

(1997) 09 CAL CK 0033
In the Calcutta High Court

Case No : Civil Appellant Jurisdiction Appeal from Original Order No. 320 of 1994

Smt. Renu Aich

APPELLANT

Vs

Smt . Lakshmi Debnath and Others

RESPONDENT

Date of Decision : 26-09-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 2, Order 21 Rule 97, Order 39 Rule 1, Order 39 Rule 2, Order 41 Rule 11
Constitution of India, 1950 — Article 311(1)
Hindu Succession Act, 1956 — Section 23, 23
Specific Relief Act, 1963 — Section 41
Transfer of Property Act, 1882 — Section 69

Citation : (1998) 2 CALLT 21 : (1998) 1 CHN 180

Hon'ble Judges : Satyabrata Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Mr. Priyabrata Mukherjee and Mr. Murari Chakraborty, for the Appellant; Mr. Tapan Dutta and Mr. Siddheswar Chandra, for the Respondent

Judgement

B. Bhattacharya, J.—This appeal is at the instance of the plaintiff and is directed against an order dated 2.4.94 passed by the learned Judge, City Civil Court, Calcutta, in Title Suit No. 1030 of 1992 thereby rejecting the application of the appellant under Order 39 Rules 1 and 2 of the Code of Civil Procedure.

2. The fact giving rise to the instant appeal is as follows:--

One Upendra Nath Alch was the owner of the suit property. The said Upendra Nath Atch died on November 1, 1944 leaving behind him two sons, namely Judgal Klshore and Krishna Chandra and his widow Sarojnl Alch. Sarojnl Alch died intestate in the year 1953. Krishna Chandra died bachelor on June 12, 1983 and Jugal Klshore died intestate on December 26, 1970 leaving the appellant and the respondent No. 3 as his sole heirs and legal representatives. On July 30, 1947 Jugal and Sarojnl mortgaged their undivided 2/3rd share in the suit property to one Bejoy Samaddar, husband of the respondent No. 2. Bejoy transferred his aforesaid mortgagee's right to the respondent No. 2 on July 12, 1949.

Subsequently Jugal and Sarojini on July 16, 1949 transferred their 2/3rd undivided share in the suit property (mortgagor's right) to the respondent No. 2. Therefore, the respondent No. 2 acquired both the mortgagee's interest and mortgagor's interest to the extent of 2/3rd share. Thereafter on February 21, 1954, Krishna sold away his 1/3rd share in the suit property to the respondent No. 2. Therefore, by virtue of the aforesaid sale deeds the respondent No. 2 became the absolute owner of the suit property. Thereafter by a registered sale deed dated June 2, 1975 the respondent No.2 sold the suit property in favour of the respondent No, 1.

3. After acquiring title to the suit property the respondent No. 1 filed a suit being Title Suit No. 1523 of 1978 against Sova, the respondent No. 2 for recovery of possession by treating her as a licensee in respect of the suit property. After contested hearing, the aforesaid suit was decreed. Being dissatisfied with the aforesaid judgment and decree passed by the learned trial judge, the respondent No. 3 preferred an appeal before this court, but ultimately the said appeal was dismissed.

4. The respondent No. 1 put the aforesaid decree into execution thereby giving rise to Title Execution Case No. 44 of 1986 in the City Civil Court, Calcutta. The present appellant resisted the said execution case by claiming independent right title and interest over the suit property and prayed for being impleaded in the said title execution case. Her application was treated as an application under Order 21 Rule 97 of the CPC and the same gave rise to Miscellaneous Case No. 301 of 1988.

5. On contested hearing the said application under Order 21 Rule 97 of the CPC was disposed of with a finding that the present appellant had no right title and interest in the suit property.

6. Being dissatisfied with the aforesaid finding arrived at in the aforesaid proceeding under Order 21 Rule 97 of the Code of Civil Procedure, the present appellant preferred a first miscellaneous appeal being F.M.A.T. No. 3209 of 1990, but the same was summarily dismissed by this court under Order 41 Rule 11 of the Code of Civil Procedure, by an order dated 12th November, 1991.

