

(2013) 01 AHC CK 0365

In the Allahabad High Court

Case No : First Appeal From Order No. 3774 of 2012

Upkar Sahkari Avas Samiti Ltd.

APPELLANT

Vs

Bhagwan Goyal (Deceased) and Others

RESPONDENT

Date of Decision : 11-01-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 43 Rule 1(r)

Land Acquisition Act, 1894 — Section 4, 48(1), 6

Transfer of Property Act, 1882 — Section 52

Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 28, 32

Citation : (2013) 1 ADJ 787 : (2013) 97 ALR 802 : (2013) 119 RD 477

Hon'ble Judges : Sunil Ambwani, J; Aditya Nath Mittal, J

Bench : Division Bench

Advocate : Navin Sinha and Shesh Kumar, for the Appellant; Ravi Kant and P.C. Jain, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Shri Navin Sinha, Senior Counsel assisted by Shri Shesh Kumar for the plaintiff-appellant. Shri Ravi Kant, Senior Counsel assisted by Shri P.C. Jain appears for the defendant-respondent No. 9. With the consent of parties, the appeal was heard. This First Appeal From Order under Order XLIII Rule 1(r) of CPC arises out of judgment and order dated 12.10.2012 passed by the Additional District Judge, Court No. 1, Agra in Original Suit No. 262 of 2006, by which he has rejected the application-Paper 133-Ga filed by plaintiff for interim injunction restraining M/s. Banara Infrastructure Development Limited, Shashtripuram Chauraha, Agra through Shri P.L. Jain from changing the nature of the property and raising construction in any manner over the land in question.

2. The Original Suit No. 262 of 2006 has been filed by Upkar Sahkari Avas Samiti Limited through its Secretary Shri Rajiv Kumar Mittal (the plaintiff-appellant) for specific performance of agreement of sale dated 22.1.1990, executed by Shri Bhagwan Goyal (dead) and defendant Nos. 2 and 3 and Smt.

Hira Devi, mother of defendant Nos. 1, 2 and 3, in favour of the plaintiff's society for sale of 1.5526 hec. (6 bigha, 14 biswa, 15 biswansi) in Mauja Kakraitha Mustikala, Tehsil, Pargana and District Agra, for sale consideration of Rs. 13,15,000/- out of which Rs. 60,000/- was paid on 22.1.1990 and another amount of Rs. 1,40,000/- was paid, with an agreement to pay the remaining amount of Rs. 11,15,000/- at the time of execution of the sale-deed, after the defendants provides a certificate of having good title on the land to the plaintiffs. The land at that time was acquired for U.P. Awas and Vikas Parishad. It was agreed between the parties that the plaintiff will take steps and will bear the expenses for releasing the land from acquisition. The land was released from acquisition u/s 48(1) of the Land Acquisition Act on 17.2.2006 but that the plaintiff did not sell the land on which this suit for specific performance was tiled on 20.3.2006.

3. It was alleged in the plaint, that during the proceedings of the suit the defendant Nos. 1 to 3 have sold the rights in the land for 11 biswa and 11 biswansi to defendant No. 2 for Rs. 16,10,000/- and that defendant Nos. 6 and 7 have sold their rights in the land on 28.7.2003 to defendant No. 8. The defendant No. 4 has sold 11 biwas and 11 biswansi land to defendant No. 5 on 19.5.2003 for Rs. 17,00,000/- and on 9.6.2004 the defendant No. 8 has sold the right to receive compensation in respect to 6 bigha, 3 biswa and 4 biswansi land by sale-deed dated 9.6.2004 for Rs. 7 lacs and these documents have been executed to defraud and to cause loss to the plaintiff.

4. The plaintiff society filed an application (Paper 74-Ga) on 17.2.2009 to restrain the defendants to sell the property or to execute any documents of transfer; to give possession of the land to any person or to change the nature of the land. This application was rejected by the trial Court on the ground that if any sale is made, the same shall be hit by the principle of lis-pendens.

