

(2004) 07 CAL CK 0008
In the Calcutta High Court

Case No : G.A. No. 3631 of 2001 and P.L.A. No. 301 of 1996

Mrinal Chakraborty

APPELLANT

Vs

Bhagwati Prasad Agarwal and Another

RESPONDENT

Date of Decision : 30-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (2005) 1 CHN 239

Hon'ble Judges : Narayan Chandra Sil, J

Bench : Single Bench

Advocate : Soumen Sen and Pooja Das Chowdhury, for the Appellant; Indrajit Sarkar and D.K. Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Narayan Chandra Sil, J.—The Court : This is to consider an application filed by Bhagwati Prasad Agarwal and his wife Smt. Madhuri Agarwal.

2. The petitioners' case in brief is that one Mrinal Chakraborty by suppressing facts and without complying with the mandatory provisions of Indian Succession Act and the Original Side Rules of this Court relating to testamentary matters obtained probate on 18th December, 1996 in respect of an alleged Will dated 15th September, 1995, alleged to have been executed by one Sita Chakraborty, since deceased. It is claimed by the petitioners that prior to her death Sita Chakraborty made and published her last Will and Testament dated 10th October, 1995 in English Language at Lucknow whereby she appointed Bhagwati Prasad Agarwal, the petitioner No. 1, the sole Executor of the Will bequeathing all her assets to Smt. Madhuri Agarwal, the petitioner No. 2. After the death of Sita Chakraborty an application for grant of probate of the said Will dated 10th October, 1995 was filed by Bhagwati Prasad Agarwal as an Executor thereof in the Court of District Judge, Lucknow. On 20th September, 1996 probate was granted. It is also stated that one Nani Bhusan Chakraborty was the father of Smt. Madhuri Agarwal. Nani Bhusan was the elder brother of Indu Bhusan

Chakraborty and Sita Chakraborty was the wife of Indu Bhusan Chakraborty. The petitioner No. 1 is the husband of Smt. Madhuri Agarwal. Sita Chakraborty was the owner of Flat No. C-3 at 3, Middleton Row, Calcutta Municipal Corporation No. A-3/3C, Sir William Jones Sarani, Apsara Co-operative Housing Society Ltd., Calcutta, After getting the probate Madhuri Agarwal caused a letter dated 25.4.1996 to be written by her Advocate to the President/Secretary of the said Apsara Co-operative Housing Society Ltd. to intimate the formalities to be observed by the petitioners for recording of transfer of the said Flat No. C-3 in favour of the petitioner No. 2. In reply dated 10th May, 1996, the Chairman of the said Co-operative Housing Society Ltd. requested the Advocate of the petitioners to submit certain documents to enable them to proceed with the formalities of transfer and recording of the name of petitioner No. 2 as owner thereof. Thereafter the petitioners were surprised by a letter dated 7th January, 1997 written by the Hony. Secretary of the said Co-operative that one Mrinal Chakraborty had obtained an order dated 18th December, 1996 from the Calcutta High Court granting probate in his favour of an alleged Will dated 15th September, 1995 executed by the deceased Smt. Sita Chakraborty claiming himself as the only legal heir of the said Sita Chakraborty and accordingly the said Co-operative expressed its inability to transfer the said Flat in the name of the petitioner No. 2 until such time the order of this Court obtained by the respondent is set aside. The petitioners started searching the records having applied for the certified copies of the relevant records of the instant case and received the same.

3. It is stated in the petition that the respondent is not the heir or legal representative of the deceased Sita Chakraborty at all in case Sita Chakraborty died intestate. It is also claimed that the respondent had falsely alleged that his father Makhan Lal Chakraborty since deceased was the brother of late Indu Bhusan Chakraborty. It is claimed that Indu Bhusan had no natural brother by the name of Makhan Lal Chakraborty. It is also stated that Nani Bhusan Chakraborty also known as Nani Gopal Chakraborty was the only natural brother of Indu Bhusan since deceased. It is also stated that in order to avoid issuance of citation and to deprive the petitioners who reside at Lucknow, of the opportunity of contesting the proceeding in respect of the alleged Will the respondent Mrinal Chakraborty falsely alleged that he was the only heir of the deceased Smt. Sita Chakraborty.

4. It is stated that the respondent Mrinal Chakraborty fraudulently obtained probate of the said alleged Will dated 15.9.1995 by making false allegation/representation concealing the fact that the petitioner No. 2, Smt. Madhuri Agarwal and her sister Kalyani Majumder were the sole heiresses and legal representatives of the deceased Sita Chakraborty and/or Indu Bhusan Chakraborty on whom the estate of the deceased would have devolved had Sita Chakraborty died intestate. The petitioners were not served with any citation or any other notice in connection with grant of probate of the alleged Will dated 15.09.1995.

