(2001) 03 RAJ CK 0026

In the Rajasthan High Court

Case No : Civil Miscellaneous Appeal No. 1681 of 2000

Ganpati Plaza Maintenance Society — APPELLANT

Vs

K.K. Complex Pvt. Ltd. — RESPONDENT

Date of Decision : 16-03-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1, 151
Income Tax Act, 1961 — Section 44AB
Societies Registration Act, 1860 — Section 1B, 20, 4
Specific Relief Act, 1963 — Section 41

Citation : (2002) 1 RLW 81 : (2001) 4 WLN 42

Hon'ble Judges : J.C. Verma, J

Bench : Single Bench

Advocate : Paras Kuhad, for the Appellant; J. Dhankar and P. Balwada, for the Respondent

Final Decision : Allowed

Judgement

Verma, J.

(1). The appellant is the plaintiff and has come up in appeal under Order 43 Rule 1 CPC against the order dated 25.9.2000 passed by the Additional District Judge No. 1, Jaipur Cily, Jaipur whereby the learned Addl. Distt. Judge has not only had dismissed the application for temporary injunction under Order 39 Rule I & 2 CPC filed by the plaintiff, but had still made certain orlher observations, which according to the appellant were not required to be made on the application of interim injunction filed by the appellant.

(2). The plaintiff Ganpali Plaza Maintenance Society (here-in- after referred to as ''the society'') is a registered society, incorporated on 3.7.1998 with the main objects of maintenance and up-keep and security of Ganpati Plaza premises. To give effective control to Ganpati Plaza Maintenance Society, which was required to maintain the common areas, service and amenities and for which it is alleged that the control of fire fighting equipments, electrical installations, air conditioners, lifts, EPABX etc. was handed over to the society, price of which had already been charged by M/s. K.K. Complex Pvt. Ltd. from different buyer of spaces/premises in Ganpati Plaza. II is the case of the society that a proper agreement was executed and the common areas/installation as per agreement were handed over to the society since 1.8.1998 which included fire fighting equipments, electrical installations, air conditioners, lifts, EPABX etc. 11 drawings in this regard were also handed over to the society.

(3). M/s. K.K. Complex Pvt. Ltd. the defendant respondent, had constructed a multi storied commercial complex known as Ganpati Plaza having show-rooms, shops, offices, etc. and had sold the respective areas of such show-rooms, shops, offices etc. to the various buyers as per various agreements entered into with them. It was one of the terms of the agreement with the buyers that they will be responsible to form a society for maintenance, up-keep and security of the complex and all the buyers shall be bound to become the members of that society. The entire saleable area as per the approved plan had already been sold. The building comprises carpel area, built up area and super built up area, common area and facilities, like elevators, water tanks, pumps etc. and other community facilities. It was the case of the plaintiff that after selling the respective areas to the buyers, the ownership of super built area, common area and facilities could not vest in K.K. Complex as it was jointly and severally vesting in the buyers as their undivided proportionate share for which the price had been charged by K.K. Complex defendant at the time of purchase.

(4). In the document of sale-deed with the buyers, there was an agreement regarding formation of a Society for the purpose of maintenance and pending formation of such society or body corporate as per Clause 38 and 39, the maintenance and upkeep was the responsibility of the promoter or its nominee i.e. K.K. Complex and the buyer had to pay the proportionate share in regard to the expenses incurred in maintenance of said complex.

(5). It was the case of the plaintiff that after entering into the agreement as a society with the promotor defendant, the society had incurred expenses on electrical charges, maintaining the air conditioners and paying water charges of the entire area including payment to the security personnel. The society had authorised Shri Sunil Jain and Shankar Parasnani, the defendants, as society agents and representatives for doing bank business and raising and accepting bills. According to the society one Bhim Sain Garg remained the President of the Society. Vide resolution dated 24.8.2000 the society had withdrawn the authority in favour of Sunil Jain and Shanker Parasnani, defendant Nos. 2 and 3 to act on behalf of society and injunction was sought against them as well restraining them to act on behalf of the society. The society had prayed injunction restraining the defendants respondents from doing any activity which may affect maintenance of the complex and working of the above society. It had also prayed that the defendant Nos. 2 and 3 be restrained from interfering in the business of the society and further not to collect any amount and to hand over all amounts to the petitioner society.

(6). The suit was contested by the defendants.

(7). Learned trial Court while dismissing the application of the appellant under Order 39 Rules 1 and 2 had suo moto had directed the defendant No. 1 not to constitute any fresh society for maintenance of the premises of Ganpati Plaza, however, they will be guided and act as per the provisions of the clause 39 of the agreement. The plaintiff challenges this part of the order of the trial court which according to the plaintiff is beyond the pleadings and prayer made in the application.

