Citation:	Gill et al v. Darbar et al 2003 BCCA 3	Date: 20030102 Docket: CA029974

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

**WAHIGUROO PALL SINGH GILL, HARABANS KAUR GILL,
TAGE KAUR SHOKKER (nee SIDHU), JASMOHANJJIT KAUR GILL,
Administrator of the Estate of SURINDER KAUR SINDHU, Deceased**

RESPONDENTS
(Plaintiffs)

AND:

**NANAKSAR THATH ISHAR DARBAR and AMAR SINGH SIDHU also known as
AMARSING SIDHI also known as AMAR SINGH also known as AMARSINGH also known as
BABBA AMAR SINGH JI**

APPELLANTS
(Defendants)

Before: The Honourable Mr. Justice Smith
(In Chambers)

A.J. Roberts	Counsel for the Appellant
D.H. Unterman	Counsel for the Respondent
Place and Date of Hearing: 17 December 2002	Vancouver, British Columbia
Place and Date of Judgment: 2 January 2003	Vancouver, British Columbia

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] There are two applications before the Court. The respondents (plaintiffs) apply for security for the trial judgment and for costs of the appeal and costs of the trial. The appellants (defendants) respond with an application to stay proceedings, including execution, in the Supreme Court pending disposition of the appeal.

[2] For ease of narrative, I will refer to the parties as plaintiffs and defendants in these reasons.

[3] The mother, brother, daughter, and legal representative of Surinder Kaur Sidhu, deceased, brought action in the Supreme Court to recover certain land from the defendants on the ground that the defendant Amar Singh had unduly influenced the deceased to transfer the land to the defendant society, which is controlled by the defendant Amar Singh.

[4] Following a lengthy trial, the trial judge granted judgment to the plaintiffs. On June 25, 2002, he ordered that title to the land be vested and registered in the name of the deceased's daughter, Tage Kaur Shokker. On July 29, 2002, the defendants filed their notice of appeal. In supplementary reasons handed down on October 10, 2002, the trial judge ordered the defendants to pay to the plaintiffs $155,000 in assessed costs of the action and $172,000 for "adjustments" in respect of the land.

[5] Title to the land has since issued in the name of Tage Kaur Shokker consequent upon the judgment and she has raised money on the land and has spent money developing it for sale.

[6] I will deal first with the defendants' application for a stay of proceedings pending disposition of the appeal. I observe, at the outset, that the defendants have identified no authority in support of their submission that I may enjoin further dealings with the land. These reasons will be concerned only with the pecuniary aspects of the trial judgment.

[7] The applicable principles are not in dispute. Generally, a successful plaintiff is entitled to the fruits of the judgment but this Court may stay proceedings if satisfied that it is in the interests of justice to do so: ***Voth Brothers Construction (1974) v. National Bank of Canada*** (1987), 12 B.C.L.R. (2d) 43 at 44-45 (C.A. [In Chambers]). The trial judgment must be assumed to be correct and protection of the successful plaintiff is a pre-condition to granting a stay: ***Morrison-Knudsen Co. v. British Columbia Hydro & Power Authority*** (1976), 112 D.L.R. (3d) 397 at 404 (B.C.C.A.). The applicant for a stay must satisfy the familiar three-stage test, that is, the applicant must show that there is some merit in the appeal, that the applicant will suffer irreparable harm if the stay should be refused, and that, on balance, the inconvenience to the applicant if the stay should be refused would be greater than the inconvenience to the respondent if the stay should be granted: ***British Columbia (Milk Marketing Board) v. Grisnich*** (1996), 50 C.P.C. (3d) 249 at 252 (B.C.C.A. [In Chambers]).

[8] The defendants raise three grounds of appeal.

[9] First, they submit that the trial judge committed "palpable and overriding error" in drawing the inference that the defendant Amar Singh exerted undue influence or fraudulently induced Surinder Kaur Sidhu to give him the land. The plaintiffs alleged that Amar Singh promised Surinder Kaur Sidhu that, if she would give the land to him, he would cure her cancer and build a temple in her honour on the land. The trial judge noted that there was no direct evidence of such promises. However, he concluded:

150] For the last quarter century of her life, Surinder had been in the thrall of Amar Singh. He was the most influential person in her life. She believed that he had powers which might be described as supernatural: she believed he was a Sant.

