

ShamsuddIn Vs. Abbas Ali

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Court : Allahabad

Decided On : Jan-19-1970

Reported in : AIR1971All117

Judge : K.B. Srivastava, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 21, Rules 35, 35(1), 35(2), 36 and 100

Appeal No. : Civil Revn. No. 230 of 1967

Appellant : Shamsuddin

Respondent : Abbas Ali

Advocate for Def. : S.C. Mathur, Adv.

Advocate for Pet/Ap. : Jagdish Narain and ;K.S. Verma, Adv.

Disposition : Revision dismissed

Judgement :

ORDER

K.B. Srivastava, J.

1. This civil revision by Shamsuddin is directed against the order of the Civil Judge, Mohanlalganj, Lucknow allowing the objection of the opposite party Abbas

Ali under Order 21. Rule 101. Civil P. C. It arises out of the following facts.

2. One Mohammad Jafar made a mortgage of five shops on the ground floor and two shops on the first floor situate at Sanitary Road, in Mohalla Maulviganj, in the city of Lucknow. Abbas Ali enforced the mortgage against Mohammad Anwar, Ashraf Jahan Begam and Masooma Begum, son, daughter and widow respectively of Mohammad Jafar, after the latter's death. He obtained a decree for sale and purchased the mortgaged property at a Court sale held on December 13, 1955. A warrant for delivery of possession was issued and possession was delivered to him on November 5, 1957 under the provisions of Order 21, Rule 36, Civil P. C., as the various shops were in the possession of tenants. Subsequently, Sultan Jahan Begum instituted Regular Suit No. 62 of 1901 in the Court of the Civil Judge for partition of her one-third share in the disputed properties and for possession over her partitioned share. She alleged in that suit that one Wahid Ali had three sons, Mohammad Jafar (mortgagor), Husain Ahmad and Nasir Ahmad, and two daughters, Ahmadi Begum and Bismillah Begam. Husain Ahmad purchased the site of the disputed shops and constructed these thereon. On his death, the inheritance devolved upon her (Sultan Jahan Begum) to the extent of one-third, she being Husain Ahmad's daughter by his first wife Noor Jahan, and upon Shah Jahan Begum, to the extent of another one-third, she also being the daughter of Husain Ahmad by his second wife Bismillah Begum and the remaining one-third devolved upon Husain Ahmad's two brothers, Mohammad Jafar (the mortgagor) and Nasir Ahmad, and upon his two sisters, Ahmadi Begum and Bismillah Begum. Mohammad Jafar had, therefore, according to inheritance, an insignificant share in the properties and had no right to mortgage the properties in their entirety so as to bind her or the other co-sharers.

The suit was instituted against all the heirs of Mohammad Jafar, the original mortgagor, and against Abbas Ali, the mortgagee auction-purchaser. Abbas Ali filed a written statement in which he averred that Noor Jahan was not the wife of Husain Ahmad and Sultanjahan Begum was not Husain Ahmad's daughter by Noor Jahan and as such she had no right or title to the mortgaged property. He took various other pleas also to nonsuit her. Sultan Jahan Begum then withdrew her suit on April 2, 1964 against Abbas Ali, without liberty to institute a fresh suit.

Her suit was decreed against the other defendants in the suit. A preliminary decree for partition was prepared, and after it had become final, she put it in execution and prayed for delivery of possession over her partitioned one-third share under the provisions of Order 21, Rule 35. Civil P. C. She died during the pendency of the execution proceedings and was substituted by Shamsuddin, the petitioner before me, her son. A warrant for delivery of possession was issued and possession was delivered on July 10, 1966. The opposite party Abbas Ali then preferred an objection under Order 21, Rule 100, Civil Procedure Code alleging his dispossession and praying for restoration. His claim was allowed by the Civil Judge on July 31, 1967 and possession was restored. Shamsuddin feeling aggrieved by that order, has come up in revision.

3. The learned counsel for the opposite party has raised a preliminary objection to the effect that no revision lies and the remedy of the petitioner was by way of a suit under Order 21. Rule 103, Civil P. C. Rule 103 says that any party not being a Judgment-debtor against whom an order is made under Rule 101, may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any), the order shall be conclusive. I have considered this matter and I am of the view that a revision is not barred though this Court may not interfere in a particular case, depending upon the facts of that case. This matter is concluded by a long series of decisions In *Buddhu Misir v. Bhagi-ratbi*. AIR 1918 All 405 *Buddhu* was found entitled to obtain possession under Order 21. Rule 95, Civil P. C. and this Court held that it will exercise its powers of revision in his favour, notwithstanding the fact that there was another remedy open to him. In *Lila v. Mahanffe*. : AIR1931 All632 the matter related to the Succession Act, but the Full Bench held as follows :--

