

(2008) 02 AHC CK 0262
In the Allahabad High Court

Shyam Ji Rastogi and Others

APPELLANT

Vs

Bar Association and Others

RESPONDENT

Date of Decision : 05-02-2008

Acts Referred:

Contract Act, 1872 — Section 23
Transfer of Property Act, 1882 — Section 6

Citation : (2008) 2 AWC 2010

Hon'ble Judges : Shishir Kumar, J; Amitava Lala, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Amitava Lala, J.—This appeal arises out of an order dated 3rd December, 2007, passed by the Additional District Judge, Court No. 1, Kanpur Nagar refusing grant of ad-interim injunction sought by the plaintiffs-appellants in the Original Suit No. 1450 of 2007, Sri Shyam Ji Rastogi and Ors. v. Cawnpore Bar Association and Ors.

2. According to Mr. Shashi Nandan, learned senior counsel appearing for the plaintiffs-appellants, two important documents, being Annexures-9 and 10 to the affidavit, are the plinth of their claim in respect of the properties. Annexure-9 is an agreement between the Lieutenant Governor of the North Western Provinces and Chief Commissioner of Oudh and the Barristers, Pleaders and Mukhtars of the District Court (Kanpur) (previously "Cawnpore") on the basis of resolution dated 28th July, 1891 laying down certain rules, under which buildings for accommodation of Barristers, Pleaders and Mukhtars attending the public courts may be erected on Government land, and whereas the Barristers, Vakils and Pleaders practising in Cawnpore having applied to erect a building for themselves, their clients and a Bar library upon the Government land in the vicinity of the Judges Court house at Cawnpore and obtained such leave to erect such building under Letter No. 5577 W. A. dated the 7th September, 1895 from the Secretary to the Government, North Western Provinces and Oudh in the

Public Works Department to the District Judge of Cawnpore. Now the Barristers, Vakils and Pleaders of the District Court, whose signatures were therein, were allowed to erect said building upon the said Government land. They agreed and undertook with the Secretary of the State for India in Council, his successors in office and assigns, on behalf of the Government and Bar, to whom the said building may be assigned, allowed or granted under the rules. The terms and conditions of the said agreement are as follows:

Firstly.-- that we shall maintain the said building in proper repair and that we shall at all times without objection, make such repairs to the said buildings as the Superintending Engineer of the Circle may, by letter under his signature, require to be made.

Secondly.--that we shall not without the permission of Government in the Public Works Department, denote the said building to any other purpose than that for which it is allowed to be erected, that is to say the accommodation of the Barristers, Vakils, Pleaders and Legal practitioners of the district of Cawnpore for all purposes connected with their practice in the civil and criminal Courts, their clients and for our Bar Library.

Thirdly.-- that if we shall, for three months after receipt thereof, fail to comply with a requisition to repair the said building made by the Superintending Engineer in the manner aforesaid, or if we shall without the aforesaid permission of Government denote the said building to any other purpose than that for which it is allowed to be erected, or if for the space of six months, the said building shall not be used for the said purpose, then the said building shall become absolutely and entirely the property of Government and we shall not be entitled to any compensation in respect thereof.

Fourthly.--that we shall not, by reason of being allowed such said building on such said Government land, acquire or be entitled to any right or interest whatever in the said or around upon which such building is and except the right to enjoy and use subject to the conditions of this agreement.

Fifthly.-- that we shall without objection pay all the chargeable upon the said building when erected, such taxes be leviable by law upon land always save and provided that we shall not be able to pay land revenue.

Sixthly. --that if the Government requires the removal of the said building whilst in our use and my agreement under these rules we shall without objection comply with a requisition for its removal within a reasonable time after receipt thereof and of the value of the building at the time such value to be by the Superintending Engineer of the Circle.

3. Annexure-10 is a further agreement dated 5th October, 1929 entered into between the Cawnpore Bar Association, incorporated under the Societies Registration Act, 1860, and the Secretary of the State for India in Council (which includes his successors in office and assigns). Bar Association wanted to erect

chambers upon the Government land in the vicinity of the Bar Association at the Court compound in accordance with the plan attached to the letter G.O. No. 155/VII-541 Allahabad dated 2nd February, 1928. The conditions of such agreement are as under:

