) Bom. C.R.680

particular case, sanction has been obtained and thereafter suit has been filed. Therefore, there is no substance even in the second substantial question of law as submitted by Mr. Pise.

13. However, it is to be noted that the suit is for specific performance. It is settled legal position that the jurisdiction to decree suit for specific performance is equity jurisdiction and therefore, no party should get unfair advantage. The Supreme Court in the decision in **Shenbagam vs K. K. Rathinavel**⁶ in paragraphs 39 and 41 observed as under:-

39. The long efflux of time (over 40 years) that has occurred and the galloping value of real estate in the meantime are the twin inhibiting factors in this regard. The same, however, have to be balanced with the fact that the plaintiffs are in no way responsible for the delay that has occurred and their keen participation in the proceedings till date show the live interest on the part of the plaintiffs to have the agreement enforced in law.

41. The twin inhibiting factors identified above if are to be read as a bar to the grant of a decree of specific performance would amount to penalising the plaintiffs for no fault on their part; to deny them the real fruits of a protracted litigation wherein the issues arising are being answered in their favour.”

(emphasis supplied)

In directing specific performance of the

agreement, this Court in Satya Jain (supra) held that sale deed must be executed for the current market price of the suit property.”

14. In this case, the said amount of Rs.4,50,000/- which the learned First Appellate Court directed to be deposited in the Court has been arrived at on the basis of consideration which has been fixed by the aforesaid two agreements at Exhibit 114 and 124 dated 8th August 1995 i.e. about 27 years earlier. Therefore, it is required that there should be direction to pay interest on said balance consideration of Rs.4,50,000/-. Mr. Pradeep Dalvi, after taking instructions from the Respondent, states that Respondent will pay interest at the rate of 12% per annum from 8th August 1995 till the date on which the said amount is deposited before the learned Executing Court.

15. Therefore, although there is no substantial question of law is involved, it is necessary to grant reasonable interest as mentioned hereinabove. Therefore, the Judgment and Decree passed by the learned First Appellate Court is modified for the reasons set out hereinabove by modifying clause No.5 of the said Judgment and Decree in the following manner. After modification, the clause No.5 of the said Judgment and Decree

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reads as under:-

“The Plaintiff shall deposit an amount of Rs.4,50,000/- with interest at the rate of 12% per annum from 8th August 1995 till deposit of the said amount before the Executing Court.

The said interest amount shall be deposited before the Executing Court within a period of eight weeks from today.”

16. It is clarified that the interest will be paid from 8th August 1995 till the date on which the Respondent has deposited the said amount of Rs.4,50,000/- before the learned Executing Court.

17. The Second Appeal is dismissed, subject to above conditions and disposed of accordingly.

18. In view of the dismissal of the Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

[MADHAV J. JAMDAR, J.]