

Mohammed Shareef and ors. Vs. Bashir Ahmed and ors.

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Court : Madhya Pradesh

Decided On : Nov-05-1982

Reported in : AIR1983MP44

Judge : G.P. Singh, C.J. and ;J.S. Verma, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 97 and 100

Appeal No. : Civil Revn. No. 529 of 1982

Appellant : Mohammed Shareef and ors.

Respondent : Bashir Ahmed and ors.

Advocate for Def. : A.K. Jain, Adv.

Advocate for Pet/Ap. : K.N. Agrawal, Adv.

Disposition : Petition dismissed

Judgement :

J.S. Verma, J.

1. This revision first came up for hearing before a single Bench, where correctness of two single Bench decisions in Civil Revision No. 145 of 1981 (Indore Bench) decided on 2-5-1981 : (Reported in AIR 1982 NOC 66), Jainarayan Shukla v. Gyansingh and Civil Revision No. 212 of 1981, decided on 31-3-1981,

Raghubirdayal v. T. Krishnaswami arose for examination, on the ground that they are contrary to the Full Bench decision in Usha Jain v. Manmohan Bajaj, 1980 MPLJ 623: AIR 1080 Madh Pra 146. Accordingly, the matter was referred by the single Bench to a Division Bench for decision and this is how this revision comes up before us.

2. The material facts are these: Respondent No. 1 Bashir Ahmed Choudhary obtained a decree against the remaining respondents for their eviction from an immovable property situate in Jabalpur. The petitioners, who are closely related to the judgment-debtors, resisted execution of that decree and made an application in the executing Court under Order 21, Rule 97 read with Section 151, C.P.C., claiming investigation into their title, alleging that they were in possession of the immovable property in their own right and not through the judgment-debtors. The executing Court, following the Full Bench decision of this Court in Usha Jain v Manmohan Bajaj (AIR 1980 Madh Pra 146) (supra), rejected the petitioners' application as untenable on the ground that a third party could not claim such an investigation as it had no right to make an application under Order 21, Rule 97, C.P.C. The petitioners have filed this revision, aggrieved by this order of the executing Court made on 28-1-1982.

3. At the hearing of this revision, learned counsel for the petitioners relied on certain observations made by a single Bench in Civil Revision No. 145 of 1981, decided on 2-5-1981 (Indore Bench), (Jainarayan Shukla v. Gyansingh) as well as the decision of another single Bench in Civil Revision No, 212 of 1981, decided on 31-3-1981 (Raghubir Dayal v. T. Krishnaswami), to contend that the Full Bench decision in Usha Jain's case (supra) does not shut out such an enquiry at the instance of a third party who resists execution of the decree claiming to be in possession in his own right. We shall first refer to the Full Bench decision in order to examine whether the point involved in this revision is concluded by that decision and then refer to the two single Bench decisions relied on by the learned counsel for the petitioners.

4. The Full Bench decision in Usha Jain's case (supra) overruled the earlier Division Bench decision in Bhagwat Narayan v. Kasturi, 1'973 MPLJ 899: AIR

1974 Madh Pra 26, and, at the same time, expressly approved the earlier single Bench decision in *Pandit Ramgulam v. Mahendra Kumar*, 1972 MPLJ 254. The earlier decisions of this Court as well as the other High Court on this point were referred and the reasons given by the Division Bench for the view it took in *Bhagwat Narayan's* case, no earlier decision being cited by the Division Bench, were also considered by the Full Bench. The Full Bench clearly ruled that an enquiry at the instance of a third party in possession is contemplated under Order 21 C. P. C. only under Rule 100 after his dispossession in execution; and that the basic assumption made by the Division Bench in *Bhagwat Narayan's* case that an enquiry is contemplated at the stage of Order 21, Rule 35 CPC at the instance of a third party, without which the executing Court has no jurisdiction to proceed with the execution, is untenable. It was also held by the Full Bench that another remedy available to such a third party is to institute an independent civil suit for declaration of his title claiming therein the relief of temporary injunction to protect his possession; and in such a suit, if the conditions for grant of a temporary injunction having the result of slaying execution of the lawful decree are satisfied by the plaintiff making out a strong prima facie case showing his alleged right and title independent of the judgment-debtor, then it is open to the civil court in that suit to grant a temporary injunction to protect his possession during the pendency of the suit. It was pointed out by the Full Bench that the view taken by it would safeguard the interest of a genuine claimant and afford him a remedy to protect his possession, if he has a strong prima facie case, while the view taken by the D. B. in *Bhagwat Narayan's* case enabled even a spurious claimant to delay execution and thereby assist the judgment-debtor to frustrate execution of the decree so long as he has even a single friend willing to help him, resulting in obvious injustice to the decree-holder.