(8). It is the case of the plaintiff that the trial court had not exercised the jurisdiction in accordance with settled principles of law and findings are perverse. The guidelines that whether the plaintiff seeking the temporary injunction had made out prima facie case; whether the balance of convenience was in its favour, and; whether in the absence of the injunction sought, the parties would suffer irreparable injury if the injunction is not granted, have not been adhered to by the trial court, it is so suggested by the learned counsel for the appellant.

(9). The cause of action had arisen in favour of the plaintiff on the notice and the direction having issued by K.K. Complex to the buyers not to deal with the society but to deal with K.K. Complex itself.

(10). As per admitted facts that K.K. Complex defendant is the promotor who had constructed the multi storied commercial complex, known as Ganpati Plaza and had entered into an agreement with the buyers and sold the premises to the buyers. A copy of the agreement had been placed on record of the trial court. Certain clauses of such agreement shall be relevant and are reproduced as under:

"The Promotor has sold the ownership rights in the demised premises with all benefits/easementary rights of using common facilities such as use of common passages, staircases, lifts and water and electrical arrangements."

"38. That on completion of the entire building and at any time hereafter in future at its discretion the Promoter shall have the unfettered right and be entitled to form a society (either under Societies Registration Act, Co-operative Society Act) or any association or any other body corporate or the responsibilily of maintenance of common amenities and common services described hereunder and/or with such other object or purpose and in such manner and to such extent as the Promoter or its nominees may decide from time to time. The Buyer agrees and undertakes that in the event of decision of the Promoter to form any such Society or association or body corporate, he shall be bound to join, subscribe and become a member of the Society or association or body corporate and to abide by and comply with the bye-laws and rules and regulations of such Society or association or body corporate. The buyer has undertaken that he shall, as and when required by the Promoter, make payment of Rs.1000/- as membership/

share application fee for the formation of the society or body corporate. The Buyer has further undertaken that he shall at all times sign and execute the application for registration and all other documents necessary for the formation and registration of the society or association or body corporate including its bye-laws and shall duly fill in, sign and return to the Promoter within 10 (ten) days of the same being forwarded by the Promoter to the Buyer. No objection shall be raised by the Buyer if any changes or modifications are made in the draft bye-laws as may be required by the Registrars of Societies or other competent Authority as the occasion may demand. After the Promoter hands over the management/maintenance of the common amenities and common services to the society or association or body corporate, it shall be the sole responsibility of the society of association or the body corporate, as the case may be, to run and maintain the common amenities and all common services and to determine from time to time the rate and amount of combined expenses and outgoing from common amenities and common services along with the sinking fund charges, recoverable proportionately from the Buyer and from all other parties and the Buyer agrees that he shall be liable to pay the said combined expenses and outgoing for common amenities and services and other dues to the society or association or the body corporate as the case may be from time to time regularly. In the event of the society of the body corporate being formed and registered the power and authority of the society, or association or body corporate so formed shall be subject to the over all control of the Promoter in respect of the matters concerning the said complex and all amenities/services appertaining to the same.

39(a). Pending formation of the society or body corporate as stated in clause 38 above entire maintenance upkeep and preservation of the said complex, operation of the common services and management of common areas therein shall be done by the Promoter or its nominee on the terms and conditions mentioned herein unless agreed to separately. The Buyer agrees to pay proportionate share of alt expenses incurred for maintenance of Ganpati Plaza as and when demanded by the Promoter and/or nominee. The maintenance charges will be collected by the Promoter or nominee or agent on 1st of every month.

(b) In case of default of payment of the aforesaid charges, the Promoter or its nominee shall be entitled to discontinue/disconnect the services of water to the demised premises apart from the right to recover the charges with minimum interest @ 18% p.a. from the Buyer and/or from the occupier of the demised premises from/out of the, rent payable to the Buyer through the process of court or otherwise.

(c) Before the occupation of the demised premises the Buyer agrees to pay security deposit to the Promoter or its nominee for timely payment of the aforesaid charges a sum of Rs. 10/- per sq. ft."

(emphasis by Court)

(11). Clause 39 provided that pending formation of the aforesaid society as per agreement clause 38, the Promoter shall continue to manage the affairs of the common facilities, meaning thereby, as soon as the society is formed, the management of maintenance shall be vested in the society.

