

**(2005) 05 AHC CK 0116**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 25805 of 2003

Ashwani Kumar Tripathi

APPELLANT

Vs

State of U.P., U.P. Awas Evam Vikas Parishad and The  
Assistant Housing Commissioner, U.P. Awas Evam Vikas  
Parishad

RESPONDENT

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**Date of Decision :** 25-05-2005

**Acts Referred:**

Transfer of Property Act, 1882 — Section 19, 54, 55, 55(1)

**Citation :** (2005) 4 AWC 3270

**Hon'ble Judges :** B.B. Agarwal, J;A.K. Yog, J

**Bench :** Division Bench

**Advocate :** R.K. Ojha and Satyanshu Ojha, for the Appellant; Pankaj Mithal and S.C., for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

A.K. Yog, J.—Above Writ Petition, listed along with along with several other petitions on the statement made by the learned counsels appearing for respective parties that since sole question of law, arising in all these cases is one and identical in all respect hence they be decided together. As desired by the learned counsels for the parties, appearing in these cases, facts of each individual case need not be stated.

2. Petitioners are allottees of flats under various Self-Financing Schemes floated by U.P. Awas Evam Vikas Parishad, Lucknow/ Regional Offices in various districts of the State of U.P. (called "Parishad") as well as Development Authorities constituted under Urban Regulation of Building Operation Act (called Authority).

3. There is no dispute either in the Schemes floated by Parishad or the Authority that land in question belong to said Parishad/Authority. Applications were invited from the persons desiring to have allotment and finally to purchase residential flats on certain terms and conditions, relevant schemes including deposition of "estimated price" of allotted flats as per schedule/revised schedule. Since

availability of flats under those Self-Financing Schemes fell short, the applicants were subjected to an accepted mode of allotment through lottery to determine priority and observance of terms and conditions of the scheme.

4. For sake of convenience, we shall refer to the record of Writ Petition No. 25486 of 2003, Lokendra Kumar Tyagi and Ors. v. State of U.P. and Ors.

5. Copy of the Brochure, containing terms and conditions of allotment of Self-Financing Scheme, called "Vasundhara Complex, Ghaziabad", is Annexure 1 to this Writ Petition. The Brochure in question comprised of maps indicating details of the flats to be constructed, the plinth area, size of rooms, Kitchen, Toilet, both on ground floor and other floors. It also declared registration fee in instalment, schedule, etc. It also mentioned expected date of start of construction and expected date of completion of flats.

6. Registration and allotment under the scheme contemplates "terms and conditions" of surrender of allotment and to withdraw from the scheme.

7. Reference may be made to Clauses 8.6 and 9.2 and 10.4 of the said Brochure-which read:

8-6 fuekZ.k ds i"pkr fo?; ewY;] {ks=Qy vkfn esa deh ;k c<`ks?kjh gks ldrh gS ftdk lek;kstu vfUre Hkqxrku ds le; fd;k tk;sxA

9-2 fdlh Js.kh fo"ks"k ds fy;s bl ;kstuk esa iathd`r IHkh vkosnd iathdj.k fu;e 7-2 ds izkfo/kkuksa ds vuqlkj lerqY; le>s tk;saxs rFk ;Fkk IEHko ;g iz;kl fd;k tk;sxA fd bl ;kstuk esa iathd`r IHkh O;fDr;ksa dks vkokl miyC/k dj;k tk;sA Hkouksa @ nqdkuksa dk uEcj vkoaVu ykVjh Mk }kjk fd;k tk;sxA ykVjh Mk ds iwoZ iathd`r O;fDr;ksa }kjk Mk Mkys tkus ls iwoZ fu/kkfr vof/k esa fyf[kr lgefz fn;s tkus ij miyC/k fLFkfr ds vuqlkj xzqfiar dh lqfo/kk nh tk ldrh gSA ?xzqfiar o ;k nks ls vf/kd Hkouksa dh gks ldrh gSA?

10-4 ;fn vkoaVh }kjk leLr vkSipkfjdrk;sa iw.kZ djds Hkou dk dCtk 6 ekg esa ugha fy;k tkrk gS rks mldk iathdj.k dh /kujkf"k dk 20 izfr"kr dk dj fujLr dj fn;k tk;sxA] "ks" /kujkf"k fcuk O;kt dj nh tk;sxA\*\*

8. Clause 10.4 clearly prescribes that possession of the flat /shop shall be given to the allottees on their making requisite deposits after relevant conveyance/ title-deed is executed and allottee failing to take possession within 6 months of letter intimating to take possession, registration was liable to be cancelled and registration amount, after deducting 20% without payment of interest.

