

IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

S.A. 186 of 2019

CAN 1 of 2019

CAN 3 of 2023

SAMBIT SARKAR

VS.

MINA MALLICK

For the Appellant	: Mr. Saptarshi Roy, Adv. Mr. Siddhartha Roy, Adv. Ms. Kakali Das Chakraborty, Adv. Mr. Biswajit Sarkar, Adv.
For the Respondent	: Mr. Shyamal Chakraborty, Adv. Mr. Debojyoti Mondal, Adv. Ms. Anjana Das, Adv.
Hearing concluded on	: 14 th August, 2023
Judgement on	: 4 th October, 2023

Siddhartha Roy Chowdhury, J.:

1. This second appeal impeaches the judgement and decree passed by learned Additional District and Sessions Judge, 2nd Court, Barrackpore, North 24 Parganas in Title Appeal No. 16 of 2015, affirming thereby the judgement and decree passed by learned Civil Judge (Junior Division) Barrackpore, North 24 Parganas in Title Suit No. 261 of 2006.
2. For the sake of convenience the parties will be referred to as they were arrayed before the learned Trial Court.
3. Briefly stated, Smt. Mina Mallick as plaintiff filed a suit against Nirmala Chowdhury seeking declaration that the deed of revocation being

no. 000224 registered on 3rd June, 2005 in the office of the District Registrar, Barasat is void, inoperative and not binding on the plaintiff and for permanent injunction among other relief.

4. It is contended that the defendant Nirmala Chowdhury was the original owner of the suit property she had no issue and on her own accord she created a trust in respect of the suit property appointing herself and the plaintiff as joint trustees.
5. The said deed of trust was executed on 10th April, 1991 and duly registered in the office of the Registrar of Assurance, Kolkata with the declaration that the trust is irrevocable. The plaintiff, thereafter, came to the suit property and started residing therewith Nirmala Chowdhury. The right title interest that the defendant had in respect of the suit property was conveyed to the trustees and the joint trustees used to enjoy and occupy the suit premises in terms of the deed of trust.
6. The defendant made it clear that in the event of death of the defendant, her husband would have the right to reside over the property and the plaintiff, to look after the husband of the defendant and shall have to observe the birthday of Gurudev of defendant. The defendant of the husband pre-deceased her.
7. On 12th August, 2006 some unknown persons came to the suit property with one Subir Kumar Mukherjee, an Advocate to survey the property and on query it was disclosed that defendant was contemplating sale of a portion of the suit property and she had revoked the deed of trust on 13th June, 2005.
8. According to the plaintiff, the defendant was not competent to deal with the property unilaterally. Notice to that effect was served upon the

defendant even the Chairman of Local Municipal Authority was informed. Upon receipt of notice the defendant for some days remained silent but again started disturbing the peaceful possession of the plaintiff.

9. The said suit was contested by defendant Nirmala Chowdhury by filing written statement. She denied the allegations made in the plaint. In her written statement the defendant stated that she executed a deed of family settlement in respect of the property which she acquired by way of gift from her husband. As per terms and conditions delineated in the deed of settlement, the plaintiff had the obligation to look after the defendant and her husband. But immediately after the registration of the document the plaintiffs started doing things in the violation of the terms of the deed. Even she tried to oust the defendant from the suit property, inflicted physical torture upon her. The defendant thus was compelled to revoke the deed of family settlement by a registered deed of revocation.
10. According to the said defendant the status of the plaintiff after revocation of the deed was reduced to the status of a trespasser. It is contended further that during the life time of Nirmala Chowdhury, the plaintiff could not have acquired any right title interest over the property and the defendants had the authority to cancel the deed of settlement
11. Sambit Sarkar the appellant herein, got himself impleaded in the suit as defendant no. 2 and contested the suit by filing written statement. In his pleading the said defendant no. 2 disclosed that he purchased the property measuring about 1 cottah 12 chhitak and 24 square feet from defendant no. 1 vide deed no. I-1074/ 23rd June, 2006 out of 3 cottahs and when he tried to get his name mutated as well as to get the building plan sanctioned, he came to know that Municipal Authority was

requested by the plaintiff through her advocate not to mutate the names of any person.

