

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

FA 134 of 2018
with
IA No.: CAN 1 of 2017 (Old No. CAN 2447 of 2017)
(Dipak Basak –vs- Goutam Mukherjee & Ors.)
with
FA 66 of 2023
FAT 262 of 2017
(Goutam Mukherjee –vs- Dipak Basak & Ors.)

For the Appellant
(in FA 134 of 2018) &
for the respondent
(in FA 66 of 2023)

:
Mr. Probal Kumar Mukherjee, Sr. Adv.,
Mr. Susenjit Banik,
Ms. Sutapa Mukhopadhyay,
Mr. Mrinal Saha.

For the Appellant
(in FA 66 of 2023) &
for the respondents
(in FA 134 of 2018)

:
Mr. Shiba Prasad Mukherjee,
Mr. Debanjan Mukherjee,
Mr. Shuvajit Bose.

Hearing is concluded on : *29th March, 2023.*

Judgment On : **28th April, 2023.**

Tapabrata Chakraborty, J.

1. Judgment and decree dated 27th January, 2017 passed by the learned Civil Judge (Senior Division) Small Causes Court & Sessions Court at Sealdah in Title Suit no. 18 of 2010, whereby the suit preferred by one Dipak Basak (in short, Dipak) and the counter-claim of the defendants, namely, Goutam Mukherjee (in short, Goutam) and Rani Mukherjee (in short, Rani) were dismissed, have been impugned in the present appeal. The appeal against the dismissal of suit has been registered as FA 134 of 2018 and the appeal against rejection of the counter-claim has been registered as FA 66 of 2023. As both the appeals arise out of the same judgment, the same have been heard analogously.

2. Facts spelt out in the plaint, in brief, are that one Saraswati Devi (in short, Saraswati) happened to be absolute owner of the land and building at 11/48, Ultadanga Road, Kolkata – 700004 under police station Ultadanga. The plaintiff, namely, Dipak came to know that Saraswati was interested to dispose of the entire ground floor, second floor together with the roof over the second floor of the building and he accordingly approached her to purchase the same at a consideration of Rs.4,00,000/-. Both sides having agreed, two separate deeds of conveyance were executed on 16th November, 2000 in consideration of Rs.4,00,000/-. Thereafter, the possession of the suit property was handed over to Dipak and he put his belongings in the same. Defendant no.1, namely,

Goutam is the son of Saraswati and the defendant – 2, namely, Rani is the wife of Goutam, who are residing in the 1st floor of the building. Saraswati was a resident of the ground floor and 2nd floor of the suit property and after delivery of possession, she left Kolkata on 16th January, 2000 with her youngest daughter, namely, Dola Chakraborty and went to Mumbai. On the next date, Goutam and Rani with some antisocial put padlock at the ground floor and 2nd floor of the suit property and prevented Dipak to enter into the suit property. Aggrieved thereby, Dipak filed a petition u/s 144 (2) of the Code of Criminal Procedure (in short, the said Code) before the learned Executive Magistrate, Sealdah. Goutam and Rani have no right, title and interest over the suit premises and they dispossessed the plaintiff from the suit property in utter violation of the law and as such, the suit.

3. The defendants, namely, Goutam and Rani filed a written statement on 27th March, 2002 contending *inter alia* that Saraswati never proposed to sell the property to Dipak and that the deeds claimed to have been executed are illegal and invalid. The original deeds are fabricated because Saraswati had no capacity to sign or put any thumb impression as she was suffering from serious illness during that time. Saraswati always used to put her signature in Bengali and Dola forcibly took away Saraswati from the custody of Goutam and Rani. The thumb impression in the deeds are not of Saraswati. If at all any such deed was executed, the contents of the same were never explained to Saraswati and she did not receive the consideration money. The only witness to those deeds was the conspirator Dola, a resident of Mumbai whose intention

was to oust Goutam from the suit property. Goutam and Rani denied the allegation of putting padlock at the suit property. Dipak never got possession of any portion of the suit property and he cannot be dispossessed.

4. Thereafter on 4th July, 2015, Goutam filed a counter-claim seeking a declaration that the alleged two purchase deeds dated 16th November, 2000 were not executed by Saraswati in favour of Dipak and are illegal, invalid asserting that Saraswati was merely a name lender and holding the property in benami for his father Late Sanat Mukherjee. After demise of his father, Saraswati along with her son and two daughters became the legal heirs and Goutam being the only son is in possession and enjoyment of the entire suit property as one of the co-owners and rightful occupier and Dipak was not entitled to purchase any portion of the suit property solely from Saraswati. The purchase deeds dated 16th November, 2000 are forged and manufactured. No consideration money ever passed through the said deeds and the same needs to be declared as void documents. Saraswati was suffering from physical disabilities since 1994 when she was attacked with '*cerebral thrombosis*' and was again attacked in the year 1995 and from that time, Saraswati lost all his memory. She could not move and act on her own and lost all her mental ability.

