

(2015) 02 CAL CK 0008
In the Calcutta High Court
Case No : CO 1272 OF 2011

Sourendra Bag and Others

APPELLANT

Vs

Saptami Bag and Others

RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 40 Rule 1, 151

Constitution of India, 1950 — Article 227

Citation : (2015) 1 CHN 649 : (2015) 2 WBLR 311

Hon'ble Judges : Subrata Talukdar, J.

Bench : Single Bench

Advocate : M.P. Gupta, Kingsuk Mondal and Sanjib Das, for the Appellant;
Rwitendra Banerjee and Shibasis Chatterjee, Ld. Advocate, Advocates for the Respondent

Judgement

Subrata Talukdar, J.—In this application under Article 227 of the Constitution of India the petitioners challenge the order dated 25th January, 2011 in Misc. Appeal no. 162 of 2010 passed by the Ld. First Additional District Judge at Howrah and arising out of Order no. 33 dated 30th April 2010 passed by the Ld. Second Civil Court (Junior Division), Uluberia in Title Suit no. 109 of 2008.

2. The present petitioners are the plaintiffs in the suit and the present opposite parties are the defendants therein.

3. By the Order no. 33 dated 30th April, 2010 the Ld. Trial Court was pleased to allow the application filed by the plaintiffs for appointment of Receiver in the suit property under Order 40 Rule 1 CPC. The Ld. Receiver was directed to administer the suit property and submit monthly accounts of profit and loss to the Court. By the order impugned dated 25th January, 2011 the Ld. Appellate Court was pleased to set aside such direction of the Ld. Trial Court.

4. Briefly recapitulating the facts of the case it is noticed that the suit for declaration and consequential relief was filed by the plaintiff in respect of the

properties of late Khudiram Bag, the father of the plaintiff no. 1 and the defendant no. 2 as well as the father-in-law of the defendant no. 1. In respect of the suit properties the late Khudiram Bag by a registered instrument of family settlement dated 20th September 1972 divided the suit property amongst his three sons Samirendra, Soumendra (plaintiff no. 1), Dibendu (defendant no. 2) and his widow, Aruna Bala Bag. Samirendra died without marrying and, therefore, his share in the suit property devolved upon the surviving heirs.

5. Saurendra, who removed himself to separate mess has alleged that their mother, Aruna Bala, who went to live with Dibendu and his wife, Saptami (defendant no. 1) was wrongfully induced to register a Deed of Gift in favour of the defendants. On the basis of such fraudulent Deed of Gift the defendants are enjoying the usufructs of the suit property. It is further alleged that the defendants are threatening to dispossess the plaintiffs from the suit property and change its nature and character.

6. Having regard to such allegations, the plaintiffs obtained an order of status quo from the Ld. Trial Court. Alleging violation of the said order of status quo the plaintiffs filed Misc. Case no. 309 of 2011 which is pending before the Ld. Trial Court. However, the plaintiffs allege that the defendants have been continuing with their illegal acts over the suit property and, therefore, prayed for appointment of Receiver under Order 40 Rule 1 read with Section 151 CPC. As noted above in this judgment the application for Receiver having stood allowed by the Ld. Trial Court, in appeal such prayer was set aside.

7. The defendants filed both their written statement and their written objection to the application for appointing a Receiver. It is the case of the defendants that the Deed of Gift was validly granted in favour of Saptami by Aruna Bala since both Saptami and her husband Dibendu took great care of the widow during her stay with them. It is their further case that the plaintiff no. 1 suddenly took away his mother from the house of the defendants on the ground of treating her by a doctor and, thereafter denied the defendants access to the widow. In the meantime the defendants were surprised to receive the summons of Title Suit no. 109/2008.

8. The Ld. Trial Court was sufficiently persuaded by the contention of plaintiffs that the defendants have been trying to possess the suit property in several ways including by acts of cultivation on the "Sali" lands. In the further view of the Ld. Trial Court since the possession of the defendants is under a cloud because of the challenge to the Deed of Gift, it would be fit to appoint a Receiver to administer the suit property comprising "Sali" or cultivable lands and submit monthly accounts of profit and loss before the Court.