12. Learned Trial Court after considering the pleadings of the parties framed issues. Before the witness action started the defendant no. 1 Nirmala Chowdhury died on 6th February, 2010. Learned Trial Court while disposing of an application for substitution on 10th September, 2010 with the findings that the defendant no. 1 since had transferred the suit property to defendant no. 2 and she had no right title interest over the suit property in any manner whatsoever and there was no legal representative of the defendant no. 1 to represent her estate, expunged the name of defendant no. 1 and thus allowed the prayer of plaintiff.
13. Learned Trial Court after considering evidence on record was pleased to pass the decree declaring the deed of revocation dated 3rd June, 2005, as void, inoperative and not binding upon the plaintiff and not enforceable in law and the defendant has no authority to deal with the property. The defendant has been restrained from transferring or parting with the suit property or in part thereof to anybody.
14. The defendant made an unsuccessful attempt to get the judgement and decree passed by learned Trial Court reversed in Title Appeal No. 16 of 2015. Hence the second appeal.
15. The second appeal was admitted on 7th August, 2019 on the following substantial question of law :-
 - (i) Is it obligatory on the part of the First Appellate Court to record its finding both on facts and law independently while affirming or reversing the judgement and decree of the Trial Court?

However, invoking the jurisdiction conferred under proviso to Section 100 of the Code of Civil Procedure, this court formulated other substantial questions of law in the following manner :-

(ii) Could the learned First Appellate Court affirm the judgement of learned Trial Court without taking into consideration the fact that estate of the defendant no. 1 Nirmala Chowdhury was not represented or the defendant no. 2 Sambit Sarkar could not have represented the estate of Nirmala Chowdhury?

(iii) Whether learned Courts below committed error in considering the document as a deed of trust with prohibition as to revocation of the same?

16. Mr. Siddhartha Roy, learned Counsel for the appellant assailing the impugned judgement submits that the appellant purchased 1 cottah 12 chittak and 24 square feet of land, out of the property in suit, at the consideration of Rs. 2,00,000/- on 23rd June, 2006 and not the entire suit property.

17. After acquiring the same by purchase, the appellant has been possessing the said property. Therefore, learned Trial Court had no reason to hold that the appellant/defendant no. 2 stepped into the shoes of the defendant no. 1 by the dint of the deed of sale.

18. Attention of the Court is drawn to the finding of learned Trial Court while disposing of the application for substitution on 10th September, 2010 which says :-

“Thus I think that the provision of Order XXI Rule 4A (2) (a) of CPC has been sufficiently complied with by the plaintiff. No written objection has been filed by the defendant no. 2 against this petition. It appears from the record at this stage that the defendant no. 1 has already transferred the suit property to the defendant no. 2 and hence, she has no right title interest over the said property in any manner whatsoever. It also appears that there is no legal heir of the defendant no. 1 living at present. In such circumstances, I think that there is no impediment in expunging the name of defendant no. 1 from this suit. Therefore, the prayer of the plaintiff is considered and allowed. Let the name of defendant no. 1 be expunged from the cause title of the suit and a note be given in the suit registered to that effect.”

Mr. Roy argues that the observation is factually incorrect and erroneous.

19. According to Mr. Roy, the plaintiff did not challenge the title deed of the defendant. In fact, no claim was ever lodged against the added defendant by the plaintiff. Learned First Appellate Court did not take into consideration that the suit was abetted as against defendant no. 1. The plaintiff/respondent did not have any cause of action against this defendant no. 2, subsequently who became the sole defendant. Learned Trial Court while admitting the fact that the defendant no. 1 did not have any legal heirs to represent her estate, had no reason to hold that the defendant no. 2 having purchased the entire property in suit stepped into the shoes of the plaintiff.

