
(1996) 01 RAJ CK 0030
In the Rajasthan High Court
Case No : Civil Writ Petition No. 110 of 1986

The Topkhana Desh Grah Nirman Sahkari Samlti Limited	APPELLANT
Vs	
The State of Rajasthan and Others	RESPONDENT

Date of Decision : 31-01-1996

Acts Referred:

Constitution of India, 1950 — Article 226
Specific Relief Act, 1963 — Section 3
Transfer of Property Act, 1882 — Section 17, 40, 53A, 54
Trusts Act, 1882 — Section 91

Citation : (1996) 3 RLW 289 : (1996) 1 WLN 580

Hon'ble Judges : V.K. Singhal, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Singhal, J.—A preliminary objection has been raised that the petitioner society has no locus standi to file the writ petition as neither the copy of the resolution has been submitted nor the copies of the agreement to sale on the basis of which the right is claimed have been filed and the writ petition is not maintainable as no title was transferred in favour of the society and even according to the averments made in the writ petition there was an agreement to sale only.

2. Mr. Agarwal appearing on behalf of khatedars has submitted that there is no valid agreement to sale and civil suits are pending on the basis thereof.

3. Mr. Mahendra Singh on behalf of. Rajasthan Housing Board stated that in the so called agreement with the Rajasthan Housing Board, which was not approved by the State Government, the society has filed the civil suit in the Court of District Judge for enforcement of the agreement. It is also submitted that the sale agreements are alleged to be executed in the year 1975 and no action was taken till 1982 which shows that the alleged agreements are fictitious documents as no khatedars would have given the possession and the petitioner would not

have kept silent till 1982. Even in the revenue record, there is no change and as such the petitioner has no right to file the writ petition.

4. Reliance has been placed on the decision of this Court in the case of The Krishna Cooperative Housing Society Ltd. v. Rajasthan Housing Board, Jaipur and Ors. S.B. Civil Writ Petition No. 2027/1992 decided on 8.12.1992 wherein it was observed by this court that the society who has only entered into an agreement to sell the agricultural land with the khatedar which has not been followed by any registered sale-deed and in a case where the value of the property is more than Rs. 100/-, and even its allottees cannot be said to be the persons interested and all that can be said is that as and when the compensation is awarded to the khatedars, they may have right to claim their money out of the compensation, but they have no right to compensation for land acquired under the provisions of the Act. It was further observed that only a person interested can challenge the acquisition proceedings. The society which has entered into an agreement to sell has no right.

5. It is stated that in Mansarovar Yojna 40,000 houses are to be constructed and out of these 40,000 houses, 10,951 houses will be constructed for Economically weaker section and 9661 house's fo Low Income Group and 8373 houses for Middle Income Group (A) and 6888 houses for Middle Income Group (B) and 4127 for High Income Group. Out of these 40,000 houses, 12628 houses have been constructed, 11,106 houses have been allotted and the possession of 7384 houses have already been given. The construction of the remaining houses is in progress. Mansarovar Yojna is one of the largest Housing Scheme of the Asia. 8 independent Divisions of the Board are working in the Mansarovar Yojna apart from the other supervisory staff working in the Head Office. The entire scheme is of 150 crores and the HUDCO which is the main financing agency has already sanctioned and granted the loan for works in hand. The houses are being constructed on the pattern provided by Housing Urban Development Corporation Limited (HUDCO). The HUDCO has already provided loan facility to the tune of Rs. 41.73 crores upto 31st March 1987.

6. Near about 400 houses are to be constructed on the land in dispute and one of the main approach road in the entire a colony is to be passed on the land in dispute. Besides this one of the Commercial Centre is to be constructed and certain houses are such which have already been constructed but the possession of the same could not be given as part of certain land forms part of the land in dispute. The other internal roads with other amenities are also to be constructed on the land in dispute. Even as per approved plan the electric and sewerage and water lines cannot be led easily in absence of the land in dispute to the other part of the colony. The electric sewarge and water Lines will not have continuity in absence of the land in dispute as the land is not at one point.

