

VANIYANKANDY BHASKARAN

v.

MOOLIYIL PADINHJAREKANDY SHEELA

(Civil Appeal No. 6103 of 2008)

OCTOBER 14, 2008

[ALTAMAS KABIR AND MARKANDEY KATJU, JJ]

Code of Civil Procedure, 1908 – O 21, r 104 – Interpretation of – Held: Language of r. 104 is clear and unambiguous – Order u/r 101 or r. 103 is to be subject to the result of pending suit on date of commencement of proceeding in which orders were made u/r. 101 or r. 103 – On facts, suit by appellant for specific performance of contract was filed long after the commencement of execution proceedings – Thus, r. 104 not applicable.

In year 1990, the respondent No.1 filed suit for recovery of possession against the appellant and the same was decreed. Appellant filed appeal. During the pendency, respondent No.1 filed rent control petition against the wife of the appellant. The petition was dismissed. Respondent No.1 filed appeal. The same was allowed and order for eviction was passed. Appellant's wife filed a revision petition which was dismissed. Appellant's wife was directed to pay the arrears of rent within the stipulated time but she did not pay the same. In year 2004, the respondent No.1 filed execution proceedings seeking the appellant's eviction and delivery of possession of the suit premises. The Executing Court ordered delivery of possession of the suit premises to the respondent. The appellant resisted the delivery. Attempts were made to settle the matter and the respondent agreed to withdraw the execution proceedings unconditionally but the same was never withdrawn. In year 2005, the appellant filed suit for specific performance and also suit for injunction to prevent the

A eviction of the appellant in Execution Proceedings which
was allowed. Respondent challenged the same before the
High Court on the ground that the execution of the de-
B decree which had been legally obtained could not be stalled
merely on account of a claim made by husband of judg-
ment-debtor on basis of an unregistered agreement al-
leged to have been executed on a stamp paper purchased
in her name. High Court held that the trial court had sim-
ply proceeded on the basis that the agreement was genu-
C ine and had shifted the burden of proving the said agree-
ment to be a manufactured document on the respondent;
that in order to prevent the respondent from obtaining
D delivery of the possession of the suit premises in the ex-
ecution proceedings, the appellant had colluded with his
wife, the judgment-debtor, in instituting the suit for spe-
cific performance and to obtain an injunction to restrain
the respondent from enjoying the benefits of the decree
obtained by her, thus, the injunction granted by trial court
in favour of the appellant was highly irregular and is to be
set aside and the petition was dismissed. Hence the
E present appeal.

Dismissing the appeal, the Court

HELD: 1:1 The submissions made on behalf of the
appellant regarding the applicability of Rule 104 of Order
21 of the Code of Civil Procedure, 1908 has substance
and merits consideration in an appropriate case, but they
do not justify interference with the order of the High Court
in the facts of the case. The suit filed by the appellant for
specific performance of contract was considerably later
in point of time than the commencement of the execution
proceedings and, in any event, the language of Rule 104
is clear and unambiguous that any order made under Rule
101 or Rule 103 would be subject to the result of a suit
pending on the date of commencement of the proceed-
ing in which orders were made under Rule 101 or 103.
H Since the appellant's suit was filed long after the com-

mencement of the execution proceedings, the provisions of Rule 104 of Order 21 of the Code will not apply to this case. [Para 14] [396 B-D]

1.2 The views expressed by the High Court in relation to the provisions of Order 21 Rule 2 of the Code regarding adjustment of the decree in terms of an oral settlement alleged to have been arrived at between the parties on 21.2.2005 cannot be faulted. Furthermore, the view of High Court that the burden of proving that the Agreement relied upon by the appellants was manufactured had been wrongly shifted upon the respondent No.1 in contravention of Section 103 of the Evidence Act, 1872, is concurred with. Therefore, there is no reason for disturbing the order of the High Court impugned in this appeal on any of the grounds urged on behalf of the appellant. [Paras 15, 16 and 17] [396 E-G]

CIVILAPPELLATE JURISDICTION : Civil Appeal No. 6103 of 2008

From the final Judgment and Order dated 6.12.2006 of the High Court of Kerala at Ernakulam in FAO No. 29 of 2006

M.K.S. Menon, Usha Nandni and Ranjith K.C. for the Appellant.

K.V. Vishwanathan, K. Rajeev and Harshad V. Hameed for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, J.1. Leave granted.

