

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**C.O. 944 of 2018
Namita Roy
Vs.
Debasish Karmakar & Ors.**

For the petitioner : Ms. Ananya Mondal

For the opposite parties : Mr. Tilak Mitra
Ms. Susmita Das

Heard on : 21.03.2024

Judgment on : 02.04.2024

Ajoy Kumar Mukherjee, J.

1. One Anil Chandra Karmakar purchased the scheduled mentioned suit property and after purchasing the same he was residing with his family members by making necessary construction therein. Thereafter said Anil died intestate on 4th September 2009 leaving behind him his widow and a son namely Debasish Karmakar, who is opposite party herein and two daughters including petitioner herein. Other daughter of Anil namely Ruchita Guha died, leaving behind her two daughters.

2. Petitioner's contention is during the life time of said Anil, he gifted entire ground floor of the suit property in favour of petitioner herein by a deed of gift dated 22nd August 2007 and delivered the vacant possession of the entire ground floor of the suit property in favour of the petitioner who

accepted the same. There was no disturbance in possessing and in occupying the said entire ground floor of the said property by the petitioner during life time of Anil, but after his demise, his aforesaid son Debashis allegedly started creating disturbance in peaceful possession and occupation of the said ground floor of the suit building by the petitioner/Defendant No.1.

3. Aforesaid son of Anil namely Debasis Karmakar being the plaintiff, instituted present suit being T.S. No. 653 of 2012 against present petitioner and also other co-owners of the suit property, *inter alia*, praying for declaration that the said deed of gift in favour of petitioner herein is illegal, manufactured and liable to be cancelled with further prayer for injunction. Initially the Trial court refused to grant ex parte ad-interim injunction. Petitioner herein thereafter appeared and filed written objection against the said injunction application. After contested hearing, Trial court was pleased to pass an order of temporary injunction to the effect that defendant No. 1 shall not create any third- party interest in respect of the suit property and further pleased to direct both plaintiff as well as defendant no. 1 /petitioner herein to allow each other to have reasonable access through the common stair-cases and the other common areas of the suit property and petitioner herein /defendant No. 1 was further directed to provide the duplicate key of the lock used in the main entrance gate by him to the plaintiff, so that the plaintiff can use the same.

4. Being aggrieved by that order the petitioner /defendant preferred Mis-Appeal before the Learned District Judge, Barasat being Mis-Appeal no. 141 of 2016. Learned Appellate Court disposed of the said Mis-Appeal by the

order impugned, whereby the court below has affirmed the order of the Trial Court and thereby dismissed the Mis- Appeal.

5. Challenging the said order Ms. Mondal, learned counsel appearing on behalf of the petitioner, submits that the order impugned is not tenable in the eye of law as well as on the facts and circumstances of the instance case, in view of the fact that the appellant No. 1 is the absolute owner occupier and possessor of entire ground floor of the suit property and she has the absolute right and authority to transfer the entire ground floor of the suit property and in respect of her share in the other portion of the suit property. She further submits that both the courts below failed to appreciate that there is another common staircase and the other common areas for which all the co-owners are using the same without any disturbance to each other. The order impugned is also bad in law in view of the fact that pursuant to such order of the court the plaintiff is trying to enter the ground floor of the petitioner/appellant and to occupy the same illegally in order to reach first floor of the suit property, in spite of the fact that there is common staircase outside the ground floor and by using the same, one can easily reach to the first floor of the suit property where the plaintiff is residing and to the roof top where the respective water tanks are installed. He further submits that taking advantage of the order impugned, the plaintiff is now trying to evict the appellant no. 1 from her occupation and possession of the entire ground floor of the suit property. She further submits that if the plaintiff is allowed to enter through the petitioner's entrance gate in the ground floor to the staircase, in that event the privacy as well as safety and security of the petitioner herein would be seriously jeopardized. In fact the

order impugned passed by the learned Appellate court is cryptic, unreasoned and based on total non-application of judicial mind.

6. Ms. Mondal during the course of argument further contended that there are three entrances to the building. One entrance is straight way from the road to the ground floor which can only be used by the petitioner and no other person is entitled to use the said entrance, as the same will disturb the privacy of the petitioner. Beside this, there is another staircase in the building from ground floor to the first floor and such staircase is attached to the other entrance gate which is presently using by the opposite party and his family members, which situates in the Northern side of the suit property. Besides these two staircases, there is another iron gate situated at the back side of the building which is completely used by the opposite party and his family members from ground level to the first floor. The common places of the building and vacant area of the land are now using by the opposite party and his family members. Such facts are evident from the report and sketch map prepared by the learned Advocate Commissioner. She further submits, since the main entrance gate is open for ingressing and egressing the building by the petitioner there is no scope of providing any duplicate key by the petitioner to the opposite party. She further submits that there is no prima facie case to pass the said orders by the courts below in as much as the balance of convenience/and or inconvenience is entirely in favour of refusing to the prayers for injunction. Furthermore, if the injunction order be not granted, the opposite party will not suffer any kind of loss, injury or prejudice. Accordingly she has prayed for setting aside the order impugned.

