
(2013) 03 AHC CK 0084

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 22576 of 2011

Smt. Rani Gulati and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 22-03-2013

Acts Referred:

Specific Relief Act, 1963 — Section 3

Transfer of Property Act, 1882 — Section 40, 5, 53A, 54

Trusts Act, 1882 — Section 91

Citation : (2013) 4 ADJ 426

Hon'ble Judges : Sunil Ambwani, J; Bharat Bhushan, J

Bench : Division Bench

Advocate : Rajiv Joshi, for the Appellant; Vishnu Gupta, for the Respondent

Judgement

Bharat Bhushan, J.—By means of this petition, petitioners have prayed for a writ in the nature of certiorari quashing the impugned order dated 4.4.2011 (Annexure 15) passed by respondent No. 2 District Magistrate/Collector, Allahabad whereby the application of the petitioners/tenants for grant of freehold rights over the Nazul land in dispute has been dismissed. The petitioners also seek a writ, order or direction in the nature of mandamus commanding the respondents not to grant freehold rights in favour of respondent No. 4 over the property in dispute vide their freehold Application No. 2387/1998-99. The brief facts necessary for adjudication of the present dispute are that the Nazul Plot No. 1, 6-Kanpur Road (P.D. Tandan Road), Mauza Beli, Mustakharja, Allahabad (having area 2 acres 4423 square yards) was originally leased out to Sri N. K. Mukherjee by the State Government for a period of 30 years w.e.f. 1.10.1921 vide lease deed dated 27.10.1921. This original lease deed was renewable for two additional periods of thirty years each (Total 90 years) as per terms and conditions of the lease deed. Late N. K. Mukherjee transferred his leasehold rights in respect of the said land/bungalow (area about 2 acres 2979 square yards) to Sri Radhey Shyam Srivastava (father of respondent No. 4), during subsistence of lease, vide registered sale-deed dated 23.2.1948. Subsequently,

lease was renewed in favour of father of respondent No. 4 namely Sri Radhey Shyam Srivastava for a further period of thirty years w.e.f 1.10.1951.

2. It is stated that husband of petitioner No. 1 and father of petitioner No. 2 was tenant of the aforesaid bungalow including the appurtenant land (area 2 acres 2979 square yards) since 1948. He died on 6.11.2003 and the petitioners have inherited the tenancy rights.

3. It is stated that late Radhey Shyam Srivastava executed an agreement to sale on 15.11.1969 for the transfer of leasehold rights in favour of Late Narendra Nath Gulati, husband of petitioner No. 1 and father of petitioner No. 2. The said agreement to sale was contingent upon the permission from the Collector/District Magistrate, Allahabad. It was allegedly agreed that after obtaining permission from the Collector the sale-deed will be executed in favour of Late Narendra Nath Gulati. It is further stated that in pursuance of alleged agreement to sale late Radhey Shyam Srivastava applied for grant of permission for the sale of property in question to the Collector, Allahabad on 22.8.1969. He reportedly sent several reminders to the District Magistrate/Collector but permission was not granted during subsistence of lease of the property in question. The said lease expired on 30.9.1981.

4. Sri Radhey Shyam Srivastava, father of respondent No. 4 died on 26.6.1983 leaving behind his wife, three sons and two daughters as his legal heirs and representatives. Widow of late Radhey Shyam Srivastava also died thereafter.

5. According to petitioners, after expiry of lease deed on 30.9.1981, heirs of late Radhey Shyam Srivastava executed an agreement to sale in favour of Pratibha Sahkari Awas Samiti Ltd., 65, Muthiganj, Allahabad through its Secretary Sri Prem Shankar Dubey in respect of property in question for a total sale consideration of Rs. 9.75 lacs. It is further alleged that entire sale consideration has been paid by vendee to the vendors i.e. heirs of late Radhey Shyam Srivastava and in pursuance thereof all rights of heirs of late Radhey Shyam Srivastava over the property in question have been extinguished.

