

(1982) 08 KAR CK 0001
In the Karnataka High Court
Case No : R.S.A. 675 of 1981

Chandhakant Mallappa Desai and Another	APPELLANT
Vs	
Mishrimal Namal Oswal and Another	RESPONDENT

Date of Decision : 11-08-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (1984) 1 KarLJ 347

Hon'ble Judges : K. A. Swami, J

Judgement

1. The following substantial question of law raises for consideration in this appeal:

"Whether the lower appellate Court is justified in law in setting aside the order passed by the Executing Court dismissing the application I.A. II filed under S. 151 of the Code of Civil Procedure, for recalling the delivery warrant and further directing that the execution proceeding must await the decision in the Suit O.S. 258 of 1978?

2. It is submitted on behalf of the appellants-decree-holders that the 2nd respondent who is not a party to the decree, has filed an application under S. 151 of the Code of Civil Procedure (for short, "the Code"), to recall the delivery warrant and to stay all further proceedings in the execution. The appellants-decree holders have filed the statement of objections to this application, which is treated by the lower appellate Court as an application filed under O. 21, R. 97 of the Code. It is further submitted that even if it is accepted that the statement of objections of the decree-holders can be treated as an application filed under O. 21, R. 97 of the Code, the lower appellate Court is not justified in setting aside the order passed by the executing Court on an application filed under O. 21, R. 97 of the Code; and further staying all further proceedings in the execution. In support of this submission, learned Counsel for the appellants relies upon R. 101 of O. 21 of the Code.

3. On the contrary, it is contended on behalf of the 2nd respondent-obstructor that the Suit O.S. 258 of 1978 was pending on the date the application under S.

151 of the Code was filed; therefore, no purpose would be served in deciding this application as the very same matter is required to be decided in the suit pending between the same parties. It is further argued that R. 104 of O. 21 of the Code, specifically provides that every order made under R. 101 or R. 103 of the Code shall subject to the result of any suit that may be pending on the date of Commencement of the proceeding in which such order is made: therefore, the lower appellate Court, it is submitted, is justified in law in passing the order of the nature in question.

4. Facts necessary to appreciate the afore said contentions are not in dispute and the same are as follows: The appellants have obtained a decree for eviction in H.R.C. No. 76/78, dt. 9-8-1978 against the first respondent. The second respondent was not a party to the said proceeding. Thereafter they have instituted execution proceeding to obtain possession of the suit premises. The second respondent has caused obstruction. Prior to causing obstruction, he has also filed a Suit O.S. No. 258 of 1978 against the appellants and also the first respondent, for a declaration that he is in possession of the suit premises as tenant and for a permanent injunction restraining the decree-holders from dispossessing him in execution of the decree for eviction obtained against the first respondent. After the institution of the suit, the second respondent has filed an application before the executing Court under S. 151 of the Code, for recalling the delivery warrant, and for staying all; further proceedings in the execution, and to dispose of the execution with out ordering delivery of possession. The decree holders have filed their objections to this application. In my order dt. 29-7-1981, while holding that the Civil Revision Petition 1642 of 1880 preferred against the decree of the lower Appellate Court in question, was not maintainable, I have held that the objections filed by the decree-holders-appellants, should be treated as an application filed under O. 21 R. 97 of Code. As the application was decided on merits, the order had the force of decree. Cosequently, the Civil Revision Petition was allowed to be converted into a Regular Second Appeal. This is how the present Regular Second Appeal has come to be registered. The executing Court, as it is already pointed out, has dismissed the application filed by the second respondent on merits. The 1st Appellate Court has allowed the appeal and has not set aside the order passed by the Executing Court and has also recalled the delivery warrant issued by the executing Court and has further directed the Executing Court to keep the execution pending till the disposal of the Suit-O.S. No. 258 of 1978.

5. R. 101 of O. 21 of the Code, provides:

"101. All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under R. 97 or R. 99 or their representatives, and relevant to the adjudication of the application, shall be determind 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."

R. 104 of O. 21 of the Code which is also relevant for our purpose, is as follows:

"104. Every order made under R. 101 or R. 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit, the party against whom the order Under R. 101 or R. 103 is made has sought to establish a right which he claims to the present possession of the property."

