

(1997) 07 CAL CK 0010

Calcutta High Court

Case No: First Miscellaneous Appeal No. 505 of 1989 in Miscellaneous Case No. 1321 of 1981

Hiralal Sha

APPELLANT

Vs

Debprosad Dey

RESPONDENT

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Date of Decision: July 25, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 97, 122

Citation: (1997) 2 ILR (Cal) 111

Hon'ble Judges: Satyabrata Sinha, J; B. Bhattacharya, J

Bench: Division Bench

Advocate: S.P. Roychowdhury and J.R. Chatterjee, for the Appellant; Ram Krishna Mitra, for the Respondent

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### Judgement

Para. 11

B. Bhattacharya, J.

This First Miscellaneous Appeal has been preferred by a third party/resister against the order passed by the learned Judge, 2nd Bench, City Civil Court, Calcutta thereby allowing the application of the Respondent No. 1 under Order 21, Rule 97 of the CPC and granting police help for execution of the decree for recovery of possession passed in favour of the Respondent No. 1. The undisputed position is that the Respondent No. 1 filed a suit for eviction against the Respondent Nos. 2 to 8 and obtained a decree which was affirmed up to this Court. Subsequently, the Respondent No. 1 and the decree holder put the said decree into execution and obtained recovery of possession in execution of the same. But on the same day the judgment-debtors again trespassed into the suit property which prompted the Respondent No. 1 to file an application for restoration of the said execution case and the learned Judge was pleased to allow the same. Against the order, Respondent Nos. 2 to 8 filed a revisional application before this Court but this Court

did not interfere with the order of the learned executing court restoring the execution case.

2. Thereafter the execution of the decree Respondent No. 1 got delivery of possession of part of the suit property except the present subject-matter of the execution case which was in occupation of the Appellant and the said execution case was dismissed on part satisfaction.

3. Subsequently, the instant execution case being Ejectment [Execution case No. 471 of 1979 was filed by the Respondent No. 1 for recovery of the remaining part of the property which could not be executed by the earlier execution case. The present Appellant and the Respondent No. 9 having resisted the Baliff, the present Respondent No. 1 filed an application under Order 21, Rule 97 of the CPC thereby giving rise to the Miscellaneous Case No. 1321 of 1981.

4. The present Appellant contested the said miscellaneous case under Order 21, Rule 97 by filing written objection thereby contending that he was originally a sub-tenant under the judgment-debtors but in execution of the decree he along with judgment-debtors were dispossessed. After being dispossessed, he approached the Respondent No. 1 for fresh tenancy and the Respondent No. 1 accepted his proposal and created a fresh tenancy in his favour in respect of the shop room at a monthly/rental of Rs. 50/-. However, it was agreed between the parties that for such tenancy no rent receipt would be granted. Thus, the Appellant has obtained a right over the suit property by virtue of his fresh tenancy.

5. At the time of hearing of the aforesaid Miscellaneous case the nephew of the Respondent No. 1 and the baliff of the court gave evidence in support of the application under Order 21, Rule 97 CPC while the Appellant deposed in opposing the said application.

6. The learned Executing Court after consideration of materials on record disbelieved the case of tenancy advanced by the Appellant in his objection to the application under Order 21, Rule 97 Cods of CPC and granted police help in favour of the Respondent No. 1.

7. Being aggrieved by the said order the present First Miscellaneous Appeal has been preferred by the Appellant.

8. Mr. S.P. Roychowdhury, learned senior advocate appearing on behalf of the Appellant has not disputed the finding of the learned Executing Court, as regards the status of the Appellant, viz., he failed to prove his alleged tenancy right. Mr. Roychowdhury's contention was, however, three fold: Firstly the application which has been described as one under, Order 21, Rule 97 CPC does not contain any averment in terms of Rule 208 of the Civil Rules and Orders and the order of the Executing Court granting police help does not mention the existence of the ground which are necessary for granting the police help. The second contention is that

previously the Executing Court wrongly restored the Execution Case after giving delivery of possession and although the said order was affirmed in revision by this Court, since the present Appellant was not a party to that proceeding, he was not bound by that order and as such a fresh execution case was not maintainable and by the fresh execution case he cannot be dispossessed. The third contention of Mr. Roychowdhury is that after an application under Order 21, Rule 97 CPC has been adjudicated and the Appellant has been found to be a trespasser, the said trespasser cannot be dispossessed by the order of the Executing Court, but according to him, after the said adjudication the decree-holder is required to file a fresh suit for recovery of possession and in that suit the finding of the executing court will be res-judicata.

9. As regard the first point raised by Mr. Roychowdhury it is undisputed that an appeal is maintainable only against an order adjudicating the rights of the parties under Order 21 Rule 97, CPC when the finding of the executing court that the status of the Appellant is that of a trespasser is not disputed by him he cannot evade the order granting police help on the ground that the provision contained in r. 208 of the Civil Rules and orders has not been followed. Mr. Roychowdhury, in support of his contention relied upon a decision of this Court reported in [Mrs. Ajit Kumar Ray Vs. Jnanendra Nath Dey and Others](#), . The aforesaid decision was given by this Court in a Civil Revisional application at the instance of the wife of a judgment-debtor who resisted a decree for recovery possession. The executing Court granted police help as the wife of the judgment-debtor resisted the decree without just cause. The grievance of the Petitioner in that case was that the executing Court granted police help without giving any reason in the order that there was. any grave situation created by the register. This Court accepted the said contention and set aside the order granting police help is the learned executing Court did not apply its mind to see who the actual resister was. The aforesaid decision was passed before the amendment of the CPC of 1976 was effected. In our opinion, that decision has got no application to the fact of the present case. In the instant appeal, we are required to consider whether the Appellant has acquired independent title over the suit property by virtue of his alleged tenancy. Once we find that no such tenancy was created in favour of the Appellant by the decree-holder we are left with no other alternative but to put the decree-holder in possession of the property.

