

(2009) 01 CAL CK 0045
In the Calcutta High Court
Case No : C.O. No. 3358 of 2008

Jagannath Dhar and Another

APPELLANT

Vs

Gopal Chandra Dhar and Others

RESPONDENT

Date of Decision : 20-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 99, 41, 47
Specific Relief Act, 1963 — Section 34, 41

Citation : (2009) 01 CAL CK 0045

Hon'ble Judges : Rudrendra Nath Banerjee, J

Bench : Single Bench

Advocate : Anik Rakshit and Sailendu Sekhar Bayerd, for the Appellant; Prabal Mukherjee and Ashim Ghosh for Opposite Parties Nos. 1 and 2, for the Respondent

Judgement

Rudrendra Nath Banerjee, J.—This revisional application under Article 227 of the Constitution of India was filed by the defendant Nos. 1 & 2/petitioners challenging the order dated 4.08.08 passed in Misc. Appeal No. 10 of 2005 before the 4th Court of the Additional District Judge, Paschim Midnapore, thereby allowing the Misc. Appeal and setting aside the order No. 1 dated 13.01.2005 passed by the learned Civil Judge (Senior Division) Ghatal in title Suit No. 4 of 2005.

2. The plaintiffs/opposite party Nos. 1 and 2 filed the title suit No. 4 of 2005 in the Court of Civil Judge (Senior Division), Ghatal, for a declaration that the judgment and decree both in preliminary and final form passed in title suit No. 26 of 1980 of the 3rd Court of Subordinate Judge at Midnapore, is illegal and not binding upon the plaintiffs and for repartition of some of the suit property on the ground that the defendant Nos. 1 and 2 of title suit No. 4 of 2005 filed the suit for partition being title suit No. 26 of 1980 without impleading the defendant Nos. 1 and 2 who were also co-sharers in the suit property. However, the said plaintiffs in title suit No. 26 of 1980 impleaded the father of the defendant Nos. 1 and 2 that their father actually sold out the portion of the said property to one

Haripada Routh by a registered deed of sale dated 28.05.1974 and the present plaintiffs/opposite party Nos. 1 and 2 purchased the same from the said Haripada Routh by a deed of purchase dated 9.12.1985 and since then the plaintiffs were in possession of the same. It is also contended that the defendant No. 4, Bankim Dhara, sold different portions of "A" scheduled property by registered sale deed to Jugal Dolai, Kartick Dolai, Ajit Kumar Bhukta, Nandalal Routh and others who were not parties to the said suit. Now the present plaintiffs/petitioners came to know of the final decree of the said title suit No. 26 of 1980 for the first time after obtaining certified copy thereof on 11.01.2005 when the present defendant Nos. 1 and 2 had already filed an execution case No. 12 of 1999 on the basis of the final decree in the said partition suit. Thus, the plaintiffs/opposite party Nos. 1 and 2 after knowing of the final decree and being not a party to the suit were aggrieved by such final decree and according to them the preliminary decree and the final decree both are illegal, as passed without making of the co-sharers a party to the suit and they filed the petition u/s 47 of the CPC in the execution Case No. 12 of 1999. The plaintiffs/opposite party Nos. 1 and 2 have brought this suit with a prayer for a decree of declaration that the said partition suit being title suit No. 80 of 2006 was illegal and not binding upon them.

3. In the said title suit No. 4 of 2005 of the Court of Civil Judge(Senior Division), Ghatal, the opposite party Nos. 1 and 2, that is the plaintiffs in the said suit, filed an application for temporary injunction restraining the defendants not to proceed with the title execution case No. 12 of 1999. The learned Trial Court rejected the petition for temporary injunction mainly on the ground that Section 41 of the Specific Relief Act, is not applicable.

4. The present petitioners then preferred the Misc. Appeal No. 10 of 2005, which was disposed of by 4th Court of Additional District Judge, Paschim Midnapore, allowing the said Misc. Appeal and setting aside the order of learned Civil Judge (Senior Division), Ghatal. It has been further ordered by learned Court below that the defendants are restrained by way of temporary injunction till the disposal of the suit from proceeding with title execution case No. 12 of 1999 but the application u/s 47 of the CPC out of the said title execution case shall be proceeded with expeditiously. Being aggrieved by the said order, the defendant Nos. 1 and 2, being the plaintiffs in the earlier title Suit No. 26 of 1980, as petitioners, filed this instant revisional application under Article 227 of the Constitution of India challenging such order.

