

(2010) 09 CAL CK 0034
In the Calcutta High Court
Case No : F.A. No. 61 of 2002

Gautam Choudhury

APPELLANT

Vs

Cauvery Choudhury

RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Evidence Act, 1872 — Section 102

Citation : (2011) 2 CHN 1

Hon'ble Judges : Kanchan Chakraborty, J;K.J. Sengupta, J

Bench : Division Bench

Advocate : Sabyasachi Bhattacharyya, Chandroday Roy and Anirban Mondal, for the Appellant; Mihir Kumar Das and Archana Manna for Respondent Nos. 1 and 2, for the Respondent

Judgement

1. This appeal is against the judgment and decree dated 23rd April, 2000, passed by the learned Judge, 5th Bench, City Civil Court, Calcutta in Title Suit No. 163 of 1992, whereby and where under the Plaintiffs (Respondents herein) succeeded to get a decree of declaration that the Plaintiffs are having 2/9th share of Rs. 53,503.23P i.e. Rs. 11,889.61 lying deposited with the Bank of India, Eliot Road Branch. The Plaintiffs also got a decree of permanent injunction restraining the Defendant No. 1 from disbursing the Plaintiffs' 2/9th share of the money i.e. Rs. 11,889.61 P. Thus, it appears that this appeal relates to a claim of a sum of Rs. 11,889.61P at the time of passing of the decree.

2. Bereft of all details, we just record that the case made out by the Plaintiffs is that the Plaintiff No. 1, Cauvery Chowdhury is the wife of late Dipak Chowdhury and the Plaintiff No. 2, Aurkah Prava Choudhury is the son of said late Dipak Choudhury. The Plaintiffs alleged that said Dipak Choudhury opened a joint savings bank account being account No. 4389 with the Defendant No. 1 bank and deposited Rs. 40,000/- under quarterly income certificate being Fixed Deposit Receipt Nos. 10/85 and 10/86 dated 30th October, 1984 each valued at Rs. 20,000/-. The said bank account was opened by late Dipak Choudhury jointly

with Goutam Chowdhury, Defendant No. 2 and Pradip Chowdhury, Defendant No. 3. Dipak Choudhury died intestate leaving behind his wife, Plaintiff No. 1, minor son, Plaintiff No. 2 and mother, Defendant No. 4, respectively. According to the Plaintiffs, the aforesaid money lying deposited with the bank, belong jointly.

3. After the death of said Dipak Choudhury, Defendant Nos. 2 and 3 surreptitiously tried to withdraw the entire money, taking advantage of their names being included in the joint account. Incidentally, the Defendant No. 2 was an employee of the said bank and it was very convenient and easy for him to withdraw the money surreptitiously. The Plaintiffs prayed for a declaration that the Plaintiffs are legally entitled to 2/9th share of the amount of Rs. 53,503.23P, i.e. Rs. 11.889.61P.

4. The Defendant No. 1, being the concerned bank, though filed written statement, has not really supported anybody's case and waited for the judgment of the Court. It appears that the Defendants Nos. 2 and 3 filed written statement and took a stand that ostensibly the said money was lying in the name of three persons but ownership of the fund did not belong to them and the source of fund for deposit was the sale proceeds and/or the premium obtained by virtue of long term lease in respect of the household debuttar property at Varanasi. In sum and substance, the claim of the Defendants is that the said money really belong to the debuttar and that those three persons were holding the fund on behalf of the deity and the said money is not secular one. The Defendant No. 4, Renuka Choudhury filed a written statement and supported the case of the Defendants Nos. 2 and 3.

5. In view of the aforesaid pleadings, the learned Trial Judge framed the following issues to resolve the dispute:

1. Is the suit maintainable in its present form ?
2. Is the suit barred by limitation ?
3. Has the Court jurisdiction to entertain the suit ?
4. Is the Plaintiffs entitled to relief as prayed for?
5. Whether the money deposited in the bank are the secular or debuttar?
6. Whether the entire sale proceeds have been deposited in the bank ?
7. Does the Plaintiff has any cause of action in the instant suit ?
8. To what relief or reliefs the Plaintiff is entitled ?

6. It appears that the Plaintiffs in order to prove their case have examined the Plaintiff No. 1 herself as witness and one Sri Lalit Mohan Halder has also deposed on behalf of the Plaintiffs. Incidentally, the Defendant Nos. 2 and 3, though filed written statement, did not come forward to depose in this case and none of the Defendants has taken any step to summon them to give testimony in this matter. The Defendants have examined three witnesses it's the Defendant No. 4, one

Smt. Anjali Das and another witness Shyamali Senapati.

7. After going through the evidence, the learned Trial Judge found that the Defendants have failed to prove that the said fund belonged to debuttar and it was also the finding of the learned Trial Judge that there is no evidence that the source of the said deposit came out from the fund in connection with the debuttar property. Hence, the learned Trial Judge did not accept the defence put forward by the Defendants.

8. Now, the question which has fallen for consideration is whether the learned Trial Judge is justified in passing a decree disbelieving the case of the Defendants that the amount lying in the bank is debuttar property.

