

Rameshbhai vs Minaxiben on 28 April, 2011

Author: Anant S. Dave

Bench: Anant S. Dave

Gujarat High Court Case Information System

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SCA/9400/2009 26/ 26 JUDGMENT

IN
THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL
CIVIL APPLICATION No. 9400 of 2009

With

SPECIAL
CIVIL APPLICATION No. 9401 of 2009

To

SPECIAL
CIVIL APPLICATION No. 9403 of 2009

For
Approval and Signature:
HONOURABLE
MR.JUSTICE ANANT S. DAVE

=====

1

Whether

Reporters of Local Papers may be allowed to see the judgment
Yes

2

To

be referred to the Reporter or not ? Yes

3

Whether

their Lordships wish to see the fair copy of the judgment

4

Whether

this case involves a substantial question of law as to the

interpretation of the constitution of India, 1950 or any
made thereunder ? No

5

Whether

it is to be circulated to the civil judge ? No

=====

RAMESHBHAI
CHATURBHAI PRAJAPATI & others

Versus

MINAXIBEN
WD/O RASIKLAL TILAKRAM & others

=====

Appearance

:

Mr. S.B. Vakil, Senior
Advocate, with Mr. Parthiv B. Shah for the petitioners in SCA Nos.
9400, 9402, and 9403 of 2009

Mr.

B.B. Naik, Senior Advocate, with Mr. Manav A. Mehta for the

petitioners in SCA No.9401 of 2009

Mr.

D.D. Vyas, Senior Advocate with Mr. Bharat Jani for respondent Nos. 1 to 4 and respondent Nos. 6 to 8

Ms.Megha

Jani for respondent No.5

Mr.

Pranav G. Desai for respondent Nos. 10 and 11

Respondent

No.9 served

=====

CORAM

:

HONOURABLE

MR.JUSTICE ANANT S. DAVE

Date

: 28/04/2011

CAV

JUDGMENT

1 Rule.

Learned counsel appearing for respective respondents waive service of Rule. At the request of the learned counsel appearing for the parties, this group of four Special Civil Applications is taken up for final hearing.

2. These four petitions under Articles 226 and 227 of the Constitution of India are directed against the order dated 15.5.2009 passed by the learned Additional Senior Civil Judge, Vadodara, below applications Exh. 30 and Exh 47 in Special Civil Suit No.391 of 2001; applications Exh. 26 and Exh 43 in Special Civil Suit No.392 of 2001; applications Exh. 25 and Exh 42 in Special Civil Suit No.393 of 2001; and applications Exh. 25 and Exh 41 in Special Civil Suit No.394 of 2001. The petitioners are original defendant Nos. 2 to 7; respondent Nos. 1 to 8 are original plaintiffs and respondent No.9 is original defendant No.1, in all four suits being Special Civil Suit Nos. 391 to 394 of 2001.

3 The issue involved in this group of petitions revolves round the non-irrigated agricultural lands being plot No.4, admeasuring 2 Hectares 7 Are 9 Sq.meters being 1/4th part of Revenue Survey No.707 admeasuring 8 Hectares 31 Gunthas 63 Sq.meters [for short 'the suit land']. The land bearing Survey No.707 initially belonged to Vithal Mandir Trust. Under the order dated 6.3.1979 of the Mamlatdar and Agricultural Land Tribunal in Tenancy Case No.3467 of 1977, Rasiklal Tilakram Jaiswal was declared as a tenant of the land bearing revenue survey No.707 and became the deemed purchaser thereof and the same came to be confirmed by the Gujarat Revenue Tribunal, this Court and the Apex Court.

4 On 30.4.2001, respondent Nos. 1 to 8 filed four suits being Special Civil Suits Nos. 391 to 394 of 2001 against the petitioners and respondent Nos. 9 to 11 for a declaration that the registered sale deeds dated 14.10.1999 in respect of plot Nos. 1 to 4 were not binding on the plaintiffs and for a declaration that the petitioners were not entitled to demand from respondent Nos.10 and 11 any building permission and further restrain them from dealing, plotting, alienation, allotment, etc, of the land in question on the basis of the impugned sale deeds. On 9.2.2007, it seems that, pending the suits, a compromise was arrived at between the petitioners and respondent Nos. 1 to 8 and reduced in writing Exh.32 and, as per the terms and conditions of the above compromise, the petitioners paid to each of respondent Nos. 1 to 8 Rs.37.50 lakhs aggregating to Rs.3 crores by cheques as per paragraph 7 of the consent terms and it was agreed to withdraw Regular Civil Suit no.792 of 2001. On 9.2.2007, respondent Nos. 1 to 8 filed four applications [i] Exh.30 in Special Civil Suit No.391 of 2001 [ii] Exh.26 in Special Civil Suit No.392 of 2001 [iii] Exh.25 in Special Civil Suit No.393 of 2001 and [iv] Exh.25 in Special Civil Suit No.394 of 2001 for amendment of the plaints in the suits by deletion of respondent Nos. 9 to 11 as defendants to the suits and renumbering the petitioners as defendants Nos. 1 to 6 and it was pointed out that there was a compromise with the petitioners and no relief remained to be obtained against them.

On 15.2.2007, respondent No.5 made application Exh.35 to withdraw the applications Exh.30, 26, 25 and 25 for amendment of the respective plaints. On 17.2.2007, respondent No.5 made an application for withdrawing the compromise and cancelling the same in the above suits. Respondent No.5 made application Exh.40 in Special Civil Suit No.391 of 2001 for depositing Rs.37.50 lakhs. On

13.7.2007, another group of applications Exh.47, 43, 42 and 41 were filed in Special Civil Suit Nos.391 to 394 of 2001 for taking a decision on the consent terms dated 9.2.2007.

