

Judgement Reserved on 27.05.2024
Judgement Delivered on 09.07.2024

Neutral Citation No. - 2024:AHC-LKO:46699-DB

A.F.R.

Court No. - 3

Case :- WRIT - C No. - 4456 of 2024

Petitioner :- Shiv Kumar

Respondent :- State Of U.P. Thru. Prin. Secy. To Govt.
Deptt. Of Housing And Urban Planning Lko. And Others

Counsel for Petitioner :- Deepanshu Dass, Lalita Prasad
Misra

Counsel for Respondent :- C.S.C., Ratnesh Chandra

Hon'ble Mrs. Sangeeta Chandra, J.

Hon'ble Brij Raj Singh, J.

(Delivered by Mrs. Sangeeta Chandra, J.)

1. This petition has been filed praying for quashing of order dated 08.05.2024 passed by the Vice-Chairman, Lucknow Development Authority (hereinafter referred to as "opposite party no.3"), where he has rejected the representation of the petitioner with respect to Flat no.-152, 1st Floor, Rupayan Gomti Nagar, Lucknow and also praying for a mandamus to be issued to the opposite party no. 2 to enter the name of the petitioner in place of his predecessor-in-interest as allottee of the said Flat and to take balance of the sale consideration from the petitioner and execute a sale deed in his favour and not to allot/settle/sell the said Flat in favour of any other person and not to disturb the possession of the petitioner over the said Flat.

2. The brief facts of the case as mentioned in writ petition are that one Sri Ram Pyare Panika, Ex-Member of Parliament had applied for allotment of a three bedroom Flat, type "Rupayan", in a residential colony called Nehru Enclave in Gomti Nagar developed by the opposite party no. 2, the Lucknow Development Authority (hereinafter referred to as 'the L.D.A.') and deposited Rs.30,000/- initially on 28.03.1989. He was allotted Flat no. 152, "Rupayan" on Ist floor at an estimated cost of Rs.4,25,000/- payable in quarterly installments of Rs.17,500/-. Sri Ram Pyare Panika deposited some installments thereafter. By a letter dated 28.07.1994, he was informed that the price of the Flat had increased to Rs.6,42,000/- until the said date, the amount deposited by him came to Rs.3,31,250/-. Later on a Hire Purchase Agreement was entered into between the L.D.A. and Sri Ram Pyare Panika on 15.09.1994 requiring him to deposit Rs.3,70,200/-, additionally, in quarterly installments of Rs.18,500/-. Suddenly, a dispute arose between L.D.A. and the Army, which claimed that Nehru Enclave was built upon land, which belonged to the Army. Army personnel occupied all vacant Flats of the said scheme, in 1999 and Sri Ram Pyare Panika decided to withdraw from the said scheme and wrote to L.D.A. to refund the amount deposited by him.

3. It is the case of the petitioner that allotment of Sri Ram Pyare Panika was never cancelled and the amount deposited by Sri Ram Pyare Panika could not be refunded to him as a dispute arose between UCO Bank and the

L.D.A. as to the amount deposited by Sri Ram Pyare Panika. UCO Bank informed the L.D.A. that it had no record regarding payments made by Sri Ram Pyare Panika and recommended that the claim of Sri Ram Pyare Panika be settled on the basis of original challans submitted by him. The petitioner was at the time living with and taking care of Sri Ram Pyare Panika. Since Sri Ram Pyare Panika no longer wanted the said Flat, on account of litigation between L.D.A. and, he on receipt of Rs.5,00,000/- from the petitioner, executed a duly notarized agreement to sell on 01.06.1999, in favour of the petitioner to sell the Flat in question. As the sale deed was not executed by L.D.A. in favour of Sri Ram Pyare Panika, he also executed a notarized Will on the same day that is on 01.06.1999 in favour of the petitioner. Sri Ram Pyare Panika died on 24.10.1999, and he could not deposit the rest of the installments towards the Flat in question. The petitioner who is in possession of the Flat has been repeatedly representing to the L.D.A. to transfer the allotment of the said Flat in his favour and to realise the balance of the sale consideration and register the sale deed in his favour, but the L.D.A. has been threatening him that he shall be evicted forcibly from the Flat in question.

4. It has been alleged by the petitioner that he was served a notice on 27.06.2023 and again on 25.09.2023, with regard to certain dispute relating to the Flat in question raised by a neighbour, and the L.D.A. recognized and acknowledged his possession over the property yet it

is not executing a sale deed in his favour. On the other hand, the money deposited by Sri Ram Pyare Panika has illegally been credited in the name of one Vipin Bakshi and the Flat in question has been allotted in his favour as per the information available on the website, of the L.D.A.

