

(2002) 07 CAL CK 0049

Calcutta High Court

Case No: F.M.A. No. 135 of 1996

Sova Rani Chandra

APPELLANT

Vs

Gur Charan Kaur

RESPONDENT

Date of Decision: July 19, 2002**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 97, Order 21 Rule 99, Order 6 Rule 4, 101
- Evidence Act, 1872 - Section 40, 41, 42, 44

Citation: 108 CWN 227**Hon'ble Judges:** Joytosh Banerjee, J; Dilip Kumar Seth, J**Bench:** Division Bench**Advocate:** Soumen Saha, for the Appellant; Jyotirmay Bhattachajee and Subhendu Banerjee, for the Respondent**Final Decision:** Allowed

Judgement

Dilip Kumar Seth, J.

This appeal is directed against an order No. 36 dated 13th December. 1995 passed in Title Suit No. 1105 of 1992 by the learned Judge, IXth Bench, City Civil Court. Calcutta. By the said order. Injunction was granted against the defendant/appellant restraining her from proceeding with the Execution Case No. 60 of 1991 arising out of Title Suit No. 567 of 1989. The plaint case, inter alia, was that the appellant/defendant had instituted a suit for eviction of licensee against the husband of the plaintiff respondent herein and obtained an ex parte decree in the said suit. In the circumstances, the plaintiff/respondent had filed a Title Suit, being No. 1105 of 1992, for declaration that the said decree was obtained by fraud and not binding upon her. In connection with the said suit, the plaintiff respondent had filed an application for injunction restraining the appellant/defendant from proceeding with the said Execution Case No. 60 of 1991 seeking to execute the ex parte decree obtained by the defendant/ appellant in Title Suit No. 567 of 1989. Injunction having

been granted, the same is being challenged in this appeal.

2. Learned Counsel for the appellant points out that in view of Order 21 Rule 101 of the Code of Civil Procedure, the suit cannot be maintained since all questions between the parties are to be decided in a proceeding under Order 21 Rule 97 of the CPC and not by way of a separate suit. According to him, the respondent herein is a party to the application under Order 21 Rule 97 of the Code of Civil Procedure, which is still pending before the learned Executing Court. Therefore, the suit being not maintainable, no injunction can be granted. He had also pointed out certain facts in order to show that there is no such allegation made out in terms of Order 6 Rule 4 of the CPC specifying the details of fraud and as such the suit cannot be treated to be a suit on the basis thereof. Further he contended that even the question of fraud can be gone into in a proceeding under Order 21 Rule 97 of the CPC in view of Rule 101 thereof. He also contended that it is not only the judgment-debtor but also the person resisting execution of the decree is a party under such proceeding and in such a case Order 21 Rule 101 of the CPC applies in full force. He also relied on the decision in [Shreenath and Another Vs. Rajesh and Others](#), in support of his contention.

3. Mr. Bhattacharjee, learned Counsel for the respondent, on the other hand, contends that when it is a case of fraud, the suit is maintainable. According to him, the appellant has not claimed through her husband against the decree as obtained. He has contended that there was allegation of fraud. If there is allegation of fraud, the suit can be brought u/s 44 of the Evidence Act independent of Order 21 Rule 97 read with Rule 101 of the Code of Civil Procedure. He has asserted that there are sufficient grounds of fraud alleged in the plaint and that a prima facie case has since been made out and as such, the suit is very much maintainable. According to him, at least there is a prima facie case which is to be determined. Even if it appears that the suit would fail, still then when the question of fraud is raised which requires determination, where a prima facie case is made out the order of injunction can very well be passed. Therefore, the injunction was rightly passed. It is also contended that unless the respondent is made party in the proceedings under Order 21 Rule 97 of the Code of Civil Procedure, the proceedings of Rule 101 thereof would not be applicable. Therefore, the appeal should be dismissed.

4. We have heard the learned Counsel for the respective parties at length.

5. Admittedly, the application under Order 21 Rule 97 of the CPC has been filed. Learned Counsel for the appellant submits that the respondent herein has been made party to the said proceeding. He also relies on certain document to show that some proceedings have been initiated under the Code of Criminal Procedure against the plaintiff and her husband. He also contends that if the plaintiff/wife is not a party to the proceeding under Order 21 Rule 97 of the CPC in view of the appeal having been filed and the wife having claimed independent right, he craves leave to add the plaintiff/wife as party to the proceeding under Order 21 Rule 97 of

the Code of Civil Procedure.

6. At this stage. Mr. Bhattacharjee, learned Counsel for the respondent, had contended that in case the Court finds otherwise, in that event, the respondent may be permitted to contest the proceeding under Order 21 Rule 97 of the CPC so as to establish her right.

