

In Re: Bijoy Kanungo

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Court : Kolkata

Decided On : Sep-25-1992

Reported in : (1993)2CALLT201(HC)

Judge : Samir Kumar Mookherjee and ;Nripendra Kumar Bhattacharyya, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Section 115 - Order 21, Rule 97

Appellant : In Re: Bijoy Kanungo

Advocate for Def. : S. Sengupta, ;S.P. Roy Chowdhury, ;Pratap Chatterjee and ;R. Genodia, Advs.

Advocate for Pet/Ap. : Sanjoy Bhattacharjee and ;Chandrima Bhattacharjee, Advs.

Disposition : Application dismissed

Judgement :

Samir Kumar Mookherjee, J.

1. The disputed property is the 1st. Floor of Premises No. 14, Alipore Park Road, Calcutta.

2. The said property was owned by the Mullicks, who ultimately transferred their right title and interest to the present opposite party No. 1. With regard to the 1st.

Floor of the said Premises, the Mulicks created a lease for 21 years in favour of Turner Morrisson & Co. Ltd. (hereinafter referred to as opposite party No. 2). The Revisional petitioner claims to be a recognized sub-lessee under opposite party No. 2. On the ground of expiry of lease, with effect from 2nd April 1981, the Mulicks instituted an eviction suit against opposite party No. 2 being title suit No. 115 of 1983 of the first Court of the learned Subordinate Judge, Alipore and during the pendency of the said suit, the sale by owners in favour of opposite party No. 1 had taken place. The said opposite party No. 1 got itself added as plaintiff in the said suit. In the said suit the prayer made on behalf of opposite party No. 2 for addition of the present revisional petitioner as a party stood rejected and on or about 28th January, 1992, the said eviction suit was decreed ex parte. The opposite party No. 1 put the said decree into execution in title execution case No. 8 of 1992. The revisional petitioner, on the other hand, filed a suit for declaration to the effect that his possession as a subtenant of opposite party No. 2 was legal, valid and protected by law and could not be interfered with even by enforcement of the ex parte eviction decree. Such suit was numbered as Title suit No. 28 of 1992. A prayer for ad interim injunction, made in the said suit, stood rejected by order No. 9 dated 24th July, 1992 of the learned Assistant District Judge, first Court, Alipore inter alia, with a finding that the defence set up by the revisional petitioner, as plaintiff, as not being bound by the ex parte eviction decree against the opposite party No. 2, was not tenable. The said order remained unchallenged. The revisional petitioner, however, filed an application purporting to be one under Order 21 Rule 97/100/101/151 of the Code of Civil Procedure in the Title execution case No. 8 of 1992 and such application of the revisional petitioner was registered and numbered as Misc. case No. 32 of 1992. In connection with the said application, the petitioner made an application for stay of all further proceedings in the execution case and for re-calling the writ of possession already issued till the disposal of the said Misc. case, filed by the petitioner. By the impugned order the said interlocutory application of the petitioner having been rejected, the present revisional application has been preferred. 'Since the contesting opposite party No. 1 has entered appearance, we heard out the application as a contested application.

3. Appearing in support of the revisional application, Mr. Bhattacharjee strenuously endeavoured to impress upon this Court, on reference to various judicial authorities, that till his client's entitlement to resist the decree was finally adjudicated, the executing Court had no right to proceed with the execution case initiated by the opposite party No. 1 and the reliance by the learned trial Judge, while rejecting the petitioner's prayer for stay, on the fact of refusal of the injunction by him in the petitioner's title suit, amounted to irregular and illegal exercise of jurisdiction by him and as such the impugned order deserves interference in revision. On behalf of the opposite party No. 1 however, Mr. Dasgupta contended that in view of the nature of the right claimed by the petitioner, the pendency of the Misc. case could not pave the ground for an automatic interim stay.

4. Upon consideration of the various judicial authorities cited by the counsel, the following legal principles appear to be firmly settled.

(i) In allowing a prayer under Order 21 Rule 97 of the Code of Civil Procedure, the Court must come to a finding as to whether a person claiming to be in possession is or is not bound by the decree under execution (vide AIR 1983 Sikkim, Page 1 ; 56 C.W.N. 832, 60 C.W.N. 147.)

(ii) A person in occupation setting up an independent title or a sub tenant in possession entitled to statutory protection or having a statutory right has a right of addition (vide : AIR1953 Cal18 ; : AIR1965 Cal51 approved in : [1954]1SCR235 .)

(iii) Sub-lease in absence of any special term is co-extensive with full term of the lease (Transfer of Property Act, Mulla page 701 ; : AIR1957 Cal252 .)

(iv) Mere payment of rent by a sub-lessee on behalf of lessor does not Create a privity of estate between the lessor and the sub-lessee (vide : AIR 1954 SC758 .)

(v) Though the criteria for granting or refusing order of injunction are not the same which require consideration under Order 21 Rule 97 of the Code of Civil Procedure, in appropriate context the refusal of injunction, on the prayer of the sub-lessee, may render a prayer for interlocutory order in a proceeding under

Order 21 Rule 97 of the Code of Civil Procedure an abuse of process of law (vide : [1964]5SCR946). Mere filing of an application for stay during pendency of a proceeding does not automatically create an entitlement to interim relief but the grant or refusal of such relief must depend on facts of each individual case (vide AIR 1977 Supreme Court 2421.)

5. Applying the aforesaid principles of law to the facts of the present case, the conclusion of the learned Judge in the impugned order appears to be unexceptionable. The sub-lessee, admittedly, claims under the lessor and not an independent right or any special statutory right. The alleged payment of rent by him on behalf of the lessor is of no consequence. In the context of the scope of the Title suit filed by him, the fact of refusal of his prayer for injunction against execution of the decree has cut at the root of his claim for interim relief during the pendency of his application under Order 21 Rule 97 of the Code of Civil Procedure, notwithstanding his right to be heard on the said application. The ground on which the lease has been determined automatically determines the sub-lease which is co-extensive with the lease. The conclusion by the learned Judge of the executing Court in refusing interim prayer being tenable, even assuming the reasoning given by him in support of such conclusion is not comprehensive and complete, there is no scope for interfering with the impugned order.

6. The Revisional application, therefore, fails and is dismissed. The impugned order is affirmed.

There will be no order as to cost.

The opposite party stands discharged from undertaking.

The prayer for stay of operation of the impugned order is asked for and is refused.

N.K. Bhattacharyya, J.

7. I agree.