AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA No. 182 of 2004

Dr. Meghraj, son of Khilloomal Ramnani, aged about 66 years, Physician, resident of Mamta Maternity Home Jawahar Nagar, Raipur, Tahsil and District Raipur (C.G)

---- Appellant/Plaintiff

Versus

1. Anupam Griha Nirman Sahkari Samiti Maryadit, Anupam Nagar, Raipur, Tahsil and District Raipur through Administrator, Office of the Registrar Co-operative Societies, D.K. Mantralaya, G.E. Road, Raipur "Through "the President", Shahid Ahmad Quresh, son of Nabi Ahmad Qureshi, resident of 51, Anupam Nagar, Raipur (C.G)."

2. Kamal Kedia, son of Amirchand Kedia, address Annapurna Rice Mill, Baloda Bazar, District Raipur (C.G), Local Address – C/o Seth Banshidhar Kedia Oxygen Pvt. Ltd., 1 1-2, Industrial Area, Urla,Raipur.

---- Respondents /Defendants

For Appellant	:	Mr. Rajeev Shrivastava, Advocate.
For Respondent No.1	:	Mr. Abhishek Sharma, Advocate
For Respondent No.2	:	Mr. Prafull Bharat, Advocate.

SB : HON'BLE SHRI JUSTICE GOUTAM BHADURI

CAV ORDER

26/11/2015

1. This is an appeal against the judgment and decree dated 25.09.2004 passed in Civil Suit No. 45-A/2002 by the III Addl. District Judge, Raipur (C.G) whereby the suit filed by the appellant plaintiff was dismissed.

2. Briefly stated facts of the case are that a civil suit was filed by the plaintiff/appellant on 17.06.2002 stating interalia that a plot was sold by the original Defendant No.1 Anupam Grih

Nirman Co-operative Society Ltd in favour of plaintiff appellant Dr. Meghraj by a sale deed dated 11.07.1991 for a sale consideration of Rs.69,885/- and with such sale, the possession was also handed over. The plaintiff pleaded that because of a raid conducted by the income tax department, all the documents were seized, as such, within 3 years of the sale deed, he could not raise a superstructure over the same and therefore on 07.05.1996, an amount of Rs.15,000/- was paid by the plaintiff which was accepted as compromised amount by the co-operative Society and the time to raise superstructure/construction was extended for a further period of two years. It was pleaded by the plaintiff that in the year 1998-1999, the plaintiff appellant again contacted the President of Society and prayed for further time of a year and pursuant to demand raised paid an amount of Rs.10,000/- to the then President, however, no receipt was issued for the same. Subsequently, the sale of said plot was cancelled by cancellation order dated 06.11.1998 by the respondent co-operative Society and the same plot was sold in favour of original defendant/respondent No.3 Kamal Kedia. The plaintiff has pleaded that after cancellation of sale deed, that he had filed a petition raising dispute under Section 64 of the M.P. Cooperative Societies Act before the Registrar, Cooperative Societies Act. Initially the Registrar by order dated 12.07.1999, directed the parties to maintain status-quo. Finally the petition u/s 64 of Cooperative Societies Act was finally dismissed by an order dated 24.4.2002. Subsequently, it is pleaded that on an advice of advocates, a civil suit was filed claiming declaration for cancellation of sale deed along-with prayer for other consequential benefits as the plaintiff was advised that the cancellation of sale deed is within the domain of Civil Court only.

3. The respondent/defendants contended that the sale deed was made in the spirit of the Cooperative Societies Act and the sale deed contained the condition that within a period of 3 years of sale the appellant/plaintiff should raise superstructure over the plot. It was further stated that an amount of Rs.15000/- was further paid for extension of time for construction thereby the plaintiff accepted the conditions of sale deed. It was further stated that the suit was not properly valued and further pleaded that the plaintiff had given an affidavit and promised to raise superstructure within time which having not been fulfilled, the cancellation of sale of plot was made which is well merited and subsequently it was sold in favour of respondent No.3.

4. The learned court below after evaluating the facts and evidence dismissed the suit and held that the cancellation order dated 06.01.1998 and sale deed executed in favour of respondent No.3 was valid. It further held that the suit is barred by limitation. Being aggrieved by such judgment and decree, the instant appeal was filed before this Court.