9. Per contra the Ld. Appellate Court was pleased to consider the provisions of Order 40 Rule 1 sub Rule (2) CPC. In the view of the Ld. Appellate Court till the Deed of Gift is set aside by a competent Court the possession of the suit property should be presumed to be in favour of the defendants. The Ld. Appellate Court

found that there is nothing to be gathered from the order of the Ld. Trial Court that the suit property stood to be dissipated or any other mischief may be caused in respect of the same entitling the plaintiffs to an order of appointment of Receiver. The Ld. Appellate Court also did not find that the threat of dispossession alleged by the plaintiff is at all of a grave nature so as to permit the appointment of a Receiver.

10. Being satisfied that the provisions of Order 39 Rules 1 and 2 CPC are adequate to take care of any contingency as alleged by the plaintiff as well as the lack of applicability of Order 40 Rule 1 sub Rule (2) CPC to the facts of the present case, the order of the Ld. Trial Court appointing Receiver was set aside.

11. Sri Gupta, Ld. Counsel has forcefully argued that the Ld. Appellate Court erroneously exercised jurisdiction by holding that because of the Deed of Gift possession lies with the defendants. Ld. Counsel further argues that it is the specific case of the plaintiffs that they have been enjoying possession over the suit property.

12. Assuming but not admitting that the suit property was looked after or cultivated by the defendants, Sri Gupta draws the attention of this Court to the relief claimed by the plaintiff which is for an order restraining the defendants not to dispossess the plaintiffs from the suit property. Since the Ld. Trial Court has held that the aspect of possession requires to be examined, it is necessary that pending such examination the properties should be held by a Receiver.

13. In support of his contention Sri Gupta relies upon the judgment of the Hon"ble Apex Court reported in Hiralal Patni Vs. Loonkaram Sethiya and Others, He also relies upon the judgment of Anthony C. Leo Vs. Nandlal Bal Krishnan and others, .

14. Relying on the above noted decisions Sri Gupta argues that the powers of the court under Order 40 Rule 1 CPC to prevent the illegal and unauthorized activities by a party in respect of the suit property by appointing a Receiver is by now well settled.

15. Arguing in favour of the present opposite parties-defendants Shri Rwitendra Banerjee Ld. Counsel draws the attention of this Court to the prayers in the suit which are, inter alia, for a decree declaring the right, title and interest of the plaintiff in the suit property together with the declaration that the Deed of Gift dated 26th December, 2005 is void and inoperative. Sri Banerjee points out there is no prayer with regard to the possession of the plaintiffs in the suit. He also points out that no averment can be found from the plaint that the Deed of Gift has not been acted upon.

16. Sri Bannerjee asserts till the validity of the Deed of Gift is finally adjudicated the possession and title should be presumed to lie with the parties claiming under the said Deed of Gift. Ld. Counsel also points out that during the lifetime of the widow, Aruna Bala Bag and her stay with the defendants there was no

whisper of any claim over the suit property by the plaintiffs. He also submits that the widow did not file any suit and neither did she claim appointment of a Receiver in respect of the suit property covered by the Deed of Gift.

17. Sri Banerjee also takes this Court to the written objection filed by the defendants to the application for appointment of Receiver by arguing that the present suit was filed in 2008, i.e. three years after the Deed of Gift in 2005. The Ld. Counsel submits that the Ld. Appellate Court has not erred in holding that the principle under Order 40 Rule 1 sub Rule (2) CPC does not apply to the facts of the present case.

18. In support of his above noted argument Shri Banerjee relies upon *State Bank of India Vs. Jayshree Ceramics Pvt. Ltd. and Others*, . He also relies upon a decision of the Madras High Court reported in *T. Krishnaswamy Chetty Vs. C. Thangavelu Chetty and Others*, .

