
(1955) 05 CAL CK 0027
In the Calcutta High Court
Case No : A.F.A.D. No. 1270 of 1951

Sm. Kundalata Biswas

APPELLANT

Vs

Sm. Chandra Kamini Dasi and Others

RESPONDENT

Date of Decision : 17-05-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 103, 47

Citation : AIR 1957 Cal 111 : 60 CWN 734

Hon'ble Judges : S.R. Das Gupta, J;Mallick, J

Bench : Division Bench

Advocate : Syama Charan Mitter, for the Appellant; Sushil Kumar Banerjee, for the Respondent

Final Decision : Allowed

Judgement

S.K. Das Gupta, J.—This is an appeal from a decision of the District Judge, Murshidabad, dated 16-6-1951, reversing a decision of the Subordinate Judge, Murshidabad, dated 31-8-1950.

2. The matter arises in this way: One Hindu Bashini Biswas and Kiran Bala Biswas purchased the properties which are mentioned in schedule Ka to the plaint filed in the suit out of which this appeal arises. Kiran Bala Biswas purchased the properties mentioned in schedule Kha in a rent execution case being Case No. 51 of 1950 on 28-4-1910. Kiran Bala's husband was one Ashutosh. He had a son by Kiran Bala named Sachinandan and two daughters named Kundalata and Kanaklata. After the death of Kiran Bala, the said Ashutosh married again and got a son by his second marriage named Nitai. The said Nitai has not been heard of, for a long time but his wife's name is Binapani and he has a son by the name of Amalendra. After the death of Kiran Bala, her property was inherited by Sachinandan and her two daughters Kundalata and Kanaklata and on Sachinanda's death his share in the properties inherited by him from Kiran Bala went to Ashutosh. Ashutosh executed a mortgage, of the properties mentioned in the Kha schedule on behalf of himself and his minor children

Kundalata and Kanaklata. After Ashutosh's death the mortgagee instituted a suit against his heirs namely Nitai and also against Kundalata and Kanaklata. The said suit was decreed against Nimai and dismissed against Kundalata and Kanaklata, the court having held that the minors are not bound by the said mortgage. In execution of this decree, Kundalata was dispossessed of her properties although the suit against her was dismissed. Thereupon she filed an application under Order 21, Rule 100, Civil P. C. for being restored to possession. The said application was successful in part that is, in respect of some of, the properties belonging to Kundalata, but the properties which were the subject matter of the Ka schedule and Kha Schedule were not restored to her. Thereupon the said Kundalata filed the Present suit under the provisions of Order 21, Rule 103 of the Code. In the said suit she complained of her dispossession not only with respect to Kha schedule property but also with respect to the Ka schedule properties. Both the courts found that she had title to the extent of 1/3rd share in Ka schedule properties and 2/3rd share in Kha schedule properties. The trial court decreed the suit in her favour. Against that decision, there was an appeal and the lower appellate court reversed the decree on the ground that the application which she made under Order 21, Rule 100 of the Code was really an application u/s 47 of, the Code and that being so, the only remedy that was left open to the said Kundalata was to prefer an appeal against the said order and no suit would lie in respect of the same. The said court inter alia observed as follows:

"It has been Urged that this suit is barred u/s 47 of the Code of Civil Procedure. It is said that as the plaintiff was a party to the mortgage suit, the application which the plaintiff filed under Order 21, Rule 100, O. P. C. was really an application u/s 47, C. P. C. and the order passed in the application which is not appealed against is conclusive and the present suit is barred in view of the provisions of section 47, C. P. C. I think this contention is well founded. In the mortgage suit the plaintiff was a partyBut though the suit was dismissed against the plaintiff yet the plaintiff was a party to the suit as contemplated by Section 47 of the Code of Civil procedure. It is clear from Section 47, Civil P. C. that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. The question as to whether the plaintiff was dispossessed in the course of the delivery of possession was a question relating to execution, discharge or satisfaction of the decree passed in the mortgage suit. Therefore the objection filed by the plaintiff regarding delivery of possession was really an application u/s 47. Civil P. C. which she termed it as one under Order 21, Rule 100 of the Code. Thus though the order in the application filed by the plaintiff was passed on the footing that it was an application under O, 21, Rule 100, C. P. C. the plaintiff is not entitled to bring this separate suit for establishment of her title to the disputed lands and challenge the order in question passed under Order 21, Rule 100, C. P. C. I find that this suit does not lie and is barred by Section 47, C.P. C."

In effect the learned Judge held that the application in question being really an application u/s 47, Civil P. C., no suit under Rule 103 of Order 21 of the Code would lie. On this view of the matter, the lower appellate court reversed the decision of the trial court and dismissed the suit. It is against that decision of the lower appellate court that the present appeal has been filed.