'Section 115 is no doubt discretionary and, therefore, it is open, to the High Court to decline to interfere in particular cases. As a matter of practice it may be conceded that ordinarily the High Court would not interfere if another convenient remedy is open to an applicant, particularly when that remedy is by way of appeal to a lower Court But it cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy by way of a suit open to the applicant. The remedy by way of

separate suit would involve a protracted litigation through several Courts and is not always a convenient remedy when more effective and speedy remedy is available. There is no jurisdiction for restricting the power conferred upon the High Court under Section 115 by laying down that no revision should be entertained when a remedy by suit lies. Each case must be considered in its own merits and if the Court below has acted without jurisdiction or with material irregularity and the applicant has been seriously prejudiced an interference is called for in the interest of justice; there is no reason why we should drive the applicant to a more circuitous remedy by way of a separate suit. We accordingly overrule the preliminary objection.'

In *Kesavalu Naidu v. Jayaganapathi* : AIR1936 Mad940 , the matter related to the maintainability of a revision against an order passed under Order 21, Rule 100, Civil P. C. and it was held that a revision petition will lie; but the question will still remain whether the High Court should interfere in orders of this kind. It would thus appear that maintainability itself was not disputed, though actual interference may or may not take place, in the circumstances of a particular case. In *Tulsi Charan Das v. Subal Chandra Das* : AIR1952 Cal9 the matter again related to an order passed under Order XXI, Rule 101, Civil Procedure Code Harries. C. J. observed :--

'There is nothing in the actual terms of Section 115 of the Code which would prevent the Court hearing this application. Where the order sought to be revised is appealable then no revision lies. But this order was not appealable, although it could be challenged by way of a suit. There is, therefore, nothing in the plain terms of Section 115 of the Code of Civil Procedure which would bar this right of revision. This Court, and others Courts constantly hear petitions for revision of orders made under Order XXII Rule 58 of the Code of Civil Procedure and decisions upon applications under Order XXI, Rule 58 can be challenged by a suit under Order XXI, Rule 63 within 12 months. If this Court has jurisdiction to hear revisions from decision under Order 21, Rule 58 it clearly has the same jurisdiction to hear revisions from decisions in applications under Order 21, Rule 100. Reliance has been placed on a judgment of Sir George Rankin, C. J. in which he held that the Court Could not in the circumstances of that case, interfere. A Court

is not bound to interfere under Section 115 of the Code of Civil Procedure. It has a discretion, and the fact that there is an alternative remedy may influence a Court in the exercise of its discretion. It is one thing to say that the Court should not exercise its discretion in favour of the petitioner, but it is an entirely different thing to say that it cannot We overrule, therefore, the preliminary objection that no revision lies.'

In *Mangilal v. Someli*. AIR 1955 Assam 234, the matter related to Order 21, Rules 58 and 63. Sarjoo Prasad, C. J. held:--

'Mr. Das appearing on behalf of opposite parties, has raised a preliminary objection that the petitioner having a remedy open under Rule 63 of Order 21 by way of a suit, no relief should be given to him under Section 115. Civil P. C. It is true that the petitioner has a remedy by way of a suit, but if it is found that the order complained of does not decide the matter according to law, in other words, if there is a failure to exercise jurisdiction on the part of the Court below, in deciding the matter, or there is material illegality or irregularity in the exercise of such jurisdiction, this Court is not prevented from entertaining the application in revision, merely because the petitioner has some other remedy also available.'

In *Deo Karan v. Satyendra* : AIR1959 Cal621 , the matter related to Order 21. Rules 97 and 103, and it was held that though the remedy by a suit under Order 21, Rule 103 is available, yet it is no bar against maintainability of application under Section 115, and in a fit case the Court could revise the order although there is a remedy by way of a suit. In *P. N. Singh v. Rang Nath*, 1960 All LJ 79, it was held that it could not be laid down as a general proposition that the High Court has no power of interference at all or should not interfere in revision where there is another remedy by way of a suit open to the applicant. The provision that a regular suit may be filed under Order 21, Rule 63, Civil P. C. after an objection filed under Order 21, Rule 58 has been disposed of. does not, therefore, bar the consideration of the propriety of the decision by the Court below under Section 115, Civil P. C. To the same effect is the decision in *Smt. Saida Begum v. Sabir Ali* : AIR1962 All9 and *State v. Jagannath* : AIR1962 All153 . The preliminary objection is, therefore, overruled and it is held that the revision petition lies.

