
(2015) 07 CAL CK 0065
In the Calcutta High Court
Case No : C.S. No. 307 of 2006

Madhuri Agarwal and Others

APPELLANT

Vs

Ved Prakash Taneja and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12
Succession Act, 1925 — Section 211, 213, 221, 227, 263
Transfer of Property Act, 1882 — Section 106

Citation : (2015) 07 CAL CK 0065

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Ravi Kapur, Rishad Medora, Ahana Sikdar and Brinda Sen Gupta, for the Appellant; S. Mitra, Suparna Mukherjee, David Mantosh, Pradeep Kumar and Smruti Rekha Das, Advocates for the Respondent

Judgement

Debangsu Basak, J—The plaintiffs seek a decree for possession of a flat and a car parking space at premises No. 3, Middleton Row, Kolkata - 700071. The plaintiffs also seek mesne profits and damages from the defendant Nos. 1 and 2.

2. According to the plaintiffs, Late Smt. Sita Chakraborty was the owner of the flat and car parking space in question. She had executed her last Will and testament on October 10, 1995 by which she had devised and bequeathed her assets and properties including the flat and car parking space in favour of the plaintiff No. 1. The plaintiff No. 2 was appointed as the executor of such Will. The plaintiff No. 1 had obtained a probate in respect of the Will dated October 10, 1995 of Late Smt. Sita Chakraborty on September 20, 1996. The plaintiffs had caused their Advocate to issue a letter dated November 22, 1996 to the defendant No. 4 which is the society in which the flat and the car parking space is located, as to their right, title and interest in respect of the flat and the car parking space. According to the plaintiffs, the claim of tenancy made by the defendant Nos. 1 and 2 in respect of the suit premises by virtue of an alleged tenancy agreement entered into by the defendant No. 3 with the defendant Nos.

1 and 2 is without any basis. According to the plaintiffs, the probate of a Will dated September 15, 1995 granted in favour of the defendant No. 3 on December 18, 1996 was revoked on February 5, 1998. The alleged tenancy was created on February 28, 1997. The creation of the tenancy is bad. The defendant Nos. 1 and 2 did not derive any title through the defendant No. 3 as the defendant No. 3 had no title in respect of the flat or the car parking space. The plaintiffs claim mesne profits from the defendant Nos. 1 and 2 for wrongful occupation of the flat and the car parking space. The plaintiffs also claim damages from the defendant Nos. 1 and 2 for damages caused to the flat and the car parking space.

3. The defendant Nos. 1 and 2 are contesting the instant suit. They have filed a written statement. The defendant Nos. 1 and 2 claim that, they are bona fide tenants without notice of the probate granted in favour of the plaintiff No. 1. According to the defendant Nos. 1 and 2, the defendant No. 3 had a valid probate existing in his favour on February 28, 1997 when the tenancy was created. Subsequent revocation of the probate would not affect the right of the defendant Nos. 1 and 2 as the tenants of the suit premises. The plaintiffs have to treat the defendant Nos. 1 and 2 as lawful tenants in respect of the flat and the car parking space. The plaintiffs not having issued a valid notice terminating such tenancy, the plaintiffs are not entitled to the decree for possession or a decree for eviction or any other relief as prayed for in the suit.

4. The issues in the instant suit settled on June 24, 2015 are as follows:-

1. Whether the plaintiff is entitled to a decree for vacant and peaceful possession of the suit premises as described in Schedule annexed to the plaint?

2. Is the plaintiff entitled to a decree for damages of Rs. 50,000/- against the defendant Nos. 1 & 2?

3. Is the plaintiff entitled to a decree for mesne profits of Rs. 21,75,000/- against the defendant Nos. 1 & 2?

4. Did the defendant No. 3 have any right to induct the defendant Nos. 1 & 2 in the suit premises?

5. What other reliefs, the plaintiff is further entitled to?

5. The plaintiffs have adduced evidence through the plaintiff No. 1. The defendant Nos. 1 and 2 have adduced evidence through the defendant No. 2.

