**(2008) 09 OHC CK 0109**

**In the Orissa High Court**

**Case No :** OJC No. 3291 of 2002

Kailash Chand Jain APPELLANT

Vs

State of Orissa and Others RESPONDENT

**Date of Decision :** 05-09-2008

**Acts Referred:**

Registration Act, 1908 — Section 17, 49
State Financial Corporations Act, 1951 — Section 29
Transfer of Property Act, 1882 — Section 53A

**Citation :** (2008) 09 OHC CK 0109

**Hon'ble Judges :** B.S. Chauhan, C.J;B.N. Mahapatra, J

**Bench :** Division Bench

**Advocate :** Dibakar Bhuyan, B.N. Bhuyan, S.K. Panda and B.N. Mishra, for the Appellant; N.C. Misra and S.K. Behera for O.P. Nos. 3 and 4, P.K. Ray and P.K. Panda for O.P. No. 2 and G. Mukherji and A.C. Panda for O.P. No. 5, for the Respondent

**Final Decision :** Dismissed

## Judgement

B.S. Chauhan, J.—This writ petition has been filed seeking direction to the Respondent Nos. 2 and 3 to transfer the lease of the property in dispute in Petitioner''s favour and to furnish him the statement of accounts and in the meanwhile not to interfere with functioning of the unit.

2. The facts and circumstances giving rise to this case are that the present Petitioner purchased the unit in dispute in pursuance of the advertisement made by the Orissa State Financial Corporation (hereinafter referred to as the "Corporation") for sale of the seized unit, namely M/s. Sarala Paper Mill situated over plot No. 160, Zone - B, New Industrial Estate, Jagatpur with an area measuring Ac.0.50 decimals along with building. The Petitioner made an offer and the Corporation agreed in principle vide its letter dated 31.3.1992. Petitioner paid Rs. 75,000 as per the term of the executed nor further instalments were paid by the Petitioner. The Corporation wanted to dispossess the Petitioner. The Petitioner filed the writ petition seeking the aforesaid reliefs.

3. In the meanwhile the said property has been settled in favour of opposite party No. 5 and it has been put in possession by the Corporation. The s aid Respondent is running the said unit.

4. Learned Counsel for the Petitioner submits that sale of the property had been settled with opposite party No. 5 in spite of the interim order passed by this Court. Therefore, this Court would take serious note of it and grant the reliefs sought for by the Petitioner. Petitioner was even otherwise entitled to retain possession by virtue of application of the provisions of Section 53-A of the Transfer of Property Act, 1882 ( hereinafter called ''T.P.Act''). Thus the Petitioner is entitled for the aforesaid relief.

5. Learned Counsel for the Respondents have submitted that agreement had never been executed between the parties. The property belongs to IDCompany No. lease deed has ever been executed in favour of the Petitioner by IDCompany The letter dated 31.3.1992 in fact is not an agreement but agreement in principle by the Corporation. Letter dated 31.3.1992 provides for proposed terms of agreement, thus cannot itself be called as agreement. It clearly provides that in case of non-payment of instalments or non-execution of the sale deed within the period stipulated therein, the allotment/sale would be treated cancelled and the money deposited by him would stand forfeited. Thus the petition is liable to be dismissed.

6. It has been submitted that subsequent sale in favour of opposite party No. 5 is a nullity as having been executed in disobedience of the interim order of this Court. In Mulraj Vs. Murti Raghonathji Maharaj, the Hon''ble Supreme Court considered the effect of action taken subsequent to passing of an interim order in its disobedience and held that any action taken in disobedience of the order passed by the Court would be illegal subsequent action would be a nullity.

7. There is substance in the submission made by the Learned Counsel for the Petitioner that the authority cannot pass an order or should not take any action in contravention of the interim order passed by this Court. However, in the instant case the interim order has not been extended after 22.8.2002 and the Petitioner made No. attempt to get it extended. The interim order stood lapsed on 22.8.2002. These opposite parties have not committed any breach of the order passed by this Court.

8. In spite of the fact that the property has been settled in favor of opposite party No. 5, and the said party has been put in possession, the Petitioner, for the reasons best known to him, did not make any attempt to amend the writ petition. Though Petitioner has impleaded opposite party No. 5 vide order dated 13.2.2007, but mere adding him as a party would not serve any purpose as No. relief has been claimed against the said party. Since quashing of allotment of land or any other subsequent correspondence made after it has not been sought, it is not permissible for the Court to travel beyond the pleadings.