6 The trial court had taken up the case for compromise to be recorded against respondent Nos. 1 to 4 and 6 to 7 and deferred the hearing on the compromise with regard to respondent No.5. On 28.1.2008, the trial court granted the applications Exh.30, 26, 25 and 25 for amendment of the plaints in the respective civil suits.

7 In the meanwhile, in the revenue proceeding being Revision Application No.319 of 2009, the Gujarat Revenue Tribunal passed the order on 28.11.2007 directing to regularize the transactions which have taken place between the parties and, on payment of an amount of premium, the restriction under Section 43 of the Bombay Tenancy & Agricultural Lands Act, 1948 [for short, 'the Act'] would be deemed to have been removed and the sale deeds to be regularized. The order dated 28.11.2007 passed by the Gujarat Revenue Tribunal was challenged by respondent No.5 by way of Special Civil Application No.3070 of 2007 before this Court and execution and operation of the order dated 28.11.2007 passed by the Gujarat Revenue Tribunal was stayed.

8 Respondent No.5 also filed Special Civil Application Nos. 3117 to 3120 of 2008 before this Court wherein the Court [Coram: M.R. Shah, J.] passed the judgment and order dated 26.8.2008. Paragraph 6 of the judgment and order dated 26.8.2008 reads as under:

"6. For the reasons stated above, all the petitions succeed in part. The orders passed below Exh.30 in Civil Suit No. 391 of 2004; Exh. 26 in Civil Suit No.392 of 2001; Exh.25 in Civil Suit No.393 of 2001 and Exh.25 in Civil Suit No.394 of 2001 are quashed and set aside and the matter is remanded to the learned trial Court for deciding the application Exh.30 in Civil Suit No. 391 of 2004; Exh. 26 in Civil Suit No.392 of 2001; Exh.25 in Civil Suit No.393 of 2001 and Exh.25 in Civil Suit No.394 of 2001 afresh in accordance with law and on merits after giving opportunity to all concerned. So far as the challenge to orders passed by the learned trial Court below Exh.47 in Civil Suit No.391 of 2001; Exh.43 in Civil Suit No.392 of 2001; Exh.42 in Civil Suit No.393 of 2001 and Exh.41 in Civil Suit No.394 of 2001 are concerned, present Special Civil Applications are not entertained at this stage by observing that it will be open for the petitioner to make all submissions which are raised in the present Special Civil Applications while challenging the orders passed below Exh.47 in Civil Suit No.391 of 2001; Exh.43 in Civil Suit No.392 of 2001; Exh.42 in Civil Suit No.393 of 2001 and Exh.41 in Civil Suit No.394 of 2001 inclusive of applicability of Order XXIII Rule 1 Sub-Rule (5); Order XXIII Rule 3 and proviso and explanation thereto of the C.P.C. and considering the submissions with respect to validity of the compromise / consent terms even by some of the original plaintiffs, the learned trial Court is directed to consider all submissions before passing any further order on the consent terms submitted by some of the plaintiffs and passing consent decree on the basis of said consent terms. All these questions are kept open and even it will be open for the contesting respondents also to make submission that qua some of the plaintiffs or all the plaintiffs consent decree can be passed and all these question are

kept open and same are directed to be considered by learned trial Court before passing any final decree on the basis of consent terms. Rule is made absolute to the aforesaid extent in each of the Special Civil Applications. There shall be no order as to costs. Direct service is permitted."

9 Thereafter, the trial court heard and rejected all the applications, namely, applications Exh.30, 26, 25 and 25 for amendment of the plaint in four suits and applications Exh.47, 43, 42 and 41 for recording compromise in the suit. Hence, the present petitions.

10 The respondents herein denied certain factual aspects narrated and so submitted by the learned counsel for the petitioners and submitted that the original plaintiffs are legal heirs of deceased Rasiklal Tilakram Jaiswal who died on 23.8.1997 and who was declared as tenant of the suit land under Section 32(O) of the Act and the order dated 6.7.1979 passed by the Mamlatdar & ALT came to be confirmed upto the Apex Court. However, the plaintiffs disputed filing of application under Section 17(O) of the Act being Tenancy Case No.62 of 1994 while Rasiklal Tilakram Jaiswal died on 23.8.1987. However, later on, initially, the Gujarat Revenue Tribunal passed an order on 28.11.2007, whereby, the Tribunal upheld the order passed by the Deputy Collector, Vadodara and quashed and set aside the order of the Mamlatdar & ALT dated 4.3.1998 in Tenancy Case No.62 of 1994 and further held that the land in question was governed by the restriction of Section 43 of the Act. The above case was admitted and pending in this Court being Special Civil Application No.30703 of 2007 wherein the stay is granted against the impugned order of the Tribunal.

11 Learned counsel for respondent No.5 has made it clear that plaintiff No.5 had withdrawn compromise and continued to challenge the decision and the proceeding of the civil court as well as the revenue tribunal to which there is no dispute.