6. The first and the fourth issues being interrelated are taken up together for consideration.

7. Learned Senior Advocate for the defendant Nos. 1 and 2 submits that, the tenancy in favour of the defendant Nos. 1 and 2 was created by the defendant No. 3 on February 28, 1997. On such date there existed a grant of probate of a Will dated September 15, 1995 of Late Smt. Sita Chakraborty in favour of the defendant No. 3. The probate of such Will was granted in favour of the defendant

No. 3 on December 23, 1996. Therefore, on the date when the tenancy was created the property of the deceased Smt. Sita Chakraborty had vested with the defendant No. 3 as the defendant No. 3 was named as the executor in the Will dated September 15, 1995. It is contended that, since the tenancy was created during the period of time when the probate was valid, the subsequent act of revocation of the grant of probate on February 5, 1998 does not invalidate the tenancy created by the defendant No. 3. In support of such contention reliance has been placed on Sections 227 and 263 of the Indian Succession Act, 1925 and *Crystal Developers Vs. Smt. Asha Lata Ghosh (Dead) through LRs. and Others*, AIR 2004 SC 4980 : (2004) 5 CTC 121 : (2004) 9 JT 64 : (2004) 8 SCALE 390 : (2005) 9 SCC 375 : (2004) AIRSCW 5704 and *All India Reporter P.H. Alphonso Vs. C.F. De Costa and Others*, AIR 1964 Kar 187 : (1963) 1 MysLJ 596 .

8. It is contended on behalf of the defendant Nos. 1 and 2 that, the plaintiffs have not made out a case that, the grant of the tenancy was fraudulent. The grant of tenancy in favour of the defendant Nos. 1 and 2 by the defendant No. 3 being lawful, the defendant Nos. 1 and 2 therefore had entered into the suit premises lawfully. Their tenancy has not been revoked in accordance with law. The defendant Nos. 1 and 2 cannot be evicted therefrom.

9. On behalf of the plaintiffs it is contended that, Smt. Sita Chakraborty had died on December 25, 1995 after leaving a Will dated October 10, 1995 in favour of the plaintiff No. 1. The plaintiff No. 2 had been appointed as the executor under such Will. The plaintiff No. 1 had obtained probate of the Will dated October 10, 1995 on September 20, 1996. Therefore, it is contended that the Will of the deceased Smt. Sita Chakraborty of which probate had been obtained by the plaintiff No. 1 was a later Will than the one which the defendant No. 3 had obtained probate on. Moreover, the grant of probate in favour of the plaintiff No. 1 was prior in point of time then the grant of probate in favour of the defendant No. 3. Therefore, in any view of the matter the property of the deceased Smt. Sita Chakraborty had devolved in favour of the plaintiff No. 2 as the executor thereof. The defendant No. 3 had no right to create a tenancy in respect of the suit premises on February 28, 1997 as such an act is subsequent to the grant of probate on September 20, 1996 in favour of the plaintiff No. 1. It is submitted that, the probate dated September 20, 1996 has attained finality. On the contrary, the probate granted in favour of the defendant No. 3 on December 23, 1996 stood revoked on February 5, 1998. The defendant No. 3 had thereafter not taken any steps with regard to the existing probate or in respect of the probate proceedings of the Will claimed by him to be that of Late Smt. Sita Chakraborty. The defendant No. 3 is not contesting the present suit.

10. In support of the contention that the property of Late Smt. Sita Chakraborty had vested with the plaintiff No. 2 as the executor of the Will dated October 10, 1995 and that the defendant No. 3 has no right, title and interest in respect thereof, reference has been placed on Sections 211, 213, 221, 227, 297 of the Indian Succession Act, 1925. Referring to Exhibit "C" being the letter dated

February 22, 1996 issued by the Advocate for the plaintiffs to the defendant No. 4 it is submitted that the defendant No. 3 had been made aware of the grant of probate granted by the Court of the Will of the deceased Smt. Sita Chakraborty in favour of the defendant Nos. 1 and 2. Referring to the evidence of the defendant No. 2 it is submitted that, the defendant No. 2 has admitted that the defendant Nos. 1 and 2 are residents of the building much prior to the creation of the tenancy. It is, therefore, submitted on behalf of the plaintiffs that, the defendant Nos. 1 and 2 were aware of the probate of the Will of the deceased being granted in favour of the defendant No. 1 when the defendant Nos. 1 and 2 were seeking to enter into the alleged tenancy. The defendant No. 2 has stated in his evidence that the defendant Nos. 1 and 2 live at the flat adjoining the flat in question.

