

Mrs. Uma Basu Vs. Swapan Chatterjee and Others

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Court : Kolkata

Decided On : Feb-02-1996

Reported in : AIR1996Cal311,100CWN419

Judge : N.K. Bhattacharyya, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47(3), 115, 148 and 151 - Order 2, Rule 2 - Order 7, Rule 11 - Order 21, Rule 32(1) - Order 23, Rule 3;; [Specific Relief Act, 1963](#) - Section 28;

Appeal No. : C.O. 64 of 1996

Appellant : Mrs. Uma Basu

Respondent : Swapan Chatterjee and Others

Judgement :

ORDER

1. Heard the submission of the learned Senior Advocate Mr. S. P. Roy Chowdhury appearing with the learned Advocate Mr. Saptangshu Basil and the learned Advocate for the opposite party Mr. Jagjibon Ghosh appearing with the learned Advocate Miss Bhaswati Pal. Considered the materials on record.

2. By this revision under S. 115 of the C.P.C. the petitioner, who is the defendant in the suit, has challenged order dt. 29-11-1995 passed in Title Suit No. 123 of 1993 by the. Assistant District Judge, 5th Court, Alipore, 24-Paraganas (South),

whereby the learned Assistant District Judge, allowed the petition of the plaintiff made under S. 151 of the C.P.C, without any cost and gave liberty to the petitioner to deposit a sum of Rs. 20 lakhs for a period of one year in the fixed deposit account subject to renewal with the development of the suit in any branch of the State Bank of India, situate within the territorial jurisdiction of that court. The fact that has given rise to this order impugned is that earlier a suit was filed by the plaintiff for specific performance of contract in the court of the Assistant District Judge, 5th Court, Alipore, 24-Paraganas (South) being Title Suit No. 103/91 against the husband of the present petitioner. The said suit ended in a compromise and a decree has been passed upon such compromise petition as has been agreed to and entered into by and between the parties in that suit. The petition of compromise was enclosed or annexed with letter 'A' and clause 3 of that petition runs to this effect that the plaintiff or his nominee will deposit the said sum of Rs. 20,00,000/- at a time or by instalment with M/s. Or, Digman & Co. 29-Netaji Subhas Road, Calcutta-700001 within 7 days from the date of receipt of the sanction of the building plan by the Calcutta Municipal Corporation or within 12 months from the date thereof whichever is earlier. In any event, upon deposit of Rs. 20,00,000/- plaintiff will have an exclusive right to sign, execute and register the deed of conveyance on behalf of defendant No. 1 in favour of his nominee or nominees. It will be apposite to mention here that the plaintiff in that suit is the plaintiff in that suit and the defendant is the present defendant. Paragraph 14 of that agreement of compromise also runs to this effect that if the plaintiff fails to comply with the provisions contained in clause 3 of that agreement then the agreement for sale and purchase of the said premises shall automatically stand discharged after the period mentioned in clause 3 without any action whatsoever from and claim or demand against the plaintiff and the defendant. Admittedly, after the said compromise in Title Suit No. 103/91, the original defendant Shri Dopti Kumar Bose died and the estate came in the hand of his widow Smt. Uma Bose, who is the defendant in the present suit and has figured as defendant No. 1. The plaintiff, who is the opposite party No. 1 herein, by a subsequent suit being Title Suit No. 123/93 before the Assistant District Judge, 5th Court, Alipore, 24-Paraganas (South), inter alia, prayed:--

'a) a decree of declaration that the defendant No. 1 is bound to admit, acknowledge and act in accordance with the decree dt. 6th July, 1992 and the terms of settlement annexed thereto in Title Suit No. 103 of 1991 of the 5th Court of Assistant District Judge at Alipore;

b) A decree of declaration that the defendant No. 1 is to help and assist the plaintiff and his nominees by granting General Power of Attorney duly registered in terms of settlement granted by her husband and predecessor in interest of the suit property to free the same and to get sanctioned plans;

c) A decree of declaration that the acts and things as are done or are being done or to be done in relation to the suit property by the plaintiff shall always be treated to be the acts deeds and things done by the defendants;-

d) A decree of declaration that the defendant is bound to adjust the sum of Rs. 2,00,000/- advance against the consideration accepted on 6th July, 1992.

e) A decree of damages after the amount is being assessed on payment of additional court fee for which damage is tentatively valued at Rs.5,000/-;

f) Mandatory injunction commanding the defendant to execute and register a General Power of Attorney in terms of the terms of settlement annexed to decree dated 6th July, 1991 passed in Title Suit No. 103/1991 by the 6th Court of Assistant District Judge at Alipore;

g) A permanent injunction restraining the defendant, her men, agent, assigns and transferees from entering into the suit premises, from changing and or interfering with the possession of the plaintiff in any manner whatsoever save and except in due course of law;

h) Leave to proceed with the pending and proper representation and writ application for freeing the suit property and for getting plans duly sanctioned;

i) Leave to add several parties and causes of action under O.2, R. 2 of the Code of Civil Procedure;

j) For all costs of the suit;

k) For any other or further relief or reliefs, decree or decrees as the plaintiff may be found entitled to under the law and equity.'

