

Rajesh Shankar Mathur Vs. D.D.A. and ors.

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Court : Delhi

Decided On : Jan-04-2005

Reported in : 2005(80)DRJ17

Judge : Pradeep Nandrajog, J.

Acts : Transfer of Property Act - Sections 41

Appeal No. : WP(C) No. 715/98

Appellant : Rajesh Shankar Mathur

Respondent : D.D.A. and ors.

Advocate for Def. : Neelima Tripathi, Adv. and ; Poonam, Adv. for respondent No. 2 in WP(C) No. 715/98

Advocate for Pet/Ap. : Jasmeet Singh, Adv. in WP(C) No. 528/98,; Rajesh K. Sharma, Adv. in WP(C) No. 653/98 and;

Disposition : Petition dismissed

Judgement :

Pradeep Nandrajog, J.

1. All petitioners claim benefit all Section 41 of the Transfer of Property Act and pray that DDA be restrained from dispossessing the petitioners from the flat,

subject matter of each writ petition.

2. defense of DDA is that a fraud has been played upon it. Whether the original allottee or whether the petitioners are parties to the fraud is under investigation with CBI, It is urged by DDA that since issue of fraud arisen between the parties, on the pleadings as laid, without recording evidence, relief cannot be granted to the petitioner and accordingly, DDA prays that writ petitions be dismissed.

3. Case pleaded by Rajesh Kumar Shankar, writ petitioner in WP(C) No. 529/98 is that being desirous of purchasing a flat, he approached one Shri Ram Avtar Gupta who was rendering services as a property broker. Respondent No. 2, who was allotted flat No. 4-A, G.F., Pocket-C, Category-III, Kondli Gharoli, New Delhi was desirous of selling the flat which was allotted to him by DDA. The broker, Ram Avtar Gupta negotiated the deal on behalf of the petitioner with respondent No. 2. An agreement was entered into between the petitioner and respondent No. 2 on 14.10.1997 by and under which agreement, respondent No. 2 agreed to sell the flat to the petitioner for a sale consideration of Rs. 10,50,500/-. It is stated in para 8 of the petition that the entire sale consideration was paid by the petitioner to respondent No. 1. Counsel for the petitioner states that this is a typing mistake. The sentence should read that the entire sale consideration was paid by the petitioner to respondent No. 2. It is further pleaded by the petitioner that respondent No. 2 executed an agreement to sell, general power of attorney, special power of attorney and a will in favor of the petitioner on 14.10.1997. It is further the case of the petitioner that DDA had handed over possession of the flat to respondent No. 2 on 10.10.1997 and that on 14.10.1997, respondent No. 2 handed over possession of the flat to the petitioner. Grievance in the petition is that on 29.1.1998, officers of DDA came to seal the flat. It is stated by the petitioner that he is a bonafide purchaser for value.

4. defense of DDA is that the flat in question was allotted to respondent No. 2 at a draw held on 31.12.1996. Demand-cum-allotment letter was issued to respondent No. 2 on 11/25-4-1997. Respondent No. 2 was to deposit a sum of Rs. 8,72,415/- within 60 days. With the connivance of officers of DDA, respondent No. 2 managed to deposit with DDA fake challans evidencing deposit with DDA. There

upon, possession of the flat was handed over to respondent No. 2, but when it was discovered that no deposit was made and the challan was a fabricated document, DDA proceeded to revoke the allotment and repossess the flat.

5. In the counter affidavit filed by him, respondent No. 2 states that when he received the demand-cum-allotment letter dated 11/25-4-1997, he did not have the requisite sum. He was contacted by one Raju Aggarwal who acts as a property broker. Raju Aggarwal agreed to purchase the allotment for a sale consideration of Rs. 90,000/-. Raju Aggarwal agreed to deposit the amount demanded by DDA. He received Rs. 90,000/- from Raju Aggarwal and handed over to him all original documents issued to him by DDA. On 7.10.1997, he was asked by Raju Aggarwal to come to the flat in question and receive possession. He reached the flat on 10.10.1997. Raju Aggarwal took him to the office of DDA where he signed the possession slip. He did not take possession of the flat. Raju Aggarwal told him that he i.e. Raju Aggarwal would collect the possession slip. Raju Aggarwal told him that he had arranged for sale of the flat to the petitioner and that he would be required to execute certain documents. He executed the documents as were furnished to him by Raju Aggarwal. These documents were in favor of the petitioner. Respondent No. 2 denies receipt of any payment from the petitioner.