5. M/s. Banara Infrastructure Development Limited-the defendant No. 9 made an application to the Agra Development Authority for sanction of the building plans on the land in Khasra Nos. 771, 774 and 776 (the disputed land) disclosing that it is in possession of the subject land. The Agra Development Authority sanctioned the plan on 2.7.2010. A show-cause notice was given by the Vice-Chairman, Agra Development Authority to Shri P.L. Jain for cancellation of the building plan on the ground that Shri P.L. Jain had made a false declaration in his application for sanction. Shri P.L. Jain filed a Writ Petition No. 70253/2010 on which the Agra Development Authority has withdrawn the notice to cancel the sanction of the building plans. The plaintiff-appellant alleged in its fresh application for injunction that M/s. Banara Infrastructure Development Limited wants to raise construction over the land, whereas it is consistently taking a stand in the High Court and before the Stamp Officer as well as in the Board of Revenue and its representations that it is not in possession nor it is owner of the land and that the transferees have transferred only the rights in the land to it. It was alleged that the plaintiff is ready to execute the contract of sale and that if

the nature of the land is changed or constructions are raised, the plaintiff will suffer irreparable loss.

6. M/s. Banara Infrastructure Development Limited-defendant No. 9 objected to the application stating that the earlier application (74-Ga) for interim injunction was disposed of on merits on 12.1.2010 and thus any fresh application on the same cause and for the same relief is barred by principles of *res judicata*. The plaintiff filed Writ Petition No. 33056 of 2012 (Upkar Sahkari Awas Samiti Limited v. State of U.P. and others) seeking reliefs against defendant No. 9, which was disposed of by the Court with directions to the Agra Development Authority to decide the representation. The land was acquired by U.P. Avas Evam Vikas Parishad for which notifications were issued under Sections 28 and 32 of the U.P. Avas Evam Vikas Adhiniyam, which are equivalent to Sections 4 and 6 of the Land Acquisition Act, and an award of compensation was also declared on 28.6.1980. The owners of the land, therefore, could not have executed any agreement to sale on 20.1.1990 as on that date they were neither owners nor in possession of the property. The agreement was void. The plaintiff is not in possession of the land in dispute and thus the second application for injunction was liable to be rejected.

7. The Additional District Judge, Court No. 1, Agra by his order dated 12.10.2012 has rejected the application on the grounds that in the order dated 12.1.2010 rejecting the earlier injunction application it was admitted by the plaintiff that he was not in possession of the land; that the defendant Nos. 1 to 4 have sold the land by executing various documents and finally all the rights have been transferred to defendant No. 9. The plaintiff also admitted that the document of title was registered in favour of defendant No. 9 on 9.6.2000 and that the suit was filed much later on 9.6.2000, whereas the present suit was filed on 6.1.2006. The rights in the property were transferred to defendant No. 9, two years prior to filing of the suit. The agreement to sale was executed in favour of the plaintiff on 20.1.1990. The plaintiff filed an amendment application to amend the prayers for getting all the sale-deeds declared as null and void and thus the plaintiff's interest not being in possession of the land would not be affected, if the property is sold during the pendency of the suit to any third person. Such transferees can also be impleaded as defendants as in the case of defendant No. 9.

8. The trial Court found that the second application for injunction was filed three years after the rejection of the first application without any change in the circumstances regarding possession or construction over the land. The plaintiff did not make any application for appointment of any commissioner for obtaining the report on the status of possession on the land.

9. The trial Court further found that the building plans for seven blocks were sanctioned and that since no fresh relief has been sought nor the circumstances have changed in any manner inasmuch as in the earlier orders the Court had observed that if any constructions are raised, they can be removed under the

orders of the Court, if the suit is decreed. It further found that the fact of filing of the Writ Petition No. 33056 of 2012 by the plaintiff against the sanction of the building plan, and in which prayers were also made that the defendant No. 9 may not raise any constructions or change the nature of the land, was not pleaded in the suit. The trial Court observed that the plaintiff has not come with clean hands, and would be responsible for legal complications, if any injunction is granted on the second application.

10. Shri Navin Sinha, Senior Counsel appearing for the plaintiff-appellant submits that the execution of the agreement to sale by the owners in favour of the plaintiff was not denied. The plaintiff was pursuing the matter for sale of land, which was possible only after the land was released from acquisition. Under the terms of the contract the owners were required to execute the sale-deed, after the land is released from acquisition. By a notification issued by the State Government for U.P. Awas Evam Vikas Parishad, the land was released from acquisition on 17.2.2006, after which without wasting time the plaintiff filed the suit for specific performance of contract on 20.3.2006. During the pendency of the suit it transpired that the owners have executed several documents and have finally executed the document of sale in favour of defendant No. 9 on 9.6.2004 and have handed over the possession of the land. The defendant No. 9. made an application for sanction of building plans, which were suspended on the objections made by the plaintiff. He submits that the plaintiff is always ready and willing to perform its part of contract and if the nature of the land is changed and sale-deeds are executed in favour of the allottees of 161 flats to be constructed according to the sanction plan, the plaintiff's rights will be seriously prejudiced. Shri Sinha submits that all the three conditions for grant of injunction, namely the prima facie case; balance of convenience and irreparable injury is in favour of the plaintiff and further the equity also lies in favour of the plaintiff to grant interim injunction after which the Court may direct the trial Court to decide the suit expeditiously.