5. Mr. Anik Rakshit, learned Advocate for the petitioners have contended firstly, that the application u/s 47 of the CPC having arisen out of the title execution case No. 12 of 1999 on the basis of the final decree of the title suit No. 26 of 1980, should not be stayed or parties should not be restrained from proceeding with such execution case, while the petition u/s 47 of the CPC has been directed to be proceeded with.

6. It is the further contention of Mr. Rakshit, that any dispute regarding execution of a decree will have to be decided under the execution case itself and

not by separate suit and no judgment and decree would be reopened. According to him, the title suit No. 4 of 2005 itself is bad and not maintainable under law and accordingly there cannot be any injunction as prayed for. Mr. Rakshit has also contended that there cannot be any injunction restraining a party to proceed with any suit or execution case pending in any other Court of co-ordinate jurisdiction. Mr. Prabal Mukherjee, learned Advocate, appearing for the opposite party Nos. 1 and 2 has contended while supporting the judgment of learned Court below that the suit of the opposite parties is for the declaration that the said decree of the partition suit is not binding upon them as the decree was obtained by exercising fraud upon the Court without impleading the plaintiffs-cosharers in the suit. According to Mr. Mukherjee, the purpose of the present suit would be frustrated if there be no order of temporary injunction against the petitioner Nos. 1 and 2.

7. Learned First Appellate Court below by the impugned judgment in Misc. Appeal No. 10 of 2005 dated 04.08.2008, has allowed the appeal with the observation that the Specific Relief Act sufficiently gave jurisdiction to the Court to pass temporary injunction in exercise of its inherent power. It has been further observed, that the plaintiffs are prima-facie necessary parties in the earlier partition suit and that if the title execution case is completed, there may be multiplicity of proceedings which prompted the learned Court below in passing the impugned order restraining the defendants from proceeding with the title execution case and directing the Court to dispose of the petition u/s 47 of the CPC at the earliest.

8. The following facts remain undisputed:

(a) The title suit No. 26 of 1980 of the Court of Civil Judge (Senior Division), Paschim Midnapur was decreed in preliminary form on 31.12.1981, the father of the present respondent Nos. 1 and 2 being impleaded as defendant No. 4. But the present respondent Nos. 1 and 2 or other subsequent purchasers of the suit property were not made parties.

(b) The said suit was finally decreed on 16.07.1994 showing specific allotments to the parties as per commissioner's report.

(c) The Execution case No. 12 was filed by the petitioners for executing the final decree of partition in the year 1999.

(d) The title suit No. 4 of 2005 was filed by the respondent Nos. 1 and 2 on 14.01.2005.

(e) The petition u/s 47 of the CPC was filed by the respondent Nos. 1 and 2 in the month of March 2005, that is, subsequent to filing of the title suit No. 4 of 2005. It is also well settled principles of law that all the co-sharers to the suit property including the stranger purchasers are to be made parties to a partition suit which is a comprehensive suit. If the respondent Nos. 1 and 2, that is, the plaintiffs of subsequent suit, are found to be co-sharers in the suit properties of

the earlier partition suit, the decrees, both preliminary and final, of the said partition suit has to be bad in law and cannot be said to be binding upon the absentee co-sharers.

9. Now, a pertinent question has been raised by Mr. Rakshit to the effect that the executing court cannot go beyond decree and even if the application u/s 47 of the CPC is converted as one under order 21 Rule 99 of the Code such principle cannot be ignored. But, it should be kept in mind, as a substantial question of law and natural justice that there cannot be an effective partition decree without a particular co-sharer. It will be preposterous to support the view that a person will get an allotment by partition decree without consideration of the interest of a particular co-sharer, even if such co-sharer is not in actual physical possession of the suit property.