5. Shri Rajeev Shrivastava, counsel appearing on behalf of the appellant/plaintiff assisted by Shri Malay Shrivastava, Advocate, would submit that predominantly the finding of the learned court below while dismissing the suit is completely illegal as the cancellation of sale deed only rest and vests within the jurisdiction of the Civil Court and the Cooperative Courts do not have any jurisdiction to cancel the sale deed as such the civil suit was filed. He relied on a

decision rendered by coordinate Bench of this Court in *W.P.No.1084 of 1999 (Shyam Kumar Gujrati Vs. Board of Revenue and others) decided on 01.09.2014* and would submit that in respect of matter like nature of litigation, the High Court has held that the cancellation of sale deed cannot be done by the Court of Cooperative Societies and any cancellation so made would be void. He went through the judgment and contended that in the said case of Shyam Gujrati (supra), the principles laid down in case of ***Indu Kakkar Vs. Haryana State Industrial Development Corporation Ltd (1999) 2 SCC 37*** was also considered and thereafter a finding is given by the Court that the bye-laws cannot be given effect for cancellation of sale deed.

6. Learned counsel also submits that in the instant case since the cancellation of sale deed was made unilaterally, such cancellation cannot be sustained. It is submitted that unless and until the sale deed is cancelled by a decree of civil court, it cannot be given effect to by private negotiation. He therefore, submits that in such situation, the finding of the Court below is completely perverse and illegal. It is further contended that since the consequential relief was that of possession as such the suit having filed within 12 years of cause of action, it was well within limitation.

7. Per contra, Shri Prafull Bharat appearing on behalf of respondent No.2 referred to the sale deed and would submit that the sale deed contained condition that within a stipulated period of time, the construction over the plot was necessary. Therefore, he referred to Section 32 of the Transfer of Property Act and would submit that the condition

contained in sale deed had a legal sanctity. Consequently, the cancellation if any made would be within the ambit of power of the Society as the condition for cancellation itself was contained in the sale deed. He strenuously relied on the decision of *Indu Kakkar Vs. Haryana state Industrial Development Corporation Ltd (supra)* and would submit that in similar situation when the superstructure was not raised over the plot within a period of time, the Supreme Court considered it to be a valid ground for cancellation of plot. He further submitted that in subsequent development of the case, the instant appeal was dismissed on 12.12.2005 which was eventually restored by this Court on 22.4.2008 and during such period more than two years, respondent No.2 had availed loan from the Bank and raised superstructure over such plot as no appeal was pending during such relevant time. Therefore, it is contended that in view of subsequent event which took place after the dismissal of appeal, now no relief can be granted to the appellant.

8. I have heard learned counsel for the parties at length and have also perused the documents and evidence on record.

9. Admittedly, a development which took place before this appellate court that the instant appeal was dismissed by an preemptory order in the year 2005 which was subsequently restored in the year 2008. During the pendency of this appeal, the appellant has moved an application under Order 6 Rule 17 along-with an application under Order 41 Rule 27 of CPC with a set of documents wherein it is pleaded that by peremptory order dated 25.10.2005, the appeal was dismissed and thereafter it remained in state of dismissal for

more than two years. Consequently, taking note of such dismissal the respondent has raised superstructure over such plot after availing the loan from the bank. The loan documents are placed on record. This issue is dealt with at the end part of this judgment.

10. Now turning to the merits of the case, a perusal of the order sheets would show that dismissal of civil suit by trial Court was made on two grounds by holding (i) firstly that the suit filed is barred by limitation as the suit for declaration for cancellation of the subsequent sale deed is preferred beyond 3 years of its execution and (ii) secondly it was held that since the sale deed contained a clause that the construction would be started within six months after execution of the sale deed and will be completed within a period of 3 years and the same having not been completed despite the fact that further time for construction was extended, the cancellation of sale deed was rightly done by the Society.