11. On the issue of eviction of the defendant Nos. 1 and 2 as the tenants of the flat, it is submitted that, the West Bengal Premises Tenancy Act, 1997 does not apply as the rate of rent in question takes the tenancy in question beyond the purview of the Act of 1997. The tenancy, therefore, would be guided and governed by the provisions of the Transfer of Property Act, 1882. Due notice under Section 106 of the Transfer of Property Act, 1882 had been given by the plaintiffs to the defendant Nos. 1 and 2. In this regard reliance is placed to Exhibit "I" being the notice dated August 18, 2006.

12. It is contended on behalf of the plaintiffs that no injunction can be issued against the true owner of the premises. In support of such contention reliance has been placed on Prataprai N. Kothari Vs. John Braganza, AIR 1999 SC 1666 : (1999) 4 JT 443 : (1999) 123 PLR 55 : (1999) 3 SCALE 109 : (1999) 4 SCC 403 : (1999) 2 UJ 785 : (1999) AIRSCW 1284 : (1999) 5 Supreme 10 . Crystal Developers (supra) has been sought to be distinguished by the learned Counsel for the plaintiffs on the ground that the fact scenario in such case was completely different to that obtaining in the present case.

13. In reply learned Senior Advocate for the defendant Nos. 1 and 2 submits that Exhibit "I" cannot be construed as a notice under Section 106 of the Transfer of Property Act, 1882 for the reason that the plaintiffs did not treat the defendant Nos. 1 and 2 as tenants and sought eviction in terms of the Transfer of Property Act, 1882 from the suit premises.

14. The plaintiff No. 1 is a legatee under the Will of Late Smt. Sita Chakraborty dated October 10, 1995 of which a probate has been granted on September 20, 1996. The plaintiff No. 2 is the executor under such Will. The plaintiff No. 1 is the wife of the plaintiff No. 2. The defendant No. 3 claims to be an executor of a Will of Late Smt. Sita Chakraborty dated September 15, 1995. The defendant No. 3 had applied for and had obtained probate of such Will on December 23, 1996. The defendant No. 3 had granted tenancy in respect of the suit premises to the defendant Nos. 1 and 2 on February 28, 1997 by an agreement of such date being Exhibit "1" in the proceedings. The defendant No. 4 is the co-operative society of the building in which the suit premises is located.

15. The contesting parties admit that the flat was owned by Late Smt. Sita Chakraborty. Apparently there are two Wills of Late Smt. Sita Chakraborty, one dated September 15, 1995 and the other dated October 10, 1995. The plaintiff No. 1 had applied for and obtained probate of the Will dated October 10, 1995 of Late Smt. Sita Chakraborty on September 20, 1996. The probate dated September 20, 1996 is Exhibit "A". The defendant No. 3 had applied for and obtained probate of the Will dated September 15, 1995 on December 23, 1996. The probate along with the Will annexed is marked as Exhibit "3". The plaintiff No. 1 had caused her Advocate to issue a letter dated November 22, 1996 to the defendant No. 4 informing the defendant No. 4 as to the grant of probate on September 20, 1996 of the Will dated October 10, 1995 of Late Smt. Sita Chakraborty.

16. The defendant Nos. 1 and 2 are in actual physical possession of the suit premises. The defendant Nos. 1 and 2 claim tenancy by virtue of a tenancy agreement dated February 28, 1997 being Exhibit "1" executed by the defendant No. 3 in favour of the defendant Nos. 1 and 2. The defendant Nos. 1 and 2 were residing at the building managed and controlled by the defendant No. 4 prior to the creation of the tenancy on February 28, 1997. This has been established by the evidence given by the defendant No. 2.

