

(1949) 08 CAL CK 0043
In the Calcutta High Court
Case No : A.F.A.D. No. 1263 of 1945

Hare Krishna Rana and Others

APPELLANT

Vs

Sm. Jamini Sundari Dassi and Others

RESPONDENT

Date of Decision : 18-08-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100
Limitation Act, 1908 — Article 11A

Citation : AIR 1950 Cal 555 : (1950) 2 ILR (Cal) 617

Hon'ble Judges : R.P. Mookerjee, J

Bench : Single Bench

Advocate : Apurba Charan Mukherjee and Paresh Nath Mukherjee, for the Appellant; S.C. Janah, Saroj Kumar Maity and Ramendra Mohan Majumdar for Deputy Registrar, for the Respondent

Judgement

R.P. Mookerjee, J.—In this appeal on behalf of the plaintiffs, the particular question which arises for decision is whether, under Order 21, Rule 100, Civil P. C., dispossession referred to therein must be in course of the execution proceedings or may be a subsequent event.

2. The plaintiffs brought the present suit out of which this appeal arises for a declaration of their eight annas share in a particular sub-tenure held by them under the Patnidar. The plaintiffs' predecessor Gostha and pro forma defendant 5 Kedar after purchasing the eight annas share in the Patni sued Satish Adhikary who was then the owner of the sub-tenure in suit. That suit was decreed and in execution of this decree Gostha and Kedar became the auction-purchasers, the sale having taken place on 15th February 1924, and possession was delivered on 24th May 1924. The plaintiff claimed in the pre-sent proceedings as the heirs of Gostha. Kedar who was the owner of the remaining eight annas share of the sub-tenure had borrowed money from defendant 3 Narendra and the latter obtained a decree for the realisation of the said amount. Defendant 3 purchased the entire sub-tenure on 16th August 1935, on the allegation that the entire sub-tenure belonged to Kedar alone. Defendant 3 obtained delivery of possession under

Order 21, Rule 95, Civil P. C., on 19th May 1936. Six months later the plaintiffs' predecessor Gostha filed an application under Order 21, Rule 100 of the Code in respect of this half share in the sub-tenure which belonged to him on the allegation that he had been dispossessed by defendant 3 on 6th November 1936, that is, long after the possession is alleged to have been delivered to defendant 3 in execution of the decree. That application was finally disposed of by the learned Subordinate Judge holding, (1) that on the allegation made by the petitioner that dispossession by the auction-purchaser was subsequent to the delivery of possession in execution of the decree, the provisions of Order 21, Rule 100 of the Code were not attracted, Accordingly, the application was not maintainable; (a) that there was no reliable evidence to show that dispossession had taken place on 6th November 1936, as alleged by the petitioner and not on 19th May 1936, as evidenced by the writ of delivery of possession; and (3) that the petitioner had failed to show that he was in possession of any portion of the disputed properties on his own account. The application was accordingly dismissed. No suit as contemplated under Order 21, Rule 103 of the Code was brought by Gosta or after him by his successor-in-interest within one year of 5th April 1937, that is, the date of disposal of the application purporting to have been under Order 21, Rule 100 of the Code. The plaintiffs' case is that they are entitled to bring this separate suit as they did in December 1941, as the application, which had been tiled purporting to be under Order 21, Rule 100 of the Code, was held to be not maintainable. In the present plaint, however, the date of dispossession as given is 29th Magh 1345 B. S. corresponding to 12th February 1939 and neither 19th May 1936, the date of the delivery of possession under Order 21, Rule 95 of the Code to the defendant, nor 6th November 1936, as had been alleged in the application filed by Gostha under Order 21, Rule 100 of the Code. The plaintiffs contend that the present suit is not only maintainable in law but is not barred by limitation, as they have come within 12 years of the date of their dispossession.

3. Defendant 3, who was the purchaser in the money execution case in 1935 and had obtained delivery of possession in May 1936, conveyed the property to defendant 2. Defendant 1 is the wife of defendant 2. During the pendency of the suit, the zemindar Halwashiya had sued defendant 1 and the heirs of defendant 3 for rent of the sub-tenure without impleading the plaintiffs as parties and in execution of the decree the entire sub-tenure was purchased by defendant 4, Surendra on 18th August 1943. The plaintiffs alleged that they continued to be in possession until 12th February 1939, when the defendant dispossessed them.

4. The principal defence is that the suit is barred by limitation. The learned Munsif overruled the objection raised by the defendant and decreed the plaintiffs' suit. On appeal the learned Subordinate Judge held otherwise and the suit was dismissed. Hence this second appeal on behalf of the plaintiffs.

5. The first question which arises for decision is whether an application made by Gostha in 1936 having been dismissed and no suit having been brought within

one year from the date of dismissal, the present suit is barred under Article 11-A, Limitation Act. On behalf of the plaintiffs-appellants, it is contended that the application, which purported to be under Order 21, Rule 100 of the Code was not maintainable in law and therefore, there is no scope for the application under the provisions contained in Article 11-A, Limitation Act. The ground upon which the application under Order 21, Rule 100 of the Code is sought to be avoided is that on Gostha's own showing the alleged dispossession was not in course of the execution proceedings but much later thereafter. Under Rule 100 no application is maintainable unless dispossession takes place as a direct result of the execution proceedings.