7. Mr. Mitra learned counsel appearing on behalf of the opposite party herein supported order impugned and contended that the petitioner herein did not place her deed of gift intentionally before the courts below in order to suppress the truth, though whatever right the petitioner is allegedly defending or exercising has arisen out of the said deed of gift and the commissioner's report. The petitioner herein is now trying to develop a new story of privacy and/or safety and security and on that pretext they are trying to disobey the orders of both the courts below, who are concurrent in their findings and said orders are also based on undisputed fact and as such no point of law involved in the present case in respect of which, this court may interfere invoking writ jurisdiction.

8. Mr. Mitra further submits that by way of supplementary affidavit the petitioner herein however has filed said deed of gift and commissioner's report which discloses that the court below did not commit any mistake in directing the common passage for the main entrance from the eastern side to the staircase leading up to the first floor of the suit building, to be used as common and the plaintiff must not be deprived or prevented to use the same as it was arranged to be used as common by the deed of gift itself. He further submits that the presumption of the said deed of gift is required to be held as genuine till the court of law decides it to be inoperative and void *ab initio*. Here although the plaintiff/opposite party no. 1 challenges the deed of gift but till the Trial court after full-fledged Trial decides it to be void *ab-initio*, the presumption regarding the genuinity of the deed of gift cannot be disturbed. Therefore without prejudice, the plaintiff's right contention and stand taken in the suit, they support the arrangement as allegedly

proposed by the deed of gift and they intend to use the passage from the main entrance to the staircase as common, which both the courts below have rationally found in their orders.

9. He further submits that the opposite party no. 1/plaintiff is the brother of petitioner /defendant no. 1 herein and as such the plea taken by the petitioner on the ground of privacy and/or safety or security is not sustainable in the eye of law. As regards alternative entrance through the Northern side of the suit premises, Mr. Mitra submits there has been no arrangement made for such entrance in deed of gift, which the petitioner /defendant no. 1 supports. Moreover, it leads to swiper passage through which no entry can be made to the suit premises. Mr. Mitra strenuously argued that there is no scope to go beyond the deed of gift, since the petitioner/defendant No.1 is herself defending her title through the deed of gift, which does not speak about any such entry or arrangement made through the northern side of the suit premises. Accordingly he has prayed for dismissal of the present application.

10. I have considered submissions made by both the parties.

11. The moot question involved in the present context is whether the court below was within his jurisdiction in passing the impugned order of injunction on the basis of available materials. Needless to reiterate that plaintiff has filed the suit for cancellation of the deed of gift executed by his father in favour of his sister i.e. defendant no.1/petitioner herein, in respect of the ground floor of the suit building. On perusal of the deed of gift it appears that the second schedule referred to the deed of gift is the subject matter of the gifted property in favour of petitioner herein which is

comprising of only the ground floor covered area measuring 945 sq.ft. together with undivided proportionate share of land measuring 472.5 sq.ft. and the divided roof right on the second floor level measuring 472 sq.ft. as well as the appurtenant land measuring 816 sq.ft. of the building described in first schedule of the deed together with all common areas rights and facilities over the building of the said premises and the stair case from ground floor to top floor. It has also been recited in the gift deed that the site plan or map of the gifted portion is marked as red border line.

12. Plaintiff/opposite party herein though has challenged the deed of gift but he further submits that so long the deed is declared as void by a court of law, its recital shall be taken as correct for the disposal of the present application for injunction.

13. A local inspection commission was held in connection with the suit property and the commissioner had submitted in his report that there are three entrance in the suit property. While reported in respect of point No.2 of commission petition, commissioner's reply is assertive stating that for the use of the stair case from ground floor to first floor of the said residential building of the suit property, there is door of ply board and lock facility is available on that door. Moreover before the entrance of the 1st floor room there is collapsible gate. He further reported that there are two gates for the entry in residential building out of which one main gate is in the eastern side and one back door in the northern side. There is also garage gate in the suit property.

14. This court while admitting this Application was of prima facie view that the sketch map prepared by the commissioner upon local inspection,

reveals that apart from the access that the plaintiff/opposite party no.1 has to reach the first floor of the premises through the portion under occupation of the petitioner, he has access through a stair case, the entry whereof is on the northern side of the building and the first appellate court has failed to consider this aspect in its proper perspective and thereby has upheld the impugned order of the Trial Court, which in effect violates the right of privacy of the petitioner.

15. Upon perusal of the contents of the deed of gift which is under challenge read with Advocate Commissioner's report, I find no reason to deviate from the aforesaid prima facie finding, after hearing the parties. In fact, the courts below without considering the report of the commissioner and the recital of the deed of gift, has passed the order impugned and thereby exceeded jurisdiction, directing both the parties that they should allow each other for reasonable access through the common stair case and has erred also by making further direction upon defendant no.1 to provide the duplicate key of lock used in the main entrance gate to the plaintiff, without considering the issue of defendants privacy and that there are alternative entrance for the plaintiff to reach at the first floor.

16. In such view of the matter **C.O. 944 of 2018** is allowed in part. The order of injunction restraining defendant no.1 from creating any third party interest in respect of the suit property is hereby affirmed till disposal of the suit in order to protect and preserve the property and to avoid multiplicity of proceedings. However, the injunction order by which the Trial court observed that each party should allow the other to have reasonable access through the common stair case and the direction upon the defendant no.1

to provide duplicate key of lock used in the main entrance gate to the plaintiff, are hereby set aside.

17. Since the suit is pending for a considerable period of time, the Trial court is requested to expedite the hearing of the suit and to make every endeavour to conclude the entire proceeding of the suit, preferably within a period of six months from the date of communication of the order.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)