17. Exhibit "3" was revoked on February 5, 1998 being Exhibit "F". Exhibit "F" is the Order dated February 5, 1998 revoking the probate being Exhibit "3" and directing the probate proceedings filed at the behest of the defendant No. 3 to be treated as a contentious cause and to be disposed of. There is nothing on record to establish that the defendant No. 3 has taken any steps thereafter in the probate proceeding filed by him. The defendant No. 3 is not contesting the instant suit also.

18. On the date when the probate being Exhibit "3" was granted in favour of the defendant No. 3 there existed a probate of a subsequent Will of the deceased Smt. Sita Chakraborty dated October 10, 1995 granted on September 20, 1996 being Exhibit "A".

19. Crystal Developers (supra) has held that, the executor or the administrator, as the case may be, of a deceased person is his legal representative for all purposes and that all properties of the deceased vest in him, as such. No right to any property of a person who had died intestate can be established in any Court, unless letters of administration are granted by the probate Court. No right as an executor or a legatee can be established in any Court unless a probate of the Will is granted, by the probate Court, under which the right is claimed. Probate of a Will when granted establishes the Will from the date of death of the testator and renders valid all intermediate acts of the executor. It protects all intermediate acts of the executor as long as they are compatible with the administration of the estate.

20. The Division Bench of the Mysore High Court in P.H. Alphonso (supra) was

concerned with an application for revocation of the probate granted for a just cause. Their Lordships did not find a just cause to revoke the grant made therein. Their Lordships have held that, revocation of a grant of probate would not operate retrospectively.

21. Prataprai N. Kothari (*supra*) has held that a person in possession of an immovable property can protect the same by seeking an injunction against any person in the world other than the true owner of such immovable property.

22. The grant of probate operates as a judgment in rem. The judgment of the probate Court, however, operates as a judgment in rem in respect of the due execution and attestation of the Will and as to the appointment of the executor of the Will. The probate Court does not decide the title of the properties involved in the Will.

23. Law of succession does not contemplate a vacuum in succession. The property of the deceased Smt. Sita Chakraborty had, therefore, devolved upon a person. The rival parties contend that the deceased had left behind a Will and as such the succession is testamentary. There are two Wills of the deceased Smt. Sita Chakraborty in contention. The defendant Nos. 1 and 2 have come into possession of the suit premises through Exhibit "1". Exhibit "1" is a tenancy agreement dated February 28, 1997 entered into by the defendant No. 3 on one part and the defendant Nos. 1 and 2 on the other part. On February 28, 1997 there existed a probate of the Will dated September 15, 1995 in favour of the defendant No. 3. However, prior to the grant of probate dated December 23, 1996 in respect of the Will dated September 15, 1995 a Court of competent jurisdiction had granted probate of the Will dated October 10, 1995 in favour of the plaintiff No. 1 on September 20, 1996. Consequently, the property of Late Smt. Sita Chakraborty had vested in the plaintiff No. 2 as the executor named in the Will dated October 10, 1995. Probate in respect of such Will had been granted on September 20, 1996. Such probate is subsisting till date. Therefore, on February 28, 1997 when the defendant No. 3 was executing and entering into the tenancy being Exhibit "1", he had no right, title and interest to do so in respect of the suit property as the right, title and interest in the suit property as enjoyed by the testatrix during her lifetime stood vested in the plaintiff No. 2 as the executor of the Will dated October 10, 1995.

24. The defendant No. 3 had no right, title and interest on February 28, 1997 when he was creating the tenancy in favour of the defendant Nos. 1 and 2 in respect of the suit premises. Consequently, the defendant Nos. 1 and 2 did not derive any right, title and interest as a tenant or otherwise in respect of the suit premises by virtue of Exhibit "1" being the tenancy agreement dated February 28, 1997. The defendant Nos. 1 and 2 are, therefore, liable to vacate the suit premises on the demand for the same by the plaintiffs. The plaintiffs through Exhibit "I" have demanded vacant possession of the suit premises from the defendant Nos. 1 and 2. They have failed to vacate the same. The plaintiffs are, therefore, entitled to a decree in terms of prayer (a) of the plaint.