[151] Specifically, at the material times before the transfer took place, Surinder believed that Amar Singh could and would intercede with God to cure her cancer. She believed that it was a condition of obtaining a cure that she transfer the land to him. Surinder also believed that Amar Singh would build a temple on the land, in her name and in her honour, if she gave the land to him.

[152] Amar Singh knew that Surinder believed these things and he allowed her to entertain those beliefs. I doubt that he ever made such promises in express words but I do find that his words to Surinder and to Tage were intended to and did convey to Surinder that what she believed would come to pass, if she gave the land to him.
[153] I find that Surinder gave the land to Amar Singh in return for what she regarded as promises and which, I find, by a combination of the words spoken by Amar Singh and the acquiescence by him in knowingly allowing Surinder to entertain her beliefs, were in fact promises.

[10] Counsel for the defendants referred to evidence that, if accepted at face value, might support the inference that Surinder Kaur Sidhu was not the victim of fraud or undue influence perpetrated by Amar Singh. However, the trial judge considered all of that evidence. Moreover, there was much evidence from which the trial judge could rationally infer that Surinder's will was indeed overborne by Amar Singh.

[11] The defendant's second ground of appeal is that the trial judge committed reversible error in concluding that Surinder Kaur Sidhu was the beneficial owner of the land at the time that it was transferred to the defendant Society by her brother and her mother, who were the registered owners of the land in the Land Title Office.

[12] The plaintiffs pleaded that Surinder Kaur Sidhu was the beneficial owner of the land. The defendants pleaded that the land was held in trust for Surinder by her mother and her brother and that Surinder, in turn, held it "on behalf of Amar Singh". In the alternative, they pleaded that Surinder gave the land to Amar Singh for charitable purposes.

[13] The defendants led no evidence to support their plea that Surinder held the land in trust for Amar Singh. During his submission, counsel for the defendants referred to certain parts of the evidence and appeared to suggest that the beneficial owners of the land were Surinder's brother and mother. However, such an allegation was not pleaded and, I am advised, was not argued at trial. Accordingly, it is not open to the defendants to make this submission in this Court.

[14] The trial judge recounted a great deal of the evidence in his reasons, some of which, arguably, tended to show that Surinder Kaur Sidhu was not the beneficial owner of the land. However, his ultimate conclusion was that she purchased the property as an investment in 1973, when she was employed in the real estate industry and was "investing in land, buying and selling properties" and registering them in her own name. He traced the dealings with the land in considerable detail from that date until the material times. He concluded:
[143] Based on the evidence recited above, I have arrived at the following conclusions of fact.
[144] First, Surinder was the sole, beneficial owner of the land at the time it was transferred to Amar Singh.
[145] Although there was considerable informality over the years among members of the Gill family as to the use of and benefit from various homes and properties which on title were owned by one or other of them, and although all members of the family helped out in the maintenance of the properties, nothing in their words or actions suggested anything but that Surinder was the sole owner. Among other things, this is true of the 1995 mortgage, from which Surinder did not benefit. She allowed the mortgage to be placed simply as a loyal and helpful member of the family, when the family needed financial help.
[146] The ultimate proof that the land was hers is the transfer itself. When Surinder told Pall and Harbans to transfer the land to Amar Singh, they did so.
[147] Nor was the land ever held in trust by Surinder for Amar Singh. The evidence as to the various dealings with the land, such as the attempts to develop it and the taking out of the 1995 mortgage, are inconsistent with the existence of a trust.

[15] In respect of these two grounds of appeal, the defendants will be essentially asking a panel of this Court to re-try the case and to substitute their view of the facts for that of the trial judge. That is not something that this Court can do: see, for example, ***Toneguzzo-Norvell v. Burnaby Hospital***, [1994] 1 S.C.R. 114 at pp. 121-22. Accordingly, while I am not prepared to say that the appeal cannot possibly succeed, it is my view that the chance of success on these issues is minimal.

