

(2014) 12 CAL CK 0071

Calcutta High Court

Case No: C.S. No. 643 of 1990

Sachchidananda Banerjee

APPELLANT

Vs

Moly Gupta

RESPONDENT

Date of Decision: Dec. 2, 2014

Acts Referred:

- Registration Act, 1908 - Section 49
- Specific Relief Act, 1963 - Section 11, 11(2), 13, 20(2)(c)
- Transfer of Property Act, 1882 - Section 41, 42, 43
- Trusts Act, 1882 - Section 77, 78

Citation: (2015) 1 CHN 338

Hon'ble Judges: Debangsu Basak, J

Bench: Single Bench

Advocate: Sabyasachi Chowdhury, Jayanta Sengupta and Nirmalaya Ray, Advocate for the Appellant; Reetobrata Mitra, Rupok Ghosh, M.A. Jabbar and N. Khanjoy, Advocate for the Respondent

Judgement

Debangsu Basak, J.

The suit is for specific performance of an agreement dated August 13, 1988.

2. The original defendant No. 1 was the owner of premises No. 12F, Nather Bagan Street, Kolkata. The plaintiff claims his father to be a tenant in respect of a portion of the said premises. The plaintiff and the original defendant No. 1 entered into the agreement dated August 13, 1988 whereby and whereunder the original defendant No. 1 agreed to sale the said premises to the plaintiff at and for an agreed consideration. The plaintiff claims that the original defendant No. 1 did not honour the agreement for sale requiring the plaintiff to file the suit for specific performance of such agreement against the original defendant No. 1 and one of her sons, the original defendant No. 2.

3. Subsequent to the filing of the suit the two original defendants died. They were substituted. During their lifetime both the original defendants filed written statements individually. The defence of the original defendants was that the agreement for sale dated August 13, 1988 was unenforceable since the original defendant No. 1 had created a trust prior to the agreement for sale. Such trust was created by a registered deed of settlement dated November 26, 1983. By such deed, the original defendant No. 1 retained to herself the right to revoke such deed of settlement. The original defendant No. 1 appointed herself and one of his sons, the original defendant No. 2 as the trustees with the right to the trustees to deal with the immovable property concerned. The deed of settlement also provided that, the original defendant No. 2 upon the death of the original defendant No. 1, the original defendant No. 2 will become the sole and absolute owner of the said premises. In her written statement the original defendant No. 1 claimed that she did not understand the agreement for sale as it was written in English.

4. The suit was initially decreed ex parte. The ex parte decree was set aside at the behest of the substituted defendants. An appeal therefrom was disposed of by allowing the substituted defendants to file additional written statement. The appeal Court requested hearing of the suit on priority basis. The substituted defendants filed an additional written statement.

5. In deference to the request made by the Division Bench in the judgment and order dated August 28, 2012, the suit was taken up for hearing on priority basis as soon as the said order was placed before me.

6. The parties suggested issues and they were settled on November 19, 2014 as follows:--

"1. Whether the plaintiff is entitled to specific performance of the agreement dated August 13, 1988 as prayed for?

2. Whether one of the trustees can deal with the trust property in exclusion to the other trustee and beneficiary?

3. Whether the trust deed dated November 26, 1983 stood extinguished prior to the alleged agreement?

4. To what relief, if any, is the plaintiff entitled to?"

7. The plaintiff produced himself as his witness. He was examined and cross-examined. The substituted defendants declined to produce any witness.

8. On the first issue learned Counsel for the plaintiff submits that the agreement dated August 13, 1988 being Exhibit "A" is a valid agreement. The fact that the original defendant No. 1 entered into such agreement is not disputed by the parties. By the agreement dated August 13, 1988 particularly clauses 3 and 9 thereof, the original defendant No. 1 agreed to make out a good marketable title in respect of

the property concerned. According to him, the plaintiff is entitled to specific performance of such clauses in the agreement for sale. The plaintiff, according to him, is seeking specific performance of the entirety of the agreement dated August 13, 1988. The agreement being Exhibit "A" is capable of being specifically enforced. The original defendant No. 1 had retained with her the right to revoke the earlier trust deed. The fact that she did not do so was not an impediment to the plaintiff obtaining a decree for specific performance of the agreement being Exhibit "A".

