

(2013) 09 CAL CK 0077

In the Calcutta High Court

Case No : A.P.O. No. 271 of 2000 and C.S. No. 394 of 1971

Smt. Indira Chunder

APPELLANT

Vs

Laxmi Charan Law and Others

RESPONDENT

Date of Decision : 26-09-2013

Acts Referred:

Citation : (2013) 09 CAL CK 0077

Hon'ble Judges : Mrinal Kanti Chaudhuri, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Arindam Mukherjee and Mr. Avirup Chatterjee, for the Appellant; Reetabrata Mitra, Aniruddha Mitra, Dwaipayan Mitra and Ms. Debjani Mitra, Advocates for the Respondent No. 2, Mr. Pradyut Kumar Das, Advocate for Legal Heirs of Respondent No. 1, Ms. Monika Ghosh, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—One Madhab Charan Law was seized and possessed of various properties. He died on September 27, 1970 leaving him surviving his widow and other children. The widow died within two months thereafter. In September, 1971 his heirs filed a suit for partition. The parties subsequently settled the suit by filing a Terms of Settlement on January 14, 1983 whereby one Ajit Chunder, husband of the appellant was appointed Receiver and Commissioner of partition. One of the properties belonging to the estate was situated at Madhyamgram that would be the subject matter of the present appeal. The facts would depict, the appellant wanted to purchase the Madhyamgram property at the rate of Rs. 40,000.00 per bigha "as is where is" basis. The other party Smt. Gouri Mondal and Smt. Geeta Roy gave her consent provided, the entire sum was paid in cash as indicated in their letter appearing at page-45 of the paper book. The letter dated June 10, 1985 at page-45 would show, Gita and Gouri gave their consent provided, Indira would pay Rs. 23,000.00 due to the estate against her requisition of one house at Raja Naba Kissen Street as per the Terms of Settlement. They also imposed a condition that

money was to be paid in cash immediately and the sale would be "as is where is basis". On the strength of the said consent, the Receiver, the husband of the appellant tried to get the property transferred in her wife's name "free from all encumbrances" that also at a much belated stage. The facts would further depict, her husband signed the agreement for sale on October 5, 1985 and obtained appropriate leave to complete the sale. While obtaining such leave the Receiver surreptitiously incorporated the clause "free from all encumbrances". Despite request being made, the Receiver did not furnish copy of the agreement to the other parties. Ultimately, by an order dated September 5, 1989 the party Receiver was discharged and two advocates of this Court being Sri Baladev Mullick and Mr. Arunava Sarkar were appointed as Joint Receiver. Mr. Mullick was the advocate-on-record for the appellant. The sale was however, not concluded. By a letter dated September 24, 1994 the appellant wrote to the Joint Receivers expressing her willingness to complete purchase in respect of a portion of Dag No. 563 and by a letter dated September 24, 1994 sent Deed of Conveyance for approval. The other parties objected to the same. This gave rise to a discord. In the mean time, one Satya Ranjan Saha tried to intervene claiming interest on the property in question. Initially he was successful in stalling the process.

2. By a letter dated April 22, 1996 Smt. Gouri Mondal objected for using the land as a cow shed permitting 150 cows and buffaloes kept by various milkmen at the instance of the appellant. Series of correspondence were exchanged between the parties on this score.

3. The said Satya Ranjan Saha claiming to have right, title and interest of the Madhyamgram property approached the learned Judge for recall of an order dated September 29, 1995 by which the learned Judge put the appellant in possession. The said application came up before the learned Single Judge on February 17, 1999. His Lordship recorded the fact, the appellant had already obtained possession of the plot of the land with Police help and certificate of possession had already been granted to the said effect. Hence, nothing would remain in the application. His Lordship dismissed the same and allowed the application of the appellant for conclusion of sale by executing conveyance in respect of 0.94 decimals of land.

4. Being aggrieved by the said order, the opposing group filed an application for recall of the said order dated February 17, 1989 that the learned Judge heard and disposed of vide judgment and order dated April 17, 2000 appearing at page 372-392 of the paper book. By the said application the applicants prayed for recall of the order dated February 17, 1999 and March 4, 1999. The order dated March 4, 1999 made little modification of the earlier order dated February 17, 1999 by extending the time to execute the conveyance.

5. Being aggrieved, the appellant preferred the instant appeal that we heard on the above mentioned date.

6. On perusal of the judgment and order impugned we find, His Lordship was

impressed by the fact, the agreement for sale had been entered into at the behest of the appellant with the consent of the opposing group on two conditions- (i) there would be cash down payment of the total consideration; (ii) the sale would be "as is where is basis".

