

(2008) 09 CAL CK 0047
In the Calcutta High Court
Case No : C.O. No. 2285 of 2007

Smt. Sabita Roy and Others

APPELLANT

Vs

Sri Chandan Roy and Others

RESPONDENT

Date of Decision : 30-09-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 227

Citation : (2008) 09 CAL CK 0047

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Ashok Kumar Banerjee and Mr. S. Sengupta, for the Appellant; Pratik Prakash Banerjee and Mr. Subrata Basak for the Respondent No. 1, Mr. Pradipta Kumar Ganguly for the Respondent No. 2, 5 and 9, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—The order dated 14th June, 2007 passed by the learned Additional District Judge of Barrackpore in Misc. Appeal No. 50 of 2007 dismissing the appeal and thereby confirming the order dated 1st February, 2007 passed by learned Civil Judge, (Junior Division), 3rd Court, Sealdah is under challenge.

2. The opposite party No.1 instituted Title Suit No. 34 of 2006 before the learned Civil Judge, Junior Division, 3rd Court, Sealdah against present four petitioners who were the defendant Nos. 9 to 12 respectively and the proforma opposite parties praying for declaration that the three deeds of gift dated 10th July, 1985, 11th September, 1986 and 11th April, 1986 executed by Sunil Chandra Roy are void and inoperative and for declaration of the plaintiff's joint ownership with the defendants in respect of his undivided 1/9th share in the property in suit and for perpetual injunction so as to restrain the defendants from dispossessing the plaintiff and from making any construction on the vacant land or from alienating the same to any third party pursuant to the deeds of gift.

3. A parcel of land measuring 07 cottahs, 18 chittaks said to be a vacant land being a portion of 18 cottahs 06 chittaks & 30 sq. ft. with a three-storied and partly one-storied building situated on the non-vacant portion at 13 Set Bagan Road, P.S. Dum Dum is the subject matter of the suit.

4. According to the plaint case the plaintiff and the defendant Nos. 1 to 18 are the heirs of Sunil Chandra Roy who was the owner of the property in suit. Sunil possessed the same. Sunil died intestate on 22.03.2001. The plaintiff approached the defendant Nos.1 to 8 for mutation of their names as the legal heirs of Sunil Chandra Roy in or about April, 2005. Defendant Nos. 2 and 4 then disclosed that Sunil Chandra Roy during his life time had executed three deeds of gift in favour of the defendant Nos.2 to 4 i.e. Swapan Roy, Bablu Roy and one Subodh Chandra Roy, predecessor of defendant Nos.9 to 12. Subodh Chandra Roy's heirs are the present petitioners. One deed of gift dated 11th April, 1986 revealed that Sunil Chandra Roy transferred a portion of the property which is a vacant portion of the plot by delineating the same in a map annexed to the deed of gift in favour of Swapan Roy. By another deed of gift dated 11th April, 1986 he transferred another portion to defendant No.4 i.e. Bablu Roy. This was also a portion of the vacant land. Then another portion of the vacant land was transferred by a deed of gift dated 10th July, 1985 to Subodh Chandra Roy, the predecessor of the defendant Nos. 9 to 12 According to the plaintiffs, these deeds of gift were the product of misrepresentation, fraud, and concealment of facts. Sunil Chandra Roy was not in position to execute the deeds of gift. The donees mentioned in the deed of gift by exploiting the trust and faith reposed upon them by Sunil Chandra Roy got the deeds of gift executed from Sunil Chandra Roy. The executant did not attend the Registration Office for the purpose of registration of the deeds. The plaintiff has 1/9th share in the undivided suit property.

5. The plaintiff who is the opposite party No.1 in this application filed an application under Order 39 Rule 1 and 2 read with section 151 CPC praying for an order for temporary injunction to restrain the defendants from alienating the suit property or from raising any construction thereon through any promoter or developer.

6. Learned trial Court by the order dated 1st of February, 2007 disposed of the injunction application as also the application under Order 39 Rule 4 CPC filed by the defendant Nos.9 to 12 by directing the parties to maintain status quo with respect to nature, character and possession of the same till disposal of the suit.