Firstly, that the Association shall maintain the said building in proper repair and that it shall at all time, without objection, make such repairs to the said building chambers as the Superintending Engineer of the Circle may by letter, under his signature, require to be made. Secondly, that the Association shall not without the permission of Government, in public works department, devote the said building, chambers to any other purpose than that for which it is allowed to be erected, that is to say the accommodating of the Barristers, Advocates, Pleaders, Members of the Association of the district of Cawnpore for purposes connected with their legal profession. Thirdly, that if the Association shall, for three months after receipt thereof, fail to comply with a requisition to repair the said building made by the Superintending Engineer in the manner aforesaid, or if it shall without the aforesaid permission of Government devote the said building to any other purpose than that for which it is allowed to be erected, or if for the space of six months, the said building shall not be used for the said purpose, then the said building shall become absolutely and entirely the property of the Government, and the Association shall not be entitled to any compensation in respect thereof. Fourthly, that the Association shall not, by reason of being allowed to erect such said building on such said Government land, acquire or be entitled to any right or interest-whatever in the soil or ground up on which such building is erected, save and except the right to enjoy and use the said building, subject to the conditions of this agreement. Fifthly, that the Association shall without objection pay all taxes chargeable upon the said building when erected whether such taxes be leviable by law upon landlord or tenant always save and provided that it shall not be liable to pay land revenue. Sixthly, that if Government requires the removal of the said building whilst in the Association's use and enjoyment under these rules, the Association shall without objection comply with a requisition for its removal within a reasonable time after receipt thereof and upon payment of the value of the building at the time, such value to be assessed by the Superintending Engineer of the Circle. Seventhly, that no additions or alterations subsequently required will be made to the said building until the plans thereof have been approved and the sanction of Government accorded to the same.

4. It is stated by the plaintiffs-appellants that the Bar Association had no fund to construct the chambers and the land was assigned to different legal practitioners to erect permanent chambers at their own cost. The chambers were constructed by the predecessors-in-interest of the plaintiffs-appellants. They are the absolute owners of the chambers by succession/transfer. The number of the chambers is disclosed in the schedule annexed with the plaint. The Bar Association has always been recognizing the absolute rights of the plaintiffs-appellants and their predecessors. In June, 2007, the respondent Bar Association took a resolution to

erect the chambers over the roofs of the chambers owned by the plaintiffs-appellants. According to the appellants, the said resolution is not in accordance with the terms of the agreement deed dated 5th October, 1929. The plaintiffs-appellants asked the defendants-respondents to withdraw the said resolution but they did not pay any heed, which gave a cause of action to the plaintiffs-appellants to file the present suit. The plaintiffs-appellants and/or their predecessors are enjoying the chambers as owners of the same for more than 70 years and they have perfected their title by adverse possession. The defendants-respondents filed their respective objections and contested the cause.

5. Learned Judge of the court below in the order impugned has extensively discussed the facts and circumstances of the case and pointed out two very important factual parts. Firstly, the agreement was made for construction of building for the occupation of the Barristers, Pleaders and Mukhtars for attending the public courts; and secondly, the subsequent agreement provided grant of land to the Bar Association for the purpose of occupation of Barristers, Advocates, Pleaders and Members of the Association for the purposes connected with their legal profession. Therefore, grant of the land was made for the purpose of justice delivery system. Neither the grant was sought for any advocate in personam nor any right in personam was created by the said grant. It appears that number of advocates, who were occupying such chambers, sold the same by registered sale-deeds. Somewhere heirs of the deceased legal practitioners have executed sale-deeds showing their proprietary right over the chambers in question. No such right has been assigned to the advocates by the State Government for the said purpose. Subsequent assignment, if any, was made by the Cawnpore Bar Association for the specific purpose with the sole objective of rendering Justice. They cannot be protected by their adverse possessory right. Since the assignment was made by the then Government to the Bar Association, any sale-deed by any advocate is outcome of fraud and can be thrown out at any stage of litigation. It has further been observed by the court below that the constructions were made without the sanction of the Kanpur Development Authority. Moreover, since the Bar Association has permitted some of the advocate to construct the chambers, the occupation is permissive occupation being contra to the adverse possession.

