

(2011) 08 CAL CK 0154

Calcutta High Court

Case No: C.O. No. 2213 of 2011

Sri Debi Chorone Roquitte and
Anr

APPELLANT

Vs

Sri Parboti Chorone Roquitte and
Ors

RESPONDENT

Date of Decision: Aug. 17, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 22 Rule 10, Order 22 Rule 3, Order 39 Rule 1, Order 39 Rule 2, 151
- Trusts Act, 1882 - Section 34

Citation: (2012) 1 CALLT 40

Hon'ble Judges: Prasenjit Mandal, J

Bench: Single Bench

Advocate: S.P. Roychowdhury and Debasish Roy, for the Appellant; B.K. Banerjee, Souradipta Banerjee, P.C. Mitra and Chaitali Chowdhury, for the Respondent

Final Decision: Allowed

Judgement

Prasenjit Mandal, J.

This application is at the instance of the Defendant Nos. 1 and 2 and is directed against the Order No. 81 dated May 18, 2011 passed by the learned Judge, City Civil Court, 3rd Bench, Calcutta in Title Suit No. 988 of 2004 thereby allowing an application u/s 151 of the Code of Civil Procedure

2. The short question is that the original Plaintiff, since deceased and predecessor-in-interest of the added Plaintiff instituted a suit being Title Suit No. 988 of 2004 before the learned Judge, City Civil Court, Calcutta praying for the following reliefs:

a) A decree for declaration that the Plaintiff is the senior trustee in respect of the Trust Estate of Dourga Chorone Roquitte and is entitled to participate in the

management of the trust properties including the said premises i.e. premises No. 39, Jawaharlal Nehru Road, P.S. Shakespeare Sarani, Calcutta 700071 and to collect the usufructs of the trust properties and said premises including collection of rent, induction of tenants, accepting surrender of tenancies, etc.

b) A decree for declaration that the Opposite Parties / Defendant No. 7 is not the recorded tenant in the said premises and is not entitled to occupy any portion of the said premises and/or any transfer, if any, of any portion of the said premises in his favour made by the opposite parties / Defendant Nos. 1 and 2 is illegal and bad in law,

c) A decree for permanent injunction restraining the Defendant No. 1 & 2 their men, agents and associates from illegally letting out and/or transferring any portion of the said premises and from illegally removing any articles and/or items from the said premises and/or not deal with the Trust properties without the written consent of the Petitioner / Plaintiff and from illegally making any constructions therein and from depriving the Petitioner / Plaintiff from participating in the day to day management and activities of the trust property and the said premises i.e. premises No. 39, Jawaharlal Nehru Road, P.S. Shakespeare Sarani, Calcutta-700071 and/or any manner dealing with the same,

d) Appointment of a Receiver for preservation and management of the trust property and the said premises i.e. premises No. 39, Jawaharlal Nehru Road, P.S. Shakespeare Sarani, Calcutta 700071,

e) Direction upon the opposite parties / Defendant No. 1 and 2 to submit audited accounts of the trust property on and from 1st April, 2000, f) Costs,

g) Any other relief or reliefs to which the Petitioner / Plaintiff is entitled.

4. At the time of filing of the suit, the Plaintiff filed an application under Order 39 Rules 1 and 2 praying for temporary injunction in the following manner:

a) Temporary injunction till the disposal of the suit restraining the opposite parties / Defendant Nos. 1 and 2 and/or their men and/or this associates and/or their agents from illegally letting out and/or transferring any portion of the said premises and from illegally removing any articles and/or items from the said premises without the written consent of the Petitioner/Plaintiff and from illegally making any construction therein and from depriving the Petitioner / Plaintiff from participating in the day to day management and activities of the trust property and the said premises i.e. premises No. 39, Jawaharlal Nehru Road, P.S. Shakespeare Sarani, Calcutta 700071 and/or in any manner dealing with the same.

b) Ad interim order in terms of prayer (a) till the disposal of the petition.

c) Further order or order as Your Honour may deem fit and proper.

5. The Defendants / Petitioners herein contested the said application for temporary injunction denying the material allegations made in the application. They contended that the original Plaintiff had No. right or locus standi to file the suit as well as the application for temporary injunction. They contended that the Plaintiff never participated actively in the property administration and function of the trust property. His whereabouts were not available in the last part of 1998. But, ultimately, the Defendant Nos. 1 and 2 knew the present whereabouts of the Plaintiff and then, they asked the Plaintiff to attend the meeting of the trust to be held on April 15, 2004. The Plaintiff did not take part in the management of the trust to file the said suit against the other trustees.