12 Mr. S.B. Vakil, learned Senior Advocate appearing for the petitioners has submitted that the trial court has erred in dismissing the applications Exh.30 and 47 and the order passed by the trial court is contrary to law and there are errors apparent on the face of record and proceeding and, therefore, such errors are to be corrected by this Court in exercise of power under Articles 226 and 227 of the Constitution of India. It is further submitted that the trial court has no jurisdiction to dismiss the application Exh.47 on which the order dated 28.1.2008 was already passed for recording compromise between the petitioners and respondent Nos. 1 to 4 and 6 to 8. Even Special Civil Application No.3117 of 2008 filed by respondent No.5 earlier was not entertained by this Court. Since the above issue of recording compromise between the petitioners and respondent Nos. 1 to 4 and 6 to 8 has already been concluded, the trial court has no jurisdiction to consider or review the said order and to dismiss the application Exh.47 as a whole. It is further submitted that the trial court could not have considered the notices and the orders passed in the tenancy cases since the entire question whether four sale deeds were invalid as contravening Section 43 of the Act was not concluded and is pending in this Court and the trial court could not have proceeded on the basis that four sale deeds contravened Section 43 of the Act and were not lawful and should have passed the decree in terms of the consent terms subject to the outcome of the Special Civil Application pending in this Court. It is further submitted that the trial court has failed to appreciate the prohibition contained in Section 43 of the Act which was subject to previous sanction of the Collector and

payment of premium. It is further submitted that the trial court has erred in exercising the jurisdiction under Order 23 Rule 3 of the Code of Civil Procedure when the parties have entered into the compromise which was reduced in writing and the prayer was made accordingly. The learned Senior Advocate for the petitioners has relied upon the decision of the Full Bench of this Court in the case of Shah Jitendra Nanalal vs. Patel Lallubhai Ishverbhai reported in 1985 GLH 53 and the decision of the Apex Court in the case of Bai Dosabai vs. Mathurdas reported in AIR 1980 SC 1334 in support of his submission that a conditional decree could have been passed and the conditional decree is permissible before the sale is actually effected.

12.1 Relying on the decision of the Full Bench of this Court in the case of Shah Jitendra Nanalal [supra], learned Senior Advocate Mr. S.B. Vakil for the petitioners has submitted that the parties can enter into a contract for transfer of land and the Court can pass a conditional decree for specific performance subject to exemption being obtained and in view of what was considered and held therein, the provisions of section 5(3) and section 20(b)(1) of the Urban Land (Ceiling and Regulation) Act, 1976 can be applied in the facts of the case and to the transactions which have taken place under Section 43 of the Bombay Tenancy & Agricultural Lands Act, 1948.

12.2 While referring to the decision of the Apex Court in the case of Bai Dosabai [supra], learned Senior Advocate Mr. S.B. Vakil has submitted that a contract for the sale of immovable property, though does not, of itself, create any interest in or charge on such property, creates an obligation annexed to the ownership of immovable property, not amounting to an interest in the property but such obligation may be enforced against a transferee with notice of the contract.

12.3 Learned Senior Advocate Mr. S.B. Vakil has relied upon a decision of this Court in the case of Mavji Dhorji and others vs. State of Gujarat, reported in 1994 (1) GLH 20 to point out the difference between two expressions 'void' and 'invalid' and submitted that invalid transaction will have to be invalidated by exercising powers in that respect by the authorities. In the said decision, the learned Single Judge of this Court referred to the decision of the Division Bench of the Nagpur High Court in the case of Mohammed Ibrahim Khan Ikramkhan vs. Sugrabi Abdul Rashid and others, reported in AIR 1955 Nagpur 272.

12.4 Learned Senior Advocate Mr. S.B. Vakil has, in the context of Order 23 Rule 3 of the Code of Civil Procedure, 1908, relied upon the decision of this Court in the case of Kaluram Bheruji vs. Bai Parvati, reported in 1982 (1) GLR 201, and submitted that Order 23 Rule 3 of the Code of Civil Procedure, 1908 does not contemplate a situation when the Court can alter the terms of the compromise and, when the consent terms duly signed by the parties and the respective advocates was placed on record and the Court has recorded such compromise, a consent decree has to be passed by the Court.

12.5 In the context of delayed and belated exercise of revisional powers by the Authority in the event of breach of any statutory provision, learned Senior Advocate Mr. S.B. Vakil has relied upon the decisions of the Apex Court in the case of Ram Chand vs. Union of India, reported in (1994) 1 SCC 44 and in the case of Mohamad Kavi Mohamad Amin vs. Fatmabai Ibrahim, reported in (1997) 6 SCC 71, and a decision of this Court in the case of Patel Rameshbhai Ramabhai v. State, reported in

2008(3) GLR 2049, and submitted that, where no time-limit is prescribed for exercise of power, it should be exercised within a reasonable time.

12.6 For the scope of powers to be exercised under Article 227 of the Constitution of India, reliance is placed by learned Senior Advocate Mr. S.B. Vakil on the decision of the Apex Court in the case of Bajonji Dinshaji Engineer vs. Amy Dhunjisha Gandhi, reported in (1997) 11 SCC 388, to point out that in the above case exercise of powers by the High Court under Article 227 of the Constitution of India in considering other questions relating to the merits which were yet to be considered by the competent authority in a pending proceeding did not find favour with the Supreme Court.

13 Mr. B.B. Naik, learned Senior Advocate appearing with Mr. Manav A. Mehta for the petitioners in Special Civil Application No.9401 of 2009, adopts and reiterates the contentions raised by Mr. S.B. Vakil, learned Senior Advocate for the petitioners in Special Civil Application Nos. 9400, 9402 and 9403 of 2009.

