

(1989) 2 CALLT 324 : 93 CWN 1069

Calcutta High Court

Case No: Matter No. 176 of 1988

M/s. Osman Mullick
and Others

APPELLANT

Vs

Md. Alauddin and
Others

RESPONDENT

Date of Decision: May 10, 1989

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 47, 9
- Partnership Act, 1932 - Section 69, 69(1), 69(2)
- Presidency Small Cause Courts Act, 1882 - Section 41(2)

Citation: (1989) 2 CALLT 324 : 93 CWN 1069

Hon'ble Judges: Umesh Chandra Banerjee, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

U.C. Banerjee, J.

The Law Courts would be within its jurisdiction to reject a plaint in the event, the suit is barred under any law or in the event the plaint does not disclose a cause of action under Order 7 Rule 11 and to do so would be a plain exercise of judicial power and there ought to be any hesitation in regard thereto. It is to be noted that such a scrutiny and subsequent order thereon would be passed upon consideration of the averments in the plaint as correct.

2. Mr. P. K. Das appearing in support of the application strongly contended that the plaintiff-firm is not registered under the Indian Partnership: Act and the persons suing as partners, viz. plaintiff Nos. 2, 3, and 4 are not shown in the Register of Firms as partners thereof and since the suit has been filed by the plaintiff to enforce a right arising from a contract, the plaintiffs are liable to be non-suited by reasons of the provisions as contained in Section 69(1) and 69(2) of the Indian Partnership Act. Secondly, Mr. Das

contended that the suit is also barred under the provisions of Rules 99 to 103 of Order 21 of the Code of Civil Procedure. The only remedy of the plaintiffs who are alleged to have been dispossessed of immoveable property in execution of the decree is to apply under the aforesaid provisions of the Code and such application is to be heard and decided in accordance with the above noted provisions and not by a separate suit. As such Mr. Das contended that the suit is thus liable to be dismissed in limine. In fine Mr. Das contended that upon perusal of the plaint it appears also that on the face of the averments in the plaint, it does not disclose any cause of action against the defendants. As such Order 7 Rule 11 has its full play in the matter.

3. On the factual score as appears from the plaint, it appears that one Osman Mullick made and created a wakf estate by a deed of wakf dated August 13, 1904, whereby and whereunder the above-named Osman Mullick appointed himself as Mutwali of the wakf estate and made himself a monthly tenant in respect of a shop room in one part of the ground floor of premises No. 7 and 7/1, Dharamtolla Street, now known as Lenin Sarani, Calcutta (hereinafter referred to as the said premises). Subsequently the defendant No. 3 was appointed as the Mutwali of the wakf estate and the business of Osman Mullick continued to be run in partnership with others paying a rent of Rs. 300 per month according to English Calendar month. The terms and conditions of the partnership business was thereafter reduced to writing under a deed of partnership whereby the plaintiff Nos. 2 and 3 along with defendant No. 3 and one Musstt. Saleha Khatoon continued to be the partners thereof. By an oral Hiba in July 1979 the above named Musstt. Saleha Khatoon made a gift of her share in the partnership firm to her daughter Musstt. Rashida Khatoon, plaintiff No. 3 herein. It is to be noted incidentally on the factual score that the defendant Nos. 1 and 2 at all material times was and still are carrying on business in partnership under the name and style of "M/s. Fashion Mart". The shop room was also situated in the building at premises No. 7 and 7/A, Lenin Sarani, as a monthly tenant under the Wakf Estate.

4. In the year 1976 the premises was proposed to be reconstructed and with that end in view the defendant No. 3 by a deed of lease dated January 25, 1977 in his capacity as the Mutwali, of the estate, granted a lease of the premises to himself for a period of 51 years renewable for a further periods of 25 years. The tenants and occupiers of the said building delivered vacant possession of their respective portions to the defendant No. 3 for facilitating such proposed reconstruction of the building. After reconstruction of the building, the defendant No. 3 in January 1979 provided the plaintiff No. 1 with a shop room on the ground floor of the said building measuring an area of 480 sq. ft. approximately, at a rent of Rs. 500 per month. The defendant Nos. 1 and 2 also were provided with another shop room in the corner of the ground floor of the premises measuring about 85 sq. ft. It appears from records that on 19th April 1979 the defendant Nos. 1 and 2 filed a suit in this Court against the defendant Nos. 3 to 7 (Suit No. 314 of 1979) for a decree for specific performance of an agreement dated 8th December 1976 by directing the defendants to let out to the plaintiffs in that suit as monthly tenants and

delivery of possession of 225 sq. ft. area at a monthly rent of Rs. 1.75 per sq. foot payable according to English Calendar month.

