

Nabbu Khan Vs. liird Additional District Judge, Pilibhit and Others

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SooperKanoon Citation : sooperkanoon.com/482356

Court : Allahabad

Decided On : Jul-28-2000

Reported in : 2000(4)AWC2667; 2000AIHC(All)4470

Judge : D.K. Seth, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 11 and 141 - Order 21, Rules 35, 37, 57, 97, 98, 100 and 103; [Constitution of India](#) - Articles 226 and 227; [Limitation Act, 1963](#) - Sections 5

Appeal No. : C.M.W.P. No. 17439 of 1988

Appellant : Nabbu Khan

Respondent : iird Additional District Judge, Pilibhit and Others

Advocate for Def. : Ajit Kumar and ;S.A. Gilani, Advs.

Advocate for Pet/Ap. : R.N. Bhalla and ;Somesh Khare, Advs.

Judgement :

D. K. Seth, J.

1. After hearing Mr. R. N. Bhalla and Mr. Somesh Khare for the applicants and Mr. S. A. Gilani, be an order dated 18th July, 2000. was dictated in open court disposing of the said application after having allowed the substitution on the

ground that the Impugned order arose out of a proceedings under Order XXI, Rule 97 of the Code of Civil Procedure, which was otherwise appealable and no revision lies, and, therefore, the case was remitted to the Court for deciding the revision directing it to treat the memo of revision as a memo of appeal in exercise of its appellate jurisdiction since the order determining the question under Rule 98 or under Rule 100 of Order XXI of the Code are deemed decrees by reason of Rule 103 of Order XXI. Mr. Khare had pointed out that the impugned orders were passed in a proceeding arising under Order XXI, Rule 97. This question was specifically pointed out to Mr. Gilani, who conceded to the situation. Therefore, the said order was passed. Subsequently at the time of correcting the order, certain confusion cropped up. The records were perused and it was found that the application on the basis whereof the impugned orders were passed, were not an application under Order XXI, Rule 97. The confusion was created that the order was related to the application filed in 1980 by the decree holder under Order XXI, Rule 97. At the point of time, Mr. Gilani did not place the relevant materials and failed to point out that these proceedings had no connection with the proceedings under Order XXI, Rule 97, which stood terminated by an order dated 10th January, 1985. Having regard to the said situation, the order was not signed and the matter was placed for orders in the computer list. Both the counsel were intimated. It was adjourned from time to time on the ground of absence of the counsel for the respective parties,

2. Today, the matter has since been taken up and heard. I have heard Mr. Somesh Khare, learned counsel for the applicants as well and Mr. S. A. Gilani for some time.

3. In order to appreciate the situation. It would be beneficial for us to refer to the facts giving rise to these proceedings.

4. The decree holder Alauddin had filed an application under Order XXI, Rule 97 on 9th May, 1980, in connection with Execution Case No. 7 of 1980 before the Additional Munsif Illrd Court, Pilibhit, which was registered as Misc. Case No. 13 of 1980. In the said application, it was pointed out that the execution was 'resisted by one Nabbu Khan. The said Misc. Case was dismissed by an order dated 10th

January, 1985. In the said order, it was pointed out that on 8th April, 1980, the Amin had pointed out that there was a resistance in the execution of the decree. In the said order, the learned Judge had pointed out that the limitation for making an application under Order XXI, Rule 97 is 30 days from the date of resistance. Therefore, according to him, the question of resistance arose on 8th April, 1980. Whereas the application under Order XXI, Rule 97 was made on 9th May, 1980. Therefore, it was beyond 30 days. But the said application did not accompany an application under Section 5 of the Limitation Act. On this ground, the application under Order XXI, Rule 97 was dismissed.

5. Thus, there was no adjudication on the merit of the case. Neither there was any finding that Nabbu Khan was in possession of the suit property. Subsequently the decree holder had filed an application on 10th May, 1985, for issuing parwana. Copy of the said application is not annexed with this petition. Neither Mr. Khare nor Mr. Gilani was able to produce a copy of the application made on 10th May, 1985. However, in the order dated 10th July, 1985, by which the application dated 10th May, 1985, was rejected mentioned that there was again an application under Order XXI, Rule 57 for issuing parwana for delivery of possession. But the fact remains that there cannot be any question of making an application under Order XXI, Rule 57, which relates to the question of attachment. But from the prayer, that was made in the application, as was mentioned in the order dated 10th July, 1985, was that the decree holder had prayed for issuing a parwana for delivery of possession. Such an application can be made under Order XXI, Rule 35. However, Mr. Gilani submitted that by mistake an application under Order XXI, Rule 37, has been ascribed as made under Order XXI, Rule 57.

6. Be that as it may, by an order dated 10th July, 1985, the application was rejected on the ground that once the application under Order XXI, Rule 97, having been rejected and a different person having been found in possession, the application for issuing parwana could not be maintained in view of the order dated 10th January, 1985.

