20.11.2024
Item No.25
Court No.11

FMA 581 of 2021
+
IA No. CAN 1 of 2019 (Old No. CAN 4578 of 2019)

CBS Uddog Pvt. Ltd. & Ors.
- Versus –
Md. Burhan Mullick & Anr.

Mr. Gautam Banerjee,
Mr. Raja Ghosh
...for the Appellants.
Mr. Sadananda Ganguly,
Mr. Indranath Mukherjee,
Mr. Pradip Kr. Neogi,
Mr. Anirban Saha
....for the State Respondents.

Under challenge in this appeal is the order dated January 18, 2019, passed by the Civil Judge (Senior Division), Ghatal, Purba Medinipur, in O.S. No. 173 of 2017. The order rejected the defendants'/appellants' application under Order 39 Rule 4 of the Code of the Civil Procedure, 1908(in short, the Code), seeking the vacation of the interim order dated April 11, 2018, which had prohibited defendants (1 to 6) from transferring the property described in Schedule'A', appended to the plaint, until the disposal of the suit.

The plaintiffs/respondents (hereinafter, the respondents) filed a suit for damages for breach of contract and for recovery of Rs. 10,00,000/- and Rs. 72,15,000/- respectively with interest accrued thereon @ 10% p.a. The respondents contended that the appellants, who had purchased the suit property in the name of CBS Udyog Private Limited, had approached the respondents, the developers, for the construction of a multi-storied building on the property.

Upon being approached, the respondents agreed to undertake the project at a total cost of Rs. 3.8 crores, subject to certain terms and conditions, which were formalized in a written agreement executed by the parties before a notary public on 22.09.2014. The respondents claimed that by the time the plaint was presented, they had already invested approximately Rs. 2.36 crores, of which the defendants had paid only Rs. 1,63,85,000/- up to 03.06.2016, leaving an outstanding balance of Rs. 72,15,000/-. The respondents contended that despite several requests and the issuance of a legal notice, the appellants failed to pay the outstanding amount. Hence, the suit.

Along with the plaint, the respondents filed an application under Order 39 Rules 1 and 2 of the Code. In addition to the averments in the plaint, the respondents claimed that the appellants were threatening to dispossess them from the suit property and that the appellants might sell the property, or any part thereof, to prospective buyers, causing irreparable loss and injury to the respondents. The application was disposed of on contest. The learned Court below by its order dated 11.04.2018, restrained the respondents therein from alienating the suit property to any prospective buyer until disposal of the suit.

The appellants filed an application under Order 39 Rule 4 of the Code, contending, inter alia, that the respondents had abruptly abandoned the project in a disorganized manner. They further argued that due to the interim order, which imposed a serious embargo on their ability to deal with the property, the appellants were unable to raise funds to complete the project. Following a joint inspection by the engineers of both parties, it was determined that the respondents were entitled to a further sum of Rs. 10 lakhs, in addition to the amount already paid to them, for the work completed so far. Additionally, the appellants claimed that the respondents had used substandard building materials in the construction. Based on these grounds, the appellants sought the vacation of the interim order dated 11.04.2018. However, the learned Court below rejected the appellants' contentions and dismissed the application, leading to the present appeal.

The record reveals that a Hon'ble Coordinate Bench of this Court made an effort to resolve the dispute amicably. One Engineer-cum-Valuer was appointed to assess the extent of construction allegedly carried out by the respondents and the probable cost based on the agreement between the parties. Initially, the Engineer-cum-Valuer determined that a sum of Rs. 10 lakhs (Rs. 10,65,658/-) was required to be paid to the respondents. However, as per direction of that Bench, the Engineer-cum-Valuer re-assessed the costs in terms of the agreement and the payment schedule attached therewith and submitted a revised report indicating that the appellants were required to pay Rs. 64,14,110/-.

In line with the approach adopted by the earlier Bench, we also made efforts to resolve the issue amicably, and as a result of our intervention, the appellants paid a sum of Rs. 10 lakhs to the respondents. However, since the parties chose to persist in their respective claims, our efforts eventually suffered a setback and ultimately failed. The parties have now invited us to dispose of the appeal on its merits.

Mr. Banerjee, the learned advocate appearing in support of the appeal, argues that the respondents entered into a construction contract with the appellants to complete the project at a cost of Rs. 3.8 crores. However, the respondents suddenly abandoned the job, forcing the appellants to appoint another developer to complete the project. He claims that it was discovered that the respondents had used substandard building materials in the project. He argues that, since no interest was created in the suit property, the learned Court below erred in passing the interim order restraining the appellants from dealing with the property, which resulted in a financial crunch for the appellants and led to an impasse. Therefore, the interim order caused undue hardship to the appellants, necessitating its vacation.

