

**(2014) 12 CAL CK 0047**

**Calcutta High Court**

**Case No:** C.O. 2072 of 2013

Ananya Dalal

APPELLANT

Vs

Mira Dalal

RESPONDENT

**Date of Decision:** Dec. 23, 2014

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 91, Order 21 Rule 97, Order 41 Rule 11
- Constitution of India, 1950 - Article 227

**Citation:** (2015) 4 CHN 567 : (2015) 2 WBLR 624

**Hon'ble Judges:** Subrata Talukdar, J

**Bench:** Single Bench

**Advocate:** Anit Kumar Rakshit and Z. Rahaman, Advocate for the Appellant; Bidhyak Lahiri and Debjit Chatterjee, Advocate for the Respondent

**Judgement**

Subrata Talukdar, J.

In this application under Article 227 of the Constitution of India the petitioner has challenged the order impugned dated 4th June, 2013 passed by the Ld. 3rd Civil Court (Junior Division) at Alipore in Misc. Case No. 11974 of 2013 arising out of Title Execution Case No. 18111 of 2011 in the matter of Ananya Dalal vs. Mira Dalal & Ors.

2. The brief facts of the case are as follows:-

- a) That on 4th June, 2013 the petitioner filed an application under Order 21 Rules 97 and 100 of the Code of Civil Procedure (for short CPC) read with Section 151 CPC in respect of an execution proceeding being Title Execution Case No. 18111 of 2011 arising out of Title Suit No. 104 of 2006 and pending before the Ld. Civil Court (Junior Division) at Alipore.
- b) The petitioner claims to be in adverse possession of the suit premises No. 2/1, Nokuleswar Bhattacharjee Lane, P.S.-Tollygunge, Kol-700026. According to the

petitioner, the complainant and the present OP 4, one Pradip Dalal, were married in the year 1990 at the end of a courtship period. The marriage between the petitioner and the OP 4 was not accepted by the Opposite Parties even after the birth of their first son on 10th September, 1992.

Due to the ill-treatment of the OPs, who were the family members of the OP4, the petitioner was compelled to live at her flat in 12/1/1A, Monoharpukur Road, Kol-26. The petitioner thereafter gave birth to a second child on 1st September, 1994 and the petitioner alleges that even after the birth of the second child her husband, the OP4, did not care to visit either his wife or his two children.

c) Since the petitioner was not accepted at her matrimonial house at 2/1, Nakuleswar Bhattacharjee Lane, Kol-700026 on 1st October, 1994 the petitioner along with the help of her father and local people forcefully took possession of the matrimonial house by ousting the OPs from the said house.

d) Thereafter the petitioner claims to have been residing in the said premises along with her father and two sons on the ground floor and has given tenancy of the first floor on a monthly basis.

e) Being in such possession of the suit premises the petitioner obtained knowledge of the fact that the OPs have obtained a decree in Title Suit No. 104 of 2006 and, on the basis of such decree, which the petitioner claims to be collusive, execution proceedings have been initiated by the OPs to dispossess the petitioner from the suit premises. The petitioner has been resisting such dispossession on the ground that she is in adverse possession of the same by making some additional construction in the suit premises.

f) It is the further claim of the petitioner that she is not bound by any decree since such decree was passed behind her back and in favour of the OPs No. 7 to 9. Since the petitioner is not bound by any decree she cannot be bound by any execution proceeding arising out of such decree and, therefore for adjudication of her rights the petitioner has filed an application under Order 21 Rules 97 & 101 read with Section 151 CPC.

g) The petitioner is aggrieved by the fact that inspite of pendency of her application under Order 21 Rules 97 & 101 read with Section 151 CPC being Misc. Case No. 11974 of 2013 before the Ld. 3rd Civil Court (Junior Division) at Alipore, no interim relief was granted to her and the execution proceeding was allowed to continue.

