

**(2013) 08 CAL CK 0092**  
**In the Calcutta High Court**  
**Case No : C.O. No. 1315 of 2012**

Smt. Sandhya Roy

APPELLANT

Vs

Biswanath Mondal and Others

RESPONDENT

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**Date of Decision :** 22-08-2013

**Acts Referred:**

Constitution of India, 1950 — Article 227

**Citation :** (2013) 08 CAL CK 0092

**Hon'ble Judges :** Tarun Kumar Gupta, J

**Bench :** Single Bench

**Advocate :** Sabyasachi Bhattacharyya and Mr. Chandradoy Roy, for the Appellant; Jaharlal De for Opposite Party No. 1 and Mr. Gurusaday De, for the Respondent

**Final Decision :** Dismissed

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## Judgement

Tarun Kumar Gupta, J.—This application under Article 227 of the Constitution of India has been filed by the plaintiff of Title Suit No. 17 of 2012 challenging order No. 2 dated 27th March, 2012 passed by learned Civil Judge (Senior Division) at Suri District-Birbhum in Title Suit No. 17 of 2012. The petitioner's case, in short, is that Jyogendranath Jyotish Sastri, the father of the petitioner and O.P. No. 2 to 10 was the original owner of the suit property. He died on 21st September, 1994 leaving behind the petitioner and O.P. No. 2 to 10 as his heirs and legal representatives. After his death the petitioner and the O.P. No. 2 to 10 had 1/10th share each in the suit property. The petitioner came to learn sometime in the month of February, 2012 that a partition suit being Title Suit No. 3 of 1976 was filed and the suit property was partitioned keeping the petitioner in dark. It is a specific case that though she had 1/10th share in the suit property being one of the legal heirs of Jyogendranath Jyotish Sastri but she was not made a party in the partition suit and accordingly said decree of partition suit dated 24.08.1982 and all subsequent proceedings were illegal being vitiated by fraud. She accordingly filed a suit being Title Suit No. 17 of 2012 praying for setting

aside the judgment and decree of the Title Suit No. 3 of 1976, for permanent injunction restraining the defendants from executing said decree through Title Execution Case No. 9 of 1998 and for other consequential reliefs. The petitioner plaintiff filed an application for stay of execution of the decree passed in said Title Suit No. 3 of 1976 being Title Execution Case No. 9 of 1998. By the order impugned learned Trial Court rejected said application for stay. Hence is this application.

2. Mr. Sabyasachi Bhattacharyya appearing for the petitioner plaintiff submits that the petitioner had admittedly 1/10th share in the suit property being one of the heirs of Jyogendranath Jyotish Sastri, the original owner of the suit property. According to him, without impleading the petitioner plaintiff said partition suit being 3 of 1976 was filed. According to him, said judgment and decree were vitiated by fraud and accordingly the petitioner plaintiff filed said suit for declaration and injunction. In this connection he refers a case law reported in (2007) (4) SCC 221 wherein it was held that a fraud goes to the root of the matter and vitiates everything arising from said fraudulent act. According to Mr. Bhattacharyya unless the Title Execution Case being No. 9 of 1998 arising out of said fraudulent decree passed in Title Suit No. 3 of 1976 is stayed till disposal of the suit, the plaintiff petitioner will suffer irreparable loss and injury as she being in possession in part of the suit property will be dispossessed therefrom on the strength of a decree obtained by fraud.

3. Mr. Jaharlal De appearing for O.P. No. 1 submits that the petitioner plaintiff of Title Suit No. 17 of 2012 was set up by some of her brothers and sisters and other parties of said partition suit to stall the execution of the partition decree obtained after long legal battle. In this connection he refers to the affidavit-in-opposition filed by the O.P. No. 1 in this case. He submits that said partition suit being Title Suit No. 3 of 1976 was decreed in preliminary form on 24th of August, 1982. He further submits that Jyogendranath Jyotish Sastri, the father of the plaintiff petitioner through whom plaintiff was claiming her 1/10th share in the suit property was a party to said partition suit and the preliminary decree was passed on 24th August, 1982 while he was very much alive. According to him, there is no question of making either the plaintiff petitioner or any other heir of Jyogendranath Jyotish Sastri a party in the partition suit as he was alive when the preliminary decree was passed after contested hearing. According to him, after preliminary decree final decree was passed and before partition of the suit property by metes and bounds learned Commissioner visited the suit property and submitted report after proper investigation. According to him, had the petitioner plaintiff remained in the suit property she would have filed the objection much earlier. He submits that the brothers and sisters of the present petitioners and some other parties of said partition suit filed one case after another to stall the execution case but without any success. All those cases ended in dismissal. He further submits that father of the plaintiff petitioner executed a deed of gift dated 14th of August, 1992 in favour of O.P. No. 7 Biswanath Roy who is one of the brothers of the petitioner plaintiff. He next

submits that after execution of said deed of gift dated 14.08.1992 the petitioner plaintiff had no right, title and interest in the suit property, and hence she was not entitled to raise even any objection against said decree of Title Suit No. 3 of 1976 or the execution proceeding arising therefrom. According to him, learned trial court rightly rejected the petition of stay.

4. I have carefully considered the submissions made by learned counsels of the parties. Perused the averments made in the application as well as in the affidavit-in-opposition and the annexed documents. There is no denial that fraud goes to the root of the matter and vitiates everything arising out of a fraudulent act. Though the petitioner plaintiff took the plea that the partition suit being Title Suit No. 3 of 1976 was filed behind her back and it was a fraud upon the court, but it is palpable that at the time of filing of said partition suit her father Jyogendranath Jyotish Sastri was very much alive and was a party to the same. It also came out that the preliminary decree was passed on 24th August, 1982 when also her father Jyogendranath Jyotish Sastri was alive. As such, there was neither any fraud nor any illegality either in filing of said partition suit No. 3 of 1976 or passing of its preliminary decree on 24th of August, 1982. It appears that the father of the petitioner plaintiff gifted his properties by a registered deed of gift dated 14th of August, 1992 in favour of one of his sons namely Biswanath Roy (O.P. No. 7) who happens to be one of the brothers of the petitioner plaintiff. So long said deed of gift stands, the petitioner plaintiff had no right, title and interest in any portion of the suit property which originally belonged to her father. Admittedly, no suit has yet been filed praying for declaring said deed of gift as void and not binding upon the petitioner. It is true that in para 6 of the plaint of Title Suit No. 17 of 2012, it was alleged that said deed of gift dated 14.08.1992 was a forged one and invalid document. But mere allegation cannot upset a registered document. Learned trial court by the order impugned rejected the petition praying for stay of the execution of Title Execution Case No. 9 of 1998 arising out of a decree of said partition suit being 3 of 1976 on the ground that the allegations of the plaintiff that she was not aware of said judgment and decree was not believable and that after long 35 years a person cannot be permitted to stall the execution of a decree. As the petitioner plaintiff has failed to establish at least prima facie that any fraud was practised upon her either in filing the partition suit of 3 of 1976 or passing of its preliminary decree, or its subsequent proceeding, she is not entitled to get an order of stay of the execution of said decree. This is more so as it came out that on the strength of a deed of gift her father gifted away the property to her another brother Biswanath Roy (O.P. No. 7) and said deed of gift is still subsisting.

5. Accordingly, I am of opinion that the order impugned is sustainable in law though in other grounds.

6. Accordingly, the application is hereby dismissed on contest.

7. However, I pass no order as to costs. Urgent photostat certified copy of this judgment be supplied to the learned counsels of the parties, if applied for.