5. The plaintiff/Dipak filed a written statement against the counter claim denying that Saraswati was holding the suit property as benamdar for her husband. Saraswati was owner of the suit property as her exclusive property

and Goutam was never occupying the entire suit property and denied the aspersions upon his sisters regarding collusive execution of the deeds. Saraswati after going through the deeds and its contents duly executed the deeds putting her left thumb impression. Saraswati was not suffering from physical disability or memory loss.

6. The *proforma* defendant no.3, namely, Dola appeared in the suit and filed a written statement supporting Dipak's case. She admitted that Dipak was put in possession of the suit property after execution of the deeds of conveyance and averred that Saraswati resided with her till her last breath.

7. Considering the pleadings, the learned Court below framed the following issues :

- i. Are the suit and counter claim maintainable in its present form ?*
- ii. Has the plaintiff/defendant any cause of action to file the instant suit and counter claim ?*
- iii. Is the plaintiff lawful owner of the suit property ?*
- iv. Is the plaintiff entitled to the decree of recovery of possession of the suit property ?*
- v. Is the plaintiff entitled to get the damages as prayed for ?*
- vi. To what other relief, the plaintiff/defendants are entitled ?*

After acceptance of the counter claim, in view of the order of the Hon'ble High Court, in C.O. No.1190/2015 dated 22.06.2015 following three additional issues were re-casted :

vii. Is the defendant -1 a lawful occupier in the suit property ?

viii. Are the deeds dated 16.1.2000 legal, valid and binding upon the parties ?

ix. Is the defendant – 1 a rightful co-owner of the suit property ?

8. In corroboration of the facts depicted in the plaint, the plaintiff adduced himself as PW – 1 and tendered the sale deeds dated 16th November, 2000, which were marked as Exhibit nos. 1 & 2. Goutam adduced himself as the sole witness of the defendants and tendered certified copy of the petition u/s. 144 Cr.P.C. in M.P. Case No.2614/2000, certified copy of the Police Report in the said M.P. Case, orders dated 10th November, 2000 and 14th November, 2000 in the said M.P. Case which were marked as Exhibit nos. A, A/1, A/2 & A/3 respectively. A certified copy of the partition deed dated 17th June, 1986 was marked as Exhibit no. B. A rent receipt dated 21st August, 1960 and certified copy of injunction order dated 14th February, 2007 were marked as Exhibit nos. C and D respectively. One Babin Chatterjee appeared as a summoned witness and was examined as D.W.2. During pendency of the suit, *proforma* defendant Saraswati died and she was substituted by her two daughters, namely Mira Banerjee and Dola Chakraborty.

9. The learned Court below by the judgment and decree impugned dismissed the suit disbelieving the contention of the appellant that delivery of possession of the suit property was effected in his favour since the appellant failed to discharge the onus to establish such positive assertion as regards

delivery of possession. The deposition of the appellant, according to the learned Court, was insufficient towards grant of a decree for recovery of possession and restoration. The learned Court was also skeptical as regards genuineness of the plaintiff's claim since no explanation was furnished as regards the delay of about 15 years towards registration of the deeds. The counter claim of the respondents was also rejected by the learned Court since the said respondents failed to discharge their onus to establish that Saraswati was suffering from severe medical ailments and that the thumb impression in the deeds of conveyance is not of Saraswati. The fact that the respondents chose not to summon Dola and to cross-examine her though she was a witness to the deeds of conveyance also weighed with the learned Court in rejecting the counter claim. The presumption about validity of the deeds also could not be disrupted by the respondents on the basis of the evidence brought on record by the respondents and accordingly their counter claim was refused.

10. Mr. Probal Kumar Mukherjee, learned advocate appearing for the appellant in FA 134 of 2018/respondent in FA 66 of 2023 submits that Dipak became the lawful owner of the suit property by virtue of the deeds of conveyance executed by Saraswati, since deceased. Dola was one of the witnesses of the said deeds and she had admitted the execution of the same in favour of the appellant. Goutam also in course of his deposition had admitted that his mother was the absolute owner of the suit property. Such fact also stands corroborated through the deposition of D.W. 2, namely, Babin Chatterjee (in short, Babin), the cousin brother of Goutam. In course of his

examination, Babin stated that '*Saraswati Devi got all properties from her matrimonial side*'.