9. The allottees (petitioners before us) are required to pay Stamp Duty on the value of the land (owned by the Parishad/ Authority and also on the value of the "superstructure"/flat.

10. According to the petitioners, demand for Stamp Duty on the deed of conveyance/title deed, which is to be executed in favour of allottees by Parishad/ Authority is unjustified. Petitioners claim that they are not liable to pay Stamp Duty on the value of the superstructure/flats inasmuch as they had already paid

the cost towards its construction. In other words, the contention of the petitioners was that the constructions in question have been raised from their own money and they are its owners. Hence no question of any conveyance or transfer of title/interest in that superstructure. On the above reasoning, petitioners claim that they could not be forced or compelled to pay Stamp Duty under Indian Stamp Act on the value of superstructure.

11. According to the respondents, the then Principal Secretary, U.P. Government issued letter dated July 27, 2000 to all the Development Authorities in the State of U.P. as well as Revenue Authorities, clarifying the position that Parishad/ Authorities could not be treated as agent or representative, or contractor of "Allotees" merely they deposit certain amount of construction so long as land on which flats are constructed-vests in them (Annexure CA-1 to the counter affidavit-sworn by A.K. Shukla on behalf of respondent Nos. 3 & 4 in Writ Petition of Lokendra Kumar Tyagi (supra). It is pointed out in the said letter dated 27.7.2000 that the contention of the allottees that they are owner of superstructure is misplaced because the land continues to be in the ownership of Parishad so long as construction raised thereon could not be treated to have vested in the allottees by mere deposition of money. It is pointed out that position will be different if land was transferred and allottees became its lessee/ owner. It is reiterated that under Self-Financing Scheme, land, on which flats are raised, never stood transferred and it remains under ownership of the Parishad/ Authority and constructions raised on it shall become part and parcel of such land. By depositing money in instalments, allottees get no right or title in superstructure. An allottee is entitled to get back his money subject to terms of the scheme. In no case allotted can claim superstructure as it will not be feasible or practicable in case of multi storied complex.

12. On the aforesaid rival contentions of the parties, the question which arises for consideration is as to what is the legal status of the superstructure over land, which does not belong to the allottees and remains in the ownership and in possession of Parishad/Development Authorities.

13. This gives rise to the question that can an allottee who raises construction with or without permission of Parishad/Authority on land of which he is not owner claim to be owner of said superstructure while embedded to earth and part and parcel of land in question only because full or part payment of its cost has been deposited under agreement to sell.

14. In the instant case, it has to be borne in mind that allottees make payment in instalments of expected cost of construction. Balance amount on account of restructuring of the price, is to be paid by allottee taking possession" and execution of title deed.

15. It will be useful to reproduce relevant statutory provisions of Indian Stamp Act, 1899.

"Uttar Pradesh with regards to payment of Stamp Duty.

2(6) Chargeable- Chargeable means, as applied to an instrument executed, or first executed, after the commencement of this act, chargeable under this act, and, as applied to any other instrument, chargeable under the law in force in India, when such instrument was executed, or where several persons executed the instrument, at different times, first executed.

2(10)" Conveyance"- Conveyance includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos, and which is not otherwise specifically provided for by schedule 1, Schedule 1-A or Schedule 1B as the case may be....

2(14) "Instrument"- Instrument includes every document and record created or maintained in or by an electronic storage and retrieval device or media by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded.

3. Instrument chargeable with duty-subject to provisions of this act and the exemptions contained in schedule I the following instrument shall be chargeable with duty of the amount indicated in that schedule as the proper duty."

23-A Certain instruments connected with mortgages of marketable securities to be chargeable as agreements-(I) Where an instrument not being a promissory note) or bill of exchange-

(a) is given upon the occasion of the deposit of any marketable security by way of security for money advanced or to be advanced by way of loan, or for an existing or future debt, or

(b) makes redeemable or qualified a duly stamped transfer, intended as a security, of any marketable security, it shall be chargeable with duty as if it were an agreement or memorandum of an agreement chargeable with duty under Article No. 5(c) of Schedule 1-B"

Sections 19, 54, 55, Transfer of Property Act read:

"19. Vested interest- Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation- An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

21-53....

