

Shishant Agarwal Vs. Krishna Kumar Agarwal and ors.

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Court : Allahabad

Decided On : Apr-20-2005

Reported in : 2005(3)AWC2460

Judge : O.N. Khandelwal, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47, 96, 104 and 151 - Order 21, Rules 58, 72, 92, 97, 98, 99, 100, 103, 103(4) and 106 - Order 43, Rule 1; Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : F.A.F.O. No. 2059 of 2002

Appellant : Shishant Agarwal

Respondent : Krishna Kumar Agarwal and ors.

Advocate for Def. : Naveen Sinha, ;Madhav Jain and ;Swapnil Kumar, Advs.

Advocate for Pet/Ap. : Party-in-person

Disposition : Appeal dismissed

Judgement :

O.N. Khandelwal, J.

1. This appeal has been filed under Section 104 read with Order XXI, Rule 103, C.P.C. challenging the order dated 11.10.2002, passed by the IVth A.D.J., Agra in

Execution Case No. 1 of 1976. The respondent decree holders have appeared and raised preliminary objection that this appeal is not maintainable.

2. Raj Narain, the grand father of the appellant was the owner of property No. 4/157 Belanganj, Agra, in respect of which he executed a registered document on 17.4.1954, by way of family settlement and created a trust in respect of his 1/5 share in favour of his wife and three minor sons (namely Kishan Chand, Bishan Chand and Mahesh Chand). The trust was to be managed by his wife and such of his sons who attained majority from time to time. It was further provided that after all his sons attained majority, they may nominate anyone of themselves as trustee. The remaining 4/5 share of the property belonged to the wife and his three minor sons. But the sons (after attaining the majority) and their mother Smt. Kapuri Devi transferred the entire properties on 15.7.1968 (including the said trust property) in favour of Sri Bishamber Nath Agarwal. However, the vendors continued to 'occupy the same on rent at the rate of Rs. 300 per month.

3. When the vendors/tenants defaulted in payment of rent, their tenancy was terminated by serving a legal notice. The vendors immediately instituted a Civil Suit No. 293 of 1973 for the declaration that they are owners and not the tenants giving a different interpretation to the recitals made in the sale deed. On the other hand the vendee Bishamber Nath filed an Eviction Suit No. 30 of 1973. However, both the parties compromised in the matter. The rate of rent was enhanced. Bishamber Nath also agreed to execute a reconveyance deed within a period of two years, provided the plaintiffs of O.S. No. 293 of 1973 paid Rs. 1,02,120 by 31.10.1975. It was also stipulated that in case the plaintiffs fail to pay the entire agreed amount and rent within this period, no reconveyance deed will be executed and they will have to vacate the premises.

4. After the expiry of the aforesaid period, vendors filed a Suit No. 439 of 1975 on 29.11.1975, against Bishamber Nath Agarwal for specific performance of contract alleging therein that he has not executed the sale deed in pursuance of the compromise. On the other hand, Bishamber Nath filed the execution application No. 1 of 1976 for the eviction of the vendor-tenants. But this execution was stayed on account of the filing of the aforesaid suit which was ultimately decreed on

15.4.1983 by IVth A.D.J., Agra. Consequently the Execution case No. 1 of 1976 filed by Bishamber Nath was struck off.

5. The appeal against the aforesaid judgment and decree was allowed by the High Court on 23.10.1989 and the suit was dismissed (reported in AIR 1990 All 65). Hon'ble Supreme Court allowing Civil Appeal No. 4 of 1993, Kishan Chand and Ors. v. Bishamber Nath Agarwal, set aside the judgment of the High Court and remanded the matter for deciding it afresh. The appeal was again allowed on 9.9.1997, by the High Court (reported in AIR 1998 All 195) special leave petition filled before the Apex Court was dismissed summarily. Under these circumstances, the Execution Case No. 1 of 1976 revived which is still pending.

6. When the sons of the deceased Raj Narain failed to stall their ejection from the disputed property, the appellant and his brother Anit (who are grandsons of Raj Narain and sons of Bishan Chand) filed O.S. No. 106 of 1999 for the declaration that the sale deed dated 15.7.1968, executed by the wife and sons of Raj Narain in favour of Bishamber Nath is illegal and void and does not affect the title of the plaintiff and other descendants of late Raj Narain to the extent of their 1/5 share which is a trust property. Similar declaration with injunction was also sought with respect to the compromise decree. On the request of the plaintiffs, an interim injunction has been granted by the Civil Judge, Agra, on 29.5.2000 in their favour restraining the vendee respondents from interfering in their possession in the said trust property.

7. In the Execution Case No. 1 of 1976 another grandson of Raj Narain namely Sanjay Kumar son of Mahesh Chand filed objection under Section 47, C.P.C. mainly on the ground that compromise decree is null and void with respect to the trust property. Another objection was filed by the appellant Shishant Agarwal. Both these objections were dismissed by the IVth A.D.J., Agra, on 2.2.2001.

8. Subsequently appellant made an application under Order XXI, Rule 97 read with Section 151, C.P.C. raising the same contentions. But it was requested that the execution proceedings for the delivery of possession of any portion of the house in dispute be stayed till the decision of the Suit No. 106 of 1999. The same has been dismissed by the impugned order dated 11.10.2002.