7. Thereafter, an order of police help was granted on the application filed by the respondent No. 1. Challenging the said order granting police help, the appellant again filed a revisional application before this court but the said application was also dismissed on contest.

8. Subsequently, the appellant has filed the aforesaid title suit being Title Suit No. 1030 of 1992, wherein the following prayers have been made :--

"a) A decree for declaration that the Deed of Conveyance dated 12th day of July, 1949 in between Srimati Sarojini Aich and Jugal Kishore Aich and Luxmi Debti wife of Bejoy Gopal Samaddar i.e. a deed of sale fully described in Schedule hereunder is not binding on the plaintiff and the defendant No. 3.

b) A decree for declaration that the deed of conveyance dated 21st February, 1954 in between Sreemati Lakshmi Debi and Sree Krishna Chandra Alch i.e. a deed of sale fully described in the Schedule "B" hereunder is a fake document and no title passed through the said deed and not binding on the plaintiff and the defendant No. 3.

c) A decree for declaration that the deed of conveyance dated 2nd June, 1975 in between Sreemati Luxmi Debi and Sreemati Lakshmi Samaddar i.e. a deed of sale fully described in the schedule "B1" hereunder is fake document and no title passed through the said deed and not binding on the plaintiff and defendant No. 3;

d) That a decree for declaration that Sarojini Aich widow of Upendra Nath Alch having died as a life estate holder in 1953 was not entitled to transfer her share to anybody and her 1/3rd share undivided in the premises No. 36, Sree Gopal Mullick Lane, P.S. Muchipara, Calcutta-12 has been devolved upon the plaintiff and the defendant No. 3 by operation of law through her sons:

e) A decree for declaration that the plaintiff being an unmarried daughter and defendant No. 3 is a widow as per section 23 of the Hindu Succession Act, 1956 are entitled to stay at 36, Sree Gopal Mullick Lane, P.S. Muchipara, Calcutta-700 012.

f) A decree for declaration that the defendant No. 1 by executing the decree obtained in Title Suit No. 1523 of 1978 obtained from the learned Xth Judge, City Civil Court at Calcutta cannot illegally evict the plaintiff from the suit premises fully described in the Schedule "A" hereunder,

g) A decree for permanent injunction restraining the defendant No. 1 from obtaining possession of the suit premises by executing the decree in Title Execution Case No. 44 of 1986 arising out of Title Suit No. 1533 of 1978 pending in the Register Bench, City Civil Court at Calcutta.

h) Temporary injunction in terms of prayer Eg) above.

i) Alternatively the plaintiff and the defendant No. 3 being the absolute owners at least to the extent of 1/3rd share are entitled to a decree for partition by metes and bounds in the preliminary form according to the shares of the parties and allotment to the plaintiff and the defendant No. 3 separate possession of their divided share in the premises No. 36, Sree Gopal Mullick Lane, P.S. Muchipara, Calcutta-12 fully described in the schedule "C" hereunder (section 23 of the Hindu Succession Act, 1955) will not be a bar to the partition in view of the fact that-

i) the premises is partly tenanted:

ii) there is no brother of the plaintiff and the defendant No. 3 and they are the only heirs of their predecessor-in-Interest;

J) The appointment of a Commission of affecting the partition in terms of the

preliminary decree.

- k) A final decree for partition embodying the Commissioner's report;
- l) injunction inclusive of Temporary injunction in terms of prayer (g);
- m) A leave under Order 1 Rule 2 of the C.P.Code;
- n) Receiver;
- o) Costs of the suit inclusive of Advocate's fees;
- p) Any other relief or reliefs to which the plaintiff is entitled to in law and equity."

9. In the aforesaid suit, the appellant filed an application for temporary injunction thereby praying for an order of injunction restraining the respondent No. 1 from obtaining possession of the suit property as described in Schedule "A" to the plaint by virtue of Title Execution Case No. 44 of 1986 in execution of decree passed in T.S. 1523 of 1978.

The opposite party No. 1 contested the aforesaid application for temporary injunction by filling written objection thereby opposing the prayer of the appellant. The defence of the respondent No. 1 was that by virtue of the deeds mentioned above, she had acquired absolute title to the suit property and the claim put forward by the appellant having already been adjudicated in the previous proceeding under Order 21 Rule 97 of the Code of Civil Procedure, the instant suit was barred by principle of constructive res judicata.