6. Upon hearing the rival contentions of both the parties, the learned Trial Judge rejected the application for temporary injunction. Being aggrieved, the Plaintiff filed an appeal being F.M.A. No. 861 of 2005 and the said appeal is pending before a Division Bench of this Hon'ble Court. In the mean time, the added Plaintiff filed an application u/s 151 of the CPC and that application was allowed by the impugned order. Being aggrieved, this revisional application has been preferred by the Defendant Nos. 1 and 2.

Now, the question is whether the impugned order should be sustained.

7. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the original Plaintiff instituted the said suit for declaration and permanent injunction praying for the reliefs as noted earlier. While disposing of the application for temporary injunction, the learned Trial Judge came to a clear finding that the Plaintiff failed to make out a prima facie case to go for trial and the balance of convenience and inconvenience did not lie in favour of the Plaintiff and so, the application for temporary injunction was rejected on contest. The Plaintiff filed all the documents in support of the plaint case and the application for temporary injunction and the learned Trial Judge discussed of the documents and the rival contentions of both the parties in details and thereafter, he came to the said conclusion that the Plaintiff had failed to make out a prima facie case to go for trial and the balance of convenience and inconvenience was not in favour of the Plaintiff. Being aggrieved by that order dated March 31, 2005, the Plaintiff filed a misc. appeal being F.M.A. No. 861 of 2005 and at the initial stage, they prayed for interim order. Upon hearing the learned Counsel of both the sides, a Division Bench of this Hon'ble Court passed an interim order dated September 20, 2005 to the following effect:

We pass an interim order to this extent that during the pendency of this application, the Appellant will be permitted to attend the meeting of the Trust and the Defendant will not create any impediment in the meeting of the Trust. Any decision taken by the Trustee in their meeting should be conveyed to the Appellant in writing. The Appellant is free to take the learned Advocate for the Appellant in the learned Trial Court for the purpose of accompanying him to the place of meeting,

but the learned Advocate will not participate in the meeting.

8. Thus, from the above facts, i.e. the orders of the learned Trial Judge and of the Hon'ble Division Bench of this Hon'ble Court, it reveals that the learned Court below did not grant the prayer for ad interim injunction in the nature of temporary injunction as prayed for and a Division Bench of this Hon'ble Court has supported the order by refusing the prayer of the Plaintiff.

9. Upon the death of the original Plaintiff, Sri Parboti Chorone Roquitte, son of the original Plaintiff filed an application under Order 22 Rule 10 of the CPC praying for addition of the Petitioner as Plaintiff No. 2 and permit him to proceed with the suit. That application was allowed and the Plaintiff No. 2 was added in the said F.M.A. by an order dated May 13, 2010 for representing the estate of the deceased Appellant. It may be pointed out herein that the impugned order was passed on May 18, 2011 on the application dated January 15, 2010 before the learned Trial Judge, when the matter in dispute between the parties was 8 virtually in seisin before the Hon'ble High Court.

10. That application was filed by the proposed Plaintiff No. 2 and it was considered by the learned Trial Judge. By the said application dated January 15, 2010, the added Plaintiff prayed for directing the Defendant Nos. 1 and 2 their men, justice, associates not to withdraw any amount as litigation expenses from the assets of the trust fund for the instant litigation between the parties and pass such other further order or orders as to be considered fit and proper. The Defendant Nos. 1 and 2 filed a written objection against the said application u/s 151 of the CPC denying the material allegations. In that scenario, the learned Trial Judge allowed the application u/s 151 of the CPC in the following manner:

Accordingly it is ordered that the Defendants shall have to deposit all Income of the estate only in one bank account which shall be opened in the name of Plaintiff and the Defendant Nos. 1 and 2 jointly and the same shall be operated by the aforesaid three persons and till disposal of this suit parties shall have to take order from the court for withdrawal of the money for payment of Municipal taxes and other charges.

And regarding the lawyer's remuneration of respective parties the parties shall have to bear that cost from their own pocket but not from the estate fund.

To 22/06/11 for further order after getting order from the Hon'ble Court in respect of C.O. No. 3471 of 2010.

11. Thus, I find that the learned Trial Judge had passed the impugned order while earlier two different forums did not grant and interim injunction as prayed for by the Plaintiff and the learned Trial Judge described in clear words that the Plaintiff had failed to make out the prima facie case to go for trial. The learned Trial Judge passed the impugned order. The prayer for the impugned order i.e. opening bank

account and the manner of withdrawal money from the Bank for specific purposes etc., was not, at all, made by the Plaintiff in the application u/s 151 of the Code of Civil Procedure, but, it was granted. I think the findings of the learned Trial Judge in the impugned order are not in conformity with the earlier observations made by the aforesaid two forums as indicated earlier.

