

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

IA No. GA. 19 of 2020

In

C.S.576 of 1990

Jagannath Marothia & Ors.

Vs.

Norman William Wilson & Ors.

For the Petitioners : Mr. Sudip Deb, Adv.
Mr. Vivek Basu, Adv.
Mr. P.K. Bagaria, Adv.

For the Respondents : Mr. K.R. Thaker, Adv.
Ms. Sananda Ganguli, Adv.
Mr. Sanjib Dawn, Adv.

Last Heard on : 28.04.2021.

Delivered on : 04.05.2021.

Moushumi Bhattacharya, J.

1. This application has been filed by the defendant no.3 in a suit for specific performance of an agreement dated 2nd January, 1989 for sale of a

premises situated at No.6, Chowringhee Lane, Calcutta-16. This application filed by the defendant no. 3, is for dismissal of the suit and rejection of the plaint under Order VII Rule 11 of The Code of Civil Procedure, 1908 (CPC) on the ground that the suit is barred by law.

2. Mr. Sudip Deb, learned counsel appearing for the defendant no.3/applicant submits that the mother of the defendant no.1, Mrs. Helen Wilson, since deceased, was a foreign national and failed to obtain the permission from the Reserve Bank of India under Section 31(1) of The Foreign Exchange Regulation Act, 1973 (FERA), which is a mandatory requirement. Counsel submits that the fact that Mrs. Helen Wilson was a foreign national would appear from a letter dated 14th December, 1989, which has been referred to in the plaint and further that the fact that the Reserve Bank of India has not granted any permission to Mrs. Helen Wilson save and except permitting her to hold the property would also be evident from a letter dated 8th October, 1993 which is part of the application. Counsel relies on Section 31(1) of FERA to submit that transfer of immovable property of a foreign national without prior or general or special permission of the Reserve Bank of India would be unenforceable in law and relies on *Asha John Divianathan vs. Vikram Molhotra*; in *Civil Appeal No.9546 of 2010* in this regard. Counsel relies on *Mayawanti vs. Kaushalya Devi*; (1990) 3 SCC 1 in support of the proposition that specific performance of a contract can only be in relation to existence of a valid and enforceable contract. It is also submitted that although FERA was subsequently repealed, the said Act was in operation at the relevant point of time and hence required mandatory compliance of

Section 31(1) of the Act in the absence of which the agreement would become void under Sections 23 and 24 of the Indian Contract Act, 1872. Counsel also refers to Section 6 of The General Clauses Act, 1897 on the effect of repeal to submit that unless a contrary intention appears, repeal of a statute would not affect any right, privilege, obligation or liability accrued or incurred under the repealed statute.

3. Mr. Krishnaraj Thaker, learned counsel appearing for the plaintiff submits that Section 31 of FERA does not require the foreign national to obtain permission at the time of entering into the agreement for sale since the permission contemplated under the said provision is required to be obtained before the transfer or disposal of immovable property by execution of a registered conveyance. Counsel submits that the Foreign Exchange Regulation Act (FERA) stood repealed by the Foreign Exchange Management Act, 1999 (FEMA), Section 49(3) of which provides that no court shall take cognizance of an offence under Section 51 of the repealed Act after the expiry of two years from the date of commencement of the new Act-FEMA. Counsel relies on *S.K. Sinha, Chief Enforcement Officer vs. Videocon International Ltd.;* (2008) 2 SCC 492 for the meaning of the expression- to take “cognizance” of. Counsel submits that this application was filed by the defendant no.3 for an alleged contravention of FERA in September 2020, which is beyond the period stipulated in Section 49(3) of FEMA. It is further submitted that a purported violation of FERA more than 21 years after its repeal cannot be considered by this Court.

4. The second limb of Mr. Thaker's submissions is that under Section 31(1) of FERA, transfer can only take place by execution of a registered Sale Deed. Counsel relies on *Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (Dead) through LRS.; (2004) 8 SCC 614* for the proposition that an agreement for sale does not create any interest of the proposed vendee in the suit property which can only be conveyed by execution of a registered Sale Deed. Counsel relies on *Vishwa Nath Sharma vs. Shyam Shanker Goela; (2007) 10 SCC 595* to urge that the requirement of permission for sale cannot be a condition precedent for passing a decree for specific performance of a contract. Counsel submits that only the agreement for sale has been entered into in the present case and that the plaintiff was hence compelled to file a suit for specific performance for execution of the registered conveyance since admittedly no transfer of property has taken place.