5. It is claimed that on inspection of the said alleged Will dated 15.09.1995 the petitioners found that the alleged signatures of Smt. Sita Chakraborty thereon are fabricated and/or forged and the said alleged Will dated 15.09.1995 had not been signed or executed by Smt. Sita Chakraborty at all. It is claimed that the alleged Will dated 15th September, 1995 became inoperative by the reason of the subsequent Will dated 10th October, 1995 in respect of which probate was granted by the District Judge, Lucknow on 20th September, 1996. Thus, the petitioners filed an application dated 21st March, 1997 for revocation of grant of probate and an order of interim status quo was passed on 21st March, 1997. The said application for revocation was finally disposed of on 5th February, 1998 whereby the probate granted in favour of the respondent Mrinal Chakraborty was revoked on the ground that citation not being issued till then to the applicants. It was further ordered that the matter be treated as a suit being contentious. It is also stated that from the correspondence made between the petitioners and the said Cooperative Society it was clear that the said Flat was not transferred in the name of Mrinal Chakraborty. But after long lapse of time on 9.4.1999 the said Cooperative Housing informed the learned Advocate-on-Record of the petitioners that Mrinal Chakraborty was pressing hard over the transfer of the said Flat in his favour by sending letter dated 1st February, 1999 to the Co-operative Housing Society Ltd. The Advocate-on-Record of the petitioners duly communicated to the said Society about the order dated 5th February, 1998 and 12th February, 1998 passed by this Court. Ultimately, the said Society replied to the letter dated 3rd May, 1999 that as the matter is sub judice the Society would not recommend the transfer of the Flat to the Deputy Registrar of Co-operative Societies Housing CMC Calcutta. And by that reply it was also intimated by the Society that Mrinal Chakraborty filed a petition u/s 144(2) of the Code of Criminal Procedure in respect of the Flat in question. It was not known to the petitioners as to when Mrinal Chakraborty took custody of the said Flat as there existryl a status quo order passed by the Court. However, the Advocate-on-Record of the petitioners immediately wrote a letter dated 13th May, 1999 requesting the said Society to intimate the date when Shaw Wallace & Co. Ltd. alleged to have given possession of the said Flat to Mrinal Chakraborty. One evasive reply by letter dated 17th May, 1999 was given by the said Society. It is also stated that the petitioners intimated Shaw Wallace & Co. about the status quo order by a letter dated 3rd June, 1999 requesting the said company to inform as to the date when it had surrendered the tenancy to Mrinal Chakraborty. Mr. Justice Sengupta by His Order dated 13th July, 1999, appointed a Special Officer authorising him to ascertain who have been in occupation and possession as on date and since when.

6. Thereafter the petitioners made an application for appointment of a receiver in respect of the said Flat. The said application was disposed of by an order dated 18th August, 1999. In the said application the petitioners with a view to showing that the said flat was not alienated or let out in favour of any third party relied upon an application u/s 144(2) of the Code of Criminal Procedure affirmed by

Mrinal Chakraborty. It was also stated by the petitioners in that application that the police report will show that the Shaw Wallace & Company did not hand over the vacant possession of the said flat to Mrinal Chakraborty as also did not pay any further rent in view of the status quo order dated 21st March, 1997. It is claimed that any such induction of any person in the said flat is in violation of the status quo order. It is also stated that the said Mrinal Chakraborty appeared before the Lucknow Court and filed objection in connection with the probate matters filed at the instance of the present petitioners but subsequently withdrew the same.

7. In such circumstances, it is prayed inter alia that direction may be issued upon the receiver to hand over peaceful vacant possession, of the said flat being Flat No. C-3 situated at Apsara Co-operative Housing Society Ltd. to the petitioners and direction may also be given upon Shaw Wallace & Co. to make payment of arrear rent to the receiver in terms of the order dated 26th April, 2001 passed by Mr. D. K. Seth, J.

