(1998) 03 CAL CK 0039

Calcutta High Court

Case No: FMAT No. 3989 of 1994

Rubiren Engineering Corporation		APPELLANT
	Vs	
Abhoy Singh Surana and Others		RESPONDENT

Date of Decision: March 26, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 97, Order 21 Rule 99, 47

Citation: 1 CWN 79

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

Bench: Division Bench

Advocate: S.P. Roychowdhury, S.K. Mukherjee and A.K. Rakshit, for the Appellant;Gautam Chakraborty, Samar Banerjee, S. Ghose Chaudhuri and Malay Das, for the Respondent

Final Decision: Dismissed

Judgement

Satyabrata Sinha, J.

The petitioner-appellant in the Civil Revision Application as also the appeal, which is a partnership firm, was a third party in an execution proceeding. The first respondent-landlord filed a suit in August, 1979 for eviction of the respondent No. 2. During pendency of the said execution proceedings the appellant filed an application purported to be u/s 47 of the Code of Civil Procedure, paragraph 3 whereof reads thus:

"That the opposite party No. 1 is staying on the 1st floor at the said premises. Your petitioner since the 1st part of year 1967 is adversely occupying a room at the ground floor at Premises No. 3. Mango Lane, Calcutta-1 without any interruption and/or resistance from the opposite party No. 1. The opposite party No. 1 nerve asked your petitioner to vacate the said premises. Therefore, your petitioner is in possession of the said room bearing their lawful right, title, interest in the said room. Actually the uncle of the opposite party No. 1 since deceased is distant

relation of one of the partners of your petitioner, who allowed your petitioner to run the said businesses as rightful owner of the said suit room without paying any rent to the opposite party No. 1. Since then your petitioner is running their business at the said premises without any obstruction from opposite party No. 1".

As during pendency of the said application the first respondent-decree holder prayed for police help in terms of Rule 208 of the High Court Civil Rules and Orders, the appellant filed another application purported to be under Order 21 Rule 101 of the CPC making the same allegations.

2. Before the learned trial Judge the appellant did not adduce any oral evidence. It appears from Order No. 24 of the Miscellaneous Case which was registered pursuant to filing of the said application, an application for adjournment was filed but the same was rejected. Both the parties appear to have filed their documents which have been considered by the learned trial Judge although they were not marked as exhibits. The learned trial Judge in terms of the judgement under appeal dated 21.3.94 held that the both the said applications u/s 47 of the CPC are not maintainable and while arriving at the said finding it relied on a decision of a division bench of this court in Lakshmi Debnath v. Renu Aich &. Ors., reported in CLT 1994(1) HC 58.

3. On merit of the matter also, the learned trial Judge clearly committed an error in holding that the appellant''s application u/s 47 of the CPC as also under Order 21 Rule 101 of the CPC were not maintainable in view of the decisions of this court as also the Apex Court inasmuch as all the objections raised by a third party must be decided in the execution proceedings itself. Reliance in this connection has been placed on Subhendu Gupta vs. Calcutta Vyapar Pratisthan Ltd., reported in 1995 W.B.L.R. 101, Sri Deba Prasad Mazumdar vs. Sri Man Mohan. Mazumdar & Ors., reported in 1997(1) CHN 495 , Bhanwar Lal Vs. Satyanarain and another, , Babulal Vs. Raj Kumar and Others, and Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, . The learned Counsel, however, accepted that although the learned trial Judge, inter alia, held that the application filed by the appellant u/s 47 as also under Order 21 Rule 101 of the CPC were not maintainable, it had the jurisdiction to decide the case on merit. The learned Counsel, however, submitted that although the appellant had taken a plea of adverse possession as also a plea of being a licencee, keeping to view the fact that the first respondent raised a specific plea to the effect that the plea of the appellant as regard grant of licence by an uncle of one of the partners of the decree holder failed inasmuch as the person concerned died in the year 1964 whereas the appellant allegedly came into possession of a portion of the suit property in the year 1967, it was incumbent on the learned trial Judge to consider the case of the appellant relating to adverse possession only. The learned Counsel submitted that it is a well-settled principle of law that even a trespasser cannot be evicted without due course of law. Reliance in this connection has been placed on Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao, The