5. The petitioner being aggrieved filed a writ petition, challenging such action of the L.D.A., namely, *Writ-C No. 117 of 2024, Shiv Kumar Vs. State of UP and Others*. In the counter affidavit filed by the L.D.A., it was stated that the entry of Flat no.- R-152, in the name of Vipin Bakshi was found to be incorrect and accordingly, orders have been passed for expunging the entry made in favour of Vipin Bakshi. The petition was finally disposed of by this Court by an order dated 26.02.2024, directing the opposite party no. 3 to decide the representation of the petitioner and till such decision is taken, it was restrained from taking any action against the petitioner regarding his proposed eviction. Now the representation of the petitioner has been decided by the opposite party no.3, rejecting the same without taking into account Section 5 of the Transfer of Property Act, which provides that a living person may convey property in the present or in the future, to one or more other persons, and also ignoring the provisions of Section 18 of the Registration Act, 1908, which requires that registration of Will which creates, declares or assigns any right/ title or interest in any immovable property in the present or in the future, is completely optional.

6. It has further been argued by the learned counsel for the petitioner that the impugned order mentions about application of children of Late Ram Pyare Panika for refund of money which was never communicated to the petitioner by the opposite party no.3. No copy of such application was supplied to the petitioner. As a result, the petitioner could not reply to this aspect of the matter and without affording any opportunity to the petitioner, in this regard, the petitioner's claim was rejected. Also, it has been argued that in the impugned order dated 08.05.2024, it has been mentioned that the allotment of Sri Ram Pyare Panika was converted from Flat No.- R-152, Nehru Enclave, Gombi Nagar to House No. 5/367 Viram Khand, Gombi Nagar. However, neither the original allotment order dated 05.10.1990, nor the Hire Purchase Agreement dated 15.09.1994 was cancelled. Also, no allotment order was issued for the house allotted in exchange or any agreement to sell was entered with Sri Ram Pyare Panika with respect to House No. 5/367. In fact, Sri Ram Pyare Panika refused to accept House No. 5/367, as is evident from his letter dated 26.07.1997. Sri Ram Pyare Panika never deposited any money in respect to House No. 5/367, and had asked for refund of money which he had earlier deposited for Flat No.- R-152, but the same was never refunded to him. Therefore, Sri Ram Pyare Panika continued in possession of Flat No.R-152.

7. It has further been argued by the learned counsel for the petitioner that the impugned order dated 08.05.2024 stated that the agreement to sell dated 01.06.1999 and

the Will dated 01.06.1999 are unregistered, and therefore are doubtful, forged and fabricated documents, and as such cannot be relied upon. It ignores Section 18 of the Registration Act, 1908. The validity of the documents i.e. the Agreement to Sell and the Will dated 01.06.1999 cannot be decided by any Administrative Authority. It is only the competent Civil Court which can test the validity and legality of such documents. Even an unregistered Agreement to Sell can be acted upon through a Suit for Specific Performance. Under Section 18 of the Registration Act, 1908, registration of Will is optional and even unregistered Will is admissible and executable. Even if the notarized Agreement to Sell is ignored, the petitioner is entitled to retain possession of the Flat on the basis of the Will dated 01.06.1999. Devolution of property or rights through Will is not a transfer of the same, and in view thereof the devolution of allotment, possession, and substitution in Agreement to Sell the same, is not a transfer and under law it is permissible. It has been argued that the directions issued in the impugned order dated 08.05.2024 to vacate the Flat in question within 15 days or else the same shall be got vacated forcibly and further direction to the petitioner to pay the rent of the Flat since 1999 and a direction to concerned officials to refund the deposited amount to the family of Late Ram Pyare Panika is wholly illegal and arbitrary and without jurisdiction. The family of Late Ram Pyare Panika has no claim or right over the consideration deposited by Sri Ram Pyare Panika, and the petitioner alone can claim the same on the basis of the Will executed in his favour by Sri Ram

Pyare Panika. On the basis of the said Will, it has been also argued that the allotment of Flat no.- R-152 has already devolved upon the petitioner, and the consideration already paid by Sri Ram Pyare Panika ought to be entered in the name of the petitioner, and L.D.A. is legally bound to take the balance consideration for sale of the said Flat from the petitioner and execute the sale deed in his favour.

8. The Counsel for the petitioner has placed reliance upon judgements of the Supreme Court in the case of ***Puran Singh and others Vs. State of Punjab, 1975 (4) SCC 518; Ram Rattan and others Vs. State of U.P., 1977 (1) SCC 188; Rame Gowda(D) by L.R.s Vs. M. Varadappa Naidu, 2004 (1) SCC 768***; to argue that even a trespasser cannot be dispossessed except in accordance with due procedure in law.

