

Ajith Kumar M.R. Vs. Vasanthi Devi and ors.

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Court : Kerala

Decided On : Nov-14-2008

Reported in : 2009(1)KLJ67

Judge : V. Ramkumar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 38, 51 and 100 - Order 42, Rule 1 - Order 21, Rules 10, 11(2), 35, 35(1), 97 to 99, 99(1), 100, 101, 103, 105 and 106

Appeal No. : Ex.S.A. Nos. 16 and 17 of 2008

Appellant : Ajith Kumar M.R.

Respondent : Vasanthi Devi and ors.

Advocate for Def. : M.M. Abdul Aziz, Sr. Adv.,; M.A. Abdul Hakhim,; P.V. Eli

Advocate for Pet/Ap. : V. Chitambaresh, Sr. Adv.,; T.C. Suresh Menon,; K. Jayak

Judgement :

V. Ramkumar, J.

1. The claim petitioners in E.A. Nos. 731 and 842 of 2006 in E.P. No. 95 of 1982 in O.S. No. 339/1969 on the file of the II Addl. Munsiff, Neyyattinkara, are the appellants in these Execution Second Appeals filed under Section 100 read with

Order 42 Rule 1 and Order 21 Rule 103 C.P.C.

2. At the time of hearing on admission of these Second Appeals, the respondents/decreed holders who had lodged caveats were also heard. These Second Appeals were heard on the following questions of law:

i) Were the courts below justified in holding that while dealing with a petition under Order 21 Rule 97 C.P.C. the executing court is not entitled to go behind the decree to record a finding as to whether the plaintiff/decreed holder is entitled to delivery of possession as against a stranger obstructor?

ii) The proceedings under Order 21 Rule 97 C.P.C. whether the courts below were justified in taking the view that where the delivery is obstructed by a stranger claiming a right independent of the judgment debtor, the burden is on the obstructor to prove that he has a better title than that of the decreed holder?

iii) In an adjudication under Order 21 Rule 99 C.P.C. at the instance of a stranger to the decree, while determining all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding, can the executing court which has not chosen to order removal of such stranger under Order 21 Rule 35(1) C.P.C, proceed on the assumption that the decreed holder need only show that the decree for possession is his title and it is for the stranger obstructor to prove that he has better title?

THE FACTUAL SETTING

3. The essential facts, shorn of unnecessary details are the following:

The suit O.S. No. 339 of 1969 was filed by the predecessors-in-interest of respondents 1 to 5 in these appeals against the legal representatives of one Krishna Pillai for redemption and recovery of possession of an extent of 3.59 Acres of land comprised in Survey Nos. 131/8 and 137/2 of the former Marukil Village which is presently the Malayinkizh Village. The mortgage which was sought to be redeemed was a puisne mortgage of the year 1117 M.E. corresponding to the year 1942. The plaintiffs contended that their mother had derived title to the properties under a sale deed of 1110 M.E. corresponding to the year 1935. The

plaintiff's mother who did not have possession over the properties had allegedly who did not have possession over the properties had allegedly executed the puisne mortgage in favour of Krishna Pillai authorising him to redeem the prior mortgage. Subsequently, another puisne mortgage was executed in favour of the original second defended by name Kuttan Nair who was the son of the said Krishna Pillai. It was alleged that Krishna Pillai had redeemed the prior mortgages and had stepped into the shoes of the mortgagee by reducing the property to his possession. The suit was thus filed by the plaintiffs against the legal representatives of Krishna Pillai for redumption of the puisne mortgage of the year 1117 M.E. and for recovery of possession. The defendants in the suit remained ex parte. A preliminary decree for redemption and recovery of possession was passed by the trial court on 30-09-1969. Later, a final decree was also passed on 08-10-1976. Subsequently, execution was taken out. Out of the plaint schedule properties 2.97 acres are compared in Survey No. 131/8 and the same is situated on the northern side of a road and the remaining 62 cents of land is comprised in Survey 137/2 and it lies to the south of the road. The two claim petitions were filed with regard to portions of the said 62 cents of land lying on the southern side of the road. The decree holders have not yet taken delivery of the larger extent of the property lying to the north of the road. The contention of the claim petitioners in E.A. 731 of 2006 (appellants in Ext.S.A. 16 of 2008) was that the said 62 cents comprised in Survey No. 137/2 of Malayinkizhu Village situated to the south of the road belonged to one Masilamony, that on his death the said property devolved on his children Kali Mariya, Zachariaya and Yohannan, that the said children petitioned the properties in the year 1120 M.E. corresponding to the year 1945 whereby Kali Mariya was allotted the western 20 cents, Zachariah was allotted middle 21 cents and Yohannan was allotted the eastern 21 cents, that the partition deed recited that a portion of the property was outstanding on mortgage right in favour of Bhagavathy Lakshmi under a mortgage deed of 1113 M.E. corresponding to the year 1938, that the first claimant got title and possession over 6 1/8 cents from the middle portion allotted to Zachariah, that the said Zacharia redeemed the prior mortgage in favour of Bhagavarhy Lakshmi in the year 1124 M.E. corresponding to the year 1949, that thereafter Zacharia gifted 11 cents to his daughter in the year 1949, that thereafter Zacharia gifted 11 cents to his daughter

