
(2016) 09 AHC CK 0104

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (M/S) No. 20065 of 2016

Bahadur Hussain @ Kalloo

APPELLANT

Vs

A.D.J. Room No. 5 Lko

RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

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

Citation : (2016) 10 ADJ 352 : (2016) 119 ALR 236 : (2016) 3 ARC 624 :
(2017) 1 CivCC 362 : (2016) 133 RD 770

Hon'ble Judges : Aditya Nath Mittal, J.

Bench : Single Bench

Advocate : Adarsh Mehrotra, Advocate, for the Petitioner; S.C, for the Respondents

Final Decision : Dismissed

Judgement

Aditya Nath Mittal, J.— Heard learned counsel for the petitioner and perused the record.

2. This petition has been filed with the prayer to set aside the order dated 25.03.2016 and 16.08.2016 passed by the opposite parties no. 1 and 2 respectively.

3. Learned counsel for the petitioner has submitted that he is the owner of the plot measuring 832 sq. ft. situated at Maidan L.H. Khan, Kashmiri Mohalla, P.S. Sahadatganj, Lucknow by way of Will executed by his uncle on 20.12.1992, which is the part of large area measuring about more than 6000 sq.ft., belongs to Syed Riyaz Husain, who has sold out various plots to different persons, out of which one plot was sold to Rafi Zaidi and another plot was sold to Shahid Akhtar, who later on sold it to Parveen Rizvi who has filed the regular suit no.378 of 2002 for declaration and possession against Nawaboo Husain, the alleged licensee. After the death of Syed Riyaz Husain in the year 2004, the petitioner has perfected his rights over the property and the said suit no.378 of 2002 was

decreed on 15.01.2015 and in the execution proceedings, the court amin along with the assistance reached the house of the petitioner for dispossessing him. It has also been submitted that the petitioner had filed the application under Order 21, Rule 97 CPC but the court below without adjudicating the rights of the parties, have rejected the said representation/application. It has also been submitted that the plaintiff of the suit had not mentioned the boundaries of her property.

4. From the perusal of the record, it reveals that an application under Order 21, Rule 97 CPC was moved by the petitioner on 08.02.2016 against which the decree holder had filed objections. In the representation/application, the aforesaid facts were narrated and in the objections by the decree holder, it was said that the property which the petitioner is telling to get by way of Will of 1992 has already been sold by Syed Riyaz Husain on 29.12.1981 to Sahid Akhtar and Sahid Akhtar, after construction of house sold the property on 21.01.1993 to the decree holder. Therefore, Syed Riyaz Husain had no occasion to execute the Will regarding the disputed property. It has also been mentioned in the objections that after contest, the judgment debtor had lost the case and now he has imposed the petitioner as a forged person as third party to claim his rights.

5. The reply was also filed by the petitioner to the objections of the petition.

6. The main contention of the learned counsel for the petitioner is that the court below has not decided the representation/application as provided in Rule 97 and Rule 101 Order 21 CPC. In this regard, learned counsel for the petitioner has relied upon Jahid Khan and another v. Suresh Chand Jain and others reported at (2013) All. C.J. 2366 in which the coordinate Bench of this Court has held that it is always in interest of justice that rights of third person should be adjudicated before he is actually dispossessed.

7. Learned counsel further relied upon Gaurav Arya and two others v. The Civil Judge (S.D.) and seven others reported at 2014 (2) ARC 539 in which Hon''ble the coordinate bench of this Court has held that the petitioner could not be dispossessed unless question that has arisen in the said application under Order 21, Rule 97 CPC has been decided under Rule 101 Order 21.

8. The gist of the aforesaid law is that if the objections under Order 21, Rule 97 CPC have been filed, they should be decided in accordance with law. Therefore, it has to be seen that whether objections have been decided or not. For the sake of convenience, Rule 97 and Rule 101 Order 21 CPC reads as under:

Rule 97 Order 21 of Code of Civil Procedure 1908: Resistance or obstruction to possession of immovable property -

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate the upon the application in accordance with the provisions herein contained.

Rule 101 Order 21 of Code of Civil Procedure 1908 Question to be determined -

"All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and 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 questions."

9. The aforesaid provisions of CPC provide that where any such application is made, the courts shall proceed to adjudicate upon the application and all questions relating to right, title or interest in the property shall be determined by the Court dealing with the application and not by a separate suit.