20. The defendant no. 1 since transferred part of suit property and retained the rest of the suit property with her as its owner and when learned Trial Court ought to have complied with the provision of Order XXII Rule 4A of the Code of Civil Procedure by appointing the Administrator General or an Advisor of the Court or such other person as the Court could have thought fit to represent estate of the deceased person for the purpose of the suit. The suit according to Mr. Roy stood abetted by operation of law.
21. Mr. Shyamal Chakraborty, learned Counsel representing respondent however, submits that the defendant Sambit Sarkar got himself impleaded as party. During pendency of the suit, learned Trial Court rightly held that the plaintiff/respondent had the locus standi to seek relief against the said defendant. Learned First Appellate Court was also justified in affirming the view of learned Trial Court. According to Mr. Chakraborty the concurrent findings of learned Court below does not merit any interference.
22. Drawing the attention of this Court to the recital of the deed Mr. Chakraborty strenuously argues that the deed of trust having been declared as irrevocable, the deceased defendant no. 1 had no reason to revoke the deed by another registered instrument that too, in the breach of Section 78 of the Indian Trusts Act, 1882.
23. The question, therefore, calls for consideration, is whether the action of a person since deceased and whose name was expunged from the suit can be called into question subsequent thereto? To find the answer we need to delve deep into the issue as to whether right to sue survives upon

the defendant/appellant or in other words could the defendant represent the estate of Nirmala Chowdhury, since deceased.

24. Admittedly, the defendant Sambit Sarkar acquired 1 cottah 12 chhitak 24 square feet of land by purchase from Smt. Nirmala Chowdhury. He did not purchase the entire property measuring about 3 kathas of land with one storied and partly two storied brick built house. Therefore, learned Trial Court could not have held that the defendant no. 1 since during her life time sold and transferred the entire property in suit, she can be represented by the defendant no. 2. This is even factually incorrect.

25. When the party to the suit dies the first question that calls for consideration is whether the right to sue survives. If it does not survive the curtain drops, bringing an end to the suit in absence of any legal representative of the deceased person brought on record under Rule 4 or Rule 4A of the Code of Civil Procedure.

26. General rule says the right of action existing in favour of or against a person at the time of death, survives to or against his legal representatives. The terms "legal representative" is defined under Section 2 (11) of the Code of Civil Procedure :

"Section 2. In this Act, unless there is anything repugnant in the subject or context,

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or issued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;"

27. Admittedly, Mr. Sambit Sarkar purchased a portion of the suit property from Nirmala Chowdhury under a deed of sale duly registered according to law. By no stretch of imagination he can be said to have represented the estate of the deceased Nirmala Chowdhury. The plaintiff being the niece of deceased Nirmala Chowdhury subject to Section 15 of the Hindu Succession Act, 1882 could be the legal representative of Nirmala Chowdhury, but not Sambit Sarkar. Provision of Order XXII Rule 10 of the Civil Procedure Code, has no manner of application in this case.

28. Therefore, I am of the view that Sambit Sarkar, the added defendant, turned sole defendant, could not have been considered by learned Trial Court and learned First Appellate Court as legal representative of Nirmala Chowdhury since deceased.

29. In **P. MURALI NARASIMHULU (DEAD) BY LRS. VS. CHINDATTALA NARASIMHULU** reported in **(2010) 12 SCALE 613 : : AIR OnLine 2010 SC 356**, Hon'ble Apex Court held :-

“From what is stated above, it is evident that the second appeal was heard and decided when all the respondents in the appeal before the High Court were dead and the heirs of none of them were brought on record. For this reason alone the judgment coming under appeal is unsustainable and it is set aside”

30. In **SMT. LEELABAI VS. RAJARAM & ANR.** reported in **AIR 1999 SCW 4709** Hon'ble Apex Court held :-

“3. The legal position is clear. The plaintiff in the suit was the minor. He had sued taking aid of his father as next friend. On the death of minor, the need of the next friend vanished. The next friend could not thenceforth act as guardian of the minor. The estate of the minor was decidedly heritable. Under the

Hindu Succession Act, 1956, the mother of the Hindu male is a Class-I heir. The estate of the minor thus fell in the hands of his mother by succession. His mother had remained silent as to the litigation. It thus logically followed that the appeal before the Lower Appellate Court became incompetent and incapable of being pursued. The power of the Court to go on with the appeal got withdrawn by the supervening event of the death of the minor. We therefore take the view that the judgement and decree passed by the Lower Appellate Court as confirmed by the High Court was not in accordance with law. Both deserve to be set aside. xxxxxxxx On this understanding of the position, we allow this appeal, set aside the judgment and decree of the High Court as also that of the Lower Court, dismissing the plaintiff's suit but with no order as to costs."

