

(2009) 07 CAL CK 0096
In the Calcutta High Court
Case No : S.A. No. 160 of 2004

Smt. Kamala Bala Ghosh

APPELLANT

Vs

Smt. Kanchan Bala Ghosh and Ant

RESPONDENT

Date of Decision : 09-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31

Citation : (2009) 07 CAL CK 0096

Hon'ble Judges : Kalidas Mukherjee, J

Bench : Single Bench

Advocate : Chapales Bandyopadhyay, Gargy Basu, Md. Zakir Hossain, for the Appellant; Rajarshri Halder, for the Respondent

Final Decision : Dismissed

Judgement

Kalidas Mukherjee, J.

The Judgment of the Court was delivered by:

1. This appeal is directed against the judgment and decree passed by learned Civil Judge (Senior Division), 1st Court, Burdwan in Title Appeal No. 103 of 2000 affirming thereby the judgment and decree passed by learned Civil Judge (Junior Division), 1st Court, Burdwan in T.S. No. 104 of 1997. The suit was instituted for declaration of plaintiff's title in the suit property as described in schedule "A", permanent injunction and for a further declaration that the deed described in schedule "B" was void, inoperative, an outcome of misrepresentation and fraud.

2. The case of the plaintiff /appellant, in short, is that the property described in "A" schedule of the plaint, originally, belonged to Madan Mohan Ghosh and Kenaram Ghosh each having moiety share along with some other properties. Subsequently, amongst the heirs there was a partition deed and the plaintiff has 5/24th share in the suit property. Swapam Kumar Ghosh, the son of the plaintiff died leaving a widow i.e. defendant No. 1. The defendant No. 1 became a widow at her younger age. The defendant No. 1 by her apparent good conduct and

behaviour picked up great reliance of the plaintiff. The plaintiff is an illiterate aged woman having no worldly knowledge and, as such, had to depend on the advice of the defendant No. 1. The defendant No. 1 taking advantage of the plaintiff's helpless condition, in collusion with defendant No. 2, asked the plaintiff to execute a registered power of attorney on the plea of looking after the properties of the plaintiff. Thus the defendant No. 1 in collusion with defendant No. 2 got a deed of "Nirupan Patra" scribed by her own men and got it executed by the plaintiff No. 1 stating that it was a power of attorney. The plaintiff on good faith put her L.T.I. on the said deed and the plaintiff was also tutored to admit her execution of the deed before the Sub-registrar. The contents of the deed were not read over and explained before the plaintiff. Subsequently, the defendant No. 1 married one Lakshmi Narayan Ghosh for the second time and left the plaintiff's house and started residing with her husband in the same village. On and from 10.12.1997 the defendant threatened the plaintiff with dispossession from "A" scheduled properties on the plea that those properties did not belong to the plaintiff. On an enquiry, the plaintiff came to learn that instead of a power of attorney one "Nirupan Patra" was managed to have been executed by the plaintiff on 18.5.1989 in favour of the defendant No. 1 in respect of "A" scheduled properties. The plaintiff never intended to execute any "Nirupan Patra" in favour of defendant No. 1. The deed was vitiated by undue influence and misrepresentation. The contents of the impugned deed were never read over and explained to the plaintiff. For the said reasons, the suit was instituted by the plaintiff in the learned Court below.

3. The defendant No. 1 contested the suit by filling written statement. The defendant No. 2, the son of the plaintiff also filed another written statement supporting the case of the plaintiff.

4. In this Second Appeal, the following substantial question of law was formulated:-

"For that the learned Court below dismissed the suit on the finding that when a deed executed by an illiterate lady is challenged, "the crucial test is fairness of the transaction", and in doing so the learned Courts below were oblivious that what is under challenge is both the character and content of the document and not whether the execution of the deed is lawful or not in as much as execution may be legal but the character and content of the deed may, unless the nature and content are thoroughly understood by the executor, the deed remains void and this requirement in law is so rigorous that it cannot be over come by evidence of stranger to the effect that the son of the executor explained the deed to the plaintiff, and the aforesaid requirement is absolutely indispensable in view of the decision reported in 52 IA."

5. Mr. Bandyopadhyay, learned counsel appearing on behalf of the appellant, submits that the plaintiff is, admittedly, an illiterate lady and that on the plea of executing a power of attorney the defendant No. 1 got a deed of "Nirupan Patra" executed and registered in her favour. Mr. Bandyopadhyay submits that the

plaintiff intended to execute a power of attorney in favour of her daughter-in-law i.e. defendant No. 1 to manage the properties. Mr. Bandyopadhyay contends that the execution is admitted, but, as the plaintiff is an illiterate lady and placed on the same footing with a "pardanasin" lady, the defendant is required to prove that the contents of the deed were read over and explained to the plaintiff at the time of execution so as to establish that the plaintiff was fully aware of the nature and character of the deed she was going to execute.