6. Meanwhile, State Government issued various Government Orders framing policies for grant of freehold rights in respect of Nazul land either to the original lessees or occupants of the premises including the statutory tenants. In pursuance of the Government Order dated 3.10.1994 (hereinafter referred as "the G.O. 94) late Narendra Nath Gulati applied for freehold rights in respect of property in question on 6.4.1995 on prescribed form alongwith deposit of receipt of Rs. 100/- vide treasury Challan as an agreement of sale holder.

7. Another Government Order No. 2029/9-aa-4-97-260 N/97 was issued on 26.9.1997 (hereinafter referred as the G.O. 97) whereby the earlier policy regarding freehold rights over Nazul land was modified. Subsequently, State Government issued another G.O. dated 1.12.1998 (hereinafter referred as the G.O. 98") whereby the policy was further modified.

8. Heirs of Late Radhey Shyam Srivastava, (respondent No. 4 Dr. Ashok Kumar Srivastava and holder of power of attorney from other heirs) applied for grant of freehold rights in respect of property in question on 28.2.1999 alongwith deposit of 25% of the amount through treasury challan calculated as per clause 6(1) of the Government Order dated 26.9.1997. However, petitioners have described this application as proxy application on behalf of Pratibha Sahkari Awas Samiti Ltd. for the simple reason that heirs of Late Radhey Shyam Srivastava had already transferred their rights over the property in question by an agreement of sale dated 27.9.1986 after obtaining full consideration and transferring symbolic possession to the vendee. They further claimed that the lease in favour of Late Radhey Shyam Srivastava and respondent No. 4 did not subsist on the date of said transfer of right in favour of third party, therefore, application for grant of freehold rights was not maintainable.

9. Respondent No. 3, Additional District Magistrate, Nazul, Allahabad issued notices to the respondent No. 4 and other heirs of Late Radhey Shyam Srivastava as well as to the petitioner No. 2 by fixing 9.10.2008 for hearing on the objections of the petitioners. But the hearing could not be conducted. The matter was pending since 1999 and no final decision was taken by the District Magistrate/Collector, Allahabad on the application of either parties. Therefore, the petitioners instituted a Civil Misc Writ Petition No. 13806 of 2010 which was finally disposed of vide order dated 9.8.2010 with the direction to the Collector, Allahabad respondent No. 2 to decide the representation of petitioners for grant of freehold rights in terms of the Government Orders. Pursuant to this direction, the District Magistrate/Collector, Allahabad passed the impugned order dated 4.4.2011 dismissing the application of petitioners for grant of freehold rights with regard to the property in question. It is this order, which has been challenged by the petitioners by means of present writ petition on various grounds.

10. It is stated by petitioners that the lease deed in favour of Late Radhey Shyam Srivastava had expired on 30.9.1981, therefore, the heirs of Late Radhey Shyam Srivastava had no authority or locus standi for moving application for grant of freehold rights. Petitioners have further claimed that heirs of late Radhey Shyam Srivastava had executed an agreement to sale in favour of Pratibha Sahkari Awas Samiti Ltd. whereby violating the terms and conditions of original lease deed. They have alleged that the entire sale consideration was paid by vendee to the vendor extinguishing all rights of heirs of late Radhey Shyam Srivastava over the property in question and the application of heirs of late Radhey Shyam Srivastava for grant of freehold rights is in fact a proxy application on behalf of Pratibha Sahkari Awas Samiti Ltd.

11. Petitioners have also assailed the observation made in the impugned order passed by the District Magistrate/Collector, Allahabad that agreement to sale executed in favour of the father/husband of petitioners was not registered and therefore no right accrued on the basis of this agreement to the petitioners, as it was not compulsory to get the such agreement registered at that point of time.

It is contended that an amendment for compulsory registration came into effect on and after 1976 under the Indian Registration Act.

12. Petitioners have further submitted that it was incumbent upon the District Magistrate, Allahabad to decide the applications of both the petitioners and respondents simultaneously.

13. Petitioners have also claimed that they are entitled of freehold rights both in pursuance of agreement to sale executed in favour of husband and father of the petitioners by Late Radhey Shyam Srivastava on 15.11.1969 and on the basis of their statutory tenancy over the property in dispute.

