

Ram Krishan Vs. Rulda and ors.

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SooperKanoon Citation : sooperkanoon.com/889180

Court : Himachal Pradesh

Decided On : Mar-03-1993

Judge : Devinder Gupta, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 97, 99 and 101

Appeal No. : Civil Revision Petition No. 1 of 1990

Appellant : Ram Krishan

Respondent : Rulda and ors.

Advocate for Def. : N.K. Thakur, Adv. for; S.S. Kanwar, Adv.

Advocate for Pet/Ap. : K.D. Sood, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Devinder Gupta, J.

1. The revision petition is at the behest of Ram Krishan, objector, challenging the order passed on 16th December, 1989 by District Judge, Una, allowing the appeal of decree-holder respondent No. 1 and holding the objections filed by Ram Krishan as not maintainable and thereby setting aside the order passed on 24th

December, 1987 by Senior Sub Judge, Una, who had allowed the objections and dismissed the execution petition.

2. It would be pertinent to give some background of the litigation. On 16th August, 1973, Civil Suit No. 300 of 1973 was instituted by decree-holder Rulda impleading Shakti Chand, Anirudh and Hem Raj sons of Bashambar as defendants, claiming possession of 17 kanals 6 marlas of land. The suit was decreed on 9th June, 1977. One fact, which deserves notice at this stage, is that Ram Krishan petitioner, while appearing as D W 1 in the said suit had deposed that the suit land was in his possession as tenant on payment of rent, which had been given to him in the year 1971 by its owners Munshi Ram and Gokali. Munshi Ram had mortgaged his, 1/2 share with Shakti Chand defendant but he was in actual possession thereof. During cross-examination, at the behest of Rulda, he denied the suggestion that he was in forcible occupation of the property. Despite this evidence on record, the court granted decree of possession in favour of Rulda against Shakti Chand etc. An appeal preferred by Shakli Chand against this judgment and decree was dismissed by the District Judge, as not pressed, on 19th January, 1978.

3. Though the decree in the suit had been passed on 9th June, 1977, yet no execution was taken out immediately thereafter and the same was preferred only in Nov. 1984. The executing court directed issuance of warrant for delivery of possession, which warrant was returned by the revenue authorities unexecuted with the report of Bishambar Dass, Kanungo dated 19th February, 1985 that Shakti Chand, Anirudh and Hem Raj, judgment-debtors were not recorded in possession of the suit property, which was shown to be in occupation of Ram Krishan, firstly as non-occupancy tenant and on coming into force of the Himachal Pradesh Tenancy and Land Reforms Act, mutation of conferment of proprietary rights had been attested in his favour.

4. On receipt of the report on the warrant, a show-cause notice was issued to the Kanungo as to why proceedings under the Contempt of Courts Act be not initiated against him for not executing the warrant. On cause being shown by him, the notice was discharged on 31st May, 1985. It appears that in the meanwhile, Ram Krishan preferred Civil Suit No. 80 of 1985 for protecting his possession. Along

with the suit, he also moved an application under Order XXXIX, Rules 1 and 2 of the Civil P.C. (hereinafter to be called as the Code). The trial court appears to have allowed the application for temporary injunction on 3rd June, 1985. On appeal, the order granting temporary injunction was set aside and the application was dismissed on 18th June, 1986. Feeling aggrieved, the petitioner preferred Civil Revision 223 of 1986 in this Court. By the interim order dated 31st October, 1986, the dispossession of the petitioner was stayed, but the Civil Revision was dismissed by the following order:

'Mr. K.D. Sood, learned counsel for the petitioner, states that in view of the observations contained in para 9 of the judgment under appeal, he will prosecute appropriate remedy before the executing court.

Mr. S.S. Kanwar, learned counsel for the respondent, states that for a period of three weeks from today, his client will not take any further action in the execution proceedings.

Rejected in view of the aforesaid statements without expressing any opinion on the questions involved herein.'

5. On 11th Sept. 1986, the petitioner filed objections purporting to be under Order 21, Rule 98 read with Section 151 of the Code, inter alia, urging that he has been coming in lawful and peaceful possession of the land in his own right as an owner and the decree-holder had no right to execute the decree against him. The judgment-debtors are not in possession of the land under decree. No effective order of delivery of possession can be passed against him unless he is afforded an opportunity to prove his claim over the land. A prayer was also made that the objections be allowed and issuance of warrant for delivery of possession be stayed till the final adjudications of the objections.]