3. Mr. Mitter appearing on behalf of the appellant contended before us that the view taken by the lower appellate court was entirely wrong. He further contended that his client was entitled to make an application under Order 21, Rule 100 of the Code, she not being a judgment-debtor and if that be so, then she is also entitled to file a suit under Order 31, Rule 103 of the Code to establish her right, which she claims, to the present possession of the property but which has not been given to her in the application made under Order 21, Rule 100 of the Code.

4. The learned Advocate appearing on behalf of the respondent on the other hand contended before us that the application in question which was purported to have been made under Order 21, Rule 100 of Code was really an application u/s 47 of the Code. He drew our attention to the provisions in Section 47 of the Code which inter, alia provide that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. He also relied upon the Explanation to the said section which lays down that for the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit. The learned Advocate for the respondent contended before us that on the terms of Section 47 of the Code It is clear that the application in question was an application made under the said section and that being so the only remedy which was open to applicant was to file an appeal against the order passed on such application. No suit under Order 21, Rule 103 of the Code would lie in such a case. He relied upon a Full Bench decision of this Court reported in the case of Kailash Chandra Tarafdar Vs. Gopal Chandra Poddar, (A).

5. In my opinion, the contention of the learned Advocate for the appellant is sound and should be accepted. Rule 100 of Order 21 of the Code provides that where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession. Rule 101 of Order 21 provides that where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor it shall direct that the applicant be put into possession of the property. Rule 103 of Order 21 reads as follows:

"Any party not being a judgment-debtor against whom an order is made under Rule 98, R, 99 or Rule 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".

From the provisions of the said rules, it seems to be clear that the appellant was entitled to make an application under Order 21, Rule 100 of the Code of Civil Procedure; or in other words, the provision of Rule 100 of Order 21 was applicable to her case. She is not the judgment-debtor in the suit although she was a party to it and she was dispossessed of the immovable property by the holder of the decree for such possession. If she is entitled to make such an application under Rule 100, Order 21 of the Code, she would also be entitled to file a suit under Rule 103 of the said Order, if the order is made against him on that application. The effect of Rule 103 is that if an application is made under Rule 100 and if an order is made on the said application, such an order would be conclusive and final subject to the right of a suit which is given to a party who may be aggrieved by the said order; in other words, no other remedy would be available to a party who would be aggrieved by an order passed on an application under Rule 100 of Order 21 of the Code except to file a suit under Rule 103. The terms of Rr. 100, 101 and 103 of Order 21, to my mind make it quite clear that the appellant before us was entitled when she lost in the application made under Rule 100 and in fact that was her only remedy to file a suit under Rule 103 of Order 21 of the Code. Some complication no doubt has been created by the provisions of Section 47 of the CPC and on the basis thereof it may be contended that the present case also comes u/s 47 of the Code. I have already referred to the provisions of the said section. In effect it lays down that any question arising between the parties to the suit or their representatives in relation to execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit and it further provides that a defendant against whom a suit has been dismissed is a party to the suit within the meaning of the said section. That being so, the respondent before us may contend that the appellant comes under the provisions of Section 47 of the Code, provided, of course we hold that the question which arose and which was determined in the application under Order 21, Rule 100 was a question relating to the execution, discharge or satisfaction of the decree, It may also be contended as it has been contended before us with some justification that the question which was raised in the application under Order 21, Rule 100 was a question which falls within the purview of Section 47, Civil P. C. This difficulty created by the provisions of Section 47 and Order 21, Rules 100, 101, 102 and 103 of the Code was solved by a division Bench of this Court in the case of Satyendra Nath Choudhury Vs. Charu Chandra Majumdar and Others, . Before I deal with that case, I should refer to the Full Bench decision on which the learned Advocate for the respondent relies. The specific question which was referred to the Full Bench for decision was whether an order passed on an application under Order 21, Rule 95 by an auction-purchaser who was decree-holder is an order u/s 47, Civil P. C. and applicable as such. Their Lordships answered the said question in the affirmative and held that an order passed on

an application under Order 21, Rule 95 by the auction purchaser who was the decree-holder is an order u/s 47, C. P. C. and applicable as such. On the basis of this decision the learned Advocate for the appellant contended before us that if an order under Order 21, Rule 95 can be said to be an order u/s 47, O. P. C., then an order passed on an application under Order 21, Rule 100 would also be an order u/s 47 and would be appealable. The effect of the Full Bench decision has been considered in the said case of Satyendra Nath Choudhury Vs. Charu Chandra Majumdar and Others, . In the said case this very contention which is now put forth before us was also pressed before their Lordships. The application in question in that case was an application under Order 21, Rule 90 and it was argued that that was in effect an application u/s 47 of the Code and, therefore was appealable as a decree within the meaning of the Code of Civil Procedure; in other words, the question raised was whether or not a second appeal lies against an order passed under Order 21, Rule 90 of the Code. Mukherji J. who delivered judgment in that case dealing with the said contention observed as follows:

"But the difficulty in accepting this argument is that the Code expressly puts an order under Order XXI, rule 90 upon a different category from orders passed u/s 47 of the Code. u/s 104 of the Code, an appeal lies from those orders only which are expressly mentioned in the said section, and it is stated that "save as otherwise expressly provided in the body of this Code or by any law for the time being in force, no appeal shall lie from any "other orders"; and Section 104, Sub-section (1) Clause (1) provides for appeals from orders made under rules from which an appeal is expressly allowed by the rules. Appealable orders provided for by the rules are to be found in Order XLIII of of the First Schedule to the Code and, under Sub-section (2) of Section 104, "No appeal shall lie from any order passed in appeal under this section." To accede to the petitioner's contention, therefore, would be to nullify the effect of Section 104 read with Order XLIII of the First Schedule of the Code to which I have referred." Their Lordships in the said case of Satyendra Nath Choudhury Vs. Charu Chandra Majumdar and Others, held that the Code expressly puts an order under Order 21, B. 90 upon a different category from orders passed u/s 47 of the Code; in other words, their Lordships in effect held that if there was no special provision relating to an order made under Order 21, Rule 90, then the argument advanced before their Lordships, namely, that it must be treated as an order passed u/s 47 of the Code and therefore appealable would "have been a valid argument, but having regard to the fact that special provisions have been made in the Code whereby an order made under Order 21, Rule 90 has been placed on different category from orders passed u/s 47 of the Code, the said argument cannot be accepted as sound. In my opinion the observations of their Lordships in the said case are equally applicable to the case which is at present before us. A review of the provisions of Order 21, Rules 100 to 103, Civil P. C., would make it clear that an order passed on an application made under Order 21, Rule 100 has been placed upon a different category from orders passed u/s 47 of the Code. If Rule 103 was not there then the contention of the learned Advocate for the respondent would

have been valid. But there being special provisions, namely, Rules 100 to 103 of Order 21, it can no longer be contended that an order passed on an application made under Rule 100 would be an order passed on an application made u/s 47 and the only remedy left open to the party aggrieved by the said order was to file an appeal and that no suit would lie in respect thereof. In other words, Rule 103 having expressly given the right to file a suit and having provided that any order made under Rule 100 of Order 21 would be final and conclusive between the parties subject to the result of a suit which may be filed under the said rule, there is no room for the contention that the ordinary incidents of an order made u/s 47 of the Code would be attracted to an order made under Order 21, Rule 100 of the Code and that an order passed under the said rule would be only appealable and no suit would lie to establish the right mentioned in Rule 103. I agree with the reasons given by their Lordships for their decision in the case of *Satyendra Nath Choudhury Vs. Charu Chandra Majumdar and Others*, . The real question in my opinion is not whether an order made under Order 21, Rule 100 of the Code is an order made u/s 47 of the said Code, the real question is whether such an order is appealable or whether the only remedy open to a party aggrieved by the order is to file a suit under Order 21, Rule 100. I am clearly of the opinion that having regard to the special provisions of Order 21, Rule 103 this contention of the learned Advocate for the respondent must fail.

6. Before concluding my judgment on this point, I ought to mention that Mukherji J. in delivering judgment in the said case of *Satyendra Nath Choudhury Vs. Charu Chandra Majumdar and Others*, distinguished the Full Bench case referred to before us by holding that the Full Bench Case dealt expressly with an order on application for delivery of possession under Order 21, Rule 95, Civil P. C. I am in entire agreement With that view and in my opinion also the Full Bench was concerned with an order passed on an application under Order 21, Rule 95 by an auction purchaser who was also the decree-holder and held that it was an order u/s 47, Civil P. C. and appealable as such. There is no such special provision which can be said to have put such an order passed under O, 21, Rule 95 upon a different category from the orders passed u/s 47 of the Code. In this view of the matter I hold that this contention of the learned Advocate for the appellant should succeed.

7. The learned Advocate for the, respondent then contended before us that on a proper construction of Rule 100 we should hold that a person. who was a party to the suit is not entitled to mate-an application under the said rule. The result of this contention, in my opinion, would be that Rule 100 has to be read differently from what it is Rule 100 makes it quite clear that anybody other than a judgment-debtor who has been dispossessed in execution of a decree is entitled to make an application under the said rule. The effect of the learned Advocate's contention would be to read in the said rule words which are not there, namely, any person "other than" a party in the suit. It would not be proper to read the rules in that Way. Rankin C. J. in the Case of *Satish Chandra Bhaduri and Others Vs. Pabna Dhana Bhandar Co. Ltd.*, , took a view which to some extent sup-port

the view which I am taking at present. In the case the representatives of the judgment-debtor made an application under Order 21, Rule 100, Civil P. C. The Munsif made an order in their favour restoring them to possession under Rule 101, An application was made in revision against that order. His Lordship held that the Munsif's decision was right. It was contended before his Lordship that the word "judgment-debtor" should include representatives of the judgment-debtor also. This contention was negatived by his Lordship and it was held that there was no jurisdiction for importing decisions u/s 47 into Rules which contain nothing of the language of Section 47 as regards the representatives of the judgment-debtor. In my opinion the present contention of the learned Advocate for the respondent namely that for the purposes of this rule the judgment-debtor should also include-a person who was a party to the suit is equally untenable.