### Chapter III OF SALES OF IMMOVABLE PROPERTY

54. " Sale" defined- "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest or charge on such property.

55. Rights and liabilities of buyer and seller- In the absence of a contract to the contrary, the buyer and the seller of immovable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:-

(1) The seller is bound-

(a) to disclose to the buyer any material defect in the property (or in the seller's title thereto) of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power"

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto"

(d) on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property when the buyer tenders it to him for execution at a proper time and place".

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

Provided that,...

The benefit of the contract mentioned in this rule shall be annexed to, and shall go with, the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.

(3) Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession or power:

Provided that...

(4) The seller is entitled-

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer, [any transferee without consideration or any transferee with notice of the non-payment], for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part [from the date on which possession has been delivered].

(5) The buyer is bound-

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs provided that where the property is sold free from encumbrances, the buyer may retain out of the purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, s between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled -

(a) where the ownership of the property has passed to him, to the, benefit of any improvement in, or increase in value of, the property, and to the rents and profits thereof:

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all per sons claiming under him, [\*\*\*] to the extent of the seller's interest in the property, for the amount of any purchase-money property paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission. :

An omission to make such disclosures as are mentioned in this section, paragraph (1), Clause (a) and paragraph (5), Clause (a (sic) is fraudulent."

16. Perusal of Sections 54 and 55, Transfer of Property Act, shows that terms and conditions under Self-Financing Scheme are merely contract for sale without possession and not the say with possession as such. Section 55(1)(d) makes it clear that seller is bound, on payment of land with or without superstructure of flat price, to execute a conveyance deed.

17. The above provisions read with the terms and conditions of Self-Financing Scheme would go to show that payment in instalment is merely a step in aid for completing contract of sale. Deposition of money (in instalment), towards cost of flat/ superstructure, is not as such part of sale consideration- which itself is not final.

18. Once it is not disputed that land, upon which superstructure, under Self-Financing Scheme is raised, continues, to be in the ownership of the Parishad Authority any superstructure fixed or raised by embedding it and making it part of earth/land, allottees-cannot claim to have interest in it as owner thereof. At no relevant point of time, allottees, who pay instalments towards cost of construction as such, get no rights transferred or vested in them with respect to the superstructure raised in land belonging to the Parishad/Authority.

19. Learned counsel representing petitioners, however, heavily rely upon passing observation made by Division Bench of this Court in the case of Smt. Vrinda Gujrati v. Bareilly Development Authority, Bareilly and Ors. (1996) 2 UPLBEC 1064.

Relevant para 25 of the judgment reads-

" It has been contended by the counsel for the petitioner that there is extreme harshness regarding the charges of registration fee for execution of instrument for conveying the title of the petitioners. Since the scheme is of self-financing nature and the petitioners contribute the entire money for the construction of the house in all reasonableness and fairness, the registration fee should be charged on the price of land and not on the price of the house and to this extent we issue order that the registration fee is only payable and chargeable on the price of the land as the entire construction cost is contributed by the petitioners.

(underlined by us)

20. Question whether payment of Stamp Duty with respect to land and superstructure thereon is payable as one unit or separately shall depend solely on "terms and conditions" of the scheme. There may be a case where land is transferred on lease or "sale" and flat thereon is also given on lease or sold absolutely.

21. Reference may be made to the case of *Duncans Industries Ltd. Vs. State of U.P. and Others*, ; pr 8, 10 & 13 of this judgment: are reproduced:-

"8. Considering the question whether the plant and machinery in the instant can be construed as immovable property or not, the High Court came to the conclusion that the machineries which formed the fertilizer plant, were permanently embedded in the earth with an intention of running the fertilizer factory and while embedding these machineries the intention of the party was not to remove the same for the purpose of any sale of the same either as a part of a machinery or scrap and in the very nature of the user of these machineries, it was necessary that these machineries be permanently fixed to the ground, therefore, it came to the conclusion that these machineries were immovable property which were permanently attached to the land in question. While coming to this conclusion the learned Judge relied upon the observations found in the case of *Reynolds v. Ashby Son and Official Liquidator v. Sri Krishna Deo*. We are inclined to agree with the above finding of the High Court that the plant and machinery in the instant case are immovable properties. The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties (sic party) whether, it decided to embed the machinery, whether such embedment was intended to be temporary or permanent. A careful perusal of the circumstances and taking into consideration the nature of machineries, involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilise the same as a fertilizer plant. The description of the machines as seen in the schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to

operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also shows that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertilizer at various stages of its production, hence, the contention that these machines should be treated, as moveables cannot be accepted. Nor can it be said that the plant and machinery could have been transferred by delivery of possession on any date prior to the date of conveyance of the title to the land...".