in the year 1955 that she constructed a building thereon by name 'Deena Vilasom' and started residing there with her family, that from out of the said 11 cents she gifted 6 1/8 cents to her son the first claimant (Baburaj) in the year 1989 and that Baburaj put up a terraced building in that property. The second claim petitioner who is the 2nd appellant in Ex.S.A. 16 of 2008 contended that an extent of property including the house 'Deena Vilasom' was gifted to him by his mother who is the daughter of Zacharia and he has constructed a house thereon in the year 1960 and that he has been residing in the suit house paying the building tax, electricity bills etc. even prior to the filing of the suit. The 4th claimant who is the 3rd appellant in Ex. S.A. 16 of 2008 contended that 16 cents within the 21 cents allotted to Yohannan was set apart to one Samuel in a partition of the year 1972, that the said Samuel sold the property to the 4th claimant who has constructed a terraced building in the property and that he has been paying the building tax, electricity bills etc. The 5th claimant who is the 4th appellant in Execution Second Appeal 16/2008 contended that 5 1/2 cents of land which is part of the 21 cents allotted to Yohannan was in the possession of the 4th appellant who had put up a residential building and was paying land revenue and electricity bills. The claim petitioner in E.A. 842 of 2006 who is the appellant in Ex. Second Appeal 17 of 2008 contended that Kali Mariya who was one of the children of Masilamani and to whom 20 cents on the western side was allotted, had three children by name Anose, Yohannan and Jhanappu, that Jhanappu had 5 children by name Rasamma, Sarasamma, Dennison, David and Albert, that the claim petitioner is the son of the Rasamma, that Sarasamma sold her right over the estate in favour of the appellants mother Rasamma as per Ext. A31 sale deed dated 8-1-1963 that Rasamma thus got 1/3 right over the 20 cents of land allotted to Kali Mariya, that after the death of Yohannan his widow and children sold their rights in favour of the appellant's mother Rasamma as per Ext.A32 sale deed dated 17-6-1961, that Rasamma thus got 2/3 right over the land allotted to Kali Mariya, that the reasoning 1/3 right belonging to Anose devolved on his only son by name. Titus who sold his right to one Ganesan Chettiar as per Ext. A33 sale deed dated 30-6-1959, that Rasamma who obtained absolute title over the estate of Kali Mariya constructed a residential building in the property by name 'Frank House', that Rasamma later executed Ext.A35 settlement deed in respect of 8 cents in

favour of the appellant in Ext.S.A. 17/08, that the appellant constructed another terraced building and has been residing there paying the land revenue etc. The delivery was resisted by the appellants in these Ex. Second Appeals putting forward the above claim independent of the rights of the judgment debtors. The appellants/claimants produced Exts. A1 to A41. The decree holders produced Ext.B 1 Ottukuzhikanom deed of 1113 M.E. and 3 re-survey plans. The Executing Court as per common order dated 10-3-2008 dismissed both the claim petitions. On appeals preferred as A.S. Nos. 43 and 45 of 2008, the lower appellate court as per common judgment dated 19-7-2008 dismissed those appeals. Hence, these Execution Second Appeals.

4. I heard Advocate Sri. P.B. Krishnan, the learned Counsel appearing for the appellants in Ex.S.A. 16 of 2008, Sr. Advocate Sri. V. Chithambaresh, appearing for the appellant in Ext.S.A.17 of 2008 and Sr. Advocate Sri. M.M. Abdul Aziz, appearing for the decree holders.