2. An interesting question regarding the interpretation of Rule 104 of Order 21 of the Code of Civil Procedure in relation to Rule 101 thereof has been raised by Mr. M.K.S. Menon, learned counsel for the appellant. In order to appreciate his submissions, it is necessary to briefly set out the facts of the case giving rise to such question.

A 3. The appellant, who was the original owner of the suit
property along with the building erected thereupon, allegedly
took a loan of Rs.50,000/- from the husband of the respondent
No.1 and under the guise of security for the loan the appellant
was made to execute a conveyance in respect of the suit prop-
erty measuring 88 cents in favour of the respondent No.1 on 1st
B October, 1986. According to the appellant, on the same day his
wife was also made to sign on a blank paper, which was later
on converted into a Rent Deed. It also appears that on account
of another loan taken by the appellant from the Syndicate Bank,
C OS No.176 of 1982 was instituted by the Bank against the ap-
pellant for recovery of the amounts due, before the Subordinate
Court, Thalasherry, in which the suit property was attached.

4. In 1990, OS 239 of 1990, filed by the respondent No.1
before the Subordinate Court, Thalasherry, for recovery of the
D suit property on the strength of the conveyance executed in her
favour, was decreed. An appeal was preferred therefrom by the
appellant before the High Court, being AS No.609 of 1992, and
during the pendency of the appeal, the respondent No.1 filed
RCP No. 292 of 1993 against the wife of the appellant under
E Sections 11(2)(b) and 11(3) of the Kerala Buildings (Lease and
Rent Control) Act, 1965, on the ground of default in payment of
rent for the suit building since August, 1989. An additional ground
was also taken by the respondent No. 1 claiming that the build-
ing was also required by her for her own use and occupation.

F 5. The said Rent Control Petition was dismissed by the
Rent Control Court on the ground that the title in relation to the
building was in dispute in OS No.239 of 1990. An appeal, be-
ing RCA No. 197 of 1994, filed by the respondent No.1 before
the Rent Control Appellate Authority from the order of the Rent
G Control Court, was allowed and eviction was ordered. The wife
of the appellant thereupon filed a revision petition before the
High Court, being CRP No.2532 of 1996, which was dismissed
on 2nd April 2004, by a common judgment delivered in AS
No.609 of 1992 and CRP No. 2532 of 1996, whereby the title
H of the appellant in respect of the suit property was upheld and

the order passed in RCA No.197 of 1994 was confirmed. The appellant's wife was given two months' time to pay the arrears of rent, failing which the respondent was given leave to take steps for execution of the order. Since the arrears were not paid within the stipulated time, the respondent No.1 filed Execution Proceedings No.407 of 2004 seeking the appellant's eviction and delivery of possession of the suit premises. The appellant's wife entered appearance before the Executing Court, which ordered delivery of possession of the suit premises to the respondent on 2nd April, 2005. Since such delivery was resisted by the appellant, the Court ordered delivery to be effected with Police help on 18th July, 2005. Thereafter, attempts were made to settle the matter and the respondent also agreed to withdraw the execution proceedings unconditionally. According to the appellant, although, the respondent had agreed to withdraw the execution proceedings, the same was never withdrawn, which compelled the appellant to file OS No. 181 of 2005 and also for an injunction to prevent the eviction of the appellant in Execution Proceedings No.497 of 2004 in RCP No.292 of 1993. Inasmuch as, such prayer for injunction was allowed by the learned Subordinate Judge, the respondent challenged the same before the High Court.

6. On behalf of the respondent herein, who was the appellant before the High Court, it was contended that when her title to the scheduled property and the building had been upheld and the eviction had also been ordered, such execution of the decree legally obtained could not be stalled merely on the basis of a claim made by the husband of the judgment-debtor on the basis of an unregistered agreement alleged to have been executed by the respondent on a stamp paper purchased in her name. The High Court observed that the Trial Court had simply proceeded on the basis that the agreement in question was genuine and had shifted the burden of proving the said agreement to be a manufactured document on the respondent. The High Court, therefore, took the view that in order to prevent the respondent from obtaining delivery of the possession of the suit premises in the execution proceedings, the appellant had

A colluded with his wife, the judgment-debtor, in instituting the suit for specific performance and to obtain an injunction therein to restrain the respondent from enjoying the benefits of the decree obtained by her. The High Court, therefore, came to the conclusion that the injunction granted by the Trial Court in favour of the appellant herein was highly irregular and deserved to be set aside. The injunction petition filed by the appellant in OS No.181 of 2005, in the Court of Subordinate Judge, Thalasherry, was therefore, dismissed.