learned Counsel submitted that keeping in view the fact that the appellant has produced a large number of letters the same would subserve the requirement of adverse possession as has been laid down in Secretary of State for India in Council vs. Debendra Lal Khan, reported in Law Reports 61 Indian Appeals, 78 and AIR 1981 707 (SC) and as such, the said applications ought to have been allowed. Mr. Roy Chowdhury would urge that the learned trial Judge misdirected himself in passing the impugned order in so far as while arriving at a finding that the plea of licence set out by the appellant was false, took the said plea itself into consideration while negativing its plea of adverse possession. The learned Counsel submits that as it cannot be held by this court as to what extent the irrelevant finding arrived at by the learned trial Judge influenced his mind in view of the decision of the Supreme Court in Budhwanti and Another Vs. Gulab Chand Prasad, the impugned order should be set aside. Last but not least it was contended that the entire procedure adopted by the learned trial Judge was illegal inasmuch as he purported to have decided the case only on the basis of the documents filed by the parties although same had not been proved. In this connection our attention has in particular been drawn to a letter written by the learned Advocate of the first respondent of the Supreme Court to the effect that while the hearing of the appeal was going on before the Supreme Court the representative of the petitioner was present.

4. Mr. Gautam Chakraborty the learned Senior Counsel appearing on behalf of the decree holder-first appellant, on the other hand, submitted that it was for the appellant itself to adduce evidence but it failed to do so. The learned Counsel submitted that even if all the documents produced by the appellant are taken into consideration, the court cannot arrive at a finding that the appellant has been able to prove its plea of adverse possession. The learned Counsel pointed out whereas only two letters are of 1978 and 1979, all other documents are from 1982 onwards whence a decree had already been passed. Mr. Chakraborty urged that the plea of adverse possession, if any, would be as against the judgment-debtor and not the decree-holder-and in that view of the matter the said plea must be held to be absolutely unsustainable.

5. There cannot be any doubt whatsoever that in view of the decisions of this court as also the Apex Court of India upon which reliance has been placed by Mr. Roy Chowdhury all the disputes arising between a third party and the decree holder must be decided in the execution proceedings itself.

6. It may be true that an application under Order 21 Rule 101 of the CPC as such was not maintainable inasmuch as the said provision lays down merely a procedure for adjudication if a proceeding arising out of an application filed under Order 21 Rule 97 and/or Order 21 Rule 99 of the CPC but in our opinion by reason of that lacuna only the application of the appellant could not have been thrown out inasmuch as it is well known that wrong mentioning of a provision of law itself would not justify rejection of an application, if it otherwise satisfies conditions precedent therefor.

However, in this facts and circumstances of this case the learned trial Judge has rightly held, that an objection u/s 47 of the CPC was not maintainable. The appellant in his application had taken a mutually destructive plea i.e. adverse possession as also licence. The said pleas are absolutely self-contradictory. While deciding a case of this nature, in our opinion, the court is entitled to consider such inconsistent and contradictory pleas for the purpose of arriving at a decision as to whether the claim of the parry is sustainable.

7. The submission of Mr. Roy Chowdhury to the effect that keeping in view the defence of the first respondent the learned trial court was precluded from taking into considering the said inconsistent plea of the appellant cannot be accepted inasmuch as the decree holder was entitled in law to refute both the pleas of the appellant. The decree holder was entitled to show that both the plea of adverse possession as also licence set up by the appellant are false. The appellant was in the category of plaintiff. It was for it to prove its own case. If it had taken a mutually destructive and self-inconsistent plea, it must suffer therefor. Only because the first respondent has been able to prove that the plea of licence set out by the appellant was ex facie false, the learned trial court in our opinion, did not commit any error in considering the said plea taken by the appellant. Furthermore, the appellant being in the position of the plaintiff was bound to fail, if no evidence was adduced by either party as it was bound to prove its own case. There cannot be any doubt whatsoever that the contention of Mr. Roy Chowdhury to the effect that the documents relied upon by the decree holder ought to have been proved but the same principle would apply in case of the appellant also. If the appellant has not adduced any evidence to prove the documents, the same could not have taken into consideration at all. Before the learned trial Judge a mere prayer for adjournment was made which was disallowed. No appeal has been preferred against the said order. The appellant submitted itself to the jurisdiction of the learned trial Judge and accepted the procedure of getting the matter adjudicated only on the basis of the documents filed by the parties. Even if the contents of the documents filed by the appellant are taken to be correct and be taken into evidence. we find that the said documents do not advance the case of adverse possession as pleaded by the appellant. As noticed hereinbefore, the appellant has raised a plea of adverse possession against the decree holder. From the judgement passed in the Ejectment Suit as also the pleadings of the parties it is evident that the respondent judgement debtor had been in possession of the tenanted premises as contained in Schedule ''A'' of the plaint for a long time. There are reference in the judgement passed by the learned trial court to show that there had been transactions in the said premises as far back as in 1956. In fact, the appellant itself took the plea that it had come into possession of the premises in question in the year 1967 and, the question which arises for consideration is whether it had been able to prove the said fact Ex facie, it did not. The registration certificate of the appellant would show that the firm was constituted in the year 1977 and it was registered as a partnership firm in the year