6. Case pleaded by Rakesh Kumar Jain, writ petitioner in WP(C) No. 653/98 is that the petitioner was desirous of purchasing a flat and was approached by Ram Avtar Gupta who stated that he was acting as a property broker. Respondent No. 1, DDA, had allotted flat No. 39-A, G.F, Pocket-C, under SFS 9th Scheme to respondent No. 2. On 11/25-4-1997, demand-cum-allotment letter was issued by DDA to respondent No. 2 demanding a sum of Rs. 8,72,415/-. Respondent No. 2 complied with the demand, in that, deposited the sum demanded vide challan No. 097142 dated 6.8.1997 issued by the Central Bank of India, New Delhi. Thereupon, vide letter dated 1.10.1997 DDA handed over possession of the flat to respondent No. 2. It is further the case of this petitioner that Ram Avtar Gupta, property broker, negotiated on behalf of the petitioner with respondent No. 2 for sale of the flat. On 14.10.1997, respondent No. 2 agreed to sell the flat to the petitioner for sale consideration of Rs. 10,50,000/-. Entire sale consideration was received by the respondent No. 2 evidenced by the receipt. Possession was taken

by the petitioner thereafter. On 28.10.1997, DDA executed the regular conveyance deed in favor of respondent No. 2 which was duly registered with the sub-Registrar, New Delhi. Thereafter, on 20.11.1997, respondent No. 2 executed a sale deed in favor of the petitioner. It is stated that the petitioner is a bonafide purchaser for valuable consideration and DDA cannot resume possession of the flat.

7. Counter affidavit filed by DDA states that a fake deposit challan was received. There is connivance of officers of DDA. Fraud has vitiated the transaction between DDA and respondent No. 2. No title can thus be said to be conveyed to respondent No. 2. For, fraud vitiates every transaction. DDA accordingly justifies action to repossess the flat.

8. Case pleaded by the writ petitioner in WP(C) No. 715/98 is on similar lines. It is stated by this petitioner that respondent No. 2 who was allotted flat No. 21-D, 3rd Floor, Pocket-D, Kondli Gharoli, New Delhi, vide demand-cum-allotment letter dated 11/25-4-1997. He intended to sell the flat. Raju Aggarwal acted as a property broker. Petitioner entered into an agreement to sell dated 2.1.1998, as per which, respondent No. 2 agreed to sell the flat for a sum of Rs. 11 lacs. Though, in the petition it has not been averred by this petitioner that he paid the entire sale consideration to respondent No. 2, agreement to sell being Annexure P-6 records the aforesaid fact. It is stated by this petitioner that when he was negotiating for purchase of the flat, he was shown challans evidencing deposit of payment pertaining to the flat in question in the account of DDA with the Central Bank of India.

9. defense of DDA is the same, namely, that a fraud has been played.

10. It may be noted that respondent No. 2 in WP(C) 653/98 and WP(C) 715/98 have not filed a counter affidavit.

11. It has to be noted that whereas in WP(C) No. 528/98 and WP(C) 765/98, conveyance deeds were not executed by DDA in favor of the allottee, a conveyance deed has been executed in favor of the allottee in WP(C) 653/98. Further, possession of the allotted flat has not been handed over by DDA to

allottee in WP(C) No. 715/98.

12. The normal rule of law is that no person can convey a title better than his and no person can convey a title if he has none. However Section 41 of the Transfer of Property Act carves out an exception. Section 41 of the Transfer of Property Act reads as under:-

'41. Transfer by ostensible owner.- Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.'

13. The Section, carves an exception to the general rule that no one can convey a better title than he himself has in the property. The principal of the section is that law will hold against a person whose indiscretion has enabled the fraud and favor him who is in possession as a victim. As held in *Ram Coomar v. Mc Queen*, 18 WR 166 :

'It is a principal of natural equity, which must be universally applicable, that where one man allows another to hold himself out as the owner of an estate, and a third person purchases it for value from the apparent owner in the belief that he is the real owner, the man, who so allows the other to hold himself out, shall not be permitted to recover upon his secret title unless he can overthrow that of the purchaser by showing that either he (the purchaser) had a direct notice, or something which amounted to constructive notice of the real title, or that there existed circumstances, which ought to have put him upon an enquiry, which, if prosecuted, would have led to a discovery of it.'