In that suit, the plaintiff, that is, the O.P. No. 1 herein made an application under S. 151 of the C.P.C. inter alia, praying:

'a) To permit the petitioner to furnish Bank Guarantee of Rs. 20,00,000/- and / or to deposit the entire consideration money of Rs. 20,00,000/- in the court with liberty to place the same in fixed deposit in any Nationalised Bank till the date of execution and registration of sale deed;

b) To permit the defendant No. 1 to withdraw Rs. 18,00,000 / - therefrom on the date of the execution and registration of sale deed in favour of the plaintiff or in favour of his nominee are done by her by freeing the land from acquisition proposal of the Calcutta Municipal Corporation by producing the N.O.C. from Urban Land Ceiling Authority etc. within two months or as the learned court may permit;

c) To disburse the balance Rs. 2,00,000/ -on the date the suit is being finally disposed of and of with interest to the wining party;

d) Alternatively, on the failure of the defendant No. 1 permit the plaintiff with all power to free the suit property from acquisition proposal at the cost of the defendant No. 1;

e) And / or pass such other or further orders as the learned court may deem fit and proper.' (sic.)

On that petition the impugned order has beenpassed by the trial court.

3. In the backdrop of 'this Mr. Roy Chowdhury contended that order is illegal and erroneous. He further contended that as there is a specific provision for the purpose of depositing the money in suit for specific performance the provision of S. 151 of the C.P.C. cannot be resorted to and cannot be attracted. In support of his submission Mr. Roy Chowdhury referred to certain provision of the C.P.C. and also to the provision of the Specific Relief Act. Though Mr. Roy Chowdhury did not

dwelt on the question of maintainability of the suit, but then he referred to O. 23, R. 3(a) of the C.P.C. Section 47(3) of the said Code and Order 21, Rule 32(1) of the C.P.C. and also Section 148 of that Code for the purpose of showing that such a relief cannot be granted in that suit. He further contended that it was available to the plaintiff in the suit and not in the earlier suit to approach the Court which passed the decree for permitting the plaintiff in the suit to deposit the money or for extension of the time as contemplated under Section 148 of the C.P.C. or under Section 28(1) of the Specific Relief Act. Regarding the bar of the suit, Mr. Roy Chowdhury referred to Order 23, Rule 3(a), Section 47(3) and Order 21, Rule 32(1) of the C. P. Code for the purpose of showing that what the Court could do in the event of non-compliance of a decree passed in a suit for Specific Performance of Contract.'

4. Mr. Jagjibon Ghose, on the other hand contended that a consent decree was obtained by suppression of material facts by the defendant in that suit and that after the compromise decree it was not made known to the plaintiff in that suit that the defendant in that suit died and the estate of the defendant has come to the hands of the widow of the defendant, who is defendant No. 1 in that suit. Mr. Ghose further contended that the plaintiff tried to deposit that money of Rupees 20,00,000/- with the Solicitor Firm M/s. Or Dignam & Co. in terms of the decree but that deposit was refused on the ground that in the meantime, the original defendant No. 1 in that suit No. 103/91 has died. His short contention was that as the executing Court could not go behind the decree, so in order to afford full relief to the plaintiff for redressal of his grievance, the plaintiff had no other remedy but to file a separate suit. In this connection Mr. Ghose referred to paragraph 13 of the written-statement of defendant No. 1 wherein it has been alleged that the plaintiff has not the financial capacity to, deposit the entire amount of Rs. 20,00,000/- and for the purpose of refuting the allegation the plaintiff had to resort to an application under Section 151 of the C.P.C. with a prayer to permit the plaintiff to deposit Rs.20,00,000/- in the manner as has been indicated earlier.

