2005 eGLR_HC 10008519,2007 CC (135)251

Before the Hon'ble MS H N DEVANI, JUSTICE the Hon'ble MR D A MEHTA, JUSTICE

RADHE ASSOCIATES Vs. O.L. OF PIRAMAL FINANCIAL SERVICE LTD.

ORIGINAL JURISDICTION APPEAL No: 9 of 2005 , Decided On: 22/09/2005

Sudhir Nanavati, Nanavati Associates, R.M.Desai

MR. D.A.MEHTA J.,

1 This appeal challenges judgment and order made by learned Single Judge on 02/07/2004 in OLR No.56 of 2003.

2 The appellant No.1 is a partnership firm and appellant No.2 is a partner of appellant No.1-Firm. One Piramal Financial Services Limited (PFSL) was directed to be wound up by an order dated 20/03/2001 and the Official Liquidator attached to this Court was appointed as liquidator of PFSL. In pursuance of the aforesaid order the liquidator was directed by an order dated 20/07/2001 made by the Court in Company Application No.44 of 2000 to take possession of all the properties and assets, more particularly described in Schedule A of the report of the Official Liquidator dated 12/07/2001. As a consequence the liquidator was to take possession of the property described as office/shop No.103, 1st Floor, Ganesh Plaza, Opp. Navrangpura Bus-stand, Ahmedabad admeasuring 2256 sq.ft. approximately (hereinafter referred to as the property in question). When the representative of the liquidator went to take possession he was informed by the person there, one Shri Dinesh P.Shah that he was the owner of the property in question and hence the representative of the liquidator did not take possession of the premises. It was in these circumstances that report was filed by the Official Liquidator seeking appropriate direction from the Company Court.

3.The liquidator produced before the Company Court a letter of allotment dated 10/04/1997 issued by Radhe Associates (Appellant No.1) along with certificate dated 10/04/1997 issued by appellant No.1. It is not in dispute that the building named as Ganesh Plaza is owned by a society known as Himalaynagar Co-operative Housing Society Limited and the said society is registered under the Societies Act. It is also an accepted position that the appellant had entered into a development agreement with the society and by virtue of the same appellant No.1 was entitled to issue necessary letter of allotment.

4.Before the Company Court, Shri Dinesh P.Shah put- up a case that he was a bonafide purchaser of the property in question and he also produced a letter of allotment issued to him by the appellant No.1. Both the appellants were also parties as respondent Nos. 10 & 11 before the Company Court and they supported the case of Shri Dinesh P.Shah. In the impugned judgment

the learned Single Judge has come to the conclusion that Shri D.P.Shah was not entitled to hold on to the possession considering the fact that PFSL was holder of prior title to the property in question. Shri D.P.Shah was therefore directed by the Company Court to hand over vacant and peaceful possession to the Official Liquidator.

5. To complete the record it may be noted that Shri D.P.Shah had also challenged the impugned judgment and order by way of separate appeal being O.J.Appeal No. 43 of 2004. The said appeal has been dismissed today by a separate order as having been withdrawn.

6. Mr.S.I.Nanavati, learned Senior Advocate appearing on behalf of the appellants submitted: firstly, that the Official Liquidator had not discharged the onus which lay on him for establishing his right to the property, and in this context he referred to provisions of Sections 101 & 102 of the Indian Evidence Act,1872; secondly, it was submitted that the property in question was never given to PFSL as an owner but was given by way of collateral security in relation to loan taken by appellant No.2 and his group concerns as was evident from agreement dated 09.07.1997; thirdly, it was contended that evidence in this regard was available as could be seen from the narration in agreement dated 08/09/1999, to the effect that PFSL had preferred a suit against Radhe Estate Developers and other group concerns qua the mortgage created by deposit of title deeds.

6.1 He further submitted that agreement dated 08/09/1999 denoted that PFSL was a party to the agreement and in light of provisions of Sections 62 & 63 of the Indian Contract Act,1872 there was a novatio by which the liabilities towards PFSL, of appellant No.1 and his group concerns, stood transferred to one Valor Finstock Private Limited discharging the obligations in so far as appellant No.2 along with other group concerns was concerned. The submission was, that as a consequence, as recorded in the agreement, title deeds were returned by PFSL and in the circumstances the Official Liquidator could not have staked his claim to the property in question. In support of the proposition reliance is placed on decisions in case of Industrial Bank vs. Western India Ltd., AIR 1931 (Bom.) 123 and Lala Kapurchand Godha Vs. Mir Nawab Himayatalikhan, AIR 1963 SC 250, at page 254 paragraph No.8 of the judgment.

