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Court : Patna

Decided On : Apr-23-2001

Judge : P.K. Deb, J.

Appeal No. : Misc Appeal No. 367 of 2000

Appellant : Phulwasi Devi @ Phulbasi Devi

Respondent : Ashan Devi and ors.

Disposition : Appeal Allowed

Judgement :

P.K. Deb, J.

1. This appeal has been preferred by the abovenamed appellant (opposite party 1st Set) against the order dated 2-6-2000 passed by Sri Mahatam Prasad, Sub-ordinate Judge, IX Patna in Misc. case No. 18 of 1996 filed under Order XXI, Rule 99 read with Section 151 of the Code of Civil Procedure for redelivery of possession of the disputed land in question.

2. The appellant Phuiwasi Devi filed Title Suit No. 22 of 1987 for specific performance on an agreement for sale regarding the land situated at plot Nos. 54, 55 and 60 Khata No. 507 of village Dhakanpura (Boring Road), part of holding Nos. 116/108, circle No. 249, ward No. 34 of Patna Municipal Corporation having

an area of 8 khatas 11 dhoors. Originally, the land in question was owned by the respondents second set, namely, Bani Dey, her son Debashish Dey and daughter Jayshree Roy, of whom are now residing in Calcutta. Originally, the land in question was purchased by one Banilata Devi, paternal aunt of late Ashish Kumar Dey. Banilata Devi; bequeathed her entire property including the disputed land in favour of her nephew Ashish Kumar Dey through a Will on 28-7-1957. After the death of Banilata Devi, Ashish Kumar Dey filed an application for grant of probate of the Will before this Court and probate was granted in favour of Ashish Kumar Dey in Testamentary case No. 2 of 1961 and he took over possession over the disputed land along with the other properties mentioned in the Will. He died leaving behind his widow Bani Dey, son Debashish Dey and daughter Jayshree Roy as legal heirs. They also came in possession on the death of their predecessor. An agreement was arrived at between Phuiwasi Devi and the above-mentioned three owners for sale of the disputed land for a consideration of four lakh and the appellant paid the earnest money of Rs. 1 lakh to the respondent Nos. 3 to 5 by way of two bank drafts each of the amount of Rs. 50,000/- drawn on the State Bank of India at Bikaner, Jaipur, 'R' Block, Patna, to its branch at Calcutta and a deed of agreement was executed on 12-7-1984. As per the agreement, the original sale deeds of Banilata Dey had also been made over to the appellant. It was stipulated in the agreement that the respondents shall take necessary permission from the authority before executing the sale-deeds on payment of the balance of consideration money of Rs, 3 lakh. The respondents did not take any steps in executing the sale-deeds after receiving the earnest money although several requests were made from the side of the appellants. A legal notice was sent to the respondents but still then no sale-deed was executed. Finding no other alternative, the appellant filed Title Suit No. 27 of 1987 against the respondents second set on 6-1-1987 for enforcing the agreement of sale before the sub-ordinate Judge at Patna. According to the appellant, respondent No. 3 Bani Dey, personally appeared in the suit through,her lawyer on 18-6-1987, filed Vakalatnama and a petition seeking time to file written statement. Her son and daughter also appeared separately on 19-8-1987 through their attorney Nihar Kumar Das. They also filed Vakalatnama and petition for filing written statement through their attorney. Although several adjournments were granted in the suit for

