(1983) 02 CAL CK 0002

Calcutta High Court

Case No: None

Ashik Mia	APPELLANT
Vs	
Akbar Ali and Others	RESPONDENT

Date of Decision: Feb. 3, 1983

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 151, 47

Citation: 87 CWN 492

Hon'ble Judges: R.K. Sharma, J

Bench: Single Bench

Advocate: N.K. Mirta, for the Appellant; M. Gosawami, M.K. Roy and Sudipa Roy for the Opposite parties Nos. 1 and 2, for the Respondent

Judgement

R.K. Sharma, J.

This Rule arises at the instance of pre-emptor-decree-holder-petitioner Ashik Mia and is directed against Order No. 99 dated 31.7.80 passed in Misc. Case No. 4 of 1970 by the 2nd Court of the Munisif at Barasat.

2. The brief history of the case may now be stated as follows : Plot No. 414 is a bastu and appertains to Khatian No. 980, Mauza Prosadnagar J.L. No. 1 P.S. Naihati, District 24-Parganas, and measures 7 cents of land. The original owner was Harmuj Khan, opposite party No. 3. Out of 7 cents of land he sold 5 cents to the present petitioner by a registered Deed of Sale on 15th February, 1968. Thereafter he sold the remaining 2 cents to opposite parties Nos. 1 and 2 who are represented by their guardian father, on the 6th of August, 1969, by executing a registered Deed of Sale. The second sale was made without any notice to the petitioner. Therefore, the petitioner filed an application u/s 24 of the West Bengal Non-Agricultural Tenancy Act seeking to pre-empt the land sold to opposite parties Nos. 1 and 2. The pre-emption case was numbered as Misc. Case No. 4 of 1970, in the Second Court of the Munsif, Barasat and it ended in a compromise. Under the compromise deed the

opposite parties Nos. 1 and 2 agreed to deliver 2 cents of land which they have purchased to the petitioner and it was also stipulated that if they did not deliver possession to the petitioner, he could obtain possession by executing the compromise decree through Court. Inspite of this compromise, it is alleged, the opposite parties Nos. 1 and 2 did not deliver possession of the said 2 cents of land. On the contrary, opposite Party No. 3 filed title Suit No. 2 of 1972, raising a dispute that the transaction by a sale deed he executed in favour of opposite parties Nos. 1 and 2 was not a real sale, but in substance a loan transaction. The said the Munsif, at Barasat, and was dismissed. Thereafter, the petitioner put the compromise order into execution and in that execution case the opposite parties Nos. 1 and 2 filed objection u/s 47 C.P.C. That application after being heard was dismissed. Thereafter opposite parties Nos. 1 and 2 through their mother filed Title Suit No. 35 of 1975, in the 2nd Court of Munsif at Barasat for declaration that the compromise decree was null and void. That suit was also dismissed by the learned Munsif. An appeal was preferred against that dismissal. But the said appeal was also dismissed.

3. The opposite parties Nos. 1 and 2 then filed a petition in execution case stating that delivery of land had been already made to the decree-holder and execution case was thereby rendered infructuous. That petition was contested by the decree-holder who contended that no delivery of possession had been given. The learned Court below after hearing the parties dismissed the petition holding that possession of the land in dispute had not been delivered to the decree-holder.

4. Thereafter the opposite parties Nos. 1 and 2 filed an application purportedly under Order 21 rule 101 read with section 151 of the CPC for appointment of an investigator for ascertainment of the boundary of the disputed plot. That petition was heard and allowed by the learned Munsif by the impugned order. Hence the present petition and the Rule obtained by the petitioner.

5. Mr. Roy appearing on behalf of the opposite parties Nos. 1 and 2 contends that no revision lies against the order passed by the learned Munsif and only an appeal lies. In order to support his contention he relies upon a judgment of a single Judge reported in Calcutta High Court Notes, Vol. 10 Part IX page 401. He submits that under Order 21 rule 103 the impugned order passed by the learned Munsif should be treated as a decree and an appeal should have been preferred instead of a revisional application. Mr. Mitra, who appears for the petitioner, draws my attention to language of Rules 97, 98, 100. 101 and 103 of Order XXI and submits that in the facts and circumstances of this case the order passed by the learned Munsif was an order u/s 151 C.P.C. and not strictly under Order 21 rule 101. He submits that rule 101 of Order 21 of the CPC does not speak of any independent application but speaks of determination by the court which deals with application under rule 97 or rule 99. He submits that the substance of the application filed by the judgment-debtor was not an application which fell under rule 97 or rule 99 of Order 21. Rule 97 deals with the matter of resistance or obstruction to possession of

immovable property and Rule 99 deals with the matter regarding dispossession by decree-holder or purchaser. Undoubtedly the petition filed before the learned Munsif by the judgment-debtor did not appertain to those matters. Therefore, I find substance in the argument made by Mr. Mitra and hold that the order passed by the learned Munsif was an order really u/s 151 C.P.C. and did not arise under Or. 21 r. 101 as contended parties. Hence, the revisional application lay in the facts and circumstances of this case.

6. The decree-holder being unsuccessful in obtaining possession amicably, applied for police help to the court below under Order 97, Order 21 C.P. C. That application was filed by the judgment-debtor praying that boundary of the case land be determined in terms of the final orders passed by the Court below in the pre-emption case with the help of an investigator and that application was allowed. Mr. Mitra submits that the disputed land is 2 cents of land out of Plot No. 414 aforesaid which measures in all 7 cents. He submits that out of that 7 cents, his client has already obtained possession of 5 cents on the basis of his registered kobala. The remaining 2 cents had been purchased by the judgment-debtors and they are to hand over that to the decree-holder failing which the decree-holder is to obtain possession of the same by executing the compromising order. He submits that there is no point in relying the boundary and making any investigation by a survey passed Pleader Commissioner to demarcate and specify the case land. On the other hand, Mr. Roy submits that Plot Nos. 412, 413 and 415 which are all adjacent to Plot No. 414, belong to the opposite parties. Therefore, if the boundary is not properly relayed, the land appertaining to Plot Nos. 412, 413 and 415 may be encroached upon and may be taken possession of by the decree-holder. He submits that in the facts and circumstances of the case it would be proper to specify the case land before possession of the same is taken over by the decree-holder. There is some substance in the submissions made by both the learned Advocates. But as the learned Munsif has appointed a Pleader Commissioner, it is safer to have the boundary of Plot No. 414 demarcated and 2 cents of case land specified properly before possession is handed over to the decree-holder by the court. This might prevent future litigation. Otherwise, what is the land to be recovered by the decree-holder from the judgment-debtor may remain a question of dispute while executing the decree. Therefore, weighing the pros and cons of the matter I find there is no sufficiently strong ground to interfere with the order passed by the learned Munsif. Hence I refrain from doing so.

7. In the circumstances, the Rule is discharged but without any order as to cost.

The demarcation proceedings will be completed within three months from the date of receipt of the record.

Let the records be sent down to the court below expeditiously.