6. The decree-holder filed his reply denying that the petitioner was holding the property independently in his own right or that he was not bound by the decree. While questioning the maintainability of the objections at the behest of the petitioner, in the absence of possession having been delivered, for adjudication of his rights, the decree-holder prayed that the objections be dismissed and warrant

of possession be ordered to be issued and he be put in actual possession of the property.

7. The executing court proceeded to frame the following issues:

1. Whether the objector is in possession of the disputed land, as alleged? OP Objector

2. Whether the objector is not bound by the decree, as alleged? OP Petitioner.

Evidence produced by the parties on the aforementioned issues was recorded. The executing court came to the conclusion that the petitioner was holding the property since the year 1971, prior to the institution of the suit independently in his own right and as such was not bound by the decree. Consequently, while allowing the objections, the execution petition preferred by the decree-holder was dismissed. Feeling aggrieved the decree-holder carried the matter in appeal. The appellate court held that the objections preferred by the petitioner were not competent and maintainable. The same would be maintainable only in case of his surrendering the possession and thereafter praying for adjudication of his rights. Consequently, the appeal was allowed. The order of executing court was set aside. It is this order which is under challenge in this revision petition.

8. Learned counsel for the petitioner has contended that the executing court was right in having proceeded to determine the question as to whether he was bound by the decree or not. Since a prayer had been made by the decree-holder, after the warrant of possession was received back unexecuted, for issuance of warrant of possession again against the petitioner, it was not necessary for the petitioner to have first surrendered the possession and then sought adjudication of his rights. It would amount to putting premium on the illegal acts of the decree-holder, who obtained the decree knowing fully well that the petitioner was in occupation of the property. Further, it has been contended that the decree-holder was estopped in challenging the maintainability of the objections preferred by him, in view of the stand taken by the decree-holder in Civil Revision No. 223 of 1986.

9. Learned counsel for the decree-holder-respondents has contended that unless the petitioner is dispossessed of the property he had no cause of action to apply under Order XXI, Rule 98 of the Code. Objections on behalf of the petitioners would be maintainable only under Order XXI, Rule 99 of the Code under which provision he could only complain of dispossession on the ground that he was not bound by the decree. Counsel for the parties have placed reliance upon number of decisions in support of their respective submissions. I have heard them at length and also gone through the record.

10. In *Smt. Usha Jain v. Manmohan Bajaj*, AIR 1980 MP 146, the Full Bench of the Madhya Pradesh High Court, while overruling the judgment of Division Bench in *Bhagwat Narayan v. Kasturi*, AIR 1974 MP 26, held that no enquiry into the title or possession of a third party is contemplated at any rate at his instance either under Rules 35 and 36 or Rules 95 or 96 of Order XXI of the C.P.C. when the decree-holder or the auction purchaser applies for obtaining possession. When the decree-holder or the auction purchaser is met with obstruction or resistance in obtaining possession, one of the options open to the decree-holder or auction purchaser is to apply under Order XXI, Rule 97 of the C.P.C, which provision is merely permissive and not mandatory and it is open to the decree-holder or auction purchaser to apply instead for a fresh warrant of possession. An enquiry at the instance of a third party in possession is contemplated only under Order XXI, Rule 100 of the Code after he is dispossessed and not before it. A similar view has been taken by a Division Bench of the Kerala High Court in *K. A. Prabhakaran v. Kuttian Prakashan*, AIR 1985 Ker 204, wherein it was held that no application for adjudication of the right, title and interest of an obstructor would lie before he is dispossessed in execution of the decree to which he is not a party. In case he is dispossessed, he has a remedy under Order XXI, Rule 99 of the Code for restoration of possession. The executing court is required to adjudicate such application and take decision on the question of right, title and interest of the dispossessed obstructor and pass appropriate orders under Order XXI, Rule 100 of the Code. It was further held that no application under Order XXI, Rule 97 of the Code would lie at the instance of the obstructor in anticipation of his dispossession in execution of decree for possession in which he was not a party.

11. Rules 97 to 106 in Order XXI of the Code deal with the resistance to delivery, of possession to decree-holder or auction purchaser. Rule 97 of the said order enables a decree-holder of a decree for possession of immovable property or purchaser of any such property in execution of decree to make application to the court complaining of obstruction by any person in obtaining possession of the property. Sub-rule (2) further says that the court shall proceed to adjudicate the application in accordance with the relevant provisions of the Code.