9. I have heard learned counsel for the parties at length with regard to the maintainability of this appeal under Section 104, C.P.C.

10. There is no doubt that even the stranger can get his claim adjudicated before losing possession to decree holder by filing an application under Order XXI, Rule 97, C.P.C., (Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Anr.) and it cannot be insisted that possession be delivered first and the objector may move the Court later on under Order XXI, Rule 99, C.P.C. Therefore, the appellant who is not a party to the execution proceedings had every right to move an application under Order XXI, Rule 97, C.P.C. (See Tanzweem-e-Sufia v. Bibi Haliman and Ors., 2002 (4) AWC 3266 (SC)).

11. Section 104, C.P.C. under which this appeal has been filed provides that an appeal shall lie from the following orders and save as otherwise provided in the body of this Code or by any law for the time being in force, from no other orders :

iff) ...

(ffa) ...

(g) ...

(h)...

(i) any order made under rules from which an appeal is expressly allowed by rules :

12. Now we come to Order XLIII, Rule 1, C.P.C. which makes an order described therein appealable under the provisions of Section 104. It does not refer to any order passed under Order XXI, Rule 103, C.P.C. Only orders passed under Rules 72, 92 and 106 of Order XXI, C.P.C. have been made appealable under these provisions. Therefore, this appeal under Section 104, C.P.C. is clearly not maintainable.

13. In Nooruddin v. Dr. K.L. Anand, , the Hon'ble Supreme Court has said that the executing court is enjoined to adjudicate upon the right, title and interest claimed in the property arising out between the parties to a proceeding or between the

decree holder and the person claiming independent right, title or interest. The determination shall be conclusive between the parties as if it were a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. The right to file a suit under Order XXI, Rule 103, C.P.C. which was available before the C.P.C. Amendment Act, 1976 has been taken away in order to put an end to protraction of the execution and to shorten the litigation.

14. In *Babulal v. Raj Kumar*, , it has been settled that determination of the questions of right, title or interest of the objector is required to be agitated under Rule 98 which would be an order and a decree under Rule 103 for the purpose of appeal or otherwise as if it were a decree. In para 6 of the judgment, the Hon'ble Supreme Court has indicated that the order is treated as a decree under Order XXI, Rule 103 and it shall be subject to an appeal.

15. In *Ghan Shyam Das Gupta and Anr. v. Anant Kumar Sinha and Ors.*, is another example in which the Hon'ble Supreme Court has said that Rules 97 and 106 of Order XXI, C.P.C. envisage questions to be determined on the basis of evidence to be led by the parties and after C.P.C. Amendment Act, 1976 such decisions have been made appealable like a decree. In this background, the Order XXI, Rule 103, C.P.C. is reproduced below :

'Where any application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to be same conditions as to an appeal or otherwise as if it were a decree.'

16. It is relevant to mention here that under Order XXI, Rule 58, C.P.C. adjudication of claims to, or objections to attachment of, property is done and the provision contained in sub-rule (4) of this rule is analogous and exactly similar to the provision contained under Order XXI, Rule 103, C.P.C.

17. This provision has been interpreted by the Delhi High Court in which it has been held that the adjudication in Rule 58 would be final and conclusive adjudication and would be appealable as if it were a decree, . Similar view has been expressed by the Division Benches of Calcutta High Court, and Patna High

Court .

18. The final order under Order XXI, Rule 58 shall have the force of a decree .

19. It is thus settled that an order passed under Order XXI, Rule 103, C.P.C. is appealable but not under Section 104, C.P.C. The only other provision under which an appeal can be entertained is Section 96, C.P.C. Thus, the present, appeal filed under Section 104, C.P.C. is not maintainable being incompetent and is therefore liable to be dismissed.

20. Under Section 96 of the C.P.C. first appeal lies against every decree passed by any Court exercising jurisdiction and order passed under Rule 103 has the force and is subject to the same conditions as to an appeal or otherwise as if it were a decree, therefore an appeal against such an order was competent only under Section 96, C.P.C. and not under Section 104, C.P.C.

21. In the last, it was also pointed out by the learned counsel for the respondent that the appellant had moved an application under the provisions of Order, XXI, Rule 97 and Section 151, C.P.C. but he did not seek any adjudication of his right, title or interest in these proceedings instead, he made this simple prayer that the execution proceedings for the delivery of possession of any portion of premises No. 4/157, Bans Darwaja, Belanganj, Agra, be stayed till the decision of applicant's Suit No. 106/99 pending in the court of VIth Addl. Civil Judge (S.D.), Agra.

22. It was submitted that in fact the appellant wanted to frustrate the execution proceedings, therefore, he moved only for stay of the execution without seeking determination of his right, title or interest and this application itself was not maintainable. In the alternative, it was also argued that the application could be treated to have been made only under Section 151, C.P.C. for stay of proceedings and in that case too, no first appeal is competent, only a revision lies. But without entering into further controversy, I hold that this appeal filed under Section 104, C.P.C. is incompetent and is, therefore, dismissed.