(12), An agreement dated 1.8.1998 has been placed on record which was entered into between K.K. Complex and Ganpati Plaza Maintenance Society, wherein the K.K. Complex had transferred the following works to the society:

1. The party of First Part hereby transfers the following to the party of second part.

- The common areas as indicated in the eleven drawings is enclosed to this agreement. The said areas have already been handed over to the party of the second part.

- Fire Fighting Equipment

- Electrical Installation

- Air Conditioners

- Lifts

- EPABXetc.

- The above mentioned 11 drawings shall be considered the part of this agreement.

2. As the party of First part has already charged from the Buyers the necessary amount of above items in the sale price charged, no amount shall be charged by the party of second part on this amount.

3. Now w.e.f. August 1, 1988 the party of second part shall be responsible to maintain, upkeep, repair, secure, clean the items as mentioned in para 1 above."

(13). This agreement is signed by the Director of K.K. Complex and the President of the Society and witnessed by two other persons.

(14). According to the society, me work had been taken over and even the bank account was opened by the Society in the Karnataka Bank. The society has placed on record the audit report of the society as required u/Sec. 44AB of the Income Tax Act having been audited by the Chartered Accountant and the particulars have been furnished to the Income Tax Authorities for the assessment year 1999-2000 wherein nature of the business or profession has been mentioned to undertake maintenance, security, sanitation, distribution of electricity & water etc. of Ganpati Plaza Complex. Details of loans and deposits had also been mentioned. Balance-sheet of the society had also been attached showing the expenditure on different items and also the income. The maintenance receipts is shown as Rs. 40,40,121/- whereas the expenditure has been shown at Rs. 52,68,781/-. Even the un-secured loans from M/s. K.K.

Complex has been shown.

(15). Counsel for the appellant wants to submit that the society had started working immediately the agreement was signed and services were transferred. On the accounting policies and notes on accounts as given by the Chartered Accountant, it was mentioned that the society was registered on 3.7.1998 and had taken over the services being rendered by K.K. Complex Maintenance Society and K.K. Complex Telephone Society.

(16). Vide letter dated 22.8.2000 addressed to the President and Managing Committee of the Society, stating therein that K.K. Complex had passed a resolution for maintaining the complex by itself in regard to amenities and, therefore, had directed the society not to collect any maintenance onwards and not to cause any hinderance in the management of maintenance of the complex. The society on receipt of the said letter had informed its members and occupiers on 25.8.2000 that the said letter of K.K. Complex is without jurisdiction as it has no locus standi in asking the members for not contributing to the service contribution.

(17). Faced with this situation, the society had filed the present suit with the interim injunction application.

(18). The trial court had primarily was swayed with the contention of the Promoter that the Promoter was over all incharge, and, therefore, if he had taken back the work from the society, the Promoter had a right to do so. However, the trial court suo moto u/s 151 CPC had directed the defendant No.1 & 2 not to form any suph society.

(19). Counsel for the respondents relies on clause 38 & 39 of the agreement with the Buyer and stales that it is absolute and unfettered right of K.K. Complex to assign the maintenance of the Complex to agency chosen by it. It is further contended by the respondent that the society which was registered under the provisions of Rajasthan Societies Registration Act as per Sections 1-B, 4 & 20, itself was not properly registered and that the persons who had got the society registered had no authority to do so and the society is precluded by the Act itself to engage maintenance work. It is further submitted that the documents were produced superstitiously before the Court and the agreement of the society itself is in excess of the authority and legally inadmissible and unforceable and is hit by Sec. 41 of the Specific Relief Act. It is submitted that no prima facie case has been made out by the society nor there is balance of convenience and for the proposition relies on the decision in the case of Jagannath v. Sukhdeo (1) to the effect that in order to prove legal injury the applicant must establish that he has a legal right to do some thing and the opponent prevents him from the exercise of such right. Unless a right is alleged and/ or shown to exist prima facie, there can be no question of any breach of that right. The question then is whether the applicant has a right to do that what he wants to prevent the defendant from doing.

(20). Reliance is also placed on the case of Narayan Dass v. Saraswali Bai (2) wherein it was held that very often statutes are enacted for the special benefit of person for whose benefit certain obligations are placed upon others. In such a case a right of action may be inferred in those for whose benefit the statute is enacted as was done in Black v. Fife Goel Co. Ltd., (3) where it was said that court is to consider the scope and the purpose of the statutes and in particular for whose benefit it is intended."