THE DECREE HOLDERS' CONTENTIONS

5. Advocate Sri. Abdul Aziz, the learned Counsel appearing for the decree holders made the following submissions in opposition to the Second Appeals:

This is a suit filed in the year 1969 and there has been several litigations between the parties and the case had come up to this Court on several occasions. There is a decree for redemption and possession of the suit property which was outstanding on mortgage. It has been held by the Court in Thakamma Mamachan -1983 KLT.487 that in the case of a mortgage decree the property belongs to the decree holder. Likewise, the law is well settled that the Executing Court cannot go behind the decree. Vide *Devasia Philipose v. Venkita Subba Iyer Harihara Iyer* 1952 KLT 289, *Govinda Pillai Sankara Pillai v. Krishna Pillai Kesava Pillai* 1953 KLT 449 and *Kunju Kunju Chandran v. Raghavan* : AIR2005 Ker317 of the memorandum appeal it is alleged that the property belonged to one Masilamani. This contention has not been proved. In fact, the 10th defendant in the suit had set up a claim over 75 cents of land tracing his title to the very same Masilamani. As per the order dated 28-11 -2001 passed by this Court in C.R.P. 2004 of 1995 this Court rejected the said claim of the 10th defendant. This Court directed the

disposal of the E.P. within three months of that date. On a subsequent occasion also this Court had in C.R.P. 2864 of 2002 observed that it was high time that a quietus was given to this litigation test the public loose faith in our civil justice administration system. On a still another occasion this Court while disposing of W.P.(C) No. 7358 of 2004 on 23-5-2006 observed that merely for the reason that a Commissioner is appointed, the Executing Court cannot delay the execution. Again in the judgment dated 27-7-2006 in W.P.(C) No. 18767 of 2006 it was observed that it was open to the decree holder to make a request before the Executing Court to effect delivery of the disputed properties identified by the surveyor. Still the entire plaint schedule properties remain to be delivered over to the decree holders. On the merits, both the courts have concurrently held that the decree schedule properties are not covered by Ext. A1 partition and that the properties covered by Ext.B1 which is a prior mortgage referred to in Ext. A1 and the properties covered by Ext.A1 partition deed are different. If so, the obstruction to the delivery was without any valid ground. The said finding is a pure finding of fact from which no Second Appeal will lie for want of a substantial question of law. It is not enough that the obstructors are found in possession but they should further show that they have a right to possession independent of the Judgment debtor and which right is not and cannot be affected by the decree. (Vide Ittiyachan v. Tomy 2001 (3) KLT 117). Rules 97 to 99 of Order 21 C.P.C. is a complete Code by itself. The Apex Court in Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and Anr. (: [1997]1SCR463 observed in unmistakable terms that what has to be adjudicated is the right, title and interest of the obstructionist. As far as the decree holder is concerned, the decree for delivery of possession is his title on the basis of which he can seek delivery of the property and it is for the obstructor to make out a case that he has better title to keep the decree holder at bay. The courts below have approached this question in the right perspective. This Court should not interfere with the concurrent findings recorded by the courts below.

JUDICIAL EVALUATION

6. I am afraid that I cannot agree with the above submissions made on behalf of the decree holders. This is not a case where the delivery of the properties so far

as the 62 cents is concerned was obstructed without any bona fides or even without any prima facie case. Had it been otherwise, the executing Court would have straightaway ordered the removal of the obstructor under did not act under Order 21 Rule 35 C.P.C. will indicate that the court was conscious-about the fact that the matter required adjudication or at least, an investigation which can be had only by recourse to Order 21 R.97 C.P.C.

7. Where the decree is for possession of immovable property and the holder of the decree is desirous of executing it, he should apply to the court which passed the decree within the meaning of Section 38 C.P.C. read with Order 21 Rule 10 C.P.C. Such application for execution has to be in the form of a written application as enjoined by Order 21 Rule 11(2) C.P.C. Such Court, on receiving the application for execution, may order execution of the decree by delivery of the property specifically decreed as provided under Section 51 C.P.C. read with Order 21 Rule 35 C.P.C. Order 21 Rule 35(1) C.P.C. reads as follows:

Rule 35, Decree of immovable property - (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on this behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

8. Under Order 21 Rule 35 C.P.C. the executing court directs delivery of possession of the property to the decree holder or his agent in that behalf and if necessary, the Court will direct delivery of possession by removal of the judgment debtor or any other person bound by the decree and who refuses to vacate the property. 'A person bound by the decree' within the meaning of Order 21 Rule 35 C.P.C. includes the judgment debtor and a person claiming through or sponsored by the judgment debtor. The said expression may also include a person who claims to be in possession in his own right independently of the judgment debtor, provided that the claim of such person is ex facie unacceptable and is not made in good faith and does not appear to necessitate an investigation. In such a case, the court has the power under Order 21 Rule 35 C.P.C. to remove the person who offers resistance or makes obstruction to the delivery of the immovable property.