5. I have considered the submissions of learned counsel appearing for the parties. To put the matter in perspective, the present suit has been filed by the plaintiff for specific performance of an agreement for sale dated 2nd January, 1989. The vendor, Helen Wilson, died during the pendency of the suit and her legal heirs, defendant nos.1 and 2, were substituted in place of the deceased Helen Wilson. The defendant nos. 2A and 2B are the legal representatives who were later substituted in place of the defendant no.2. The defendant no.3 claims to be the sole Executor of the Will of the deceased vendor Helen Wilson. Upon the demise of the original plaintiff on 22nd December, 2020, the legal heirs of the original plaintiff have also been substituted in his place and stead.

6. The present application has been filed by the defendant no.3 for dismissal of the suit and rejection of the plaint under Order VII Rule 11 of The Code of Civil Procedure, on the ground that the suit is barred by law; Order VII Rule 11(d). It is the case of the defendant no.3 that Helen Wilson, since deceased, had gifted the property in question by way of a Will to the defendant no.3. The defendant no.3 has applied for grant of probate on that basis. The application for grant of probate has been challenged by the plaintiff.

7. The ground urged by the defendant no.3 for dismissal of the suit is that the agreement for sale is hit by Section 31 of FERA, 1973 and is void which bars the suit filed by the plaintiff for specific performance of the said agreement for sale.

8. The case of the defendant no.3 applicant rests on a letter dated 14th December, 1989 which has been referred and annexed to in paragraph 10 of the plaint and was written on behalf of the plaintiff to Helen Wilson with reference to the subject premises situated at No.6, Chowringhee Lane, Calcutta. The primary contention of the plaintiff's lawyer in the said letter is that despite repeated requests, Helen Wilson has failed to make over the title deeds of the said property to the plaintiff. The letter states that Helen Wilson is a foreign national and further that as on 14th December, 1989, Helen Wilson, as the vendor, did not have the permission of the Reserve Bank of India under Section 31(1) of FERA. The factual position is clarified by a subsequent letter of 8th October, 1993 from the Reserve Bank of India to

Helen Wilson stating that Helen Wilson has the permission to hold immovable property being the premises in question, which has been acquired by Helen Wilson by way of inheritance subject to certain conditions. The letter clearly states that permission is being granted to Helen Wilson under Section 31(1) of FERA in respect of holding immovable property situated in India. This letter forms part of the application. Since this is an application for rejection of the plaint under Order VII Rule 11, the Court must restrict the canvas to the plaint and the documents forming part thereof. The issue which emanates, however, from the letter dated 14th December, 1989 is whether Helen Wilson, a foreign national, could have entered into an agreement for sale of the property in question with the plaintiff without the requisite permission under Section 31(1) of FERA.

9. Section 54 of the Transfer of Property Act, 1882 provides that transfer for tangible immovable property exceeding Rs.100/- can only be made by a registered instrument. This position is reiterated in *Rambhau Namdeo Gajre* where the Supreme Court held that in view of Section 54 of the TP Act, sale of property exceeding Rs.100/- does not, by itself, create any interest in the property unless the property is registered by executing a Sale Deed. The stage at which permission from RBI is to be obtained under Section 31(1) of FERA would also be evident from "Form IP12" of the Forms prescribed by the RBI for application for permission under Section 31(1) to transfer or dispose of immovable property in India. This Court, therefore, agrees with the contention made on behalf of the plaintiff that general/special permission of RBI under Section 31(1) of FERA is required to be obtained before execution of the Sale

Deed and registration of the same and not before entering into an agreement for sale.

10. In *Vishwa Nath Sharma*, a defence was taken by the vendor that the agreement for sale was void as prior permission of the concerned Officer had not been obtained in violation of a specific condition of the lease deed which provided that no transfer was permissible without prior permission of the Land and Development Officer. The Supreme Court, relying on the decision of the Privy Council, in *Motilal vs. Nanhelal; AIR 1930 PC 287*, was of the view that if after the grant of the decree of specific performance of the contract, the authority refused to grant permission for sale, the decree holder may not be in a position to enforce the decree but disagreed with the view that such permission is a condition precedent for passing a decree for specific performance of the contract. The other relevant facet of the present case is Section 47(2) of FERA which provides that it shall be an implied term of every contract governed by the law of any part of India that anything agreed to be done by any term of that contract which is prohibited to be done by or under any of the provisions of FERA except with the permission of the Central Government or the Reserve Bank of India, shall not be done unless such permission is granted. Section 47(2) significantly clarifies that the agreement shall not be invalid if it provides that something shall not be done without the permission of the Central Government/RBI. To put it differently, the agreement would be conditional and subject to permission being obtained from the RBI.