14. Mr. D.D. Vyas, learned Senior Advocate for the original plaintiffs [respondent Nos. 1 to 4 and 6 to 8 herein] has submitted that execution of sale deeds as early as in 1992 was contrary to law and even subsequent execution of four sale deeds was also illegal and barred by law. He has further submitted that, on the day when the compromise was recorded, all the parties were not present. Besides, in view of Explanation to Order 23 Rule 3 of the Code of Civil Procedure, it is submitted that an agreement or compromise being void or voidable under the Indian Contract Act, no decree in any form whether conditional or unconditional could have been passed since the land in question is governed by the restriction of Section 43 of the Act by which without previous sanction of the Collector, no agreement with regard to mortgage, transfer, alienation, etc of the land could have been entered into. It is further submitted that sub-section (2) of Section 43 bars any transfer or partition and any agreement of transfer or any rent or any interest thereof in contravention of sub-section (1) or sub-section (1c) of Section 43, shall be invalid and held to be as invalid. It is further submitted that there are decisions to this effect and reliance is placed on AIR 1993 SC 1139 [Banwari Lal vs. Chando Devi] in respect of Order 23, Rule 1, 3, AIR 1970 Gujarat 204 [Shashikant vs. State] in respect of the objects of the Act and prohibition of restrictive nature under the Act and AIR 1996 SC 904 [State of Maharashtra vs. Babu Govind Gavate] in respect of Section 43 of the Act.

14.1 So far as the decision of the Full Bench in the case of Shah Jitendra Nanalal [supra] is concerned, it is submitted that under the then ULC Act, right to claim exemption under Section 20 of the Act was available to the holder of excess vacant land, while under Section 43(1) of the Act, rights are restrictive and previous sanction of the Collector is a must before entering into any agreement of alienating the land in any manner known to law. When previous sanction of the Collector is a condition precedent, no agreement could have been entered into and sub-section (2) of section 43 declares such alienation or transfer as invalid and, therefore, the above decision of the Full Bench of this Court is not applicable to the facts of the present case. The learned counsel for the plaintiffs has relied upon the decision in the case of Mohammad Ibrahim vs. Sugrabi, reported in AIR 1955 Nagpur 272 to explain meaning of the words 'void' and 'voidable'.

15. Ms. Megha Jani, learned counsel appearing for respondent No.5 has highlighted the ingredients of Order 23 Rule 3 of the Code of Civil Procedure and submitted that exercise of powers by the trial court is not mechanical but it has to consider the compromise carefully and it has to arrive at a satisfaction about the compromise. It is further submitted that, in view of Explanation to the proviso to Order 23 Rule 3 of the Code of Civil Procedure and Sections 23 and 24 of the Indian Contract Act, 1872, the agreement itself was forbidden by law in view of operation of Section 43 of the Act and no decree could have been passed by the trial court on the basis of the order of the Gujarat Revenue Tribunal dated 28.11.2007, which was stayed by this Court in the writ petition which is pending. It is further submitted that by virtue of the order of the Gujarat Revenue Tribunal dated 28.11.2007 where a specific declaration was made that the restrictions enumerated in Section 43 are applicable to the land in question, at the same time, a direction was issued to regularize the transactions which have taken place between the parties which, ultimately, was stayed by this Court, which is a double standard. It is further submitted that in the case *Shah Jitendra Nanlal* [supra] before the Full Bench, the suit was already instituted prior to ULC Act coming into force and, in view of exemption available to the land holder of the excess vacant land, it was found by the Full Bench that the valid agreement was not to be defeated. She has further submitted on the basis of the conduct of the parties that the consent terms were only filed but they were kept for verification. She has also relied upon the application dated 17.2.2007 to rescind the terms of the compromise and to deposit the amount in question in the Court. In support of her submission, she has relied upon AIR 1976 Calcutta 196 [*Sm. Sumitra Devi Agarwala vs. Sm. Sulekha Kundu*] that no terms can be recorded contrary to the provisions of the Indian Contract Act in exercise of power under Order 23, Rule 3 and Section 151 of the Code of Civil Procedure. She has, in the context of Order 23 Rule 3 of the Code of Civil Procedure, 1908, while relying the decision in the case of *Sm. Sumitra Devi Agarwalla* [supra], submitted that the term 'lawful agreement' in Order 23 Rule 3 does not include within it an agreement which is vitiated by fraud, undue influence or coercion. It excludes such an agreement as also an agreement which on the face of it is void. She has also relied upon the decision of the Apex Court in the case of *V. Narasimharaju vs. V. Gurumurthy Raju*, reported in AIR 1963 SC 107, with regard to unlawful consideration and submitted that the agreement would be treated as invalid for the reason that its consideration is opposed to public policy. She has also relied upon the decisions of the Bombay High Court in the cases of *Shri Parshuram Kathod Gaikar vs. Pandu Mahadu Hard*, reported in MANU/MH/0609/1993 and *Lotan Ramchandra Shimpi vs. Shankar Ganpat Kayasth*, reported in MANU/MH/0784/1994 and submitted that under Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, previous sanction of the competent authority, namely, Collector, is required and, if such previous sanction is not obtained, agreement to sell an agricultural land is invalid and even Section 53A of the Transfer of Property Act, 1882, would not safeguard such agreement. She has also relied upon the decision of the Bombay High Court in the case of *Himatrao Ukha Mali vs. Popat Devram Patil*, reported in AIR 1999 Bombay 10 and submitted that, in the above case, even the sale deed executed by the tenant was held invalid on the ground that Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, imposes a total prohibition or legal bar on alienation of the lands vested in favour of the tenants under the said Act. The Court further held that, if an agreement of sale or any instrument in respect of the subject land is executed without taking permission of the Collector under Section 43(1), the said agreement will be invalid as per Section 43(2) of the said Act and the above fact remains undisputed in the facts of this case and, therefore, the Civil Court has rightly refused to pass a decree in terms of the consent terms

submitted by the parties when plaintiff No.5 filed an application rescinding his consent before the Court could pass any order. Lastly, it is submitted that since no error is committed by the trial court while exercising the jurisdiction, this petition must fail under Articles 226 and 227 of the Constitution of India.