9. The Court cannot grant the relief to the litigant, which he has not asked for

 

meaning thereby, that in absence of an application for condonation of delay, it is not within the competence of a Court or Tribunal to condone the delay suo motu as held by the Hon''ble Supreme Court in Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, ; Rhone-Poulenc (India) Ltd. Vs. State of U.P. and Others, and National Board of Examinations Vs. G. Anand Ramamurthy and Others, .

10. There can be No. dispute to the settled legal proposition that the Court or Tribunal is not permitted to decide a case going out of pleadings of the parties nor the evidence led on a non-existing plea is permitted to be taken into consideration. (Vide Sri Mahant Govind Rao v. Sita Ram Kesho and Ors. (1898) 25 IA 195 (PC); Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar, ; Kishori Lal Vs. Mst. Chaltibai, ; Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, ; Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another, ; Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others, ; Bhoona Bi and Another Vs. Gujar Bi, ; Dr. R.K.S. Chauhan and Anr. v. State of U.P. and Ors.; Commissioner of Income Tax, Calcutta Vs. Park Hotel (P) Ltd., 15 Park Street, Calcutta-16, ; Syed Dastagir Vs. T.R. Gopalakrishnasetty, ; Sankaran Pillai(dead) by Lrs. Vs. V.P. Venuguduswami and Others, ; J. Jermons Vs. Aliammal and Others, ; Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, ; Om Prakash Gupta Vs. Ranbir B. Goyal, ; Ashutosh Gupta Vs. State of Rajasthan and Others, ).

11. Admittedly, ''the Petitioner did not make any deposit as per the terms of alleged agreement entered into by the Respondent Corporation.

12. In Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, , the Apex Court has emphasized that recovery of the dues of the Corporation must be made as it requires for circulation to meet the requirement of other applicants. The Court observed as under:

The Corporation as an instrumentality of the State deals with public money. There can be No. doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by insurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand on the way of a deserving borrower getting financial assistance.

13. Clause 11 incorporated therein clearly provided that Non-payment in time would automatically cancelled the allotment had been pressed into service.

 

Whatever may be the fact, the legal position remains that in spite of the fact No. bi-lateral agreement has ever been executed between the parties and on principle the Corporation has agreed to hand over the Unit to the Petitioner who ought to have deposited the instalment in time.

14. In view of the above, as the payment had not been made in time, the equity court cannot come to the rescue of the Petitioner for the reason even after filing of the writ petition in 2002, No. attempt was made by the Petitioner to settle the matter with the Corporation by making payment.

15. Much stress has been given by the Learned Counsel for the Petitioner on the provision of Section 53-A of the T.P.Act. Section 53A of the T.P. Act provides issue of a direction to a person in pursuance of an agreement between the parties i.e. agreement to transfer immovable property and the transferee who had already taken permission in pursuance of that agreement has performed part of his contract and is willing to perform is entitled to shield the protection of the umbrella of Section 53A of the T.P.Act. the said provision clearly stipulate inter alia provides for two conditions.

(a) There must be agreement between the parties;

(b) Part performance had been performed by the transferee and he is further willing to perform his pat of contract.

16. In the instant case we are very much doubtful regarding the agreement. There is No. document on record which can show that the agreement had ever been executed between the parties. What has been filed by the Petitioner is merely an agreement in principle issued by the Corporation meaning thereby it could be further subject to negotiation and the condition could be varied. More so, even it is treated to be an agreement, the Petitioner had never been willing to perform his part of contract after depositing the first instalment and while taking possession of the land, he had never made any payment. Therefore, the question to assume that the Petitioner had ever been willing to perform his part of contract does not arise. It is a case of execution of a lease deed by IDCO in favour of the Petitioner at the instance of the Corporation.

17. In Punjab National Bank v. Ganga Narain Kapur AIR 1994 All. 223; the Allahabad Court expressed the doubt regarding the applicability of Section 53A of T.P.Act in a case of lease and the view taken thereby has been that it applies to sale and lease does not amount to transfer of title in immovable property.

18. The Division Bench of Patna High Court in Smt. Kalawati Tripathi and Others Vs. Smt. Damayanti Devi and Another , held that the provisions of Section 53A of T. P.Act applies to make out defence of part performance to an action in ejectment by the owner are that the transferor has agreed to transfer on consideration for any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee must be willing to

 

perform his part of the contract. If any of the conditions are not fulfilled then the transferee cannot avail the provisions of the aforesaid section. The Court further held the plea of part performance can be used as a shield and not as a sword. This section does not confer active title on the transferee in possession, it only imposes a statutory bar on the transferor and confers a right on the transferee to defend his possession.