31. Mr. Chakraborty in support of the judgement impugned submits that Nirmala Chowdhury could not have revoked the deed of trust because of the prohibition in deed. Attention of the Court is drawn to the provision of Section 78 of the Indian Trusts Act, 1882, which envisages :-

"78. Revocation of trust.—A trust created by will may be revoked at the pleasure of the testator. A trust otherwise created can be revoked only—

(a) where all the beneficiaries are competent to contract—by their consent;

(b) where the trust has been declared by a non-testamentary instrument or by word of mouth—in exercise of a power of revocation expressly reserved to the author, of the trust; or

(c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors—at the pleasure of the author of the trust."

32. In my humble opinion, since the plaintiff was not a beneficiary, rather one of the joint trustees, Section 78 of the Indian Trusts Act, 1882

has no manner of application in this case. Thus the judgements relied upon by Mr. Chakraborty in the case of **Smt. Sikha Das & Anr. vs. Sri Jitendra Kumar Borral & Ors.** reported in **2009 CWN 919** and in **Chetan Kaur vs. Jaspreet Singh & Ors.** reported in **2023 (3) ICC 615** are of no help.

33. Upon plain reading of document be it a trust deed or deed of settlement, Exhibit-1 it becomes clear that there was no disposition in praesenti. After the demise of Nirmala Chowdhury, as stated in the deed Exhibit-1, the plaintiff could have acquired the right, title interest in the property. This very nature of disposition indicates the instrument is a Will in trust, which is always open to be revoked at the desire of the testator.
34. Even the clause prohibiting revocation of deed in any ground would not change the nature of the document itself, unless there is disposition in praesenti. In this regard we can profitably use the judgement of Hon'ble Apex Court in **P.K. MOHAN RAM VS. B.N. ANANTHACHARY & ORS.** reported in **AIR 2010 SC 1725** wherein it is held :-

“16. In Ramaswami Naidu v. Gopalakrishna Naidu (supra), the High Court laid down the following broad test for construction of document:

The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. But the main test to find out whether the document constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant

divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. The general principle also is that the document should be read as a whole and it is the substance of the document that matters and not the form or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant.

If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti.

35. The estate of Nirmala Chowdhury, since deceased was not represented, her name was expunged. Deceased Nirmala Chowdhury could have been represented by Administrator General in absence of any legal heir but not by the defendant no. 2. Therefore, the suit stood abetted against Nirmala Chowdhury.

36. Interest of the defendant/appellant over the part of suit property shall remain protected under Section 64 of the Indian Trusts Act, 1882 which says :-

“64. Saving of rights of certain transferees.—Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

(a) a transferee, in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or

(b) a transferee for consideration from such a transferee. A judgment-creditor of the trustee attaching and purchasing trust property is not a transferee for consideration within the meaning of this section. Nothing in section 63 applies to money, currency notes, and negotiable instruments in the hands of a bona fide holder to whom they have passed in circulation, or shall be deemed to affect the Indian Contract Act, 1872 (9 of 1872), section 108, or the liability of a person to whom a debt or charge is transferred.”

37. Under such circumstance, I am of the view that impugned judgement and decree warrants interference being perverse and should not be allowed to remain in force and should be set aside, which I accordingly do. Consequently, the appeal succeeds and the suit stands dismissed. Pending applications, if any, stand disposed of.
38. Let a copy of this judgement along with lower Court record be sent down to the learned Trial Court immediately.
39. Urgent photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(SIDDHARTHA ROY CHOWDHURY, J.)