7. The possession of the land is said to have been taken by the Housing Board on 3rd May, 1988.

8. In Krishna Co-operative Housing Society Ltd. v. Raj. Housing Society Ltd. referred to above.

9. The Court also observed that the land was shown in the revenue record as agricultural land and the transfer of the agricultural land for building purpose was contrary to the provisions of Section 42(a) of the Rajasthan Tenancy Act as also the provisions of Section 90-A of the Land Revenue Act. In accordance with the provisions of Section 90-A(2), any person desiring to use the agricultural land or any part thereof for any purpose other than agriculture shall apply for the requisite permission in the prescribed manner and to the prescribed officer and every such application shall contain the prescribed particulars. The decision given in the case of Banwarilal Vs. State of Rajasthan and Another, was also relied wherein the court examined the question as to whether a transferee of agricultural land for non-agricultural purposes i.e. for building purposes has any locus standi to file the writ petition and this court said that the transferor and transferee both are trespassers. The provisions of Section 5(44) of the Tenancy Act were also discussed in the said judgment and it was observed that where a person takes or retains possession of land without authority or who prevents another person from occupying land duly let out to him is included within the expression "trespasser".

10. The decision in the case of Sunil Kumar Jain Vs. Kishan and others, has also been relied wherein the Apex Court has held that "it is settled law that the agreement of sale does not confer title and, therefore, the agreement-holder, even assuming that the agreement is valid, does not acquire any title to the property."

11. Mr. Agarwal relied on the decision of Apex Court in the case of Bharat Singh and Others Vs. State of Haryana and Others, wherein the Apex Court observed as under--

When a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the CPC and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.

12. Reliance has also been placed on the decision in the case of Radhakisan Laxminarayan Toshniwal Vs. Shridhar Ramchandra Alshi and Others, wherein the provisions of Section 54 of the Transfer of Property Act were taken into

consideration and it was observed as under--

Under Section 54 of the Transfer of Property Act a contract for sale does not of itself create any interest in or charge on immovable property and consequently the contract in the instant case created no interest in favour of the vendee and the proprietary title did not validly pass from the vendors to the vendee and until that was completed no right to enforce pre-emption arose.

13. Reliance has also been placed on the decision of *Narandas Karsondas Vs. S.A. Kamtam and Another*, wherein it was observed by the Apex Court that a contract of sale does not of itself create any interest in, or charge on, the property. 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.

14. The decision of *Vijay Singh Shekhawat v. State of Rajasthan and Ors.* D.B. Civil Writ Petition No. 2214/89, decided on 9.4.1990 has also been relied wherein the court observed that the agreement to sell is not a document which create any right or ownership till the agreement has been implemented in toto by executing a sale-deed or getting decree for specific performance from the Court. This court, further observed that there are three types of Housing Societies, namely tenant ownership Housing society, tenant co- partnership housing society and other housing societies, but the land has to be held either on lease hold basis or free hold basis by the society and the houses are owned by it or its members. It was observed that the land grabbing movement in Rajasthan particularly at Jaipur is reaching the sky high and needy people have become the victims. Thousands of people have been allotted land by the society and one cannot think of such a magnitude of land grabbing movement unless three wings of the State are directly or indirectly involved in it. It was further observed that the societies should be taken to the task with iron hand and the plots should first be acquired by the State and may be re- allotted on certain terms and conditions to the persons who do not own any land or houses directly or indirectly and are really the needy persons. There should be prohibition against the sale of the plots and Housing Board should come forward and should construct houses on the said plots and sell the houses to the needy persons, but no person shall be allowed to transfer the land to any person, as in the grab of transfer of land number of irregularities and illegalities may be committed.

15. Reliance has been placed on *Delhi Motor Company and Others Vs. U.A. Basrurkar and Others*, wherein it was observed that Section 53A brings a bar against enforcement of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other rights on the basis of un-registered lease. Section 53A of the Transfer of Property Act is only available as defence to a

lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor.

16. The decision of the Bombay High Court in the case of Special Land Acquisition Officer (I) Bombay v. Anil Krishna Biswas (Lessee) and Anr. 1992 LACC 609 is also relied to point out that a person having agreement of sale does not acquire any title to such land and is not entitled to any compensation.