filing written statement but the respondents second set, who were defendants in the suit, did not file any statement nor taken any steps in the suit. Subsequently, the suit was heard ex parte. It appears that a petition was filed from the side of the appellant, as plaintiff in the suit, for publication of summons in the news paper as required under Order V Rule 20 of the Code of Civil Procedure although there was already appearance by the defendants in the suit but that petition was ultimately not pressed. By the judgment and order dated 8-11-1990, the suit was decreed ex parte by the Sub-ordinate Judge and directed the defendants (respondents second set) to execute the sale-deed within 90 days and, if not, the deed would be executed through the process of the Court. There was no prayer for possession in the suit. As per the decree granted, the appellant deposited the balance of consideration amount of Rs. 3 lakh by challan on 30-11-1990. When no sale-deed was executed by the defendants the appellant filed Execution Case No. 4 of 1991 and prayer was made for execution of the sale deed by the Court. The deed was executed by the Court and was sent for registration. The Registration office took objection in registration as no permission was therefrom the authority regarding the sale but ultimately, the same was registered through the direction of the Court as the deed was executed by the Court itself in pursuance of the decree granted by the Court. Ultimately, the sale-deed was registered on 1-6-1993. Then there was prayer for delivery of possession but at the first stage such prayer was not entertained. But, on the basis of a Division Bench judgment ultimately order was passed for issuance of delivery of possession through the process of the Court. As per prayer of the decree-holder-appellant, the Nazir along with the Magistrate and police force went to the spot and possession was delivered on 5-9-1996 to the appellant. According to the appellant, after delivery of possession she started construction work over the land in question. The delivery of possession was granted by the executing Court, and satisfaction to that effect was recorded by the executing Court on 20-11-1996 but the matter was kept open regarding the satisfaction of the cost decree.

3. On 21-9-1996, the respondents second set filed an application under Order XXI Rule 99 of the Code of Civil Procedure for restoration of possession which was registered as Misc. Case No. 18 of 1996, The case of the respondents first set was that by the four sale deeds dated 4-6-1985, 5-6-1985, 29-11-1985 and 2-12-

1985, the land in question had been purchased by them from respondents second set and that immediately after their purchase they were put in possession and have been continuing in their possession as the owner and that their names were being mutated not only in the revenue records but also before the Municipal authorities. One of the purchasers Ramrati Devi died on 1-6-1987 and her only son respondent No. 2 also got his name mutated and came in possession with respondent No. 1. According to them, coming to know of attempt of disturbances in possession in the evening of 5-9-1996 they informed about breach of peace before the local police but no action was taken. Consequently, on 6-9-1996 a petition was filed before the S.D.M. Sadar, Patna, to preserve peace, who called for a report but no report was submitted. Then again, a petition was filed on 10-9-1996 by respondent No. 1 and a proceeding under Section 144 of the Code of Criminal Procedure was initiated against the parties by order dated 10-9-1996 but then the respondents could know that delivery of possession was made through the Court and as such, they searched in the Civil Court at Patna and came to know that delivery of possession was taken by the appellant through paper transactions although they remained in possession and as per advice, filed the petition for redelivery of possession as contemplated under Order XXI, Rule 99 of the Code of Civil Procedure. On the basis of such petition, the above-mentioned Misc. case was registered. Both the parties adduced both oral and documentary evidence and the learned Sub-ordinate Judge-IX, Patna, who was the executing Court in respect of Execution case No. 4 of 1991, passed the impugned order of redelivery of possession. Hence, this appeal.

4. The cases of the respondents had been allowed by the learned Court below on the following points, namely, (i) that the respondents had been delivered possession in respect of the decretal land after their purchase and they had mutated their names in the Municipality, (ii) that the appellant did not take proper steps regarding incumbance on the land before filing of the suit and that from the circumstances, it could be understood that the appellant must have the knowledge about the sale deeds in favour of the respondents as she stated in her evidence that she had made search before filing of the suit in Calcutta Registration Office also including that of Patna but did not get any trace that the land had been purchased by anybody else. Thus, the decree obtained ex parte cannot be binding

and legally not maintainable when the subsequent purchase to the so-called agreement had not been made parties to the suit and the title of the appellant had not been perfected thus, (iii) the appearance of Bani Dey and her son and daughter in the suit are only hoax. The appellant had taken steps even after their appearance for getting the summons notified in the newspaper as contemplated under Order V, Rule 20 of the Code of Civil Procedure which belies the so-called appearance of all the defendants in the suit, (iv) that the signature of Bani Dey did not tally with the signature with the sale-deeds of the respondents raising a doubt about veracity of the Vakalatnama and the time petition filed by Bani Dey in the suit. Considering all these points, as mentioned above, the executing Court had allowed the Misc. case and hence this appeal has been preferred.