11. The letter dated 14th December, 1989 written on behalf of the plaintiff to Helen Wilson thus has to be seen in this context where information as to the status of the permission from RBI under Section 31(1) of FERA was sought for.

12. The argument which has been made in the alternative is whether Section 31(1) of FERA can be raised at this stage of the proceedings by the defendant no.3/ applicant to invalidate the transaction between the vendor Helen Wilson and the vendee plaintiff for having the suit dismissed on that ground. The Foreign Exchange Regulation Act, 1973 was repealed by The Foreign Exchange Management Act, 1989 (FEMA). Section 49 of FEMA – “*Repeal and Saving*” – sub-section (3) thereunder provides that notwithstanding any other law in force, no Court shall take cognizance of an offence under FERA and no Adjudicating Officer shall take notice of any contravention under Section 51 of FERA after the expiry of a period of two years from the date of commencement of FEMA. In other words, Section 49(3)- is what is evocatively called –a “*sunset clause*”- stipulating a time limit for a repealed statute to remain operative. Hence, in the present case, the agreement for sale being in contravention of Section 31(1) of FERA would remain an offence under FERA for the purpose of taking notice of the contravention for a period of two years from 1st June, 2000 when FEMA came into force. The FERA sun would thus statutorily - set - forever on 30th May, 2002. Section 51 of FERA, which is mentioned in Section 49(3) of FEMA, in relation to the Court taking cognizance of a contravention under Section 51, relates to the power of the Adjudicating Officer to judge whether any person

has contravened any of the provisions of FERA other than those referred to in Section 50 of FERA. *S.K. Sinha* considered the effect of Section 49(3) of FEMA and held that to take cognizance of would mean “*to take notice of judicially*” and clarified that the expression “*cognizance*” indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence. The aforesaid decision assists the plaintiff/respondent in limiting the Court’s power to take judicial notice of the contravention of Section 31(1) of FERA at the time of entering into the agreement for sale dated 2nd January, 1989. It is relevant to state that Section 6 of the General Clauses Act, 1897, - “*Effect of Repeal*” – relied on by the defendant no.3, enumerates certain instances which would remain untouched by the repeal of a Central Act or Regulation made after the commencement of the General Clauses Act (GCA). Section 6 of the GCA cannot, however, assist the applicant by reason of the expression “*unless a different intention appears,.....*” which must, by implication, be construed as the sunset period of FERA as contemplated under Section 49(3) of FEMA. Since this Court has been invited to take judicial notice of an offence under FERA in September 2020, almost 20 years after commission of the alleged offence, this Court is powerless to do so under the limits stipulated under Section 49(3) of FEMA.

13. Since strong reliance has been placed by learned counsel appearing for the defendant no.3 on *Asha John Divianathan* on the mandatory requirement under Section 31 of FERA, this decision should be dealt with in some detail. The Supreme Court in that decision held that a contract or agreement

including a gift pertaining to transfer of immovable property of a foreign national would be unenforceable in law in the absence of previous, general or special permission of the RBI. In that case, the agreement for sale was entered into between the foreign national and the predecessors of the appellant before the Supreme Court after which the foreign national executed the gift deed in question in favour of the respondent without prior permission of the RBI. A supplementary gift deed was also made in favour of the respondent without prior permission of the RBI. A ratificatory agreement for sale in favour of the predecessors of the appellant was executed by the foreign national on 4th December, 1982 followed by a Power of Attorney, after which permission from RBI was sought for and granted on 2nd April, 1983. The first sale deed was registered on 9th April, 1983 after permission was given by the RBI. The predecessors of the appellant sued the respondent for having the deed of gift declared void under Section 31(1) of FERA. On the suit being dismissed, the issue before the Supreme Court was whether the deed of gifts which were registered without prior approval of RBI were void. The Supreme Court held that no title was transferred as the gift deeds were executed without prior permission and the same were void and that the appellant, being the beneficiary of the transactions for sale, was entitled to possession of the suit property. The facts of the decision makes it evident that the permission from RBI under Section 31 of FERA must be obtained after entering into an agreement for sale but before executing a registered conveyance as was done by the predecessors of the appellant in *Asha John Divianathan*. The registered gift deeds were declared void by the Supreme Court since they were executed for the purpose of transferring the property

without the permission of RBI. In the facts of this case, the letter of 14th December, 1989 makes it clear that only the agreement for sale had been entered into which thus necessitated the plaintiff seeking specific performance of the agreement or in other words for the execution of the registered conveyance by the original defendant. The subject matter of challenge by the defendant no.3 for dismissal of the suit is the agreement for sale. Since the suit is for specific performance of the agreement, transfer of property had admittedly not taken place on the date of filing of the suit. Prayer (b) of the plaint makes the aforesaid position clear. By this prayer, the plaintiff has sought for a decree directing the original defendant and her assigns, etc. to execute and register in due form of law, the deed of conveyance in respect of the subject premises in terms of the agreement dated 2nd January, 1989, in favour of the plaintiff.

