

Ajmera Housing Corporation

Vs

Amrit M. Patel (Dead) Through Lrs. and Others

Civil Appeal No. 3589 of 1998

(S. B. Majmudar, M. Jagannadha Rao JJ)

03.08.1998

JUDGMENT

M. JAGANNADHA RAO, J. –

1. Leave granted.

2. This is an appeal against the judgment of the Gujarat High Court dated 2-3-1998 dismissed CRA No. 1342 of 1996 filed under Section 115 of the Code of Civil Procedure. By that judgment, the order of the trial court dated 1-8-1996, dismissing an application filed by the appellant under Order 1 Rule 10, Section 146 and Order 22 Rule 10 CPC for impleadment as a plaintiff in the suit, was confirmed.

3. For the purpose of appreciating the questions raised before us, it is necessary to state the following facts :

The appellant is a third party to Suit No. 1761 of 1988 which was pending before the City Civil Judge, Ahmedabad. The suit was filed by a builder, one Amrit M. Patel, who was the predecessor-in-interest of Respondents 1-A to 1-C, against three defendants, viz., (1) Arjun Bhai Jayanti Lal Parikh, (2) Nirmalaren Arjunbhai Parikh and (3) Indrajit Arjunlal Bhai Parikh (predecessors-in-interest of Respondents 2-A to 4). The relief claimed was for specific performance of an agreement dated 4-2-1982 executed by the three defendant-owners of the property (hereinafter called "the owners") in favour of the said Amrit Mohan Lal Patel (plaintiff) (hereinafter called "the Builder"). The said Builder was the sole proprietor of a firm called "Star Builders". The plaintiff entered into the abovesaid agreement with the defendants for the purposes of development of the defendants' property by construction of flats. Ultimately, after the land was developed and the flats were constructed, the owners and the builder were to join in the sale deeds to be executed in favour of the purchasers of the flats. Under the agreement, it was also agreed that the defendant-owners would get Rs. 400 sq. ft. of built-up area as mentioned in clause 15 of the agreement. Further, the Builder was to pay Rs. 3 lakhs on or before the execution of the agreement, Rs. 21 lakhs within 3 months from the date of agreement and Rs. 22 lakhs from the date of payment of Rs. 21 lakhs. The Builder paid Rs. 3 lakhs as aforesaid and accordingly to the defendants, he committed default in payment of Rs. 21 lakhs as well as of the further amount of Rs. 22 lakhs. Simultaneously with the abovesaid agreement, the three owners executed an irrevocable general power of attorney dated 4-2-1982 in favour of the Builder.

4. Six years later, the plaintiff-Builder entered into an agreement dated 26-2-1988 with the appellant, Ajmera Housing Corporation (hereinafter called "the Developer") under which the appellant was to undertake the development of the property. On the same day, the plaintiff executed an irrevocable power of attorney in favour of the appellant. The points that arise in the revision mainly turn upon the interpretation of the clauses in this agreement dated 26-2-1988 by the Builder in favour of the appellant-Developer.

5. On the ground that the defendant-owners did not allow the plaintiff-Builder to develop the property, the Builder filed the present suit on 8-4-1988 impleading the owners as Defendants 1 to 3 and claiming various reliefs, i.e., specific performance of the agreement dated 4-2-1982, certain injunctions in regard to the property and possession of that part of the property which was in the possession of the owners. An alternative prayer was also made for damages in a sum of Rs. 81 lakhs against the owners. Pending the suit, one of the owners Arjun Bhai Jayanti Lal Parikh died and his legal representatives were brought on record.

6. After the filing of the suit, the plaintiff-Builder, Shri Amrit Mohan Patel died on 18-4-1995 and his legal representatives were also brought on record. During the pendency of the suit, a deposit of Rs. 21 lakhs was made by the plaintiff-Builder into court. There is a dispute between the plaintiff's legal representatives and the appellant-Developer in regard to the said amount of Rs. 21 lakhs. The legal representatives of the plaintiff-Builder contend that the said amount of Rs. 21 lakhs belongs to their father late Amrit Mohan Lal Patel and that he had deposited the said amount in the Court from his funds. But the contention of the appellant-Developer is that it was he who gave the said amount to the Builder for such deposit. The said amount of Rs. 21 lakhs was invested by the trial court in a fixed deposit.