9. The Counsel for the petitioner has read out Paragraph-12 of *Puran Singh* (supra) where the Supreme Court observed that where a trespasser was in settled possession of the land, he could not be evicted except in due course of law, and he is further entitled to resist or defend his possession, even against the rightful owner who tries to dispossess him. The only condition laid down by the Court was that the possession of the trespasser must be settled possession. The Court explained that the settled possession must be extended over a sufficiently long period of time and acquiesced in by the true owner. The possession of a trespasser must be effective,

undisturbed and to the knowledge of the owner or without any attempt at concealment, but the Supreme Court further observed that an occupation of the property by a person as an agent or a servant at the instance of the owner will not amount to actual physical possession. The nature of possession in such cases which may entitle a trespasser to exercise the right of private defence of property and person should contain the following attributes: –

- (1) that the trespasser must be in actual physical possession of property over a sufficiently long period;
- (2) that the possession must be to the knowledge either express or implied of the owner or without any attempt at concealment, which contains an element of *Animus Possidendi*. The nature of possession of the trespasser would, however, be a matter to be decided on the facts and circumstances of each case;
- (3) the process of dispossession of the true owner by the trespasser must be complete and final, and must be acquiesced in by the true owner; and
- (4) that one or usual test to determine the quality of settled possession, in the case of cultivable land would be whether or not the trespasser, after having taken possession, had grown any crop. If the crop had been grown by the trespasser, then even the true owner has no right to destroy the crop grown by the trespasser and take forcible possession, in which case the trespasser will have a right of private defence,

and the true owner will have no right of private defence.

The Supreme Court relied upon textbooks of English jurists for example 'Salmond', where it was observed:—

“In English law possession is a good title of right against anyone who cannot show a better. A wrongful possessor has the rights of an owner with respect to all persons except earlier possessor and except the true owner himself.”

Many other legal systems, however, go much further than this, and treat possession as a provisional or temporary title, even against the owner himself. Even a wrong doer who is deprived of his possession, can recover it from any person whatsoever, simply on the ground of his earlier possession. Even the true owner who takes his own, maybe forced in this way to restore it to the wrongdoer and will not be permitted to set up his own superior title to it. He must first give up possession, and then proceed to recourse of law for the recovery of the thing on the ground of his ownership. The intention of the law is that every possessor shall be entitled to retain and recover his possession, until deprived of it by judgement according to law.

10. The law in India, as it has developed, accords with the jurisprudential thought as propounded by Salmond. However, the courts have mostly quoted Latin maxim:—*“possessio contra omnes valet praeter eur cui ius*

sit possessionis". (He that hath possession hath right against all but him that hath the very right).

11. The Supreme Court in almost all the aforecited cases has referred to the observations made by the Allahabad High Court in ***Horam Vs. Rex, AIR 1949 Alld 564***; wherein a distinction was drawn between the trespasser in the process of acquiring possession and the trespasser, who had already accomplished or completed his possession, wherein the true owner may be treated to have acquiesced in; while the former can be obstructed and turned out by the true owner, even by using reasonable force, the latter, may be dispossessed by the true owner only by having recourse to the due process of law for a re-acquiring possession over his property.

12. Per contra, Sri Ratnesh Chandra appearing for the L.D.A. has referred to Annexure-16 to the writ petition, which is a counter affidavit filed by the L.D.A. in earlier petition Writ-C No. 117 of 2014; and pointed out that initially Flat No. R-152 was allotted in favour of Late Ram Pyare Panika and a Hire Purchase Agreement was executed in his favour and possession was also delivered to him. Subsequently, on an application being given by Sri Ram Pyare Panika, in place of Flat no. R-152, Nehru enclave, Gomti Nagar, he was allotted House No. 5/367, Viram Khand, Gomti Nagar. While making adjustment of payments already received by L.D.A. for Flat no. R-152 in exchange of House No. 5/367, Viram Khand, Gomti Nagar, Lucknow, Sri Ram Pyare Panika was also provided with the

calculation sheet for making payment in respect of House No. 5/367. A copy of the calculation sheet in respect of House No. 5/367, Viram Khand, as well as the order of adjustment in respect of House No. 5/367, Viram Khand, Gomti Nagar has been filed as an Annexure to the said counter affidavit.