4-A. Mr. Sukumar Sinha, Advocate, appearing for and on behalf of the appellant, has very much hammered on the maintainability of the petition filed under Order XXI, Rule 99 of the Code of Civil Procedure. His contention is that until and unless there is actual dispossession of the respondents from the suit land, there is no scope to entertain a petition under Order XXI, Rule 99 of the Code of Civil Procedure. He has referred to a single Bench judgment of this Court as reported in : AIR1989 Pat80 (Mohammad Akhtar and Ors. v. Ramhars Chaturvedi and Anr.). He has also referred to the averments made in the petition itself. His further submission is that the learned executing Court had gone beyond the decree when he had found fault in the proceeding with the suit and the orders passed therein although no suit is there challenging the *exparte* decree itself. His submission is that regarding the appearance of defendants in the suit and the *exparte* proceedings the suit thereafter are within the scope of the *exparte* decree itself. Thus, the matters are beyond the scope of adjudication within the limited scope under Order XXI, Rule 99 of the Code of Civil Procedure. His further contention is that there was no legal knowledge of the appellant regarding the sale by Bani Dey and her son and daughter in favour of the respondents. The defendants that is Bani Dey and her son and daughter, who had appeared in the suit, had never disclosed that fact which go to show that the sale-deeds in favour of the respondents are collusive documents which is amply clear from the facts that the consideration amounts in the sale-deeds are much less than the amounts stipulated towards consideration in the agreement of sale which was much prior to

the so-called sale deeds. The collusiveness of the documents makes it also clear from the fact that the deeds have been registered at Calcutta giving no reasons when the jurisdiction falls in the Patna Registration Office. On all those submissions, it is submitted by Mr. Sinha that the impugned order suffers from illegality, irregularity and. on jurisdiction point also and hence, the same is required to be set aside.

5. On the other hand, Mr. S.S. Dwivedi, Senior Counsel appearing for and on behalf of the respondents, submits that the respondents had exercised possession over the suit land which is amply clear from the facts that their names have been mutated in Patna Municipality and such mutation and holding numbers can only be given when there is actual physical possession and to that effect, there is evidence to the effect that a house in dilapidated condition was already there over the suit land when possession was being taken from the side of the appellant. His further submission is that, even if, there is no actual dispossession but by implication of law dispossession is there as under the provisions of the Transfer of Property Act when there is execution of sale deed the same includes delivery of possession also. On the other submissions, it is stated that by the change of wordings of Order XXI, Rule 99 of the Code of Civil Procedure all powers have been given to the executing Court to consider the title of the parties and, as such, instead of wordings 'inquiry' it has been substituted by the word 'adjudication' and when under Rule 101 of the Code of Civil procedure a suit is barred then on the point regarding right, title and possession and of exclusive determination within the scope of a petition under Order XXI, Rule 99 of the Code of Civil Procedure. His further submission is that on factual aspect learned trial Court has by considering the pros and cons decided the issues involved on proper adjudication and hence, the same cannot be interfered with.

6. In the light of the submission made by the learned Counsel for both the parties, the records of the Court below are scrutinised including the evidence adduced together with the documentary evidence. The factual position remains that the suit for specific performance was filed by the appellant on the basis of the agreement of sale entered into by Bani Dey and her son and daughter. Before filing of the suit a legal notice was also given to them but they did not reply. After the suit was filed

