
(2011) 05 CAL CK 0098
In the Calcutta High Court
Case No : C.O. No. 1193 of 2011

Sultan Ahamed

APPELLANT

Vs

Md. Asgar Khan

RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 99, Order 9 Rule 9

Citation : (2012) 2 CHN 535

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Partha Pratim Roy and Sabyasachi Bhattacharya, for the Appellant; S.T. Meena, for the Respondent

Final Decision : Dismissed

Judgement

Prasenjit Mandal, J.—Challenge is to the Order No. 2 dated March 28, 2011 passed by the learned Additional District Judge, Sealdah in Misc. Appeal No. 34 of 2011 thereby affirming the order No. 214 dated March 11, 2011 passed by the learned Civil Judge (Junior Division), 1st Court, Sealdah in Misc. Case No. 9 of 2011 arising out of Misc. Case No. 23 of 2004.

2. The short fact is that the Plaintiff/opposite party No. 1 herein instituted the suit being Title Suit No. 476 of 1969 for eviction against the predecessor-in-interest of the opposite party No. 2 on the ground of subletting before the learned Munsif, 1st Court, Sealdah. That suit was decreed on contest in December 1993 and the appeal preferred by the opposite party No. 2 against the said judgment being the Title Appeal No. 24 of 1994 was also dismissed.

3. In the mean time, the Plaintiff put the said decree into execution being Execution Case No. 18 of 1994 for getting the recovery of possession of the premises-in-suit and other reliefs. The opposite party No. 2 is contesting the said title execution case and the objector/Petitioner herein filed an application under Order 21 Rule 99, 100 and 101 of the CPC and the said application was

converted into the Misc. Case No. 23 of 2004. That misc. case was dismissed for default. Thereafter, the objector/Petitioner herein filed another application under Order 9 Rule 9 of the CPC for restoration of the aforesaid misc. case and the said application was registered as Misc. Case No. 9 of 2011. The Plaintiff contested the aforesaid misc. case by filing a written objection.

4. Upon consideration of the evidence, the learned Trial Judge dismissed that misc. case.

5. Being aggrieved, the Petitioner preferred a misc. appeal being Misc. Appeal No. 34 of 2011 before the learned Additional District Judge, Sealdah. That misc. appeal was also dismissed by the Lower Appellate Court holding that there was no sufficient cause for his non-appearance at the time of call of the aforesaid application.

6. Being aggrieved by the order of dismissal of the said misc. appeal, this application has been preferred.

7. Now, the question is whether the impugned order should be sustained.

8. Upon hearing the learned Counsel for the parties and on going through the materials on record, I find that the above facts as narrated, are not in dispute. Now the question is whether the Petitioner was prevented by sufficient cause for non-appearance at the time of call of first misc. case being Misc. Case No. 23 of 2004.

9. It is pertinent to mention here that the objector/Petitioner herein filed two applications-one for amendment of the misc. case and another for addition of parties. Those two applications were allowed by the learned Trial Judge. Being aggrieved, the Plaintiff/decreed-holder filed a revisional application being C.O. No. 179 of 2006. While disposing of that revisional application, this Court specifically directed that the application for amendment of the misc. case and addition of parties filed by the judgment debtor stood rejected. The learned Trial Judge was directed to dispose of the misc. case No. 23 of 2004 within two months from the date of communication of the order and that the Executing Court shall proceed with the execution case expeditiously. Such order was passed on December 7, 2010.

10. On getting the copy of that order, the learned Executing Court preponed the date of hearing of the said misc. case fixing January 31, 2011 in presence of both the sides on January 25, 2011. The learned Advocate for the Petitioner made an endorsement on the order-sheet on January 25, 2011 acknowledging the intimation that the date of hearing had been shifted back from the date of February 2, 2011 to January 31, 2011. So, the learned lawyer for the Petitioner was quite aware of the date of peremptory hearing of the said misc. case. It is unfortunate to note that in spite of such knowledge on the part of the lawyer for the Petitioner, none appeared on behalf of the Petitioner on the date fixed, that is, on January 31, 2011 and as such, the said misc. case was dismissed on

January 31, 2011.

11. After dismissal of the said misc. case, another misc. case under Order 9 Rule 9 of the CPC was filed and in that misc. case being Misc. Case No. 9 of 2011, the evidence was adduced by the Petitioner to show sufficient cause for non-appearance on January 31, 2011. Both the Courts below have disbelieved the evidence of the learned Advocate who deposed on behalf of the Petitioner to the effect that he could not intimate his client. I think the learned Trial Judge as well as the Appellate Court have rightly disbelieved in the statement. A lawyer having obtained a brief from a client has a duty to give necessary instruction to his client. But he has failed to discharge the same as per evidence on record.

12. In modern days, there are various modes of communication including information over telephone. The learned Trial Judge has rightly disbelieved in the statement of the lawyer that he forgot the matter and so he could not inform the Petitioner. At the sake of repetition, it may be pointed out that the lawyer made endorsement on the order-sheet on January 25, 2011 knowing well that the date had been fixed for hearing on January 31, 2011, that is, within six days. So, his contention that he forgot the matter, I hold, has been rightly rejected by the learned Trial Judge.

13. Therefore, I am of the view that both the Courts below have arrived at a concurrent findings based on evidence and such findings cannot be said to be perverse at all. So, there is no scope for interference with the impugned order.

14. It is not out of place to mention that by filing an application for amendment of the plaint and addition of parties, the objector/Petitioner herein has wanted to give a long life of the litigation as observed by this Bench and that has been rejected by this Bench earlier.

15. Further, the execution case for recovery of possession is till pending since 1994. It may also be recalled that the suit for recovery of possession was filed in the year 1969. So, it is apparent that the objector/Petitioner herein has adopted a dilatory tactics to prolong the litigation.

16. This application is, therefore, without merits at all. It is dismissed with costs.

17. Considering the circumstances, the objector/Petitioner herein is directed to pay costs of Rs. 5,000/- to the decree-holder within a period of 30 days from date. Such costs must be paid or deposited in the said execution case within the aforesaid period failing which the learned Executing Court is at liberty to take appropriate steps for realisation of such costs in accordance with law.

18. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.