13. Sri Ratnesh Chandra has also pointed out page 139 of the paperbook which is a letter dated 30.11.1996, and it refers to request by Sri Ram Pyare Panika made on 03.09.1996 praying for allotment of HIG House No. 5/367 in Viram Khand, Gomti Nagar in place of Flat R-152, Nehru Enclave, Gomti Nagar. It refers to an order passed by the then Vice Chairman on 10.11.1996 accepting such request and directing conversion/exchange. Rest of the terms and conditions of such allotment would remain the same as before. The cost of such house was indicated as Rs.7,49,718/- and Sri Ram Pyare Panika was directed to deposit the same latest by 31.12.1996 or else penal interest would be charged. At page 141 of the paperbook is the letter dated 03.09.1996, written by Sri Ram Pyare Panika. He has mentioned that he had been allotted Flat No.152 Nehru Enclave and had also been given possession thereof, but the Army, having taken possession had put a lock on it, as a result, it would be difficult to reside in the same as civic amenities were also not available. Sri Ram Pyare Panika referred to his Reserved Category status and poor financial condition and asked for allotment of House No. 5/367 in Viram Khand Phase-V, Gomti Nagar in its place.

14. Also, Sri Ratnesh Chandra has pointed out page-143 of the paperbook, which is a letter written again by Sri Ram Pyare Panika on 26.07.1997, saying that he had been allotted a house in Viram Khand in place of Flat in Nehru Enclave, but the sale consideration was very high, which he could not pay, therefore, he prayed that the amount he had already deposited be returned with interest to him so that he can make efforts to arrange a residence for himself. In pursuance of such application dated 26.07.1997, the refund voucher was prepared in respect of House No. 5/367, Viram Khand, Gomti Nagar and was submitted to the Branch Manager UCO Bank, but in the Challan Nos. 8579, 8591, 8592, 13877, and 12516, which were mentioned in the refund order, the name of Sri Ram Pyare Panika was not shown nor there was any mention of deposit of any amount by Sri Ram Pyare Panika. Hence, the bank returned the said vouchers without making any payment to Sri Ram Pyare Panika . As per challan available of various dates in the office of the L.D.A., payment of Rs.2,37,500/- alone was done by Sri Ram Pyare Panika in pursuance of the allotment of Flat No.R-152, Nehru Enclave. It has been admitted also in the counter affidavit that although refund vouchers were prepared, but were returned by UCO Bank, therefore, no refund could be made to Sri Ram Pyare Panika and he died soon thereafter.

15. On the basis of the counter affidavit and the order impugned dated 08.05.2024, it has been argued by Sri Ratnesh Chandra that the petitioner is claiming that Sri Ram Pyare Panika had executed a Will in his favour on

01.06.1999, and also an unregistered Agreement to Sell on the same day, but since Sri Ram Pyare Panika had himself made an application on 26.07.1997, for getting the said Flat R-152 Nehru Enclave exchanged with House No. 5/367, Viram Khand, Gomti Nagar, and the said house was also allotted to him against which he also made certain payments, Sri Ram Pyare Panika had no right to execute any Agreement to Sell, or any Will in favour of the petitioner by claiming himself to be the owner of the Flat in question. As soon as House No. 5/367 Viram Khand was allotted on request of Sri Ram Pyare Panika in place of Flat No. R-152 Nehru Enclave, all rights of Panika were extinguished from Flat No.R-152, Nehru Enclave, Gomti Nagar, Lucknow. Sri Ram Pyare Panika was incompetent to enter into any agreement to sell or even bequeath the said Flat through a Will in favour of the petitioner or anyone else.

16. It has also been pointed out from Paragraph-22 of the counter affidavit that Sri Ram Pyare Panika was informed at the time of delivery of possession of the Flat in September, 1994 of the terms and conditions contained in the Hire Purchase Agreement and that he was required to make payment of Rs.3,70,200/- along with interest at the rate of 21% in quarterly installments of Rs.21,425/-. However, the same was not deposited. Sri Ram Pyare Panika instead initially sought exchange of Flat in question with HIG house and later on sought refund of the past payment made by him for the flat. Also, reliance was placed on letters dated 24.04.1993 and 28.07.1994 filed

along with the said counter affidavit, mentioning therein the tentative/estimated cost of the Flat, category name Rupayan, of Rs.4,25,000/-, which was later on increased to Rs.6,42,000/-. In the letter dated 18.07.1994, payment of only Rs.3,31,250/- was admitted since the date of its allotment on 23.06.1989, by the Property Officer, Gomti Nagar for L.D.A.

17. It has further been argued by Shri Ratnesh Chandra that in fact, there was no Agreement to Sell as alleged by the petitioner in his petition and also in his representation made to the opposite party No. 3. The alleged agreement to sell which has been filed by the petitioner as annexure-9 to the petition is in fact, a notarized Sale Deed as it clearly mentions at the top of the document "Vikray Vilekh Patra". The said notarized and unregistered sale deed has been read out in its entirety by the counsel for the respondent. It says that Sri Ram Pyare Panika is the owner and in possession of Flat No. R-152, which is free from all encumbrances and for the sale of which he has a legal right and he has decided to sell it off for a sale consideration of Rs.5,00,000/- to Shiv Kumar, son of Kamta Prasad, resident of Teliyarganj, Allahabad. It further recites that such Rs.5,00,000/- has been accepted in cash and possession of the Flat has been given to the purchaser and that Sri Ram Pyare Panika's legal heirs would have no right or interest in the same. It also says that the purchaser would have the right on the basis of said sale deed to get his name mutated in the revenue records as owner and in possession. It has been argued that at the

time, when the said sale deed was executed by Sri Ram Pyare Panika, he had no right/ title or interest over the property and such unregistered notarized sale deed ought to be impounded as it allegedly transfers immovable property without payment of requisite Registration fees and Stamp duty.