12. Rule 99 of Order XXI of the Code says that where any person, other than the judgment-debtor, is dispossessed of the immovable property by the holder of a decree for possession or by a auction purchaser, he may make an application to the court complaining of such dispossession. An application made is required to be dealt with in accordance with the relevant provisions of law.

13. Rule 101 of Order XXI provides for the determination of the questions, which reads as under:

'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.'

Rule 101 of Order XXI, as now exists, in the Code was substituted for the former Rule 101 by the Code of Civil Procedure Amendment Act, 1976. The provisions of the amended Rule 101 are comprehensive and mandatory. It makes it clear that no separate suit can be filed for determining questions relating to right, title and interest in the property arising between the parties to proceedings under Rule 97 or Rule 99 of Order XXI of the Code or their representatives 'but the same shall be determined by the court dealing with the application. Order XXI, Rule 103 of the Code further says that where any application has been adjudicated under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal as if it was a decree. Procedure for hearing

applications is contained in Rule 105. Reading of Rules 101 and 103 of Order XXI would show that the enquiry contemplated under Rule 101 is to be treated as a trial to the suit and the procedure for the trial of the suit under the Code will be the procedure under Rule 101. Rule 98 provides that upon determination of the questions referred in Rule 101, the court in accordance with the determination and subject to the provisions of Sub-rule (2) make an order allowing an application and directing the applicant to put back in possession or dismissing the application or make such an order as it may deem fit. Rule 100 also provides for the nature of the order to be passed by the court on an application complaining of dispossession.

14. It is not disputed that Order XXI, Rule 35 of the Code says that where a decree is for delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged by removing any person bound by decree. When the property, which is the subject matter of the suit for possession is in possession of a tenant of usufructuary mortgagee, whose term has not expired or is in possession of a person having a right of residence, delivery of property in execution is required to be made under Order XXI, Rule 36, provided, of course, that such a person is not bound by the decree.

15. The aforementioned provisions and the two judgments referred to above would show that various remedies are available to the holder of a decree for possession, when obstruction is made by a third party not bound by the decree. The decree-holder may proceed under Order XXI, Rule 97 of the Code, seeking determination of the questions, one of which would be whether the obstruction is bound by the decree. Instead of resorting to this summary remedy, decree-holder may apply again to execute the decree under Order XXI, Rule 35 or Order XXI, Rule 36 of the Code, or he may institute a regular suit for possession against the obstructor.

16. As noticed above, when a warrant was taken to the spot, report was made that the judgment-debtors were not in possession, nor they were so recorded as such in the revenue record. On the other hand, it was the petitioner, who was in actual possession and was also recorded, not only the owner but also in possession of the suit land. The warrant was returned. The petitioner filed a civil suit and in

proceedings for grant of temporary injunction, ultimately when the prayer was refused and matter was carried in appeal, his appeal was also dismissed. While dismissing the appeal, the appeal court held that the petitioner could agitate his claim in the executing court by resorting to the remedies as laid down in Order XXI, Rules 97, 99 and 101 but he was not entitled to seek stay of the decree passed by the trial court after due consideration of the material adduced on record. When the matter was brought before this court in revision, the petitioner's counsel stated that in view of the observations made by the appellate court that he could resort to the remedies provided under Order XXI, Rules 97, 99 and 101, learned counsel for the decree-holder stated that for a period of three weeks, the decree-holder would not take any further action in execution proceedings and consequently the revision petition was dismissed. The civil suit, it is stated at the Bar, in view of the refusal of the temporary injunction and in view of the petitioner's having preferred objections was not prosecuted further.

17. The petitioner intimated the executing court about the nature of his rights in the property and stated that D.H. admittedly was not entitled to execute the decree against him. The objection of the decree-holder was and is that such objections were not maintainable, since the petitioner had not been dispossessed. Objections at his behest would be maintainable under Order XXI, Rule 99 of the Code, only, in case he is dispossessed in pursuance to the warrant of dispossession.

