

RAJASTHAN HIGH COURT

Jahoran

Vs.

Kalyanmal

S.B. Civil Revision Petition No. 396 of 2002 and S.B. Civil Revision Petition No.
1056 of 2002
(Prakash Tatia, J.)

19.08.2003

ORDER

Prakash Tatia, J.

1. Heard learned counsel for the parties finally on these two revision petitions.
2. Brief facts of the case are that plaintiff non-petitioner obtained decree for eviction against one Mohd. Hanif, now deceased for eviction from the suit premises on 20.1.98. The appeal filed by deceased Mohd. Hanif was dismissed by the appellate court on 25.1.2001. The execution petition was submitted by non-petitioner No. 1 in which present petitioner Smt. Jaharoon, who is daughter of judgment-debtor, submitted an objection petition under Order 21 Rule 97 Civil Procedure Code stating therein that the suit premises was originally let out to Fateh Mohd, the father of the petitioner and judgment-debtor Mohd. Hanif. Fateh Mohd. expired and during the life time of Fateh Mohd., the petitioner was also residing with Fateh Mohd. After the death of Fateh Mohd., the petitioner is residing with his brother judgment-debtor Mohd. Hanif in the suit premises. According to learned counsel for the petitioner she became tenant being heir of original tenant Fateh Mohd, and there is no decree for eviction against the petitioner Despite this fact, the non-petitioner No. 1 decree-holder wants to evict the petitioner from the suit premises in execution of the decree obtained against the non-petitioner Mohd. Hanif. The petitioner submitted number of affidavits in support of her application along with her own affidavit.
3. The non-petitioner No. 1 contested the application under Order 21 Rule 97 Civil Procedure Code by filing reply and also submitted affidavits of number of persons.

4. In the executing court, the petitioner-objector submitted an application under Order 19 Rule 2 Civil Procedure Code and prayed that she may be permitted to cross-examine the deponents, who have filed the affidavits in support of the case of the non-petitioner No. 1 decree-holder. The said application was dismissed by the trial Court vide order dated 18th April, 2002 on the ground that application under Order 19 Rule 2 Civil Procedure Code to cross-examine the deponent was submitted at the stage after completion of arguments on application under Order 21 Rule 97 Civil Procedure Code of learned counsel for the objector, but even after counsel for the decree-holder also concluded his arguments and learned counsel for the objector was to advance rejoinder arguments. It was also observed by the executing court that affidavits were filed on 7.2.2002 and after arguing on application under Order 21 Rule 97 Civil Procedure Code itself, this application had been filed on 8th March, 2002. Therefore, the court below found that the application is malafidely filed to delay the proceedings. The executing court also observed that in the opinion of the executing court, it is not a fit case for granting permission for cross-examination of the deponents, who filed the affidavit in support of the case of the decree-holder.

5. Learned counsel for the petitioner vehemently submitted that in a proceeding under Order 21 Rule 97 Civil Procedure Code, all the rights, even the title of the parties are decided. Proceeding under Order 21 Rule 97 Civil Procedure Code is just akin to the proceedings of a civil suit and, therefore, the executing court should not have dismissed the application under Order 19 Rule 2 Civil Procedure Code. According to learned counsel for the petitioner, the order passed under Order 21 Rule 97 Civil Procedure Code is appealable order and, therefore, the court should have permitted the petitioner to cross-examine the deponents of the non-petitioner No. 1. Learned counsel for the petitioner relied upon the judgment of this court delivered in the case of *Lookman v. Indra Singh*,¹ wherein this Court held that the court is under obligation to pass an appropriate order giving content reasons while allowing or rejecting the application for calling the deponent for cross-examination.

6. Learned counsel for the petitioner further relied upon the judgment of the Hon'ble Supreme Court delivered in the case of *Silverline Forum Pvt. Ltd. v. Rajiv Trust & Anr.*, reported in² wherein the Hon'ble Supreme Court held that the executing court can decide whether the resister or obstructor is bound by the decree or not. While considering this controversy, the Hon'ble Supreme Court held that adjudication need not be based on detailed enquiry or evidence but, if deemed necessary, the court can require abduction of evidence.