(21). He also relied on the Supreme Court decision in the case of Southern Roadways Ltd. Madurai v. S.M. Krishnan (4) and Shiv Kumar Chadha v. Municipal Corpn. of Delhi (5), wherein it was held that a party is not entitled to an order of injunction as a matter of right or course. Grant of injunction is within the discretion of the court and such discretion is to be exercised in favour of the plaintiff only if it is proved to the satisfaction of the Court that unless the defendant is restrained by an order of injunction, an irreparable loss or damage will be caused to the plaintiff during the pendency of the suit. The purpose of temporary injunction is, thus, to maintain the status quo. The court grants such relief according to the legal principles-ex debito justitise. Before any such order is passed the court must be satisfied that a strong prima facie case has been made out by the plaintiff including on the question of maintainability of the suit and the balance of convenience is in his favour and refusal of injunction would cause irreparable injury to him.

(22). Per contra, counsel for the appellant submits that the finding of the Addl. District Judge was that the plaintiff society was a registered society and the its constitution had also been accepted by the defendants as well and the claim of the society is based on the basis of its constitution and on the strength of the agreement dated 1.8.1998. The society was corporated in accordance with the provisions of the Act.

(23). After hearing learned counsel for the parties, I am of the opinion that the learned trial court had erroneously dismissed the application under Order 39 Rules 1 and 2 CPC and had unnecessarily given further direction taking cognizance u/s 151 CPC for not forming any other society by the defendants which was not called for in the circumstances of the case. It is not disputed that the premises/shops had been sold to the Buyers with the common amenities areas. The management of such facilities/ amenities could have been retained by the Promoter himself, but in clause 38 of the letter of sale-deed it has been specifically mentioned thai the Promoter shall cause a society or any other agency as named therein to be constituted and till such agency of society is constituted, it shall be the duty of the Promoter to manage and arrange the facilities which is apparent from clause 39. Clause 38 specifically mentions that once the society is constituted, each Buyer shall be duty bound to get himself registered and pay amount towards the maintenance which amount had also been mentioned. Clause 38 also stipulates that once the society has been constituted, the management of the facility shall be entrusted to the society itself which shall be sole responsible for the functioning, however, even though all control is of the Promoter. It does not stipulate that in the garb of the control, the society which was constituted only for the purpose of maintenance shall be kept aside or rendered even non functioning. The aims and objects of the society are only to maintain the amenities in Ganpati Plaza, which society had been constituted under clause 38 of the agreement and if these very amenities and facilities are taken out of the society, nothing remains with the society to justify even its existence or the registration.

(24). Apart from above, as per agreement dated 1.8.1998, the work had been transferred to the society. It goes without saying that the society after taking over the work was continuing with the work and facilities and maintenance of the facility when a direction was issued by K.K. Complex vide later dated 22.8.2000 directing the society to stop maintenance work which became the bone of contention between the parties. The society is said to have spent huge amount for maintenance and for arranging the maintenance as is clear from the documents. The society was maintaining the facilities concerning hundreds of show-rooms, shops and offices and must have employed number of persons for such work and must have spent huge amount and having so threatened by the defendants, in my opinion, the best course for the trial court ought to have been to order status quo of working instead of non-suiting the society itself. The society which has been constituted only for the maintenance of Ganpati Plaza and duly signed by one of the Director of the defendants, cannot be refused interim injunction in the circumstances of the case and, therefore, the balance of convenience was in favour of the plaintiff for ordering status quo order as prevailing before circulating a letter of the defendant dated 22.8.2000. The society itself is statutory entity, had been constituted as per agreement between the parties and had taken over the work; number of transfers of work had been made; employees were engaged; huge amount was spent, and at this stage the order of the trial court would amount to a direction to the defendant to take over the work which work the society was legally entitled to continue. The order of the trial court has not been passed in accordance with the settled principles of law in exercising discretionary powers; prima facie case; balance of convenience and the concept of suffering of loss was in favour of the plaintiff if the injunction is not granted. The order is perverse and arbitrary is to be reversed.

(25). For the reasons mentioned above, the appeal is accepted, the order of the trial court is reversed and application of interim injunction is accepted directing the defendants not to interfere in the working of the society till the final decision pf the case and the society shall be entitled to do the work of maintenance etc. of Ganpati Plaza as per agreement dated 1.8.1998 which work was being done by the society right after the said agreement.

(26). With the consent of the parties on 25.10.2000, a direction was issued to the respondents to maintain the complete accounts and in case the appeal was to be accepted, it was undertaken by the respondent that he would refund the amount so collected by the plaintiff society without any demeur. The order was passed with the concurrence of both the parties. As appeal is being allowed as discussed above, therefore, as per the consent order passed on 25.10.2000, the respondent defendant shall submit the complete accounts to the plaintiff immediately of the period upto date and shall refund the unspent amount immediately.

(27). The misc. appeal is accepted with a cost of Rs. 2000/-.