19. In order to differentiate the provisions of Section 53A of the T.P.Act, there has to be concluded contract i.e. proposer gives and it is accepted by the parties, the further question as to whether it has been supported by consideration would not arise unless there is a concluded contract between the parties. Agreement means a concluded contract. (Vide Pipraich Sugar Mills Ltd. Vs. Pipraich Sugar Mills Mazdoor Union, ).

20. The provisions of Section 53A do not create a form of transfer of property which is exempt from registration. It creates No. legal right, it merely creates rights of estoppel between the proposed transferee and transferor which have No. operation against third persons not claiming under these persons. It merely debars the transferor from enforcing against the transferee in respect of the property of the transferee has taken possession. (Vide S.N.Banerjee v. KuchwarLime Stone Company; (1941) PC 128).

Therefore, the principle enshrined in the said provisions is a doctrine of equity against the transferee himself.

21. In a case where lease has not been registered but executed, the person in whose favour the lease deed has been executed, may claim that certain rights had accrued in the immovable property for which the lease deed has been executed. The unregistered lease can be looked into for finding out the nature of possession while making reference to the proviso to Section 49 of the Indian Registration Act. An unregistered lease deed may be a good evidence for part performance of a contract as it gives statutory rights and where the transferee has been put in possession, he cannot be evicted without following the procedure prescribed by law. In Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons, , the Hon''ble Supreme Court considered the scope of Section 53A of the Act 1882 and held as under:

It may also be observed that an agreement of lease creating a present demise but not registered is admissible u/s 49, Registration Act as evidence of part performance........A formal lease is not necessary to attract the application of Section 53A, T.P. Act. All that is required is that an agreement in writing signed by the transferor can be gathered from the evidence.

22. In Bhaiya Ramanuj Pratap Deo Vs. Lalu Maheshanuj Pratap Deo and Others, , the Hon''ble Supreme Court held as under:

As regards the second reason, the argument is based on Section 17 read with Section 49 of the Registration Act. Section 17 of the Registration Act enumerates the documents requiring registration. Section 49 of the Registration Act provides that No. document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall

(a) affect any immovable property comprised therein,

(b)...........

(c) be received as evidence of any transaction affecting..such property or conferring such property unless it has been registered. Khorposh (maintenance) deed is a document which requires registration within the meaning of Section 17 of the Registration Act and,as the document was not registered it cannot be received as evidence of any transaction affecting such property. Proviso to Section'' 49, however, permits the use of the document, even though unregistered, as evidence of any collateral transaction not required to be effected by registered instrument. In this view of the legal position the maintenance deed can be looked into for collateral purpose of ascertaining the nature of possession.

23. A similar view has been reiterated by the Hon''ble Apex Court in Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others, .

24. More so, the provisions of Section 53A become relevant as lease deed executed, if registered subsequently, would take effect from the date of execution. The right, title, interest in respect of such a property would pass with retrospective effect, i.e. from the date of execution. (Vide Ram Saran Lall and Others Vs. Mst. Domini Kuer and Others, ; Nanda Ballabh Gururani Vs. Smt. Maqbool Begum, ; Thakur Kishan Singh (dead) Vs. Arvind Kumar, ; and A. Jithendernath v. Jubilee Hills Coop. Housing Building Society and Anr. (2006) 10 SCC 96).

25. Neither there is a concluded agreement between the parties nor the Petitioner had been willing to perform his part of contract as No. attempt had ever been made to make the payment even during the pendency of the case. Thus, in view of the above, the provisions of Section 53-A of the T.P.Act are not attracted in the facts situation of the case at hand.

26. To sum up, the Petitioner without having any valid contract had been put in possession of the land with pious hope that he will make the payment of instalments as his predecessor in interest had been deprived of the possession of the unit by the Corporation in exercise of its power u/s 29 of the State Financial Corporations Act, 1951 only for Non-payment of due. The question of not making the payment of instalments in such a fact situation becomes more serious. In case Corporation has to bear such a situation, No. purpose would be served by taking the possession from the earlier allottee and handing it over to the Petitioner. The Petitioner had never shown his bona fides to make the payment of instalments or even to settle the matter with the Corporation after filing of the case.

27. Interim order passed by this Court expired on 22.8.2002 and No. attempt

had ever been made by the Petitioner to get it extended or to get the matter heard finally. As such, when the unit had been settled with opposite party No. 5, interest of justice requires No. interference. The Petition lacks merit and is accordingly dismissed.

B.N. Mahapatra, J.

28. I agree.

 