9. It is submitted on behalf of the plaintiff that, the defendant No. 1 had knowledge of English as would appear from her written statement. The written statement is in English and there is no endorsement that such written statement was read over and explained to her. The learned Counsel for the plaintiff refers to the rent receipts issued by the defendant No. 1 to the plaintiff. Such rent receipts are in English. He refers to the tenancy agreement of 1971 which is in English and signed by the defendant No. 1 in English. He submits that the defendant No. 1 was well-versed in English as will appear from the evidence of the witness of the plaintiff.

10. So far as Exhibit "H" being the tenancy agreement of 1971 and its objection as to admissibility is concerned, learned Counsel for the plaintiff submits that, the document was relied upon for collateral purpose. He relies upon Section 49 of the Registration Act, 1908 and submits that, Exhibit "H" can be used as an evidence of any collateral transaction not required to be affected by the registered instrument. He submits that, Exhibit "H" is relied upon for the purpose to establish that the original defendant No. 1 had knowledge of English and for no other purpose. He relies upon [SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.,](#) and [K.B. Saha and Sons Pvt. Ltd. Vs. Development Consultant Ltd.,](#) in this regard.

11. Learned Counsel for the plaintiff submits that, the original defendant No. 1 agreed to convey the immovable property to the plaintiff. She had retained to herself the power to revoke the earlier trust. He refers to Section 42 of the Transfer of Property Act, 1882 and submits that, in the event the original defendant No. 1 sold the property to the plaintiff even without revoking the earlier trust, by virtue of Section 42 of the Transfer of Property Act, 1882 the second transaction would be valid.

12. The learned Counsel for the plaintiff refers to the clauses of the agreement for sale and submits that, the original defendant No. 1 made certain representations as contained in the agreement for sale. The plaintiff acted on the basis of such representations and had altered his position to his prejudice. The original defendant No. 1 was, therefore, estopped from contending anything to the contrary. He submits that, the original defendant No. 1 was alive on the date of filing of the suit. She was competent to make out a marketable title in favour of the plaintiff. She was required to do such acts as were required for making out a good marketable title in favour of the plaintiff in respect of the immovable property concerned. He submits that, the Court will direct doing so on the principle of feeding the estoppel. He relies

upon Sections 41 and 43 of the Transfer of Property Act, 1882 apart from Section 42 thereof. Drawing attention to various clauses in the trust deed being Exhibit "D" in the suit, learned Counsel for the plaintiff submits that, the original defendant No. 1 retained the power to revoke the trust. He refers to Exhibit "G" being a letter issued by the Advocate for the original defendant No. 1 in reply to the letter dated August 23, 1988 being Exhibit "B" written on behalf of the plaintiff. In Exhibit "G", the Advocate for the original defendant No. 1 stated that, the plaintiff cannot call upon the original defendant No. 1 to join her son in the transaction. According to the learned Counsel for the plaintiff, this letter being Exhibit "G" presupposes a request being made at the behest of the plaintiff to the original defendant No. 1 to get the title of the plaintiff in respect of the property concerned perfected. He relies upon 1874 Volume 22 The Weekly Reporter page 60 (R.S.E. Judah v. Mirza Abdool Kurreem). Learned Counsel for the plaintiff refers to clauses 3 and 9 of Exhibit "A" being the agreement for sale and submits that, the original defendant No. 1 is obliged to execute the conveyance in favour of the plaintiff.

13. Learned Counsel for the substituted defendants refers to Section 20(2)(c) of the Specific Relief Act, 1963. He submits that, the conduct of the plaintiff must be taken into account. The plaintiff had filed the suit in 1990 and had allowed a large period of time to pass and, thereafter, obtained a decree ex parte in 2007. He submits that, the plaintiff had waited till the death of the original two defendants to obtain the ex parte decree without notice to the substituted defendants.

14. He, thereafter, refers to Section 11 particularly Sub-section (2) of the Specific Relief Act, 1963 and submits that, the plaintiff is not entitled to the relief as prayed for. He submits that, the agreement for sale being Exhibit "A" was entered into in breach of the deed of settlement being Exhibit "D". He contends that not only was Exhibit "A" entered into in breach of Exhibit "D" but also Exhibit "A" was entered by the original defendant No. 1 in excess of his power as a trustee. He refers to various clauses of the deed of settlement being Exhibit "D" and submits that the two trustees were required to act jointly when selling the immovable property concerned. He points out that Exhibit "A" was entered into by the original defendant No. 1 who was one of the trustees under the deed of settlement being Exhibit "D" and, therefore, she had acted in excess of her power. He relies upon Section 13 of the Specific Relief Act, 1963 and submits that, the plaintiff is not entitled to specific performance of Exhibit "A".