10. Perusal of the order dated 25.03.2016 passed by the executing court reveals that both the parties were heard on the application moved by the petitioner. The executing court has come to the conclusion that the suit was decreed on 15.01.2015 and the objection under Section 47 CPC in which it was alleged that the property is unidentifiable on the ground that the boundaries have not been given, was decided by order dated 18.02.2015 and the objections under Section 47 were rejected holding that in the original suit no.378 of 2002, the boundaries of the disputed property have been given specifically, which is identifiable.

11. The contention of the learned counsel for the petitioner is that the boundaries of the property in dispute have not been shown, were found wrong on the ground that in the plaint itself, the boundaries of the property in dispute were mentioned. The learned executing court has also come to the conclusion that the boundaries which the petitioner has mentioned in his application C-13 are different from the disputed property and the petitioner himself has not mentioned any house number of his alleged plot. Learned executing court also came to the conclusion that the Will in original has neither been filed nor it has been proved and even if the existence of the Will is presumed, then also the boundaries of the property, which has been mentioned in the Will and the boundaries of the property of the decree holder, are different. Therefore, the application C-13 has been rejected. The aforesaid order was challenged by way of Civil Revision No.98 of 2016 and the Additional Sessions Judge, Lucknow after taking into consideration all the facts and circumstances of the case has reiterated the findings of the executing court.

12. The intention of Order 21, Rule 97 read with Rule 101 CPC is that the question which has arisen should be decided by the executing court. In the present case, the said question has been decided by the executing court by a speaking and reasoned order and the executing court has come to the conclusion

that the boundaries of the property of the petitioner are entirely different from the boundaries of the property in original suit no.378 of 2002.

In the alleged Will of the petitioner, the boundaries are as under:

East : House of Rafi, Zaidi

West : Wall of Shia Orphanage

North: Rasta Amad Rafat and thereafter property of others

South : Property of Shahid Akhtar

It is not disputed that Shahid Akhtar had subsequently sold the property in dispute to the plaintiff - opposite party no.3. The boundaries as mentioned in the plaint as well as in sale deed are as under:

East : House of Syed Riyaz Husain.

West : Wall of Shia Orphanage.

North: Garden Shia Orphanage.

South : Rasta.

13. From the comparison of the aforementioned all boundaries, it is clear that the boundaries of North and South are entirely different and in the Will itself on the southern side, the boundaries of predecessor (i.e. Sahid Akhtar) of the plaintiff are mentioned, which goes to show that in all the circumstances, there existed the property of Sahid Akhtar, who had subsequently sold it to the plaintiff.

14. It is not the case of the petitioner that apart from the property, which Shahid Akhtar sold to plaintiff, there was any other property of Shahid Akhtar. When the executor of the Will has himself admitted in his Will that on the southern side, there is property of Shahid Akhtar, then the property which belongs to Shahid Akhtar could not be bequeathed by way of Will. Moreover, the property, which has been sold to Shahid Akhtar by Syed Riyaz Husain is not the subject matter of the Will. Therefore, the petitioner cannot claim any right on the property of Shahid Akhtar, which has subsequently been sold to the plaintiff. It appears that in the garb of the alleged Will, the petitioner, as a third party, intends to grab the property which belonged to Shahid Akhtar. It is also not disputed that the defendant of original suit no.378 of 2002 has already lost the case and the judgment debtor also got defeat in the original suit no.38 of 1999, which was for permanent injunction against the plaintiff.

15. The area as well as the boundaries of the property as claimed by the petitioner are different from the property regarding which the decree has been passed. The executing court has decided the application in detail adjudicating the rights of parties, which has further been affirmed by the revisional court by a speaking and reasoned order. The property of original suit No.378 of 2002 is neither vague nor unidentifiable. The boundaries have been mentioned in para 1

of the plaint. Therefore, there is no substance in the submission of learned counsel for the petitioner that boundaries have not been mentioned in the plaint. The contention of learned counsel for the petitioner that in the garb of decree, the Court Amin is trying to dispossess the petitioner, also appears to be baseless in view of the fact that the property of suit no.378 of 2002 is identifiable.

16. For the aforesaid reasons, I find no substance in the submissions of the learned counsel for the petitioner that the executing court has not adjudicated the rights of the petitioner under Order 21, Rule 97 read with Rule 101 CPC. Thus, I do not find any substance in the present petition.

17. The petition is dismissed.