11. He argues that the deeds of conveyance are registered and contains an unambiguous declaration of total divestment of property. A registered document carries with it a presumption that it was validly executed and as such it was incumbent upon the party questioning the genuineness of such transaction to show that the transactions were not valid in law. In support of such contention reliance has been placed upon a judgment delivered in the case of *Abdul Rahim and others -vs- Sk. Abdul Zabar and others*, reported in (2009) 6 SCC 160.

12. He contends that on the date of execution of the deeds, Saraswati handed over peaceful vacant possession to Dipak but on 17th November, 2000, he was forcibly dispossessed and aggrieved thereby Dipak filed an application u/s 144 of the Code. In the backdrop of such sequence of facts, the learned Court below ought to have appreciated that there was no further necessity on the part of the appellant to establish his dispossession by asking for an inspection.

13. According to Mr. Mukherjee, the learned Judge failed to appreciate the scope and ambit of Section 34 of the Specific Relief Act and proceeded on the basis that the declaration sought for by the appellant was otiose since no evidence surfaced to imperil his title to the property. Such finding is absolutely

contrary to the finding that *'from the evidence it appears that the entire transaction was nothing but a paper transaction'*.

14. He further submits that Goutam, having knowledge about the fact that Dola was the witness to the deed and that she had filed a written statement, did not take any steps to summon Dola or to cross-examine her and miserably failed to establish that the deeds were invalid and the learned Court rightly rejected the counter claim of the respondents.

15. Drawing our attention to the averments made in the plaint, Mr. Shiba Prasad Mukherjee, learned advocate appearing for the respondent, namely, Goutam submits that there was no proper pleading to the effect that Dipak approached Saraswati and in turn Saraswati agreed to sell the ground floor and second floor of the house property at a paltry consideration of Rs.4 lakhs though in the year 2000 the value of the property, which is situated at Ultadanga Road, was about Rs.55 lakhs. The averments in the plaint would reflect that the deed of conveyance was allegedly executed on 16th November, 2000 and on the self-same date Dipak was allegedly handed over peaceful vacant possession and on the said date itself Saraswati left Calcutta with Dola for Mumbai and on the very next date, i.e., 17th November, 2000, the respondents along with anti- socials put lock and key over the pad lock affixed by Dipak in the ground floor flat and in the second floor flat of the building. Such fact was stated to have been put on record through an application under Section 144(2) of the Code and it was further stated that a report was

submitted by the concerned official of the local police station between the learned Court. However, no such report was exhibited and in course of his cross examination, Goutam stated that on 17th November, 2000 the defendants restrained him and though he filed an application u/s 144 of the Code, he did not lodge any complaint with police.

16. He argues that the allegation that Goutam and Rani had tortured Saraswati is absolutely unfounded. Goutam's father, namely, Sanat along with Saraswati were residing along with Goutam and Rani in the suit property since long. Sanat ultimately expired on 5th June, 2000 and even thereafter till the date of alleged execution of the sale deeds there was no contemporaneous complaint to the effect that Goutam and Rani had tortured Saraswati. It would be surprising to note that Dola filed the application under Section 144 of the Code of Criminal Procedure on 10th November, 2000 stating *inter alia* that Saraswati was suffering from various ailments and also '*suffered twice with cerebral paralyses and for want of food, necessary treatment and nursing she is facing tremendous troubles*' and that she came to learn that for want of proper treatment, food and nursing Saraswati was passing her days in constant hardship and that she wants to reside with her daughter. In the said application an order was passed on 10th November, 2000 directing the OC, Ultadanga P.S. enquire and report by 14th November, 2000 and to issue notice upon the opposite parties, i.e., Goutam and Rani to appear before the Court on 14th November, 2000. No such notice was served and abruptly on 14th itself an order was passed directing the OC P.S. '*to see that at the time of taking away*

*petitioner's mother from the schedule premises by the petitioner no obstruction, disturbance is created by the Ops leading to any breach of peace'. In the said proceeding ultimately a police report was submitted on 19th November, 2000 though there was a direction to file such report on 14th November, 2000. In the said report it was stated *inter alia* that in course of enquiry Saraswati was contacted and she expressed her willingness to go with Dola. In the written statement Dola had not disclosed the date on which Saraswati was removed by her from the suit property on the strength of the order dated 14th November, 2000. It would be surprising to note that the deeds were executed on 16th November, 2000 and the memo of the first deed executed at 1.23 hours refers to a bank draft dated 14th November, 2000 of Rs.2 lakhs drawn on Indian Overseas Bank, Central Clearing Office, Bombay and purchased from Indian Overseas Bank, Dumdum Park Branch. The memo of the second deed executed on the same date at 13.40 hours refers to five bank drafts dated 13th November, 2000 of Rs.40,000/- each drawn on UBI, SR Branch, Mumbai and all the drafts purchased from UBI, Sovabazar Branch. The drafts were, thus, drawn up about three dates prior to execution of the deed. The very execution of the deeds is shrouded with suspicious circumstances moreso when Saraswati was literate, the deeds were executed on the basis a left thumb impression.*