8. The petition is contested by one Murli G. Lalchandani by filing an affidavit-in-opposition. He is one of the tenants and occupiers of Flat No. C-3, Middleton Row, Calcutta and he affirmed the affidavit also on behalf of another tenant and occupier of the said flat of Mr. V. P. Taneja. It is stated that both Mr. Lalchandani & Mr. V. P. Taneja are the tenants in respect of the said premises at 3rd floor at a monthly rental of Rs. 12,000/- on the terms and conditions stated in an agreement dated 28th February, 1997 made between them on one side and Mr. Mrinal Chakraborty on the other. Both of them had deposited a sum of Rs. 24,000/- in advance to be adjusted against the rent of last two months of the tenancy. The terms of the agreement has been annexed to the affidavit-in-opposition. It is further stated that Mrinal Chakraborty represented to them that one Smt. Sita Chakraborty since deceased, was the owner of three bed room flat being No. 3-C (3rd floor), Apsara Co-operative Housing Society, Middleton Apartments, 3, Middleton Row, Calcutta-700 071 together with a car parking space on the ground floor of the said premises. It was also represented by Mrinal Chakraborty to them that Smt. Sita Chakraborty died on 25th December, 1996 at Lucknow leaving behind her last Will and Testament dated 15th September, 1995 appointing Mrinal Chakraborty as the sole Executor and beneficiary of her estate. It was also represented by Mr. Mrinal Chakraborty to them that he made a petition for probate of the said Will before this Court and probate was granted after duly considering all the facts and figures by an order dated 18th February, 1996. It was also represented by Mr. Chakraborty to them that he had been looking after the immovable property of Smt. Chakraborty and had paid rates and taxes to the Calcutta Municipal Corporation and maintenance and other charges of the flat to the said Co-operative. Mrinal Chakraborty also said that on the strength of the said probate he obtained possession of the said flat on 19th February, 1997 on behalf of Shaw Wallace & Company Limited, the then tenant/lessee of the said flat. It is also stated that both Mr. Lalchandani and Mr. Taneja obtained keys and vacant possession of the said flat from Mrinal Chakraborty on

1st March, 1997 and had been paying rents regularly upto the month of July, 1999 to Mrinal Chakraborty. Subsequently, they came to know that a Special Officer and thereafter one Mr. Nisith Mukherjee, learned Advocate were appointed receiver by this Court on a petition of Bhagwati Prasad Agarwal and Smt. Madhuri Agarwal. It is admitted that both of them came to know the subsequent developments and the orders passed by this Court from time to time.

9. It is further stated that the Special Officer held a meeting with the tenants on 22nd July, 1999 and directed the said tenants to produce the rent receipts and accordingly the tenants produced the rent receipts to him. The said Special Officer Mr. Ranjan Sinha, learned Advocate came for inspection of the said flat along with the advocates of the parties to ascertain who are the occupants and in possession of the said flat and Mr. Sinha submitted his report to the Court after such inspection. It is further stated that on an application of the petitioners, Mr. Nisith Mukherjee, the learned Advocate was appointed receiver by order dated 18th August, 1999. Mr. Mukherjee visited the flat in question to take formal possession on 6th September, 2000 and since then the tenants have been paying regularly the monthly rents to the said receiver from the month of August, 1999 till the month of October, 2001. It is further stated that the electric connection to that flat was discontinued by the authority on the ground of nonpayment of the common maintenance charges. It is claimed that the payment of common maintenance charges was not the responsibility of the tenants. But a sum of Rs. 267A on account of electricity charges was recovered from the tenants by the said Co-operative. It is further stated that Mrinal Chakraborty took the steps with the receiver for restoration of the electric connection and his advocate took up the matter with the Society but nothing has been done. The tenants move the matter before Mr. Pinaki Chandra Ghose, J. on 9th November, 2000 upon a notice to the learned Advocates of the parties and after hearing the submissions of all concern it was ordered that the said petition may be filed before the appropriate Court. It is claimed that the tenants have paid a sum of Rs. 7,72,000/- on account of rent in respect of the said flat upto October, 2001 and had also made a deposit of Rs. 24,000/- equivalent to two months' rent. In this background the tenants made some prayers to the Court including that an order of injunction may be passed restraining the parties to this proceeding and the Society from interfering with the possession with all facilities enjoyed by the tenants. The tenants have also mentioned the order of Mr. Pinaki Chandra Ghose, J. passed on 13th December, 2000 and the order passed by Mr. D. K. Seth, J. on 9th February, 2001, The tenants have also denied all the claims of the petitioners.

10. An affidavit-in-reply has been filed by Bhagwati Prasad Agarwal in which the same thing has indeed been repeated which was stated in the petition itself. Beside oral argument of the learned Advocate for the defendant/petitioner, i.e. Bhagwati Prasad Agarwal and Madhuri Agarwal, written notes on arguments have been filed by them in which it is stated that in the probate proceeding which was initiated at the instance of Mrinal Chakraborty and subsequently being the same treated as contentious the present petitioners became the defendants, the

plaintiff Mrinal Chakraborty is not appearing in the proceeding although he had contested in the earlier interlocutory proceeding. This goes to show that the plaintiff is not interested in the proceeding. It is also stated that Mrinal Chakraborty had withdrawn his objection in the earlier grant of probate in favour of the defendant No. 1 before Lucknow Court and as such he cannot claim any grant of probate in his favour in respect of the alleged Will dated 15th September, 1995. Accordingly, the instant probate proceeding is liable to be dismissed.