14. Being an exception to the general rule, conditions laid down in Section 41 of the Transfer of Property Act must be strictly fulfilled before its benefit can be availed by the transferee.

15. Though, learned counsel for the petitioners relied upon : [1979]2SCR424 , Syed Abdul Khader v. Rami Reedy and Ors., , State of Maharashtra and Ors. v. Kanchanmala V. Shirke and Ors. to argue that the employer would be constructively liable for acts done by his employee, I propose not to deal with the same for the reasons which shall follow shortly. I would also not be dealing with the decision cited, being AIR 1965 Pun 40, Smt. Asharfi Devi v. Trilok Chand, as also the decision of the Supreme Court : [1999]3SCR1279 , Common Cause v. Union of India for the same reason.

16. I am not dealing with the authorities aforesaid lest any observation in the present judgment were to prejudice any party; judicial discretion would guide that no opinion be expressed on disputed question of fact which would require evidence, till evidence is led.

17. Pleadings of the writ petitioner in WP(C) 528/98 are categorical that he paid the sale consideration to respondent No. 2 and thereafter took possession of the flat. Respondent No. 2 categorically states that he only received a sum of Rs. 90,000/- and that too from the broker Raju Aggarwal. Respondent No. 2 has disclaimed anything to do with the deposit with DDA.

18. In the instant case, conveyance deed has not been executed by DDA in favor of the allottee, though, possession of the flat was handed over as apparently, a deposit challan was deposited with DDA evidencing deposit of payment.

19. In view of the defense of respondent No. 2 that he had nothing to do with the fake challan, evidence would be required to be lead by this petitioner. The petitioner would have to establish that he is a bonafide purchaser. He would have to establish that he caused reasonable enquiries to be made in the office of DDA. It may be true that possession was handed over by DDA to the allottee, but that would be a circumstance favorable to the petitioner. It would be open to DDA to lead evidence in rebuttal, may be even to show that the petitioner was fully aware of what was happening. It would be open for DDA to establish, in the context of evidence of respondent No. 2 that claim of the petitioner that he paid the entire consideration to respondent No. 2 is false. It would be open for DDA to establish that petitioner was a gullible buyer.

20. Petitioner of WP(C) 653/98 would also be required to establish that he paid the entire sale consideration to respondent No. 2. We do not have on record, as respondent No. 2, the allottee, chose to remain absent as to what his version is. All defenses noted above, qua writ petitioner of WP(C) 528/98 would be available to DDA. All of which would require evidence to be led. It may be true that as far as WP(C) 658/98 is concerned DDA has even executed a conveyance deed in favor of allottee, but that would be one of the factors in favor of the petitioner.

21. Similar would be the position in WP(C) 715/98. Unfortunately for this petitioner, his position is a little weak inasmuch as even possession of the flat was not handed over.

22. All petitioners would require evidence to be led in support of their plea that they are bonafide purchasers for valuable consideration. They would have to lead evidence as to who received the consideration from them. They would have to lead evidence that they cause enquiries to be made. They would have to lead evidence that all reasonable care required was taken by them. DDA would be entitled to lead rebuttal evidence to show as to how fraud was committed and if possible, even show the involvement of the petitioners. Certainly, DDA cannot be denied the right to do so.

23. I am not, therefore, dealing with the legal issue, whether in a case of fraud of the kind, Section 41 of Transfer of Property Act would be attracted or not. I am also not, therefore, dealing with the issue as to whether an employer would be vicariously liable for a fraud committed by his employee, not in the official course of his duties, but in conspiracy with third parties.

24. Even otherwise, issues of title have to be got adjudicated through a civil court. Writ jurisdiction is not to create a title, may be in appropriate case, writ jurisdiction could be invoked to seek a declaration. Pleadings of the parties and facts of the three cases would require, creation of a title in favor of 2 out of 3 writ petitions.

25. Rule is accordingly discharged. Writ petitions are dismissed. However, it would be open to the petitioners to file a civil suit. Petitioners of WP(C) 653/98 and WP(C) 528/98 have interim orders in their favor requiring DDA to maintain status

quo. To enable the said petitioners, if they are advised to file a civil suit and obtain interim orders, order of status quo granted in the said two writ petitions would continue to operate for a period of 3 weeks from today.

26. Needless to state that nothing observed in the present judgment would be construed as an expression on the merits of the claim or the defense of the parties. If petitioners file a suit, the civil court would adjudicate the matter on the basis of evidence which would be led by the parties.

27. No costs.

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