5. In view of the clear pronouncement of the Full Bench in *Usha Jain's* case (AIR 1980 Madh Pra 146), that a third party has no locus standi to seek investigation into its claim under Order 21, Rule 97 C. P. C.; that a third party's remedy under Order 21 C. P. C. is only after dispossession under Rule 100; and that such a third party can protect its possession during execution of the decree only by an independent civil suit claiming temporary injunction therein, on the basis of a strong prima facie case showing its right to possession independent of the

judgment-debtor, there can be no doubt that the petitioners' objection filed in the executing Court was rightly rejected as untenable by the impugned order. The matter is fully covered by the Full Bench decision and if is not necessary to reiterate all the reasons for this view contained in the Full Bench decision. The question, however, is whether the two aforesaid single Bench decisions, relied on by the learned counsel for the petitioners, support the petitioners' case and, if so, are they in conflict with the Full Bench decision in Usha Jain's case (*supra*). It is obvious that a single Bench cannot ignore a Full Bench decision or legitimately take a contrary view or in any manner dilute the authority of a Full Bench decision, unless it is overruled by a larger Bench of this Court or the Supreme Court. Admittedly, the Full Bench decision in Usha Jain's case continues to hold the field and, therefore, the aforesaid two single Bench decisions, if they express a contrary view, have no authoritative value and have to be ignored. It is this question which is examined hereafter.

6. In Civil Revision No. 145 of 1981 (Indore Bench) decided on 2-5-1981, Jainarayan Shukla v. Gyansingh, the decree-holder himself made an application for enquiry under Order 21, Rule 97, C.P.C. complaining of resistance by a third party. When enquiry on that application made by the decree-holder had been concluded, the decree-holder made another application under Order 21, Rule 35, C.P.C. for issuance of a fresh warrant for delivery of possession. An objection was taken in the executing Court that the decree-holder having chosen to make an application for an enquiry under Order 21, Rule 97, C. P. C., he could not abandon the same and seek a fresh warrant on another application made under Order 21, Rule 35, C.P.C. at the conclusion of the enquiry already held. This objection was rejected and the executing Court ordered issuance of a warrant for delivery of possession. The Civil Revision was then filed challenging the issuance of a fresh warrant for delivery of possession, in these circumstances. The learned single Judge relied on the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146) to hold that the decree-holder having adopted one of the three courses open to him, as indicated by the Full Bench, of making an application under Order 21, Rule 97, for an enquiry, he could not thereafter ignore it and apply for issuance of a fresh warrant for delivery of possession under Order 21, Rule 35, C.P.C. Accordingly, the single Bench held that the decree-holder having voluntarily

adopted one of the three courses available to him, on resistance being made, he could not thereafter abandon that course and adopt another course. It is, therefore, clear that in deciding the case before it, the single Bench followed the Full Bench decision, instead of taking a contrary view. However, thereafter the learned single Judge proceeded to make some observations which being unnecessary for the decision of the case, are clearly obiter, but it is these further observations which have been relied on by the learned counsel for the petitioners who also says that these further observations, even though obiter, are often cited before the subordinate Courts to support the contention that the Full Bench decision in Usha Jain's case has not settled the controversy on the point it decides.

7. These further observations in Jainarayan Shukla's case (AIR 1982 NOC 66) (Madh Pra) are as under:--

'Furthermore, in Sub-rule (1) of Rule 35 of Order 21, the expression 'if necessary by removing any person bound by the decree who refuses to vacate the property' is significant. The decree-holder may submit an application under Rule 35 on the assumption that the person refusing to vacate the property is not bound by the decree. But the whole question is : How the executing Court can without holding an inquiry into the question as to whether the person refusing to vacate the property is bound by the decree or not and order his dispossession? If in a case on the facts admitted by such a person, it can be concluded that he is bound by the decree, he may be ordered to be dispossessed but, if he has disputed the facts stated by the decree-holder, holding of an inquiry is necessary.'