7. The present proceedings arise in the following manner :

During the pendency of the suit, the legal representatives of the plaintiff filed interlocutory application (Ex. 125) seeking to withdraw the suit under Order 23 Rule 1 CPC and in that application they naturally impleaded only the owners-defendants as respondents. It appears that the said respondents had no objection to the withdrawal of the suit. In the said suit, the appellant-Developer filed the present application (Ex. 136) under Order 1 Rule 10, Section 146 and Order 22 Rule 10 CPC for being impleaded and for "substituting" himself as a plaintiff in the place of deceased Builder, late Amrit Mohan Lal Patel, notwithstanding that the legal representatives of the original plaintiff were already brought on record and they had desired to withdraw the suit. The appellant claimed in his application that he was an "assignee" of the interest of the plaintiff-Builder in view of the agreement dated 26-2-1988 executed by the plaintiff in his favour and he, therefore, wanted to continue the said suit for specific performance of the agreement dated 4-2-1982 against the owners.

8. The learned trial Judge by his order dated 1-8-1996 permitted withdrawal of the suit by the legal representatives of the plaintiff-Builder and rejected the application of the appellant-Developer for being substituted as a plaintiff in the suit. He initially rejected the contention of the defendants' counsel, Shri Vakil that the plaintiff-Builder could not have assigned his rights without the consent of the owners and also the further contention for the owners that the agreement dated 4-2-1982 was based upon the special skill of Shri Amrit Mohan Lal Patel and was of a personal nature and therefore not assignable. Having rejected the above contention of the owners, the trial Judge,

however, felt that the language of the agreement dated 26-2-1988 by the Builder in favour of the Developer showed that under the latter agreement, the development rights were merely "entrusted" to the Developer by the Builder and that there was no "assignment" of the rights which the Builder got under the first agreement of 4-2-1982 in favour of the Developer. According to him, the second agreement dated 26-2-1988 was an independent agreement by the Builder in favour of the Developer. The learned Judge rejected the contention of Shri Shelat on behalf of the appellant-Developer that Section 146 or Order 22 Rules 9, 10 were attracted to the facts of the case. According to him, "entrustment" of development work by the Builder to the Developer could not be equated with "assignment" of his rights under the earlier contract. The learned Judge also held that in any event, as it was not a case of assignment of "all the rights" of the Builder, the Developer could not be treated as an assignee and, therefore, the appellant could not be treated as a legal representative of the deceased plaintiff. The subsequent transaction dated 26-2-1988 was only a "part" of the transaction covered by the earlier agreement dated 4-2-1982. Further, the plaintiff could not be said to be a necessary party to the suit inasmuch as he did not have any direct interest in the property. The Developer was not a party to the agreement dated 4-2-1982 sought to be enforced. The Court relied upon *Anil Kumar Singh v. Shivnath Mishra* ((1995) 3 SCC 147) where, in the context of Order 1 Rule 10(2) CPC and Order 22 Rule 10 it was held that a person who claimed to have subsequently acquired interest as a co-owner was neither a necessary nor a proper party and could not be impleaded even as a defendant. For the above reasons, the application of the plaintiff's legal representatives for withdrawal of the suit was allowed and the application of the appellant for being substituted as a plaintiff was dismissed.