14. Petitioners have reiterated their claim in rejoinder-affidavits dated 9.11.2011 and 8.12.2012. They have stated that a suit for specific performance of contract is also pending in the Civil Court, Allahabad.

15. Respondent No. 1 i.e. the State has not filed any counter-affidavit despite service. However, the District Magistrate, Allahabad and Additional District Magistrate (Nazul), Allahabad being respondent Nos. 2 and 3 have jointly filed counter-affidavit on 15.11.2013. Respondent No. 4 Dr. Ashok Kumar Srivastava has filed his counter-affidavit on 16.8.2011 and supplementary counter-affidavit on 21.2.2013.

16. Respondent No. 5 Pratibha Sahkari Awas Samiti Ltd. has not filed any counter-affidavit and no one has put in appearance for the said respondent. Office report indicates that neither the acknowledgement nor undelivered cover has been received back, therefore, under the Rules of the Court notices are deemed to have been served on respondent No. 5.

17. It is stated by respondent Nos. 2 and 3 in their counter-affidavit that the petitioners had submitted an application dated 21.4.1995 for grant of freehold rights over the Nazul plot in question on the basis of an un-registered agreement for sale dated 15.11.1969. This application could not be considered inasmuch as under the prevailing rules/policy of the State Government there were no provision for grant of freehold rights on the basis of agreement for sale. Further under the Government Order dated 3.10.1994 only the lessee was entitled for grant of freehold rights and there was no provision for grant of freehold rights on the basis of agreement to sale or tenancy. They further claimed that petitioners were not entitled of freehold rights even under the Government Order dated 1.12.1998 for the simple reason that under the said G.O. only the person with registered agreement to sale in their favour were to be considered, and in any case the G.O. provides that original lessee was entitled of freehold rights with regard to the Nazul plots in their favour. Claims of statutory tenants for consideration of grant of freehold rights is contingent upon the condition contained in the Government Order which entails that firstly, the original lessee are entitled for grant of freehold rights even if they have violated the terms and conditions of the lease deed. Therefore, the violation of terms of lease deed by legal heirs of late Radhey Shyam Srivastava would not by itself entitle the

petitioners to claim grant of freehold rights in their favour. Respondents have further claimed that pursuant to G.O. dated 1.12.1998, legal heirs of Late Radhey Shyam Srivastava had already submitted freehold application No. 2837 dated 28.2.1999 claiming grant of freehold rights over the Nazul land in question together with deposit of amount of Rs. 5,32,578.00 and Rs. 4,20,000.00 i.e. total Rs. 9,52,578.00 being 25% of freehold charges on the basis of self assessment.

18. Respondent No. 4 has denied that Late Radhey Shyam Srivastava ever executed any agreement to sale in favour of Late Narendra Nath Gulati. He has denounced the agreement to sale dated 15.11.1969 as a forged document. He has also claimed that legal heirs of Late Radhey Shyam Srivastava always denied the existence of alleged agreement to sale and no suit for specific performance of contract was filed within the period of limitation. However, he admitted that suit for specific performance (Original Suit No. 943 of 2005) is pending in the Court of Civil Judge (SD), Allahabad but he has stated that the aforesaid suit is highly time barred.

19. Respondent No. 4 has further stated that under the Government Order dated 3.10.1994 only lessee could have moved an application for grant of freehold rights. Aforesaid Government Order did not contain any provision for tenants or agreement to sale holder to acquire freehold rights.

20. Respondent No. 4 belatedly claimed that the heirs of late Radhey Shyam Srivastava had applied for renewal of lease for a period of thirty years w.e.f. 1.10.1981. This application was received by the concerned clerk in the office of Nazul Adhikshak, Nagar Mahapalika, Allahabad on 10.7.1987 and the concerned clerk put his initial and official seal acknowledging the receipt of this application, copy of which is annexed as SCA-1 to the supplementary counter-affidavit.