16. In rejoinder, Mr. S.B. Vakil, learned Senior Advocate appearing for the petitioners has reiterated his submission based on the decision of the Full Bench and further submitted that this Court has very limited scope under Articles 226 and 227 of the Constitution of India and cannot delve into various factual aspects and submissions made by the learned counsel for the defendants which were not raised, contended or taken up or not dealt with by the trial court. According to the learned Senior Counsel, the word 'invalid' appearing in sub-section (2) of section 43 had no bearing on the sale deeds, which were already executed. Unless the competent authority declares such sale invalid, the trial court could not have placed reliance on Section 43 of the Act. The trial court could have addressed to the questions, whether sale deeds were invalid and/or whether compromise was invalid under Section 43 of the Act or under the Indian Contract Act and decree could have been drawn and also about the consideration of sale money already paid which was approximately Rs.37 lakhs to each of the parties-plaintiffs herein and accepted by them. Further, in rejoinder, learned Senior Advocate Mr. S.B. Vakil has distinguished the decision relied upon by learned Senior Advocate Mr. D.D. Vyas, in the case of Shashikant Mohanlal Desai [supra] [AIR 1970 Gujarat 204], interpreting Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, and submitted that the transfer may be made by the tenant to another after sanction by the Collector and on payment of such amount as the State Government may by general or special order determine and if either of these two conditions is not fulfilled, the transfer would be invalid and, therefore, if the agreement is entered into for transfer of land subject to availing sanction of the Collector by itself cannot be said to be invalid unless so declared by the Competent Authority. On the basis of such agreement and an application preferred by the tenant for removal of restriction under Section 43, the Collector would see various circumstances relating to the proposed transfer and decide whether he should grant sanction or not and, if the sanction is granted by the Collector on a condition of making payment as provided and called as premium, the land shall stand transferred, but the agreement entered into between the parties to transfer such land before the sanction cannot be said to be invalid.

16.1 Similarly, with regard to the decision relied upon by learned Senior Advocate Mr. D.D. Vyas, in the case of Banwari Lal [supra] [AIR 1993 SC 1139], learned Senior Advocate Mr. S.B. Vakil submitted that, in view of proviso read with Explanation to Rule 3 of Order 23, a Court which had entertained the petition of compromise has to examine whether compromise was void or voidable under the Indian Contract Act and this aspect was completely overlooked by the Court below and, therefore, the order impugned deserves to be quashed and set aside.

17. In sur-rejoinder, learned Senior Advocate Mr. D.D. Vyas has relied upon the decision of the Apex Court in the case of Jayamma vs. Maria Bai, reported in AIR 2004 SC 3957 and submitted that when an assignment or transfer is made in contravention of statutory provisions, the consequence whereof would be that the same is invalid and, thus, being opposed to public policy, the same shall attract the provisions of Section 23 of the Indian Contract Act and, in the facts of the present case,

the agreement to transfer/alienate/sell the land in question was barred by Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, and, therefore, no error of law much less of jurisdiction is committed by the Civil Court warranting interference of this Court in extraordinary jurisdiction under Article 227 of the Constitution of India.

18. To appreciate the rival contentions of the parties, it is necessary to advert to the relevant provisions of the Code and the Act and the observations made by the Civil Court in the order impugnd.

18.1 Order XXIII of the Code of Civil Procedure, 1908 reads as under:

"1. Withdrawal of suit or abandonment of part of claim:

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff

(a) abandons any suit or part of a claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of other plaintiffs.

1-A When transposition of the defendants as plaintiffs may be permitted.

Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 or Order I, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.

2. Limitation law not affected by first suit.-

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit has not been instituted.

3. Compromise of suit.-

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit:

Provided that where it is alleged by one party and denied by the other that any adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for the reason to be recorded, thinks fit to grant such adjournment.

Explanation.- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872) shall not be deemed to be lawful within the meaning of this rule.

3-A Bar to suit.-

No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

3-B No agreement or compromise to be entered in a representative suit without leave of the Court.

(1) No agreement or compromise in a representative suit shall be entered into without the leave of the Court expressly recorded the proceedings; and any such agreement or compromise entered into without the leave of the Court so recorded shall be void.

(2) Before granting such leave, the Court shall give notice in such manner as it may think fit to such persons as may appear to it to be interested in the suit.

Explanation.-

In this rule, 'representative suit' means,-

(a) a suit under section 91 or section 92

(b) a suit under rule 8 or Order I,

(c) a suit in which the manager of an undivided Hindu family sues or is sued as representing the other members of the family,

(d) any other suit in which the decree passed may, by virtue of the provisions of this Code or of any other law for the time being in force, bind any person who is not named as party to the suit.

4. Proceedings in execution of decrees not affected.-

Nothing in this Order shall apply to any proceedings in execution of a decree or order.

18.2 Section 43 of the Bombay Tenancy and Agricultural Lands Act, 1948, reads as under:

"43. Restriction on transfer of land purchased or sold under this Act.

No land or any interest therein purchased by a tenant under Section 17B, 32, 32F, 32-I, 32U or

43.ID, or sold to any person under Section 32P or 64 shall be transferred or shall be agreed by an instrument in writing to be transferred, by sale, gift, exchange, mortgage, lease or assignment, without the previous sanction of the Collector and except in consideration of payment of such amount as the State Government may by general or special order determine; and no such land or any interest, therein, shall be partitioned without the previous sanction of the Collector.

