(2000) 09 DEL CK 0088

In the Delhi High Court

Case No : IAs. No.627/99 and 1275/99 in Suit No. 993/93

Nirmal Kumari Gupta APPELLANT

Vs

Sh. Ramotar Aggarwal and Others RESPONDENT

Date of Decision : 14-09-2000

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, 70

Citation : AIR 2001 Delhi 86 : (2000) 57 DRJ 41 : (2001) 2 RCR(Civil) 262

Hon'ble Judges : Kripa Shankar Gupta, J

Bench : Single Bench

Advocate : Sh. Suresh Gupta and Sh. Lalit Gupta, for the Appellant; Sh. Vijay Kumar, for the Respondent

Judgement

K.S. Gupta, J.—This order will govern the disposal of is 627/99 filed under Order XXXIX Rules, 1 & 2 read with Section 151 CPC by the plaintiff and is 1275/99 under Order XXXIX Rule 4 read with Section 151 CPC filed on behalf of Allahabad Bank, defendant No. 4.

2. Prayer clause of the suit which was instituted on 28th April, 1993 against Ramotar Aggarwal, Rajesh Sutodia and Bimal Kumar Singhania, defendants reads as under:-

"It is, Therefore, most respectfully prayed that :-

a) that a decree for specific performance be passed in favor of the plaintiff and against the defendants directing the defendants to execute the sale deed/title deeds of the half of the property No. 2/47, West Punjabi Bagh, New Delhi in favor of the plaintiff and against the defendants.

b) a decree for permanent injunction be passed in favor of the plaintiff and against the defendants, their agents restraining the defendants, their agents, attorneys and associates from dispossessing the plaintiff from the property bearing No.2/47, West Punjabi Bagh, New Delhi and from interfering in the peaceful occupation of the said property of the plaintiff in any manner whatsoever more specifically shown in the site plan attached herewith."

3. In is 10458/98 under Order I, Rule 10(2) read with Section 151 CPC filed by the plaintiff, Allahabad Bank was allowed to be imp leaded as defendant by the order dated 10th February, 1999. In said is No.627/99 by the order dated 22nd January, 1999, it was ordered that property No. 2/47, Punjabi Bagh will not be sold and disposed of by the Recovery Officer, Debt Recovery Tribunal without the prior permission of Court.

4. Aforesaid is No.1275/99 has been filed by Allahabad Bank alleging that property No.2/47, West Punjabi Bagh was mortgaged with it by the defendants on 18th May, 1992 to secure the repayment of loan advanced to them. Suit filed by the bank for recovery of dues and sale of mortgaged properties in this Court was later on transferred to Debt Recovery Tribunal, Delhi and numbered as OA 855/95. In that case, Debt Recovery Tribunal, Delhi passed final order on 28th May, 1997 and granted a certificate dated 15th June, 1998 for recovery of the amount of Rs. 42,34,225/- together with interest from the date of institution of suit, i.e. 5th October, 1993 till recovery of the said amount and also for sale of the mortgaged property No. 2/47, West Punjabi Bagh. It is alleged that the objections filed by plaintiff had been overruled by the Recovery Officer by the order dated 21st January, 1999. It is stated that the plaintiff is alleged to have entered into an agreement to sell dated 12th February, 1992 for purchase of one Duplex flat in said property No.2/47. Under law, no title in an immovable property passes under an agreement to sell and said agreement to sell dated 12th February, 1992 cannot affect the rights of bank to recover its dues from the sale of said mortgaged property. It is further stated that even if the plaintiff succeeds in obtaining a decree of specific performance in respect of one Duplex flat against defendants 1 to 3, the bank is still entitled to the sale of said mortgaged property. It is prayed that ad interim ex parte injunction order dated 22nd January, 1999 be vacated.

5. plaintiff has contested the application by filing reply. It is alleged that only after entering into an agreement to sell dated 12th February, 1992 and receiving Rs.1,50,000/- by cheque No. 469894 dated 11th February, 1992 drawn on State Bank of India, Nirankari Colony branch, the defendants took loan by mortgaging said property No.2/47, West Punjabi Bagh from Allahabad Bank on 16th May, 1992. In pursuance of the said agreement to sell the defendants 1 to 3 were to complete the construction and hand over possession of one Duplex flat to the plaintiff on or before 18th November, 1992 on receiving the balance sale consideration of Rs.7,50,000/- and to get the sale deed registered in favor of plaintiff or her nominee. It was further agreed between the parties that if the defendants fail to deliver possession of the flat, the plaintiff would be at liberty to file suit for specific performance and in that event, she become the owner of 1/2 of said property No. 2/47, West Punjabi Bagh with construction raised thereon. It is alleged that the defendant finding themselves unable to complete the construction, offered the plaintiff to raise construction at her cost and take 1/2 of

property vide letter dated 3rd October, 1992. It is claimed that the plaintiff through her husband and brother in law completed the work of foundation, basement and ground floor. She paid to the defendant balance sale consideration of Rs. 7,50,000/- on 16th November, 1992, 17th November, 1992 and 18th November, 1992 in three installments of Rs. 2,50,000/- each against a receipt dated 18th November, 1992. In completing the construction, the plaintiff had to incur an expenditure of Rs. 5 lacs and said defendants are liable to pay 1/2 of it to her which they have failed to pay*nor have they executed the sale deed in her favour. Defendants demanded additional amount of Rs. 3 lacs. The plaintiff was thus forced to file this suit against them. It is further alleged that from the order dated 28th May, 1997 passed by Debt Recovery Tribunal it is manifest that the defendants had also mortgaged with the bank another immovable property bearing No.T-17, Green Park Main, New Delhi and the amount of Rs. 42,34,225/- Along with interest can be easily recovered by sale of that property and 1/2 of property No. 2/47, West Punjabi Bagh owned by defendants 1 to 3.