7. The order of the learned trial Court was challenged in the appeal, and as aforesaid, the lower appellate Court dismissed the appeal. It has been submitted by Mr. Ashok Kumar Banerjee appearing with Mr. S. Sengupta, learned advocates for the petitioners that the suit of the opposite party No.1 who claims to have 1/9th share in the property is absolutely untenable, mischievous and has been filed just to harass the defendants because of the fact that the opposite party No.1 was all along having knowledge of execution of three deeds of gift executed

by Sunil Chandra Roy in the year of 1986 and did not commence any action within the period of 18 years during which when Sunil Chandra Roy was alive. It is submitted that Sunil Chandra Roy was a pragmatic man having sufficient of worldly affairs and he made a Will sometime in the year of 1999 making arrangement of his properties other than the suit property and by virtue of the Will provision was made not only for the opposite party No.1 but also for other legal heirs including his widow and, so far as the opposite party No.1 is concerned he was given half of the second floor of the building by that Will. He was also given 30 per cent share in the business of late Sunil Chandra Roy. So far as the vacant portion is concerned, it was gifted to Swapan Roy, Bablu Roy and Subodh Roy by three deeds of gift. In the Will itself in terms of which the opposite party No.1 is along with Swapan Roy, executor there is a mention of the fact of execution of the deed of gift in favour of Subodh Chandra Roy. It is submitted that the building situated on 11 cottah of land is partly three-storied and partly two- storied. Bablu Roy, one of the sons of Sunil Chandra Roy has been given a mutated separate and demarcated portion of the holding No.30/3 Set Bagan Road. Swapan Roy, another son of Sunil Chandra Roy was given a separate portion within a demarcated area in that plot. Subodh, the brother of Sunil, was given a separate portion, more or less 04 cottah and 8 chittaks. It is submitted therefore that the opposite party No.1 as plaintiff has come to challenge the three deeds of gift almost two decades after its execution by Sunil Chandra Roy. It is submitted that the defendants have been in exclusive enjoyment and possession of the property in their respective areas and portions. A development agreement was executed by the defendant Nos. 9 to 12 with regard to construction of a structure on their allotted area of the vacant land, and building sanctioned plan has already obtained. Developer started construction work and with a view to just stopping the construction the suit has been instituted by the opposite party No.1 with full knowledge that the deeds of gift were not fraudulent and that he had no share in the property. Mr. Banerjee, learned senior advocate appearing for the petitioners submitted that the learned Court of appeal unnecessarily referred to an order of His Lordship Hon"ble Justice Jyotirmoy Bhattacharya passed in W.P. No. 8620 (W) of 2006 on 16th of May, 2006 whereby His Lordship by an order of injunction asked the heirs of Subodh Chandra Roy not to raise any construction in respect of plot No. 30/2 and 30/3, Set Bagan Place. According to Mr. Banerjee, the order in the writ petition cannot be made applicable to the injunction application preferred by the opposite party No. 1 in the suit.

8. Mr. Pratik Prakash Banerjee, learned advocate appearing for the opposite party No.1 while supporting the impugned order submitted that by no means can the Court come to conclusion at this stage that the three deeds of gift are not fraudulent and do not suffer from any illegality. That the opposite party No.1 is one of the legal heirs of Sunil Chandra Roy is not in dispute. If Sunil Chandra Roy was a pragmatic man and a man thoroughly conversant with worldly affairs there is no reason how the opposite party No.1 was alone excluded in the suit

property. It is submitted that since there was an attempt to alienate the suit property to a developer the opposite party No.1 filed a writ application being No. W.P. 8620 (W) of 2006 and the Writ Court restrained the private respondent No. 6 to 10 (heirs of Subodh Chandra Roy and also Bablu Roy) from raising any further construction on the sub-divided plot No. 30/2 and 30/3, Set Bagan Road, and that order of injunction was an appropriate one and the learned Court of appeal did not commit any illegality in referring to the order of the writ Court. Though in the writ petition the principal respondent was the Dum Dum Municipality who allegedly sanctioned plan for such construction in the fitness of things the only option left open to the learned trial Court was but to direct the parties to maintain status quo.

9. The impugned order has been assailed by the heirs of Subodh Chandra Roy alone not by the other defendants. By the deed of gift dated 10th July, 1986 Subodh Chandra Roy has been given more or less 04 cottahs of land with demarcated boundary at 13 Set Bagan Road which is now known as 28 Set Bagan Place. By another deed of gift 02 cottah more or less was given to Bablu, another son, and yet by another deed of gift 02 cottah more or less was given to Swapan. These are in respect of the vacant portion of the plot. It appears from a copy of the Will that Sunil Chandra Roy executed a Will making in details some arrangement of his properties including his business. So far as the opposite party No.1 is concerned, he has been given by this Will dated 18.01.1999 a portion of the house situated on the suit plot. A share of business has also been to the opposite party No. 1 as also to the two others. By this Will other sons have been given other portions of the building and in the Will there is a reference to the deed of gift executed by Sunil Chandra Roy in respect of a vacant portion of the suit plot to Subodh Chandra Roy, his brother. In the Will, the opposite party No.1 and Swapan Roy, (one of the sons of Sunil Chandra Roy) have been made executors. The argument of the learned Advocate for the petitioners that the opposite party No.1 came to have knowledge of the deeds of gift only after defendants No. 2 to 4 disclosed to him about those deeds of gift is untenable may not be rejected outright. Argument has been made by the learned advocate for the petitioners that the whole object of the suit was to restrain the heirs of Subodh Chandra Roy from making any construction of the vacant portion of the suit plot only to take revenge against non-execution of any deed of gift by Sunil in favour of the opposite party No.1 in respect of at least a portion of the vacant area. It is also true that Sunil Chandra Roy died in March 2001 and the deed of gift in favour of Sunil Chandra Roy was executed on 10th July, 1985 and thus Sunil Chandra Roy survived for 16 years during which the opposite party No.1 did not commence any action.