C 7. It is in the aforesaid background that Mr. Menon urged that the provisions of Rule 104 of Order 21 of the Code of Civil Procedure were required to be considered.

8. Since we shall be considering the effect of the aforesaid Rule, the same is set out hereinbelow:-

D *“Order XXI. Rule 104.- Order under Rule 101 or Rule 103 to be subject to the result of pending suit. - Every order made in Rule 101 or Rule 103 shall be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made, if in such suit the party against whom the order under Rule 101 or Rule 103 is made has sought to establish a right which he claims to the present possession of the property.”*

F 9. Mr. Menon submitted that the said provision was not there in the Code of Civil Procedure in its original form and was included by amendment with effect from 1st February, 1997 together with Rules 98 to 103, 105 and 106 of Order XXI.

G 10. Mr. Menon submitted that in order to curtail the delay in executing the decree for possession of immovable property, the amended Rules were brought on the Statute book to enable the Executing Court itself to decide claims of title which might be raised in execution proceedings without filing of a separate suit for the said purpose.

H 11. Mr. Menon submitted that the amended provisions of Order 21 of the Code provided for a scheme by which any ob-

struction to the execution of a decree giving rise to questions relating to right, title or interest in the suit property, arising between the parties to a proceeding, on an application under Rule 97 or Rule 99 or their representative and relevant to the adjudication of the application, is to be determined by the Court dealing with the application and not by a separate suit. The said provision contained in Rule 101 has been referred to in Rule 104 which indicates that any order made under Rule 101 or Rule 103 would be subject to the result of any suit that may be pending on the date of commencement of the proceeding in which such order is made. According to Mr. Menon, although the execution proceedings were commenced on 3rd November, 2004, and the suit for specific performance was filed by the appellant on 27th August, 2005, the actual order was passed on the application under Rule 97 by the Executing Court on 19th December, 2005, after the suit had been filed by the appellant. In other words, according to Mr. Menon, the suit filed by the appellant was pending on the date when the order under Rule 97 and Rule 98 was made and would, therefore, be subject to the provisions of Rule 104 and would have to await the outcome of the suit for specific performance filed by the appellant. Mr. Menon urged that the High Court had erred in relying on the provisions of Rule 2 of Order 21 of the Code in setting aside the order of injunction passed by the learned Subordinate Judge on the application for injunction filed by the appellant in OS No.181 of 2005.

12. Appearing for the respondent, Mr. Vishwanathan, on the other hand, submitted that the submission regarding the applicability of Rule 104 of Order 21 of the Code of Civil Procedure to the facts of this case was wholly misconceived since the execution proceedings had been commenced long before the appellant's suit for specific performance was filed. While the respondent's suit for recovery of possession was decreed in 1990, the execution proceedings for executing the decree was commenced on 3rd November, 2004, and the appellant filed his suit for specific performance about ten months later on 27th August, 2005.

A 13. Mr. Viswanathan submitted that since the eviction proceedings against the appellant's wife had reached its final stages, the appellant raised a new claim based on an unregistered document to stall the execution of the decree for possession made as far back as in 1990.

B 14. The submissions made on behalf of the appellant regarding the applicability of Rule 104 of Order 21 of the Code has substance and merits consideration in an appropriate case, but they do not justify interference with the order of the High Court in the facts of this case. The suit filed by the appellant for specific performance of contract was considerably later in point of time than the commencement of the execution proceedings and, in any event, the language of Rule 104 is clear and unambiguous that any order made under Rule 101 or Rule 103 would be subject to the result of a suit pending on the date of commencement of the proceeding in which orders were made under Rule 101 or 103. Since the appellant's suit was filed long after the commencement of the execution proceedings, the provisions of Rule 104 of Order 21 of the Code will not apply to this case.

E 15. We cannot also find any fault with the views expressed by the High Court in relation to the provisions of Order 21 Rule 2 of the Code regarding adjustment of the decree in terms of an oral settlement alleged to have been arrived at between the parties on 21.2.2005.

F 16. Furthermore, we also agree with the High Court that the burden of proving that the Agreement relied upon by the appellants was manufactured had been wrongly shifted upon the respondent No.1 in contravention of Section 103 of the Indian Evidence Act, 1872.

G 17. We, therefore, find no reason for disturbing the order of the High Court impugned in this appeal on any of the grounds urged on behalf of the appellant. The appeal, therefore, fails and is dismissed, with cost assessed at Rs.10,000/-.

H N.J.

Appeal dismissed.