6. It is further contended that there is no independent finding of the learned First Appellate Court which is a clear violation of the provisions contained in Order 41 Rule 31 of the Civil Procedure Code. It is submitted that the learned First Appellate Court failed to exercise jurisdiction as the final Court of facts and merely accepted the findings of the learned Trial Court and did not scrutinize the evidence independently. Mr. Bandyopadhyay contends that the learned First Appellate Court erred in law and facts and the impugned judgment should be set aside.

7. Mr. Halder, appearing on behalf of the respondents, submits that there is ample evidence to show that the plaintiff being fully aware of the nature and character of the deed executed the same in favour of the defendant No. 1. Mr. Halder submits that the son of the plaintiff Swapan Kumar Ghosh i.e. the husband of the defendant No. 1 died at the younger age of the defendant No. 1 and, as such, after holding a salish which was attended by the plaintiff and her sons, it was decided that the plaintiff No. 1 would transfer some portion of her property in favour of the defendant No. 1. Mr. Halder contends that from the evidence it is clear that the contents of the deed were read over and explained to the plaintiff and the defendant No. 2, that is, the son of the plaintiff also signed the deed as witness and "bakalamdar" of the plaintiff. Mr. Halder contends that there is no ground to interfere with the findings of the learned First Appellate Court and the learned First Appellate Court was justified in passing the impugned judgment and decree.

8. Admittedly, the deed was executed by the plaintiff in favour of the defendant No. 1. The dispute arises as to the knowledge of the plaintiff with regard to the nature and character of the deed. In case of "pardanasin" lady or an illiterate woman, the defendant is to prove that the executant duly executed the deed knowing fully the contents thereof. In other words, it is not merely a physical act by putting signature or L.T.I., but also the mental act of the executant showing that she was aware of the nature, character and contents of the deed which she executed. In the instant case, the defendant No. 1 is the wife of Swapan Kumar Ghosh, the predeceased son of the plaintiff. It is also in evidence that the defendant No. 1 became widow at her younger age and the plaintiff attended a salish wherein it was resolved that the plaintiff would transfer some of her properties in favour of the defendant No. 1. The contention of the plaintiff is that she wanted to execute a power of attorney in favour of defendant No. 1 for looking after her properties, but, instead of power of attorney the defendant No.

1 in collusion with defendant No. 2 managed to get a deed of "Nirupan Patra" executed by the plaintiff in favour of the defendant No. 1.

9. It is in cross-examination of defendant No. 1 (D.W.1) Sujoy Ghosh that he, his brother and mother agreed to transfer the property to the defendant No. 1 and they did it accordingly. It is in the cross-examination of P.W.1 that she executed the disputed deed after holding discussion with the defendants. D.W.1 in his cross-examination has stated that he signed the disputed deed as witness and attested the L.T.I. of his mother. D.W.1 is the son of the plaintiff. It is not in consonance with probability that the plaintiff instead of her son, wanted to execute the alleged power of attorney in favour of the defendant No. 1. From the evidence it is abundantly clear that the plaintiff agreed to transfer some of her properties in favour of the defendant No. 1 for the security of her future life. From the evidence it further transpires that defendant No. 1 married elsewhere and thereafter the trouble started. D.W. 3 has stated that he signed in the deed as one of the attesting witnesses and that the plaintiff executed the deed in favour of the defendant No. 1 and that Sujoy Ghosh, the son of the plaintiff read over and explained the contents of the deed to the plaintiff. He further stated that the plaintiff after understanding the contents of the deed put her L.T.I. which was attested by Sujoy Ghosh. It is in his evidence that the plaintiff gifted the property to the defendant No. 1. D.W.4 Md. Zikria has stated that the plaintiff voluntarily executed the deed of "Nirupan Patra" in favour of the defendant No. 1 and he identified the plaintiff on the day of registration of the deed.

10. So in view of the evidence on record it cannot be said that the plaintiff was not aware of the nature, character and contents of the deed she executed in favour of the defendant No. 1. It is abundantly clear that she executed the deed being fully conscious and aware of the nature and contents thereof. The defendant No. 1 succeeded in discharging the onus lying upon her in proving that the plaintiff executed the deed voluntarily knowing fully well the nature of the deed and contents thereof. The learned Judge of the First Appellate Court considered the entire evidence on record and decided the matter rightly both on points of law and facts. There is no ground to interfere with the findings of the learned Judge of the First Appellate Court in this appeal. There is no merit in this appeal. The appeal, therefore, stands dismissed. There will be no order as to costs.

11. Let a copy of this judgment along with the L.C.R. be sent down to the learned Court below immediately. Urgent Xerox certified copy, if applied for, be handed over to the parties as early as possible.