11. It is further stated that the dismissal of probate proceeding simpliciter without any consequential order with regard to the restoration of possession in favour of the beneficiary, i.e. the defendant No. 2 would cause undue hardship to the present defendants for which the instant application being G. A. No. 3631 of 2001 has been filed. It is claimed that the copy of the said petition was served upon Mrinal Chakraborty and others. It is pointed out in the written notes on arguments that the main question arises in the instant probate proceeding is as to whether this Court having regard to the developments taken place during the pendency of the said probate proceeding is required to pass consequential orders including the orders in the nature of restitution having dismissed the probate proceeding initiated by Mrinal Chakraborty showing the restitution to form part of the decree asking the receiver to execute such order.

12. In the written notes on arguments the learned Advocate for the defendants/petitioners have given the genealogical table of Bani Kant, the father of Nani Bhusan and Indu Bhusan and their descendants where the name of Mrinal Chakraborty does not appear. Thereafter only the facts of the case as we have already stated has been repeated.

13. Mr. Indrajit Sarkar, the learned Advocate appearing for the occupants like Mr. Murli G. Lalchandani and Mr. V. P. Taneja has drawn my attention to the arguments made by the learned Advocate for the petitioners that the main attack of the defendants/petitioners is on Mrinal Chakraborty who is not before the Court. It is also pointed out that the present petition has been filed in P. L. A. 301 of 1996 by Mrinal Chakraborty and as Mr. Chakraborty is not appearing to contest the P. L. A. it should be dismissed along with the present petition. Mr. Sarkar has drawn my attention to the prayers made in the application and according to him the vital and main prayer is prayer "d". The said prayer of the petitioners reads as below :

"Direction upon the receiver to hand over peaceful vacant possession of the said flat being Flat No. C-3 situated at Apsara Co-operative Housing Society Ltd. to the present petitioners".

From the above paragraph Mr. Sarkar has drawn the conclusion that in fact the petitioners by that prayer want to evict the bona fide tenant under the guise of restitution.

14. It is claimed by Mr. Sarkar that both the occupants Mr. Lalchandani and Mr.

Taneja are valid tenants engaged by the executor Mrinal Chakraborty holding valid probate at that time. It is pointed out by him that Mrinal Chakraborty got the probate on 18.12.1996 and the tenants were inducted on 28.2.1997 whereas the said probate of Mrinal Chakraborty was revoked on 9.4.1999. Mr. Sarkar has also taken note of the fact that the order of status quo was passed on 21.3.1997 and accordingly the induction of the tenants was not during the prohibitory period. Mr. Sarkar has also drawn my attention to the report of the receiver wherein it is clear that on the date of inspection i.e. on 6.9.2000 the learned receiver found the tenant in occupation of the premises in question. Mr. Sarkar has confirmed that those tenants are paying rents to the receiver under the order of the Court. Mr. Sarkar has then drawn my attention to the copy of an order passed by the learned Judge, City Civil Court, Calcutta in connection with Title Suit No. 1308 of 2001 appearing at page 127 of the affidavit-in-opposition. It appears from the said order that Mr. Taneja filed the said suit and an application under Order 39 Rules 1 and 2 read with Section 151 of the CPC was also filed by him. The learned Judge appears to have passed an ex parte order of an ad interim injunction in favour of the said Taneja. Thus, it is argued that the occupation of Taneja as tenant was recognised by that order. It is also pointed out that the said suit was ultimately transferred to the High Court and is pending with the said ad interim order of status quo. Mr. Sarkar has further argued that in this background the main question before the Court to determine whether a bona fide tenant can be evicted without filing a suit for eviction and only by affidavit a petition as that of G. A. No. 3631 of 2001, keeping in view that the status quo order in a separate suit in favour of one of the tenants which still exists, order, as prayed for can be passed.