10. It is well settled that in the matter of grant of temporary injunction three factors, namely prima facie case, balance of convenience and inconvenience and irreparable loss and injury have to be considered. Though all the three deed of gift have been challenged it is the deed of gift standing in favour of heirs of Subodh Chandra Roy who was the brother of Sunil Chandra Roy conveying by

Sunil in favour of Subodh an area of 04 cottah and odd that has been particularly challenged in view of the fact that the heirs of late Subodh Chandra Roy in the attempt to raise construction of residential structure on the property covered under the deed of gift dated 10th of July, 1985. A deed of gift which is more than 21 years old is presumed to be valid and legal unless it is impeached by impeachable evidence. The ground of impeachment of the deed of gift standing in favour of Subodh Chandra Roy is that the donor was at the time of execution of the deed of gift 78 years old and had no capacity to understand as to the contents of the deed and had reposed confidence in the donee. The donor did not get independent legal advice and had no intention to disinherit the opposite party No.1 from share in the property. Therefore, the deed of gift suffers from fraud, misrepresentation and coercion. The submission of Mr. Pratik Prakash Banerjee, the learned advocate for the opposite party No.1 that till by disposal of the suit it is decided whether the impugned deed of gift is valid or not it is in the fitness of things that the parties should maintain status quo is a usual submission. As against this submission Mr. Ashok Kumar Banerjee, learned senior advocate for the petitioner has submitted with reference to a decision in Svenska Handelsbanken Vs. M/s. Indian Charge Chrome and others, that mere allegation of fraud in the plaint or in the petition for injunction with respect to a registered document which is more than two decades old without specifying how the deed of gift came to be outcome of fraud or misrepresentation cannot entitle the opposite party No. 1 to seek order of injunction so as to restrain the petitioner from raising their own residential house on the property, and if the submission of Mr. Pratik Prakash Banerjee is accepted then the defendant No.1 will be given an unjust relief which he is not entitled to. Since nobody knows when the suit will be disposed of including disposal of first appeal, second appeal and of SLP it amounts to virtual denial to the rightful owner of the property to use his property. In the reported decision it has been observed by their Lordships that mere pleadings do not make a strong case of prima facie fraud and with reference to the decision of the Privy Council in AIR 1941 93 (Privy Council) it has been observed that a finding as to fraud cannot be based on suspicion and conjecture. Their Lordships in the reported decision were disposing in appeal application for temporary injunction. It has been submitted by Mr. Ashok Kumar Banerjee, learned senior advocate appearing for the petitioner that motive of the opposite party No.1 was to see the construction of the petitioner's stopped by hook or by crook. It has been submitted that mere allegation of fraud does not make out a prima facie case nor even any arguable case. Now, during hearing of the application my attention has been drawn to a registered Will dated 18th January, 1999 executed by Sunil Chandra Roy in favour of all his sons. In this registered Will which is a lengthy one the testator stated that he was 72 years old at the time of execution of the Will. The averment in the injunction application or in the plaint and at the time of the execution of the deed of gift Sunil Chandra Roy was 78 years old does not appear to be prima facie true because when the testator himself says in the registered Will that he was 72 years old in 1999 then at the time of execution of the deed of gift Sunil Chandra