10. The next question for consideration is whether the vendor did transfer the title of the plant and machinery in the instant case by the conveyance deed dated 9-6-1994. Here again, it is imperative to ascertain the intention of the parties from the material available on record. While ascertaining the intention of the parties, we cannot preclude the contents of the agreement pursuant to which the conveyance deed in question has come into existence....

13 For the reasons stated above, we are of the considered opinion that the vendor as per the conveyance deed dated 9-6-1994 has conveyed the title it had not only in regard to the land in question but also the entire fertilizer business on "as is where is" condition including the plant and machinery standing on the said land. Therefore, the authorities below were totally justified in taking into consideration the value of these plant and machineries along with the value of the land for the purpose of the Act."

22. In view of terms and conditions of "Self-Financing Schemes" before us, we have no hesitation in holding that superstructure stood embedded in the land without any right or interest to the allottees being created therein.

23. Passing observations, by the Division Bench in the case of Vrinda Gujarati (supra) without referring to the relevant provisions of the stamp Act, Transfer of Property Act and also that aforesaid question was neither required to be decided in that case (which was mainly with regard to the competence of the Development Authority to revise and enhance cost of flat/ structure) is per incuriam and it has no binding force.

24. Learned Standing Counsel in this context, refers to the Apex Court judgment reported in Bareilly Development Authority Vs. Vrinda Gujarati and Others, . whereby the Apex Court set aside the judgment and order dated 14-5-1996 passed in the case of Vrinda Gujarati (supra).

25. Submission of the learned Standing Counsel representing respondent is that in view of the Supreme Court Judgement no reliance can be placed on the aforesaid observation made by the Division Bench in the case of Vrinda Gujarati (supra).

Reliance is placed upon the case of Municipal Committee Amritsar v. Hazara Singh, AIR 1975 Supreme Court 1087 (Pr 4) which reads-

"judicial propriety, dignity and decorum demand that being the highest judicial

tribunal in the country even obiter dictum of the Supreme Court should be accepted as binding Declaration of law by that Court even if it be only by the way has to be respected. But all that does not mean that every statement contained in a judgment of that Court would be attracted by Article 141. Statements on matters other than law have no binding force."

26. In the case of M. S Chawla and Ors. v. State of Punjab and Anr.,(2001)5 Supreme Court Cases 358. Supreme Court held that a decision rendered without noticing judgment of Supreme Court is not a binding precedent. It follows from it that judgment rendered without noticing relevant provisions or binding decisions is not a binding precedent.

27. We agree that the observations made by Division Bench in para 25 of its judgment in the case of Vrinda Gujarati (Supra, as far as the question of charging Stamp Duty on the valuation of the superstructure is concerned without referring to relevant statutory provisions or terms and condition of registration or Self-Financing Scheme, have no binding force.

28. We may also point out that, if contention of the petitioners is to be accepted, it will lead to various complications, anomalies and it will give a handle for avoiding payment of Stamp Duty on sale transactions by making payment before hand and executing the property subsequently. Parties get no edge to argue that since they had already paid certain amounts, it will invariably mean vesting transfer of right or ownership in a given property, cannot be accepted as a universally correct proposition in law. It will result preposterous.

29. We do need not consider it necessary burden our judgment by referring to the submissions of the learned counsel for the respondents that provisions of Indian Stamp Act which are of fiscal nature which require to be construed strictly and hence "Stamp Duty charged on valuation of flat" is to be viewed from that perspective. We feel such a situation has not arisen in present cases as yet. There is no dispute as far as question of applicability of present, provision of Indian Stamp is concerned.

30. In the end, we find no illegality in the respondents charging Stamp Duty on the valuation of the superstructure on the land in question under present Self-Financing Schemes. There is no merit in the contention of the petitioners.

31. Writ Petition is dismissed.

32. Interim order, if any stands discharged.

33. No order as to costs.