Provided that no previous sanction of the Collector shall be required, if the partition of the land is among the members of the family who have direct blood relation or among the legal heirs of the tenant.

Provided further that the partition of the land as aforesaid shall not be valid if it is made in contravention of the provisions of any other law for the time being in force:

Provided also that such members of the family or the legal heirs shall hold tenant, after the partition, on the same terms, conditions and restrictions as were applicable to such land or interest therest therein purchased by the tenant or the person.

(1A) The sanction under sub-section (1) shall be given by the Collector in such circumstances and subject to such conditions, as may be prescribed by the State Government.

(1AA) Notwithstanding anything contained in sub-section (1), it shall be lawful for such tenant or a person to mortgage or create a charge on his interests in the land in favour of the State Government in consideration of a loan advanced to him by the State Government under the Land Improvement Loans Act, 1884, the Agriculturists' Loan Act, 1884, or the Bombay Non- agriculturists' Loans act, 1928, as in force in the State of Gujarat, or in favour of a bank or cooperative society, and without prejudice to any other remedy open to the State Government, bank or cooperative society, as the case may be, in the event of his making default in payment of such loan in accordance with the terms on which such loan was granted, it shall be lawful for the State Government, bank or cooperative society, as the case may be, to cause his interest in the land to be attached and sold and the proceeds to be applied in payment of such loan.

Explanation:

xx xx (1B) Nothing in sub-section (1) or (1AA) shall apply to land purchased under section 32, 32F or 64 by a permanent tenant thereof, if prior to the purchase, the permanent tenant, by usage, custom, agreement or decree or order of a court, held a transferable right in the tenancy of the land.

2. Any transfer or partition, or any agreement of transfer, or any land or any interest therein in contravention of sub- section (1) shall be invalid"

18.3 The observations made by the trial court in paragraph 40 of the order impugned, translated into English, read as under:

"40.Considering the submissions of the plaintiffs and the defendants, the plaintiffs and defendant No.2 have filed consent terms. Plaintiff No.5 took objection to the said consent terms. Applications have been filed on behalf of defendants Nos. 2 to 7 to the effect that the consent terms/settlement/agreement qua plaintiff Nos. 1 to 4 and 6 to 8, except plaintiff No.5, be recorded and a decree be passed. On behalf of the plaintiffs, it has been submitted that the consent terms is contrary to law. On behalf of the defendants, it has been stated that as the consent terms is in accordance with

law and the plaintiffs have accepted the amount of consideration as per the consent terms, decree be passed. Permission has been sought for modification deleting the names of defendants Nos. 1, 8 and 9. On behalf of plaintiff No.5, it has been submitted to proceed with the suit since he is not agreeable to the consent terms. As the High Court of Gujarat has directed to take further action in connection with the consent terms entered into between the parties, on behalf of other plaintiffs also, it has been submitted that the consent terms is illegal. It has been contended on behalf of defendants Nos. 1 to 4 and 6 to 8 that the consent terms has been got executed by fraud, but such contention is not believable. The parties have produced the agreement, which has been signed by them voluntarily and all the plaintiffs have also made a declaration before the Notary regarding the consent terms, therefore, the story of fraud is not believable. It is to be seen whether the said consent terms, which has been produced before the Court in all the four suits, is legal or not. The lands of four suits are tenancy lands. The father of the plaintiffs has been declared to be a tenant, therefore, the same is restricted land as per Section 43 of the Tenancy Act. Against the order passed by the Revenue Tribunal, the Gujarat High Court has granted stay. Thus, as the dispute with regard to all the suit lands is going on and that the consent terms, which has been produced, is signed voluntarily and with consent, the decree cannot be passed under Order 23 Rule 3 of the CPC on the basis of the said consent terms because the lands referred to in the settlement are disputed lands under the Tenancy Act. Agreement, which is void and voidable under the Indian Contract Act, cannot be said to be an agreement in accordance with law. Therefore, considering the judgments cited on behalf of the plaintiffs, since the settlement is contrary to law, decree cannot be passed. As per the judgments cited on behalf of the defendants, if the agreement is in accordance with law, objection taken by any party thereafter will not be tenable. The agreement, which has been produced in the present four suits, pertains to restricted land under Section 43 of the Tenancy Act. Therefore, as the lands are restricted land under Section 43 and tenancy dispute is going on and as the agreement is not lawful, decree cannot be passed as per the agreement. Therefore, applications Exh.30 in Special Civil Suit No.391 of 2001, Exh.26 in Special Civil Suit No.392 of 2001, Exh.25 in Special Civil Suit No.393 of 2001, Exh.30 in Special Civil Suit No.394 of 2001, for deleting names of defendants Nos. 1, 8 and 9 as party-defendants cannot be allowed. Further, as the agreements in all suits are not legal and lawful, applications Exh.47 in Special Civil Suit No.391 of 2001, Exh.43 in Special Civil Suit No.392 of 2001, Exh.41 in Special Civil Suit No.393 of 2001 and Special Civil Suit No.394 of 2001 filed by defendants Nos. 2 to 7 requesting for passing a decree in accordance with consent terms/agreement cannot be allowed in as much as no such decree can be passed as the agreements are illegal, therefore, following final order is passed.

ORDER

41. Applications Exh.30 and 43 in Special Civil Suit No.391 of 2001, Exh.26 and 43 in Special Civil Suit No.392 of 2001, Exh.25 and 42 in Special Civil Suit No.393 of 2001,

Exh.25 and 41 in Special Civil Suit No.394 of 2001, are rejected."