Roy was 58 years old. During hearing of the argument Mr. Pratik Prakash Banerjee did not put any challenge to the Will. It was a Will executed by Sunil Chandra Roy in respect of his properties particularly the residential property and also of his business and having gone through the Will minutely it appears to me that so far as the opposite party No.1 is concerned he was given in one floor of the building to reside with his family and also share in the business. It was an exhaustive Will delineating in particular as to who will get how much in which property. The averment in the plaint that by fraud or misrepresentation Sunil Chandra Roy was made to execute the deed of gift does not appear to be consistent with the averment in the Will wherein there is a reference to the deed of gift standing in favour of Subodh Chandra Roy which was executed by Sunil in July 1985. It appears from recitals of the Will that Subodh was allotted one room in the three-storied building to reside. The vacant land covered 04 cottah and odd was given to Subodh so as to enable him to construct his own house so that after such construction he leaves the room allotted to him in the original residential house. What is more striking is that the opposite party No. 1 who is challenging the deed of gift was a co-executor to the Will and his name also appears in the Will as beneficiaries of some properties. How the deed of gift came to be subjected to fraud and undue influence has not been mentioned save saying that the donor was 78 years old which does not appear to be true and why the deed of gift was executed has again been mentioned in the Will itself. In the circumstances, it is difficult to say that the opposite party No.1 had no knowledge of the deed of gift. Sunil Chandra Roy survived for long 16 years after the execution of deed of gift and the opposite party No.1 did not commence any action and this is a point which should not be lost sight of. In the circumstances, unless impeached through cogent evidence a hint of which is not there in the materials before the learned trial Court what is apparent has to be treated as real. Mutation was effected in favour of the petitioners. Thus, in such circumstances, mere allegation of fraud in the plaint does not by itself make out a prima facie case of fraud. Balance of convenience and inconvenience viewed in such circumstances does not tilt in favour of the opposite party No. 1. With regard to irreparable loss and injury it has been argued by Mr. Ashok Kumar Banerjee, learned senior advocate appearing for the petitioner that due to stalling of the construction the petitioners have been put to loss and damage.

11. It was argued by Mr. Pratik Prakash Banerjee, learned advocate appearing for the opposite party No.1 that His Lordship Hon"ble Justice Jyotirmoy Bhattacharya in W.P.No.8620(W) of 2006 by His Lordship's order dated 16th of May, 2006 passed a order of injunction from raising any construction on the portion alleged to Subodh Chandra Roy in the deed of gift. Mr. Ashok Kumar Banerjee has rightly submitted that the said writ petition was filed by the opposite party No.1 against the South Dum Dum Municipality challenging violation of Rule 10 of the West Bengal Building Rules 1996 in the matter of sanctioning of building plan. It was the municipal authority which was the principal respondent in the writ. His Lordship was not called upon to decide the application arising out of the suit

between the heirs of Subodh Chandra Roy and the present opposite party No.1. There was no scope on the part of His Lordship to consider whether any prima facie case existed with regard to the opposite party No. 1's application for temporary injunction. Therefore, the order passed in the writ petition cannot be said to cover the present application under Article 227 of the Constitution of India that arose out of the order passed by the learned Additional District Judge, Barrackpore a Misc. Appeal No. 15 of 2007 arising out of Title Suit No. 34 of 2006. The learned Additional District Judge principally relied on the order passed in the writ petition which virtually was an order passed pursuant to the application of the opposite party No.1 alleging violation of the Building Rules.

12. Mr. Pratik Prakash Banerjee submitted that if injunction is not granted that opposite party No.1 will be non-suited and in case the petitioners who are the heirs of Subodh Chandra Roy get their residential house constructed the opposite party No.1 will be without any remedy. Except the opposite party No.1 none of the heirs of Sunil Chandra Roy has come forward in support of injunction application. Injunction is an equitable relief available to a party who can establish a clear prima facie case and in whose favour balance of convenience and inconvenience stands. When the principles governing grant of temporary injunction do not appear to be in favour of the petitioner then the reasoning that the opposite party No.1 will be without any remedy if injunction is not granted has not leg to stand up. It cannot be said that in the event of success of opposite party No.1 in the suit he will not have the proper remedy. Even if the plaintiff in a suit has prima facie case in his favour that itself could not entitle him to get relief of temporary injunction because the Court has to further consider whether the party seeking extraordinary relief of injunction could be compensated in terms of money and whether the balance of convenience lies in his favour. However, the appropriate order in these circumstances will be to ask the defendant No. 9 to 12 to furnish a bank guarantee in the sum of Rs.40,000/- in favour of the plaintiff and the bank guarantee will be in the Court not encashable till the disposal of the suit. The object of the interlocutory injunction is to protect the plaintiff no doubt against injury by violation of his right if any, only to be established at the trial but such protection has to be weighed against the corresponding requirement of the defendant to be protected against injury resulting from his prevention from exercising legal right for which he could not be adequately compensated. Therefore, one need has to be pitted against another need.

13. In the circumstances, I do not find that the learned Court of Appeal below rightly decided the matter.

14. Situated thus, the application is allowed. The order of the learned Additional District Judge, Barrackpore in Misc. Appeal No. 15 of 2007 confirming the order of the learned trial Court is set aside. The application for temporary injunction stands dismissed on condition that the defendant No. 9 to 12 will execute a bank guarantee for Rs.40,000/- in favour of the plaintiff and shall keep it in deposit with the learned trial Court till disposal of the suit.

The observation made in this order are only for disposal of injunction application.

A copy of this order shall be sent to the learned Additional District Judge, Barrackpore for information and necessary action.