12. While disposing of the application for temporary injunction, the learned Trial Judge observed that when the Plaintiff had failed to take active participation in the management of the affairs of the trust property, the Defendants could not be interfered with by the Plaintiff in the management of the said trust properties. It was also the observation of the learned Trial Judge that No. specific dispute had been raised by the Plaintiff and to make out the same at the time of hearing even by filing cogent documents. It was also the observation of the learned Trial Judge that the Plaintiff's application for temporary was not tenable in law, unless, he had disclosed his identity as a Member of the Trust property and the suit had been filed by him only in his individual capacity which the law of trust did not permit. In spite of such clear observations by the learned Trial Judge, subsequently by the impugned order, the learned Trial Judge passed the impugned order which was far from the reliefs sought for in the application u/s 151 of the CPC Under the circumstances, it appears that the impugned order is not tenable.

13. Mr. B. Banerjee, learned Senior Advocate appearing for the Plaintiff / opposite party has contended that there is No. dispute that the original Plaintiff was a trustee. Sri Parboti Chorone Roquitte, son of the original Plaintiff filed an application for addition of parties under Order 22 Rule 10 of the CPC and that application was allowed by the appellate forum. The original Plaintiff executed a deed of trust appointing the added Plaintiff No. 2 as trustee by registered deed and such a recourse was permissible as per terms of the original trust and as such, the added Plaintiff No. 2 has become one of the trustees and as such, he is entitled to participate in the administration of the trust property and for that reason, the impugned order is justified in view of the contentions raised by the Plaintiff in the suit. But, as noted above, the original Plaintiff filed the said suit in his individual capacity which the law of trust did not permit.

14. Mr. S.P. Roychowdhury, learned Senior Advocate appearing for the Petitioners has contended that had it been the case of institution of a suit in the individual capacity, the added Plaintiff No. 2 should have taken steps for substitution under the provisions of Order 22 Rule 3 of the Code of Civil Procedure; but he did not do so. In the view of the observations of the learned Trial Judge in the order dated March 31, 2005, the original Plaintiff having failed to make out the prima facie case to go for trial, the learned Trial Judge should not have granted the reliefs which was not prayed for at all by the added Plaintiff No. 2 in his application.

I fully agree with such submission made by Mr. Roychowdhury. In spite of specific observations as noted above, the learned Trial Judge had passed the impugned

order, while the appellate forum was virtually in seisin over the matter.

15. Mr. Banerjee, while making submission, has referred to the decision of [Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and Others](#), particularly the paragraph No. 5 and submits that the Section 151 of the CPC gives inherent powers to the Court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the Court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is No. express bar in filing an application for withdrawal of the withdrawal application.

16. He has also referred to Section 34 of the Trust Act and thus, he submits that the added Plaintiff is permitted to file such an application and in support of his contention, he has referred to the decision of [Shri Mahadeo Jew and Another Vs. Balkrishna Vyas and Another](#), particularly the paragraph No. 36 and thus, he submits that in a suit for administration of the trust relating to a private trust, the Court is competent to frame a scheme for proper management of the trust. A suit for a scheme and administration of a private trust is a justifiable claim within the meaning of Section 9 of the CPC and, therefore, the Court has all the relevant and necessary powers to determine a scheme for the proper administration and due management of the trust. So, the learned Trial Judge was justified in passing the impugned order. Such proposition of law as referred to by Mr. Banerjee is not in dispute, but the question that remains for decision is whether the impugned order is sustainable in view of the facts and circumstances as stated above. After the death of the original Plaintiff, the added Plaintiff No. 2 stepped into the shoes of his father. So, his stand remains the same as that of his father. The observations of the learned Trial Judge in the order dated March 31, 2005 have not been set aside as yet.

17. Having considered the above facts and circumstances, this Bench is of the view that the learned Trial Judge was not justified in passing the impugned order which is far from the prayer made in the application u/s 151 of the Code of Civil Procedure, although, the learned Trial Judge has inherent power to pass appropriate orders according to the situation. He has committed errors of law in granting the reliefs not asked for in the application. The impugned order cannot, therefore, be sustained.

18. Accordingly, the revisional application is allowed. The impugned order is hereby set aside.

19. Considering the circumstances, there will be no order as to costs.

Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.