on 18-6-1987, Bani Dey appeared by filing Vakalatnama and on 18-7-1987 a petition was also filed by her signature to file written statement. But no written statement was filed and the suit proceeded ex parte against her. In the same manner on 19-8-1987 her son and daughter i.e. Debashish and Jayshree also appeared through attorney Mr. Nihar and prayed for filing written statement. But they did not contest the same and allowed the suit to proceed ex parte. On 8-11-1990, ex parte decree was passed and on 30-11-1990 balance amount of consideration was deposited. On the face of the records, it appears that agreement of sale was made for as consideration of the suit land to the tune of Rs. 4 lakh but very peculiarly the suit land has been sold to the respondents as alleged by the respondents at a very meagre sum and no evidence is coming forth as to why the suit land was sold at a meagre sum when it was agreed upon to be sold at a high amount to the appellant. What was actually in the mind of the vendors could not be found out as those vendors had neither appeared in the suit nor they appeared in the present proceeding although it appears that notices have been served on them. As they did not appear in the Misc. case notice on them have been dispensed with in the present appeal also. From the impugned order, it does not appear that the learned Court below has considered that aspect of the matter rather, the learned executing Court had gone to hold that the decree itself passed in favour of the appellant was improper. It is a matter to be considered in the following line. At one side, there is legally valid decree fought for long three years and the defendants knowing fully well about the suit did not appear in the suit to contest the same. It might be that when they have already washed off their hands about the suit land they did not want to involve themselves again in the suit and hence they remained absent in all the proceedings. But, the defendants in the suit being the vendors of the respondents, they could have validly got all those points clarified, as mentioned above, by at least examining them or one of them on commission in Calcutta but that has not been done. Mr. Dwivedi submitted that when decree is there in favour of the appellant then it was their burden to do it. But, I do not concede such submission rather when the respondents were coming to have purchased the suit land on payment of consideration amount and on the basis of those sale-deeds they want to deny the decree granted by the Civil Court, it was their burden to prove their sale-deeds and also the points involved by at

least examining their vendors in their favour or getting them examined through commission but that has not been done. It is peculiar to note that the learned executing Court has raised his eye-brow when he found that the signatures in the vakalatnama and the time petition filed by Bani Dey did not tally with the signature in the sale deeds of the respondents as if the sale-deeds in favour of the respondents were admitted fact to have been executed by the so-called vendors rather those were challenged at the very inception itself. No where it is there that the signature of the vendors of the respondents were ever been tallied with the agreement on the basis of which a decree has been granted in favour of the appellant. A Court of law on consideration of the materials on record held that Bani Dey had once appeared in the suit and time was also granted to file written statement but then did not contest. The same is the position in respect of her son and daughter. But those orders passed by the trial Court has been sought to be nullified by the executing court and I am afraid, he has got no such jurisdiction to do so that too on the basis of a wrong assumption. It might be that the signature in the sale-deeds of the respondents did not tally with the signatures in the vakalatnama and the time petition then who is to say which signatures are proper and genuine? It was Bani Dey or her son and daughter to say on this point but they had not said so. Nowhere the agreement for sale executed by Bani Dey and her son and daughter had ever been challenged by them. So on that ground to hold that the ex parte decree was not proper as held by the learned Court below is definitely beyond the jurisdiction of the executing Court and the reasonings given by the Court were also improper on the face of it. To arrive at such a decision much more evidence is necessary in the proceeding but the same is lacking on the face of it. Nowhere there is petition from the side of the respondents challenging the signatures of the defendants in the suit or in the agreement itself. Rather their plea was that they being the subsequent purchasers they were necessary parties in the suit and when they have not been made parties the decree itself is a nullity in the eye of law. The question remains as to whether there was knowledge of the appellant about the execution of the sale-deeds in favour of the respondents before filing of the suit. On the face of it, there is no legal knowledge of the appellant. It was never informed to them either by Bani Dey or her son and daughter nor there is any iota of evidence to show that the appellant had got the