15. He refers to Sections 77 and 78 of the Trust Act, 1882 and submits that, the trust created by Exhibit "B" was not revoked. He contends that, on the execution of Exhibit "D" which is a registered document, the title to the immovable property concerned is stood transferred to and vested with the trust. In absence of the trust being revoked in terms of Section 78 of the Trust Act, 1882 that is, by way of a registered document, the property concerned continued to remain vested with the trustees. He contends that, revocation by conduct is not envisaged under Section 78

of the Trust Act, 1882 and relies upon 65 Calcutta Weekly Notes page 649 (Sachindra Nath Chatterjee v. The Official Trustee of West Bengal & Ors.) in support of such proposition.

16. He next contends that, the trust came to an end with the death of the settlor which happened in 1995. Once the trust has come to an end, it is not within the power of any other person to revoke the deed of trust. Therefore, according to him, the Court cannot ask the substituted defendants to revoke the deed of trust. He relies on [Thanthi Trust Vs. Income Tax Officer](#), for such proposition.

17. Learned Counsel for the substituted defendants refers to 65 Indian Appeals page 108 (Singh Sanatan Dharam High School Trust, Indaura v. Singh Rajput High School, Indaura) and submits that, the transaction is not in terms of Section 42 of the Transfer of Property Act, 1882. He next contends that, even on the strength of Exhibit "A" the plaintiff is unsure of a marketable title of the original defendant No. 1 in respect of the property concerned. He refers to clauses 3 and 9 of the Exhibit "A" in this regard. He refers prayer (b) of the plaint and submits that, the plaintiff is unsure of the title and, therefore, is not entitled to a decree for specific performance.

18. In reply, the learned Counsel for the plaintiff submits that, Section 11(2) of the Specific Relief Act, 1963 will not apply as the original defendant No. 1 did not enter into the Exhibit "A" as a trustee.

19. In my view, all the issues in the suit and the right of the plaintiff to receive any relief in the suit will turn on the provisions of Section 11(2) of the Specific Relief Act, 1963. It is not disputed that the original defendant No. 1 was the owner of the premises concerned. That she created a trust by Exhibit "D" is also not disputed. Exhibit "D" is the trust deed dated November 26, 1983. By the deed of trust dated November 26, 1983 being Exhibit "D" the original defendant No. 1 conveyed and transferred to the trustees appointed by such deed of trust, the entirety of premises No. 12F, Nether Bagan Street, Kolkata, for the use and benefit of the original defendant No. 1 during the term of her natural life without impeachment of waste and with full power and absolute authority to the original defendant No. 1 to hold, enjoy, use and occupy the said premises and to collect rents, issues, profits and income thereof and to appropriate the same for her sole use and benefit. The deed of trust being Exhibit "D" further provided that, after the death of the original defendant No. 1 settlor Samir Kumar Gupta, the original defendant No. 1 will be entitled to possession of the said premises and to enjoy the same as the absolute owner thereof with the full right of disposal and that, on the death of the original defendant No. 1 the trust will come to an end. The original defendant No. 1 as the settlor appointed herself and the original defendant No. 2 as the trustees. The composition of the trustees did not change subsequently. The deed of trust being Exhibit "D" permitted the trustees or trustee for the time being, various powers and authorities. One of them was to sell the said premises. The settlor being the original

defendant No. 1 retained to herself the right to withdraw the said premises from the trust for her absolute use or otherwise howsoever without substituting any equivalent for the same and that, she retained the right to revoke to all limitations, trusts, powers and provisions declared of or concerning the said premises.

20. Learned Counsel for the plaintiff contends that, the original defendant No. 1 had the right to enter into the agreement for sale being Exhibit "A". His contention is that, in the event the original defendant No. 1 had conveyed the immovable property notwithstanding the trust not being revoked by an earlier deed, the subsequent conveyance in favour of his client by the original defendant No. 1 would be valid in view of Section 42 of the Transfer of Property Act, 1882.