7. Learned counsel for the petitioner also submitted that even in proceedings in civil original suit in which decree for eviction was passed and sought to be executed against the petitioner itself, there was an objection of the defendant-judgment-debtor-brother of petitioner that present petitioner Jahooran is necessary party in the suit and she is residing with the judgment-debtor-defendant. For that even the High Court directed trial court to frame the issue about the necessary party, but that issue was deleted by the trial Court and while deciding the suit itself, the trial court without there being any issue recorded finding on this point, therefore, the decree is illegal.

8. Learned counsel for the non-petitioner vehemently submitted that the revision petitions of the petitioner deserve to be dismissed as the order of the trial court is just, proper and, on merits also, no case has been made out by the petitioner for calling the witnesses for cross-examination. Learned counsel for the non-petitioner further submits that this court as well as the Hon'ble Supreme Court has already held that the proceedings under Order 21 Rule 97 Civil Procedure Code can be decided on the basis of the affidavits and material available on record and discretion is left with the executing court to decide how to proceed. The executing court has exercised its discretion and did not permit the cross-examination of the deponent, the court has acted well within its jurisdiction to proceed with the hearing of the application under Order 21 Rule 97 Civil Procedure Code and rightly exercised its discretion under Order 19 Rule 2 Civil Procedure Code. Learned counsel for the non-petitioner further submits that the petitioner is a married daughter of deceased Fateh Mohd. She was married in the year 1971, the suit was decreed in the year 1998 for eviction and appeal against that was dismissed in the year 2001. Therefore, in these circumstances, it appears that the application has been filed to protect the possession of judgment-debtor and of delaying the disposal of the proceedings under Order 21 Rule 97 Civil Procedure Code.

9. Learned counsel for the non-petitioner relied upon the judgment of this court delivered in the case of *Smt. Sudha & Anr. v. Manmohan & ors. reported in* ³ wherein this Court held that in case the application does not contain *bona fide* reasons for summoning the witnesses for cross-examination and the court rejected the application for summoning the witnesses under Order 19 Rules 1 and 2 Civil Procedure Code, this court could not interfere while exercising power under Section 115 Civil Procedure Code and it is an order passed within absolute discretion of the court. Learned counsel for the non-petitioner further relied upon the judgment of the Hon'ble Supreme Court delivered in the case of *Silverline Forum Pvt. Ltd. (supra)*, which was relied upon by

learned counsel for the petitioner to show that the procedure is to be fixed by the executing court how to proceed to decide the application under Order 21 Rule 97 Civil Procedure Code. Yet another judgment relied upon by learned counsel for the non-petitioner is delivered in the case of *Sri Vaishnav Brahmin Trust, Jodhpur v. Ramesh Chandra & Ors.*, reported in⁴ The relevant portion of judgment referred is as under :-

"22. This expression in Rule 103, enacts a fiction thereby making the orders to be having the same force and subject to the same conditions as to appeal or otherwise, as if for decree, but then it never means that procedure for adjudication of the objection is to be that of a regular suit which culminates into decree. In my view even on the basis of language of Rule 103, the adjudication of objection under Order 21 Rule 97 is not required to be made by adopting the procedure as if it was a civil suit culminating into decree, the objections can be and should be determined on the basis of affidavits filed by the respective parties and documents that may be submitted."

I considered the rival submissions and the decisions relied upon by both the parties. It appears from the facts of the case that only point involved in these revisions petitions is whether the executing court was justified in rejecting the application filed by the petitioner-objector under Order 19 Rule 2 Civil Procedure Code. The facts reveal that the objection was filed by the real sister of the judgment-debtor and, who is married since 1971 and decree was passed in the year 1998 after long contest by the judgment-debtor. This is not the case of the petitioner that she had any inimical relation with his own brother, rather the case of the petitioner is that because of the disability of his brother, she was residing with his brother despite the fact that her own husband is blind. The facts further reveal, according to learned counsel for the petitioner himself, that even the judgment-debtor himself was taking care of interest of the petitioner in the suit by submitting that petitioner is necessary party in the suit. Learned counsel for the petitioner read over the application under Order 19 Rule 2 Civil Procedure Code filed before the executing court and from that application it comes out that only objection and the allegation of vagueness in the affidavits is due to the reason that all the deponents stated in their affidavits that the petitioner is not permanently residing in the house in dispute, but the deponents did not disclose where the petitioner is residing. Meaning thereby the only alleged reason for seeking permission to cross-examination of the deponents is only that petitioner wants to find out truth about the statement of the deponents as they failed to disclose where the petitioner is permanently residing. This can hardly a ground in the light of the statement of the

deponents where they have stated that the petitioner is not permanently residing in the house in dispute.