18. No doubt in view of the clear provision contained in Order XXI, Rule 99 of the Code, third party cannot insist upon the adjudication of his right, title and interest without actually being dispossessed. He can only make complaint of his dispossession and seek adjudication of his rights in the same very proceedings and once the objections are filed, the same would have to be adjudicated as if it was a suit and once this application is moved, such right, title and interest cannot be tried in a separate suit as envisaged in Order XXI, Rule 101 of the Code. After having raised objection about the maintainability of the objections, the decree-holder insisted upon in getting adjudication of the rights when he filed reply and therein stated that the petitioner was bound by the decree and was liable to be dispossessed and also prayed for issuance of warrant for delivery of possession. This reply, in my opinion, was a prayer made by the decree-holder to the court

under Order XXI, Rule 97 of the Code complaining of obstruction raised by the petitioner to the execution of decree and seeking adjudication of the rights since he prayed that warrant of possession be issued and he be put in possession, meaning thereby that the petitioner should be actually dispossessed since he is bound by the decree. It is not necessary that obstruction has to be made physically. It can be made to a decree in different manners by intimating the executing court by the obstructionist that he is not bound by the decree. This intimation to the court would amount to obstruction to the decree and the objections preferred by the petitioner have to be treated as an intimation to the court. The same can also be treated as caveat to the decree-holder complaint or counter in opposition.

19. In *Smt. Tahera Sayeed v. M. Shan*: mugam, AIR 1987 AP 206, after discussing the entire case law on the subject and after noticing the two judgments in *Usha Jain's* and *Prabhakaran's* cases (*supra*), the court in para 8 of the report observed as under (at page 211; of AIR AP):

'Though Rule 99 of Order 21 gives right to file an application by a person dispossessed of the immovable property, it is a poor consolation to him to be asked to approach the court after dispossession when he lays bear the facts in advance and seeks assistance to protect his possession. In *Savamma v. Radhakrishna Moorthy*, (1985) 1 Andh LT 436, I held that the faith of the people is the saviour and succour for the sustenance of the rule of law and any weakening link in this regard would rip apart the edifice of justice and cause disillusionment to the people in the efficacy of law. The acts of the Court should not injure a party. When the stains on the purity of fountain of justice is apparent, it is but the duty of the court to erase the stains at the earliest. It is well settled that right to an adjudication is a procedural right. The procedure has been devised as handmaid to advance justice and not to retard the same. The primary object for which the court exists is to do justice between the parties. The approach of the court would be pragmatic but not pedantic or rigmarole. Considered from this perspective, I have no hesitation to hold that when the third party, not bound by the decree approaches the court to protect his independent right, title or interest before he is actually dispossessed from immovable property and files an application under

Order 21, Rule 97, it must be treated to be an intimation to the court as caveat to the decree-holder or purchaser or a person claiming through him that 'look here, your fraud would be exposed and collusion uncovered; I am not a pretender for judgment-debtor. I have my own just right, title or interest in the immovable property in my possession and I am not bound by your decree', and the court is to treat it as a complaint or a counter in opposition as an application for the purpose of Order 21, Rule 97 and to adjudicate it under Rule 98 or Rule 101 which shall be final and conclusive between the parties and it shall be treated to be a decree for the, purpose of Rule 103 and it is subject to appeal and further subject to the result in the prior pending suit under Rule 104. This approach is consistent with Ubi jus ebi remedium, shortens the litigation, prevents needless protraction and expenditure and affords expeditious quietus to execution apart from assuaging fair justice. Accordingly, I hold that the application under Order 21, Rule 97 of the petitioner or the counter of respondent No. 1, Narasimha, be treated as an application under Order 21, Rule 97 and it is maintainable.'

20. The learned single Judge of the Andhra Pradesh High Court also brought in aid the inherent powers under Section 151 of the Code and said as under:

'Even otherwise, the inherent power under Section 151 of the Code also successfully be invoked by the petitioner. The inherent power is in addition to the power which the Court is already possessed of. Procedure is not a vested right. It is to be tailored (to?) attune to the ends of justice. Inherent power is intended to be exercised to prevent miscarriage of justice, or abuse of the process of the court. Order 21, Rule 97, if interpreted strictly, could be available only when the decree-holder or purchaser chooses to make avail of. Instead if he persists in execution under Order 21, Rule 35, against a third party not bound by the decree, on issue of Warrant in Form XI of Appendix E of the Schedule to the Code, the bailiff is bound to execute the decree and deliver physical possession under relevant Clauses (1) to (3) thereof; if necessary by assault or by use of criminal force. Thereby the procedure aids abuse of the process enabling the decree-holder or the purchaser to over-reach his object to saddle himself in possession of the immovable property depriving the person in possession but not bound by the decree of his valuable right to property. Procedure is but the machinery of law -- the channel and means

whereby law is administered and justice reached. All procedure, therefore, is an armour to effectuate the right to property. Procedural safeguard is an ingrained facet of fair play in action to subserve the legal right and not to extinguish it. The highest duty of a Court is to take care that its act does not injure a suitor. Thus, in a given situation, as stated earlier, if inherent power is not exercised by the court to modulate its procedure, it would facilitate heaping injustice upon a rightful person.....'