21. Such contention, however, does not arise in the facts and circumstances of the instant case. The original defendant No. 1 did not execute any conveyance in favour of the plaintiff in respect of the suit property and, therefore, the plaintiff had to file the present suit for specific performance. The learned Counsel for the plaintiff contends that, the original defendant No. 1 had within her power the right to convey the property notwithstanding the deed of trust and, therefore, in a suit for specific performance as in the present case and more particularly when the original defendant No. 1 was alive at the time when the suit was filed, the Court can direct the execution of a deed of conveyance in terms of the agreement for sale being Exhibit "A". In such an event, the Court is not directing anything which is contrary to law.

22. I have given serious consideration to such a contention. The original defendant No. 1 was entitled to execute a deed of conveyance in favour of the plaintiff notwithstanding the deed of trust and the plaintiff could have received a good title in view of Section 42 of the Transfer of Property Act, 1882. Such is not the fact scenario here. The original defendant No. 1 did not execute any conveyance in favour of the plaintiff, therefore, necessitating the suit for specific performance. The original defendant No. 1 instead of executing a deed of trust entered into an agreement for sale being Exhibit "A" with the plaintiff. Once the plaintiff comes to Court to enforce the agreement for sale the question whether such an agreement can be specifically enforced in view of Section 11(2) of the Specific Relief Act, 1963 requires an answer.

23. Section 11 of the Specific Relief Act, 1963 is as follows:--

"11. Cases in which specific performance of contracts connected with trusts enforceable.-

(1) Except as otherwise provided in this Act, specific performance of a contract may, in the discretion of the court, be enforced when the act agreed to be done is in the performance wholly or partly of a trust.

(2) A contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced."

24. Under sub-section (2) of Section 11 of the Specific Relief Act, 1963, a contract made by a trustee in excess of his powers or in breach of trust cannot be specifically enforced. In the instant case, the original defendant No. 1 was one of the trustees. When the agreement for sale being Exhibit "A" dated August 13, 1988 was entered into the two trustees appointed by the deed of trust dated November 26, 1983 being Exhibit "D" were alive. The two trustees are the original defendant No. 1 and original defendant No. 2. The agreement for sale dated August 13, 1988 being Exhibit "A" was entered into by the original defendant No. 1 only.

25. It is to be seen whether the original defendant No. 1 entered into the agreement for sale dated August 13, 1988 in excess of her power or in breach of the trust. Exhibit "D", the deed of trust, allows the trustees to exercise few powers and authorities. Relevant to the context of the present suit the term of Exhibit "D" is set out as follows:--

"AND IT IS HEREBY AGREED AND DECLARED that

the Trustees or Trustee for the time being of these presents shall have and exercise the following power and authorities viz.

.....

c) To sell the said house and premises or any portion thereof upon such terms and conditions as they think best but so that the money so to be raised shall be immediately invested in safe securities preferably in landed properties and the money so to be raised or the investments thereof shall be subject to the same trusts objects and purposes as may affect the said house and premises so sold."

26. In my view, the words "trustees or trustee for the time being" used in the deed of trust being Exhibit "D" means the number of trustees at the point of time when the power or the authority granted by the deed of trust is sought to be exercised. Exhibit "D" does not specifically permit any trustee to act singularly when there are more than one trustee in any other place therein. In such circumstances I read the relevant clause in Exhibit "D" to mean that, the trustees or trustee at a material point of time seeking to exercise any power or authority granted by Exhibit "D" must act jointly if there are more than one and obviously singularly if there is only one trustee at such point of time. In the instant case, as noted above, there were two trustees appointed by Exhibit "D". In such circumstances, I find that the original defendant No. 1 entered into Exhibit "A" both in breach of the terms and conditions of Exhibit "D" as well as in excess of the power granted to her by Exhibit "D". On such a finding arrived at, I am afraid, the parties are guided by Section 11 of the Specific Relief Act, 1963 and the agreement for sale being Exhibit "A" cannot be specifically enforced.

27. The original defendant No. 1 had knowledge of English. She understood the meaning and purport of both Exhibits "A" and "D". She signed the written statement without the contents of the written statement being explained to her in English. So far as Exhibit "H" is concerned the same is relied upon by the plaintiff to establish that the original defendant No. 1 had knowledge of English. Exhibit "H" is not used for any other purpose. Exhibit "H" is tendered in evidence for a collateral purpose other than the main issues to the suit. In K.B. Saha & Sons Pvt. Ltd. (supra) the Hon'ble Supreme Court was of the view that, under the proviso to Section 49 of the Registration Act, 1908 an unregistered document can also be admitted into evidence for a collateral fact or a collateral purpose. In paragraph 34 of such report it was held as follows:--

"34. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title and interest in immovable property of the value of one hundred rupees and upwards.
5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

28. In SMS Tea Estates Private Ltd. (supra) the Supreme Court explained the meaning of "collateral transaction" used in Section 49 of the Registration Act, 1908. A collateral transaction was explained to be a transaction not affecting the immovable property, but the transaction which was incidentally connected with that transaction.

