

(2012) 02 CAL CK 0011

Calcutta High Court

Case No: G.A. No. 3082 of 2005 and C.S. No. 346 of 2001

Namita Barua

APPELLANT

Vs

D.K. Singhal and Stet

RESPONDENT

Date of Decision: Feb. 6, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 103, Order 21 Rule 104

Citation: (2012) 2 CHN 61**Hon'ble Judges:** I.P. Mukherji, J**Bench:** Single Bench**Advocate:** S.N. Mitra, B. Biswas, Sutapa Sanyal and Arup Bhattacharjee, for the Appellant; Sudip Ghosh for decree holders, for the Respondent

Judgement

I.P. Mukherji, J.

This is an application by Mr. Biswanath Mondal residing at No. EC-116, Salt Lake City, Sector-I, Kolkata- 700 064. He is aggrieved by the decree dated 16th December, 2004 passed in a suit, being C.S. No. 346 of 2001, between the Baruas, the plaintiffs Mr. D.K. Singhal and Mr. Jaydeb Pal, being the first two defendants. The other defendant, being the third was proforma. He was the landlord, Biswa Ranjan Sarbadhikari against whom no relief was claimed. He is now dead. Since he was a proforma defendant, his name may be deleted from the cause title. The petitioner is particularly aggrieved by the execution levied further to the decree. He says that he enjoys tenancy rights over one big hall, one kitchen and one toilet on the ground floor and a mezzanine floor leading from the hall consisting of three wooden cubicles in premises No. 49, Lenin Sarani, Kolkata - 700 013 (hereinafter "the said premises") which was acquired from the said proforma defendant, who was the owner of the property. He complains of dispossession and asks the Court under Order 21 Rules 99 to 103 to adjudicate this issue.

2. According to him this suit is a collusive suit between the Baruas and the first two defendants to evict him. Furthermore, the suit was framed in this way. The plaintiffs, the Baruas were tenants under the proforma defendant. The first defendant was his manager and the second defendant the manager's accomplice. Both of them collaborated with each other to dispossess the plaintiffs.

3. The suit was decreed ex parte on 16th December, 2004. The decree provided for delivery of "khas possession" of the said premises to the plaintiffs. Thereafter, execution proceedings were taken out by the plaintiffs/decreed holders. The application was marked as EC No. 85 of 2005. On 25th August, 2005 an order was passed appointing a receiver to make an inventory of the said premises and file a report. On 8th September, 2005 another order was passed recording that the "suit premises" was found locked, by the Receiver. He put his own padlock. Furthermore, the receiver was directed to hand over possession of the "suit premises" to the plaintiffs/decreed holders. The execution application was disposed of. Accordingly, the receiver handed over its possession to the plaintiffs/decreed-holders.

4. According to the petitioner the first defendant Mr. Singhal was a tenant of the proforma defendant Mr. Biswa Ranjan Sarbadhikari. His learned Counsel showed me a copy of a rent receipt dated 1st November, 1996 issued by Mr. Sarbadhikari in favour of Mr. Singhal which is annexed at page 19 of the petition. Thereafter, it is said that the petitioner entered into a partnership with Mr. Singhal to deal with electronic goods and to sell fast food from a restaurant in the said premises. A copy of a partnership deed dated 29th September, 2002 between inter alia, Mr. Singhal and the petitioner is annexed at page 78 of the petition. It appears that the petitioner had a 32% share in such partnership. It is argued on this basis that at least from 2002 the petitioner is in possession of the said premises. Then it is argued that from November 2005 the petitioner became a tenant under the proforma defendant. Copies of receipts for rent from February, 2005 till July 2005 issued by the proforma defendant to the petitioner are annexed to the application. I am also shown a copy of a document executed by Mr. Sarbadhikari being annexure "H" to the petition at page 91 thereof. It says that the said premises was let out to the petitioner for running a restaurant-cum-shop, selling electronic goods, wine, motor cycles and so on.

5. It is further reiterated that the above suit was a collusive suit between plaintiffs Baruas and the first and second defendants collaborating with him. They practised fraud upon the Court by framing a cause of action as if the said defendants were trying to dispossess the Baruas. The said defendants did not contest the suit. An ex parte decree was passed granting possession to the Baruas. On the basis of this decree the plaintiffs Baruas became successful in dispossessing the petitioner.