17. It is also stated that there was no valid agreement executed by Khatedars and the fact of execution and existence of the agreement of 1975 is entirely disputed. It is also stated that the khatedars are in cultivatory actual physical possession and the so called agreement dated 25.10.1975 was never acted upon and was cancelled. Even the amount as mentioned in the agreement of Rs. 17 lacs in the case, of Lala and Ors. has not been paid. The copy of the agreement has also not been submitted by the petitioner. Similar prayer has been made on behalf of Bhanwar Lal and others Khatedars where it is contended that even the payments have not been made to the khatedars and the agreement has expired. In respect of Hari Narain and others where the agreement is claimed to have been executed on 30.11.1976 and 8.1.1976, the agreement itself has been denied and the khatedars are said to be in actual cultivatory possession. Some suits in the Civil Court and appeal in the High Court are also stated to be pending with regard to specific performance under the said contract.

18. Mr. Sharma submitted that the judgments relied by the other side are in challenge in special appeal and that an agreement- holder acquires the right to file the writ petition against any illegal acquisition of land. Such right is stated to be under the provisions of the Rajasthan Land Revenue (Allotment, Conversion and Regularisation of Agricultural, Lands for Residential and Commercial Purposes in Urban Areas) Rules, 1981. It is stated that under the last proviso to Rule 4 of the Rules of 1971, the agreement to sell is required to be submitted before the Authorised Officer within 156 days of the commencement of the Rules and thus the right of the agreement-holder is recognised by the said Rule. Under the proviso to Rule 5(1), an exception has been given to the land to which conversion cannot be permitted and the society being the agreement holder is excluded by this provision. The word "society" has been defined as Housing Co-Operative Society Formed and registered under the Rajasthan Co- operative Societies Act, 1965.

19. I have considered over the matter. Under the Rules of 1981, relied by the learned counsel for the petitioner, the housing cooperative society formed and registered under the Rajasthan Co- operative Societies Act, 1965 have been excluded from the land of which the conversion is not permitted. The word "Housing Society" has been defined under clause 2(m) of the Rajasthan Co- operative Societies Rules, 1965 to mean the society the object of which is providing dwelling houses or construction of houses for its members or the financing or facilitating the construction of houses by its members. This definition makes it clear that the object of the society must be to provide to its members

the dwelling houses or construction of houses for its members or the financing or facilitating the construction of houses by its members. This position is further fortified by Rule 9 of Rule of 1966 wherein the housing societies have been classified in three categories--

Housing society.

(a) Tenant Ownership Housing societies where land is held Housing Society, either on lease hold or free hold basis by societies & house are owned or are to be owned by member (b) Tenant Co-partnership Housing Societies which hold both Housing society land and buildings either on lease -hold or free hold basis and allot them to their members. (c) Other Housing House Mortgage Societies and societies House construction societies.

20. The above provision of rule makes it further clear that the housing societies must hold the land, lease hold or free hold. The provisions of Rules of 1981 could only be interpreted to get the land converted for non-agricultural purposes in respect thereof for the societies. The provisions of Rules of 1981 incorporating the definition of society under clause 2(m) have restricted the operation of Rules of 1981 to the housing co- operative societies formed and registered under the Co-operative Societies Act, 1965 and as explained above, the Act of 1965 and the Rules of 1966 framed thereunder have recognised only three types of housing societies. No such rule has been brought before me by which the society can be registered as housing co-operative society without the object of constructing the houses of without undertaking the responsibility of constructing house could allot the plots even to its members. The judgment of this court in the case of Vijay Singh Shekhawat referred to above was given as back as on 9.4.1990 and it is really strange that the respondents have instead of complying with the provisions of law or enforcing the provisions of law strictly in the sense in which the co-operative movement has been contemplated given a long rope for flouting it. The result is that the trading in agricultural land have developed and the beneficiaries are only the office bearers of the society and not the members. It will be seen in this case that the writ petition was filed in the year 1986 when the said person was the Secretary and now he is said to be President of the society and thus, on the face of it, it appears that the only few interested persons i.e. the office bearers changes the post amongst themselves and are trading in land as a result of which the public is looser.