18. It has also been argued that when Sri Ram Pyare Panika had sold off the Flat in question to the petitioner, he could not have bequeathed it on the same day to the petitioner, hence, the opposite party no. 3 was entitled to presume that the Will could not be relied upon by the petitioner to create any right/ title or interest in the property. Referring to page 140 and 141 of the paperbook, it has been argued that once allotment of Flat in question had been exchanged for allotment of HIG House No. 5/367, Viram Khand and Sri Ram Pyare Panika, having discovered that he could not pay for the said HIG house, had asked for refund of his money along with interest in July, 1997, he could not have claimed to be the owner and in possession of Flat R-152. The petitioner cannot claim that since the L.D.A. did not refund the amount deposited by Sri Ram Pyare Panika, the Flat in question belonged to him and he could validly transfer the same in favour of the petitioner. The question as to whether L.D.A. had refunded the money deposited by Sri Ram Pyare Panika is a question which Sri Ram Pyare Panika's legal heirs alone can raise.

19. It has also been argued that although in the order dated 08.05.2024 reference has been made of by the opposite party No. 3 of Sri Ram Pyare Panika's children asking for refund of money deposited by Sri Ram Pyare Panika, the petitioner has not impleaded any of them and he claims that he does not know them, although he had been allegedly living with Sri Ram Pyare Panika and taking care of him and moved by his love and affection, Sri Ram Pyare Panika had bequeathed the Flat in question to him. It has also been argued that refund vouchers were indeed prepared, but they did not contain any description of money deposited by Sri Ram Pyare Panika, and therefore, the bank had returned such vouchers and by the time actual refund could be initiated again, Sri Ram Pyare Panika had already died. Sri Ratnesh Chandra has also argued that the petitioner claims to have been sold or bequeathed the Flat in question in 1999, but he made no effort to get such sale deed/will deed executed till filing of the Writ-C No. 117 of 2024: *Shiv Kumar Vs. State of U.P. and others*. The petitioner waited for almost twenty five years before staking his claim on the basis of these alleged documents. In the said petition L.D.A. filed counter affidavit, disputing the claim of the petitioner regarding subsisting allotment in favour of Sri Ram Pyare Panika. They also stated that a wrong entry had been made on the portal with regard to allotment of the Flat in question in favour of Vipin Bakshi, which has been ordered to be corrected. The earlier writ petition was disposed of without entering into the merits of the controversy with the direction to decide the petitioner's representation. Now the

representation has has been decided by the opposite party No.3, and in the garb of decision on the said representation, a fresh cause of action has been sought to be created. When the initial writ petition was filed, it was a delayed petition with no explanation for such delay regarding putting forth a dead / stale claim. It has also been argued by the learned counsel for the L.D.A. that writ jurisdiction is an equitable jurisdiction and should not be exercised in favour of a person who is in possession of public property without any right/ title or interest created in his favour by the L.D.A. Sri Ram Pyare Panika had made certain payments to L.D.A. and not full sale consideration for Flat R-152 Nehru Enclave and his children can at best on the basis of such payments having been made by their father ask for refund along with interest.

20. The learned counsel for the petitioner in rejoinder has reiterated the claim of the petitioner and has argued that this Court has to see (a) whether the rights and interest of Sri Ram Pyare Panika stood extinguished after 24.07.1997, when he asked for refund of his money under compulsion as a dispute had been created by the Army regarding the ownership of the land on which such Flats had been raised by the L.D.A.?; (b) whether on 01.06.1999 when Sri Ram Pyare Panika had made out a Sale deed and Will in favour of the petitioner, he had any alienable right or interest in the property?; (c) whether admitting possession of the petitioner for twenty five years, L.D.A. can forcibly evict the petitioner under the provisions of the U.P. Urban Planning and Development Act

of 1973?; (d) whether the findings recorded in the impugned order are arbitrary and perverse?.