11. Shri Navin Sinha has relied upon *Dorab Cawasji Warden Vs. Coomi Sorab Warden and others*, and *Julien Educational Trust Vs. Sourendra Kumar Roy and Others*, , in support of his argument for grant of injunction in a case where a suit for specific performance of contract has been filed by the plaintiffs. He has also relied upon *Arjun Singh Vs. Mohindra Kumar and Others*, *G.N. Nayak Vs. Goa University and Others*, and a judgment of learned Single Judge of this Court in *Smt. Tara Devi v. District Judge, Basti*, 2003 ALJ 399, in which it was held, that where new facts and circumstances have subsequently emerged, it is open to the Court to pass suitable orders. In such case, the earlier orders passed in respect of the same relief will not operate as bar on the basis of principle of *res judicata* or issue of estoppel. The principle of *res judicata* in the same proceedings are applicable, where any issue is determined in a controversy raised in the suit and such order puts an end to the litigation on such issue.

12. Shri Ravi Kant, Senior Counsel appearing for M/s. Banara Infrastructure

Development Limited-respondent No. 9 states that there was no change of facts and circumstances for filing a second application for interim injunction after three years of the rejection of the first application. The sanction of the building plans at the instance of defendant No. 9 did not change the circumstances in which the second application for injunction could be filed. The reliefs claimed in the first application were also for a direction to the defendants not to change the nature of the land or to raise any constructions in any manner. The trial Court had rejected the first application on the ground that if the land is sold in the meantime, the principle of lis-pendence will apply and that if any constructions are raised, the same can be demolished and the possession given to the plaintiff, if the suit for specific performance of contract succeeds. In between the first and second application the only change was the sanction of building plans. The ground was already considered and rejected and that the plaintiff did not file any appeal against the rejection of the first application for grant of injunction.

13. Shri Ravi Kant submits that the plaintiff does not have a good or sustainable prima facie case inasmuch as the agreement with the plaintiff was conditional upon the release of the land. It was a case of contingent contract. On the date of agreement of sale, the land was acquired by the U.P. Awas Evam Vikas Parishad. The transfer of rights, if the land was released from the acquisition and for which the steps were to be taken by the plaintiff, would not give to the plaintiff a right for execution of the sale-deed after the land was released. The plaintiff did not take any steps and had virtually given up the claim for execution of the sale-deed in its favour for 16 long years between 22.1.1990, when the agreement was executed, upto 22.3.2006 when the suit for specific purposes of contract was filed. In between the land was sold for valuable consideration and was ultimately purchased by defendant No. 9, who had made huge investment on the land and had got the building plan sanctioned. It is submitted that the reliefs for specific performance of contract is a discretionary relief and cannot be granted to the plaintiff, who did not take any steps for 16 years in getting the land released from the acquisition. The defendant No. 9 has purchased the land for valuable consideration and has got the building plans sanctioned in which the residential flats are to be constructed. There was no injunction or restraint order when the defendant No. 9 had purchased the land nor any public notice was given at any time by the plaintiffs, and thus the sale-deed executed in favour of the defendant No. 9 cannot be affected by any relief given in the suit. At best the plaintiff is entitled to return of Rs. 2 lacs given as part of the sale consideration in the year 1990. He has relied upon *Kishorsinh Ratansinh Jadeja Vs. Maruti Corp. and Others*, , in which the Supreme Court held in paragraphs 22, 23 and 24 as follows:

22. It is well established, that while passing an interim order of injunction under Order XXXIX Rules 1 and 2 CPC, the Court is required to consider three basic principles, namely,

(i) prima facie case;

(ii) balance of convenience and inconvenience; and

(iii) irreparable loss and injury.