It is clear that the above quoted observations made by the learned single Judge in Jainarayan Shukla's case are not only obiter but also directly in conflict with the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146). The view expressed by the learned single Judge that an enquiry is contemplated at the stage of Order 21, Rule 35, C.P.C. is contrary to the Full Bench decision wherein it was pointed out that the basic assumption made by the Division Bench in Bhagwat Narayan's case (AIR 1974 Madh Pra 26) that an enquiry is contemplated at the stage of Order 21, Rule 35 C.P.C. at the instance of a third party, without

which the executing Court has no jurisdiction to proceed with the execution, is untenable. It is unnecessary for us to reiterate the reasons given at length in the Full Bench decision. With respect, we are constrained to hold that the above quoted observations contained in the single Bench decision in Jainarayan's case are contrary to the Full Bench decision in Usha Jain's case and have, therefore, to be ignored.

8. The other decision which has occasioned the reference is a single Bench decision in Civil Revision No. 212 of 1981, decided on 31-3-1981 (Raghubirdayal v. T. Krishnaswami). It is necessary to mention the facts on which that decision was made. The decree-holder T. Krishnaswami obtained a decree for eviction from an immovable property against the judgment-debtor R.L. Raghunath, brother of Raghubirdayal. This decree passed by the trial Court on 30-8-1971, was affirmed in first appeal on 3-3-72 and in second appeal on 6-7-72. During execution of the decree the judgment-debtor's brother, Raghubir dayal, filed a civil suit for a declaration that it was he and not his brother, the judgment-debtor, who was in possession of the property and that he was in possession in his own right and not through the judgment-debtor, as a co-tenant or as a trespasser, so that the decree against the judgment-debtor did not bind him. The objector Raghubirdayal had obtained a temporary injunction against execution of the decree and, therefore, this decree could not be executed till the suit was dismissed on 30-8-1975 and then the first appeal as also the second appeal had failed. This is how the objector Raghubirdayal's claim to be in possession independently in his own right and not through his brother the judgment-debtor R. L. Raghunath, was rejected in that suit. The objector Raghubirdayal thereafter made an application in the execution proceeding under Order 21, Rule 35 and 9? C. P. C. claiming investigation of his independent title, in spite of the same being negatived earlier in his suit. What enquiry remained to be made is difficult to visualise, but the objector's application resulted in stay of execution. This was obviously the result of the view taken in Bhagwat Narayan's case (AIR 1974 Madh Pra 26) (supra), which held the field then. It may be mentioned that the objector, in the meantime, filed another civil suit for declaration of his title to the property on the basis of adverse possession but the plaint was rejected and the objector thereafter did not pursue that suit. The decree-holder opposed the objector's application inter alia on the

ground that it was barred by the principle of res judicata as well as Order 2, Rule 2 C. P. C, because of the findings resulting in dismissal of the objector's civil suit earlier on merits. The executing Court was requested to try the question pertaining to res judicata and the bar under Order 2, Rule 2, G.P.C. as preliminary issues, but this request of the decree-holder was rejected and these objections to the maintainability of the objector's application under Order 21, Rule 35 and 97 C.P.C. were rejected. The decree-holder then filed Civil Revision No. 1432 of 1978 in this Court, complaining against the rejection of his pleas based on res judicata and Order 2, Rule 2, C.P.C. This revision was allowed by a learned single Judge on 27-7-1979 and a direction was given to the executing Court to consider and decide the decree-holder's objections to tenability of the objector's application, including those based on the plea of res judicata and Order 2, Rule 2, C.P.G. afresh on merits. This is how the matter went back to the executing Court and the question of tenability of the objector's application was also required to be decided afresh on all grounds raised by the decree-holder.

9. In the meantime, the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146) (supra) came on 1-4-1980. The decree-holder, therefore, raised another objection to the maintainability of the objector's application for an enquiry into his claim under Order 21. Rule 35 and 97. C.P.C. on the basis of the Full Bench decision. The executing Court upheld this objection and rejected the objector's application under Order 21, Rule 35 and 97, C.P.C. as untenable on 8-5-1980. The objector challenged this Order in Civil Revision No. 736 of 1980 (Raghubar Dayal v. Krishna Swamy), which was dismissed on 17-9-1980, by a single Bench of the Court. This decision is referred hereafter as Raghubir Dayal (I). The objector's contentions were rejected and it was expressly held that his application was untenable under Order 21, Rule 97, as well as Section 151, C.P.C. in view of the Full Bench decision in Usha Jain's case (supra). It was also held that the earlier decision in Civil Revision No. 1432 of 1978, decided on 27-7-1979, merely directed that the decree-holder's objection, which had been rejected earlier by the executing Court, should also be considered afresh on merits, to decide the tenability of the objector's application for enquiry. The history of the litigation till then, including the objector's earlier civil suits, was mentioned and the learned single Judge expressly indicated that the objector's application was a clear abuse