19. The above paragraph 40 of the order impugned passed by the learned Judge takes note of the consent terms produced on record between the plaintiffs and defendant No.2 and objection to the said consent terms raised by plaintiff No.5. In addition to the above, the learned Judge has further noticed the fact about grant of stay by the High Court to the order passed by the Gujarat Revenue Tribunal by which the Tribunal had given certain directions to regularize the transaction which had taken place between the parties on payment of an amount of premium. Even the contention of the plaintiffs about execution of the consent terms by fraud is not believed on the ground that the consideration was paid and it was signed by the plaintiffs voluntarily and a declaration was also made before a Notary. Thereafter, the nature of the consent terms was also examined by the learned Judge in the context of Section 43 of the Tenancy Act whether a decree could be passed under Order XXIII Rule 3 of the Code of Civil Procedure. While examining the above aspects, the learned Judge has also found that the subject land was restricted land under section 43 of the Tenancy Act and, therefore, the agreement was not lawful and any agreement whether void and/or voidable under the Indian Contract Act for which recourse cannot be taken to Order XXIII Rule 3 of the Code of Civil Procedure and the above view and reasoning of the learned Judge cannot be said to be contrary to law or illegal in any manner since Explanation to proviso to Order XXIII Rule 3 of the Code of Civil Procedure clearly provides that the agreement or compromise which is void or voidable under the Indian Contract Act, 1872, shall not be deemed to be lawful within the meaning of this Rule. Thus, if the above Explanation to proviso to Order XXIII Rule 3 of the Code of Civil Procedure is construed in juxtaposition to Sections 23 and 24 of the Indian Contract Act, 1872, it defines unlawful contract/agreement forbidden by law and, therefore, when, admittedly, subject land of the consent terms is 'restrictive tenure land' and governed by the restriction imposed under section 43 of the Tenancy Act, viz. 'without previous sanction of the Collector, no such land shall be alienated/transferred', rejection of the prayer to draw a decree in terms of the consent terms/agreement forbidden by law as above cannot be said to be illegal, which deserves any interference by this Court in exercise of the jurisdiction under Article 227 of the Constitution of India. The Trial Court has neither failed to exercise jurisdiction nor illegally exercised jurisdiction warranting any interference at the hands of this Court in exercise of extraordinary jurisdiction.

20. The decision of the Full Bench of this Court in the case of Shah Jitendra Nanalal {1985 GLH 53} [supra], relied upon by learned Senior Advocate Mr. S.B. Vakil for the petitioners, was in a different context and under the statutory provisions of Urban Land [Ceiling and Regulation] Act, 1976 whether right to claim exemption under section 20 of the ULC Act was available to the holder of the excess vacant land. In the above decision, agreement to sell certain land was executed on 4.7.1966 and further agreement was entered into on 1.7.1967 and the civil suit, being Civil Suit No.1915 of 1970, was filed while another suit filed by the defendants as the plaintiffs being Civil Suit No.2063 of 1969 was compromised between the parties thereto and, on the basis of the settlement, a decree was passed on 5.7.1972. Subsequent to institution of the suit, Gujarat Vacant Lands in Urban Areas [Prohibition of Alienation] Act, 1972 came into force which later on ceased to operate in its place on the advent of Urban Land [Ceiling and Regulation] Act, 1976. Further, right to claim exemption by the owner of the land under the ULC Act continued until vesting under section 10(3) of the ULC Act and, therefore, a conditional decree for specific performance subject to exemption being obtained

under section 20 of the ULC Act was held to be permissible. In the facts of the case, transfer/alienation of tenure land viz. a land given to a tenant by the Government under various provisions of Tenancy Act to the tiller of the land, subject to restriction of Section 43 of the Act, is clearly impermissible without previous sanction of the Collector/Competent Authority, therefore, the law laid down by the Full Bench in Jitendra Nanalal [supra] is not applicable to the facts and circumstances of the present case.

21. In the scenario of factual and legal aspects of the present case, I am in respectful agreement with law laid down in the decisions relied upon by Mr. D.D. Vyas and Ms. Megha Jani, learned counsel appearing for respondent Nos. 1 to 4 and 6 to 8 and respondent No.5, respectively.

22. In the case of V. Narasimharaju (AIR 1963 SC 107) [supra], the Apex Court held with regard to unlawful consideration that the agreement would be treated as invalid for the reason that such consideration is opposed to public policy and particularly when previous sanction of the Collector was a mandatory and, admittedly, such previous sanction was not obtained by the parties and the agreement to sell an agricultural land is invalid and even Section 53A of the Transfer of Property Act, 1882 would also not safeguard such agreement. The above aspect is also dealt with by the Bombay High Court in the case of Himatrao Ukha Mali vs. Popat Devram Patil, AIR 1999 Bombay 10, [supra], wherein it is held that Section 43 imposes a total prohibition or legal bar on alienation of the lands vested in favour of the tenants under the provisions of the Tenancy Act. If an agreement of sale or any instrument in respect of the subject land is executed without taking previous sanction of the Collector under section 43(1) of the Tenancy Act, the said agreement shall be invalid as per Section 43(2) of the said Act. Suffice it to say that Section 43(1) of the Tenancy Act bars even entering into agreement or alienating the land and usage of term 'shall' twice in the section including in the penultimate part of the section reveals mandatory character of the language contained therein and to be interpreted as such and, particularly when the agreement/transaction was barred by sub-section (1) of Section 43 of the Tenancy Act and sub-section (2) of Section 43 of the said Act clearly refers such agreement or transfer shall be invalid, the trial court has rightly concluded by not probing into the question of declaration of such transaction/agreement as invalid. The satisfaction of the learned Judge based on the understanding of the language contained in sub-sections (1) and (2) of Section 43 of the Tenancy Act and the relevant materials on record of the case for not passing the decree as prayed for cannot be said to be in any manner contrary to law warranting any interference by this Court in exercise of powers under Articles 226 and 227 of the Constitution of India.