knowledge during the pendency of the suit or before filing of the suit regarding transfer of the suit land in favour of the respondents. A stray statement was there by the appellant that she had made search in the Patna Registration Office and that of the Calcutta Registration Office but she could not get any trace that any sale-deed was ever been executed. The learned executing Court in the impugned judgment held that there must have been knowledge of the appellant regarding the sale-deeds otherwise there was no reason for her to make a search in Calcutta Registration Office. Such sort of stray statement cannot in any way bind the appellant regarding her knowledge about the sale-deeds. In normal circumstances, when the sale-deeds were executed in Calcutta although the suit property is within the jurisdiction of the Patna Registration Office then there remains no scope of the appellant to know about conveyance or transfer of the suit land before filing of the suit or during the pendency of the suit. Such legal position cannot be brushed aside by such stray statement made by the appellant. The respondents have also not given any plausible reason as to why sale-deeds have been executed in Calcutta that too on meagre amount when the consideration amount was much higher prior to the execution of the sale-deeds and it is the submission of Mr. Sinha that this fact alone creates doubt about the veracity of the sale-deeds. Regarding the petition filed under Order V, Rule 20 of the Code of Civil Procedure much argument has been placed before the Court below and also before this Court that the same shows that there was no appearance of the defendants in the suit itself otherwise there was no reason for filing such petition. Explanation has been given that due to inadvertance and charge of lawyers such petition was filed due to mistake and when the mistake could be understood that petition was never proceeded. The order-sheet of the suit shows the appearance of the defendants in the suit and that has never been challenged by the persons who can challenge it. The respondents being third party cannot challenge such appearance that too in the proceeding under Order XXI, Rule 99 of the Code of Civil Procedure. They might be bona fide purchasers but for that if they are not dispossessed by the execution of the decree then they are not entitled to claim that the decree obtained is a nullity in the eye of law. The very factum of dispossession in the executing of decree has been challenged vehemently from the side of the appellant and on that point practically there is no valid decision by

the learned Court below although voluminous impugned order has been written.

7. On this point of possession by execution of decree, Mr. Sukumar Sinha's submission is that there is no scope of interpretation of the wordings of Order XXI, Rule 99 of the Code of Civil Procedure regarding the word 'dispossession' to take it as deemed dispossession and not actual dispossession. According to him, the whole chapter of Order XXI, Rule 97 to Rule 103 clarifies the position that there must be obstruction during the course of execution in delivery of possession and if obstruction is not there then actual physical dispossession. There is no scope of any interpretation of deemed dispossession to attract these provisions. It is submitted by Mr. Sinha that nowhere in the petition filed by the respondents, it has been stated that they have been dispossessed on execution of the decree rather their case is that by execution of decree their legal possession has been disturbed and hence this petition has been filed. Mr. Sinha has referred to paragraph-12 of the petition filed under Order XXI, Rule 99 of the Code of Civil Procedure which runs as follows:

That the alleged purported D.P. dated 5-9-1996 was also illegal on the face of it but amounts to dispossession of the applicant which entitled the applicant to seek relief for restoration of possession under Order XXI, Rule 99 and 101 of the Code of Civil Procedure on the grounds referred above.

Thus, this statement, according to Mr. Sinha, there is admission on the part of the respondents in their petition itself that they had never been dispossessed from the decretal land in execution of the decree and on delivery of possession on 5-9-1996 and when according to the wordings of Order XXI, Rule 99 of the Code of Civil Procedure, there is no scope of interpretation of dispossession to the tune of amounts to dispossession or deemed dispossession then the petition is not maintainable. Such factum of dispossession as claimed from the side of the respondents belies from their actions, if they were in actual possession as per Mr. Sinha's submission, there must have been obstruction to the delivery of possession but on the face of it, there was no such obstruction by anybody as is revealed from the report of Yogendra Pd. Singh, Nazir, dated 5-9-1996 and also the report of the Executive Magistrate, who had accompanied at the time of