7. The appellant, through her husband, surreptitiously suppressed both the conditions before His Lordship while he obtained the order dated September 5, 1989, permitting the Receiver to conclude the sale in her favour "free from all encumbrances". Moreover the said order did not record the condition, there would be instant payment of the entire consideration. Hence, subsequent direction for execution of the conveyance only to the extent of 0.94 decimal would be contrary to the provisions of the agreement that the parties had in fact entered into.

8. His Lordship held, the agreement for sale dated October 5, 1985 would have no binding effect on the parties. His Lordship discharged earlier Receivers and appointed two advocates of this Court as the incoming Receivers. His Lordship directed the incoming Joint Receivers to hold meeting of the parties, inspect the subject land and take appropriate steps for making the land "free from all encumbrances" and submit a report to the Court.

9. Mr. Arindam Mukherjee, learned counsel advanced his argument in support of the appeal. Mr. Mukherjee would rely upon Section 2 and 8 of the Partition Act. Section 2 would provide, when a property is impartible sale of the same would be beneficial for the shareholders. The Court would be competent to make an order of sale and such order of sale u/s 8 would be a deemed decree within the meaning of Section 2 of the Code of Civil Procedure. Mr. Mukherjee would contend, once the Court permitted the Joint Receiver to sell the property, such order should be treated as a deemed decree and could not be recalled in the manner as was done in the instant case. He would also contend, the order dated February 17, 1999 would require execution of conveyance only in respect of the 0.94 decimal of land whereas the learned Judge nullified and set aside the entire sale that would be contrary to law.

10. Elaborating his argument, Mr. Mukherjee would contend, the Receiver did not do any deliberate act, at best it could be said to be an error of judgment that would not vitiate the entire process of sale. To support his contention, Mr. Mukherjee would also rely upon Order XXI Rule 89 that would provide for the mechanism to be adopted in case of application for setting aside of the sale. The provision would stipulate, where immovable property has been sold in execution of a decree any person claiming an interest, may apply to have the sale set aside. To make such application one would have to deposit the entire purchase price along with 5% increase and along with the amount specified in proclamation of sale that the decree holder would have to be paid. He would rely upon the Bombay High Court decision reported in All India Reporter 1926 Bombay page-377 (Bhagvan Savlaram Sonar Vs. Duttatraya Jayant Purandhare). Mr. Mukherjee prayed for setting aside of the judgment and order impugned.

11. Per contra, Mr. Reetabrata Mitra, learned counsel would refer to the earlier orders of this Court and the letter of consent to say, the opposing group notified their consent on two conditions that the appellant failed and neglected to fulfill. The cut off date as fixed, was also not adhered to. He would rely upon clause 10 of the agreement for sale that would require a prior consent from the other parties for extension that the appellant or her husband never obtained, rather the respondents were kept in the dark. Mr. Mitra would contend, the order dated February 17, 1993 was obtained by fraud by suppressing material fact. The execution of the conveyance for 0.94 decimal could not have been made as the entire land was comprised of 1.73 acres that the appellant would have to take in one go by making full payment of the price. Once she failed and neglected to do so, the entire agreement would automatically fall and the appellant would not be entitled to transfer the land in question in her favour.

12. While giving reply, Mr. Mukherjee would contend, the respondents were similarly enjoying the Jhautala Road property. The present litigation would be nothing but retaliation to the appellant's objection with regard to the Jhautala Road property.

13. We are told, the personnel of the Receivers from time to time changed. At present Ms. Monika Ghosh and Mr. Arunava Sarkar are acting as Joint Receivers. Ms. Ghosh appeared before us and contended, she was appointed on August 7, 2009 since then, she did nothing in the matter. She prayed for her discharge.

14. We have considered the rival contentions. We have carefully perused the judgment and order impugned herein. The agreement for sale was nothing but an agreement between the two groups. The letter dated June 10, 1985 appearing at page 45-46 would clearly stipulate, the appellant would be obliged to pay Rs. 40,000.00 per bigha and the entire purchase price was to be paid in one go and she would have to take the property subject to encumbrance, if any, attached to the property. The then Receiver surreptitiously obtained permission from the Court without having this stipulation with regard to encumbrance. The subsequent order was also obtained for part execution that would also be contrary to the condition imposed by the opposing group. In any event, the relevant orders were obtained without giving opportunity to the opposing group to have their say before the Court. The learned Judge considered the plight of the parties particularly in respect of the conduct of the then Receiver and/or the appellant or her advocate who was also a Receiver. The learned Judge recalled the order, directed the incoming Receivers to take possession of the property and submit a report. His Lordship did not give any final direction with regard to the fate of the land. The judgment and order impugned would thus call for no interference at our end.

15. Ms. Monika Ghosh, Advocate is discharged from further acting as Receiver.

16. The appeal fails and is hereby dismissed. There would be no order as to costs.

Mrinal Kanti Chaudhuri, J.

I agree.