7. Admittedly, this order is a revisable one and Civil Revision No. 36 of 1985 was filed by the decree holder, which was allowed by an order dated 13th September,

1988, treating the application dated 10th May, 1985 as an application under Order XXI, Rule 35 and by directing issue of parwana for delivery of possession under the said provision. This order has since been challenged by Nabbu Khan in a proceeding under Article 226 of the [Constitution of India](#) before this Court.

8. The said Nabbu Khan is now dead. An application for substitution was filed by judgment debtor Yusuf, which has since been dismissed by an order dated 18th July, 2000. Thereafter, Mr. Khare had presented an application for substitution on behalf of the sons of Nabbu Khan claiming to be substituted on the ground that they were heirs of Nabbu Khan.

9. In this writ petition, the order dated 13th September, 1988, has since been challenged. In this background, the entire question is to be looked into. Therefore, both the substitution application filed by the heirs of Nabbu Khan as well as the writ petition itself was taken up for hearing simultaneously. In order to decide the issue, which involves a very interesting question of law.

10. Mr. Bhalla had made submissions on behalf of Yusuf while Mr. Somesh Khare had made submissions on behalf of heirs of Nabbu Khan. Mr. S. A. Gilani has made submissions on behalf of the decree holder.

11. I have heard the learned counsel for the respective parties as mentioned hereinabove.

12. Admittedly, the claim of Nabbu Khan and his heirs as advanced by Somesh Khare is that Nabbu Khan is in possession of the suit property being subject-matter of the decree. It is claimed that the decree cannot be executed against Nabbu Khan, who had claimed title to the property by virtue of adverse possession since 1966, This question could have been gone into in the proceedings under Order XXI, Rule 97. But the said question has not been adjudicated on the ground that the application under Order XXI, Rule 97, was made on 9th May, 1980, while the resistance was made on 8th April, 1980, being beyond 30 days from 8th April, 1980. It appears that the application was late by two days. But the said application was not accompanied by any application under Section 5 of the Limitation Act and as such the application was dismissed as barred by limitation.

13. Thus, there was no adjudication on the rights of the parties and the petition was dismissed on the ground being barred by time. Once the execution having failed on account of resistance by some parties, it is open to the decree holder to apply for fresh parwana for fresh execution. The principle enunciated in Section 11 of the Code does not apply to an execution proceedings under Order XXI, Rule 97. Once a decree is passed, so long it remains executable, it has to be executed and the decree is to be satisfied. The only exception is to the extent that either the decree is inexecutable on the ground of various reasons that are permissible within the scope and ambit of the Code of Civil Procedure or that it is Inexecutable against the property for some reason that the property cannot be identified or it is not the suit property or that someone else who had interest in the property is not bound by the decree or that the suit is sought to be executed against a person against whom it cannot be executed on account of the fact that he is not bound by the decree. But these questions are subject to adjudication on an application under Order XXI, Rule 97 and could be gone into by reason of Order XXI, Rule 98. But in this case, no such adjudication was made. As such, there was no scope to apply the principle of res judicata, which applies in the case where a question is decided. Here, the question having not been decided, the principle of res judicata cannot be attracted.

14. Be that as it may, the character of an application is to be determined on the basis of the substance of the application and the reliefs claimed. The application that was made was for issue of parwana for delivery of possession, which can be had under Order XXI, Rule 35. The said application even if inscribed as an application under Order XXI, Rule 57, the same cannot be treated as such since Rule 57 has no manner of application in the present case and the relief that was claimed was not a relief within the meaning of Rule 57. Similarly if it was an application under Order XXI, Rule 37, the same was a mistake, since Rule 37 applies to money decree and not with regard to delivery of possession of an immovable property which is being sought for in the present case. Thus, there is no alternative but to conclude that the application was one under Order XXI, Rule 35 and nothing else. The said view finds support from the observations made in the order dated 10th July, 1985, in which it was mentioned that it was an application for issuing parwana for delivery of possession.

15. Since such an application could not be dismissed on the ground that the application under Order XXI, Rule 97, was dismissed by an order dated 10th January, 1985, therefore, the trial court was not Justified in rejecting the application by an order dated 10th July, 1985. Thus, the said order was passed in illegal exercise of jurisdiction or in other words, it has failed to exercise its jurisdiction and as such the reviaional court had rightly found that the decree holder was entitled to make a fresh application under Order XXI, Rule 97 and by reason of Order dated 10th January, 1985, dismissing the application under Order XXI. Rule 97, as barred by limitation. The application under Order XXI, Rule 35, could not have been thrown out and an appropriate order ought to have been passed. The said application was mentioned as an application under Order XXI, Rule 35, which presupposes that the mention of Order XXI. Rule 57, might be a clerical or typographical mistake. At the same time, it may be presumed that Mr. Gilani had made his submissions on the basis of his presumption since he was handicapped in absence of a copy of the said application.