9. In the revision filed by the appellant in the High Court, it was held while dismissing the revision, that there was no clause in the agreement dated 26-2-1988 which provided or which could be construed as a transfer of rights by the plaintiff in favour of the appellant with respect to the suit property. Hence there was no "assignment". The High Court however, differed from the trial court on the question as to whether the plaintiff-Builder could assign the benefits or liabilities under the agreement dated 4-2-1982 to the appellant, without the consent of the original owners. The Court held that such consent of the owners was indeed necessary for the assignment. The Court held that the agreement dated 26-2-1998 was an independent agreement between the Builder and the Developer. It was contended in the High Court by the learned counsel for the appellant that inasmuch as the appellant had deposited Rs. 21 lakhs before the trial court (a contention disputed by the plaintiff's legal representatives), the said fact coupled with the execution of power of attorney by the Builder in favour of the Developer on 26-2-1988, amounted to an "assignment". This contention was also not accepted by the High Court. The Court held that neither Order 22 Rule 10, nor Section 146 nor Order 1 Rule 10 CPC applied. Order 22 Rule 10 did not apply because there was no assignment and even if there was one, it was not during the pendency of the suit but before the suit. Again, Section 146 did not apply because there was no "assignment" and the purpose of Section 146 was different. Order 1 Rule 10 did not apply as the appellant was a third party to the agreement dated 4-2-1982. For the above reasons, the revision was dismissed.

10. In this appeal, the learned Senior Counsel for the appellant Shri S. K. Dholakia contended that the agreement dated 26-2-1988 amounted at least to an assignment of the "development" rights if not of other rights of the Builder and that that was sufficient to bring the case under Section 146 or Order 1 Rule 10 CPC. Learned counsel fairly conceded that Order 22 Rule 10 CPC did not apply because the agreement dated 26-2-1988 was not one entered into a pending suit but was one entered into before the suit. The clauses in the agreement dated 26-2-1988 and the power of attorney of the same date were explained for contending that it was not a case of "entrustment" but a case of "assignment". It was contended that the view of the High Court that consent of the owners was

necessary before the Builder could enter into an agreement with the appellant-Developer was not correct. It was argued that the trial court was right in this behalf in holding that such consent was not necessary and in also holding that the contract with the plaintiff was not one based on the special qualifications or skills of the plaintiff-Builder. So far as this aspect as to the personal nature of the contract was concerned, the High Court referred to the same in its judgment but did not express any opinion. Counsel for the appellant submitted that the appellant need not go for a suit but could be allowed to be substituted as a plaintiff to continue the present suit in the place of the original plaintiff. It was also argued that the deceased plaintiff had executed a separate agreement dated 29-8-1989 in favour of the appellant that he would not "settle" the matter with the defendants without the appellant's consent.

11. On the other hand, learned Senior Counsel for the owners-defendants. Shri Ramesh P. Bhat, argued that his clients have nothing to do with the appellant. The defendants have no connection whatsoever with the appellant because the appellant was not a party to the agreement dated 4-2-1982. Nor were the defendants parties to the agreement dated 26-2-1988. Further, the original plaintiff when he filed the suit on 8-4-1988 did not think of impleading the appellant as a co-plaintiff even though the plaintiff had by that time entered into the agreement dated 26-2-1988 with the appellant before the suit. Nor did not appellant think of joining in the suit which was filed in 1988 if he had acquired some rights by "assignment" before the suit. Even after the death of the plaintiff in 1995, the appellant did not wake up but filed the application only after a delay of one year. The defendant-owners could not be compelled to defend a suit - which the plaintiffs did not want to pursue - merely because a third party claiming that he had acquired certain rights against the original plaintiff under an agreement dated 26-2-1988 wants to continue the suit. The appellant has to first establish his rights against the plaintiff's legal representatives and then only can he have locus standi to proceed against the owners. The defendants have no privity of contract with the appellant. It was urged that the agreement dated 4-2-1982 had set out in great detail the special qualifications and skills of Shri Amrit Mohan Lal Patel, the original plaintiff. Therefore, the said Amrit Mohan Lal Patel had no right to entrust his duties to a third party for development purposes without the consent of the owners and the owners were satisfied that the appellant was an equal to the original plaintiff in his skills and capacity. The owners have no idea of the capacity or skills of the appellant. The rights and duties which were absolutely personal to the late Amrit Mohan Lal Patel could not have been assigned to the appellant. It was true that in the preamble to the agreement dated 4-2-1982, the word "assigns" was used while describing the original Builder as including "his heirs, executors, administrators and assigns of the OTHER PART". Learned counsel argued that if the rights or duties of the Builder were personal to the Builder and were not assignable, then the mere use of the word "assigns" could not be of any help to the appellant. The interest created must be an assignable interest. The owners had also confidence in the financial capacity of Shri Amrit Mohan Lal Patel, the Builder and that was also another reason for holding that the contract dated 4-2-1982 was one of a personal nature. Thus there was no assignment in fact or in law and there was no consent of the owners. The original plaintiff had defaulted. So far as the legal representatives of the Builder were concerned, they were entitled to say that they had neither the capacities nor the special skills of the original plaintiff. Therefore, the legal representatives of the original plaintiff were, for good reasons, not interested in seeking the specific performance of their development agreement against the owners. Thus they were entitled to withdraw the suit and plead that this was not a contract they could perform.