6. Mr. Shashi Nandan, learned senior counsel, contended before this Court, there is no dispute that the plaintiffs-appellants made construction of the chambers at their own costs. This important aspect has not been considered by the court below. When the construction is made out of their own funds, the respondents cannot take a resolution to make construction on the roof of the respective chambers to allot the same to others. Relying upon two Judgments of the Supreme Court in Dalpat Kumar and Another Vs. Prahlad Singh and Others, and Maharwal Khewaji Trust (Regd.), Faridkot Vs. Baldev Dass, he stated that prima facie case is not attached to prima facie title, which the court below failed to appreciate and rejected the prayer for ad-interim order of injunction. At the time of grant of injunction only three aspects are to be seen by the Court, i.e., (a)

prima facie case; (b) irreparable injury; and (c) balance of convenience. We find from the judgment of the Supreme Court in re : Dalpat Kumar (supra) that the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad-interim injunction pending the suit. By referring Maharwal Khewaji Trust (supra) Mr. Shashi Nandan wanted to say that the Court should not permit the nature of the property being changed, which also includes alienation or transfer of property which may lead to loss or damages being caused to the party, who may ultimately succeed and may further lead to multiplicity of proceedings.

7. Mr. P.N. Saxena, learned Counsel appearing for the defendants-respondents, contended before this Court that there is no prima facie case prescribing grant of ad-interim order of injunction. The annexures to the paper-book from pages 168 to 215 are the receipts towards deposit of municipal tax mostly of 15th June, 2007, i.e., just at the time of filing of the suit. Some of the receipts are not even for the legal practitioners. Land was allotted to the Bar Association. The plaintiffs-appellants are not the original owners but relying upon such receipts wanted to enforce their right. In spite of the same, if the construction is made by the Bar Association on the roof of the existing chambers to accommodate other members of the Bar Association, how the rights of occupation of the occupants of the chambers will be infringed, is not known to them.

8. According to us, it is an admitted position that originally the land was allotted for the purpose of construction of the building by the Barristers, Pleaders and Mukhtars upon the Government land to facilitate the legal practitioners. A specific condition is there that if the building is not used for the purpose, then the same will become absolutely and entirely the property of the Government. Since the Bar Association was formed subsequently, a permission was accorded to them to construct the building as per the sanctioned plan. The Bar Association had no adequate fund to construct the chambers to facilitate the members of the Bar at its own cost when it was offered to several legal practitioners for the purpose of construction of chambers of the legal practitioners at their own cost to facilitate the effective purpose of the original agreement. Therefore, such persons including their predecessors did not construct such chambers for their personal purpose but public purpose. Hence, no one can be vested with the exclusive proprietary right therein. It appears from the different annexures attached with the appeal that even the occupiers of such lawyers' chambers transferred the same to others by way of respective sale-deeds. Therefore, the situation is grave. Now we have to see what is the respective right of the occupiers of the chambers on the basis of the purported permission or arrangement. Even if we wanted to place the matter little higher than what has been projected before us, i.e., considering the purported permission or arrangement as a contract existed and/or still existing by the passage of time, let us see what law says to that extent. According to Section 23 of the Indian Contract Act, 1872, if the consideration and object is forbidden by law or opposed to public policy then any of the contracts cannot be held to be legally enforceable. Even a contract cannot arise from misconduct following the maxim

of *ex malaficio non oritur contractus*. There are certain classes of contracts, which have been dealt with by the Courts as opposed to public policy, as follows:

- (1) Agreements tending to injure the public service;
- (2) Agreements which injure the State in its relation with the other States;
- (3) Agreements which tend to prevent the course of justice;
- (4) Agreements which tend to abuse the legal process;
- (5) Agreements which affect the freedom or security of marriage;
- (6) Agreement in restraint of trade; and
- (7) Agreements which is in restraint of marriage, etc.

9. The term "public policy" is equivalent to the "policy of the law". It is applicable to the spirit as well as the letter. Whatever tends to injustice of operation, restraint of liberty, commerce and natural or legal right ; whatever tends to the obstruction of justice or to the violation of the statute and whatever is against good morals, when made the object of a contract, is against public policy, and therefore void and not susceptible of enforcement. Therefore, a contract forbidden by law and opposed to the public policy appears to be two sides of the same coin. It is not a policy of a particular Government. It connotes some matter which concerns the public good and the public interest. When public good comes, invariably the question of public purpose follows. Therefore, when we find from the factual matrix that the land was given by the State to facilitate the legal practitioners for constructing building and subsequently to the Bar Association after its formation and when Bar Association did not find the adequate fund and requested its members to construct the same by their own cost, the property which has been owned by them on the land of the State cannot be held to be personal property for any collateral purpose. Public purpose means general interest of the public which requires development to be made. It is not constant. The scope of an expression which conjugates general interest of the public must necessarily depend *inter alia* on social and economic need and broad interpretation of the democratic ideal. According to us, the need of the year 1891 and of the year 2007 or 2008 cannot be same and similar. There is a sea change in respect of the circumstances. Number of legal practitioners has increased enormously. Therefore, need of providing shelter to them seems to be public necessity to be fulfilled by the Bar Association. Public purpose includes a purpose in which the general interest of the community as opposed to the particular interest of individuals and is directly and virtually concerned. It ordinarily means something for the benefit of the public or a section of the public as opposed to private purpose, which must mean for the benefit of an individual. A public purpose includes general welfare amongst other objectives. Therefore, bona fide possessor, if any, is liable for only that which has come to him following the maxim *bonae fidei possessor in id tantum quod ad se pervenerit, tenetur*. Even if we take the restrictions as u/s 6 of the Transfer of Property Act, 1882, we shall

