

Supry Vs. Benedict

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Court : Kerala

Decided On : Feb-10-2003

Reported in : 2003(2)KLT190

Judge : Pius C. Kuriakose, J.

Acts : Code of Civil Procedure (CPC)

Appeal No. : O.P. No. 4126 of 2003

Appellant : Supry

Respondent : Benedict

Advocate for Def. : Joseph Franklin, Adv.

Advocate for Pet/Ap. : N.K. Mohanlal, Adv.

Judgement :

Pius C. Kuriakose, J.

1. An order passed by the executing court overruling the objections in the matter of delivery in execution of a decree for recovery of possession on the strength of title is impugned before me.

2. The point that is seriously highlighted in the memorandum of revision and in the submissions made at the Bar by the learned counsel for the revision petitioner is

that the ex parte decree for recovery of possession was passed by the learned Munsiff solely on the basis of a claim affidavit. According to the learned counsel, going by the C.P.C. as amended by the C.P.C. Amendment Act, 2002, the decree is a nullity. Learned counsel was unable to show me any provision in the C.P.C. as it stood prior to amendment or subsequent to the amendment which shows that no decree for recovery of possession cannot be passed on the basis of proof affidavits alone. I do not agree with the reasonings of the learned single Judge of the Rajasthan High Court in Jagdish v. Premalata Rai (AIR 1990 Rajasthan 87) on the facts that the learned Judge was only following the pronouncement of the Supreme Court in Sudha Devi v. M.P. Narayanan (AIR 1988 SC 1381). Sudha Devi's case (supra) is distinguishable on facts. Sudha Devi's case was a case where the lacuna in evidence recorded on the original side was sought to be filled up by filing an affidavit before the Supreme Court. The ultimate decision taken in Sudha Devi's case, 1 notice is on the basis of consents. I am not prepared to accept the argument of the learned counsel for the petitioner that the decree is a nullity. But I am now told by him that today (10.2.2003) his client has filed an application for setting aside the ex parte decree. According to him, he has filed a separate application for stay also.

3. I have before me Adv. Sri. K.M. James, who was impleaded pursuant to a direction by the Court. I have also before me the respondent through Adv. Sri. Joseph Franklin. Both of them submitted before me that from the point of view of the decree holder, the situation is really harsh. I do appreciate their submissions. But when I am told that an application for setting aside the ex pane decree in respect of which execution is presently levied has been filed, I feel that a breathing time should be given. Therefore while confirming the impugned order, which is not tainted by any jurisdictional infirmity whatsoever, I direct that the delivery which going by the impugned order stood posted on 11th instant will stand adjourned till 3rd March, 2003. The learned Munsiff shall effect delivery on that day, if delivery is not stayed by any other court including the trial court.

4. I have gone through the report forwarded by the learned Munsiff. It is infact not a report by the learned Munsiff, on the contrary, it is a report prepared by the Joint Registrar of this Court on the basis of his telephonic conversation with the learned

Munsiff. According to this report, the order - delivery and report - 11.2.2003 will enable the court to effect delivery of the decree schedule building on a date prior to 11th February, 2003. I will only observe that it is very improper on the part of the executing court especially when they are executing decree for delivery of immovable property to pass orders of delivery without notifying any specific date for effecting delivery. I would have expected the learned Munsiff to order specifically that the delivery will take place on a given date and report the same date itself or the next day. It is very much necessary that when highly consequential orders of delivery of building are passed, the judgment debtors who are being dispossessed should at least be informed as to when they will be dispossessed.

The Original Petition is disposed of as above.

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