(2012) 07 CAL CK 0144

Calcutta High Court

Case No: A.P.O. No. 31 of 1997 with C.S. No. 570 of 1983

Abdul Quadir and Others	APPELLANT
Vs	
Naila Asgar and Others	RESPONDENT

Date of Decision: July 4, 2012

Hon'ble Judges: Shukla Kabir Sinha, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: P.K. Das, Advocate, for the Appellant;Supratik Basu, Advocate, Ms. Gargi Saha, Advocate, Respondent No. 9(ii) to 9 (vii), Mr. Ratanlal Shaw, Advocate and Mr. Javed Sanariwala, for the Respondent

Final Decision: Dismissed

Judgement

Ashim Kumar Banerjee, J.

One Akbari Begum and others filed a suit against Shahzadi Bibi and others inter-alia claiming partition of the immovable properties described in schedule A, B, C and D amongst the coparceners. Facts would depict, one Sheikh Kasem deceased was the owner of four properties including 12Q, Patwar Bagan Lane, Calcutta. He had another property being premises No. 13/1/1 Patwar Bagan Lane, Calcutta. He had four wives and children from the respective wedlock. His first wife Khadiza Bibi was the benamder in respect of premises No. 12Q, Khadiza Bibi, later relinquished her right over the said property in favour of her husband Sheikh Kasem. Sheikh Kasem, by Deed of Gift bequeathed half share to Khadiza Bibi subsequently. Hence Khadiza and Kasem became the joint owner of the said property having equal share. In the partition suit plaintiffs claimed, Kasem acquired properties in the name of his wives and children as benamder. The plaintiffs also prayed for setting aside of a purported sale in respect of premises No. 13/1/1 by the defendant No. 2. Sheikh Asghar Kasem, one of the sons of Kasem, in favour of Muhammad Kasem who was claiming to be the absolute owner of the said property. It was contended that the defendant No. 2 did not have absolute ownership of the said premises and after cancellation of sale, that property should also come within the hotch potch of the joint family property

liable for partition amongst the coparceners including Mohammad Kasem. The plaintiffs moved an application for interim order. The learned Judge passed the following order.

It appears from the affidavit-in-opposition of the defendant No.2 that he has already sold the business mentioned in the petition to an outsider whose name has been given in his affidavit-in-opposition. Therefore there cannot be any order relating to the said business.

The case of the defendant No.6 is that he has purcahsed the suit premises (premises No.13/1/1, Patwar Bagan Lane, Calcutta) from Defendant No.3

In the circumstances, the only order that can be issued against the defendant is not to sell the suit premises till the disposal of the suit.

Costs-cost in the cause.

The above quotation is made from paragraph 13 of the petition filed by the plaintiffs before the learned Single Judge being the subject matter of the present appeal. From the order quoted (Supra) we find the defendants being restrained from selling the "suit premises". If later on transpired, Shahzadi Bibi, the defendant No. 1 entered into a purported agreement with one Hussamat Hazra Begam for sale of premises No. 12Q describing her as the absolute owner of the same. It further transpired, Shahzadi claimed ownership on the basis of an Oral Gift (Hiba). Hussamat filed a suit being suit No. 570 of 1983 for specific performance of the agreement for sale and her sons (she died during pendency of the suit) obtained collusive decree recording a purported compromise between the parties. By the said decree, a receiver was sought to be appointed with a direction to hand over possession to the purchaser. When the receiver attempted to hand over possession on the strength of the purported consent decree the plaintiffs came to know of the said suit based upon the purported agreement for sale Shahzadi sought to have entered into with Hussamat. The plaintiffs made an application inter-alia claiming for appointment of receiver over the said premises in question as also an order of restraint from dealing with or deposing of said premises No. 12Q. The purchasers being the heirs of Hussamat contested the claim. According to them, the interim order prevalent in the partition suit was restricted to premises No. 13/1/1. Hence, there was no order of injunction restraining sale of premises No. 12Q. The learned Judge rejected such contention and passed an order recalling the compromise as recorded in the order dated April 23, 1996. The decree passed in the suit No. 570 of 1983 was set aside and the deed of transfer executed on the basis of such decree was also declared to be illegal and of no effect. Being aggrieved, the purchasers being the heirs of Hussamat filed two appeals, one in relation to the suit No. 570 of 1983 and the other in relation to a partition suit No. 494 of 1980. We heard both the appeals on the above mentioned date and are being disposed of by this common judgment and order.