None of the said principles have been considered by the High Court while passing the second and third interim orders dated 22nd April, 2008 and 7th May, 2008, nor has the High Court taken into account the long silence on the part of the Respondent No. 1 Corporation in filing a suit after 19 years.

23. In our view, while passing the interim order dated 7th May, 2008, the High Court ought to have considered the effect which its order would have on the 280 transferees to whom some portions of the land had already been sold and who had commenced construction thereupon, particularly when they were not even parties in the appeal, nor were they heard before they were enjoined from continuing with the construction work. Such an order affecting third party rights in their absence, as they were not parties to the proceedings, cannot be sustained having further regard to the manner in which the said order was passed. An application for an order which would have far and wide reaching consequences was sought to be disposed of by the Division Bench on the very next day without giving an opportunity of controverting the allegations made therein even to those who were parties in the suit, though it had been brought to the notice of the Court that conveyances had been executed in favour of 280 purchasers. This is not a case where the appellant and the other co-owners had violated any restraint order passed by the Court in transferring the plots in question to the said 280 transferees. The said transfers were effected at a point of time when there was no injunction or restraint order against the appellant and the other owners of the property and as far as the said transfers are concerned, the only order that could have been passed on the said application is the order which was passed at the first instance on 29th January, 2008, based on the principles of Section 52 of the Transfer of Property Act, 1882. The restraint order on the transferees must, therefore, be held to be bad and liable to be set aside.

24. As far as the lands which the appellant and the other joint owners have been restrained from alienating by the second order dated 22nd April, 2008, are concerned, we are of the view that in the event the order of 22nd April, 2008, is set aside, the Respondent No. 1 can be compensated in terms of money and no irreparable loss and injury will be caused to it on account thereof. On the other hand, if the owners of the property remain restrained from developing the same, it is they, who will suffer severe prejudice, as they will be deprived of the benefit of the user of their land during the said period. The balance of convenience and inconvenience is against grant of such injunction. The success of the suit for specific performance filed by the Respondent No. 1 depends to a large extent on tenuous proof of genuineness of the agreement sought to be enforced after 19 years, despite the finding of the Trial Court that the suit was not barred by limitation.

14. We have considered the respective submissions and do not find that the

principles of res judicata, or issue estoppel are attracted inasmuch as the plaintiff can apply for interim relief at any stage or stages in the suit provided the facts and circumstances have changed, which warrant the grant of equitable relief of injunction to the plaintiff. The principles of res judicata or issue estoppel are attracted, if any of the rights of the parties in the proceedings of the suit are decided which have attained finality and cannot be challenged in subsequent proceedings on the issues raised and decided between the same parties. The grant of injunction based on prima facie case, balance of convenience and irreparable injury as well as the consideration of equitable relief as held in Mandali Ranganna and Others etc. Vs. T. Ramachandra and Others, , may not remain static during the proceedings of any case. The facts and circumstances may change in which either party can request the Court to grant interim injunction to protect or preserve the property, or the interest of the parties which may change from time to time. The Court, however, cannot on the pretext of granting equitable relief on the new facts and circumstances, change its opinion and grant reliefs, which were earlier refused on same facts and circumstances.

15. In the present case, we find that the claim set up by the plaintiff for specific performance of contract did not make out a prima facie case for the reasons that the plaintiff after execution of the agreement did not take any steps on its part as agreed by it for getting the land released from acquisition. The contract of sale of land, which was acquired by the State Government for U.P. Awas Evam Vikas Parishad on the date of agreement, was contingent upon the release of land from acquisition and for which the plaintiff was required to take all steps and incur requisite expenses. There are no pleadings that the plaintiff had taken any steps to get the land released. The land was ultimately released from acquisition on 17.2.2006, by which time the owners had entered into several transactions and finally the defendant No. 9 had acquired the rights on 9.6.2004. It was admitted that the plaintiff is not in possession and that the defendant No. 9 is in possession of the land on which it had given an application for sanction of the building plans. There was no order operating against the owners or defendant No. 9 inasmuch as the suit for specific performance of contract was filed on 20.3.2006.

16. We do not find that the trial Court committed any error of law in rejecting the second application for injunction on the ground that the plaintiff-appellant did not have a good prima facie case and further on the ground that the circumstances did not materially change for grant of injunction three years after the earlier application for injunction was rejected. The First Appeal From Order is dismissed.