dispossession. This Executive Magistrate had also been examined in this Misc. case and he has specifically stated that there was none in possession rather it was a vacant land and he could not find any construction over the land although, according to the respondents, they had exercised possession by making some constructions and on seeing the same, mutation was granted by the Municipality. Rather he stated that he found some two Zopries on the north-east side but nobody claimed those Zopries during the course of delivery of possession. According to the respondents on 5-9-1996, they apprehended some trespass and dispossession and filed the petition before the Sub-divisional Officer. When no action was taken, they filed a petition before the Sub-divisional on 6-9-1996 and the Sub-Divisional Officer called for a report but no report was submitted and then they came to know that there was delivery of possession through Court and then they took steps to inspect the records of the executing proceeding and the title suit and afterwards filed this petition under Order XXI, Rule 99 of the Code of Civil Procedure. Thus, on the face of the records except that the respondents claimed that they had mutation over the suit land from Municipality and that was due to the physical verification by the Municipality but no such actual evidence has been adduced from the side of the Municipality regarding actual physical possession of the respondents and in view of the admission made by the respondents in their petition itself, it cannot be said that the respondents were on the date of delivery of possession in fact actual physical possession and they have been dispossessed of delivery of possession in the executing proceeding.

8. Now the question comes in as to whether there is scope of entertaining a petition under Order XXI, Rule 99 of the Code of Civil Procedure even if there is no actual dispossession but from the circumstances, it could be construed as deemed dispossession. This maintainability of the petition was challenged by the appellant at the very outset on filing of the petition and registering of Misc. case. But as the matter was not entertained by the Court below at the initial stage, the appellant came up before this Court in Cr. Revision No. 122 of 1998 but the same was dismissed on 5-3-1998 with an observation to raise all these question before the trying Court. Against that order, the appellant went in S.L.P. before the Hon'ble Supreme Court but the same was dismissed as withdrawn on 24-8-1998. So the question of maintainability remained open to be decided. In the impugned order,

as stated above, the learned Court below has found on the basis of the averments made in the sale deeds of the respondents and evidence adduced and also on the analogy of the provisions of T.P. Act and that there was mutation in the Patna Municipality in favour of the respondents that respondents were in possession and that by delivery of possession in the execution proceeding being Execution Case No. 4 of 1991 the respondents have been dispossessed. Actual physical possession of the respondents on the date of delivery of possession could not be found as per the Nazir's report and as per the evidence of the Executive Magistrate and as per statement made in the petition of the respondents, it was clear that there was no actual physical possession of the petitioners or there was actual dispossession by the decree-holder in the process of execution proceeding by way of delivery of possession. I have already quoted the relevant paragraph in the petition itself. Now the question comes in whether the dispossession as mentioned in the provisions of Order XXI, Rule 99 of the Code of Civil Procedure means actual dispossession or it can be construed as dispossession from juridical possession or not. Actual possession was not there as is revealed from the contents of the petition itself. From the documents and averments made in some documents it can be construed that they were in juridical possession but dispossession as contemplated must be an actual dispossession and not dispossession of juridical possession. This has been held by a single Bench of this Court as reported in : AIR1989 Pat80 (Mohammad Akhtar and Ors. v. Ramhars Chaturvedi and Anr.). Learned Single Judge by referring to various judgments of this Court and of different High Courts of Calcutta, Madras and Cochin held that dispossession as contemplated under Rules 99/100 of the Code of Civil Procedure is actual dispossession and not dispossession of symbolical and juridical dispossession. Rule should be read in conformity with Rule 97 and Rule 98 of Order XXI of the Code of Civil Procedure. Rule 97 relates to obstruction by third party. Rule 98 refers to Order after adjudication in the inquiry held when obstruction is raised by third party and Rule 99 relates to dispossession by the decree-holder or purchaser of a person from the property other than the judgment-debtor. Rule 99 reads as follows:

(i) 'Whether any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for the possession of such property

or whether such properties were sold in execution of a decree by the purchasers thereof, he may make an application to the Court complaining of such a dispossession.'