6. Now, according to the petitioner, he was in possession of the said premises, had locked its doors and gone elsewhere. The receiver on 5th September, 2005 visited the said premises and found it locked. He put his own padlock according to the

directions of this Court made in the execution application, on 25th August, 2005. On 8th September, 2005 this Court directed the receiver to break the padlock, and deliver possession to the plaintiffs, which was accordingly done.

7. According to the petitioner this was the result that the said collusive parties in the above suit wanted.

8. This application was filed on 22nd September, 2005.

LAW:

9. Now, the provisions of law: If any person other than the judgment-debtor is dispossessed of an immovable property by a decree-holder, he is given the right under sub-rule (1) of rule 99 of Order 21 of the Code of Civil Procedure, 1908 to complain of the dispossession to the Court. Upon such application being made the Court is to hear out the application. The Court can pass suitable orders under rules 100 and 101, deciding all questions raised.

10. The decree-holder takes an objection based on Rule 102. This rule says that nothing in the above rule would apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person. Since, the landlord, Mr. Sarbadhikari was a proforma defendant, he could be considered as a judgment-debtor. Therefore, this application is incompetent.

11. Let us have a look at the definition of "judgment-debtor" in section 2(10) of the Code of Civil Procedure. According to the definition a judgment-debtor is any person against whom a decree has been passed or order capable of execution has been made.

12. Now, the decree of 16th December, 2004 was passed against Mr. Singhal and Mr. Jaydeb Pal, the first two defendants and could be executed against them only. Therefore, no decree was passed against Mr. Sarbadhikari, the proforma defendant and he could not be a judgment-debtor. Yet [Muppidi Dora Reddy Vs. Bollareddy Ramakrishna Reddy and Others](#), was cited on behalf of the plaintiffs. In that case the appellant obtained a lease of the property of the judgment-debtor after the decree. In those circumstances it was held that his application under Rule 98 and 100 of Order 21 of the CPC was hit by Rule 102 as he was a transferee of the judgment-debtor.

13. Furthermore, it was contended on behalf of the plaintiffs that only an application u/s 47 of the CPC could have been filed by the petitioner. In [Umaprasad Pal and Others Vs. Mrityunjay Pal and Others](#), cited on their behalf the question was about the right of a proforma defendant complaining of dispossession if he applied under Order 21. It was observed that there was a limited right under Order 21 although the proforma defendant could apply under that order as a person other than the

judgment-debtor. The Court held that rights u/s 47 were open to him also as he was a party. Section 47 was a more comprehensive section.

14. I do not know how this case applies. First of all, the petitioner could not apply u/s 47 because he was not a party to the suit. In this application the late proforma defendant Mr. Sarbadhikari or his heirs did not complain of dispossession but a third party is complaining of dispossession.

15. Therefore, the law can be summarised as follows: Any person other than a judgment-debtor, who is dispossessed by the decree-holder can apply before the Court for adjudication of his rights (Order 21 Rule 99). In my opinion, on a consideration of section 2(10) of the Code of Civil Procedure, a judgment-debtor does not include any proforma defendant, i.e., a defendant against whom no relief is claimed or granted. A transferee of a judgment-debtor is equally bound as the judgment-debtor to undergo the process of execution. He is not a person other than a judgment-debtor. This is recognised in Order 21 Rule 102 of the CPC [See [Usha Sinha Vs. Dina Ram and Others](#),].

16. [Umaprasad Pal and Others Vs. Mrityunjay Pal and Others](#), is a difficult decision to understand but it is quite explicit in saying that a right of a proforma defendant, who was dispossessed in that case could also be urged in a section 47 application because for the purpose of that section he was to be considered as a party. The principle in that pronouncement is that the remedy u/s 47 is greater than the remedy under Order XXI Rule 97 to 101 of the Code of Civil Procedure, for a dispossessed proforma defendant.

17. It is true that the applicant was a transferee of the proforma defendant landlord. But I have held that a proforma defendant can never be a judgment-debtor. So the applicant was not bound by the decree. Complaining of dispossession he could apply before this Court for protection under Order 21 rule 99, as he has done. He is a person other than the judgment-debtor being aggrieved by dispossession by the decree-holder. Moreover, not being a party to the suit, he has no remedy u/s 47.