17. He contends that the chain events leading to execution of the sale deed in the year 2000 with a consideration of Rs. 4 lakhs, the belated registration of the deeds about 15 years thereafter, the hot haste in filing

application under Section 144 and removal of Saraswati from the suit property on the strength of an order passed in the absence of Goutam and Rani on 14th November, 2000 and shifting Saraswati to Mumbai on 16th November, 2000 casts serious doubts about execution of the deeds moreso when there is no evidence on record towards delivery of possession in favour of Dipak and as such the learned Court erred in law in not declaring the deeds to be invalid.

18. In reply, Mr. Probal Kumar Mukherjee submits that the paramount title of Saraswati as regards the suit property stands admitted and no evidence has been brought on record on the strength of which the validity of the deeds can be doubted.

19. The key to unravel the complexities of the problem posed lies in the pleadings and the deposition tendered by the respective parties. The precise degree of imperfections needs to be investigated and categorised on the rudiments of preponderance of probabilities. Inference from the evidence and circumstances must be carefully distinguished from conjectures or speculation. Standard of proof cannot be put in a strait-jacket formula. No mathematical formula could be laid on degree of proof. The probative value could be gauged from facts and circumstances in a given case.

20. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the Court that he, in law, is entitled to dispossess the defendants from their possession over the suit property and for the

possession to be restored to him. There is an essential distinction between the burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In the present case Dipak in course of his cross examination stated that he had no document to show that Saraswati got the property. He got possession of the property in the afternoon of 16th November, 2000 and that on that day Saraswati and Dola came to the Registry Office and left. He also deposed that on the very next date the defendants restrained him and though he filed an application u/s 144 of the Code, he did not lodge any complaint with police. He also deposed that Saraswati was literate in Bengali and that Binod Goswami can say that he got possession by virtue of the deeds. However, Binod Goswami was not summoned.

21. Dipak has failed to discharge his onus to prove his assertion that he was put in possession of the suit property and was forcibly dispossessed thereafter. He has not been able to create a high degree of probability so as to shift the onus on the defendants. In view thereof, we do not found any infirmity in the observation of the learned Court that question of issuance of any decree towards recovery of possession in favour of the plaintiff does not arise when the factum of possession does not stand established and as such the title suit has been rightly dismissed by the learned Court. That apart, Dipak is a stranger purchaser and as such he is not entitled to claim joint possession.

22. In their counter claim, the respondents prayed for declaration that the deeds were invalid and that Goutam was the rightful co-owner of the suit property and that Saraswati was holding the property in benami and her husband was the real owner.

23. The respondents could not establish that the left thumb impressions in the deeds were not of Saraswati and that the deeds were void. The allegation of fraud towards execution of the deeds does not stand corroborated through the deposition of Goutam inasmuch as in course of cross examination he stated that he has *'never filed any criminal case against Dola Chakraborty that she got the suit property transferred by my mother by execution of a deed'*. The evidence brought on record by the respondents was not strong enough to overcome the rigors of legal presumption as regards validity of the deeds since they were registered.

24. Goutam himself in course of his cross examination stated that his mother *'became owner of the suit property by partition'* and that his *'mother during her life time sold the property after demise of my father'*. Babin Chatterjee, the cousin brother of Goutam in course of his examination also stated that *'Saraswati Devi got all properties from her matrimonial side'*. As such, the respondents' claim that Goutam was the rightful owner of the suit property and that Saraswati was holding the property in benami and her husband was the real owner, have no legs to stand. Question of cancellation of the deeds at the instance of Goutam would have occasioned had his title been

affected by the deeds. Having admitted in course of his deposition that his mother was the absolute owner of the property, he cannot turn back and claim cancellation of the said deeds, moreso when the same had not been executed by a stranger to that title or least to say by any co-sharer of the property.

25. In view thereof, the decision towards rejection of the respondent's counter claim does not suffer from any infirmity warranting interference of the Court.

26. Accordingly, both the appeals are dismissed. Judgment and decree impugned herein is affirmed. Parties shall bear their own costs.

27. Let a decree be drawn up, accordingly.

28. Let a copy of this judgment along with LCR be sent down to the learned Court below forthwith.

29. Urgent Photostat copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)