

(1991) 05 CAL CK 0018
In the Calcutta High Court
Case No : S.A. No. 400 of 1977

Sri Ragunath Prasad

APPELLANT

Vs

Sri Sant Lal Show and Others

RESPONDENT

Date of Decision : 14-05-1991

Acts Referred:

Transfer of Property Act, 1882 — Section 105

Citation : (1992) 1 CALLT 144

Hon'ble Judges : Amulya Kumar Nandi, J

Bench : Single Bench

Advocate : Bidyut Banerjee, for the Appellant; Harinarayan Mukherjee, for the Respondent

Final Decision : Dismissed

Judgement

Amulya Kumar Nandi, J.—This second appeal has been preferred against the judgment and decree passed in Title Appeal No. 39 of 1971 by the Subordinate Judge at Asansol. The plaintiff filed a suit for declaration. that the plaintiff has right to the stair case and has right to reconstruct the said stair case to convert it into a pucca stair case. He has also asked for permanent injunction restraining the principal defendants from interfering with the plaintiff's intended reconstruction or to disturb it or to cause obstruction to it.

2. The plaintiff alleges that "A" schedule property belonged to one Srikrishan Show who died leaving his widow and only heir Rajpati Devi figing as proforma defendant No. 5 in the suit. The said Srikrishan by virtue of a deed of gift gave away the "B" schedule property to the said widow which forms part of "A" schedule property. Srikrishan Show also executed a will in respect of the remaining part of the property mentioned in Schedule "C" The will was not probated. Proforma defendant No. 5 as the sole heir of her husband succeeded to the property by inheritance. There is a stair case to negotiate the first floor from the ground floor. It is located on the western part of the building and it is very old and dilapidated. It needs an urgent repair. Proforma defendant No. 5 granted

a monthly tenancy in favour of the plaintiff for a term of 40 years in respect of "C" schedule property. The plaintiff intends to reconstruct the said stair case in order to enjoy his "C" Schedule property. The defendant challenged various allegations in the plaint. It is particularly stated in the written statement that the stair case referred to by the plaintiff is located on the north-west corner of the property gifted by Srikrishan Show in favour of his widow who in turn sold it to the defendant. The stair case forms part of the property purchased by the defendant. The trial Court decreed the suit. The court of appeal below has allowed the appeal and dismissed the suit.

3. The plaintiff has preferred this second appeal. The cross-objection filed by the respondent is not pressed and therefore it stands rejected.

4. In allowing the appeal the learned Judge meant to say that the fact that the will was not probated will heavily weigh against the plaintiff. It was meant to be said that on account of the existence of an unprobated will the property cannot vest in the heir and consequently a transfer by her to the plaintiff confers no title on him. Mr. Banerjee appearing for the appellant challenges this finding of the court of appeal below.

5. Admittedly "A" Schedule property belonged to Srikrishan Show. There is no controversy either that the "B" and "C" Schedule properties form part of "A" schedule property. It is also admitted by the parties that 9 decimals of land appertaining to "B" Schedule was gifted by Srikrishan to his wife Rajpati. It is also admitted or rather proved in evidence that Rajpati sold the said property to the defendant by virtue of a deed dated 25.3.68. It is undisputed that Srikrishan executed a will in respect of "C" schedule property on 11.1.54. It is not controverted either that no probate in respect of the will was obtained. It is also admitted that Rajpati leased out "C" schedule property covered by the will to the plaintiff by virtue of a deed dated 16.9.68. Mr. Banerjee contends that natural succession to the estate of the testator shall not remain arrested on account of the existence of an unprobated will. In support of his contention he placed reliance upon the decision in Jogendranath Banerjee Vs. Makhan Lal Banerjee and Others, and Balkishan and Another Vs. Prabhu and Others, According to Mr. Banerjee Rajpati the only surviving heir of the testator would succeed to the estate in the event of existence of an unprobated will. Mr. Mukherjee seeks to challenge the proposition relying on Section 307 of the Indian Succession Act. Section 307 of the Indian Succession Act lays down that the executor can transfer a property provided there is no restriction to such alienation. In the instant case there is no evidence that Rajpati is the executrix and therefore her transfer cannot be challenged on the ground of restriction to alienation as contemplated u/s 307 of the Indian Succession Act. That apart, Section 307(3) provides that an alienation in violation of the provision contained in Clause (I) shall be voidable and not void. Therefore even if we assume for argument's sake that Rajpati as executrix transferred the property in violation of the restriction only the person interested in the property can challenge the alienation or rather

he can avoid such alienation. In that view of the matter I am unable to accept the contention of Mr. Mukherjee. In view of the decisions referred to by Mr. Banerjee I find that the succession by the heir is not arrested on account of existence of an unprobated will. Therefore the transfer by way of a lease for a long term in favour of the plaintiff by Rajpati is not open to impeachment in this proceeding.

6. Mr. Mukherjee contends that his is an earlier transfer. The defendant purchased the property from Rajpati by virtue of a deed dated 25.3.68. The deed of lease executed in favour of the plaintiff saw the light of the day on 16.9.68. Obviously, therefore, the plaintiff cannot claim any title to the stair case in suit if it is found that the stair case and the land underneath had been transferred in favour of the defendant. The plaint has been very intelligently drafted. It is silent as regards the title to the stair case. But on a perusal of the deed of transfer executed in favour of the defendant, which has been marked Ext. B, it is evident that the stair case and the land underneath were transferred in favour of the defendant, we may also refer to a plan according to the scale marked Ext. "A". There is no controversy that the disputed stair case is located on the north-western portion of the building. The red-bordered part of the property has fallen to the share of the defendant and the green bordered property is the leasehold property of the plaintiff. It is very clear from the plan that the disputed stair case has gone to the share of the defendant. Evidently therefore the plaintiff has no title to the stair case. The positive assertion made by the defendant in his written statement that the stair case belongs to him finds ample support from the defendant's deed of purchase and the plan referred to above. Now let us turn to the plaintiff's deed of lease marked Ext. 2. It does not prove the title of the plaintiff to the disputed stair case. Mr. Banerjee very much relies upon Clause 9 of the deed of lease. Relying upon this clause the trial court decreed the suit. The said clause provides that the lessee will have right to repair the wooden stair case and to convert the same into pucca one. In my opinion, the lessor had absolutely no right to incorporate this clause in the deed of lease without joining the defendant in the deed since the title to the stair case had already passed by a transaction in favour of the defendant. Therefore, the lessor could not reserve this right in favour of the lessee while the lessor had no title to the said property. Clause 9 of the deed of lease does not come to the rescue to the plaintiff. So even if the plaintiff had acquired a valid leasehold interest in "C" Schedule property he cannot exercise his right over the stair case located in the "B" schedule property. The reasons which weighed with the court of appeal below to dismiss the suit will not weigh against the plaintiff as has been pointed out above ; But the pertinent fact that the plaintiff has no title to the stair case is sufficient to dismiss the suit. In view of the fact that the stair case was being used by the contending parties the user of the stair case by the plaintiff for six months shall not be disturbed by the defendant.

7. In view of the foregoing reasons the appeal cannot succeed. It is dismissed accordingly. I make no order as to costs. No formal decree need be drawn up.

Let copy of the judgment go down to the court below forthwith with lower court record.