find some restrictions inclusive of Clause (h) therein, as follows:

(h) No transfer can be made (1) in so far as it is opposed to the nature of the interest affected thereby, or (2) for an unlawful object or consideration within the meaning of Section 23 of the Indian Contract Act, 1872 (9 of 1872), or (3) to a person legally disqualified to be transferee.

Therefore, the properties in question, i.e., respective chambers of the legal practitioners are not the personal properties of individuals as alleged or at all. This is, at best, a facilitated permissive occupation to discharge the duties for the public. If such right is given by the Bar Association to them, the right can be confined only to their respective chambers and nowhere else. It is to be remembered that all learned advocates being members of the Bar Association have their equal right to adequate means of livelihood by way of discharging duties towards the Court and for the same if any office is made considering the present circumstances, no objection can be adhered to on the part of the restricted users of the occupation, i.e., the plaintiffs-appellants herein. Therefore, when the right, if any, of the individual legal practitioner is restricted in respect of their chambers, which stand on the Governmental land granted to the Bar Association and constructed by their predecessors' contribution, such restricted right cannot be extended other than their place of occupation. Moreover, since such right cannot be held to be the personal right of occupation exclusively and forever, the Bar Association cannot be restricted from constructing any accommodation to facilitate the other members of the Bar. In other words, the roof right can be exclusive when the legal right under the Transfer of Property Act by all means is exclusively enforceable to one or his family members. Since no such right is available to the occupants of the chambers, they cannot restrain the Bar Association, for whose benefit the land was given and even for whom the contributions have been made by the predecessors-in-interest by making structure on such land. Therefore, we are of the prima facie view that roof right is not inclusive of the right of structure constructed by the predecessors of the occupants of the respective chambers. Right to roof cannot be a right as a matter of course when one has no exclusive right by means of Transfer of Property Act. Although in the different circumstances, a Four Judges' Bench of the Supreme Court in a judgment in Dwarka Prasad Vs. Dwarka Das Saraf, dealt with the question of accommodation but laid down a principle therein that where the lease (to be read as the present accommodation herein) is composite and has a plurality of purpose, the decisive test is the dominant purpose of the demise. Therefore, the purpose of occupation of the premises is the decisive factor. Hence, we cannot construe the same as exclusive occupation of an individual as per the law of land for the residential purposes or other purpose where roof right seems to be inclusive of. The land is of the State. The Bar Association is the occupant of such land as per the agreement of the entire area. The Bar Association has allowed its members to construct a structure at their cost in absence of its own fund. Therefore, it is permissive occupation of the structure on contribution. It is not a private transferable property. Moreover,

necessitas publica major est quam private public necessity is superior to private. Therefore, taking into account all these aspects, as aforesaid, we are of the view that the order impugned refusing to grant interim order of injunction cannot be interfered with.

10. However, at the end of such order the learned Judge was pleased to pass further order issuing a show cause notice upon the plaintiffs-appellants as to why the plaint should not be rejected under Order VII, Rule 11 of the Code of Civil Procedure. Admittedly, similar application has already been rejected by the court below in the earlier occasion. Hence, according to us, any order in such way should not be passed with undue haste. There is a proper procedure for the purpose of framing of issues particularly the preliminary issue to hear out at first and the court below is not debarred from taking such steps at an appropriate time. There was no occasion for the court below to incorporate such observation voluntarily. Hence, such part of the order impugned cannot be sustained and is, accordingly, set aside by this Court.

11. Therefore, in view of the above, the appeal is treated to be disposed of in the place and instead of dismissal with the above observations and order and without imposing any cost.