
(2003) 06 CAL CK 0008
In the Calcutta High Court
Case No : F.M.A.T. No. 756 of 2002

Sanjib Chakraborty and Another

APPELLANT

Vs

Ramanath Ghosh

RESPONDENT

Date of Decision : 12-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 102, Order 21 Rule 103, Order 21 Rule 104

Citation : (2003) 3 CALLT 500

Hon'ble Judges : Rajendra Nath Sinha, J; Dilip Kumar Seth, J

Bench : Division Bench

Advocate : T.K. Ghosh and Tapas Kumar Manna, for the Appellant; Soumya Roy, for the Respondent

Judgement

D.K. Seth, J.—In course of hearing of the application for stay, the parties are agreed that the main appeal may be disposed of. Treating the appeal, by consent of the parties, as on the day's list, the appeal is taken up for hearing.

2. After hearing the learned counsel for the respective parties and perusing the materials placed before this Court, it appears that an application under Order 21 Rule 97 of the CPC registered as Miscellaneous Case No. 1141 of 1997 was filed by the decree holder. In connection therewith the judgment debtor/appellant had filed an application under Order 21 Rule 101 of CPC registered as Miscellaneous Case No. 6287 of 2000. But from the order appealed against, it appears that the Executing Court without disposing of the application under Order 21 Rule 101 of CPC had disposed of the application under Order 21 Rule 97 of Code of Civil Procedure. These facts are not in-dispute.

3. The learned counsel for the appellants contends that the application under Order 21 Rule 97 of CPC could not be disposed of without disposing of the application under Order 21 Rule 101 of Code of Civil Procedure. Therefore, the impugned order is liable to be set aside. The learned counsel for the respondent, on the other hand, contends that the decision on the application under Order 21

Rule 97 is an adjudication of the disputes between the parties. From the order appealed against, he attempts to point out that virtually the question raised under Rule 101 has since been determined, though specific mention has not been made therein. It is the substance not the form which is material. From the materials shown to this Court, he attempts to make out a case that the question raised in the application under Rule 101 has since been determined in the proceedings under Rule 97. Mere technically will not invite this Court to intervene.

4. We have perused the order appealed against. It does not appear that the question raised under Rule 101 has, in fact, been determined. Rule 97 entitles a decree holder to complain to the Court of resistance or obstruction in obtaining possession of the suit property. Under Sub-rule (2), the Court is required to proceed to adjudicate the application under Rule 97 in accordance with the provisions therein contained. These provisions are provided in Rule 97 to 106. By reason of the expression used in Rule 97, the application thereunder cannot be decided independent of the other provisions contained therein. Rule 98 empowers the Court to allow the application under Rule 97 directing that the applicant be put into possession of the suit property or to dismiss the same or to pass such order as the circumstance may warrant. But such order under Sub-rule 1(a) and (b) can be made only upon determination of the question referred to in Rule 101. Under Sub-rule (2), if upon such determination the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or at his behalf or by any transferee pendente lite, then the Court may direct the decree-holder to be put into possession and if there is further resistance or obstruction in obtaining possession, then the Court may detain such person resisting or obstructing in civil prison.

5. Thus, before passing any order under Rule 98 pursuant to an application under Rule 97, the question raised under Rule 101 is required to be determined. Rule 101 envisages all kinds of questions relating to right, title or interest in the suit property arising between the parties to a proceeding 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 that the Court dealing with it notwithstanding anything contained in the contrary in any other law for the time being in force shall be deemed to have jurisdiction to decide the question. Thus, if any question relevant to Rule 101 is raised either by way of objection to the application under Rule 97 or by way of an application under Rule 101, then the Court is bound to determine the same before passing any order under Rule 98. Rule 98 empowers the Court to pass appropriate orders either allowing or dismissing the application but after determining the questions envisaged under Rules 97 and 101. Without a determination of such question envisaged under Rule 101, if raised, no order under Rule 98 can be passed. It is the corps of the provision and the heart of it. The provisions had restricted determination or settlement of the right, title and interest in the suit property of the person or persons resisting or obstructing the

execution within the scope and ambit of these rules. No separate suit can be brought for that purpose. When a right is restricted and a procedure is provided for, it has to adhere to such procedure. This is an opportunity provided for to person obstructing or objecting the execution of the decree. Such right cannot be ignored or overlooked. If the question raised under Rule 101 is not decided then any order passed under Rule 97 without such determination would be a nullity and cannot be sustained. In view of the framing of the statutes as appears from Rule 95 to Rule 106, there cannot be any other interpretation except as observed by us. An application under Rule 97 can be adjudicated in terms of Rule 98, which in turn can be proceeded with only after determination of the question under Rule 101 and not without it.

6. As observed earlier, we are of the view that the question referred to in Rule 101, has not been determined by the learned Executing Court in the order appealed against. Though rightly contended on behalf of the decree holder that it is the substance and not the form, which is material, yet from the order appealed against, we do not find that the determination under Rule 101 was made in substance.

7. Therefore, we set aside the order appealed against and direct the learned Executing Court to determine the question raised in the application under Rule 101 and thereafter to decide the application under Rule 97 simultaneously under Rule 98 or together according to the convenience of the Court.

8. Both the applications (Miscellaneous Case No. 1141 of 1997, 6287 of 2000) are to be disposed of by the learned Executing Court within two months from the date of communication of this order.

9. The judgment-debtor shall deposit without prejudice to his rights and contentions in the Executing Court a sum of Rs. 15,000/- to the credit of Kolkata Municipal Corporation (KMC) within a period of four weeks from date. The amount be deposited with the learned Registrar of the Court executing the decree. In default, this order shall stand recalled.

10. In case the judgment debtor succeeds, this amount shall be permitted to be withdrawn by the KMC or by the decree holder provided the decree holder produce proof of payment of the dues to the KMC as demanded by it under which the stall is held being the subject matter in suit, by the Executing Court. It would be open to the learned Executing Court to allow release of the amount in favour of the Kolkata Municipal Corporation demanding the amount without prejudice to the rights and contentions or pass such further order or orders as it may deem fit and proper in the facts and circumstances of the case.

11. The learned counsel appearing for the respondent has lodged Caveat, the appearance be regularised.

The appeal and the application for say are thus disposed of. Liberty is granted to take and communicate the gist of the order.

Xerox plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the learned counsel for the parties upon the usual undertakings.

Appeal and the stay of the application disposed of

R.N. Sinha, J.

12. I agree.