6. Aforementioned is 627/99 filed by the plaintiff is based on facts identical to those pleaded in the reply to said is 1275/99. Additionally, it is alleged that though defendants 1 & 3 had been served by publication they have not contested the suit. It is only defendant No. 2 who filed written statement in May 1998 taking totally false defense. Defendants 1 to 3 are bound to execute the sale deed of 1/2 property No.2/47, West Punjabi Bagh in favor of the plaintiff and Recovery Officer deserves to be restrained from auctioning said property No.2/47 pursuant to recovery certificate No.855 dated 15th June, 1998 in the matter of Allahabad Bank Vs. M/s. Jagdambha Properties Pvt. Ltd. & Ors.

7. Heavily relying on the provisions contained in Section 53A of Transfer of Property Act, 1882 (for short the ''Act''), it was contended by Sh. Suresh Gupta appearing for plaintiff that property No.2/47, West Punjabi Bagh in possession of the plaintiff in part performance of the agreement to sell dated 12th February, 1992, cannot be auctioned by the Recovery Officer for recovery of the amount of Rs. 42,34,225/ together with interest and costs. In support of the submission that provisions of said Section 53-A can also be used by plaintiff as a shield to defend his right, reliance was placed on the decisions in Yenugu Achayya and Another Vs. Ernaki Venkata Subba Rao and Others , Akram Men Vs. Secunderabad Municipal Corporation, , Ashig Ali Vs. Khalil and others, 1983 All L.J. 405 and Dharmaji alias Baban Bajirao Shinde Vs. Jagannath Shankar Jadhav since deceased by his heirs Bhanudas Jagannath Jadhav etc., . On the other hand, relying on the deci sions in Vora Mulla Taheralai Mulla Akbaralli Vs. Manoranjan Barua, and S.F. Munuswami Gounder and Others Vs. Erusa Gounder, , it was urged by Sh.Vijay Kumar for defendant No.4 that said Section 53-A does not confer any active title in the transferee and such a right can be enforced only as a shield by the defendant. As a part of the submission, it was further urged by him that possession of property No.2/47, West Punjabi Bagh as per the plaintiff was delivered on 3rd October, 1992 while mortgage in favor of defendant No.4/bank was created by defendants 1 to 3 on 18th May, 1992 and

agreement to sell dated 12th February, 1992 did not create any interest in or charge on said property No. 2/47 in favor of the plaintiff. It is pertinent to note that by filing aforesaid is No.10458/98 which was allowed in terms of the order dated 10th February, 1999, Allahabad Bank was sought to be imp leaded as a defendant without further seeking consequential amendments in the plaint. Admittedly, no allegation whatsoever is made in the plaint about the entitlement of protection of said Section 53-A in the matter of auction of property No. 2/47, West Punjabi Bagh in execution of the order dated 28th May, 1997 passed by Debt Recovery Tribunal in OA No.855/95, Allahabad Bank Vs. Jagdambha Properties Pvt. Ltd. & Ors. Further, the prayers made in the suit only pertain to defendants 1 to 3. That being the position, the relief claimed in said is 627/99 being beyond the scope of suit cannot be granted to the plaintiff. Having reached this conclusion it is unnecessary to examine the merits of said submission advanced on behalf of the plaintiff.

8. u/s 54 of the Act, transfer of any immovable property of the value of Rs.100/- and onwards can be made only by a registered instrument. Latter part of this Section defines the ''contract of sale'' as under:-

"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 in or charge on such property."

9. Section 58(a) of the Act says that a mortgage is transfer of an interest in specific Immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability. Section 70 provides that if, after the date of mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession. Thus, despite the execution of said agreement to sell dated 12th February, 1992 the defendant No.4/bank is legally entitled to have the mortgaged properties including said property No.2/47 sold for realisation of the amount as per order dated 28th May, 1997 by the Recovery Officer. Yet another submission that Recovery Officer should restrict to the sale of another mortgaged property No.T-17, Green Park Main, only for recovery of bank dues cannot be made by the plaintiff in this suit. The plaintiff has thus not even made out a prima facie case for grant of the ad interim injunction prayed for and the said order dated 22nd January, 1999 which continues to operate till date, deserves to be vacated with costs to defendant No. 4 bank.

10. Consequently, is No.627/99 is dismissed with Rs.5,000/- as costs while is No.1275/99 is allowed and order dated 22nd January, 1999 is vacated.