5. Having heard the learned Advocates for the parties and considering the materials on record, I am of the view that the impugned order cannot be sustained in law for the reasons as under:

While deciding the question that granting permission to the plaintiff to deposit the amount as mentioned earlier the trial Court came to a finding that the plaintiff had the capacity and means to acquire the disputed property. That is a matter which is to be decided in a suit for Specific Performance and not in a declaratory suit and as such the observation of the trial Court goes to the very root of the suit itself because, according to the compromise decree, the money is to be paid in the suit being Title Suit No. 103/91 in terms of the decree passed therein and not in a separate suit.

6. Secondly, the learned trial Judge has also observed in the impugned order that the question of maintainability of the suit which had been raised in the suit by the defendant has been set at rest by order dated 10-7-1995. I have considered that order as was placed before me wherefrom it appears that a prayer was made that the maintainability question is to be decided as a preliminary issue by framing an issue. But the learned Court on a consideration that the question is not only a question of law but a mixed question of law and fact did not consider it and kept the matter pending. As such it was improper on the part of the trial Court to hold that the question of maintainability has been set at rest. What is to be decided in the suit, the trial Court has decided the same and thereby the trial Court by the impugned order has prejudged the suit itself and the same is not permissible according to law. In the petition under Section 151 of the C.P.C. the plaintiff has sought permission, inter alia, for depositing the sum of Rs. 20,00,000/- either by furnishing a Bank Guarantee or by keeping the money in fixed deposit. That sum was arrived at as the consideration money for purchase of the property in the compromise decree: Section 28, sub-section (1) of the Specific Relief Act provides that 'where in any suit a decree for specific performance of a contract for the sale or lease of immovable property has been made and the purchaser or lessee does not, within the period allowed by the decree or such further period as the Court may allow, pay the purchase money or other sum which the Court has ordered him to pay, the vendor or lessor may apply in the same suit in which the decree is made, to have the contract rescinded and on such application the Court may by order, rescind the contract either so far as regards the party in default or altogether, as the justice of the case may require.' (the under scoring is made by me).

7. So, this provision indicates that in a suit for Specific Performance of Contract the Court which has passed the decree has the power to grant further time. The same provision is appearing also in the C.P.C. under Section 148 which runs as follows:

'Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by the Court, the Court may in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.'

The power of extension of time for deposit of the consideration money has been reserved by Section 28(1) of the Specific Relief Act and under Section 148 of the C.P.C. only for the Court which has passed the decree and not by any other Court.

8. Mr. Ghose contended that as it was not known that the defendant in suit No. 103/91 died and that to whom the estate of the deceased devolved, such money could not be tendered which was the money for purchase of the property in question. It is the admitted position that when the second suit meaning the Title Suit No. 123/93 was filed during that time it was known to the plaintiff who was the successor of Late Dipti Kumar Bose. From a plain reading of the plaint of Title Suit No. 123 of 1993 it appears that the estate of deceased Dipti Kumar Bose came into the hands of his widow Uma Bose. A decree which has been passed either in favour or against the plaintiff or the defendant in a suit and if the estate of the plaintiff or the defendant, who has died in the meantime, comes in the hands of his successors or heirs then he will be bound by that decree. So, the decree that has been passed in the Title Suit No. 103 of 1991, in the terms of compromise, the same is binding on the widow of the deceased Dipti Kumar Bose. For the redressal of his grievance, the plaintiff in that suit, under the law, had a right to approach that Court which passed the decree and that Court had the right and jurisdiction to modify the decree by extending time. That has not been done in the instant case, instead, by a separate suit permission was sought for to deposit that consideration money of Rs. 20,00,000/- which was agreed, by and between the parties in the compromise decree, to be deposited in a separate suit.

That is not permissible under Section 28(1) of the Specific Relief Act and Section 148 of the C.P.C..

9. In such view of the matter, I am to hold that the order is not sustainable in law and by the impugned order as passed the trial Court has transgressed its jurisdiction as vested in it. I refrain from making any comment regarding the maintainability of the suit and regarding the merit of the suit as the suit is pending for adjudication. Mr. Roy Chowdhury, in the last lap of his argument, made a prayer that as the application of the defendant under Order 7, Rule 11 of the C.P.C. is pending hearing before the trial Court on 15-2-1996, a direction be given to the trial Court for disposal of the matter on that date. I cannot give any firm direction regarding the same as the position of the diary of that Court is not known to me. But I express my view that if the Court is not otherwise engaged, the Court shall make all efforts, to dispose of that matter on that date.

10. The revisional application is, accordingly, allowed. The impugned order is hereby set aside.

11. If certified xerox copy of this order is applied for by either of the parties, the department shall make all endeavours to supply the same at an early date.

12. Petition allowed.