19. Having heard the parties and considering the materials on record this Court notices that by the Deed of Family Settlement dated 20th September, 1972 the father and predecessor-in-interest of both the plaintiff no. 1 and defendant no. 2 gifted the suit property in favour of his legal heirs, including the widow, Arunabala Bag. This Court further notices the fact that thereafter Arunabala executed the purported Deed of Gift in the year 2005 in favour of the defendants and this Court also notices that the Donor has not come forward to allege that the said Deed of Gift is fraudulent.

20. Admittedly, the plaintiff no. 1, Sourendra was staying in separate mess. The plaintiff no. 1 does not dispute the fact that the family settlement dated 20th September, 1972 was executed by way of registered instrument and delivery of possession was made between himself, the other brothers, including the defendant no. 2 and their widow mother. Such fact is pleaded at paragraph 4 of the plaint of Title Suit No. 109 of 2008.

21. From the above noted position of facts it can be reasonably inferred that arising out of the family settlement dated 20th September 1972 each of the brothers and the widow received possession of their respective shares in the property of the late Khudiram, including the suit property. After enjoying possession of her respective share in the suit property, Arunabala in the year 2005 executed the said Deed of Gift in favour of the defendants 1 and 2. After a lapse of three years in the year 2008 the plaintiff no. 1 claims to be in possession of the suit property, that is the share of Arunabala.

22. This Court finds it difficult to digest that the suit property covered under the Deed of Gift which belongs to share of Arunabala was claimed by the plaintiffs to be also in their possession after a long efflux of time. This Court also notices the submission of Sri Banerjee that there is no prayer with regard to return of possession in the plaint. This Court further notices that Arunabala, the original Donor, has not come forward to claim that the Deed of Gift is void. Moreover, there has been a lapse of three years from the year 2005, when the Deed was

executed, to the year 2008 when the suit was filed.

23. Therefore, this Court finds sufficient substance in the observations of the Ld. Appellate Court that till such Deed of Gift is finally adjudicated the possessory right of the plaintiff no. 1 to the suit property is difficult to believe. This Court also notices with approval the finding of the Ld. Appellate Court that the provisions of Order 40 Rule 1 sub Rule (2) CPC do not enable the plaintiffs to claim appointment of Receiver over the suit property.

24. Order 40 Rule 1 sub Rule (2) CPC reads as follows:-

Nothing in this rule shall authorise the court to remove from the possession or custody of the property of any person, whom any party in the suit has not present right so to remove. 25. This Court also notices the observations of the Hon"ble Division Bench in AIR 1987 Calcutta Page 194 (supra) on the principle guiding appointment of a Receiver. Paragraph 8 of the said judgment is usefully reproduced:-

The principles which should guide the courts to the appointment of a Receiver are (i) that the plaintiff for appointment of the Receiver must show prima facie that he has strong case, or good title to the property or a special equity in his favour and that the property in the hands of the defendant is in danger of being wasted, (ii) where the property is in medio, that is to say, in the possession of no one, a Receiver can readily be appointed. But where any one is in possession under a legal claim, strong and compelling reasons are necessary for interfering with such possession (iii) An application for the appointment of the Receiver should always be made promptly and delay in making it is a circumstances unfavourable to such an appointment. The court while considering the question whether it will be just and convenient to appoint the Receiver must keep in mind the abovementioned principles. The decision in the case of Muniammal Vs. P.M. Ranganatha Nayagar and Another, is relied on. 26. Last but not the least this Court is persuaded by the fact that the widow, Arunabala, the Donor, has not come forward to challenge the Deed of Gift.

27. In the backdrop of the above discussion this Court finds no reason to interfere with the order of the Ld. Appellate Court dated 25th January 2011. It is also made clear that the observations made in this judgment are relevant only for the purpose of deciding the correctness of the order impugned and the Ld. Trial Court shall be free to decide the main suit on its own merits.

28. CO 1272 of 2011 is accordingly dismissed.

29. However, in view of the age of the suit which was filed in 2008 the Ld. 2nd Civil Court (Junior Division), Uluberia is requested to dispose of the same within a period of one year from the date of communication of this order on its own merits and subject to its diary.

30. There will be, however, no order as to costs.

31. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.