But where the holder of a decree for possession of immovable property or a court auction purchaser is resisted or obstructed in obtaining possession by any person on a ground which appears to necessitate an investigation, then the court cannot direct removal of such resistor or obstructor in obtaining possession by any person on a ground which appears to necessitate an investigation, then the court cannot direct removal of such resistor or obstructor under Order 21 Rule 35 C.P.C. In such a contingency, the court will have to have recourse to Order 21 Rule 97 C.P.C. by proceeding to adjudicate upon an application filed by the decree holder complaining of such resistance or obstruction (vide Ragho Prasad v. Pratap Narain Agarwah (1969) ALJ 929- Varkey Joseph v. Board of Revenue : AIR1978 Ker149) Chandrika v. Gangadharan 1983 KLT 953 and Raman v. Karthikeyan 1948 KLT 1071). Order 21 Rule 97 C.P.C. reads as follows:

Resistance or obstruction to possession of immovable property:

1. Where the holder of a decree for the possession of unmovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

2. [Where any application is made under Sub-rule (1) the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

9. The result of such adjudication is indicated in Order 21 Rule 98 C.P.C. which reads as follows:

Orders after adjudication - (1) Upon the determination of the questions referred to in Rule 101, the Court shall, in accordance with such determination and subject to the provisions of Sub-rule (2);

a) make an order allowing the application and directing that the applicant be put into the possession of the property or dismissing the application; or

b) pass such other order as, in the circumstances of the case, it may deem fit.

(2) Where, upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, or by any transferee, where such transfer was made during pendency of the suit or execution proceeding, it shall direct that the applicant be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may also, at the instance of the applicant, order the judgment-debtor, or any person acting at his instigation or on his behalf, to be detained in the civil prison for a term which may extend to thirty days.

10. In the case of a person other than the judgment-debtor or some other person at his instigation or on his behalf or a transferee pendente lite as are mentioned in Order 21 Rule 98(2) C.P.C, the provision applicable is Order 21 Rule 99 C.P.C. Such persons may be total strangers to the decree and claiming an independent right in themselves. Going strictly by Order 21 Rule 99 C.P.C, such persons get a right to file an application to have their claims adjudicated only after they are dispossessed by the decree holder or court auction purchaser by taking delivery of the property. Order 21 Rule 99 C.P.C reads as follows:

Dispossession by decree-holder or purchaser (1) Where 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 where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) Where any such application is made, the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

11. Until the Apex Court gave an authoritative pronouncement on the real scope of Order 21 Rule 99 C.P.C, the preponderance of judicial opinion was that a stranger to the decree and answering the description under Order 21 Rule C.P.C. could not object to the delivery of the property in execution, before delivery is effected and that his remedy was either to file a suit before delivery or to wait until he is dispossessed so as to make an application under Order 21 Rule 99(1) C.P.C. Vide *Prabhakaran v. Kuttian Prakasan* 1985 KLT 225 and *Augnstin and Company v.*