4. The learned counsel for the petitioner has strenuously pressed that Order 21, Rule 100, Civil P. C. applies only in the case of 'actual dispossession and not in a case which relates to symbolical or juridical dispossession and since the opposite party Abbas Ali was only in symbolical possession and since the petitioner Shamsuddin was also given possession of that very kind, therefore, the learned Civil Judge erred in applying Rule 100 to the case and restoring possession to the opposite party. Reliance for this proposition has been placed on various cases. The earliest case is Ibrahim Mullick v. Ram Jadu Rakshit, (1903) ILR 30 Cal 710. , In that case Ram Jadu Rakshit obtained a decree for arrears of rent against his tenants and in execution of that decree, brought the defaulting tenure to sale and purchased it himself. Formal possession was delivered to him. Ibrahim Mullick made an application under Section 335 of the old Code of Civil Procedure on the allegation that though he continued to be in possession, formal possession over the tank had been given to Ram Jadu Rakshit and since this amounted to his dispossession, therefore, possession should be restored to him. The Calcutta High Court held;--

'The question we have to consider is whether the applicant in the Court below was dispossessed within the meaning of the section On his own evidence he is still in possession; he has not been dispossessed. It is said that he has been dispossessed because symbolical possession has been given of the tank in question to the petitioner. Whatever, as between the parties, ultimately may be the legal effect of this, it does not amount to the dispossession contemplated by Section 335'.

In Pera Naidu v. Soundaravalli Ammal : AIR1954 Mad516 , Rama Swami Naicker purchased the disputed lands at a sale held by a certain co-operative society. Soundaravalli Ammal filed a suit for recovery of the lands against Naicker and others. An ex parte decree was passed against Naicker. In execution of the decree, Ammal obtained possession over the lands. Pera Naidu and others filed an application under Order 21, Rule 100 on the ground that they were brothers of Naicker, that they were all members of a joint undivided Hindu family, that the lands were joint Hindu family property, that the sale deed was exclusively in the name of Naicker, that accordingly Pera Naidu and the other petitioner were

entitled to two-third share, that Naicker was not the manager of the Joint Hindu Family and consequently the decree passed against him and the execution proceedings in consequence thereof were not binding on them. They claimed that Ammal had obtained symbolical possession and that did not bind them but if it would be found that Ammal obtained actual possession it should be re-delivered to them. It was held that Pera Naidu could maintain an application under Order 21, Rule 100, Civil P. C. as co-owner provided he was in actual possession and was physically dispossessed but not otherwise. Venkatarama Aiyar. J. held:

'The object of these rules is to sustain the possession of persons who were not parties to the suit and who are in possession on their own account or on behalf of others who are not judgment-debtors. The scope of the enquiry under these rules is limited to finding whether the applicant was in possession at the time of delivery. If that is found he has to be restored back to possession. That clearly indicates that what the Court is concerned with is actual possession. Any question of juridical possession would be foreign to the nature and purpose of the enquiry.'

In *Kesavan v. Neelkantan*, AIR 1955 Trav-Co 225 (FB), the question for determination was whether an application under Order 21, Rule 100, Civil P. C. could be made by a stranger to the decree before possession had been obtained by the decree-holder. The question in issue was not necessary for decision in that case. But the Full Bench made the following observations :--

'Possession within the meaning of the rules has been held in (1903) ILR 30 Cal 710, by Maclean, C. J. to be khas possession. Symbolical possession is outside the ambit of the rules. It is clear, therefore, that the dispossession contemplated by Rule 100 after which alone a stranger can approach the Court for relief is actual dispossession'.

On the other hand, the learned counsel for the opposite party has placed reliance on *Mancharam v. Fakir Chand*, (1901) ILR 25 Bom 478 and *Brajabala Devi v. Gurudas Mundle*. (1906) ILR 33 Cal 487 for his contention that dispossession includes actual as well as symbolical dispossession. In *Mancharam's* case, (1901) ILR 25 Bom 478 he obtained a decree for possession of a certain shop against the tenants in occupation. On persisting to execute the decree, he was obstructed by

his brother Fakirchand and he thereupon applied under Section 328 of the Code of Civil Procedure (Act 14 of 1882) to have the obstruction removed. Fakir Chand alleged that the shop was joint family property and that the tenants against whom Mancharam had obtained the decree, were the common tenants of both. He, therefore, contended that Mancharam was not entitled to recover sole possession in execution. The subordinate Judge held that Section 331 applied and directed that Fakir Chand's claim should be numbered and registered as a suit between Mancharam as plaintiff and Fakir Chand as defendant. Mancharam contended that Section 331 did not apply as that section had application only where the obstruction was caused by a person actually in possession and that Fakir Chand was admittedly not in such possession. It was held that the word 'possession', as used in Section 331, is not limited to actual physical possession and that it includes also constructive possession, such as possession by a tenant.