2. Mr. P.K. Das, learned senior advocate appearing for the appellants contended that the order quoted in the application as appearing in page 19 - 20 of the paper book clearly mentioned about premises No. 13/1/1 Patwar Bagan Lane, hence, the order of injunction should be construed as restricted to the said premises alone. He referred to the judgment and order impugned appearing at pages 315 - 339 of the paper book particularly page 332 where the learned Judge misquoted the said order by deleting the words "premises No. 13/1/1 Patwar Bagan Lane Calcutta.

3. Mr. Das further contended that since there was no prevalent order of injunction the suit for specific performance was maintainable and the decree could not be set aside. He conteded that Shahzadi Bibi claiming to be the absolute owner of the premises agreed to sell the property to Hussamat. On her failure to conclude the sale, Hussamat filed the suit that was subsequently compromised between the parties. Such decree of compromise could not be recalled at the instance of the plaintiffs in the other suit. He contended that premises No. 12Q could not have been included within the hotch potch of the joint family property. The property admittedly belonged to Shahzadi in terms of Hiba referred to above.

4. Opposing the appeals Mr. Supratik Basu, learned counsel appearing for respondent No.9(ii) to 9(vii) contended that the premises No. 12Q was owned by Khadiza and by not Shahzadi. Khadiza was holding it as benamder of Kasem. Hence, Kasem''s heirs were entitled to have the said property partitioned amongst themselves. The agreement for sale sought to be brought into existence was nothing but a ploy to grab the family property. Learned Judge rightly approached the problem and set aside the decree of compromise as well as sale that would deserve no interference.

5. Learned counsel appearing for the other defendants-respondents as well as the plaintiffs-respondents supported Mr. Basu.

6. We have perused the order dated June 8, 1981 appearing at pages 19 - 20 as well as page 332. It is true, in the second quotation the premises No. 13/1/1 was omitted. We tried to locate the original order in the department. We were however, not successful. On a close look to the said order we are of the view that mentioning of that premises would have no bearing on the present appeal. In the second paragraph of the order the learned Judge recorded that the defendant No. 6 claimed to have purchased the suit premises from defendant No. 3. This statement would relate to premises No. 13/1/1 as would appear from the plaintiff''s case made out in the plaint. Hence mentioning of the said premises may not be so relevant. However, the third paragraph of the order was clear that defendants were restrained from selling the "suit premises" that would mean four properties as per schedule A, B, C and D including premises No. 12Q. Hence the order certainly covered premises No. 12Q as well.

7. If we look to the problem from a different angle we would find that a partition suit was pending wherein the plaintiffs claimed that premises No. 12Q was being held by Khadiza as benamder and the said property could be liable to partition treating it as a property belonging to the estate of Kasem. During pendency of the said suit if any attempt is made to transfer the same that would amount to violation of the principle of "lis pendence".

8. Hence on both the counts neither Khatiza nor Shahzadi could enter into agreement for sale or attempt to transfer the said property. If it was so that was liable to be set aside. Learned Judge rightly did so. If the purchasers paid any sum to the vendors they would be at liberty to recover the same from the persons whom they paid. If the purchasers were defrauded by the vendors they have their remedy in law that would not affect the judgment and order impugned.

9. As a worse case if we accept the case made out by the appellants in its face value we would find that Khatiza transferred the property on the strength of oral Hiba. Khatiza was owner of the premises to the extent of half share. The balance half share was with Kasem. Hence Khatiza could not have transferred the entire property to Shahzadi who, in turn, could sell it to Hussamat.

10. The appeals fail and are hereby dismissed. There would be no order as to costs. Urgent Xerox certified copy of this order, if applied for, be given to the parties on their usual undertaking.

Shukla Kabir (Sinha), J.

I agree.