of the process of the Court and permitting him to pursue that course would defeat the ends of justice, instead of subserving the same. The objector then preferred a special leave petition to the Supreme Court against this decision of the single Bench in Civil Revision No. 736 of 1980, decided on 17-9-1980, Raghubir Dayal (I). That special leave petition was dismissed by the Supreme Court on 24-11-1980, resulting in the view taken by the single Bench in Raghubirdayal (I) becoming final between the parties.

10. The decree-holder, apprehending trouble at the time of execution of the decree, requested the executing Court to grant police aid at the time of actual execution of the warrant for possession, which had already been issued. The executing Court, by its order dated 27-9-1980, granted that request. The objector did not challenge this order but made an application under Section 151, C.P.C. on 14-11-1980, to the executing Court, urging that he should have been heard before giving police aid. This application of the objector was rejected by order dated 2-12-1980. Undeterred, the objector filed another revision to this Court against the executing Court's order dated 2-12-1980 and that was Civil Revision No. 1531 of 1980, decided on 21-1-1981 (Raghubirdayal v. T. Krishnaswami), hereafter referred as 'Raghubirdayal (II)'. In that revision, the objector's counsel contended inter alia that as a third party in possession and not bound by the decree, he was entitled to the remedy under Section 151, C. P. C., if not Order 21, Rule 97, C. P. C.; and that the decree-holder's application for police aid is tantamount to his application for investigation under Order 21, Rule 97, C. P. C. In support of the revision, the objector's counsel contended that a third party in possession could claim investigation of his right notwithstanding the Full Bench decision in Usha Jain's case. The learned single Judge, in his detailed order dated 21-1-1981, considered and rejected all the points urged in support of the revision and dismissed the revision. It was held by the learned single Judge that the objector's contention of being entitled to claim an investigation into his right, is expressly negatived by the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146), which has overruled the Division Bench decision in Bhagwat Narayan's case (AIR 1974 Madh Pra 26) (supra). The learned single Judge also referred to the facts on which the objector had repeatedly raised the same points covered by the Full Bench decision and strongly criticised the objector's conduct, concluding that

accepting the objector's contention 'would only mean promoting abuse of the Court's process' to which no Court can be a party.

11. Ordinarily, that litigation should have ended at least with the decision in Raghubir Dayal (II), when the objector's attempt to circumvent the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146) was rejected for the second time by this Court. However, instead of going to the Supreme Court, where he had failed earlier, the objector repeated his attempt here and was successful the third time. It is the third decision in that case by a Single Bench, the correctness of which is to be considered.

12. The execution having remained stayed till then, the executing Court reiterated its earlier direction to provide police aid at the time of execution of the warrant by its order dated 31-1-1981, when the matter returned to the executing Court after decision in Raghubir Dayal (II), on 21-1-1981. This led to yet another revision by the objector Raghubir Dayal, which was Civil Revision No. 212 of 1981 (Raghubirdayal V. T. Krishnaswami), hereafter referred as 'Raghubirdayal (III)'. The objector's counsel again claimed that the Full Bench decision in Usha Jain's case had not fully concluded the controversy and, at any rate, it required reconsideration. The matter was heard by another Single Bench of this Court and this revision was allowed by order dated 31-3-81. It was held in Raghubirdayal (III), contrary to the earlier decisions between the same parties in Raghubir Dayal (I) and (II), that the request of the decree-holder seeking police aid 'can only be treated as an application under Order 21, Rule 97 read with Rule 35 and also Rule 236 of the Rules and Orders (Civil)', and having started an inquiry 'the only course open to the executing Court is to investigate the matter to come to the conclusion as to whether the petitioner is or is not bound by the decree'. In this view, it was held by the learned single Judge that the enquiry having been instituted on an application of the decree-holder himself, it could not be said that it is contrary to the law laid down by the Full Bench and, therefore, the wider question of reconsideration of the Full Bench decision raised by the objector's counsel was not necessary.