6. Mr. Janah appearing on behalf of the defendant, on the other hand, contends that under Rule 100 there is no reference to dispossession being limited to one in course of the execution proceedings. The terms as contained in Rule 100 are very general and the application of the rule ought not to be limited by practically introducing words which are not to be found there. If the provisions contained in Rule 100 were to be interpreted as standing by themselves, there is room for argument, as contended for by the defendant. Rule 100, however, cannot stand by itself. Whether the suit is barred by limitation or not has to be decided on Article 11A, Limitation Act. Article 11-A of the Act is in the following terms:

"By a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for the possession of immovable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order."

7. As observed by Chatterjee and Pearson JJ. In *Nirode Borani Dasi v. Manindra Narayan* 26 C. W. N. 853 : (A. I. R. (9) 1922 Cal. 229), and also in some other decisions, the provisions contained in Rule 100 of the Code have to be interpreted and taken along with the provisions contained in Article 11-A, Limitation Act:

"But although the article does not refer to any section, the order must be an order under Order 21, Rule 103, That rule expressly refers to Rr. 98, 99 and 101 and these rules provide for investigation into a petition of objection. The right of suit is given by R 103 only when there is any order under Rule 98, 99 or 101, and Art. 11-A merely provides for limitation applicable to such suits." (at p.858).

8. Without any reference to any decided case on the point if we are to decide the point in issue on the provisions contained in Article 11-A, Limitation Act read with Rule 100 of Order 21 of the Code, I do not think that there can be any doubt that dispossession referred to is one which takes place in course of the execution proceedings. The words "to the delivery of possession "thereof" as appearing in

Article 11-A put the matter beyond the shadow of any doubt.

9. Reference has, however, been made to a decision by Guha J. in the case of Rajendra Kishore Pal Chaudhury and Another Vs. Asirulla and Another, , where there are observations which support the contention, as urged by the defendant. It appears that in the civil revision case, which was before this Court, Guha J. was satisfied that the Court ought not to interfere in that case even if the decision moved against were erroneous, as there was a more comprehensive remedy open to the petitioner to establish his title to the property as against the person in whose favour the order had been made in a summary proceeding arising out of execution of a decree, The learned Judge, however, had also considered the merits of the case, although the rule might have been discharged on the view as indicated above. The opinion expressed on the merits was *mera obiter*. It was held that what was contemplated under Order 21, Rule 100 of the Code was a case of dispossession by a decree-holder of a person in possession other than the Judgment-debtor and the only question the Court has to consider is whether the dispossession was by a decree-holder or auction-purchaser as such and not whether the dispossession took place during or after the disposal of any execution case started at the instance of the decree-holder or auction-purchaser. With great respect, I would differ from the view expressed by Guha J.

10. In the case of Satyanarain Mullick Vs. Jinsi Sah and Others, , a Division Bench of the Patna High Court came to the conclusion that

"Article 11-A would only apply if it is established that the plaintiffs are actually dispossessed of the property in course of the delivery of possession." If there is no allegation that as a matter of fact the plaintiff has been dispossessed in the course of the delivery possession, the application must be thrown out on the ground that the same is not maintainable in law.

10a. This view finds favour from the observations of Rankin C. J. so far as the particular case is concerned in the case of Kiron Soshi Dasi v Official Assignee of Calcutta 36 C.W.N. 965: (A. I. R. (1933 Cal. 246). it is observed that:

"The question in this suit is whether an application having been made to Mr. Justice Greaves on 12th April 1923, by Khanna saying that in spite of repeated demands Kiron Soshi was unwilling to give him possession the dismissal of that application meant that Khanna had one year only within which to bring his suit, In my judgment, that is not so. Khanna's application was not an application within Rule 97, the order was not an order within Rule 99 and this suit is not within Rule 103 there having been no execution proceeding or no order made by the Court at any time directing that Khanna should be put into possession of the property on the strength of the gale certificate. The application may have been dismissed for this very reason."

In the case now before me while dealing with the application filed by Gostha the learned Subordinate Judge had, as a matter of fact, come to the conclusion that that application was not maintainable in law, as the dispossession alleged was

not in course of execution but subsequent to the alleged delivery of possession in course of the execution case. This is a much stronger one on the facts than the one which was before Rankin C. J. referred to above.