21. We have heard Mr. Keshri Nath Tripathi, learned Senior Advocate assisted by Sri Rajiv Joshi, advocate for the petitioners, learned Standing Counsel on behalf of respondent Nos. 1 to 3, Mr. Vishnu Gupta, Advocate for respondent No. 4 and have perused the material on record.

22. The claim set up by the petitioners is based on an agreement to sale dated 15.11.1969 alleged to have been executed by Late Radhey Shyam Srivastava in favour of Sri Narendra Nath Gulati, father/husband of petitioners and on the basis of various Government Orders issued with regard to conversion of lease rights into freehold rights. Petitioners have claimed inter alia that they have acquired rights for freehold on the basis of aforesaid agreement to sale dated 15.11.1969. This claim of petitioners cannot be accepted for several reasons.

23. Firstly, the heirs of Late Radhey Shyam Srivastava/respondent No. 4 have denied the existence of any agreement to sale dated 15.11.1969 for transfer of lease right in favour of Late Narendra Nath Gulati. They have specifically denounced this agreement as a forged document. Further, this issue involves disputed questions of facts requiring determination on evidence. The matter

cannot be addressed and determined in writ jurisdiction.

24. It is settled by catena of decisions that disputed question of facts are not ordinarily decided by this Court in writ jurisdiction. In any case, a suit for specific performance is admittedly pending in the Civil Court, Allahabad where the existence and validity of agreement to sale will be decided after recording evidence.

25. Secondly, original lease deed dated 27.10.1921 and subsequent renewal deed dated 28.4.1951 contemplate that lease rights could only be transferred after obtaining the permission of the State Government through Collector, Allahabad. Relevant portion of the original lease deed is reproduced hereunder:

.....It is hereby agreed that the said lessee his Executors, Administrators or assigns, shall not assign under let or otherwise part with the premises hereby demised or any part thereof without the permission of the said secretary of State his successors or assigns (which permission may be signified by the said Collector or by such other person as the Government of the North Western Provinces or the said Secretary of State may appoint in that behalf) for that express purpose had and obtained.....

26. This lease deed was renewed on 28.4.1951 w.e.f. 1.10.1951 for a further period of thirty years. This renewal deed specifically stipulates that the terms and conditions of original lease deed will be applicable for additional lease period of thirty years as well.

27. There is nothing on record to suggest that the State Government or the Collector, Allahabad ever accorded permission for sale of property pursuant to the alleged agreement to sale dated 15.11.1969. On the contrary petitioners have admitted that the State Government or Collector, Allahabad did not grant any permission for sale during subsistence of lease. Even if, we assume that late Radhey Shyam Srivastava did execute an agreement to sale on 15.11.1969, it did not give any rights to the petitioners inasmuch as this agreement to sale admittedly was dependent upon the permission of the Collector/State Government. No permission was admittedly accorded, therefore, the petitioners cannot claim any rights on the basis of agreement to sale dated 15.11.1969. In any case, contract for sale of immovable property is a contract that sale of such property shall take place on the terms settled between the parties. It does not by itself create an interest in or charge on such property. An agreement for sale is merely a document creating a right to obtain another document of sale on fulfillment of terms and condition specified therein. A buyer does not become owner of the property merely on the strength of an agreement to sale. Ownership remains with the vendor and it is transferred to the buyer only on the execution of the sale-deed by vendee. A buyer only obtains right to get the sale-deed executed in his favour.

28. This position has also been made clear by Hon"ble Apex Court in Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana and Another, The relevant

observation of Hon"ble Apex Court is reproduced as below:

16. Section 54 of TP Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in *Narandas Karsondas Vs. S.A. Kamtam and Another*, observed:

32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See *Rambaran Prosad Vs. Ram Mohit Hazra and Others*, The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

33. In India, the word "transfer" is defined with reference to the word "convey". The word "conveys" in Section 5 of Transfer of Property Act is used in the wider sense of conveying ownership.

* * * *

37.....that only on execution of conveyance ownership passes from one party to another....