23. Besides, all the parties to the compromise were not ad-idem. Here, in the instant case, plaintiff No.5 had not agreed and rescinded the contract. Since plaintiff No.5 specifically filed an application rescinding his consent even before the Court could pass any order, the payment of consideration as reflected in the consent terms by itself was not a ground for the learned Judge to consider the agreement lawful warranting to pass a decree as sought for. Before the learned Judge could pass the final order, all the plaintiffs had expressly withdrawn their consent. Thus, the contention of learned Senior Advocate Mr. S.B. Vakil for the petitioners that the Court which had entertained petition for compromise has to examine whether the compromise was void or voidable under the Indian Contract Act has no substance because, in the facts of the case and on perusal of the order passed by

the learned Judge including the paragraph 40, it did not reveal that the learned Judge has failed to examine such issue in any manner. In the instant case, the learned Judge had given a finding in favour of the petitioners that the sale was voluntary and consideration was paid - that itself is indicative of the fact that the learned Judge has considered all relevant aspects and applied his mind. A question about recording of compromise and rejecting applications for passing a decree in terms of compromise are two different facets of the procedure and even if the compromise is recorded, it is not obligatory upon the learned Judge to pass a decree in terms of such compromise or request made and, in the facts of the case, the learned Judge has considered the above compromise in context of Section 43 of the Tenancy Act vis-a-vis Order 23 Rule 3 of the Code and proviso and explanation therein and, therefore, it cannot be said that the trial court has no jurisdiction to dismiss the applications under Section 43 of the Tenancy Act, warranting exercise of power by this Court under Article 227 of the Constitution of India.

24. Further, the Division Bench of this Court considered spectrum of Section 43 of the Tenancy Act in the case of Shashikant Mohanlal Desai {AIR 1970 Gujarat 204} [supra] and examined the objects of the Act and while interpreting Section 43 of the Tenancy Act the restrictive nature of tenancy and specific bar contained about previous sanction of the Collector/Competent Authority in case of conversion of such land was held to be statutory and, therefore, according to this Court, the learned Judge has not committed any error either of jurisdiction or of law in considering the nature of agreement whether void or voidable and, therefore, no interference is called for. Further, the learned Judge has taken into consideration all the aspects of the matter as directed by this Court [Coram: M.R. Shah, J.] vide judgment and order dated 22.8.2008 in Special Civil Application Nos. 3117 to 3120 of 2008 and passed the order, which cannot be said to be contrary to said order dated 22.8.2008.

25. The law laid down by the Apex Court in the case of Banwari Lal [AIR 1993 SC 1139] (supra) about the proposition that, in view of the proviso read with Explanation of Order 23, Rule 3, a Court which had entertained the petition for compromise, has to examine whether the compromise was 'valid or invalid' or 'void or voidable' under the Indian Contract Act, is considered by the learned Judge and, in the context of clear language in Section 43 of the Tenancy Act, which prohibited alienation of land restricted by operation of Section 43 of the said Act without previous sanction of the Competent Authority/Collector, the order impugned cannot be said to be illegal.

26 In the case of Lotan Ramchandra Shimpi [Manu/MH/0784/1994] {supra}, it is held that, without sanction under Section 43 of the Tenancy Act, the impugned agreement is invalid and possession given to the purchaser is invalid and the same is not protected under Section 53A of the Transfer of Property Act.

27. Keeping in mind the law laid down by the Apex Court in the case of Bajonji Dinshaji Engineer [(1997) 11 SCC 388] {supra}, it is not open for this Court to consider other questions relating to the merits of the matter in as much as this Court is satisfied with the sound judicial discretion exercised by the learned Judge in refusing to pass a decree of compromise as prayed for. The question about the bar on exercising revisional power by the Authority after a delay of more than reasonable period is a question not to be gone into at this stage and suffice it to say that the High Court stayed the

direction of the Gujarat Revenue Tribunal to consider the case for regularization of deal/agreement/transaction between the parties upon the payment of premium and the matter is sub-judice. So is the case about the decisions relied upon by the learned counsel for the parties about the difference between two expressions 'void and voidable' and 'valid and invalid' contract. No further discussion is required at this stage on the above issue in view of the finding recorded by the learned Judge about the agreement being unlawful barred by Section 43 of the Tenancy Act, therefore, covered under proviso read with explanation to Order 13 Rule 3 of the Code of Civil Procedure and the Indian Contract Act and the land was given to a tenant by the State Government by virtue of operation of various provisions of the Tenancy Act and keeping in mind the objects and reasons of the Tenancy Act and the intention of the Legislature in making the tenant a 'deemed purchaser' and applying restrictions about transfer of such land as interpreted by the Division Bench of this Court in the case Shashikant Mohanlal Desai, {AIR 1970 Gujarat 204} (supra), in my view, no error appears on the face of the order impugned with regard to exercise of jurisdiction by the Civil Court or deciding the prayer of the petitioners herein to pass a decree under Order 23 Rule 3.

28. The other decisions relied upon by the learned Senior Counsel for the petitioners are not applicable to the facts of the present case.

29. In the result, all the four petitions deserve to be dismissed and are hereby dismissed accordingly. Rule is discharged in each of the petitions. The interim relief stands vacated. There shall be no order as to costs.

(ANANT S. DAVE, J.) (swamy)