Damodaran 1991 (2) KLT 11. In other words, such a person had no right to obstruct the delivery in anticipation of dispossession in execution of the decree. But now after the decision of the Supreme Court in *Brahmadeo Chaudharay v. Rishikesh Prasad Jaiswal* : [1997]1SCR463 , such a person need not wait until he is dispossessed in execution of the decree so as to stake his claim. Such a person also can resist or obstruct the delivery and thereupon the Court is obliged to adjudicate the application, if any, filed by the decree holder or auction purchaser under Order 21 Rule 97 C.P.C. complaining of resistance or obstruction. If, instead of complaining of resistance, the decree holder or auction purchaser applies for re-issue of warrant for delivery of possession, then it could be treated as an application for removal of obstruction under Order 21 Rule 97 C.P.C. and the Court will have to adjudicate upon the rival claims. (Vide - Paragraphs 6 and 11 of *Brahmadeo Chaudhari's Case* (supra). Thus, now after the interpretation placed on Rule 99 of Order 21 C.P.C, a purported stranger to the decree has a right of obstruction or resistance even at the pre-holder stage and upon such obstruction or resistance, the decree-holder or auction purchaser will have to move the court under Order 21 Rule 97 C.P.C. whereupon the Court will have to adjudicate upon the rival claims within the ambit of Rule 101 of Order 21 C.P.C. Such a stranger can also apply under Order 21 Rule 99 C.P.C. after losing possession of the property. (Vide paragraph 9 of *Brahmadeo Chaudhary* (Supra)). The questions which are relevant for such adjudication by the Court on applications filed both under Rule 97 and 99 of are indicated under Order 21 Rule 101 C.P.C. which reads as follows:

Rule 101. Question to be determined - All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

But the observations in paragraphs 7,8 and 11 of *Brahmadeo Chaudhar's case* that the procedure for adjudication of all questions arising between the parties to

the applications under Rules 97 and 99 of Order 21 C.P.C. is laid down by Order 21 Rule 98 C.P.C, with due respect, do not appear to be correct. The procedure is to be found under Rules 105 and 106 of Order 21 C.P.C. Rule 98 of Order 21 C.P.C. covers only cases involving resistance or obstruction by a judgment-debtor or by some other person at his instigation or on his behalf and by a transferee pendente lite. The nature of the order to be passed after adjudication in cases involving resistance or obstruction by strangers to the decree, is to be found in Rule 100 of Order 21 C.P.C and not in Rule 98 of Order 21 C.P.C. Thus, all questions including questions relating to right, title or interest in the property arising between the parties to the applications filed both under Rules 97 and 99 of Order C.P.C. and relevant to the adjudication, are to be determined any the Court as provided under Rule 101 of Order 21 C.P.C. Order 21 and 103 C.P.C treats the order on such adjudication as if it were a decree.

12. The further question is whether the executing Court, in an adjudication under Order 21 Rule 101 C.P.C, need only call upon the resistor or obstructor to show that he has a better title than that of the decree-holder or auction purchaser. As early as in 1978 in *Mammoo. v. Krishnan* 1978 KLT 901 a learned Single Judge of this Court had observed as follows;

The Indian Code generally does enable a stranger to the suit to come on the party array on his own motion without the consent of the plaintiff, and his remedy lies in resisting and obstructing his dispossession whereupon the decree holder has to move the execution court for removal of resistance and obstruction. The Court is then called upon to decide the respective rights of the obstructor and the decree holder in respect of the property to deliver, possession of which, warrant has been issued.

13. In *Ayyappa v. Ananda* 1999 (1) KLT 278 again another learned Single Judge of this Court observed as follows at paragraph 9:

Under the above rules, all questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under R.97 or R.99 shall be determined by the Court dealing with the application. The provision contained in the above Rules does not admit of any ambiguity and the execution

court is required to go into the question of right, title and interest in the property not only of the claimants but of the judgment-debtor or auction-purchaser also, because the expression used is 'rising between the parties to a proceeding'. This would mean that the execution court will have to go into the question of title of both parties'. In other words, the auction purchaser cannot take advantage of the weaknesses of the claimants case alone. He is entitled to get possession of the property or what has been bid by him in auction. In this case, the sale certificate has only conveyed him the right, title and interest of the judgment-debtor, Achu. Therefore, he can claim delivery of the said property which belongs to the judgment debtor and which was in his possession. He is bound to prove that the disputed property belonged to Achu and it was in his exclusive possession. I have already referred to the observations of Madhavan Nair, J, that this is a matter of judicial determination and it cannot be left to the magical hands of the Amin of the Court.

14. The Apex Court in *Nooruddin v. Dr. K.L. Anand* : (1995)1SCC242 has observed in paragraph 8 of the decision as follows:

Thus the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated suit.

15. Again in *Anwarbi v. Pramod D.A. Joshi and Ors.* : (2000)10SCC405 the following observation made by the Supreme Court are apposite;

In view of the obstruction so caused it was for the decree-holder to take appropriate steps under Order 21 Rule 97 for removal of the obstruction and to have the rights of the parties including the obstructionist adjudicated under the provisions of Order 21 Rule 101.