10. There may be an ignorance of the plaintiff or fraud is practised by the plaintiff, upon which such co-shareship has been suppressed before the Court. It is the specific case of the respondent Nos. 1 and 2 that although their father was made a party defendant in the earlier partition suit, but, before the preliminary decree such father (defendant No. 4) had already transferred a portion of the suit properties to a third party in the year 1974 and before the final decree the present plaintiffs/respondent Nos. 1 and 2 purchased such transferred share in the year 1985 from such transferee.

11. Thus, if the respondent Nos. 1 and 2 are found to have interest as co-sharer in the suit property in the partition suit, the present suit for such declaration that such partition decree is not binding upon them appears to be well within the provisions of the CPC and u/s 34 of the Specific Relief Act.

12. Mr. Rakshit, relied upon the decision reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, and has contended that learned Court of appeal below ought not to have stayed execution pending in a Court of Coordinate jurisdiction. In the said case, the correctness of the interim order of injunction restraining a Cotton Corporation of India from prosecuting a winding up petition was called into question.

13. It was held, while dealing with the impact of Section 41(b) of the Code, that the Court is precluded from granting an injunction restraining any person from instituting or prosecuting any proceeding in a Court of Coordinate or superior jurisdiction. It is further held that such proposition is true, not only for permanent injunction, but also for temporary injunction in the aid of or as auxiliary to the final relief.

14. But the cited decision does not stand on the way of filing such a suit like the present for declaration. Here in the present case the prayer for declaration that the earlier partition decree is not binding upon the plaintiffs cannot be ignored. In the aid of such valid relief sought for in the suit, both the parties can very well be directed to maintain status quo in respect of the alienation, possession and nature and character of the present suit property. It, after all, cannot be over

looked that the respondent Nos. 1 and 2 have also taken steps to ventilate their grievance in the execution case itself, which the lower appellate court has kept open to be considered and disposed of first. Furthermore, the Court cannot be expected to turn its face from the very equitable claim of the respondents that if no injunction is granted and the petitioners are allowed to execute the decree, the same will obviously invite multiplicity of proceedings.

15. It appears that the deeds mentioned in the plaint and the petition for temporary injunction were not made a part of the affidavit but were filed separately by firisthi at the time of moving for interim injunction. The learned lower appellate court has obviously not overlooked the existence of such registered deeds of transfer.

16. Mr. Rakshit has also cited a decision reported in Muktipada Sarkar Vs. H.K. Mallick and Co. and Another, and has contended that such suit filed by the respondent Nos. 1 and 2 is not maintainable as the dispute regarding executability of decree of the partition suit can be challenged only in the execution case under order 21 Rule 99 of the Code of Civil Procedure.

17. In this cited decision, a decree of eviction was passed on 19.09.2002. Thereafter, on 03.01.2003, the appellant filed a title suit for declaration that he is a tenant under the respondent No. 2, his employer, and for declaration that the earlier decree was not binding upon him. In the said decision, the prayer for temporary injunction in favour of the appellant has been refused firstly on the ground that has to be raised in the proceeding under order 21 Rule 97 or Rule 99 of the Civil Procedure Code, and then even on merit the Division Bench was not satisfied with the case made out by the appellant. In the cited decision the filing of the subsequent suit has not been barred, but the injunction was not granted, as there was no prima facie case. But the same does not preclude from passing an order of temporary injunction of maintenance of status quo.

18. Thus, considering the facts and circumstances of the case and the equity prevailing, I find that there should be an order directing both the sides to maintain status quo, as on date, in relation to further encumbering or transferring the suit property and in relation to possession and nature and character of the suit properties till disposal of the suit. The interim order of injunction of staying further proceeding of the execution case granted by learned lower appellate court be vacated as against the settled principle of law. But the order of disposal the petition u/s 47 or Order 21 Rule 99 of the CPC before proceeding with the execution case shall remain unaltered. The impugned order is modified to such extent.

19. The revisional application under Article 227 of the Constitution of India is disposed of accordingly.

20. There shall be no order as to costs.

21. Let urgent xerox certified copy of this judgment be supplied to the parties, if

applied for.