11. It is not in dispute that the sale in favour of the appellant/plaintiff was made by registered sale deed dated 11.07.1991 by Cooperative Society. The said sale deed is marked as Ex.D1(C). A perusal of the sale deed would show that it contains a condition at clause (2) that the purchaser shall start the construction within six months of the execution of sale deed and would complete the construction within a further period of 3 years and in case, the construction is not completed within 3 years, on an application, the period would be extended by the Managing Committee for further one year maximum for two occasions.

12. As per the evidence of Dr.Meghraj, the plaintiff he

could not raise construction, therefore, in the year 1996, he applied for extension of time and the Society, after accepting the amount of Rs.15,000/**-,** extended the period of two years for construction. Therefore, the stipulation which contained in the sale deed by way of contract was extended for a further period of two years. As per the plaintiff, the appellant again applied for extension of time in the month of June 1998 wherein it is stated that an amount of Rs.10,000/- was paid. However, no document has been placed to prove either the payment was made or time was extended.

13. The documents placed would show that subsequently a deed of cancellation was executed by Society unilaterally by Ex.D-3 which purports that since the construction was not completed within time, the sale deed Ex.D-1 dated 11.07.1991 was cancelled. The cancellation deed was registered on 05th November, 1998. Therefore, the fact emerges that a sale deed was unilaterally cancelled by the Society in the year 1998. The respondent contended that after cancellation of the sale deed, the same plot was sold to respondent/defendant No.3 namely Kamal Kedia. The learned court below has held that since the sale deed contained stipulation and condition to start the construction within six months of execution of the sale deed and was to be completed within 3 years and the same having not been made, consequently the cancellation made by the Society is valid resulting thereby the cancellation was held to be correct.

14. Indisputably, the first sale deed was registered in favour of the appellant. In the present case, the registered

sale deed executed in favour of the appellant was cancelled by unilateral deed of cancellation by the Society. Therefore, in the opinion of this Court, even if the recession of contract was made, it could not have been done unilaterally as has been made in this case without instituting any suit before a court of law. If the contract according to the Society was voidable or terminable as per the agreement contained in the sale deed then in such a case, it was obligatory on the part of Society to take recourse to appropriate legal/statutory proceeding by filing civil suit before the appropriate civil court. The cancellation of sale deed by inhouse unilateral act would certainly against the spirit of section 31 of Specific Relief Act, 1963, which lays down the complete procedure to cancel any registered deed. Further, the Society has failed to place before this Court any statute to show the source of power by which the Society could have unilaterally cancelled a registered deed of sale.

15. Similar issue had come up before this court in *Shyam Kumar Gujrati Vs. Board of Revenue* and others decided on 01.09.2014 (supra) wherein it was held that cancellation of registered sale deed can only be done by a decree of civil court. Nothing has been placed on record by the respondent except the case law of *Indu Kakkar (supra)* to show that the Society had cancelled the sale deed by virtue of power conferred by the statute to cancel sale deed without taking recourse to the remedy as provided under section 31 of the Specific Relief Act through a decree of court of competent jurisdiction. Therefore, according to this court even the sale deed contained voidable or terminable clause in the form of an agreement the same has to be adjudged by the court as

would be required under Sections 27 & 31 of the Specific Relief Act 1963.

16. As has been held in *Baldeo Kumar Agrawal Vs. Managing Director, M.P. Rajya Laghu Van Upaj Sahkari Sangh Maryadit reported in AIR 1997 M.P. 147* which has been reiterated in *Kusum S. Verma Vs. Pritam Singh Gulati 1998 (1) MPLJ 578 (supra)*, in enacting section 64 of the Act, the Legislative intent obviously was to provide self-contained dispute resolving mechanism through the hierarchy of original and appellate co-operative Courts. Therefore, the finding of the trial Court that the cancellation of sale deed was legally valid cannot be upheld in view of the statutory provision and the principles reiterated by this Court in W.P.No.1084 of 1999 (*Shyam Kumar Gujrati Vs. Board of Revenue)*. In the result, it is held that the cancellation of sale deed by virtue of unilateral cancellation deed cannot be given effect to as it was done without filing a suit for cancellation of an instrument as provided u/s 31 read with section 27 of the Specific Relief Act. Consequently, the cancellation deed executed by the Society will have no effect at all. Since the cancellation was not done by the decree of Civil Court, therefore, the cancellation cannot be held to be legal and would be *nonest* in the eyes of law.

