

(2003) 11 CAL CK 0049

Calcutta High Court

Case No: F.A. No. 103 of 1998

Md. Hanif, being dead his widow
Qurmnuessa and Others

APPELLANT

Vs

Rozan Mian and Others

RESPONDENT

Date of Decision: Nov. 13, 2003**Acts Referred:**

- Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 - Section 2, 6(3), 7(2)

Citation: (2004) 2 CHN 493 : 108 CWN 1191**Hon'ble Judges:** Joytosh Banerjee, J; Dilip Kumar Seth, J**Bench:** Division Bench**Advocate:** Bhupendra Kumar Dey and P.K. Nandi, for the Appellant; S.P. Roy Choudhury and Anit Rakshit, M. Verma, Nilam Verma and Punam Verma, for the Respondent**Final Decision:** Allowed

Judgement

Dilip Kumar Seth, J.

Shorn of all details, in this appeal, the moot question that requires first consideration, is as to whether the specific performance of the agreement for sale becomes impossible of performance or not by reason of the promulgation of the Calcutta Thika Tenancy (Acquisition and Regulation) Act, 1981 (1981 Act) during the pendency of the suit. The vendor, admittedly, was a thika tenant. He agreed to sell the structure without the land to the plaintiff-respondent. The agreement having not been performed though the plaintiff was ready and willing, a suit for specific performance was instituted in 1974. Mr. Verma's client purported to have purchased a part of the property agreed to be sold subsequent to the alleged agreement between the vendor and the plaintiff. But she did not contest the suit. Her application under Order 41 Rule 27 of the CPC filed in this Court has been rejected. However, Mr. Verma had addressed the Court on pure question of law, as to the availability of specific performance of the agreement after the 1981 Act had come into force. Mr. Dey, appearing on behalf of the appellants, had elaborated the

contention with regard to the proposition in law apart from the contentions with regard to the facts.

2. Mr. Roy Choudhury in his submission not only had addressed to the facts and pointed out that those were in favour of grant of decree for specific performance but also met the legal proposition as advanced by the respective counsel and pointed out that it was an agreement for sale of a structure without the land. The sale of the structure is not a transfer of the interest in thika tenancy. Therefore, it would not attract the mischief of Sections 6 and 7 of the 1981 Act. Having regard to the definition in Section 2(a) of 1981 Act defining "thika tenant", Mr. Roy Choudhury contended that the mischief would have been attracted only in cases where the land is sought to be transferred or the structure together with the land is sought to be transferred. It would not be attracted in a case where the structure without the land is agreed to be transferred. According to him, the effect of 1981 Act would not render the agreement void if the mischief of the Act is not attracted because of absence of agreement to transfer any incidence in the land i.e., the thika tenancy. In such a case, there would be nothing to prevent the Court from granting decree for specific performance of the contract. If in law there appears to be any contravention, in that event, it would be a matter between the State and the purchaser or the vendor as the case may be in which case the consequences prohibited for in the Act would come into play. He further contended that by reason of the purchase, the respondent-plaintiff may acquire some right, which is other than that of thika tenant since he is not acquiring any interest in the land by virtue of such purchase.

3. Mr. Verma and Mr. Dey, on the other hand, contended that the structure is an incidence of thika tenancy. The structure cannot stand without the land. The incidence of thika tenancy, namely, the structure being sought to be transferred, it squarely attracts the mischief of Sections 6 and 7 in order to render the agreement void and unenforceable debarring the Court from granting any decree.

4. The question that has been raised is simple and free from difficulties. The definition given in Section 2(a) makes the position clear. The incidence of thika tenancy is not devoid of the land. It is neither devoid of the structure. It is rightly contended by Mr. Roy Choudhury that it is conjunctive. A thika tenancy has two incidences, (i) that the thika tenancy is in respect of the land (ii) on which the thika tenant either had constructed a structure or acquired a structure. The thika tenancy cannot be conceived without the land or without the structure. Both must be satisfied to complete the incidence of thika tenancy.