R. 103 of O. 21 of the Code, further provides that the adjudication made under R. 98 or R. 100 of the Code, and an order passed 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. R. 101 of O. 21 of the Code, further provides that the Executing Court shall be deemed to have jurisdiction to decide all questions including those relating to right, title or interest in the property arising between the parties to a proceeding or their representatives and relevant to the adjudication of the application under R. 97 or 99, shall be determined by the Court dealing with the application and not by a separate suit. Consistent with this, the order passed under R. 98 or R. 100 of O. 21 of the Code, has been provided with the force of a decree. That being so, the same subject-matter cannot, in law, be allowed to be tried between the same parties in another suit. Similarly, if a proceeding under R. 97 of O. 21 of the Code, is instituted during the pendency of the suit between the same parties involving same issues filed by the party to establish a right which he claims to the present possession of the property which is the subject matter of both the proceedings, cannot be allowed to go on in view of the fact that there is already a suit filed by the obstructor seeking the very same relief. In such a situation, the proceeding under R. 97 of O. 21 of the Code, being a subsequently instituted proceeding, cannot be allowed to overtake the suit instituted earlier and to render the suit infructuous. The position prior to coming into force of the C.P.C. Amendment Act 104 of 1976 was quite different as there was no provision similar to R. 103 of O. 21 of the Code. Now the effect of R. 103 of O. 21 of the Code, is that even a proceeding under R. 97 of O. 21 of the Code, is treated as suit and the order passed upon the adjudication of the application on merits is treated as a decree. The result is that the provisions of S. 10 of the Code, are also attracted. Therefore, later proceeding will have to be stayed. This is necessary to avoid multiplicity of proceedings.

6. R. 103 of O. 21 of the Code, as it stood prior to Central Act No. 104/76 provided that "any party not being a judgment-debtor against whom an order is made under R. 98, and R. 99 or R. 101 may institute a suit to establish the right which he claims to the present possession of the property; but, Subject to the result of such suit (if any) the order shall be conclusive". The period of limitation for such a suit as per Art. 98 of the Limitation Act, 1963, is one year from the date of the final order. There were different views expressed by the High Court of Calcutta and Madras, as to whether it was necessary to institute a suit within one year or whether a decision in a pending suit could be availed of, if it involved the

same question. To set at rest the controversy, the Law commission, in its 54th Report, recommended for substitution of R. 103 and insertion of the new R. 104. Accordingly the present R. 103 and 104 of O. 21 of the Code, came to be substituted and inserted respectively by C.P.C. (Amendment) Act, 1976 (Central Act No. 104 of 1976). But it appears to me, present R. 103 and 104 of O. 21 of the Code, if interpreted literally, do not help to avoid multiplicity of proceedings. No doubt, the adjudication falling under Rr. 98 and 100 of O. 21 of the Code, are intended to provide a speedy remedy. But having regard to the provisions contained in R. 103 of O. 21, an order passed on adjudication under R. 98 or R. 100 of O. 21 of the Code, shall have the same force and be subject to the same conditions as to an appeal, or otherwise, as if it were a decree, the proceeding censures to be a summary proceeding, it shall have to be tried as a suit. That being so, I fail to understand why the proceeding initiated under R. 97 of O. 21 shall go on when there is already a suit filed by the affected party seeking to establish a right which he claims to the present possession of the property. In addition to this, R. 104 of O. 21 makes the decision rendered under R. 101 or R. 103 of O. 21 of the Code, subject to the result of any suit that may be pending on the date of the commencement of the proceeding in which such order is made. When under R. 103 of O. 21, the decision is raised to the status of a decree; why again it should be made subject to the result of the suit that may be pending on the date of commencement of the proceeding in which such order is made. Therefore, to avoid multiplicity of proceedings and to read the provisions contained in Rr. 101, 103 and 104 of O. 21 of the Code, harmoniously, as the same are to be read and interpreted harmoniously, and also keeping in view S. 10 of the Code, the proper course appears to me is to hold that if on the date of initiation of the proceeding under R. 97 of O. 21 of the Code, a suit between the parties has already been filed by the party who has sought to establish a right which he claims to the present possession of the property, proceeding instituted under R. 97 of O. 21 of the Code, being a subsequent proceeding involving the same issues that are required to be decided in a pending suit between the same parties in respect of the same subject-matter, shall have to be stayed pending decision in the suit. In this view of the matter, the order passed by the lower appellate Court does not call for interference.

7. Accordingly, the Regular Second Appeal fails and it is dismissed.