17. In *Rambhau Namdeo Gajre Vs. Narayan Bapuji Dhotra (dead) through Lrs.*, this Court held:

10. Protection provided u/s 53A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale-deed in favour of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party

18. It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale-deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

29. In view of aforesaid observation of Hon"ble Apex Court, petitioners will not get any right on the basis of mere agreement to sale. The opinion expressed by Hon"ble Apex Court will also be applicable to the transfer of leasehold property.

30. As no sale-deed was ever executed by either Late Radhey Shyam Srivastava or his heirs in favour of the petitioners, no right shall accrue to them on mere strength of alleged agreement to sale. Therefore, it is clear that petitioners cannot claim any right for grant of freehold rights over the property in question

on the strength of the alleged agreement to sale dated 15.11.1969 alone.

31. In addition to that G.O. 1998 also creates another obstacle for petitioners, if they insist on freehold rights on the basis of alleged agreement to sale dated 15.11.1969. Clause (4) of the GO 1998 contemplates that if the leaseholder has executed a registered agreement in favour of any other party with rights for renewal of lease deed and possession, then on fulfillment of specified conditions, freehold rights can be granted in favour of vendee. This clause requires agreement to be registered and possession to be handed over. The agreement dated 15.11.1969 is not registered.

32. Learned senior counsel for the petitioners has pointed out that in the year 1969 there was no requirement for registration of such agreements. He has pointed out that the amendment for compulsory registration came into effect since 1976 under the Indian Registration Act. This argument may be justified as far as Indian Registration Act is concerned. But the fact of the matter is that as statutory tenants petitioners had no right for obtaining freehold rights with regard to property in their tenancy. These rights accrued to them on the basis of the G.O.-98 which specifically provides that only registered agreement would be considered for the grant of freehold rights on fulfillment of certain conditions. The "Collector, Allahabad could not have granted freehold rights to the petitioners on the basis of alleged agreement to sale dated 15.11.1969 inasmuch as it was beyond the scope of the G.O.-98. The Collector, Allahabad was under legal obligation to follow the provisions of G.O.-98. It is pertinent to point out that the G.O.-98 and its contents are not under challenge in this writ petition.

33. Petitioners have further claimed that they are entitled of freehold rights on the aforesaid property on account of Government Order dated 3.10.1994 as modified by Government Order dated 26.9.1997 and on 1.12.1998. Here, it will be appropriate to adduce the contents of the G.O. dated 3.10.1994, which is quoted as under:

34. Bare perusal of the aforesaid Government Order would reveal that the freehold rights can be granted only in favour of lessee. It does not contain any provision for grant of freehold rights on the basis of agreement to sale or on the basis of statutory tenancy. Therefore, application of petitioners dated 21.4.1995 for grant of freehold rights on the basis of the G.O.-94 was meaningless and not sustainable.

35. Similarly, G.O.-97 also does not provide any right to statutory tenants for obtaining freehold rights. It is pertinent to point out that petitioners moved application for freehold rights in the property in dispute, on mere deposit of Rs. 100/- with Treasury Challan on 31.5.1995 in the wake of G.O.-94 which did not provide any succour to them.

36. It is apparent that claims of both petitioners as well as legal heirs of Radhey Shyam Srivastava flow from G.O. 1998, and yet there is no averments in the petition that any separate application for freehold rights was ever submitted by

the petitioners subsequent to the G.O.-98.

37. The Government Order dated 1.2.1998 contemplates freehold rights in favour of statutory tenants only if original leaseholder fails to apply for grant of freehold rights in consonance of aforesaid Government Order. The relevant portion of Government Order dated 1.2.1998 is reproduced hereunder:

38. It is thus, clear that as per the terms of the aforesaid Government Order claim of tenants for consideration of grant of freehold rights is contingent upon fulfillment of conditions contained in the G.O.-98 which specifically provides that claim of original lease holder would be considered first. Mere allegations of violation of the terms and conditions of the lease deed would not by itself entitle the statutory tenants to claim grant of freehold rights in their favour. Legal heirs of Late Radhey Shyam Srivastava had already submitted an application for freehold rights bearing No. 2387 dated 28.2.1999 together with required deposits on the basis of self assessment in wake of the G.O.-98. The claim of legal heirs of Late Radhey Shyam Srivastava is required to be considered first and only on their failure in obtaining the freehold rights the claim of the petitioners could be considered.