6.2. A further contention was that as already mentioned in affidavit-in-reply a consent decree had been passed in the suit filed by PFSL and the appellants must be permitted to refer to and rely upon the said document in support of the case of the appellants because the said document went to the root of the matter; alternatively, it was contended that the matter be restored to the learned Single Judge so as to examine the said document. The submission was that on the basis of the said consent decree the appellants would be in a position to show that PFSL was never put in possession of the property nor was PFSL owner at any point of time, but held the property only as a collateral security for a limited period. Reliance was placed on provisions of Order 41 Rule 27(1)(b) of the Code of Civil Procedure 1908 to contend that additional evidence must be permitted to be OJA/9/2005 tendered and taken into consideration "for substantial cause".

6.3.It was further contended on the basis of provisions of Section 59 of the Transfer of Property Act that the law did not require any registration of a mortgage where a mortgage was on the basis of deposit of title deeds of the property. Therefore, any agreement which altered or modified terms of the mortgage, including the parties, should stand on the same footing and the learned Judge was in error in insisting upon the registration of the said document for the purpose of establishing mortgage.

7. In the impugned judgment it has been found by the learned Single Judge that :

[i] Procedure prescribed by rules and regulations of the society regarding admission of a person as Member of the Society and allotment of premises has been followed in respect of the allotment of the property in question to PFSL;

[ii] PFSL is in possession of the letter of allotment which records that the allotment is in lieu of full and final payment made by PFSL;

[iii] Society is the owner of the land and super structure and PFSL has been allotted the office/shop in question and having been put in possession PFSL is de facto owner of undivided share in the unit, super structure and other allied services to it;

[iv] Genuineness of the documents has not been challenged by the respondents i.e., appellants herein and Shri D.P.Shah;

[v] Once the title to the property had been passed on to PFSL, the transferor i.e., appellant No.1 ceases to have any right over the same and could not have dealt with the said property subsequently in point of time;

[vi] If appellant No.1 was not in a position to claim any right, title or interest over the property no third party, like Radhe Estate Developers, could make any claim to right, title or interest in respect of the property in question even for the limited purpose of creating a security;

[vii] PFSL has been issued a possession certificate which is not shown to be fraudulent document and thus giving of possession to and possessory right of PFSL stands established;

[viii] Even if the contention raised by the appellants on the basis of various agreements, with special reference to agreement dated 08/09/1999 is accepted for the sake of argument, the document talks of release of securities in favour of Radhe Estate Developers, and therefore, the property in question could not have been allotted by appellant No.1 herein to Shri D.P.Shah.

8.In light of the aforesaid findings of fact recorded by the learned Single Judge the contentions raised on behalf of the appellants may be examined. The first contention based on provisions of Sections 101 & 102 of the Evidence Act does not merit acceptance for the simple reason that the genuineness of the allotment letter has never been challenged as recorded by the learned Single Judge. The challenge is limited to the aspect that no consideration has been received by appellant No.1 from PFSL. Once the document in question, namely allotment letter dated 10/04/1997 records that the allotment is made in light of full and final payment made by PFSL, the onus is on the appellants to show that the said statement is not correct. The entire case for showing

that PFSL was not the owner of the property or was not in possession of the property is based on various agreements commencing from agreement dated 09/07/1997 under which the property in question is stated to have been placed by way of collateral security by Radhe Estate Developers with PFSL. It is not disputed that appellant No.1 and the said Radhe Estate Developers are independent and separate partnership firms. May be, appellant No.2 might be a common partner. However, nothing has been brought on record to show any link between appellant No.1 and the said firm viz., Radhe Estate Developers. There is no document to show how and in what context Radhe Estate Developers could have dealt with the property in question. The learned Single Judge has in this context rightly stated that the said firm had no right, title or interest to deal with the property. Therefore, the entire case is built upon the so called transaction of creation of mortgage and placing the property by way of collateral security with PFSL remains unestablished, to say the least. Once this is the position any reliance on the suit proceedings between PFSL and Radhe Estate Developers loses significance altogether.