3. Shri Anit Kumar Rakshit, Ld. Counsel appearing on behalf of the petitioner submits that the petitioner is entitled to have her rights independently adjudicated in her application filed under Order 21 Rules 97 & 101 read with Section 151 CPC. In the event the decree is allowed to be executed during the pendency of Misc. Case No. 11974 of 2013, the petitioner shall suffer grave prejudice.

4. Shri Rakshit submits that a direction may be given by this Court to the Ld. Trial Court to dispose of Misc. Case No. 11974 of 2013 within a specified period prior to proceeding with the execution case.

5. Per contra, Shri Amitava Ghosh, Ld. Counsel appearing for the OPs 7, 8 & 9/decree holders submits as follows:-

1) That the present petitioner is the wife of the OP4, who is one of the judgment debtors in Title Suit No. 104 of 2006. In this connection he draws the attention of this Court to the contents of the application under Order 21 Rules 97 & 101 read with Section 151 CPC.

2) Shri Ghosh has emphatically argued that in spite of the elaborate story spun by the present petitioner of estranged relations between the husband and wife, no suit or any other proceeding has been initiated or is pending between the parties. Shri Ghosh draws the attention of this Court to the contents of the Order impugned No. 34 dated 4th June, 2013 passed by the Ld. Civil Court (Junior Division) in Misc. Case No. 11974 of 2013. The said order reads as follows:-

"The record is put up today by the petitioner.

Ld. Advocate for the petitioner moves the application for stay of all proceedings in Title Execution Case No. 18111 of 2011.

Hd. the Ld. Advocate for the petitioner.

Peruse the record.

The impugned decree was passed on contest and the same was affirmed upto Second Appeal by the Hon"ble Court. Thereafter, the two Misc. Cases were filed to stall the execution proceeding and both were dismissed. The instant case is a third one in the row.

Considering the fact that the writ for delivery of possession had already been issued and the same is pending for report, I am not inclined to pass any ad-interim order of stay without hearing the other side. Moreover, if the petitioner succeeds in establishing her case, law provides for remedy in case the decree has already been executed.

As such, the prayer for an ad-interim order of stay is rejected at this stage.

To date."

3) Placing the application under Order 21 Rules 97 & 101 read with Section 151 CPC, Shri Ghosh has argued that the present petitioner does not fall within the category of any person aggrieved under Order 21 Rules 91 & 97 CPC. Shri Ghosh points out the petitioner has been set up by the OP4/judgment debtor/husband since the rights of the judgment debtor have already been decreed against him. Shri Ghosh further points out that there is a contradiction between the story concocted in her

application under Order 21 Rules 97 & 101 read with Section 151 CPC to the effect that although in terms of the report of Bailiff the judgment debtors being the OP Nos. 1 & 4 are in possession of the suit premises, in her application the petitioner has claimed to be in possession of the same.

6. Shri Ghosh has pointed out that the OP4/judgment debtor filed an earlier application under Order 21 Rules 100 & 101 read with Section 47 of the CPC and the same was registered as Misc. Case No. 5013 of 2011. The said Misc. Case having stood dismissed the OP/Judgment debtor set up another person namely, one Sreya Hazra (Dalal) and filed Misc. Case 1059 of 2014 under Order 21 Rules 97 & 101 read with Section 47 & 151 CPC. The second Misc. Case having also stood dismissed, the judgment debtor/OP4 has now set up his wife to present Misc. Case No. 11794 of 2014 praying for identical reliefs. Shri Ghosh therefore argues that the present application is vexatious and deserves to be dismissed.

7. Heard the parties. Considered the materials on record.

8. At the very outset this Court finds that the present application being CO No. 2072 of 2013 turns on its peculiar facts. This Court also notices that the seemingly innocuous prayer made by the petitioner has been met by Sri Ghosh appearing for the OPs 7 to 9 with sufficient force.

9. On examination of the facts and the chain of events this Court finds substance in the argument of Sri Ghosh that there is contradiction in the story narrated by the petitioner in her application under Order 21 Rules 97 and 101 read with section 151 CPC claiming to be in possession of the suit premises, whereas, according to the report of the Bailiff, it is the judgment debtors/OPs 1 to 4 who are in possession of the suit premises. The OP No. 4 is not only the judgment debtor but also the husband of the present petitioner.