17. Now turning to the question of limitation, a perusal of the plaint would show that after cancellation of sale deed of appellant/plaintiff, the plot was sold to Respondent No.3 Kamal Kedia by sale deed 06.11.1998. The pleading and evidence would further show that in order to cancel such sale deed, a proceeding was initiated by the plaintiff under

Section 64 of the Cooperative Societies Act 1960 before the Registrar Co-operative Societies on 28.05.1999 wherein order of status-quo was passed and ultimately the said petition was dismissed on 24.4.2002. Thereafter, the civil suit was filed. The plaintiff has pleaded and contended in his evidence that he consulted the lawyers and he was advised that since the cancellation of deed can only be done by the Civil Court, therefore, the civil suit was filed on 17.06.2002, by such suit declaration was prayed that cancellation of sale deed of plaintiff be declared void and further declaration to annul the subsequent sale deed in favour of Kamal Kedia was prayed for. Alongwith such declaration, possession was also claimed. To be more specific, reading of the plaint would further show that in the prayer clause amongst other relief(s) it was mainly prayed that the sale deed executed on 06.11.1998 in favour of Kamal Kedia in respect of the subject plot be declared void and the plaintiff be placed in possession by ejecting the respondent/defendant No.3.

18. The trial Court has held that the suit is barred by limitation as the suit was filed beyond the period of 3 years which is contemplated in suit of declaration under Article 58 of the Limitation Act 1963. Now if the relief clause is examined, considering the prayer that the plaintiff had specifically pleaded that he be placed in possession by evicting Respondent No.3, then certainly the suit could have been filed within a period of 12 years, according to the Article 65 of the Limitation Act, 1963. The order of the trial Court would show that the trial Court has merely proceeded on the assumption that the suit is merely for declaration of title and nothing-else. The pleading and evidence would

show that the plaintiff has claimed not only a declaration that he is owner of the property and the sale deed executed in favour of respondent No.3 be declared void but also at the same time, the reliefs for possession of land and damages were also claimed.

19. Once the cancellation of subsequent deed of sale in favour of respondent Kamal Kedia is declared void, the consequences are obvious and the character of the plaintiff's suit is evidently for declaration of title and recovery of possession. Therefore when the character of suit is that for possession which is claimed in consequence of declaration, article 65 of the Limitation Act, 1963 is correct provision and not Article 58 which only confined to a decree of declaration.

20. Calculating the date as against the provision of Article 65 of the Limitation Act, the deed of cancellation of sale deed was made on 06.11.1998 and the civil suit was filed on 17.06.2002. Therefore, the suit was within the period of 12 years of limitation and the finding of trial Court in this regard is erroneous which cannot be sustained and is accordingly set aside.

21. Now turning to the other aspects of subsequent development, at the appellate stage an application for amendment has been filed. The amendment application purports that when the appeal was pending before this Court, by way of peremptory order dated 25.10.2010 the appeal was dismissed and during such period since no appeal remained pending before the Court for a period of more than two years, the respondent has made improvement on such plot by taking loan from the Bank and

has raised the superstructure. Alongwith the amendment application, the application under Order 41 Rule 27 has also been placed to show that the respondent has incurred expenses by availing loan from the Bank to construct house over the subject land.

22. A perusal of the appellate record shows that the peremptory order was passed to make good the default within a further period of two weeks, failing which, it was ordered that the appeal shall stand dismissed without reference to the Bench. The A.R(J) note dated 12.12.2005 shows that the default was not removed, consequently, the appeal was dismissed. Thereafter, the order sheets contain that the appeal was restored on 22.4.2008 in M.C.C.No.66 of 2007. As such from 12.12.2005 to 22.04.2008, almost for more than two years the appeal remained in state of dismissal. The order passed in MCC would show that respondents 1 & 2 i.e., D-1 Anupam Griha Nirman Sahkari Society and D-2 K.A. Ansari, President of Society though served, but were not represented. Respondent No.3 Kamal Kedia was represented.