15. I shall now deal with the several case laws referred to by the learned Advocate for the defendants on the question of fraud as alleged in the instant case. Thus, it was held in the case of S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, that judgment or decree obtained by fraud is to be treated as nullity and can be questioned even in collateral proceedings. There the term, "fraud" was explained as non-disclosure of relevant and material documents with a view to obtain advantage amounts to fraud. It was held in the case of Ram Preeti Yadav Vs. U.P. Board of High School and Intermediate Education and Others, that once fraud is proved it will deprive the person of all advantages or benefits obtained thereby. In the case of Ram Chandra Singh Vs. Savitri Devi and Others, , the concept of fraud and its effect was explained.

16. The learned Advocate for the defendants submitted that the act of Court cannot prejudice a party and in this connection he cited a number of case laws as follows :

1. Jai Berham and Ors. v. Kedar Nath Marwari and Ors. AIR 1922 PC 269;
2. Mohamed Akbar Zaman Khan v. Sukhdeo Pande and Anr., XIII CLJ 467;

3. A. Venkatasubbiah Naidu Vs. S. Challappan and Others, .

The essence of the decision in those cases is that if any order is passed for the fault of the Court, a party cannot suffer therefor.

17. On the question of restitution the learned Advocate for the defendants referred to the case law reported in ILR 21 Cal 340. Despite my efforts to collect the book from the library of the Court, I could not collect the same. But the decision of that case is quoted in the written notes on arguments filed by the defendants and it reads as under :

"Therefore, when the question of restitution arose, it became necessary to decide what was the position of holding in regard to these tenants. The learned Advocate General has argued that u/s 583 of the Code of Civil Procedure, restitution cannot be granted, by motion, unless there is an order for restitution in the decree. So far as we are aware, that is a proposition contrary to the settled practice of this Court and of the Bombay High Court, as well as of Their Lordships of the Privy Council, holding has no doubt a right to be put exactly in the same position in which he was before, and neither more nor less; and therefore he is entitled to joint possession with the other owners; and no title taken pendente lite can prevent him from removing a tenant if he was not found on the land before the partition; or, in the words of Section 263, he is entitled to have possession delivered over to him, or to such person as he appoints to receive delivery on his behalf, and, if need be, by removing any person bound by the decree, who refuses to vacate the property".

It is also stated that the said decision was relied on in the case of Manikchand Sarupchand Shah and Another Vs. Gangadhar Shankar Shete and Another, : In the said case suit premises was in occupation of the tenants of defendants. The decree-holder obtained possession in execution evicting the tenants of the defendants. The said decree was reversed in appeal and in such circumstances the application for restitution u/s 144 of the CPC was filed by the defendants. It was held that the defendant is entitled to actual possession and not merely symbolic possession of the premises in spite of the fact that it was not in his occupation when he lost possession of it under the decree passed by the Trial Court. It was further held that the tenant inducted pendente lite is liable to be evicted in restitution proceedings.

18. The learned Advocate for the defendants has also argued that it is a settled principle of law that a successful party can demand the delivery of benefit earned by the opposite party under the interim order of the Court or to make restitution for what it has lost and it is the duty of the Court to do so. The principle of restitution is also explained in the ratio decided in the case of South Eastern Coalfields Ltd. Vs. State of M.P. and Others, .

19. The striking features of the instant case before this Court are that first, the suit itself is yet to be disposed of and second, the status quo order passed in the other suit pending before the High Court is still in existence.

20. It is true that the defendants have prima facie found the grounds of fraud which can be dealt with against the plaintiff, Mrinal Chakraborty and the same can be decided finally only at the time of hearing and disposal of the suit arising out of P.L.A. No 301 of 1996. In this connection, I may hark back on the decision made in the case of Manikchand (supra) where this question of restitution came after the decree passed in favour of the tenants and was reversed in appeal. But the position is altogether different here in the instant case.

21. The second point which in my humble view may be the stumbling block against the present petition filed by the defendants. There is no denial, of course no admission also, as regards the ground taken by the learned Advocate for the tenants that the status quo order passed in the other suit being T. S. No. 1308 of 2001 in favour of Mr. V. P. Taneja, one of the occupants and another is still in force and in the said suit Mrinal Chakraborty, the plaintiff of the suit was the defendant. Rightly or wrongly the occupants obtained the status quo order in that suit and the said suit is still pending before the High Court. In any of the case laws cited by the learned Advocate for the respondents such situation as stated above was not in existence and here the facts of the instant case differ materially from the facts of the case laws referred to by the learned Advocate for the petitioners. Accordingly, I am of the view that the application being G. A. No. 3631 of 2001 has no merits to stand.

22. In view of what has been discussed in the foregoing lines the application being G. A. No. 3631 of 2001 stands rejected. Let the matter go out of the list with liberty to mention.

23. Urgent xerox certified copy of this order be made available to the parties, if applied for.