21. The other circumstance which has been brought of the notice of this court that in the agreement dated 25.10.1975, a sum of Rs. 17 lacs is said to be paid in 1975. Whether it was shown to have been paid in cash or was it through cheque. The question as to whether the agreements were executed or not or are valid agreement enforceable is not in dispute before me and suits for specific performance have already been filed. No decision is needed so far as alleged agreements are concerned.

22. This court has observed in number of cases that the agreements are even

shown to have been executed by making it a pre-dated agreement. The khatedars are befooled and even the instances have come where without making the payment the amount is shown to have been paid to the khatedars. Most of them being illiterate do not even understand as to on what they have put their thumb impression. It is a matter which may require investigation but here the right of the petitioner has to be seen on the basis of the alleged agreement which is disputed by the khatedars as stated above.

23. Section 53A of the Transfer of Property Act 1882 has provided that where any person contracts to transfer for consideration of 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 has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the Law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract.

24. The above provision of Section 53A only protects the right of the transferee if the transferor or any person enforces any right against him. It is a weapon of defence and not of attack. In respect of immovable property if the value exceeds Rs. 100/- then in accordance with the provisions of Section 54 it has to be registered. In order to see the applicability of Section 53A when the question is examined as to whether the possession of the property or any part thereof has been taken by the transferee, the claim which has been made in the present case is raising altogether different position. The petitioner claiming itself to be a transferee under the agreement says that the land is in its possession since 1975 while on behalf of the Housing Board it is contended that after the notification u/s 17(4), the property vested in the Housing Board and lot of development has been carried thereon and is in their possession. The khatedar altogether disputes the position and claims their physical cultivatory possession. The position itself thus is a matter of dispute. Under law, the legal position has to be presumed on the basis of notification which was issued u/s 17(4) on 16th October 1985 that the possession is with Housing Board. It may also be observed that the petitioner claims to have taken possession in the year 1975, but no copy of Khasra Girdawari or even of Jamabandi or of mutation entry in their support have been produced. Even the copy of the agreement on the basis of which the right is claimed has not been submitted along with the writ petition and, therefore, as observed by the Apex Court in the case of Bharat Singh and others (referred to

above) it was the duty of the petitioner to have submitted the copy of such agreement. Not placing the same on record goes to prejudice to the petitioner. This is besides the point that Section 53A can be available as a prior was prior of defence and does not confer any right on the basis of which any action could be taken. The position of Rule 4 of the Rules of 1981 at the most could be considered to have given the right for moving for conversion and not beyond that. The rules cannot be contrary to the Act. If the agricultural land is put to non-agricultural use without permission then the State Government has the power to cancel the khatedari right or any other right accruing thereunder and resume the possession. On the basis of an un-registered agreement even the possession or any other right cannot be claimed as was held in the case of Delhi Motor Company, referred to above.

25. While interpreting the provisions of Rules of 1981 read with the Rajasthan Housing Co-operative Societies Act, 1965 and the Rules of 1966 made thereunder, it is abundantly clear that the Housing Societies which could move the application for conversion could be only of the categories mentioned under Rule 9 of the Rules of 1966. Lot of illegality have been committed even in converting the land for non-agricultural purposes contrary to the rules. I would not like that the citizens of Jaipur should suffers for the mistakes of State Government and, therefore, the State of Rajasthan should take immediate steps that the work of allotment of land should be undertaken only by the Jaipur Development Authority, Municipal Corporation and the Housing Board and the Housing Co-operative societies should be allowed to carry on the activities of the nature as referred under Rule 9 of the Rules of 1966 alone. A copy of this order be sent to the Chief Secretary to the State Government Commissioner JDA, Registrar Cooperative Society & Revenue Secretary for immediate compliance. The secretary plots which have so far been allotted by the society to the members contrary to the rules as explained above should be considered to be regularised so that the public may not put to any inconvenience and the procedure is so simplified that even the allegation as has been made in this case that the agreement is pre-dated or receipts have been obtained without making the payment does not happen in any other case.