Evidence Analysis

18. The evidence brought on record by the petitioner shows Mr. Singhal, the first defendant as the tenant and not the plaintiffs. The partnership deed dated 29th September, 2002 also discloses some connection of the petitioner with the said premises, namely, that he would be carrying on business in partnership with Mr. Singhal. Then the agreement of lease dated 22nd January, 2005 is a demise of the said premises by the proforma defendant landlord in favour of the petitioner. The petitioner was also able to show rent receipts for the period February 2005 to July 2005 granted by the landlord. All these documents were appended to the petition.

19. So, it seems to me to be quite extraordinary that the plaintiffs, whose presence is not even found in the records would assert that their alleged manager Mr. Singhal

and his collaborator Mr. Jaydeb Pal were interfering with his possession of the said premises and that they had no right to be there. More intriguing becomes the case when Mr. Singhal and his alleged collaborator do not even put in an appearance in the suit and allow themselves to suffer the decree dated 16th December, 2004. The mystery deepens when the receiver appointed in execution met with no resistance. He finds a padlocked door, breaks the padlock and hands over possession to the plaintiffs.

20. In the affidavit-in-opposition filed by the plaintiffs no evidence of any tenancy is brought-on-record. The averments in the Affidavit-in-Opposition themselves show that there was a dispute with the petitioner with regard to possession of the said premises.

21. Take for example, the averments in paragraph 3 of the affidavit-in-opposition which are as follows:

3. ...I say that all the defendants in the suit were permanently restrained from transferring the suit property to any Third Party in any manner whatsoever and thereby any transactions after 14.8.2001 are void, ab initio. I further deny that the defendant No. 1 or 2 or 3 had any authority to induct the present Biswanath Mondal as a Tenant in respect of the self-same property. It is needless to mention that all purported documents alleged to have been entered into by and between the Defendants and Biswanath Mondal was void, sham and not at all valid in the eye of law.

22. The statement in paragraph. 4 of the affidavit-in-opposition may also be considered:

4. ...It is emphatically denied that Biswaranjan Sarbadhikary since deceased was restrained in transferring the suit property to any third party and any alleged rent receipt as annexed in the application are deemed to be non-est....

The following is said in paragraph 5 of the affidavit-in-opposition:

It is denied that the petitioner was carrying on any renovation or repairing at the suit premises alleged. It is also denied that any renovation work was in progress, I say that the report of the Receiver will corroborate this statement and also prove that the petitioner Biswanath Mondal is in collusion with the heirs of the then Landlord tried to commit some mala fide attempt and as such the statements made in the said petition are all untrue, baseless and manufactured for oblique motive.

23. The petitioner has been able to bring on record some evidence to show that he had a right to claim possession of the said premises.

24. Furthermore, in my judgment the petitioner was a necessary party or an added party in the suit by the plaintiffs claiming possession.

25 There is substantial evidence to raise the suspicion that the suit between the plaintiffs and the first two defendants was collusive so as to wrest possession from the petitioner. The petitioner being dispossessed of the said premises and not being a party had a right to apply before the Court to get his right adjudicated under Order 21 Rule 97 to 104 which the petitioner has exercised.

Conclusion:

26. I am convinced that the petitioner has been wrongfully deprived of possession of the said premises and should be put back into possession. The Court enjoys the power make this kind of an order under Rules 100 and 101 of Order 21 which are inserted below:

100. Order to be passed upon application complaining of dispossession. -- Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination, --

(a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

(b) pass such other order as, in the circumstances of the case, it may deem fit.

101. Question to be determined. -- All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

27. Under Rule 103 such an order is treated as a decree.

28. The decree dated 16th December, 2004 is set aside to the extent it decides the right to possession of the said premises in favour of the plaintiffs/decreed-holders.

29. I direct the plaintiffs/decreed-holders to put the petitioner in possession of the said premises immediately.

30. I make it clear that I have only adjudicated that the petitioner was in possession on the date of the decree dated 16th December, 2004 and thereafter till his dispossession through execution of the decree and that he was so dispossessed wrongfully without the due process of law. For this reason he should be put back into possession.

31. This order will not prevent the adjudication of rights in the said premises, in a properly constituted proceeding.

32. This application is disposed of accordingly. No order as to costs.

33. Let this order be drawn up, expeditiously as a Decree and is to be treated as such.

34. Urgent certified photocopy of this judgment and order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

Later:

35. Learned Counsel for the plaintiff prays for stay of operation of this judgment and decree. Considering the circumstances, let this decree not be executed for a period of two weeks from date.