21. It has been argued on the basis of Sri Ram Pyare Panika's application for allotment of alternative house in exchange for Flat R-152, that such application was made under duress and compulsion as the Army had taken over all the vacant Flats in Nehru Enclave. The allotment letter approving such exchange asked Sri Ram Pyare Panika to deposit Rs.7,49,718/- latest by 31.12.1996, Sri Ram Pyare Panika could not deposit the money and asked for a refund only out of compulsion as he could not arrange such a huge amount in such a short period of time. The L.D.A. admitted that Rs.3,31,250/- had been deposited till 18.07.1994, by Sri Ram Pyare Panika. They did not return such money. They also did not cancel the allotment of Flat No. R-152, therefore, at the time when Sri Ram Pyare Panika executed the Sale deed and the Will in favour of the petitioner his allotment was intact. Part performance of the contract between L.D.A. and Sri Ram Pyare Panika was also admitted. The agreement entered into between L.D.A. and Panika on 15.09.1994 also stated that his/dependents and legal heirs would be entitled to succeed to such property. Since refund was not made, and the possession of the Flat in question, was still with Sri Ram Pyare Panika, he was entitled to alienate the property by means of either a Will or a Sale deed. Under the Transfer of Property Act, any interest that the seller has in any immovable property, either in the present or in the future, can be transferred by him to the purchaser. One

of the residents in the colony had complained about use of garage of Flat R-134, Nehru Enclave by the petitioner to the L.D.A. and the L.D.A. had issued a Show Cause Notice to the petitioner on 27.06.2023 admitting his possession over Flat R-152. Similarly, a joint inspection of the property was done and the Executive Engineer had asked the petitioner to remove the temporary shed he had constructed on the terrace by notice dated 25.09.2023. It has been argued on the basis of such notices, copies of which have been filed as annexures to the petition that the L.D.A. knew since long that the petitioner is in possession over Flat R-152, and even if he was a trespasser, he cannot be removed without following due process of law.

22. Reiterating the argument made earlier that even an unregistered agreement to sell can be enforced by filing a Suit for specific performance, it has been argued that not only present interest in the property can be sold but also future interest in property can be sold through an agreement to sell as per Section 5 and Section 6 of the Transfer of Properties Act. It has also been argued that the Will made out by Sri Ram Pyare Panika on 01.06.1999, in favour of the petitioner has neither been challenged by Sri Ram Pyare Panika's children nor by L.D.A.. Hence it would be binding till it is set aside by competent Civil Court.

23. Reference has been made again to Section 18 of the Registration Act, 1908, and it has been argued that even an unregistered Will can be acted upon. It has been again reiterated that relinquishment of right of Sri Ram Pyare

Panika can only come to be when refund of his money would have been made by L.D.A. and since the petitioner was living with him and taking care of him he had a right to such money and interest there on having accrued in his favour which interest the petitioner is not claiming but he is claiming his right to the property bequeathed by Sri Ram Pyare Panika to him instead. It would therefore be appropriate that this Court directs the L.D.A. to either take remaining sale consideration from the petitioner and execute a sale deed in his favour of the Flat in question or allot him some other vacant Flat which is available with L.D.A. as is evident from information available on their website regarding proposal to auction such vacant properties.

24. Learned Counsel for the petitioner has placed reliance upon ***Jugalkishore Saraf Vs. Raw Cotton Company Ltd., AIR 1955 Supreme Court 376***, and paragraph 53 thereof. Justice Bhagwati, while giving his concurring opinion with regard to whether the Respondent Company could step into the shoes of the decree holder under Order XXI Rule 16 of the C.P.C. made certain observations about Section 5 of the Transfer of Property Act.

25. Justice H.N. Bhagwati, while delivering his concurring opinion explained Section 5 of the Transfer of Property Act. He observed that "Transfer of Property" is an act by which the transferor conveys property in present or in future, to the transferee. A transfer of a decree by assignment in writing may be affected by conveying the decree in the present or in future, to the transferor, but for the transfer

to operate in future, the decree which is the subject matter of the transfer must be in existence at the date of the transfer. The words "in present or in future" qualify the word conveys and not the word property in the Section and it has been held that a transfer of property that is not in existence operates as a contract to be performed in the future which may be specifically enforced as soon as the property comes into existence. Justice Bhagwati placed reliance upon observations made by the Privy Council in an English case where it observed:-

"But how can there be any transfer, actual or constructive, upon a contract under which the vendor sells that of which he has not possession, and to which he may never establish a title? The bill of sale in such a case can only be evidence of a contract to be performed in future and upon the happening of a contingency, of which the purchaser may claim a specific performance, if he comes to court showing that he has himself done all that he was bound to do."