26. Since, the petitioner has no right on the basis on un- registered agreement and the possession, existence of agreement, payment and other matters have been disputed, I do not consider that the present one is a fit case even for admission. This case was listed for admission on 5.4.1990 and was adjourned, then on 8.4.1993 it was directed to be listed before the Single Bench. The preliminary objection that without there being a registered sale-deed, the validity of the acquisition proceedings cannot be challenged under Article 226 of the Constitution has substance and is supported not only by various authorities of the Apex Court as also of this Court. The preliminary objection is allowed.

27. It may also be observed that initially, when the model guidelines for the Housing Co-operative Societies were framed, the societies were not authorised

by the Registrar, Co-operative Societies to allot the plots alone to its members and they were under obligation to construct the houses. These model guidelines were subsequently changed and a restriction was placed that the member-ship shall not exceed 100 and it is seen that the practically in all the cases the member-ship has exceeded 100 In number, but still no action is taken. .The decision of Anand Bhawan Nirman Sahkari Samiti v. Swaroop RLR 1989(2) 770 has also dealt with the activities of the societies and their scope of work similar to that of Krishna Co-operative Housing Society Ltd. v. Raj. Housing Society Ltd. referred to above.

28. u/s 54 of the Jaipur Development Authority Act, it is provided that notwithstanding anything contained in the Rajasthan Land Revenue Act, 1956, the land as defined in Section 103 of that Act, excluding land referred to in sub-clause (ii) of clause (a) of the said section and nazul land placed at the disposal of a local authority u/s 102A of that Act in Jaipur Region shall, immediately after establishment of the Authority u/s 3 of this Act, be deemed to have been placed at the disposal of and vested in the Authority which shall take over such land for and on behalf of the State Government and may use the same for the purposes of this Act and may dispose of the same subject to such conditions and restrictions as the State Government may, from time to time lay down and in such manner as it may, from time to time, prescribe. This Act came into force in 1982 and, therefore, the provisions of Land Revenue Act stands, superceeded by the provisions of Jaipur Development Authority Act and all the actions have to be taken by the JDA with regard to land which is situated within its jurisdiction.

29. The Registrar, Co-operative Societies should have administered the provisions of the Rajasthan Co-operative Societies Act strictly and sanction should not have been given to frame the bye-laws contrary to the Act. The conversion rules have contemplated for conversion of land on the basis of agreement of sale if the society falls in the category of Housing Society as defined in Rule 9 of the Co-operative Societies Rules. It was the duty of the Land Conversion Officer to see that the permission should have been given only to such societies which falls within the purview of Rule 9. The Registrar, Co-operative Societies is directed to ensure the compliance of the provisions of the Rajasthan Co-operative Societies Act and the Rules made thereunder and to take disciplinary action where the audit has been completed contrary to the bye-laws, Act or Rules.

30. The Commissioner, JDA has already called a list of the members as on 17.5.1994. The date was subsequently extended till 31.5.1994. The land which has been allotted by the societies to its members till that date should be tried to be regularised (except in case where the land is under acquisition or has already been acquired for any other purpose or where the plots have been allotted in such a strip of land where the construction of house is impossible like allotment of land in the area of Nala or low lying areas etc.) so that right of those plot-holders are not effected. A regular patta should be issued to the plot holders by the JDA. If there is any allotment of land or transfer of plot by any member to

another person it is for the Government to frame appropriate scheme or issue an order so that the problem of transferor/transferee is eliminated and the work is done smoothly with a charge of nominal fee.

31. I would like to observe that in this case the Additional Advocate General appeared in the year 1988, but then this writ petition was taken up for hearing on 3.1.1996 and 4.1.1996, no one appeared on behalf of the State Government. The Government Advocate present in the Court even pointed out that the file has not been allotted or given to him. I am not deciding the question raised on merit in this case in view of the preliminary objection raised and found sustainable under law, but the manner in which the cases are represented by the State Government; this is one of the example where even after 10 years, the State has not even cared to file the reply. A copy of this order be sent to the Chief Secretary to the State of Rajasthan as directed above for taking necessary action against the defaulting officer incharge. The result of the inquiry be communicated to this Court within four months and a separate file be opened for that purpose.

32. The writ petition is dismissed on the preliminary objection with the cost of Rs. 2,000/-