39. The conditions enshrined under the GO 1998 entitle the respondent No. 4 and legal heirs of Late Radhey Shyam Srivastava to move the application for freehold rights despite allegations of violation of terms and conditions of lease deed.

40. Learned counsel for the petitioners has relied on the judgement of this Court in Rustam Khusro Shapoor Ji Gandhi and Others Vs. State of U.P. and Others He submits that application for freehold rights of the legal heirs of Late Radhey Shyam Srivastava is the proxy application on behalf of respondent No. 5. Their rights on Nazul property in question were obliterated subsequent to the execution of an agreement to sale in favour of respondent No. 5. It would be appropriate to consider the contents of this agreement which has been annexed as Annexure 7 to the writ petition by the petitioners. This agreement to sale acknowledges the payment of Rs. 25,000/- only by way of earnest money as against the total sale considerations of RS, 9,75,000/- (Rs. Nine lacs seventy five thousand only). It also acknowledges the need to obtain necessary sanction from the competent authority for execution of sale-deed. Paragraph No. 6 of this agreement includes a specific averment that the vendor will only execute sale-deed in favour of respondent No. 5 within one month from the date of grant of permission from appropriate authority concerned.

41. The contents of this agreement clearly disclose that agreement to sale is based on the condition that the sale-deed will only be executed after obtaining permission from the competent authority in terms of original lease deed of the year 1921 and renewal dated 28.4.1951.

42. With regard to the judgement of this Court in " Vice Admiral, Rustam Khusro Shapoor Ji Gandhi and others, 2010(3) ADJ 319 (DB)", it is to be noted that the

facts of the case are clearly distinguishable from the facts of the present case. In the said case "original leaseholders executed agreement to sale after receiving entire sale consideration of Rs. 1.35 crores from the vendee. The vendor also executed a "Kabzanama"/possession-deed. Special power of attorney was also executed in favour of one D.K. Gandhi. The contents of special power of attorney and agreement to sale impelled the Court to conclude that the petition was nothing but a proxy petition on behalf of vendees.

43. As against this, in the instant case, there is no evidence that the possession was ever transferred in favour of respondent No. 5. The contents of agreement reveal that only Rs. 25,000/- were received as earnest money against the total sale consideration of Rs. 9,75,000/- (Rs. Nine lac seventy five thousand only). There is additional condition in the aforesaid agreement that the sale-deed will only be executed after obtaining permission from the appropriate and competent authority. There is nothing on record to show that the competent authority ever accorded permission to transfer the lease rights in favour of respondent No. 5. Therefore, the arguments of the petitioners in this regard are not sustainable.

44. It is, thus, clear that as statutory tenants, petitioners have no overriding claim for obtaining freehold rights with regard to the property in dispute.

45. Learned senior counsel has submitted that District Magistrate/Collector, Allahabad should have decided freehold applications of both the petitioners and respondent No. 4 simultaneously. The record, however, shows that it was petitioners themselves, who compelled the District Magistrate/Collector, Allahabad to decide their application for freehold right on the strength of orders of this Court dated 23.7.2010 and 9.8.2010 passed in Writ-C No. 13806 of 2010. Under the circumstances, the Collector Allahabad had no option but to reject the claim of the petitioners as the freehold application of heirs of Late Radhey Shyam Srivastava was pending for decision.

46. In view of what has been discussed above, we do not find any reason to interfere with the impugned order dated 4.4.2011 (Annexure 15) passed by respondent No. 2, District Magistrate/Collector, Allahabad. Consequently, the writ petition fails and is hereby dismissed. However, it would be open to the petitioners to submit a fresh application for grant of free hold rights, if prevailing rules so permit, in case the application of legal heirs of Late Radhey Shyam Srivastava for free hold rights is rejected by the competent authority. Such authority would then decide the fresh application of petitioners on merits in accordance with law and the observation made in this judgement within a reasonable time.