It is only by operation of the equitable principle that as soon as the property comes into existence and is capable of being identified, equity taking as done that which ought to be done fastens upon the property, and contract to assign thus becomes a complete equitable assignment. The decree not being in existence at the time of the transfer cannot be said to have been transferred by the assignment in writing and the matter resting, merely in a contract to be performed in future, which may be specifically enforced as soon as the decree was passed,

and there would be no transfer automatically in favour of the 'transferee' of the decree when passed. It would require a further act on the part of the 'transferor' to completely effectuate the transfer, and if he did not do so, the only remedy for the transferee would be to sue for the specific performance of the contract to transfer. There would therefore be no legal transfer or assignment of the decree to be passed in future by virtue of the assignment in writing executed before the decree came into existence, and the only way in which the transferee could claim that the decree was transferred to him by assignment in writing would be by the operation of the equitable principle above enunciated, and the contract to assign having become a complete, equitable assignment of the decree.

26. The Judgement in *Jugalkishore Saraf (supra)* is inapplicable to the facts of the case as we shall discuss later in this judgement.

27. The learned Counsel for the petitioner has argued that even an unregistered Will can be enforced and has placed reliance upon judgement rendered by a Coordinate Division Bench in a matter under Article 227 No. 8279 of 2022: *Pramila Tiwari versus Anil Kumar Mishra and 4 others*.

28. We do not dispute the proposition of law pronounced by the Coordinate Bench in *Pramila Tiwari (supra)*. However, we have our own view about the applicability of the said judgement to the facts of the instant case.

29. Having heard the learned counsel for the petitioner and the respondent, we have carefully examined the pleadings and also the documents brought on record by the contesting parties.

30. It is evident from the allotment letter issued to Late Ram Pyare Panika that a 3 BHK Flat at an estimated cost of Rs.4,25,000/- was initially allotted on 23.06.1989. Later on another letter was issued on 28.07.1994, indicating the revised estimated cost of the Flat as Rs. 6,42,000/- and admitting payment of Rs. 3,31,250/- being made, till July 1994. Sri Ram Pyare Panika , however, prayed for exchange of Flat allotted to him with HIG House at Viram Khand Phase-V through his letter dated 03.09.1996. Such request was granted by the then Chairman of L.D.A. in November, 1996, and information regarding the same and the cost of such HIG house was communicated to Sri Ram Pyare Panika on 13.11.1996. Sri Ram Pyare Panika, however, could not pay the higher value and asked for refund of his money along with interest. Such letter has been admitted by the petitioner himself.

31. In the counter affidavit filed by the L.D.A. in the earlier petition, it has been stated that refund vouchers were also prepared, but the bank would not ascertain the amount deposited by Sri Ram Pyare Panika, and therefore, returned the said vouchers. It was not as if the L.D.A. did not initiate refund or that it had no intention to return the amount deposited by Sri Ram Pyare Panika, however, Sri Ram Pyare Panika died, before such a refund could

actually be given to him. Sri Ram Pyare Panika having relinquished his right to the Flat by his letter dated 03.06.1996, could not have made out any sale deed in favour of the petitioner for the Flat in question. However, he did execute an unregistered notarized document describing it as a Sale Deed (Vikray Vilekh Patra) having taken sale consideration of Rs.5,00,000/- allegedly from the petitioner for the said Flat. Inexplicably, he also allegedly executed a Will in favour of the petitioner for the same Flat. The petitioner is claiming his rights on the basis of such Sale deed which he claims to be only an agreement to sell, and the Will which he argues can be acted upon, even if it is unregistered.

32. Learned counsel for the petitioner has also placed great reliance upon the agreement entered by L.D.A. with Sri Ram Pyare Panika on 15.09.1994, at the time of giving possession of the Flat in question. It has been argued that such agreement has never been cancelled. It is binding upon L.D.A.

33. On careful examination of the Hire Purchase Agreement signed between the parties on 15.09.1994, we find it mentions the date of allotment as 05.10.1990 and the cost of the Flat as Rs. 6,27,000/- of which Rs.2,56,800/- had been paid and the remaining Rs. 3,70,200/- had to be paid in quarterly installments along with penal interest at the rate of 21% amounting to Rs.21,425/- for each such installment. Only After such payment of Rs.6,27,000/- of sale consideration was made

a sale deed would be executed. It also states that possession had been given only for the purpose of residence; until execution of sale deed no construction/changes be brought about in the property by the allottee; the allottee had to make payments of all taxes and dues on such property. It also states that the seller could cancel such allotment at any point of time and Clause 10 states clearly that the agreement would not create any lien/ right, title or interest or ownership in the property. Also, Clause 11 states that during the subsistence of the agreement, the purchaser would not have any right to either mortgage / hypothecate or sell such property.

34. The petitioner is relying upon clause no.-13 of the said Hire Purchase Agreement to say that the legal heirs of the purchaser in case of his death would have all the rights which the purchaser had in the property had he remained alive. It has been argued that since allotment was not cancelled by the L.D.A., the petitioner being the successor through unregistered Will executed by Sri Ram Pyare Panika is entitled to all the rights which Sri Ram Pyare Panika would have had had he been alive.