5. Subsequently on the application made by the defendant Nos. 1 and 2 this Court by an order dated 22nd June 1979 appointed a Receiver to take possession of the shop room of the plaintiff No. 1 herein and the defendant Nos. 3 to 6 thereafter, however, preferred an appeal from the said order being Appeal No. 223 of 1979 whereupon the Court of Appeal by an order dated 25th June 1979 was pleased to direct the Receiver not to take possession of the said shop room. On December 3, 1986, however, a consent decree in Suit No. 314 of 1979 was passed and the suit was disposed of in terms of settlement. On an application made by the defendant Nos. 1 and 2 in execution of the said consent decree, one Mr. Subrato Mukherjee was appointed on March 11, 1987 as Receiver for taking possession of the shop room of the plaintiff No. 1. The Receiver on April 22, 1987 took over possession of the shop room of the plaintiffs with the help of police and made over possession of the shop room to the defendant Nos. 1 and 2 on April 29, 1987. On May 19, 1987, however, the plaintiffs made an application for review, of the order and decree dated December 3, 1986 with a prayer for restoration of Suit No. 314 of 1979 for disposal after adding the plaintiffs as necessary parties in Suit No. 314 of 1979. The application was however dismissed. S. K. Hazari, J. while passing the order observed:

I have carefully considered the submission of the learned. Counsels and I hold that the words "any person considers himself aggrieved" mean and confine the person who is a party to the lis. This was is based on the principle that a decree or order adversely affects a person who is not a party to the lis in which that order or decree passed is in law not binding on him. Such a person, therefore, can ignore the order or decree which adversely affects him and so cannot apply for a review of that order or decree. He may take such other view as may be available to him in law to protect his right as and when the order or decree adversely affecting him is sought to be imposed so as to jeopardise his rights. In the instant case it is submitted by Mr. Mukherjee appearing for the petitioners that the consent decree was put into execution and the petitioners have already been disposed. Since the consent decree is not binding upon the petitioner, the petitioners' remedy lies in filing suit and/or proceeding which may be available to the petitioner. In view of the findings above, I hold that the application is not maintainable in law.

6. Let us now, therefore, on the basis of the above factual background consider the submission of Mr. Das in support of the contentions as noted above.

7. Turning onto the second contention first that the suit is barred by reason of Rule 99 to 106 of Order 21 of the Code Mr. Das placed strong reliance on the decision of this Court in the case of [Deb Prokash Set Vs. Hariprosad Mallick](#), The precise question before the Court was that when the Executing Court had already investigated the complaint of resistance or obstruction made against a person and has come to the finding that he has no just cause to resist or obstruct execution of the decree, whether such an unsuccessful resister or obstructor can institute an independent suit challenging the determination

made under the provisions set out in Rules 97 to 103 of Order 21 of the CPC and on that issue this Court observed:

The language of the statute is clearly against the contention of the plaintiff-Opposite party that the suit brought by him is maintainable. Under the unamended Rule 103 of Order 21 of the Code any party not being a judgment-debtor against whom an order is made under Rules 98 and 101 could institute a suit to establish the right which he claims to present possession of the property. The CPC (Amendment) Act 1976 has substituted the said Rule 103 of Order 21 under which such orders are to be treated as decrees, i.e. as adjudications conclusively determining the rights of the parties with regard to matters specified in Rule 101 of Order 21 of the Code. Under the amended provisions of Rule 101 of Order 21 of the Code, all questions (including the question of right, title and interest of the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 and relevant adjudication of the application shall be determined by the Court dealing with an application and not by a separate suit. For this purpose the Legislature by inter alia, using the expression "be deemed to have jurisdiction to decide such question" under Rule 101 of Order 21 has introduced a legal fiction and has overridden any contrary law and has vested the Executing Court with powers greater than those conferred by section 47 of the Code.

8. Incidentally it is to be noted that Court has left open the wider question as to whether a person can at all institute a suit for establishing that he is not bound by the decree passed against a third party.

9. The Madras High Court in the case of *Fathima Automobiles v. P. K. P. Nail & Anr.* reported in 1985 Mad 318 also observed in the same vein on which strong reliance was also placed by Mr. Das. The Madras High Court observed:

Thus, after the Amending Act 104 of 1976 was passed, the Executing Court before which an application is filed for removal of obstruction has to decide all questions arising between the parties, viz. the decree-holder, the obstructor and that no separate suit will lie for the purpose of deciding the dispute between the decree-holder and the obstructor. Having regard to the specific and express provision contained in Rule 101 Order 21, C.P.C, that against an order of removing or refusing to remove obstruction, a separate suit is not maintainable, all the questions arising between the parties to the application for removal of obstruction have to be decided by the Executing Court itself, as that Court has been conferred a specific power to decide all the questions arising between the parties while disposing of the application for removal of obstruction. Therefore, we are not in a position to agree with the view taken by Mohan, J. to the effect that a suit is maintainable in this case by the appellant who is an obstructor against when an order of removing obstruction has been passed.

