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Court : Kolkata

Decided On : Dec-22-1949

Reported in : AIR1950Cal342,54CWN372

Judge : Harries, C.J. and ; Sinha, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 38, Rule 8 - Order 21, Rule 58

Appeal No. : Civil Rule No. 1562 of 1949

Appellant : Reliance Development and Engineering Ltd.

Respondent : Bhabani Charan Banerjee and ors.

Advocate for Def. : Debabrata Mookerjee and ; Ajay Kumar Basu, Advs.

Advocate for Pet/Ap. : Paresh Nath Mookerjee and ; Chandra Nath Mookerjee, Advs.

Disposition : Petition allowed

Judgement :

Harries, C.J.

1. This is a petition for revision of an order of a learned Subordinate Judge, made in a claim case.

2. Certain property had been attached before judgment and the property was claimed by the petitioners in this case. They made their application under the provisions of Order 38, Rule 8, Civil P. C. That rule provides that where any claim is made to property attached before judgment the claim is to be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for the payment of money. In other words, the claim is to be investigated under the provisions of Order 21, Rule 58, Civil P. C.

3. The learned Judge came to the conclusion that the company were not in possession of certain bricks which had been attached before judgment. The company claimed to be in possession of these bricks under a document which purported to transfer the bricks to them. The learned Judge, however, was not satisfied that this document really transferred the bricks to them and he winds up his judgment in these words :

'I dilate no more on the merits of these papers and writings because I have already said that I am not impressed that the Company hold these bricks on their own account.'

4. In short, he held that the company were mere benamidars of the defendant Girija Prosad Pal and, therefore, they could make out no claim to these bricks.

5. Mr. Paresh Nath Mokerjee on behalf of the petitioners has contended that it was not open to the learned Judge to decide--whether or not the company were mere benamidars of the defendant. He has pointed out that it has been repeatedly held in this Court and in other Courts that in proceedings under Order 21, Rule 68 a Court is not entitled to go into the question as to whether a transaction is benami or not. The Court is solely entitled to deal with the question of who is in possession and the Court is prohibited from entering into a question of title.

6. It is true that the words of Order 21, Rule 58 would suggest that the Court could go into a question such as benami. But as I have said the authorities of this and

other Courts forbid the investigating Court so to do. The very same question came before me in the case of Protiva Sundari v. Reliance Bank Ltd., 52 C. W. N. 56, in which I had to hold that the Judge in that case could not go into the question of the benami nature of a transaction. In the judgment I have cited certain cases of the Patna High Court and of this Court and it is quite clear that this Court has over a considerable length of time consistently held that in a claim case the Judge cannot go into the question of benami. The learned Subordinate Judge in this case did go into this question and decided that the company was a mere benamdar and that they did not hold the bricks on their own account, but on account of the true owner, the defendant.

7. Having regard to the authorities we are bound to hold that the decision of the learned Judge cannot be sustained and must be set aside. The case should, in my view, be sent back to the learned Subordinate Judge for him to decide it upon the evidence relating to possession which was before him and on that evidence alone. If he can decide the matter he must do so, but he cannot go into the question of benami and hold that the petitioners are mere benamdars, If there is nothing to suggest that the possession of the petitioners is other than genuine he will have to find for the petitioners. He cannot find for the opposite parties on a finding that the petitioners are benamdars.

8. In the result, therefore, this petition is allowed, the order of the learned Subordinate Judge is set aside and the case is remanded to him to be decided in accordance with the observations made in the judgment and according to law. The costs of these proceedings will abide the event before the learned Subordinate Judge. The rule is disposed of in these terms.

9. The interim order of attachment 'continues pending the disposal of the application before the learned Subordinate Judge.

10. Let the counter-affidavit filed in Court today be kept on the record.

Sinha J.

I agree.