10. The learned trial Judge after hearing both the parties arrived at a conclusion that the appellant has an arguable case to go for trial. In arriving at such a conclusion, the learned trial Judge held that as Sarojini died before commencement of Hindu Succession Act, 1956, she having limited interest in the property left by her husband and having sold the same without having any legal necessity and Jugal and Krishna each having sold not exceeding 1/3rd share, the appellant being a grand daughter of Upendra and being not a party to the earlier suit being Title Suit No. 1523 of 1978, was not bound by the said decree.

11. However, the learned trial Judge refused to grant injunction by relying upon the decision of the Supreme Court of India in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, on the ground that the decree in T.S.No. 1583 of 1978 was also passed by a learned Judge of City Civil Court and as such being a court of co-ordinate Jurisdiction he cannot injunct the respondent No. 1 from proceeding with the said execution case in view of section 41(b) of the Specific Relief Act, 1963.

12. Being dissatisfied with the aforesaid order passed by the learned trial Judge, the plaintiff has preferred the instant first miscellaneous appeal.

13. Mr. Mukherjee, the learned advocate appearing on behalf of the appellant, has submitted before us that in view of specific finding arrived at by the learned trial Judge that the appellant has a prima facie case to go for trial, the learned

trial Judge erred in law in refusing the prayer for temporary injunction by relying upon a decision reported in Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, as according to Mr. Mukherjee, the same is not applicable to the fact of the present case. In support of such contention Mr. Mukherjee has relied upon a decision of this court reported in AIR 1987 Cal 312. (Sallen Seth v. Steel Authority of India.)

14. Mr. Mukherjee has further contended that in view of the fact that Jugal and Sarojfni executed a mortgage in favour of the vendor of respondent No. 1, the said vendor could not purchase mortgagor's interest from Jugal and Sarojini as, according to him, the same is prohibited u/s 69 of the Transfer of Property Act. In support of such contention, Mr. Mukherjee has relied upon a decision of the Madras High Court reported in The Egmore Benefit Society Vs. K. Aburupammal and Others, It may be mentioned here that while this matter was being heard, Mr. Mukherjee's client filed an application before this court thereby praying for leave to file an application before the trial court to amend her plaint, incorporating a prayer for redemption of the mortgage which was executed in the year 1947. It may be further mentioned here that no such application for amendment of plaint has been filed in the trial court and as we are hearing a first miscellaneous appeal against an order refusing to grant temporary injunction, in our opinion, we have got no jurisdiction to entertain such prayer. We however, make it clear that Mr. Mukherjee's client is at liberty to file such application for amendment of plaint, if she is so advised, before the trial court,

15. Mr. Dutt, the learned Advocate appearing on behalf of the respondent No. 1 on the other hand has submitted that the finding of the learned trial Judge that the appellant has a prima facie case to go for trial is patently wrong inasmuch as the learned trial Judge totally over looked the fact that in the earlier proceeding under Order 21 Rule 97 of the Code of Civil Procedure, the alleged right, title and interest of the appellant has been negatived and against the said order the appellant unsuccessfully came up in this Hon'ble Court. According to Mr. Dutt, in view of the Supreme Court decision reported in Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, all such rights of a third party are required to be adjudicated in a proceeding under Order 21 Rule 97 of the CPC and a separate suit is barred. Mr. Dulta has further submitted that the alleged right, title and interest as claimed by the appellant in the suit property could have been raised in the previous proceeding under Order 21 Rule 97 of the CPC and the plea that Mr. Mukherjee's client now wants to take, was very much available to her in the previous proceeding under Order 21 Rule 97 of the Code of Civil Procedure. Having failed to lake those pleas in the earlier proceeding, those are barred by principle of constructive res Judicata.