16. There is nothing in the decision in *Brahmdeo Chaudhary's Case* (Supra) to indicate that what has to be adjudicated upon is only the right, title and interest of the obstructionist or that title of the decree holder is the decree itself and the court cannot go behind the decree. The proposition that the decree itself is the title of the decree-holder may be valid as between the parties to the decree or their privies but not against strangers to the decree. The argument that the executing court cannot go behind the decree is not available to the decree holder or auction purchaser in the case of an adjudication under Order 21 Rules 97 to 101 C.P.C. It is relevant to note that the authority given to the court under Rules 98 and 100 of Order 21 C.P.C. includes a power to put the decree holder or auction purchaser (who are the applicants under Order 21 Rule 97 C.P.C.) or the stranger obstructor (who is the applicant under Order 21 Rule 99 C.P.C) to be put in possession of the property. It is such an order passed under Rules 98 or Rule 100, as the case may be of order 21 C.P.C. which will be deemed to be decree and which will be executable and appealable. Such an order supercedes the earlier decree to which the stranger obstructor was not a party.

17. A perusal of the orders under appeal will go to show that the courts below proceeded as if they cannot go behind the decree and that the only enquiry which was contemplated was as to whether the obstructor has made out his claim in support of the obstruction. It is pertinent to note that the claimants in this case are not claiming under the judgment debtors or at their instigation but instead they were setting up independent claims. If in the adjudication of such a claim the court were to merely call upon the obstructor to establish his case, then there could be situations wherein a person in actual possession under a valid title could be thrown out of the property by another person obtaining decree for possession not against the person who is in actual possession under a valid title could be thrown out of the property by another person obtaining a decree for possession not against the person who is in actual possession under a valid title but against somebody who may have a semblance of title and it will be travesty justice if the person in actual possession under a lawful title were to be ejected without examining the title of the person who seeks to dispossess or eject such person. That explains the language used by the legislature under Rule 101 of Order 21 to indicate that all the questions including the questions relating to right, title or

interest in the property arising between the parties to the proceeding, are to be determined by the court. Incidentally, it is pertinent to remember that the position of an obstructor as in this case would be analogous to the position of a defendant in a suit for recovery of possession on the strength of title and the enquiry in such a proceeding should be not to consider whether such a proceeding should be not to consider whether such a person has better title over the person who seeks recovery of possession. The enquiry should be as to whether the person who seeks to displace or dispossess or eject the person who is admittedly found in possession has sufficient title qua the person in possession so as eject him from the property. The enquiry in this case should have been primarily in that direction, particularly, in a case as the present where both the preliminary as well as final decree were obtained ex-parte without a contest. This is not to say that after such adjudication the court is precluded from finding that the obstructor is in occupation under the J.D. or is claiming under a title created by the J.D. or was inducted into possession pendente lite or that the obstruction was at the instance of or on behalf of the J.D. or that the obstructor is a pendente lite transferee. But the enquiry should be to find out whether the decree holder has sufficient title de hors the decree to dispossess or eject the obstructor. I am inclined to give the decree holders an opportunity to prove that they have sufficient title to dispossess the appellants herein and get delivery of the property in pursuance of the final decree passed on 8-10-1976. The substantial questions of law are answered in the negative and in favour of the appellants the impugned judgments are, accordingly, set aside and the matter is remanded to the trial court for fresh adjudication in the light of the legal position adverted to. The parties shall appear before the trial court without any further notice on 19-12-2008. the executive Court shall make an endeavour to dispose of the matter expeditiously.

18. I make it clear that this case pertains only to 62 cents of land situated on the souther side of the road and the adjudication to be made also pertains to the said 62 cents and the said adjudication will not preclude the executing court below from effecting delivery of the bulk of the property situated on the norther side of the road.

19. Now, after the interpretation placed an Order 21 Rule 99 C.P.C. by the Apex Court in Barahmadeo Chaudari's Case a legislative intervention in tune with the verdict of the Apex Court is a long felt desideratum. It will be appropriate if the Legislature steps in with a suitable amendment of the C.P.C. entitling strangers to the decree also to make resistance or obstruction to delivery at the pre-delivery stage. The provisions of Rules 98 and 100 of order 21 C.P.C. could be clubbed and incorporated under Rule 101 of Order 21 C.P.C. indicating the nature of the order which the Court may pass after an adjudication.

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