[16] The third ground of appeal alleges an error of law arising from the fact that, on numerous applications for social assistance over a lengthy period of time, Surinder Kaur Sidhu declared that she did not own property. The defendants contended before the trial judge that, if she was the beneficial owner of the property, her estate was disentitled to relief in equity because it did not come "with clean hands." The trial judge said of this submission:

[167] I have found that Surinder's receipt of welfare was based on repeated applications by her which fraudulently concealed her ownership of land. The defence contends that this history disentitles her estate to equitable relief.

[168] The short answer to this is that the blameworthy conduct must have some connection with the relief sought. In this case, it did not.

[17] The defendants submit that the trial judge erred in law in that passage. They refer to the following authorities: ***Canada (Attorney General) v. Massinghill*** (1915), 17 Ex. C.R. 510 (Exch. Ct.), ***Gascoigne v. Gascoigne***, [1918] 1 K.B. 223, and ***Re Emery's Investments' Trusts, Emery v. Emery***, [1959] 1 All E.R. 577 (Ch. D.). Those cases appear to me to make it clear that the basis of the "clean hands" doctrine is that "No man can take advantage of his own wrong": ***Canada (Attorney General) v. Massinghill***, *supra*, at 514. The point is made in other terms by the learned authors of ***Hanbury & Martin Modern Equity***, 15th ed. (London: Sweet & Maxwell, 1997) at p. 26, where they say of the "clean hands" doctrine that:

...equitable relief will only be debarred on this ground if the plaintiff's blameworthy conduct has some connection with the relief sought. The court is not concerned with the plaintiff's general conduct. Thus, in *Argyll (Duchess) v. Argyll (Duke)*, the fact that the wife's adultery had led to the divorce proceedings was no ground for refusing her an injunction to restrain her husband from publishing confidential material. Nor will unclean hands debar a claim which does not involve reliance on one's own misconduct. [*Tinsley v. Milligan*, [1994] 1 A.C. 340 (H.L.)].

[18] Counsel for the defendants did not suggest that the improper conduct which the defendants invoke in this regard was in any way relied upon in the litigation by the plaintiffs. In my opinion, it is unlikely that this ground of appeal will succeed.

[19] The next two stages of the three-stage approach require a consideration of whether, if the stay should not be granted, the defendants will suffer irremediable harm and where the balance of convenience lies. I will deal with these branches of the test together.

[20] The defendant Society was incorporated in Ontario and is registered extra-provincially in B.C. It is wholly controlled by the defendant Amar Singh. The plaintiffs have been unable to find any assets in British Columbia or elsewhere owned by either defendant, except for a parcel of real estate in Ontario owned by the defendant Society. The Society purchased that parcel for $675,000 in 1997. On the date of purchase, it granted a mortgage of the land for $414,000. As of September 2002, the balance owing on that mortgage was $360,357. On September 12, 2002, the Society granted a second mortgage on the land in the amount of $100,000. Thus, the defendant Society has an apparent equity in the land of approximately $215,000.

[21] On January 6, 2000, judgment was granted in the Supreme Court of British Columbia against the defendant Society in favour of Jatinder Minhas and Bhupinder Singh Nijjar for $250,909 and costs for the return of a deposit that they paid to the defendant Society on account of the purchase price of the land that was returned to the plaintiffs in this action, which the defendants had agreed to sell to them. The judgment was registered in Ontario on November 21, 2002, and a writ of execution has since been issued by the Superior Court of Justice in Toronto to the Sheriff in the Region of Peel, instructing him to sell the property. Unless the plaintiffs place their execution in the hands of the Sheriff before he sells the land and distributes the proceeds of sale, they will not be entitled to share in the proceeds under the Ontario ***Creditors' Relief Act***.

[22] None of that is controverted in the defendants' evidence, which is contained in an affidavit sworn by a Mr. Baljit Dhaliwal on information and belief. His informants are said to be Amar Singh and "members of" the defendant Society. He does not say what information he obtained from each source. In his affidavit, the defendants disclose the land in Ontario as an asset and assert that it is exposed to claims from

the aforesaid judgment creditors in excess of $1 million, as well as to the claims of the plaintiffs in this action. Mr. Dhaliwal deposes that, if this appeal fails and if the judgment creditors proceed to execute on their judgment, "the Ontario society will have insufficient assets to satisfy those claims, and will be unable to survive." He deposes, further, that the defendant Society serves a congregation of "one to two hundred Ontario resident Sikhs" who are of "modest means" and who have "donated and loaned monies" to "assist the society to survive". Notably, there is no assertion that the defendant Society has no other assets or no income and no assertion as to the personal means of the defendant Amar Singh.