23. Now, if the reference is made to the amendment proposed in the written statement, it contains a submission that while the appeal stood dismissed, the respondent on the presumption of bonafide belief that the appellant is not interested to pursue the appeal, availed the loan from financial institution and has raised superstructure over the same. The amendment further shows that for construction of house, Rs.74 lakhs were got sanctioned, out of that Rs.61 lakhs was withdrawn and the property has been mortgaged

with the Bank where-from the loan was obtained. Alongwith the amendment petition, the documents have also been placed so as to show that during the period of dismissal, the loan was availed and superstructure has been raised. Therefore, necessarily, the amendment would be an effective defence if it is proved. Sub-section (2) of section 27 of the Specific Relief Act 1963 contemplates that the defence is available when a proceeding for recession of a contract is filed. Clause (b) of Section 2 provides that the defence which is available takes within its sweep that owing to change of circumstances which has taken place after the making of contract, when the parties cannot be substantially restored to the possession in which they stood, when the contract was made or where the third parties during the subsistence of contract haveacquired right in good faith without notice and for value. Therefore with the change and development of circumstances, certain defence has become available to the respondent by virtue of aforesaid provisions.

24. Now if we consider the defence of the respondent, it is stated that after cancellation of the sale deed in favour of the plaintiff, the subsequent sale deed was made in favour of Respondent No.3. The sale deed made in favour of Respondent No.3 was for a valuable consideration, therefore, he can be stated to be a purchaser or transferee from the ostensible owner i.e., Society which executed the sale deed in favour of Respondent Kamal Kedia. In this case, as would be evident from the facts, it is clear that because of the fault of appellant, the appeal remained dormant in the stage of dismissal for a considerable period of time between 12.12.2005 to 22.04.2008 that is for approximately 2 years

and 4 1/2 months.

25. Under the facts of this case, considering the subsequent event, in the opinion of this Court, the interest of justice demands remand of the case to the trial Court for framing and trial of the specific issue with respect to the pleading made during the appellate stage before this Court along-with consideration of document. Taking into averments made in the pleading before the appellate court, this court is of the opinion that the same needs to be allowed and accordingly it is allowed. Further if the proposed documents are accepted without giving opportunity to the plaintiff, it will prejudice the right of the appellant. In these circumstances, the appellant should also get proper opportunity to defend and rebut the same. Therefore, in view of the amendment, if the construction has been made during the pendency of dismissal of appeal, the change of circumstances which took place since the making of contract i.e., the original sale deed made in favour of the plaintiff/ appellant and whether the parties cannot be substantially restored to the possession in which they stood when the contract was made and where the third party i.e., respondent No.3 herein during the subsistence of the contract acquired the right in good faith without notice and for value are to be adjudicated afresh after consideration of pleading and evidence of parties.

26. From the above resume of facts and the nature of developments as the construction has been stated to be made by respondent No.3 who has pleaded that he is a bonafide purchaser for a value, the issue would necessarily to be adjudicated in view of the aforesaid observation made

by this Court in the foregoing paragraphs. Without the issues being framed and addressed, the just decision cannot be rendered in the facts of this case. It is settled preposition that the appellate courts are not inhibited by the acts or omission of the parties and Rule 25 of Order 41 CPC empowers the appellate court to frame issue and remit a case for adjudication. Therefore, the case is remanded with the following issues :

> "(I) Whether after dismissal of the appeal by peremptory order the respondent having constructed his house, the parties cannot be substantially restored to the possession in which they stood earlier ?"
>
> (ii) Whether any relief, if any, the appellant is entitled for or no relief can be granted in view of subsequent development ?

27. Accordingly, the appeal is remitted back to the trial Court to adjudicate upon the issues by taking further evidence of the parties. The appellant shall also be entitled to make necessary consequential amendment. The parties shall appear before the trial Court on 12th January, 2016. The proposed amendment may be carried out by the respondent within a further period of two weeks from the date of the order. In the facts and circumstances of the case, there shall be no order as to cost. The records of the lower Court be sent back forthwith.

Sd/-
GOUTAM BHADURI
JUDGE

Rao