11. Reference may in this connection be made to the case of Bisweswar Banerjee and Others Vs. Naba Kumar Singh Dudhuria and Others, In that case the plaintiff had brought a suit for recovery of possession of the land beyond one year of the date of the order under Rule 100 of Order 21 of the Code. The defendant pleaded that the suit was barred under Article 11A, Limitation Act. Henderson J.'s view was that it was competent for the plaintiff to prove in this suit that there was no dispossession of the predecessor of the defendant and consequently there was no foundation for an order under Order 21, Rule 100. If it held that there was no valid order under Rule 100, Article 11-A, Limitation Act will not apply and in this view the suit was held not to be barred by limitation. The decision as above was also made on the view that the finding, which might have been arrived at in a proceeding under Order 21, Rule 100, did not, in the circumstances as stated above, operate as *res judicata*, in the subsequent suit. Reference was made to the case of Muthiah Chetti v. Palaniappa, Chetti 55 I. A. 256 : A. I. R. 1928 P. C. 139). Although the special facts which gave rise to the observations were different from those which appear in the present case, the general observation and the principle referred to by their Lordships of the Judicial Committee are apposite :

"The point to be considered is:-- is the appellant a person against whom an order as just described has been made? The Board is of opinion that the answer is in the negative. By Article 11, Limitation Act, already quoted, he must be a person against whom an order has been made under the CPC "on a claim preferred to, or an objection made to the attachment of, property attached in execution." The case thus comes to be narrowed down to whether it is a necessity of the order here specified that the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached.

It would seem to be so by the words, and by the very nature of the case, for the only property referred to is "property attached in execution". Unless there has been an attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no terminus a quo for the running of limitation, and with this the limitation itself is nonexistent. The first head of Article 11, in the opinion of their Lordships, can on its words mean nothing else."

As observed by the Judicial Committee the special point in issue in that case was that although there had been an order for attachment, that order had not been given effect to. There was no dispossession therefore as there had been no attachment in execution. In the case of dispossession also, it must be in course of execution.

12. On a reading of the provisions contained in Rule 100 of Order 21 of the Code and Article 11-A, Limitation Act the only conclusion to which one may arrive at is that dispossession must be in course of execution. But I may as well indicate that the wider interpretation attempted to be put on Rule 100 taken by itself by the learned advocate for the defendant cannot be supported if reference is made to the position occupied as also its context in which it appears. Order 21 of the Code deals with execution of decrees and orders. The rules appearing under this Order are sub-divided under different Sub-headings. All the different Sub-headings deal with one or different possible stages and the adverse circumstances which may occur in course of execution. After making provisions in Rr. 41 to 57 for attachment of property Rr. 58 to 63A of the Code are introduced to regulate investigation of claims and objections. The next three Sub-headings deal either with sale jointly or with sale of movable or immovable properties. These cover Rr. 64 to 96. Rules 97 to 103 are the concluding rules of the Order under the sub-heading "Resistance to delivery of possession to decree-holder or purchaser." Bearing in mind that the proceedings contemplated under these rules are to be initiated in and to be dealt with by the executing Court, we may consider the implication of the different rules appearing under these sub-headings. Rules 97 to 99 un-mistakably refer to resistance or obstruction in course of execution. If possession is delivered and there is subsequent dispossession, such sub-sequent happening would not be interpreted to invest the executing Court with jurisdiction to deal summarily with various questions of conflicting title as will ordinarily arise in such cases. The provisions contained in this order are for the expeditious disposal of the execution proceedings. They do not contemplate to provide for a particular procedure not arising out of execution proceedings but outside the same. From this point of view also I hold that Rule 100 cannot be interpreted to be attracted in cases where dispossession is alleged in course of execution but subsequent thereto.

13. As indicated already, the learned Subordinate Judge, while dealing with the application by Gostha purporting to be under Rule 100 of Order 21, himself pointed out that the application was not maintainable in law. In that view the application was dismissed although there are observations dealing with some of the points touching the merits of the case. If an application is held not to be an application maintainable under Rule 100 of Order 21 of the Code, Article 11-A, Limitation Act, will not be attracted, I therefore hold that the present suit is not barred by limitation.

14. A decision on this point however does not dispose of the whole case. It is open to the parties to adduce evidence in the present case to prove when dispossession took place. If it is found that dispossession had, as a matter of fact, taken place in course of execution, that is, on 19th May 1936, when possession is alleged to have been delivered under Order 21, Rule 95 of the Code, in spite of the fact that a contrary allegation is made by the plaintiff, the suit must be dismissed and after the decision of the claim case no suit as contemplated u/s 103 was brought within one year and it is not open to the

Court at this stage to decide the question of title which ought to have been raised at that stage or within one year of such dispossession.

15. If on the other hand, the final Court of fact comes to the conclusion that dispossession was not as alleged by the defendant but subsequent thereto either as alleged by the plaintiff or on any other date subsequent to the delivery of possession which took place on 19th May 1936, the plaintiffs' suit has to be decreed, as the title of the plaintiffs has not been destroyed by lapse of time.

16. There is no finding by the Court of appeal below as to the date on which the plaintiffs were dispossessed. This matter must therefore go back to the Court of appeal below for a decision on this question of fact. If it is found in favour of the defendant the suit is to be dismissed; on a contrary view the plaintiffs' suit will have to be decreed.

17. The appeal is accordingly allowed and the case remanded to the Court of appeal below for a decision on the question of fact referred to above and for the final disposal of the suit according to the directions given above. The learned Subordinate Judge will proceed on the evidence already on the record. There will be no order for costs in this Court.