8. This question may be viewed from another standpoint. In order to bring a matter within the purview of Section 47 of the Code, the questions involved must be questions relating to the execution, discharge or satisfaction of the decree. The question | which raised in this suit out of which the present appeal has arisen, was a question of title namely whether or not the plaintiff Kundalata was entitled to hold her share in the properties in her own right. The point is whether or not such a question relate to the execution, discharge or satisfaction of the decree. This point came up for consideration in the case of Nijibal Islam Molla Vs. Golam Afsar Molla and Others, . The plaintiff in that case prayed for Khas possession of the lands in suit appertaining to a tenancy held by one Gandhari Bewa, predecessor-in-interest of the defendants Nos. 2 and 3. According to the plaintiff, the lands appertaining to the tenancy were sold in execution of a rent decree obtained by him in which the defendant No. 1 was made a defendant, as a co-sharer landlord, with a view to the plaintiff's obtaining an effective rent decree in execution of which the tenancy could be sold. The defendant No. 1 had obtained a Kabala from Gandhari Bewa, the tenant, before the tenancy was put to sale in execution of the decree for rent obtained by the plaintiff. The defendant No. 1 succeeded in getting possession of the lands in suit, after they were sold in execution of the rent decree against the tenant from Gandhari Bewa. Thereafter the suit out of which the said appeal arose was instituted by the plaintiff. The question arose as to whether or not Section 47 of the Code was applicable to the facts of his case and whether the said suit was maintainable. Their Lordships held that it could not be said that the question of execution, discharge or satisfaction of the decree was involved in the suit. Their Lordships held that as between the plaintiff who succeeded in obtaining a decree for rent against the tenant, and the defendant No. 1--a co-sharer landlord, who was joined as a party defendant in the suit for rent for satisfying the requirements of law, as contained in Section 148A of the Bengal Tenancy Act -- there could not be any, and there was no question relating to the execution of the rent decree nor was there any question relating to the discharge or satisfaction of the rent decree. The decree being a decree for rent, the liability to satisfy the decree according to their Lordships was in the tenant defendant or her representatives, and not in the

defendant No. 1, the co-sharer landlord. If therefore their Lordships held there was no liability in the defendant No. 1 to satisfy the decree for rent, as there was none, no question of execution, discharge or satisfaction of the decree could possibly arise as between the plaintiff on the one hand, and the defendant No. 1 on the other. The position in this case is also the same. In this case" also there was no liability on the present plaintiff to satisfy the decree because no decree was passed against her and applying the reasoning of their Lordships in the said case of Nijibal Islam Molla Vs. Golam Afsar Molla and Others, , it should be held that there was no question of execution, discharge or satisfaction of the decree. In a previous case of this Court a similar view was taken -- Narayan Bera Vs. Jharu Mandal of Baratola and Others, . In that case Suhrawardy J. in dealing with the contention that the purchaser of a non-transferable occupancy holding is a representative of the "judgment debtor" u/s 47 of the Code and is therefore one of the persons who came within the expression "judgment debtor" as used in Rule 100 of Order 21 and as such is not entitled to make an application under the said rule observed as follows:

"The opposite party in the present case does not clearly come within the definition as given in Section 2(10) of the Code, But it is contended that as a representative of the judgment debtor u/s 47, Civil P. C., he must be considered as a judgment-debtor under Rule 100. The considerations which have induced the learned Judges in some of the cases to hold that such a person may be representative within the meaning of Section 47 of the Code do not arise in this case for in the first place the question does not refer to execution, satisfaction or discharge of a decree and in the second place the auction purchaser is a third party and not the decree-holder."

Camiade J. in that case observed as follows:

"It is obvious that the executing court can only execute decree against the persons against whom it has been passed. It has no jurisdiction to investigate the title of a third person and decide that the decree-holder has the right to recover possession against him."

9. I therefore, hold that the contention of the learned Advocate before us must fail.

10. In the result, therefore, this appeal is allowed. The judgment and decree of the lower appellate court are set aside and those of the trial court are restored and affirmed.

11. The appellant will get the cost of this appeal.

Mallick, J.

12. I agree.