9. Similarly reliance on the agreements dated 09/07/1997, 07/09/1999, 08/09/1999 as well as consequential actions thereupon cannot carry the case of the appellant any further, for the simple reason that on examination of the said documents it becomes clear that the said documents, wherein the limited companies are parties, are not shown to have executed the document as required in law. It is settled position that a resolution is necessary for the limited company to enter into an agreement for dealing with the property of the company. Not only is there no evidence in this regard but there is no averment to the said effect in the pleadings. Therefore, the said agreements cannot be treated as valid agreements, even on the assumption that the same were executed at the point of time when they are stated to have been executed.

10.As an illustration agreement dated 09/07/1997 stated to have been executed between PFSL on the one side and Radhe Estate Developers on the other side may be examined. The said document states that it has been signed and delivered by the President of PFSL, but neither does the document show that the execution thereof has been witnessed by anybody nor is the common seal of the company shown to have been affixed in the document, despite the fact that it is stated that the parties have put their respective hands and seals on the day and year mentioned in the document. It is not necessary to burden the record by referring to each one of the document, suffice it to state that the same position prevails in all the documents placed on record.

11.Resolution dated 07/09/1999 of PFSL produced at page No.87 of the Paper Book is subsequent in point of time i.e., after the agreement dated 09/07/1997. Yet, the fact remains that the resolution in relation to the first agreement is not available on record and in the circumstances the subsequent proceedings cannot be taken into consideration. At the cost of repetition, it requires to be stated that the link between Appellant No.1 and other concerns, including Radhe Estate Developers, has not been established and therefore even if all these documents are accepted at their face value they cannot carry the case of the appellants any further.

12. The plea in relation to the permission to refer to consent decree deserves to be rejected firstly because it is not disputed that the appellants admittedly had the knowledge about existence

of the same when the matter was conducted before the Company Court; secondly, it is not even the case of the appellants that with due diligence it could not have procured the document so as to place it on record when the proceedings were alive before the Company Court; thirdly, though the appeal was filed on 16.08.2004 no ground was raised nor was any application filed praying for permission to tender additional evidence. The contention based on Civil Application No.129 of 2005 moved by the Official Liquidator in O.J. Appeal No.43 of 2004 cannot save the appellants from the fact that the plea is raised at a belated stage. The said application was moved by the Official Liquidator as late as on 08.07.2005. 22.09.2005.

13. Under Rule 27 of Order 41 of the Code of Civil Procedure sub-rule (1) mandates that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. Thereafter, exceptions have been carved out, circumstances specified, by clauses (a), (aa) and clause (b). The case of the appellant in the present appeal is based only on provisions of clause (b) of sub-rule (1) of Rule 27 of Order 41. The said clause states that if the Appellate Court, requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or documents to be produced , or witnesses to be examined. Discretion that the Appellate Court is required to exercise is governed by rider in the form of sub-rule (2) which prescribes that whenever additional evidence is allowed to be produced the Appellate Court shall record the reasons for its admission. Therefore, the issue that requires to be addressed is whether the Court requires production of any document or evidence to enable it to pronounce judgment; or the Court requires any document or evidence to be produced for any other substantial cause. It was admitted by the learned Senior Advocate appearing on behalf of the appellants that the case of the appellants cannot be governed by the first requirement viz.,for the purpose of pronouncement of judgment; his contention was that he should be permitted to produce the consent decree by way of evidence for substantial cause.

14. In the case of Pari Mangaldas Girdhardas Vs. Commissioner of Income Tax, 1977 CTR (Guj.) 647 this Court was called upon to decide as to in what circumstances Income Tax Appellate Tribunal can admit additional evidence in light of provisions of Rule 29 of the Income Tax (Appellate Tribunal) Rules,1963. After reproducing Rule 29 at page 667 of the report, it is stated by this Court that since the provisions of the said Rule are in pari materia with the provisions of Order 41, Rule 27 of the Code of Civil Procedure, the Court may refer to some of the decided cases relating to Order 41 Rule 27(1)(b) of the Code of Civil Procedure in order to appreciate the nature and ambit of the power conferred. After referring to decision of the Privy Council in case of Parsottam Vs.Lal Mohar, AIR 1931 P.C.143 and the Supreme Court in the case of Arjan Singh Vs. Kartar Singh, AIR 1951 SC 193 and in the case of K.Venkatramiah Vs. Seetharama Reddy, AIR 1963 SC 1526, the following principles have been culled out by this Court :