14. The defendant no.3 has based his challenge to the filing and continuation of the suit on the premise that the original defendant no.1 Helen Wilson could not have agreed to sell the property in favour of the plaintiff in the absence of approval granted to Helen Wilson to sell the property to the plaintiff. According to the defendant no.3, the agreement dated 2nd January, 1989 is rendered *non est* in view of the bar contained in Section 31 of FERA and no decree of specific performance can therefore be passed in favour of the plaintiff. This forms the crux of the present application for rejection of the plaint and dismissal of the suit.

15. Section 31(1) of FERA must be given an interpretation which is in line with the law decided on the subject. It is indisputable that a foreigner who is not a citizen of India can only acquire, hold, transfer or dispose of an immovable property situated in India by way of a sale, gift, etc. upon prior permission being granted by the Reserve Bank of India subject to the proviso to Section 31(1) concerning lease of immovable property for a period up to five years. For a purposive construction however, Section 31 must be construed in the manner as follows. The requirement of permission to be obtained from the Reserve Bank must be at the time of entering into the agreement for sale and before the immovable property is sought to be transferred or disposed of by execution of a registered conveyance. In other words, Section 31(1) of FERA does not require the foreign national to obtain permission at the time of entering into the agreement for sale *per se*; the material point of time for being granted the approval is before the foreign national takes steps to alienate the property in question in favour of a third party. This construction would also be in consonance with Section 54 of The Transfer of Property Act, 1882, which provides that transfer of ownership of a tangible immovable property of or in excess of Rs.100/- can only be made by a registered document: Ref- *Rambhau Namdeo Gajre vs. Narayan Bapuji Dhotra (Dead) through LRS.*; (2004) 8 SCC 614. It should be borne in mind that the defendant no.3 seeks dismissal of the suit under Order VII Rule 11(d) of The Code of Civil Procedure, 1908- “*where the suit appears from the statement in the plaint to be barred by any law*”. The statement in the plaint has been made with reference to the letter dated 14th December, 1989 from the lawyers of the plaintiff to Helen Wilson which reveals that Helen Wilson was a foreign

national and hence came within the statutory requirement of Section 31(1) of FERA. This letter also reveals that Helen Wilson may not have had the permission of the RBI or communicated such permission to the plaintiff as on 14th December, 1989 which would be corroborated by the letter of 8th October, 1993 of the RBI granting permission to Helen Wilson under Section 31(1) of FERA. The letter of 8th October, 1993 has been brought on record by the applicant defendant no.3 as a part of the application for dismissal of the suit. Order VII Rule 11(d) applies where the plaint, on the face of it, is barred by law and the contravention of the law must be clear and unambiguous from the plaint itself. A Court which is called upon to decide the issue cannot engage with the alleged statutory violation or the fact to be determined beyond the limits of what the plaint discloses. The letter dated 14th December, 1989 would have served the objective of the defendant no.3 of having the suit dismissed if by such letter the Court could have come to an indisputable conclusion that Helen Wilson, a foreign national, had alienated the property by way of sale or gift or otherwise in favour of the plaintiff without first obtaining the permission from the Reserve Bank of India under Section 31(1) of FERA. This is obviously not the case since the plaintiff was constrained to file a suit on 18th July, 1990 precisely because the agreement had not been executed hence necessitating a direction on the original defendant to execute and register the deed of conveyance in terms of the agreement for sale dated 2nd January, 1989. The contention of the applicant in respect of Section 31(1) of FERA, subject to Section 49(3) of FEMA setting the time-limit for cognizance of any offence under FERA, would have also been acceptable had Helen Wilson attempted to set the property in motion from herself to the

plaintiff without first complying with the statutory requirement as existed on the date of sale of the property. Since this is not the factual position, this Court is not persuaded to dismiss the suit or reject the plaint for contravention of any law which existed on the date when the suit was filed.

16. The prayers in G.A.19 of 2020 must hence be rejected and the application for dismissal of the suit is accordingly dismissed without any order as to costs. The suit shall be listed for hearing after the summer holidays.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)