13. The detailed order of the single Bench in Raghubirdayal (III), directing holding of the enquiry, treating the decree-holder's application for police aid as an application made by the decree-holder himself under Order 21, Rule 97, read with Rule 35, C. P. C., does not show how the learned Judge overcame the two earlier single Bench decisions in Raghubirdayal (I) and Raghubirdayal (II) and more particularly Raghubirdayal (II), wherein the objector's same contention that the application made by the decree-holder for police aid was tantamount to an application under Order 21, Rule 97, C.P.C., was rejected. We find that the decisions in the two earlier revisions in Raghubirdayal (I) and Raghubirdayal (II), by two other single Benches, had expressly rejected the objector's contentions, including those accepted later by the third single Bench in Raghubirdayal (III). We may reiterate that in an even earlier revision (Civil Revision No. 1432 of 1978, decided on 27-7-1979), which had been filed by ' the decree-holder, the only thing decided, prior to the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146), was that the executing Court was required to consider and decide afresh the decree-holder's objection to the maintainability of the objector's application on all grounds including those based on res judicata and Order 2, Rule 2, C. P. C. It was not the decision of this Court in that revision that the objector's application was tenable under Order 21, Rule 35 and 97 or Section 151, C. P. C. This was clearly pointed out in Raghubirdayal (I).

14. The single Bench decision in Raghubirdayal (III) makes scathing criticism of the Full Bench decision in Usha Jain's case (AIR 1980 Madh Pra 146), attempting to show that some points mentioned therein have been overlooked by the Full Bench and that the D. B. decision in Bhagwat Narayan's case survives to some extent even after the Full Bench decision. It was stated at the Bar that the decision in Raghubirdayal (III) is being relied on before the Subordinate Courts to dilute the authority of the Full Bench decision in Usha Jain's case. With the utmost respect to the learned single Judge, deciding Raghubirdayal (III), we must state that we are unable to subscribe to the view expressed in Raghubirdayal (III) and we must add that nothing stated in Raghubirdayal (III) should be treated as diluting the authority of the Full Bench decision in Usha Jain's case. We are in agreement with the learned Judges deciding Raghubirdayal (I) and Raghubirdayal (II) in their reading of the Full Bench decision in Usha Jain's case. We are, therefore, constrained to

say that the criticism made of the Full Bench by the learned single Judge in *Raghubirdayal* (III) is unjustified and results from an incorrect reading of the Full Bench decision. The observations made by the learned single Judge in *Raghubirdayal* (III), criticising the Full Bench decision, have, therefore, to be ignored by the Subordinate Courts, who are primarily concerned with application of the Full Bench decision while executing the decrees,

15. We may add that the aforesaid *Raghubirdayal*'s case is a typical illustration of abuse of the process of Court, resulting from following the overruled Division Bench decision in *Bhagwat Narayan*'s case (AIR 1974 Madh Pra 26), and justifies the apprehension which was expressed by the Full Bench in *Usha Jain*'s case (AIR 1980 Madh Pra 146). The objector *Raghubirdayal*, brother of the judgment-debtor, even after the dismissal of his suit based on his title and affirmance of that decree up to the High Court in second appeal, successfully delayed execution of the decree claiming investigation under Order 21, Rule 35 and 97, read with Section 151, C. P. C. for several years. It is difficult to visualise what possible investigation into his claim or title remained to be made even thereafter as directed in *Raghubirdayal* (III). The view expressed in *Raghubirdayal* (III) deferred execution even then at the instance of such an objector whose title had been expressly negated in a civil suit. The resulting injustice to the decree-holder from such a view, is too obvious to require any further elaboration. The real concept of justice means justice to all parties and not only one of them, who happens to be a spurious claimant, A view which enables a spurious claimant to frustrate lawful execution does not commend to us as legal or just,

16. It follows that the observations in *Jainarayan Shukla v. Gyansingh* (Civil Revision No. 145 of 1981, decided on 2-5-1981), quoted by us, which are obiter and contrary to the Full Bench decision in *Usha Jain v. Manmohan Bajaj*, 1980 MPLJ 623 : (AIR 1980 Madh Pra 146), are to be ignored. Similarly, we are of the opinion that *Raghubirdayal v. T. Krishnaswami*, Civil Revision No. 212 of 1981, decided on 31-3-1981, is not correctly decided and the criticism of the Full Bench made therein is unjustified, which has to be ignored and it is not to be read as diluting the Full Bench decision in *Usha Jain*'s case (AIR 1980 Madh Pra 146).

17. Consequently, this revision fails and is dismissed. Parties shall bear their own costs.

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