1978. It had shown its principal office of business in the second floor of 2, Mango Lane which admittedly was vacated by it in 1979. The subject matter of the dispute is a portion of the suit premises which is being a portion of the room partitioned by a wooden wall. The ground floor was a godown. The suit for eviction was filed in respect of the said ground floor. Only 3 documents prioto institution this suit were filed by the appellant to show that it had made correspondence from the said address. Other documents were created during pendency of the suit.

8. The learned trial Judge, in our opinion, was not wholly incorrect when it came to the conclusion that in Calcutta, although business is carried out by a partnership firm from another address, for other purposes another address is shown. The very fact that the appellant-firm was constituted in the year 1977 ex facie goes to show that its plea that it came to the possession in the year 1967 is false. Further, its principal address was the second floor of 2, Mango Lane and not in the ground floor.

9. The ground floor admittedly had been let out to the Judgement debtor. It is interesting to note that during the course of hearing before the learned trial court, the judgement debtor supported the case of the appellant despite the fact that admittedly it had taken the plea throughout the course of litigation that it was itself in possession of the tenanted premises and it had not the sub-let premises to another concern which was said to be a sister concern.

10. Both the judgement debtor and the appellant carry on similar nature of business. With a view to prove adverse possession the appellant was bound to furnish all particulars as to how and in what manner it had committed covert, acts to show that its possession was hostile to the decree holder. It is now a well settled principle of law that mere possession does not constitute adverse possession. The appellant further failed to prove as to how and in what manner it came to possession Of the properties in question. Apart from the correspondences it also Sidled to prove that it was in actual physical possession of the premises to question. The premises to question being a part of the suit premises was admittedly in possession of the judgement debtor. The decree holder -first respondent could not have put the appellant in possession of the premises in question.

11. Whether possession of a person would amount to justerti is essentially a question of fact and must be proved by cogent evidence. The appellant has not adduced any evidence at all.

12. In Jahurul Islam Vs. Abul Kalam and others, a division bench of this court has laid down the law in the following term :

"It is true, as noted by the learned trial Judge, that the appellant has exhibited a large number of documents to establish that he has been living and carrying on business in the suit land since 1966. We have already mentioned previously what these documents are. But then as pointed out by the learned trial Judge-in such. a

case as the present, mere possession even of a tresspasser will not constitute adverse possession unless accompanied by open assertion of hostile title; Premendu Bhusan Mondal Vs. Sripati Ranjan Chakravarty, ; Bhagavathy Pillai (died) and Another Vs. Savarimuthu and Another, ; Gaya Parshad Dikshit Vs. Dr. Nirmal Chander and Another, Since when the appellant has been claiming adverse possession in this case?"

13. In that case also several documents had been filed but despite the same it was held that the same did not constitute adverse possession.

14. The appellant has also utterly failed to prove as to since when his possession begun and in any view its possession, if any, was either permissive or adverse vis-a-vis the judgement debtor and in any event such provision could never be adverse to that of the decree holder. The tests of adverse possession in the decisions cited by Mr. Roy Chowdhury also are to the same effect. It is, therefore, not a case where the learned trial Judge has committed an error of jurisdiction or has failed to appreciate the evidence in their proper perspective. The appellant had put forward a wholly false plea and the same had rightly been rejected by the learned trial Judge.

15. In Hiralal Sha vs. Debprosad Dey & Ors., (F.M.A. No. 505 of 1989) disposed of on 25th July, 1997, a Division Bench of this court has held that the executing court can issue a direction in terms of Rule 208, of the Civil Rules, and Orders made by this court while disposing of an application under Order 21 Rule 97 of the Code of Civil Procedure. For the reasons aforementioned there is no merit either in this appeal or the revision application which are accordingly dismissed. Keeping in view the fact that the first respondent could not get possession for a long time, the appellant shall pay and bear the cost of the decree holder-respondent. Counsels fee assessed at 200 Gms.

D.B. Dutta, J.

I agree.