[23] Accordingly, it appears that whether a stay of execution on the judgment is granted or not, the defendant Society stands to lose all of its equity in the Ontario land. On the other hand, if a stay is granted, the plaintiffs will be precluded from sharing in the proceeds of the sale of that land. Therefore, the harm that will be suffered by the plaintiffs if a stay is granted outweighs the harm that will be suffered by the defendants if a stay is refused.

[24] I am not persuaded that a case for a stay of proceedings has been made out. There is little merit in the proposed grounds of appeal and the balance of convenience test favours the refusal of a stay. Accordingly, the defendants' application to stay proceedings, including execution, in the Supreme Court is dismissed.

[25] The plaintiffs seek an order for security for costs of the appeal. The burden is on the defendants on this application to show that it is in the interests of justice that security for costs not be awarded: ***Zen v. M.R.S. Trust Company*** (1997), 88 B.C.A.C. 198 at 201-02 (In Chambers). After a preliminary consideration of the merits of the appeal and after considering the evidence of the defendants' means, I am satisfied that security for costs of the appeal should be awarded.

[26] Counsel for the plaintiffs has estimated their costs, if the appeal should be unsuccessful, at approximately $15,000 to $20,000 including disbursements. He emphasized that this estimate is not a considered one. I must consider the means of the defendants when making an order for security for costs but, as I have already noted, their evidence in this regard is not compelling. I note, as well, that the plaintiffs brought their application in a timely way after notice of appeal was filed and that it appears that they will have difficulty realizing on a judgment for costs if they should succeed on the appeal. On the whole of the evidence, and given the weakness of the evidence on both sides of this issue, I consider that security for costs in the amount of $10,000 would be appropriate. The appeal will be stayed until security in that amount is posted in a form satisfactory to the Registrar.

[27] On the application for security for the costs of trial and for the trial judgment, the burden is on the plaintiffs to show that it is in the interests of justice to order security and that the plaintiffs will suffer prejudice if the order is not made. In determining the interests of justice I may take into account the merits of the appeal and the effect of an order for security on the ability of the defendants to continue the appeal: ***Aikenhead v. Jenkins*** 2002 BCCA 234 at para. 30.

[28] This appeal has little chance of success. The defendants' evidence does not permit me to conclude that they have made full and frank disclosure of their financial means. Moreover, as the evidence stands, if the plaintiffs succeed in retaining their judgment, which seems likely, they are unlikely to be able to recover anything beyond their rateable share of the sale proceeds of the land in Ontario, assuming they are able to participate in their distribution. To allow the appeal to proceed without requiring the defendants to post substantial security would be to allow the defendants to gamble with the plaintiffs' money: see ***Fraser Canyon Transport Ltd. v. 5391945 B.C. Ltd., 539197 B.C. Ltd., and Teal Cedar Products Ltd.*** 2002 BCCA 625 at para. 11.

[29] On a consideration of all of the circumstances, I conclude that it is appropriate that the defendants be required to post substantial security for the trial costs and for the pecuniary portion of the trial judgment as a condition of proceeding with this appeal. I fix the amount of that security at $300,000. It may be posted in a form satisfactory to the Registrar. The defendants have not satisfied me that they will be unable to prosecute the appeal if they should be required to post security. The plaintiffs will be entitled to withdraw

all or parts of that sum on account of their judgment upon lodging security in a form satisfactory to the Registrar for repayment, including interest at post-judgment rates, should the appeal be allowed.

[30] In summary:

1. The defendants' application for a stay of proceedings, including execution, in the Supreme Court is dismissed;
2. The plaintiffs' application for security for costs of the appeal is allowed and it is ordered that proceedings in the appeal be stayed until the defendants post security in the amount of $10,000 in a form satisfactory to the Registrar;
3. The plaintiffs' application for security for the trial costs and the trial judgment is allowed and it is ordered that proceedings in the appeal be stayed until the defendants post security in the amount of $300,000 in a form satisfactory to the Registrar.

"The Honourable Mr. Justice Smith"