10. Further reliance was placed on the decision of the Bombay High Court, in the case of *Nusserwanji E. Pwooneir & Ors. v. Mrs. Shirinbai F. Single Judge of the Bombay High*

Court summarised the legal position to the effect that under Rule 101 read with Rule 99 of Order 21 of the Code, all questions including the question of tenancy under the Bombay Rent Act can be decided by the Executing Court subject, however, to the condition as mentioned in Rule 101 itself that those questions must arise between the parties to a proceeding on the application and must be relevant to the adjudication of the application. The learned Judge further proceeded on to observe that if on the determination of such question or questions, it becomes necessary to order that possession of immovable property should be given from the landlord to the tenant, the Executing Court has the jurisdiction to pass that order under Rule 100(a) and the bar contained in section 41(2) of the Presidency Small Causes Courts Act or the bar implied by section 28 of the Bombay Rent Act does not apply to the field covered by Rule 101 of Order 21. In fine, the learned Judge observed the proceedings under Rule 101 and Rule 105 of Order 21 of the CPC are in the nature of a suit and it would be appropriate for the Executing Court to frame issues and allow parties to lead all evidences that may desire to do.

11. Whereas in both the Calcutta and the Madras decisions noted above, adjudication has already been made. In the Bombay case section 99 application was made and hearing had taken place and it was at that juncture the High Court was moved. On the factual score, therefore, it appears that there was in fact a prior adjudication in all the three cases on which strong reliance was placed by Mr. Das. But in the facts and circumstances of the matter under consideration, it appears that consent decree passed in the suit being Suit No. 314 of 1979 and A. K. Sengupta, J. in the Execution Application filed by the defendant Nos. 1 and 2 in respect of the said consent decree appointed a Receiver to take possession of the shop room at premises No. 7 and 7/1, Lenin Sarani. Subsequently on April 22, 1987 A. K. Sengupta, J. passed the following order:

The matter is mentioned on behalf of the Receiver. By the order dated 11th March 1987 the Receiver was appointed to take possession of the shop room at premises No. 7 and 7/1, Dharamtolla Street, now known as Lenin Sarani. The Receiver has submitted a report. From the report it appears that some outsiders have encroached a portion of the shop room facing Lenin Sarani and fixed, up Sign Board. It appears that the persons who have encroached have no right or interest in the said shop room. Accordingly, the Receiver is directed to remove them with police help. The Receiver shall take necessary police help from the Taltola Police Station. Officer-in-Charge, Taltola Police Station shall render all assistance to the Receiver, as he may require to carry out this order.

All parties including the Receiver shall act on the signed copy of the Minutes of the dictated order upon an undertaking on the Advocate-on-Record for the record to apply and obtain certified copy of the order made herein.

12. Thereafter on 29th April 1987 the Receiver was directed to hand over the keys to the decree-holder in respect of the shop room at premises No. 7 and 7/1, Dharamtolla Street, Calcutta and it is on these two orders that Mr. P. K. Roy appearing for the plaintiffs in the suit submitted that since there is no adjudication as such, question of the suit being

barred does not and cannot arise. Mr. Roy submitted that there is no application under Order 21 Rule 97 neither Order 21 Rule 99 can be termed to be a bar since it is a permissible provision and admittedly has been engrafted in the Code by reason of the specific provisions of Order 21 Rule 98.

13. At this juncture let us now however consider the effect of Rules 97 to 103 of Order 21 of the Code. Whereas Rule 97 provides the right of the holder of a decree for possession of immovable property or the purchaser of any such property to make an application in the event of resistance or obstruction, Rule 99 provides that in the event of any person other than the judgment-debtor is dispossessed of the immovable property, he may make an application to the Court complaining of such a dispossession. Rule 101 provides that 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 shall be determined by the Court dealing with the application and not by a separate suit, Rules 98 to 100 are the procedural aspect upon determination of the questions in terms of Rule 101. Both Rules 98 and 100, therefore, presupposes an adjudication of the questions raised in terms of Rule 101. Incidentally it is to be noted that Rule 101 expressly provides "arising between the parties to a proceeding or their representatives...", and on that background Rule 103 was engrafted which provides that after the adjudication in terms of Rule 98 or 100 the same shall be subject to the conditions as to an appeal or otherwise as if it were a decree. Rule 103 is a follow up action after obtaining the determination of questions in terms of Rules 98 and Rule 100. Admittedly Rule 101 is of very wide amplitude and even wider than section 47 of the Code by reason of the user of the language in the Rule to the effect - "notwithstanding anything to the contrary contained in any other law for the time in force be deemed to have jurisdiction to decide such questions". But in my view, Rules 98 and 100 read with 101 and 103 do not have any manner of application in the facts and circumstances of the matter under consideration. As noted above, user of the language in Rule 101, viz. "arising between the parties or their representatives" makes all the differences in the matter in issue. The question for consideration in the matter is whether there is any adjudication? If there be such an adjudication there cannot be any manner of doubt that a suit would be barred.