16. As regards the second contention raised by Mr. Mukherjee that the vendor of the respondent No. 1 bleng a mortgagee cannot purchase the mortgagor's right in the suit properly, in view of section 69 of the Transfer of Property Act. In our opinion, the same has got not force. Section 69 of the Transfer of Properly Act

vests with the mortgagor or any person acting on his behalf power to sell or concur in selling the mortgage property or any part thereof under certain circumstances. It may be mentioned here that the aforesaid provision has got no application in a case where either mortgagor or the mortgagee is a Hindu, Mahammedan, Bhudlsh or members of any other races, sects, tribe or class from time to time specified in this behalf by the State Government in the Official Gazette. It does without saying that in the instant case both the mortgagor and the mortgagee were Hindu. Over and above, it appears that the said sale deed dated July 16. 1949 was executed by Jugal and SaroJIni themselves and as such the said sale was not effected at the instance of the mortgagee in exercise of power u/s 69 of the Transfer of Property Act. Thus, in our opinion, the decision reported in AIR 1943 Mad 30i (Egmore Benefit Society v. K. Abuntpamrnl) has no application to the fact of the present case. The question as to whether Mr. Mukherjee's client is still entitled to redeem the mortgage was not before the trial court and till date no application for amendment of plaint claiming right of redemption has been prayed. Therefore, we refrain from making any comment as to whether Mr. Mukherjee's client is entitled to redeem the mortgage executed by Jugal and Sarojini in the year 1947. Therefore, we find no force in the second contention raised by Mr. Mukherjee.

17. As regards first contention raised by Mr. Mukherjee that the learned trial Judge having found prima facie case in favour of his client, ought to have granted an order of temporary injunction, we are of the opinion that the finding recorded by the learned trial Judge that the plaintiff has established a prima facie case cannot be sustained. As indicated above, in view of the fact that in the earlier proceeding under Order 21 Rule 97 of the CPC she specifically took the plea that she had her independent right, title and interest in the property and she having failed and the said order having attained finality, in our opinion, the learned trial Judge from the materials on record ought not to have held that the plaintiff has got a prima facie case to go for trial. We are of the opinion that the suit is prima facie barred by the principle of res Judicata. In this connection reference may be made to the decision of Hon"ble Supreme Court of india reported in State of U.P. Vs. Nawab Hussain, In the aforesaid decision the petitioner before the Supreme Court was dismissed from service. He filed a petition for quashing disciplinary proceeding on the ground that he was not afforded reasonable opportunity to meet the allegation against him and the action taken against him was mala fide. The said petition was dismissed. Thereafter he filed a suit in which he challenged the order of dismissal on the ground, fnter alia, that he had been appointed by I.G.P. and Deputy I.G.P. was not competent to dismiss him by virtue of Article 311(1) of the Constitution of india. On the aforesaid fact, it was held by the apex court that the plea taken in the subsequent suit was available to the petitioner in the earlier proceeding and as such, the said plea though not adjudicated in the earlier proceeding was barred in the second suit by the principle of constructive res judicata. Keeping in view the aforesaid principle laid down by the apex court, we are of the opinion,

that all the pleas taken in instant suit in support of her alleged right, title and interest in the suit property were available to the petitioner in the earlier proceeding under Order 21 Rule 97 of the CPC and the same having been dismissed, the instant suit is prima facie barred by the principle of constructive res judicata. Moreover, in view of the Supreme Court decision in *Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another*, a subsequent suit at the instance of a third party for establishing its right, title and interest in the suit property is also barred.

18. Therefore, we find substance in the contention raised by Mr. Dutt that in view of the dismissal of the proceeding under Order 21 Rule 97 of the Code of Civil Procedure, the appellant has no prima facie case in the instant suit, Therefore, we agree with the conclusion arrived at by the learned trial Judge that the appellant is not entitled to get an order of injunction although on a different reason.

19. Let it be kept on record that our observation as regards maintainability of the suit is wholly prima facie for the purpose of disposal of the application for temporary injunction.

Thus, we find no merit in the instant first miscellaneous appeal and the same is dismissed.

There will however, be no order as to costs. All interim orders are vacated.

After delivery of this Judgment, Mr. Mukherjee appearing on behalf of the appellant prays for stay of operation of the order passed by us. In view of the fact that the decree for eviction was passed in the year 1983, we are not inclined to grant such stay. The prayer is thus refused.

S. B. Sinha, J.

20. I agree.

21. Appeal dismissed