10. Even as per the judgment of this Court relied upon by learned counsel for the petitioner in the case of Lookman (*supra*), the trial court was very much right in rejecting the application. In the judgment relied upon by learned counsel for the petitioner itself it is clearly observed by the court that :

"the party seeking permission of the court to cross-examine the declarant must disclose the reasons why it is necessary to cross-examine the deponents and it should not merely be a pretext for delaying the proceedings. Tendency to procrastinate proceedings by any means has to be deprecated, but at the same time, sufficiency of the grounds/reasons for seeking permission to cross-examine the deponents require to be examined. The Court is under an obligation to pass an appropriate order giving cogent reasons while allowing or rejecting the application for calling the deponent for cross-examination. Undoubtedly, such a course is not to be adopted in a routine manner. No straight-jacket formulae can be adopted. The court has to examine the facts and circumstances of each case."

11. In view of this judgment, which was relied upon by learned counsel for the petitioner himself, it is clear that the court is not under an obligation to summon the witnesses simply because there is an application and prayer for summoning the witnesses for cross-examination. The petitioner is required to make out a case for summoning the witnesses for cross-examination and for the purpose he is required to show not only cogent reasons for summoning the witnesses but also to show his *bonafide*. The Hon'ble Supreme Court also held that it is for the court to decide how to proceed in a matter when objection is filed under Order 21 Rule 97 Civil Procedure Code and the same judgment was relied upon by both the parties then it hardly remains a dispute about the jurisdiction of the executing court about the procedure to be adopted.

12. Learned counsel for the petitioner also vehemently submitted that the case was not heard on application under Order 21 Rule 97 Civil Procedure Code. Learned counsel for the non-petitioner seriously submitted that the case was heard on application under Order 21 Rule 97 Civil Procedure Code itself. This plea is not available to the petitioner at all, as what has been recorded in the order of the courts below is conclusive as per the judgment of the Hon'ble Supreme Court and the event recorded

in the judgment or order can be challenged by way of review petition before the same court only and cannot be agitated in appeal or revision.

13. In view of the above reasons, I do not find any illegality in the order passed by the executing court and in the facts of this case, the reasons given by the executing court are just, legal and proper.

14. The revision petition No. 1056/2002 is against the rejection of application filed under Section 151 Civil Procedure Code by the petitioner-objector for seeking stay of executing of the decree. Learned counsel for the non-petitioner submits that non-petitioner No. 1 undertakes not to execute the decree till the decision of the application under Order 21 Rule 97 Civil Procedure Code by the executing court. Learned counsel for the petitioner has apprehension that in view of the detailed order passed by the executing court dated 27th August, 2002, the executing court may feel persuaded or influenced by its own order while deciding application under Order 21 Rule 97 Civil Procedure Code. It goes without saying that by order dated 27th August, 2002, the executing court has not determined the issues involved in the application under Order 21 Rule 97 Civil Procedure Code finally, but as required, expressed the prima facie opinion only and that opinion is not binding upon the executing court while deciding application under Order 21 Rule 97 Civil Procedure Code and the executing court is expected to give full opportunity to the parties and decide the application under Order 21 Rule 97 Civil Procedure Code absolutely uninfluenced by the order dated 27th August, 2002.

15. In view of the above, the revision petition No. 396/2002 is dismissed. The revision petition No. 1056/2002 is disposed of on the basis of undertaking of the non-petitioner No. 1 that non-petitioner No. 1 shall not execute the decree till the decision of the application under Order 21 Rule 97 Civil Procedure Code by the executing court. The executing court is directed to decide the application under Order 21 Rule 97 Civil Procedure Code expeditiously. The stay order granted in these revision petitions are vacated.

16. Hence, S.B. Civil Revision Petition No. 396/2002 is dismissed. S.B. Civil Revision Petition No. 1056 of 2002 is disposed of.

Petition dismissed.

Cases Referred.

1. 2003(3) R.C.R (Civil) 444, (S.B. Civil Revision Petition No. 1298/2001)decided on

4th April, 2002

2. 1998(1) R.C.R (Rent) 394: (1998)3 SCC 7233

3. AIR 1996 (Raj.) 59

4. 2000(4) WLC (Raj.) 581