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Chagla C. J.

carried on by the Society. But that is not the only circumstance which has led us to the conclusion to which we have arrived. As we have already pointed out the reason for our decision is not the absence of the profit motive but the absence of any intention on the part of the Society to sell the goods at the time when the bricks were manufactured or the steel was imported. The question which the Tribunal has considered with regard to the profit motive would only fall to be determined when we have a case where the assessee either buys or manufactures goods with the intention of selling them and sells them without making profit. Then it will be time to consider whether such an activity would constitute business within the meaning of the Sales Tax Act.

The result is that we must uphold the view taken by the Tribunal that the Ahmedabad Education Society cannot be declared to be a dealer within the meaning of s. 2 (c) of the Sales Tax Act. We answer all the questions in the negative. Applicant to pay the costs.

Answers accordingly.

G. N. V.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

DHANJIBHAI KHIYASHIBHAI GUJRATHI, APPELLANT (ORIGINAL DECREE-HOLDER) *v.* DOULATBEE MARD NAJAKALI AND OTHERS RESPONDENTS (ORIGINAL JUDGMENT-DEBTORS),*

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Mar. 8

Bombay Tenancy and Agricultural Lands Act (Bom. LXVII of 1948), ss. 63, 89—Execution of Decree dated October 10, 1947 confirmed in appeal on June 6, 1949,—Decree for specific performance of an agreement to lease for 99 years in favour of a non-agriculturist—Darkhast Application dated September 28, 1950 praying for execution of the lease through Court—Power of Executing Court to question the validity of the decree—Whether s. 63 bars the Execution of the decree —Right to claim execution of the lease under the decree whether saved under s. 89.

On the question whether execution of a decree for specific performance of an agreement to lease at the instance of a non-agriculturist decree-holder was barred by s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948, although the suit for specific performance was filed and decree passed before the coming into force of the Act,

Held, that the decretal rights were not affected by the provisions of s. 63 as they were saved by s. 89 of the Act; the decree could therefore be executed as if the Act had not been passed.

Dhondi Tukaram v. *Dadoo Piraji,*[1] *Bai Suraj* v. *Haribhai Motabhai,*[2] *Appa Ganpat* v. *K. B. Wassoodev,*[3] *Bhima Balu* v. *Basangouda,*[4] referred to.

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*Second Appeal No. 877 of 1954.

1. (1953) 55 Bom. L. R. 663.
2. (1942) 44 Bom. L. R. 907.
3. (1954) 56 Bom. L. R. 517.
4. (1954) 56 Bom. L. R. 520, F. B.

Quaere, Whether s. 63 of the Bombay Tenancy and Agricultural Lands Act bars the execution of a decree for specific performance.

Second Appeal against the order passed by R. S. Ambekar, Esquire, District Judge, Ahmednagar, setting aside the order passed by P. T. Patil, Esquire, Civil Judge, Shergaon.

Execution proceedings.

The facts material to this report are stated in the Judgment.

V. M. Tarkunde, for the Appellant.

G. S. Gupte (Sr.), for Respondents Nos. 1 to 7.

Gajendragadkar J.—This appeal arises from execution proceedings and it raises a short question of law under s. 63 of the Bombay Tenancy and Agricultural Lands Act, 1948. The question arises in this way: S. No. 8 of Shevgaon belonged to Kazi Mahamad. Kazi Mahamad entered into an agreement with Dhanjibhai and promised to execute a lease in favour of Dhanjibhai for 99 years. The lease was to come into operation from October 1, 1945. Contrary to this agreement, however, Kazi Mahamad executed a lease in favour of Mir Najakali for 75 years. That led to Civil Suit No. 429 of 1945 by Dhanjibhai, in which Dhanjibhai claimed specific performance of the agreement to lease. To this suit Kazi Mahamad was impleaded as defendant No. 1 and his lessee Mir. Najakali was impleaded as defendant No. 2. This suit ended in a decree in favour of the plaintiff on October 10, 1947. By the decree an order was passed calling upon defendant No. 1 to execute a lease in favour of the plaintiff. The decree further provided that if defendant No. 1 failed to execute the lease, the Court would take steps to do the needful in that matter. The decree also provided that after the deed of lease was executed the plaintiff should recover possession of the suit land from the defendants. The decree also allowed mesne profits to the plaintiff from October 1, 1945, and an inquiry was ordered to be made under O. XX, r. 12 (c) of the Civil Procedure Code. An appeal was preferred against this decree, but it was dismissed and in the result the decree of the trial Court was confirmed. On September 28, 1950, the present darkhast application was filed by the decree-holder and in the application execution of the rent-note was claimed in terms of the decree. The executing Court directed the Nazir to execute the lease on behalf of the Court and the decree-holder was directed to deposit Rs. 10 for costs of the execution and registration of the rent-note. This order has been reversed by the appellate Court on the ground that if offends against the provisions of s. 63 of the Tenancy Act. As a result of this finding recorded by the lower appellate Court the darkhast filed by the decree-holder has been dismissed with costs throughout. It is this order which has given rise to the present Second Appeal. That is how the only question which arises for our decision in this appeal is, whether

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in view of the provisions of s. 63 of the Tenancy Act it is open to the executing Court to pass a lease in favour of the decree-holder.