In Brajabala Devi's case, (1906) ILR 33 Cal 487 she obtained a decree for rent against Gurudas Mundle in respect of a holding and in execution of her decree she brought to sale and purchased the holding and was put in possession thereof by the Court. Thereupon one Behari Lal Roy Chowdhury jointly with the said Gurudas Mundle applied to the Court under Section 335 of the old Code of Civil Procedure alleging that he was the landord of the holding, that Gurudas Mundle was his tenant in respect thereof and that both he and the said Gurudas Mundle had been dispossessed from the holding by the decree-holder. It was argued that as Behari Lal Roy Chowdhury claimed to have been only in constructive possession he could not be said to have been dispossessed within the meaning of Section 335 and was consequently not competent to maintain an application under Section 335. Rampini and Mookerjee, JJ. held:--

'Now the terms 'possession' and 'Dispossession' are used not only in Section 335 but also in Sections 331 and 332 of the Civil P. C. and the scope and object of these sections indicate that these terms are used in the same sense throughout. If then we turn for a moment to Sections 318 and 319 of the Civil P. C., we find that the former deals with delivery of actual physical possession and the latter treats of the delivery of constructive possession, both referring to delivery of property sold in execution of a decree. Provisions precisely analogous are to be found embodied

in Sections 263 and 264 of the Civil P. C. both of which refer to the delivery of immoveable property covered by a decree. Prima facie, therefore, it is difficult to see why the term 'possession' in Section 335 of the Civil P. C. should be narrowly construed and why it should be limited only to the case of actual physical possession. We must hold accordingly that the term 'possession' is not used in a restricted sense as relating to a mere tangible or physical possession but includes constructive possession or possession in law, by receipt of rent or otherwise.'

Their Lordships then referred to a large body of authorities in support of that view. I may here mention that Sections 263, 264, 318, 319, 331, 332 and 335 correspond to present Order 21, Rules 35, 36, 95, 96, 99, 100 and 101. There is apparently, therefore, a conflict between various High Courts as to the meaning and true import of the word 'dispossession', as occurring in Rule 100. There is no precedent of our own High Court cited before me.

5. It appears to me that the possession referred to in Sub-rules (1) and (3) of Order 21, Rule 35 is Khas or actual possession, while that referred to in Sub-rule (2) and Rule 36 is formal or symbolical possession. Formal or symbolical possession is delivered by fixing a copy of the warrant in some conspicuous place of the property and proclaiming by the beat of drum or other customary mode at some convenient place the substance of the decree. Rules 35 and 36 refer to cases where a suit is brought for possession of immoveable property and a decree is passed in the suit for the delivery of the property to the decree-holder. If the immoveable property of which possession is directed by the decree to be delivered to the decree-holder is in the possession of the judgment-debtor, actual possession must be delivered to the decree-holder under Sub-rule (1) of Rule 35. Where it is in the possession of a tenant or other person entitled to occupy the same only symbolical possession can be delivered, and that is to be done under Rule 36. Symbolical possession can in such cases operate as actual possession against the judgment-debtor.

Thus, though the law has made a distinction between actual and symbolical possession under Rules 35 and 36, no such distinction has been made under Rule 100. Where, as in the instant case, symbolical possession was delivered to the

auction purchaser and symbolical possession is alleged to have been superimposed on that there would, to my mind be clear dispossession. Plain meaning must be assigned to the word 'dispossession' as occurring in Rule 100. In any case, Shamsuddin did not apply for possession under Order 21, Rule 36. The prayer was for possession under Order 21, Rule 35 even though the disputed shops were in the possession of tenants. The warrant says the Shamsuddin must be put in possession and the officer executing the warrant was authorised to remove any person bound by the decree who refused to vacate the shop. The tenants Mehar Jahan, Abdul Rashid and Fayaz Ali Khan made endorsements on the warrant that thenceforward they recognized Shamsuddin as the owner and they would, pay their rents to him. Not only that, the Commissioner who was entrusted with the execution of the warrant for delivery of possession got a four feet high wall made to demarcate the one-third share of Shamsuddin from the remaining two-third share in the shops. It comes to this, therefore, that instead of giving joint possession or symbolical possession, demarcations were made, a partition wall was put up and the one-third portion of the premises was segregated and Abbas Ali was virtually dispossessed, even physically. In the circumstances, therefore, he was entitled to maintain his application under Rule 100. Even if symbolical possession was delivered, which I hold not to have been the case, no ground has been made out for interference in this revision.

6. The revision petition is, accordingly, dismissed with costs.

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