Per contra, Mr. Ganguly, the learned advocate opposing the appeal, persistently sought to impress upon us that by agreeing to allow the earlier Bench to appoint an Engineer-cum-Valuer, the appellants have effectively accepted the respondents' claim. According to him, the re-assessment made by the Engineer-cum-Valuer, indicating that the respondents are entitled to outstanding dues of Rs. 64 lakhs and odd amounts, has taken on the character of a consent decree. Therefore, he argues, such a re-assessment is binding on the appellants. He further contends that there is nothing left to be decided in the suit. In support of his contention, he relies on the decision reported at 2022 LiveLaw SC 143 (*M/s. Sree Surya Developers and*

Promoters v. N. Sailesh Prasad & Ors. & M/s. Raja Push Prop. Pvt. Ltd. v. N. Sailesh Prasad & Ors.). Mr. Ganguly also places reliance upon a decision, reported at AIR 1975 Cal 225 (*Bank of Baroda v. Fishco*) for the proposition that the principle of res judicata applies between two stages in the same litigation to this extent that a Court, whether the Trial Court or a higher Court having at an earlier stage decided a matter in any way will not allow a party to re-agitate the matter in the same proceedings.

In the present case, it is undisputed that the parties entered into a pure construction contract, without creating any interest in the suit property. There can be no dispute with the settled legal proposition that such an agreement cannot be specifically enforced. It is also undeniable that the appellants are the owners of the suit property. Ownership is a right in rem, which is enforceable against the world at large. This ownership includes rights to possess, use, enjoy, alienate, and more. However, a court, following due process of law and based on settled legal principles, can curtail any of these rights.

Undoubtedly, the suit is essentially a suit for the recovery of money and therefore, the Schedule ‘A’ property cannot be considered to be the ‘property in dispute in the suit’ simply because the claim is for amounts allegedly due for its construction.

It can be argued that the settled legal principles for granting an injunction require the court to consider whether the condition of "irreparable loss and injury" is met, in addition to the other two conditions, namely, "prima facie case" and "balance of convenience." The court should have assessed whether the plaintiffs could be compensated in monetary terms if the interim order was refused. Since this suit is primarily for the recovery of money, the court should have taken measures to secure the amount to prevent the decree from being frustrated. Instead, by abruptly limiting the appellants' constitutional right to property without requiring the defendants to provide security, the court has misdirected itself. If the appellants failed to furnish security, only then such drastic measures could have been considered. As a result, the interim order risks leaving the property unused and the appellants in a state of impasse. Situated thus, such interim order has caused undue hardship to the appellants. Therefore, we are of the view that the learned Court below erred in declining to vacate the interim order.

We are surprised to note that Mr. Ganguly seeks to have us hold that, since the appellants agreed to the suggestion of the earlier Bench to appoint an Engineer-cum-Valuer, this agreement has assumed the character of a consent or compromise decree. Consequently, the re-assessment made by the Engineer-cum-Valuer would be binding on the appellants. It was argued for the respondents that this re-assessment should be treated as an admission by the appellants and the doctrine of promissory estoppel would apply to prevent the appellants from disputing the re-assessment.

A decree must conclusively determine the rights and liabilities of the parties. A decree can be passed on consent or a compromise reached by the parties only if it is proved to the satisfaction of the Court that the suit has been wholly or partially adjusted by a lawful agreement or compromise, which must be in writing and signed by the parties. The records do not show that the appellants have ever admitted that the amount mentioned by the Engineer-cum-Valuer in the re-assessment represents the justified claim of the respondents.

Undoubtedly, the principles of res judicata apply between two stages of the same litigation, but the issue must be conclusively decided at the earlier stage. In the present case, it cannot be concluded that the issue was finally decided by the earlier Bench merely because the appellant consented to the appointment of the Engineer-cum-Valuer, who submitted a report based on a re-assessment.

The proposition laid down in the judgment of M/s. Sree Surya Developers and Promoters (supra) is that, under Order 21 Rule 3A of the Code, a party to a compromise decree cannot challenge the decree on the grounds that it was not lawful by filing a suit before the same Court that recorded it. Therefore, there is no scintilla of doubt regarding the binding nature of these two decisions but the propositions laid down therein do not apply to the present case.

Therefore, for the reasons stated above, we are of the view that the interim order dated 11.04.2018 has caused undue hardship to the appellants and, consequently, the same is vacated.

As a result, the appeal succeeds, and the impugned order is set aside. However, it is clarified that the trial Court may proceed with the trial uninfluenced by any observations made in this order, which are made solely for the purpose of deciding the appeal.

With these observation and order, the appeal and its connected application are, thus, disposed of.

(Partha Sarathi Chatterjee, J.) **(Tapabrata Chakraborty, J.)**