35. The question before this Court is whether the petitioner can be allowed to rely on one of the clauses of the said Hire Purchase Agreement while ignoring the rest of them. Sri Ram Pyare Panika did not make payments of all the quarterly installments and at the time of his making request to the Chairman L.D.A. for exchange of said Flat

with HIG house situated in Viram Khand Phase-V only Rs.3,31,250/- had been paid by him. His request was respected and he was allotted the HIG house in Viram Khand, but its price was naturally greater than the price for the First floor Flat in Nehru Enclave. On receiving letter issued by the L.D.A. for making payment of the estimated cost of the house Sri Ram Pyare Panika expressed his inability and asked for refund. He, therefore, relinquished his right to the Flat in question when he made a request for allotment of HIG house in exchange. His request having been granted, the limited rights that Sri Ram Pyare Panika had acquired in pursuance of such letter dated 30.11.1996 were with respect to the HIG house allotted to him in Viram Khand. Even those rights stood extinguished once Sri Ram Pyare Panika asked for refund of the money deposited by him through his letter dated 26.07.1997. Had full payment been made by Sri Ram Pyare Panika of the Flat in question in pursuance of the Hire Purchase Agreement, then alone, some alienable right could have been said to have accrued in his favour to bequeath the property which he was likely to have become owner, upon the petitioner through an unregistered Will. The right created through the Hire Purchase Agreement was only a contingent right subject to the condition of making full payment of sale consideration along with penal interest thereon.

36. The argument made by the learned counsel appearing for the petitioner that since no refund was made to Sri Ram Pyare Panika, he had a subsisting right over

the Flat in question which he could transfer by way of Sale deed, or by Will in favour of the petitioner cannot be countenanced as such a right allegedly arising out of the Hire Purchase Agreement ignores Clauses 10 and 11 thereof. The petitioner cannot be allowed to approbate and reprobate on the basis of the same document. He cannot be allowed to take advantage of one of the clauses of such agreement and ignore the other clauses thereof.

37. The law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election, which postulates that no party can accept and reject the same instrument and that "*a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn around and say it is void for the purpose of securing some other advantage;*" as observed by Lord Justice Scrutton in **Verschures Creameries Ltd vs. Hull And Netherlands Steamship Co Ltd**.

38. According to Halsburys Laws of England (4th Edn.) Volume 16, as quoted by the Supreme Court in **R N Gosain v Yashpal Dhir 1992 (4) SCC 683**, in Para 10; "*after taking an advantage under an order, a party may be precluded from saying that it is invalid and asking to set it aside.*"

39. In **Bhagwat Saran (through L.R.) Vs. Purushottam and Others, 2020 (6) SCC 387**, the

Supreme Court observed in paragraph 26 and 27 that *"it is trite law that a party cannot be permitted to approbate and reprobate at the same time. This principle is based on the principle of doctrine of election. The doctrine of election is a facet of law of estoppel. A party cannot blow hot and blow cold at the same time. Any party which takes advantage of any instrument must accept all that is mentioned in the said document. In respect of Wills, this doctrine has been held to mean that a person who takes benefit of a portion of the Will cannot challenge the remaining portion of the Will..."*

40. This Court, hence is of the considered opinion that no right much less an alienable right accrued in Late Ram Pyare Panika to have executed a Sale deed or a Will in favour of petitioner with regard to flat in question, allotment of which was followed by a Hire Purchase Agreement which specifically laid down that possession was being given only for the purpose of residence to the allottee and he would not have any right to mortgage, sell or create any third party interest in such property till Sale deed is executed by L.D.A. on receipt of full sale consideration. The entire sale consideration having not been paid by Late Ram Pyare Panika and his having opted for exchange of allotment of the flat in question with an H.I.G. house, which request was allowed by the then Vice Chairman of L.D.A.; Late Ram Pyare Panika also did not make any payment for such H.I.G. house and instead opted for refund of amount paid by him for Flat R-152, Nehru Enclave.

41. The order impugned in the writ petition although mentions the sale deed executed by Late Ram Pyare Panika as an Agreement to Sell, cannot be set aside only on this ground. The substance of the order being otherwise sound in law, this Court finds no good ground to issue a writ of Certiorari, which is even otherwise a discretionary writ which cannot be issued as a matter of course.

42. The writ petition is ***dismissed*** with the liberty to the respondents to take possession of Flat R-152 in accordance with procedure prescribed in law.

[Justice Brij Raj Singh] [Justice Sangeeta Chandra]

Order Date :- 9/07/2024
Rahul

Judgement and order has been pronounced today under Chapter-VII Rule 1 (2) of the Allahabad High Court Rules, 1952.

[Justice Sangeeta Chandra]