10. It emerges from the pleadings and from arguments at the Bar that the husband of the petitioner/judgment debtor, the OP No. 4 filed several Misc. Cases being Misc. Case No. 5013 of 2011 and Misc. Case No. 1059 of 2014 praying for identical reliefs which have been prayed for by the present petitioner/his wife in Misc. Case 1179 of 2014. The first Misc. Cases being Misc. Case No. 5013 of 2011 having stood dismissed, the OP4/Judgment debtor set up a third person, one Sreya Hazra (Dalal) to file the second Misc. Case being No. 1059 of 2014 which also stood dismissed. As submitted by Sri Ghosh while the first Misc. Case was filed under Order 21 Rules 100 and 101 read with Section 47 CPC, the second Misc. Case was filed under Order 21 Rules 97 and 101 CPC read with Section 47 and Section 151 CPC.

11. Both the Misc. Cases having stood dismissed the OP 4/Judgment debtor has now set up his wife as the petitioner to file the third Misc. Case 11974 of 2013 under Order 21 Rules 97 and 101 read with Section 151 CPC for identical reliefs and, in effect, to frustrate the decree.

12. This Court also finds the story spun by the petitioner in Misc. Case 11974 of 2013 as argued at the Bar elaborately embroidered to invoke sympathy. However, in the face of the cold facts presented by Sri Ghosh it does appear to the mind of this Court that the entire exercise is collusive and fraudulent between the OP4 and the petitioner, being the husband and wife. Moreover, there does not appear anything from the records that there is a history of estrangement between the husband/OP4 and the wife/petitioner.

13. This Court also notices that the judgment and decree of the Ld. Trial Court dated 11th August, 2011 in Title Suit No. 104 of 2006 was affirmed right upto this Hon"ble Court in second appeal. Dismissing the appeal of the defendants the Hon"ble Division Bench refused to admit the appeal under Order 41 Rule 11 CPC and held the defendants to be liable for eviction.

14. The Hon"ble Division Bench while affirming the order of the Ld. 11th Additional Court at Alipore in Title Appeal No. 296 of 2011 dated 19th September, 2012 affirming the judgment and decree dated 11th August 2011 by its solemn order dated 28th February 2012 in SAT No. 50 of 2011, *inter alia*, held as follows:-

"This is a second appeal against judgment of affirmance. The suit was instituted for eviction of a licensee. The ancestral properties of the predecessor-in-interest of the plaintiffs and the defendants were partitioned by a deed of partition on December 12, 1961.

The suit property was allotted to Phanindra Nath Dalal. His brother, namely, Manindra Nath Dalal was allotted other portion of the property. Phanindra Nath Dalal, out of his love and affection to his said brother, permitted him and his family members to resided in the portion of the ancestral property, which was allotted to Phanindra Nath Dalal. Thus, undoubtedly, Manindra Nath Dalal was a licensee. The son of Phanindra Nath Dalal instituted the suit on May 17, 2006 for eviction by the licensee. The partition was proved. It was established that Phanindra Nath Dalal was the owner of property-in-suit. The property-in-suit was inherited by the original plaintiff and, therefore, by the substituted plaintiffs. The defendant's claim of ownership could not be accepted. The defendant has not title in relation to the property-in-suit. Therefore, the defendant was liable to be evicted. We do not think that the learned judges of the courts below have committed any substantial error of law in decreeing the suit for eviction in the facts and circumstances of these cases. The appeal is, therefore, summarily dismissed under Order XLI rule 11 of the Civil Procedure Code.

In view of dismissal of appeal, the connected application, if any, is, also dismissed."

15. In the backdrop of the above discussion this Court finds no reason to interfere with the order impugned No. 34 dated 04th June, 2013 passed by the Ld. 3rd Civil Court (Junior Division) at Alipore.

16. CO 2072 of 2013 is thus dismissed at costs assessed at Rs. 10,000/- in favour of the OP/decrees holders.

17. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.