Section 63 (*1*) of the Bombay Tenancy and Agricultural Lands Act, 1948, provides *inter alia* that save as provided in this Act, no sale including sales in execution of a decree of a Civil Court or for recovery of arrears of land revenue or for sums recoverable as arrears of land revenue, gift, exchange or lease of any land or interest therein, shall be valid in favour of a person who is not an agriculturist. It is common ground that the decree-holder is not an agriculturist and it is obvious that if a lease had been executed in favour of the decree-holder by the lessor and the provisions of s. 63 (*1*) were applicable to the lease, then the lease would have been void. The lower appellate Court has held that the prohibition contained in s. 63 (*1*) applies to sales in execution and it really makes no difference to the application of s. 63 that the question of executing the lease arises in execution proceedings. In substance he has held that by executing the decree and directing a lease to be executed in favour of the decree-holder the provisions of s. 63 would be offeneded and so the executing Court should not direct the execution of the lease even in execution proceedings. In dealing with this question two considerations would be relevant. The question has been raised in execution proceedings and the jurisdiction of the executing Court to allow a challenge to the validity of the decree is circumscribed by certain well defined limitations. If a decree has been passed by a Court of competent jurisdiction, it would not be open to the executing Court to entertain the plea that the decree is contrary to any provisions of the law and can in that sense be regarded as opposed to law. A plea of this kind must be raised by proper proceedings and unless proper proceedings have been taken and the plea against the validity of the decree has been raised and rejected, it would be outside the jurisdiction of the executing Court to make the validity of the decree a subject-matter of adjudication in execution proceedings. In this connection it is necessary to draw a distinction between a decree which is opposed to law and a decree which is a nullity in the sense that it is altogether void. Every decree which is opposed to law cannot be properly described as a nullity. It is only in respect of a decree which can be regarded as nullity or wholly void that the executing Court would be justified in refusing to execute it. This point has been considered by Mr. Justice Vyas and myself in *Dhondi Tukaram* v. *Dadoo Piraji*.[5] It is however urged by Mr. Gupte for the respondents that even though the decree in question may not be a nullity it would not be competent to the executing Court to enforce the decree because of the provisions of s. 63 of the Tenancy Act; and in support of this argument we have been referred to the decision

5. (1953) 55 Bom. L. R. 663.

of Broomfield and Macklin, JJ., in *Bai Suraj* v. *Haribhai Motabhai*.[6] In that case the plea against the executability of the decree was raised under s. 1 of the Bhagdari and Narwadari Act. In upholding the plea Mr. Justice Broomfield observed that though the general rule no doubt was that when a proper application is made for the execution of a decree which is not a nullity the Court cannot refuse to execute it, in the case before them there was a special statutory prohibition which was addressed to the Court itself and which made execution illegal quite apart from whether the decree was good or bad as a decree. Inasmuch as s. 1 of the Bhagdari and Narwadari Act specifically and expressly directed that no Civil Court shall execute a decree or issue a warrant for possession or any process in fact contrary to the provisions of the said section, the executing Court was justified in complying with the mandatory directions issued to Civil Courts and in refusing to execute the decree. It may be conceded that though a decree may not be a nullity and in that sense though it may not be open to the executing Court to entertain a plea against the validity of a decree, if the execution of such a decree itself is barred by a statutory prohibition which is addressed to Civil Courts, as in the case of s. 1 of the Bhagdari and Narwadari Act, it would be the duty of the executing Courts to comply with the statutory prohibition and to refuse to execute such a decree. Whether or not the prohibition contained in s. 63 of the Tenancy Act amounts to such a direction to the executing Court as would justify the executing Court in refusing to execute the decree it is unnecessary for us to consider in the present appeal. As I will presently point out, s. 63 cannot in our opinion be invoked in the present proceedings at all. That is why it is not necessary for us to decide whether the effect of s. 63 (*1*) would be similar to the effect of s. 1 of the Bhagdari and Narwadari Act; and that takes us to the second relevant consideration in this appeal.

In considering the question as to whether s. 63 of the Tenancy Act would apply to the present proceedings it would be relevant to refer to s. 89 of the Act. Under this section certain rights are saved. It is now well settled that a right to claim specific performance of an agreement of sale or to execute a lease is not one of the rights saved under s. 89 of the Act. In *Appa Ganapat* v. *K. B. Wassoodew*,[7] Chagla C. J. and Shah, J. have held that the right that is protected under s. 89 (*2*) of the Bombay Tenancy and Agricultural Lands Act, 1948, is a right independent and different from sale, which has been rendered void under s. 64 (*3*) of the Act. In this case, the Court was dealing with a sale of agricultural land effected after the coming into force of the Tenancy Act but in pursuance of an agreement of sale which had been executed prior to the coming into force of the Act. Dealing with the question as to the

6. (1942) 44 Bom. L. R. 907.

