

(2013) 01 CAL CK 0086

Calcutta High Court

Case No: C.O. No. 3853 of 2012

Amiya Kumar Das

APPELLANT

Vs

Tarak Nath Sinha and Others

RESPONDENT

Date of Decision: Jan. 8, 2013**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 90, Order 21 Rule 99
- Constitution of India, 1950 - Article 227

Hon'ble Judges: Prasenjit Mandal, J**Bench:** Single Bench**Advocate:** Mihir Das and Mr. Gorachand Samanta, for the Appellant; Priyabrata Mukherjee and Mr. Murari Chakrabarty, for the Respondent

Judgement

Prasenjit Mandal, J.

This application is at the instance of a third party/appellant and is directed against the Order dated September 24, 2012 passed by the learned Judge, City Civil Court, 4th Bench, Calcutta in Misc. Appeal No.1 of 2009 arising out of the Order dated November 28, 2008 passed by the learned Judge, Presidency Small Causes Court, 6th Bench, Calcutta in Misc. Case No. 140 of 2006 arising out of an Ejectment Execution Case No. 122 of 2003. The appellant/petitioner herein filed an application under Order 21 Rule 101 of the C.P.C. praying for declaration of his independent right, title and interest in the suit property and also for declaration that the decree passed in the original eviction suit being Ejectment Suit No. 894 of 1983 is not binding upon him.

2. The decree-holders/opposite parties herein instituted the aforesaid title suit for ejectment and recovery of possession in respect of the premises in suit against the judgment debtors/opposite parties herein and the said suit was decreed on contests against the judgment debtors / opposite parties herein. Thereafter, the judgment debtors preferred a first appeal before the Hon"ble High Court, Calcutta but the said

appeal was dismissed for default. Thereafter, the decree-holders / opposite parties herein instituted the aforesaid execution case against the judgment debtors for recovery of possession. In that execution proceeding, the appellant / petitioner herein filed an application under Order 21 Rule 101 of the C.P.C. which was converted into Misc. Case No. 140 of 2006. The said misc. case was dismissed on contests without costs by the Executing Court.

3. Being aggrieved by such order of dismissal of the misc. case, the appellant/petitioner herein preferred an appeal being Misc. Appeal No. 1 of 2009 which was also dismissed on contests with costs. Being aggrieved by such order, this application under Article 227 of the Constitution of India has been preferred by the appellant/petitioner herein.

4. Now, the question has cropped up for hearing over the maintainability of this application.

5. Upon hearing the learned Counsel for the parties and on perusal of the materials on record, I find that facts as recorded above are not in dispute. The question of maintainability of this application has arisen in view of the provisions of Order 21 Rule 103 of the C.P.C.

6. Mr. Priyabrata Mukherjee, learned Advocate appearing for the opposite parties, has contended that the order passed on an application under Order 21 Rule 101 of the C.P.C. is akin to a decree as per provisions of Order 21 Rule 103 of the C.P.C. Accordingly, he has submitted that after the dismissal of the misc. case, the petitioner preferred an appeal being Misc. Appeal No. 1 of 2009 and this is the correct procedure against the order of dismissal of the said misc. case. Since the petitioner has claimed his independent right, title and interest in the suit property and also for a decree of declaration that the decree passed in the original eviction Suit No. 894 of 1993 is not binding upon him, the adjudication arrived at by the Executing Court on the said application amounts to a decree in view of the provisions of Order 21 Rule 103 of the C.P.C. So, no revision under Article 227 of the Constitution lies.

7. Mr. Mukherjee has also referred to the decision of Jogendra Kaur v. Kali Prasad reported in AIR 2003 Jharkhand 67 particularly the paragraph no. 16 and thus, he has submitted that if the petitioner is aggrieved by the order of the Appellate Court, he has a further right of appeal, i.e., the second appeal.

8. In support of his contention Mr. Mukherjee has also relied on the decision of [N.S.S. Narayana Sarma and Others Vs. Goldstone Exports \(P\) Ltd. and Others](#), and thus, he has submitted that according to the paragraph no. 19 of the said decision, the Executing Court is competent to consider all the questions raised by the person offering obstruction against the execution of a decree and pass appropriate order which under the provisions of Order 21 Rule 103 of the C.P.C. is to be treated as a decree and thus, he has submitted that the appropriate step is to file a second misc.

appeal against the order of dismissal of the aforesaid misc. appeal.

9. On the contrary, Mr. Mihir Das, learned Advocate appearing for the petitioner, has contended that since the provision of the C.P.C. is not clear as to whether an appeal or revision lies, this application under Article 227 of the Constitution of India is quite maintainable.

10. Upon due consideration of the rival contentions of the learned Advocates of both the sides, I think it would be proper to set out the provisions of Order 21 Rule 103 of the C.P.C. below:-

103. Orders to be treated as decrees. - Where any application has been adjudicated upon under rule 98 or rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree.

11. From the tenor of the application, it is clear that the adjudication of the independent right, title and interest in the suit property is involved in the Misc. Case No. 140 of 2006. So, when an adjudication on right, title and interest in respect of the suit property is held in a proceeding under Order 21 Rule 101 of the C.P.C., such an adjudication on right, title and interest, in my view, amounts to a decree as per provisions of Order 21 Rule 103 of the C.P.C. My view gets the support from the case of N.S.S. Narayana Sarma & ors. (supra).

12. While deciding the case of Jogendra Kaur (supra), a Single Judge of the Jharkhand High Court has held that the second appeal is quite maintainable against the order of the Appellate Court arising out of a proceeding under Order 21 Rule 99 of the C.P.C. Relying on different decisions of the Privy Council, such as, (1916) ILR 39 617 (P.C.) (Privy Council) , AIR 1934 81 (Privy Council) and a full bench decision of the Patna High Court in [Ramlal Sahu and Others Vs. Mt. Ramia and Another](#), to the effect that a second appeal does lie to High Court arising out of an order passed under Order 21 Rule 90 of the C.P.C., the learned Judge has concluded that the second appeal is quite maintainable. In the instant case, as noted above, since the stranger has raised a pure question of right, title and interest over the suit property and also for declaration that the decree passed in the concerned suit is not binding upon him, such an adjudication is akin to a decree as per provisions of Order 21 Rule 103 of the C.P.C. So, after the dismissal of the Misc. Appeal No.1 of 2009, in my view, a second misc. appeal lies and not an application under Article 227 of the Constitution of India. Accordingly, I am of the view that this application is not maintainable at all and so, the application should be dismissed on the preliminary point of maintainability.

13. Accordingly, the application is dismissed on the preliminary point of maintainability.

14. It is recorded that I have not decided the merit of the application.

15. It is also recorded that this application was filed on October 19, 2012 and is disposed of today (08/01/2013).

16. The petitioner is at liberty to take back the certified copy of the impugned judgment by annexing another set of Xerox copy of the same.

17. Considering the circumstances, there will be no order as to costs. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.