12. The learned Senior Counsel, Shri Maganbhai Barat for the plaintiff's legal representatives, adopted the above contentions of Shri Ramesh P. Bhat and contended that there were no merits in the appeal.

13. We have set out the respective contentions of the parties in sufficient detail. We may state that the learned Senior Counsel for the appellant has, and in our view, rightly, nor relied upon Order 22 Rule 10 CPC as it is nobody's case that there is an assignment or devolution of interest during the pendency of the suit. So far as the reasons given by the trial court and the High Court for rejecting the case of the appellant under Order 1 Rule 10 and Section 146 CPC are concerned, we do not think it proper to go into them in detail inasmuch as, in our opinion, the above issues have to be thrashed out in a properly constituted suit. We think it neither desirable nor in the interest of the parties to go into the above questions in an appeal arising out of an interlocutory application. The problem is that if we interpret the agreements, for the purpose of the application under Order 1 Rule 10 or Section 146 CPC, our view is likely to prejudice any decision on the same questions if taken up either in this suit or in any separate suit that may be filed by the appellant. The reason is this. Any decision in favour of the appellant to implead him as a plaintiff would necessarily require us to go into the rights of the appellant-Developer vis-a-vis the original plaintiff-Builder and vis-a-vis the defendant-owners, under the two agreements. This may prejudice the case of the owners and the legal representatives of the Builder in this very suit. Similarly, any decision against the appellant will prejudice the appellant's case if he files an independent suit. In the abovesaid peculiar circumstances of the case, we are of the view that this is not a fit case to go into the merits and no interference is called for under Article 136 of the Constitution of India. The plaintiff, if he is so advised, may pursue his remedies by way of a fresh suit. The observations or findings of the trial court or of the High Court in the impugned judgments as to the rights of the plaintiff under the agreement dated 26-2-1988 - whether the observations or findings are in favour or against the plaintiff - are kept open for adjudication in such a suit. We are not to be understood as having said anything upon the maintainability or non-maintainability of any such suit or about the rights of any of the parties who may be impleaded therein.

14. We have stated earlier that Rs. 21 lakhs deposited by the original plaintiff in this suit are kept in fixed deposit. As stated earlier, there is a dispute between the parties in regard to this amount. The appellants says that he provided these monies to the deceased plaintiff but the legal representatives of the deceased plaintiff contend that these monies were not provided by the appellant but were the monies belonging to the deceased plaintiff himself. As this is a dispute which cannot be resolved in these proceedings without taking evidence, we are of the view that the trial court should be directed to keep the said amount of Rs. 21 lakhs and interest thereon in its control for a period of eight weeks from today so as to enable the appellant to seek appropriate relief in a duly constituted suit. We order accordingly. If no orders are obtained by the appellant within the abovesaid period in his favour, it shall be open to the trial court to dispose of any application for withdrawal of the said monies which may be filed by the plaintiff's legal representatives, in accordance with law. We are not to be understood as deciding anything in favour or against the appellant or other parties to the suit in regard to the said amount and interest thereon, lying in deposit in the trial court.

15. Subject to the above, this appeal is dismissed. In the circumstances, there will be no order as to costs.