21. The aforesaid was also the view of the Division Bench of the Madhya Pradesh High Court in Bhagwat Narayan's case (supra). The main order in the said case was by Justice Shiv Dayal, which is to the following effect:

(1) The Executing Court has no jurisdiction under Order 21, Rule 35, C.P.C. to remove a third person who is not bound by the decree, unless the court holds that such third person is holding on behalf of the judgment-debtor without any just cause.

(2) If the third person is not bound by the decree, the only two courses open to the decree-holder are to institute a regular suit for declaration of title or to apply under Order 21, Rule 97, C.P.C. and obtain an order after a summary enquiry under Order 21, Rule 98 in his favour.

(3) Unless the decree-holder- satisfies the Executing Court that such third person is bound by the decree so that he can be removed under Order 21, Rule 35 or applies under Order 21, Rule 97 and gets an order under Order 21, Rule 98, Civil Procedure Code the Executing Court must stay its hands as it has no jurisdiction to proceed with execution on resistance or obstruction of such third party indicated by filing an application in Court. ,

(4) Such a view alone will avoid confusion and do justice to a third party claiming to be in possession in his own right because otherwise the only remedy to him would be under Order 21, Rule 100, C.P.C. after dispossession. This view requires only a summary enquiry of a short duration which would not be unjust to the decree-holder. Award of costs and mesne profits to the decree-holder can be made in case of frivolous or vexatious claims.

22. In *Ram Chandra Verma v. Manmal Singhi*, AIR 1983 Sikkim 1, it was held that where in the course of execution of decree for delivery of immovable property, a person is in possession of the property, who is not a party to the decree, preferred an objection to the execution of decree by filing an application that he was not bound by the decree, the executing court, without holding the person to be bound by the decree, could not reject the application as not maintainable under the law and order the execution to proceed. It was further held that the executing court should have stayed its hands in the matter leaving it to the decree-holder to proceed under Order XXI, Rule 97 of the Code or in such other manner, as he might have thought fit.

23. In the instant case, after intimation was given by the objector-petitioner to the court that he was not bound by the decree and could not be dispossessed which act on his part is nothing but putting an obstruction to the decree, the decree-holder by filing his reply contended that the petitioner was bound by the decree and had no right to retain possession and had also prayed for his dispossession by issuing warrant, which reply itself was nothing but making a prayer to the court under Order XXI, Rule 97 of the Code and complaining of obstruction and would be deemed to be a prayer for adjudication of the question as to whether the petitioner was bound by the decree or not. The executing court thereafter proceeded to frame the aforementioned issues as to whether the petitioner in possession of the property and whether he was bound by the decree and thereafter proceeded to determine the question posed before it. Consequently, I find that though the appellate court was right in saying that the objections at the behest of the petitioner were not maintainable but erred in not treating the reply preferred by the decree-holder as an application under Order XXI, Rule 97 of the Code.

24. The facts have already been stated and it has been observed that even during the pendency of the suit, petitioner took up a plea that he was in possession of the property independently. Despite this, the decree-holder proceeded with the suit and obtained decree. The decree-holder while appearing as RW2 admitted that he was not in actual possession of the property. The other fact proved on record that the petitioner moved an application for correction of entries in the revenue records

and on 13th December, 1974; an order was made for correction of entries showing the petitioner to be in possession on payment of Rs. 200/- as rent under the owners, of the property. Petitioner's possession was recorded firstly in Roznamcha Wakiati Ex.O/1, which was carried to jama-bandi, Ex.O/4. The order of correction is Ex.O/7. Thus the executing court was right in saying that it was the petitioner, who was in possession of the property much prior to the decree, who was holding the same not under the judgment-debtors but independently and had also been recorded as owner thereof.

25. In view of this, the order passed by the appellate court cannot be sustained. The order passed by the executing court deserves to be upheld. Consequently, I allow the revision petition. Set aside the impugned order and restore that of the executing court by dismissing the execution petition preferred by decree-holder respondent No. 1. No costs.