25. In view of the discussions above, the first issue is answered in the affirmative and in favour of the plaintiffs. The fourth issue is answered in the negative and against the defendants.

26. The second and the third issues are taken up together as they relate to damages and mesne profits. It has been rightly pointed out on behalf of the defendant Nos. 1 and 2 that the plaintiffs have not established the quantum of damages for a decree to be passed for damages. It has been also pointed out on behalf of the defendant Nos. 1 and 2 that there is no evidence of the quantum of mesne profits.

27. On behalf of the plaintiffs it is submitted that, the defendant Nos. 1 and 2 had caused damages to the suit premises and the same has been established on the basis of the evidence of the defendant No. 1 where he has stated that the defendants have broken a wall existing between the adjoining flat to the suit premises so as to allow the defendants better accessibility to the suit premises. Consequently, it is submitted that, the plaintiffs having established that the defendant Nos. 1 and 2 have caused damages to the suit premises, the quantification of the damages may be referred to a Special Referee in terms of Order XX Rule 12 of the Code of Civil Procedure, 1908 for adjudication. The quantification of mesne profits should also be referred to the Special Referee.

28. The plaintiffs have not established the quantum either of the damages suffered or of the mesne profits. However, the fact that damages have been caused to the flat in question is borne out from the evidence given by the defendant No. 1. The quantification of the damages can be left to the Special Referee which may be appointed herein. So far as the mesne profits are concerned the defendant Nos. 1 and 2 did not have any right, title and interest to enter into the suit premises on February 28, 1997 as tenants thereof. The defendant Nos. 1 and 2 are liable to pay mesne profits for their occupation of the suit premises on and from February 28, 1997 until making over vacant possession thereof to the plaintiffs. The plaintiffs should be allowed an opportunity to lead evidence as to the quantum of mesne profits.

29. In such circumstances, Mr. Ritzu Ghosal, Advocate is appointed as the Special Referee to go into the question of damages suffered by the plaintiffs on behalf of the defendant Nos. 1 and 2 of the suit premises. The Special Referee will also quantify the mesne profits receivable by the plaintiffs from the defendant Nos. 1 and 2 for the occupation of the defendant Nos. 1 and 2 of the suit premises for the period on and from March 1, 1997 until making over vacant possession thereof to the plaintiffs. The plaintiffs will bear the costs and expenses of the Special Referee at the first instance. The plaintiffs will extend all possible cooperation to the Special Referee including making available the venue and the secretarial assistance required by the Special Referee to complete the assignment. The Special Referee will proceed as expeditiously as possible and shall endeavour to file his report within four weeks from the date of communication of this order on him. The Special Referee will not grant any

unnecessary adjournment to any of the parties. The remuneration of the Special Referee is fixed at Rs. 40,000/- to be paid by the plaintiffs at the first instance. The plaintiffs are at liberty to add the remuneration paid and the costs incurred as part of their claim in this suit.

30. The second and the third issues are, therefore, answered accordingly.

31. So far as the fifth issue is concerned, the plaintiffs has paid a Court-fees of Rs. 46,280/-. The plaintiffs are entitled to costs of the suit assessed at Rs. 20,000/-. The plaintiffs are, therefore, entitled to aggregate costs of Rs. 66,280/- for the time being. Such costs are to be paid by the defendant Nos. 1 and 2 jointly and severally. The fifth issue is answered accordingly.

32. There will be a decree in terms of prayer (a) of the plaint in favour of the plaintiffs and against the defendants. There will also be a decree in favour of the plaintiffs for costs assessed at Rs. 66,280/- against the defendant Nos. 1 and 2 jointly and severally.

33. C.S. No. 307 of 2006 will appear in the monthly list of September 2015.