16. Be that as it may, in view of the prayers made in the said application, it was nothing but an application under Order XXI, Rule 35. Thus, the Court had jurisdiction to issue parwana for delivery of possession. In absence of a decision on merit on the application under Order XXI, Rule 97, adjudicating the rights of the parties as contemplated under Rule 98. It is not open to the judgment debtor or the person resisting the execution of the decree to raise any objection in issuing any order under Order XXI, Rule 35.

17. Be that as it may, at the stage of the proceedings under Order XXI, Rule 35. Nabbu Khan who in order to claim his independent right resists the execution of the decree is neither a necessary party nor he is entitled to any notice. Inasmuch as the parwana is issued for delivery of possession of the suit property in execution of the decree. At the time of issuing the parwana, it is not necessary to ascertain as to who is in possession. If anyone claims that he is in possession, still then the same may not be gone into under Order XXI. Rule 35. The Court does not prescribe any such procedure to entertain any objection by anyone else other than the judgment debtor while deciding an application under Order XXI. Rule 35. Specific provisions having been provided in Rule 98, the contention of Mr. Khare

cannot be accepted that the stranger in the execution proceedings has a right to Intervene. If such a contention is accepted, in that event the execution will be an impossible proposition. The judgment debtor may Invite his neighbours and friends to intercept and intervene at every stage and thereby rendering the whole execution proceeding redundant and Inconclusive for all time to come and it will give rise to unnecessary proceedings.

18. If a stranger has no right to intercept or intervene at this stage, he cannot claim any right to prefer a revision or make an application under Article 226. Against an order passed under Order XXI, Rule 35, a stranger has no right. But then the said Nabbu Khan was not a party in the execution proceedings and, therefore, he cannot claim any right independently through proceedings under Article 226 relating to a civil proceedings. Inasmuch as the question is to be determined under the provisions of the Code of Civil Procedure. By reason of Section 141 of the Code, the provisions of the Code are not applicable in a proceeding under Article 226 and as such by no stretch of imagination an application under Article 226 could be maintained against a proceeding relating to civil matters particularly in the facts and circumstances of the present case challenging the execution, that too, by a stranger at a stage when a stranger has no right to intervene.

19. This application preferred by Nabbu Khan could not be maintained on account of absence of a locus standi. Then again the heirs of Nabbu Khan claiming through Nabbu Khan cannot have any right to espouse the cause of Nabbu Khan even if they are permitted to be substituted in the proceedings.

20. Mr. Gilani had made an application for abatement of the petition on the ground of death of Nabbu Khan. But as soon heirs of Nabbu Khan has intervened, then the petition could be maintained and would be maintainable. But the heirs of Nabbu Khan would be prevented from getting themselves substituted in the proceedings. Since these questions require to be gone into, therefore, for the sake of convenience, the heirs of Nabbu Khan be substituted in the place and stead of the deceased Nabbu Khan and be substituted in the present writ petition and be permitted to carry on the writ petition.

21. In fact, Mr. Somesh Khare appearing on behalf of heirs of Nabbu Khan has been permitted to make his submission on the application as well. Since the matter has been heard on merits, therefore, it is justified that the application be allowed. Since both the applications for the substitution and the writ petition was taken up on merit by consent of the parties, therefore, the matter is treated as on day's list and also be decided on merit in view of the observations made hereinbefore.

22. Since Nabbu Khan has no right as a stranger to the decree to intervene at this stage, therefore, the application under Article 226 made by a stranger Nabbu Khan could not be maintained and as such is liable to be dismissed.

23. Mr. Khare had made a prayer for converting this application into one under Article 227 of the Constitution.

24. The prayer is allowed. The application is permitted to be converted into one under Article 227 of the [Constitution of India](#).

25. Even then, if it is so converted into an application under Article 227 of the Constitution, still then the position would not change. Inasmuch the stranger having no right to intervene at this stage in an execution proceeding, the heirs of Nabbu Khan cannot invoke jurisdiction under Article 227 of the Constitution.

26. Having gone through the order dated 13th September, 1988, passed in Civil Revision No. 36 of 1985 reversing the order dated 10th May, 1985, passed in Misc. Case No. 13 of 1980 arising out of Execution Case No. 7 of 1980, I do not find any infirmity, so as to intervene in exercise of power of superintendence under Article 227 of the [Constitution of India](#).

27. In that view of the matter, this petition fails and is accordingly dismissed. No cost. The learned executing court is directed to expedite the execution in accordance with law. All questions with regard to the merits and the claims of the respective parties shall remain open to be agitated in appropriate proceedings. If occasion so arise.