"48. The principles, which emerge from the decided cases are, as earlier stated, applicable even in relation to the exercise of power under the first part of Rule 29 and accordingly, in the context of exercise of such power, the following principles should be borne in mind :(1) The discretion given to the Tribunal to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in Rule 29; (2). The Tribunal has the power to allow additional evidence if it requires such evidence to enable it to pass orders, that is to say,

when it finds that there is any lacuna or defect which needs to be filled up so that it could pronounce an order; (3) The Tribunal has the power to allow additional evidence also if it requires such evidence for any other substantial cause, that is to say, even in cases where the Tribunal finds that it is able to pronounce judgment on the state of the record as it is, it may still allow additional evidence to be brought on record if it considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its order in a more satisfactory manner;(4) Such requirement in either case must be of the Tribunal and it will not arise ordinarily unless some inherent lacuna or defect becomes apparent on an examination of the evidence and, therefore, the legitimate occasion for the exercise of discretion under Rule 29 is not before the appeal is heard but when on an examination of evidence as it stands, some inherent lacuna or defect becomes apparent; (5) such defect may be pointed out by a party or a party may move the Tribunal to supply the defect or the Tribunal itself may act suo motu in the matter; (6)if the additional evidence is allowed to be adduced contrary to the principles governing the reception of evidence, it would be a case of improper exercise of discretion and the additional evidence so brought on record will have to be ignored; and (7) a fortiori, if the decision not to allow additional evidence is arrived at unreasonably or capriciously or by ignoring relevant facts and adopting an unjudicial approach, then the exercise of discretion would, in law, be wrongful and improper".

15.Applying the aforesaid principles to the facts of the case the contention may be examined. This cannot be stated to be a case where there is any lacuna or defect which needs to be filled up so that the Court can pronounce an order. The concept of any other substantial cause would mean that the Court may allow additional evidence to be brought on record if the Court considers that in the interest of justice something which remained obscure should be filled up so that it can pronounce its order in a more satisfactory manner. Further more, such requirement has to be of the Court and a party may point out to the Court a lacuna or the defect, but cannot insist as a matter of right. In the present case, admittedly, no lacuna or defect has been pointed out in the evidence on record. The Court is not required to take additional evidence so that it can pronounce the judgment in a more satisfactory manner, considering the fact that the appeal is at the stage of admission. In other words, for the purpose of deciding whether the appeal requires to be admitted or not, it is not necessary on facts to admit additional evidence. Therefore, the request made on behalf of the appellants stands rejected.

16.The last contention raised on behalf of the appellants based on provisions of Section 59 of the T.P.Act need not be gone into for the simple reason that, as stated hereinbefore, all the documents of 1997 and 1999, viz., after 10/04/1997 i.e., the date of allotment cannot carry the case of appellant any further nor dislodge the right to the property held by PFSL as an owner. At the cost of repetition, it is required to be stated that learned Single Judge was right when he recorded that once PFSL had become the owner of the property in question there was no occasion for any party to deal with the property without showing in the first instance as to how PFSL had given up its rights in the property. The appellants have singularly failed to establish the same.

17.It is further necessary to reiterate the basic fallacy existing in the premise on which the entire case of the appellant rests, viz., so called transaction by Radhe Estate Developers in relation to the property in question. The appellants have not shown, even prima facie, as to how Radhe Estate

Developers was entitled to deal with the property in question. One cannot lose sight of the fact that the allotment letter and the possession certificate issued on 10/04/1997 was by appellant No.1, a separate entity having independent existence. Therefore, in absence of the link between the appellants and the other concerns, stated to have entered into various transactions with PFSL, the said documents cannot come to assistance of the appellants in establishing that it had not issued letter of allotment and possession certificate, or that it had not received any consideration before issuance of such letter of allotment when the document itself acknowledges receipt of the amount.

18. In the circumstances, in light of the findings of fact recorded by the Company Court after appreciation of the evidence on record and what is stated hereinbefore, the appeal does not deserve to be admitted in absence of any error, on facts or in law, in the order of the Company Court. The Appeal is accordingly dismissed. Civil Application No.48 of 2005.

In light of the order made in O.J.Appeal No.9 of 2005 this Civil Application has become infructuous is rejected as such.

19. At this stage learned Advocate for the appellants prays that the operation of this order be stayed for a period of eight weeks so as to enable the appellants to challenge the same. In light of the facts that have come on record the request is rejected.

Apeeal dismissed