29. In view of such ratio and in view of the fact, that the plaintiff produced Exhibit "G" to establish knowledge of English of the original defendant No. 1 and that such a purpose is collateral to the main transaction or specific performance of an agreement for sale, objection with regard to admissibility of Exhibit "H" is overruled.

30. Learned Counsel for the plaintiff relied heavily on R.S.E. Judah (supra) for the proposition that, the original defendant No. 1 was capable of executing the deed of conveyance and being so capable the Court must ensure that the conveyance is executed in favour of the plaintiff. In that case, the owner executed a mortgage

subsequently, having full knowledge of a prior deed of gift executed by her. The second transaction was held to prevail over the first transaction. In the instant case, the ratio will not apply since, the original defendant No. 1 did not execute any conveyance in favour of the plaintiff. An agreement for sale was entered into by the original defendant No. 1 with the plaintiff and which such agreement for sale was entered into in excess of the power of the original defendant No. 1 as the trustee of the trust created by her through Exhibit "D". The Court cannot enforce such capability of the original defendant No. 1 in view of Section 11 of the Specific Relief Act, 1963.

31. In such circumstances, the first issue is answered in the negative and against the plaintiff.

32. The second issue is answered in the negative in view of the discussions on the first issue.

33. The third issue is taken up for consideration. The trust deed dated November 26, 1983 being Exhibit "D" is a registered document. Title in respect of the immovable property stood transferred to and vested in the trust. The trust has to be revoked in accordance with Section 78 of the Trust Act, 1882. There is no document on record to show that Exhibit "D" was revoked in terms of Section 78 of the Trust Act, 1882.

34. In Sachindra Nath Chatterjee (supra) the Division Bench of this Court was considering an appeal passed in a proceeding of originating summons under Chapter XIII of the Original Side Rules. The settlor had created a trust. He wanted to effect certain changes in the trust contrary to the expressed provisions under the trust deed. He applied under Chapter XIII of the Original Side Rules to do so. The application was allowed. On appeal the Division Bench was of the view that, the rights ought not to have been allowed to be revoked.

35. In Thanthi Trust (supra) the Madras High Court was of the view that if a valid and concrete dedication had taken place, there would be no power left in the founder to revoke the trust. Any deviation will amount only to a breach of trust.

36. In Singh Sanatan Dharam High School Trust, Indaura (supra) it was held that, a valid endowment was created cannot be revoked by the donor. As rightly pointed out by the learned Counsel for the substituted defendants, there is no document to revoke the trust deed dated November 26, 1983 being Exhibit "D". The original defendant No. 1 did not revoke the trust deed being Exhibit "D" during her lifetime. No other person has the right to revoke all the deed of trust. The deed of trust being Exhibit "D" provided that, on the death of the original defendant No. 1 the property will vest absolutely on the original defendant No. 1. Without the trust deed being revoked, the property stood vested with the original defendant No. 1.

37. There is no document to show that, the original defendant No. 1 revoked the deed of trust being Exhibit "D" prior to the agreement for sale being Exhibit "A". It is

not the contention of the plaintiff that the original defendant No. 1 did so. On the contrary, it is contended on behalf of the plaintiff that, the original defendant No. 1 ought to have revoked Exhibit "D" and that the Court is not powerless to ensure that the substituted defendants revoked the deed of trust being Exhibit "D" to enforce Exhibit "A" specifically. I have already held that, Exhibit "A" cannot be specifically enforced. The trust deed being Exhibit "D" was not extinguished prior to the agreement for sale being Exhibit "A" herein. In such circumstances issue No. 3 is answered in the negative.

38. The plaintiff not being entitled to any specific performance of Exhibit "A" the question of the plaintiff entitled to any decree for damages also does not arise. In such circumstances, issue No. 4 is answered in the negative and against the plaintiff.

39. C.S. No. 643 of 1990 is dismissed. No order as to costs.