(ii) Whether any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

There are special provisions are there wherein a third party has been dispossessed by an unscrupulous decree-holder in execution of the decree when actually the third party was in possession of the suit property other than the judgment-debtor. By connotation of those whole it has been held by different High Courts that a tenant under the judgment-debtor is definitely a third party and can come under this Rule if he is dispossessed in course of delivery of possession and the tenant should be construed as a person other than the judgment-debtor. Similarly, a co-sharer of the judgment-debtor, who is in possession, can also come under this provision if he is dispossessed during the course of delivery of possession in execution of the decree. So this special provision is enacted by the Legislature giving protection to a who is in actual physical possession over the decretal land but a decree has been obtained without making him a party and in the course of delivery of possession he has been dispossessed. A person might have a right over the property but if he is not in possession of the property cannot come under this special provisions so the pinpoint for maintainability of such petition is that such petition should be filed by a person other than the judgment-debtor and that he has been dispossessed during the course of execution proceeding through delivery of possession by the Court. A person having right over the property can very well come up for a suit but if actual dispossession is there then he is not entitled to come for a separate suit challenging the decree and possession thereof. Very much reliance has been put by Mr. Dwivedi, Senior Counsel, on the decisions of the Apex Court as reported in : [1997]1SCR463 (Bahmadeo Chaudhary v. Rishikesh Prasad Jaiswal and Anr.) and : [1998]2SCR709 (Shreenath and Anr. v. Rajesh and Ors.). Those, cases practically related to the interpretation of obstruction and resistance by third party as contemplated under Order XXI, Rule 97 of the Code of Civil Procedure. As per the provisions of Rule 97 when the third party obstructs the delivery of possession in

execution of a decree and the same comes to the notice through any application by the decree-holder or on the Nazir's report then inquiry/adjudication is to be made as per the claims made by the third party. The decree-holder had the option for filing application but the Apex Court has extended the same by giving right to the third party even to come up under that provisions but pre-condition attached to it was obstruction in delivery of possession. If obstruction is there or not but still then delivery of possession has been made dispossessing the third party then definitely third party comes within the purview of Rule 99. But a person who is claiming right over the property, although has not been actually dispossessed, definitely does not come within the purview of Order XXI, Rule 99 of the Code of Civil Procedure and in that way, he is not debarred from filing a suit as per restrictions put under Rule 101, Order XXI of the Code of Civil Procedure. If actual dispossession is not there then anybody claiming right over the property would be coming under Rule 99 for adjudication of his claim via media by the executing Court for establishing his right without going to regular suit and if this position is maintained that anybody apprehensive of dispossession or anybody claiming right although not actually dispossessed can come within the purview of Rule 99 then there would be flood-gate and a decree-holder who obtained a decree by due process of law would be frustrated of not getting the fruit of the decree. In the present case, not only delivery of possession has been given, but such delivery of possession has also been confirmed by the executing Court during the pendency of this Misc. case as is revealed from the impugned order and the records of the case itself. After the confirmation of delivery of possession in favour of the decree-holder he should not be dispossessed by redelivery of possession under this Rule as redelivery of possession presupposes earlier possession of the party. When the respondents were not in actual physical possession on the date of delivery of possession via media they are going to take possession through this sleep-shot method which cannot be allowed and the same cannot be the intention of the Legislature. So, in my view, the actual dispossession of the third party is the first ingredient for the purpose of entertaining a petition under Order XXI, Rule 99 of the Code of Civil Procedure and definitely on the face of the averments made in the petition itself, this petition of the respondents cannot be held to be maintainable. I am fortified by the judgment of the Allahabad High Court as

reported in AIR 1968 Allahabad 52 (Smt. Sona Devi & Ors. v. The District Judge, Allahabad and Ors.) wherein it has been held objection under Order XXI, Rule 99 is maintainable by a person other than the judgment-debtor complaining of his dispossession only after he is dispossessed from his premises which constitutes the subject-matter of decree. It has further been held if the executing Court wants to stay its hands still investigation/adjudication into the third party's claim is not finally decided, it would be resulting in depriving the decree-holder of his possession because of spurious claims. Kerala High Court although not exactly on the same point held in : AIR1991 Ker413 (Khandigramody-od-Bharan v. Union of India and Ors.) that plain reading of the provisions of Order XXI makes it clear that an application for adjudication of the right, title and interest of an obstructor would not lie before he is dispossessed in execution of a decree of which he is not a party. The remedy lies to the obstructor only when he has been dispossessed in execution of the decree for the purpose of maintaining a petition under Order XXI, Rule 99 of the Code of Civil Procedure. If he has been actually dispossessed in execution of the decree then definitely the clog of non-maintainability of a separate suit as per Rule 101 of the Code of Civil Procedure would not create a bar in maintaining a separate suit.