7. (1954) 56 Bom. L. R. 517.

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legal effect of the right flowing in favour of the intending purchaser from the agreement of sale, the learned Chief Justice has observed in his judgment that such an intending purchaser had a right to file a suit for specific performance, if the contract was not completed by the vendor. He however added that specific performance is a discretionary remedy and the Court would not be bound to grant specific performance to the vendee as a matter of course. That is why it was held that the right that the petitioners had was not a right to obtain a sale deed but a right to file a suit in which the proper relief would have been granted by the Court in its discretion. On this view of the nature of the right available to the intending purchasers it was held that if the sale took place after the commencement of the Act it would attract the provisions of s. 64 of the Act. In reaching this conclusion, the learned Chief Justice took the precaution of adding that the Court refused to pronounce upon the whole content or nature of the right and he also thought it necessary to make the observation that if the law confers any right upon the intending purchasers as persons in whose favour the agreement of sale has been entered into, that right cannot be interfered with under the Act. This view has been confirmed by a Full Bench of this Court in *Bhima Balu* v. *Basangouda.*[8] It is thus settled that if a suit is filed by an intending purchaser in whose favour an agreement of sale has been passed before the commencement of the Act but the suit is instituted after the commencement of the Act, the Court would refuse to order specific performance of the contract on the ground amongst others that the granting of specific performance would be inconsistent with the provisions of s. 64 or s. 63 of the Tenancy Act, as the case may be. In the present case, however, we have passed the stage of passing a decree for specific performance. The decree for specific performance had in fact been passed by the trial Court on October 10, 1947, and even though the Act had come into operation on December 28, 1948, the appellate Court confirmed the decree of the trial Court on September 6, 1949 ; and it is this decretal right which is sought to be enforced in the present proceedings. The right which the decree-holder had to file a suit to enforce the agreement of lease executed in his favour has been asserted by him and in recognition of the right the decree of a Court of competent jurisdiction has been passed in his favour. We do not think that the decisions of this Court in regard to the bare right of a party to sue for specific performance can be extended to the decretal right of the appellant with which we are concerned in the present appeal. By the decretal right the decree-holder is entitled to claim not only a sale deed in his favour, but also possession of the property and what is more mesne profits. The consideration in refusing to grant specific performance which would be relevant and valid at the time when the decree for specific performance was passed cannot in our

8. (1954) 56 Bom. L. R. 520, F. B.

opinion be regarded as relevant or applicable at the stage of the present execution proceedings. Besides, the present proceedings are a continuation of the proceedings in suit, and the suit was filed long before the Tenancy Act came into operation. Section 89 (2) of the Tenancy Act provides that proceedings in respect of rights which are saved and in our opinion the appellant's decretal rights are saved, would be continued and disposed of as if this Act had not been passed, if it is shown that the said proceedings had been instituted before the date on which the Act came into operation. If the present execution proceedings are a continuation of the suit and if the suit was filed long before the Act came into operation, it would not be open to the judgment debtor to invoke the provisions of s. 63 in support of his plea that a lease should not be executed in favour of the decree holder. We must, therefore, hold that the lower appellate Court was in error in applying the provisions of s. 63 of the Tenancy Act to the present proceedings. If a plea under s. 63 cannot be raised against the claim made by the decree-holder in the present execution proceedings, there is no reason why the executing Court should refuse to execute the decree for specific performance.

In the result, the appeal must be allowed, the order passed by the lower appellate Court must be set aside and that of the executing Court restored with costs throughout.

Appeal allowed.

G. N. V.

APPELLATE CIVIL

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

RAMCHANDRA VITHAL PALSULE, APPLICANT (ORIGINAL CREDITOR No. 1) *v.* PAYAGONDA ANANTGONDA PATIL AND ANOTHER, OPPONENTS (ORIGINAL DEBTORS).*

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Bombay Agricultural Debtors Relief Act (Bom. XXVIII of 1947) s. 22 Second Proviso—Kolhapur State (Application of Laws) Order 1949 paragraph 5—Kolhapur Debt Conciliation Act—Mode of taking accounts—Whether the amount determined as due from the debtor under the Kolhapur Debt Conciliation Act could further be reduced under s. 22—Whether the Second Proviso is ultra vires *the Kolhapur State (Application of Laws) Order, 1949.*

Notwithstanding the determination of the amount due from a debtor under the Kolhapur Debt Conciliation Act the debt so determined, though binding on the parties under the second Proviso to s. 22, is liable to be reduced under s. 22 of the Bombay Agricultural Debtors Relief Act.

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*Civil Revision Application No. 405 of 1955, with Civil Revision Application No. 406 of 1955.