9. Mr. Sabyasachi Bhattacharyya appearing for the Appellants submits that the Plaintiffs have miserably failed to prove that the money belonged to said Dipak Choudhury so far his share is concerned and it is not proved that the Defendant Nos. 2 and 3, whose names were also recorded in the said bank account, have also come forward with the fund. Rather, from the written statements of the Defendant Nos. 2 and 3 it is clear that the fund was collected from the sale proceeds as well as the premium obtained by way of a long term lease in respect of the debuttar property. He further-submits that when the Plaintiffs have failed to prove, and when there is evidence of such a strong circumstance which suggest that the fund was not secular rather debuttar, the learned Trial Judge should not have ignored this aspect of the matter. Had the evidence been made available before the learned Trial Judge and been read in right direction, then the suit should have been dismissed.

10. Mr. Mihir Kumar Das, learned Counsel appearing for the Respondents Nos. 1 and 2 while supporting the decree submits that the holders of any bank account are presumed to be the owners of the money lying in the said account unless it is shown that the source of the fund for opening the bank account is otherwise. He submits that although it is pleaded in the written statement that the source of the fund of the said bank account which is the subject-matter of the suit is from the debuttar property, but nothing has been proved except making an oral statement. Therefore, the learned Trial Judge has rightly disbelieved the defence of the Defendants. He has also drawn our attention to the relevant portion of the evidence of the D.W. 2 at page 81 of the paper book wherein she has specifically stated that she does not know what had happened to the money which was received after leasing out the residential house at Varanasi. She has also stated that she has seen the lease deed in respect of the residential house at Varanasi. Thereafter, she has stated that she has not seen the lease deed. Ultimately, she has admitted in her cross-examination that Dipak, Gautam and Pradip each had 1/3rd share in the money kept in the bank.

11. Mr. Das has also drawn our attention to the relevant portion of the evidence of D.W.1 wherefrom we notice that she is candid enough to say that she is not really fighting the litigation and her daughters are fighting this case through her.

She has also admitted that she does not know the quantum of money which has been deposited in the bank after leasing out the property at Varanasi. She has no document to show that the money has been kept with the bank after leasing out the house at Varanasi. She admitted that her son Dipak had business. Her admission is to be found in the cross-examination that the said business is now being run by the daughter-in-law Kaberi. She is very truthful to say that her father-in-law had properties other than the properties of Durgapriya.

12. While considering the arguments of the learned Counsels for the parties and while reading the aforesaid evidence we are of the view, as has been correctly observed by the learned Trial Judge, that the contesting Defendants have failed to prove that the source of the fund of the said bank account is the fund of debuttar; rather the Defendant No. 4 has stated specifically that she does not know what happened to the money said to have been received by granting lease of the property at Varanasi. The Defendant Nos. 2 and 3 could have come to the Court to say that at the time of opening of the account they supplied the money. Moreover, we find that the amount collected by granting lease was about Rs. 2 lacs and odd whereas the money deposited in the bank account is much less than that.

13. Mr. Bhattacharyya submitted that it is the onus of the Plaintiffs to prove that the husband of the Plaintiff No. 1 had source of income. We think, when the mother came forward to say that her son being the husband of the Plaintiff No. 1 had business, the presumption should be that he had money to open the bank account of his own. It is settled law that when any account is opened in the name of any person, the presumption of ownership of the fund of that account is in favour of the account holder, unless it is shown otherwise. Here, the Defendants had taken a plea that the amount lying in the bank account had the source of debuttar property. Therefore, it is the burden of the Defendants to prove it and they are bound to discharge.

14. Under the provisions of Section 102 of the Evidence Act it is clear that a suit will fail if no evidence is adduced. Here is a case that the Defendants have failed to prove their right and equally the Defendants/Appellants failed to rebut the presumption lying in favour of Dipak Choudhury so far his 1/3rd share of the said bank account is concerned.

15. Mr. Bhattachryya has taken a plea that if the entire evidence is read then there appears to be an irresistible circumstance that the money had the source of debuttar property. Firstly, we have not been able to gather any such circumstance to accept the plea that the source of the fund of the bank account is from a debuttar property; secondly, such circumstantial evidence is preferred by the Court in a condition where no direct evidence is available or could not be made available with due diligence. Here, direct evidence could have been made available had the Defendant Nos. 2 and 3 come forward to depose or had the Defendant No. 4 taken steps to produce them before the Court to tell the truth regarding the source of the fund of the bank account. It has not been done so.

Therefore, when the Defendant Nos. 2 and 3 have not come forward to depose before the Court to prove the case though they could have been the most competent and effective witnesses in this case to tell the truth, we have no option but to accept the version of the Plaintiffs that the money really belonged to the husband of the Plaintiff No. 1 and the father of the Plaintiff No. 2 to the extent of one third.

16. In view of the aforesaid discussions, we do not find any flaw, in any respect, in the judgment and decree of the learned Trial Judge. We, therefore, affirm the same. Accordingly, the appeal fails and the same is dismissed, however, without any order as to costs.