10. The second point raised by Mr. Roychowdhury, in our opinion, has got no force for the simple reason that in an application under Order 21, Rule 97 the third party/resister can resist the decree on the ground that he has acquired an independent title over the suit property and that he is not claiming through judgment-debtor or, in other words, he is not bound by the decree. Therefore, the second plea that the second execution case is not maintainable, is not available to him.

11. As regards the third point raised by Mr. Roychowdhury, we are at a loss to appreciate the submission made by him. Once an adjudication is made by Order 21 Rule 97 CPC and in terms of r. 98 Court passes an order for putting the decree-holder into possession, there is hardly any scope for argument that even after such adjudication the decree-holder is required to file a fresh suit for recovery of possession and that in such a suit the present finding will be a res judicata.

12. Thus, we find no merit in this appeal and the same is liable to be dismissed.

We, however, make no order as to costs.

Let the lower court records be sent down by Special Messenger at the cost of the Respondent No. 1 and such cost is to be deposited within a week.

Certified xerox copy of the order, if applied for, be supplied to the parties within a fortnight.

Satyabrata Sinha J.:

13. Although I agree with the judgment pronounced by my learned Brother, keeping in view the importance of the question involved in this matter I would like to add a few words of mine.

14. Section 122 of the CPC empowers the High Court to make rules. Such rules had been made by the High Court prior to coming into force of the CPC (Amendment) Act, 1976. Keeping in view the anomalies which may arise as regard the rules framed by the different High Courts in exercise of the power conferred upon them in terms of Section 122 of the Code of Civil Procedure, the Parliament in its wisdom provided as follows:

Any amendment made, or any provision inserted in the principal act by a State Legislature or a High Court before the commencement of this act shall, except in so far as such amendment or provision is inconsistent with the provisions of the principal act as amended by this Act shall stand repealed.

15. Rule 208 of the Civil Rules and Orders made by this Court does not take into consideration the peculiar situation arising in view of the amendment made under Order 21, Rule 97 of the Code of Civil Procedure. Keeping in view such amended provision I am of the opinion that now a composite application both under Order 21, Rule 97 as also Rule 208 of the Civil Rules and Order is maintainable in view of Clause (b) of the former provision.

16. The learned trial Court has not, thus, committed any illegality in passing the impugned order.

17. In view of the fact that an obstruction had been made by the Appellant culminating in filing of an application under Order 21, Rule 97 CPC it was not unlikely for the Decree-holder to anticipate that such an obstruction might again be

made.

18. So far as the third contention of Mr. Roychowdhury is concerned, the same, to me appears to be wholly misconceived. Prior to amendment of 1976 in the Code of Civil Procedure, an enquiry by the executing court under Order 21 Rule 97, in an execution procedure for removal of obstruction, was a summary one wherein the court was concerned only with the question of possession of the obstructor and in terms of r. 98 thereof, at the instance of a resister or the judgment-debtor or some other persons at his instigation, as the case may be, the Court had to direct for giving possession. But in terms of Order 21, Rule 97 CPC as it stood prior to amendment the third party could prove to be in bona fide possession of the property in question in which event, the said application was bound to be dismissed. CPC (Amendment) Act, 1976 brought a sea change in the aforementioned provisions. In fact, the Parliament, keeping in view the mischief which was being caused by the third party either in collusion with the judgment debtor or otherwise by obstructing to the delivery of possession to the Decree Holder, in its wisdom thought it fit to amend the Act. The amended provision, thus, have to be construed keeping in view the well known principles of Heydon's Rules;

19. In terms of 1976 Amending Act, all questions including the question as to the right, title or interest in the property arising between the parties to the proceeding under, Rule 97 or Rule 99 of Order 21 of CPC must be determined by the executing court and not by a separate suit.

20. The scope of a proceeding under Order 21 Rule 97 of the CPC has, therefore, been expanded to the extent that all questions arising between the Decree Holder and third party in collusion with the judgment-debtor or otherwise including the question as to the title of such parties in the property has to be adjudicated upon which could be raised earlier only in terms of Rule 103 of Order 21 of the CPC as it then existed. The procedure prescribed in a complete code in itself in the case of [Babulal Vs. Raj Kumar and Others,](#)

21. In that view of the matter once an order is passed under Order 21, Rule 97 of the Code of Civil Procedure, the same would be final and binding on the obstructor and there cannot be any reason as to why despite such an order in terms whereof the Decree-Holder is to be put in possession, he has to file a separate suit therefor. Further in terms of the said rule the Court is entitled to pass any other order as to it may appear fit and proper.

22. This aspect of the matter has been considered in [N. Palaniappan Vs. G. Pandurangan,](#) (per Abdul Hadi, J.). I respectfully agree with the said view.