9. Mr. Dwivedi, Senior Counsel, has relied very much on a decision of a Madras High Court as reported in : AIR1991 Mad209 (Vimala Ammal v. C. Suseela and Ors.). According to Mr. Dwivedi, the present case is wholly similar to that of the Madras High Court's case. Therein also a suit for specific performance was decreed against the judgment-debtor who was the title-holder of the suit property but before filing of the suit the judgment-debtor had sold away to a third party. But the third party had not been made a party in the suit and ultimately a decree was granted for specific performance, sale-deed was executed by the Court in favour of the decree-holder and then in execution of the decree possession was given to the decree-holder and then the petition was filed by the third party not the judgment-debtor for redelivery of possession as contemplated under Order XXI, Rules 99-102 of the Code of Civil Procedure. Reference was made under Section 19-B of the Specific Relief Act and held that the suit for specific performance without making subsequent purchase as a party is not maintainable and hence, the decree cannot be executed. It was also ordered for delivery of possession to

the purchasers since they are prior purchaser before the filing of the suit, after proper adjudication. The question of maintainability was also raised with regard to the word dispossession in that case and the learned Single Judge of the Madras High Court held that in view of the statement made in deposition to the effect that the subsequent purchasers were in possession when D.P. was issued and delivery of possession was taken by the decree-holder when they did not protest about such dispossession at the time of delivery of possession and hence, it was held that actually there was dispossession in execution of the decree to the subsequent purchaser and hence the petition was maintainable under Order XXI, Rule 99 of the Code of Civil Procedure. So on principle, it was also held by the learned Single Judge in that judgment of the Madras High Court that actual dispossession necessary for the purpose of maintaining a petition under Order XXI, Rule 99 of the Code of Civil Procedure. There in that case obstruction was not raised but it was admitted by the decree-holder that the third party was in possession on the date of delivery of possession but did not raise objection or protest regarding such delivery of possession. So on principle, it remains the consistent view that for maintaining a petition under Order XXI, Rule 99 of the Code of Civil Procedure actual physical dispossession must be there in respect of the third party who can come up for redelivery of possession as contemplated under Rules 99/100 of, the Code of Civil Procedure on adjudication of his claim. Right of adjudication of the claim comes subsequent to the maintainability of the petition itself. If the petition itself is not maintainable due to absence of first ingredient of actual physical dispossession then there remains no scope of adjudicating the claim of the third party. Thus on legal principle, I hold and find that the petition of the respondents under Order XXI, Rule 99 of the Code of Civil Procedure is not maintainable as there is no actual physical dispossession in execution of the decree and, as such, the adjudication of his right and claim over the property is outside the scope and jurisdiction of the executing Court. Mr. Dwivedi, Senior Counsel has submitted that when restriction is there for non-maintainability of the suit then right of respondent have rightly been decided by the learned executing Court. I do not find much force in this submission. When a petition is not maintainable under Order XXI, Rule 99 of the Code of Civil Procedure then clog of non-maintainability of a separate suit has got no bearing.

10. In that view of the matter, as per discussions made above, I hold and find that the impugned order suffers from jurisdictional error and also with regard to the findings thereof. In the result, this Misc. appeal is allowed. The impugned order is hereby set aside. But no order as to costs.

11. Before parting with the records, I must observe that any finding or observation made either by this Court or by the learned executing Court in the impugned order on merit would not in any way be binding on the parties if a separate suit is filed by the aggrieved party for title and possession thereof.

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