7. We have examined the pleadings in the plaint. Assuming that a separate suit can be maintained on the ground of fraud, then also we do not find sufficient pleadings as contemplated under Order 6 Rule 4 of the Code of Civil Procedure. The ground taken does not show that such prima facie case of fraud based on an independent right is made out. It is not a simple case for grant of injunction in an ordinary suit where prima facie case is sufficient. In the present case, it is to be examined from a different angle, viz in the light of the provisions contained in Order 21 Rule 101 of the Code of Civil Procedure. These provisions specifically bar filing of a separate suit. When the statute creates a bar, the same cannot be avoided by reason of pleading fraud, in view of the wide expression embodied in the said provisions. Rule 101 of Order 21 of the CPC in express language makes it clear that all disputes or all questions including the question relating to right, title or interest in property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 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 question. Thus the Legislature had intended to create extensive jurisdiction in respect of such questions so as to avoid filing of a separate suit and delay the procedure for execution. The Legislature had even gone to the extent of conferring jurisdiction on the Executing Court, if it is necessary for the purpose of such decision, in order to avoid decision in a separate suit. The parties that have been referred to are the parties to the application under Rule 97. It necessarily includes the parties who may not have been parties to the suit. Whoever might resist the execution of the decree, he may be a party to such proceeding, or may be a stranger, but still then the Legislature had intended that the dispute between the decree-holder and any person; including a stranger resisting execution is to be decided in the said proceeding. In other words, the Executing Court is clothed with the power to examine finally, whether the decree is executable against the person resisting execution or the executability of the decree. In view of such situation, the Rule 98 and Rule 101 have been made appealable under Rule 103 thereof. Thus, the intention of the Legislature is clear and unambiguous. The expression "all questions" which was emphasized by the expression "including the question relating to right, title or interest in the property" makes the same inclusive and not exhaustive. Thus, this includes the question of fraud within the scope and ambit of such proceeding. Even if it is contended that the fraud is independent and that the person sought to be affected is not bound by the decree or that the decree has been

obtained fraudulently without making him a party, are also the questions, which can be gone into within the scope and ambit of Rule 101.

8. Our above observation may find support from the decision of the Apex Court in *Shreenath vs. Rajesh* (supra). We may beneficially refer to paragraphs 10 and 11 of the said decision. In this decision the Apex Court had referred to the decision in [Noorduddin Vs. Dr K.L. Anand](#), and [Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another](#), where similar view was taken.

9. Having regard to the said decisions, it appears that the Apex Court had recognized the exhaustiveness of the said provision to include all questions within the scope and ambit of the provisions under Order 21 Rule 97 or Rule 99 of the CPC as the case may be, without being tried through a separate suit

10. Reference to Section 44 of the Evidence Act by Mr. Bhattacharya is misconceived and would be of no assistance to him. Inasmuch as, Section 44 deals with the extent of admissibility of Judgment of Courts of justice when relevant, particularly, those referred to in Sections 40, 41 and 42 of the Evidence Act. Court is supposed to take cognizance of such judgments referred to in the said three Sections. But such judgments can be resisted in relation to or in respect of its relevance on the ground of fraud or collusion or incompetence of the Court, as the case may be. Section 44 does not confer any independent right of initiating a proceeding. It is a matter of evidence, which can be done by proving those judgments to have been obtained from a Court not competent to deliver the judgment or that such judgment was obtained by fraud or collusion. It is a procedure for admissibility of an evidence and has nothing to do with filing of a suit. In any event the question is of no importance when it is considered in the context of a proceeding under Order 21 Rules 97, 99 read with Section 101 of Code of Civil Procedure, which permits determination of all questions between the parties as discussed above. However, the aid of Section 44 of Evidence Act can be taken even in a proceeding contemplated under Order 21 Rules 97 and 99.

11. For all these reasons, we find that the order appealed against could not be sustained in view of the fact that no prima facie case could be said to have been made out since the suit appears to be hit by a statutory bar provided in Order 21 Rule 101 of Code of Civil Procedure. Therefore, the order of injunction cannot be sustained.

12. In the result, the appeal is allowed. The order appealed against is hereby set aside.

13. Injunction granted by the learned Trial Court stands vacated. The execution proceeding may proceed. In case the respondent is not a party to the said proceeding, the appellant shall include the respondent as a party therein. In any event, if the respondent claims any right to resist the decree, she shall be added as a party to the execution proceeding. The application under Order 21 Rule 97 shall be

decided in accordance with law after giving opportunity to the respondent, who shall be at liberty to take all points, as may be advised. The observations made herein are all tentative for the purpose of deciding this appeal. The learned Executing Court shall be free to decide all questions in accordance with law and according to its own wisdom and discretion, without being influenced by any observation made in this order.

14. There will be no order as to costs.

15. This Court expects that the Executing Court shall decide the question indicated above within a period of six months from date.

16. Learned Counsel for the appellant submits that the order granting police help has already been allowed. Having regard to the peculiar feature of this case, the said order shall be given effect to only after giving opportunity of hearing to the respondent herein in terms of this order as directed above. Let the Lower Court Records be sent down to the learned Court below within fortnight from date.

Joytosh Banerjee, J.

I agree.