5. Prior to 1981 Act, there was no bar in transferring structure without the land and a person purchasing the structure would have become a thika tenant. But under the 1981 Act the interest in thika tenancy is prohibited from transfer by reason of Sub-section (3) of Section 6. By reason of Sub-section (2) of Section 7, any transfer or agreement for transfer in contravention of Section 6 Sub-section (3) would be void.

In case we can persuade us to accept the contention of Mr. Roy Choudhury and make a distinction between a transfer of structure with the land and a transfer without the land to such an extent that the incidence in land is not being transferred, then only we could avoid the mischief of Section 6(3) read with Section 7(2) of the 1981 Act.

6. The history of the legislation as it appears from the promulgation of the 1981 Act, which materially differs from those of the Calcutta Thika Tenancy Act, 1949 (1949 Act) indicates the changes that was sought to be brought about through legislation. Under the 1949 Act, the superior interest in the land, which used to be the subject-matter of thika tenancy, was held by the landlord under the State. That superior interest in the land available to the landlord was transferable. Thereby the superior interest in the land or the thika tenancy (i.e., interest in the land and structure of a thika tenant) both could be transferred. But the 1981 Act has brought about drastic changes in the concept. The superior interest of the landlord holding under the State vested in the State by operation of law. With the promulgation of 1981 Act, the interest of the landlord having been vested in the State and the thika tenant occupying under the landlord became a thika tenant holding the thika tenancy directly under the State. Since the thika tenancy cannot be conceived of without the land and the interest having been something more than that in the structure, it is very difficult to distinguish the structure and the land as two separate interests unconnected with each other. The structure cannot be conceived without the land and the right acquired in the structure entitles the person to occupy the structure. The structure occupies the land and occupation of the structure would follow occupation of land. Therefore, separate incidences of land and structure comprising a thika tenancy is unacceptable. The transfer of the structure alone without the land would enable the transferee to occupy the structure along with the land underneath. Therefore, the interest of the thika tenant in the structure is an interest in the thika tenancy, transfer whereof is prohibited by reason of Sub-section (3) of Section 6 after the promulgation of the 1981 Act, and any such transfer or agreement for transfer prohibited under Sub-section (3) of Section 6 would become void by reason of Section 7 Sub-section (2) of the 1981 Act.

7. Specific performance of a contract can be granted by a Court only in cases where the contract is a valid and enforceable in law. If a contract becomes void, the same becomes unenforceable. By reason of Section 7(2) of the 1981 Act, promulgated during the pendency of the suit, the agreement or the contract for sale, specific performance whereof was asked for in the suit, have become void. There is no scope for the Court to grant any relief to the plaintiff in the form of specific performance of such a void contract.

8. In the circumstances, the appeal succeeds. The judgment and decree passed by the learned Trial Court is hereby set aside to the extent it had granted specific performance of the contract and the registration of the deed. After having gone

through the merits of the case and the evidence we hold that there was a valid agreement of which the plaintiff was entitled to specific performance and that despite the plaintiff having been ready and willing his part of the contract, the defendant had failed and neglected to perform his part of the contract. But after the promulgation of the 1981 Act by reason of operation of law, the contract having become void, the plaintiff is entitled only to the refund of the consideration together with interest and cost of the suit together with further cost as assessed by us hereafter. We hereby modify the decree by granting relief to the plaintiff in the form of refund of the consideration and the earnest paid, together with interest at the rate of 6% simple interest per annum from the respective date of payment or deposit in Court, if invested, calculated till the date of payment or withdrawal from Court as the case may be. We also grant cost of the suit to the plaintiff as assessed by the learned Court below in the decree together with an additional cost assessed by us at Rs. 3,000/- to be paid or deposited within 3 (three) months from date, in default this amount shall carry interest @ 6% per annum from this date till payment or deposit. The defendant No. 1 shall pay the amount of earnest received together with interest as above to the plaintiff either directly or by depositing in Court within a period of three months from this date, in default, the plaintiff shall be entitled to execute the same as against the defendant No. 1. The plaintiff will also be entitled to withdraw the amount together with interest already deposited in Court.

9. This appeal stands thus allowed.

10. In view of this decision, no order need be passed on the application being CAN 8625 of 2002.

Joytosh Banerjee, J.

11. I agree.