14. In that view of the matter the decisions noted above do not lend any assistance in the matter in issue.

15. It is to be noted, Rule 101 conferred jurisdiction onto the Court in dealing with the application provided however there is an application under Rule 99 and in that event, all questions including the right, title and interest of the property is to be decided in the application itself and not by way of a separate suit. Can it be said that in the event there is no application and instead a suit has been filed to vindicate the rights of the parties, Rule 101 would be a complete bar? In my view, the answer would be in the negative. Language of Rule 99 makes the position clear since Rule 99 itself envisages - "He may make an application to the Court". Sub-rule (2) of Rule 99 provides that where any such application is made, "the Court shall proceed to adjudicate upon the application in

accordance with the provisions herein contained and Rule 101 ought to be read as provision therein contained. Incidentally it is to be noted that ouster of the jurisdiction of the Courts in entertaining a civil suit cannot be inferred lightly. Section 9 of the Code expressly grants such a right to the Civil Courts to have jurisdiction to try all suits of the civil nature.

16. In my view, the language used "may make an application" in Rule 99(1) read with sub-rule (2) and Rule 101 under Order 21 is permissive in nature and in the event of there being an application under Rule 99, Rule 101 will have its full play but not otherwise. The ouster of jurisdiction as noted above can be had only on strict construction and it is now well-settled that it is for the party who seeks to oust the jurisdiction of a civil court, to establish his contention. In this context the observations of the Supreme Court in the case of [Abdul Waheed Khan Vs. Bhawani and Others](#), seems to be very apposite. The Supreme Court observed:

Under section 9 of the Civil Procedure Code, a Civil Court can entertain a suit of a civil nature except the suit of which its cognizance is either expressly or impliedly barred. It is settled principle that it is for the party who seeks to oust the jurisdiction of a civil court to establish his contention. It is also equally well-settled that a statute ousting the jurisdiction of a civil court must be strictly constructed.

17. It is to be noted "that the purport of section 9 of, the Code is to confer an all embracing jurisdiction onto the civil Court except to the extent as excluded by an express provision or by "clear intendment" arising from such law. On a perusal of Rules 97 to 103, can it be said that there is an express provision or a "char intendment" to oust the jurisdiction of the civil Court in a suit? In my view, the answer is in the negative. The Rules under Order 21 as noted above provide for determination or adjudication of a right and in the absence of which question of a suit being barred does not and cannot arise. Stretching of the language of the rule in concluding an ouster is not permissible, neither any outside aid for the purpose of implying an ouster can be had to bring home the point in issue. I however, respectfully record my concurrence with the view expressed by this Court in D. P. Set's case (Supra) but the applicability of the principles laid down in that decision is restricted to the effect that in the event the Executing Court had already investigated the matter, question of a further suit would not arise.

18. In the facts and circumstances of the matter under consideration, can it be said that there was a proper investigation or determination or adjudication of the right, title and interest over and in respect of the immovable property? In my view, there cannot be said to be any adjudication far less a proper adjudication as envisaged under Rule 99 or Rule 97.

19. In the premises, I am unable to accept the contention of Mr. Das that the suit is barred by reason of the provisions of Rules 97 to 103 under Order 21 of the Code.

20. Turning onto the other aspect of the matter, viz. the suit is barred by reason of provisions of section 69 of the Indian Partnership Act, it appears that the law is well-settled on that score to the effect that in respect of a claim arising out of a contract, the prohibition indicated by section 69 will have its full play and I need not dilate much on that score. Let us, therefore, analyse as to whether there was in fact such a contract as pleaded in the plaint, since this plea as taken by Mr. Das is a plea of demurrer. On perusal of the plaint, it is to be noted that there is no contract as such pleaded and in the event of no such pleading, question of reading the same in the plaint does not arise, since ouster involves strict construction. Incidentally it is to be noted that Mr. Das's submission was also restricted to an assumed contract and not a contract as such. In my view, assumption of a contract cannot be had in the matter of ouster of jurisdiction. The ouster must be clear, unambiguous and unequivocal and not otherwise.

21. In that view of the matter, the second contention of Mr. Das also fails. As regards the non-disclosure of cause of action, a plain reading of the plaint negates such a plea.

22. In the premises, this application fails and is dismissed without any order of costs. The suit is, however, expedited. Written Statement within a week after the re-opening of the May holidays; Cross-order for discovery within ten days, thereafter inspection forthwith and the suit to appear in the appropriate list four weeks after the May holidays.