

Shreenath

Vs

Rajesh

(K. Venkatswami, A. P. Misra JJ)

13.04.1998

JUDGMENT

MISRA J

1. The seekers of justice many a time has to take a long circuitous routes, both on account of hierarchy of Courts and the procedural law. Such persons are and can be dragged till the last ladder of the said hierarchy for receiving justice but even here he only breaths nearness of receiving the fruits of that justice for which he has been aspiring to receive. To reach this stage is in itself an achievement and satisfaction as he, by them has passed through a long arduous journey of the procedural law with many hurdles replica of mountain retrain with ridges and furrows. When he is ready to take the bite of that fruit, he has to pass though the same terrain of the procedural law in the execution proceedings the morose is writ large on his face. What looked inevitable to him to receive it at his hands distance is deluded back into the horizon. The creation of hierarchy of Courts was for a reasonable objective for conferring greater satisfaction to the parties that errors, if any, by any of the lower Courts under the scrutiny of a Higher Court be rectified any long procedural laws also with good intention to exclude and filter out all unwanted who may be the cause of obstruction to such seekers in his journey to justice. But this obviously is one of the causes of delay in justice. Of course, under this pattern the party wrongfully gaining within permissible limits also stretches the litigation as much as possible. Thus, this has been the cause of anxiety and concern of various authorities, Legislators and Courts. How to eliminate such a long consuming justice? We must confess that we have still to go long way before true satisfaction in this regard is received. Even after one reaches the stage of final decree, he has to undergo a long distance by passing through the ordained procedure in the execution proceedings before he receives the bowl of justice.

2. The Courts within its limitations have been interpreting the procedural laws so as to conclude all possible disputes pertaining to the decretal property which is within its fold in an execution proceeding i.e., including what may be raised later by way of another about of litigations through a fresh suit. Similarly legislatures equally are also endeavouring by amendments to achieve the same objective. The present case is one in this regard. Keeping this in view, we now proceed to examine the present case.

3. In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding the justice is to be adopted. The procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the receipt of justice is not to be followed.

4. This appeal arises out of the judgment and order of the High Court of Madhya Pradesh, Bench at

Indore, in Civil Revision No. 406 of 1983.

5. The question raised is, whether the third party in possession of a property claiming independent right as a tenant not party to a decree under execution could resist such decree by seeking adjudication of his objections under order 21, Rule 97 of the Civil Procedure Code ?

6. The respondent No.1, Rajesh, filed a suit for the redemption of his mortgage against respondent No.2, Prem Shanker, which was decreed. The decree directed the delivery of vacant possession of the mortgaged property to the applicant (Respondent No.1). In the said suit, admittedly, the present appellants were not parties. The decree-holder put his decree in execution in which the present appellants obstructed on the ground that vacant possession cannot be delivered in execution because they were the tenants in the shop from the year 1952 much before the execution of the mortgage which was in the year 1962, hence, only symbolical possession can be given. There has been two rounds of proceedings in execution. Initially, the Executing Court held that the decree-holder was not entitled to take actual possession in execution of the decree against the non applicants. The case of the decree-holder is that in the suit it was held that the mortgagor had to deliver vacant possession to the mortgagee, hence he is entitled to get back vacant possession. Thus he made strong plea for a vacant possession in terms of the decree. For him, it is submitted that a similar objection was taken by the judgment debtor Prem Shanker that only symbolic possession could be given to the decree-holder. The objection was negatived by the trial court, appellate court, and even by the High Court in the second appeal. Hence, the executing court cannot go behind the decree. The appellants case is they were not parties to those proceedings. However, this objection of the decree-holder was rejected in the first round by the Executing Court and the Revisional Court holding that the person resisting viz. the present appellants were not parties to the suit nor there is any decree against them. It seems subsequently, the decree-holder again moved another application in the aforesaid execution case No.1A of 1970-81 for delivery of vacant possession. The present appellants also moved an application/objections under Order 21, Rule 97 C.P.C. resisting that they cannot be dispossessed in terms of the said decree, as they were not parties to the said suit nor they are deriving any right and title through the Judgement debtor. They claim separate and independent legal right, not affected either by the mortgage or redemption of the mortgage. It is not clear as under what circumstances the second application for actual possession was made by the decree-holder after the matter was earlier disposed of. Since this point seems not raised either before the Executing Court or the High Court, we are not adverting to this point. We find the Executing Court in the second round on consideration of a subsequent decision of the Full Bench of the M.P. High Court in Smt. Usha Jain, and others Vs. Manmohan Bajaj and others (AIR 1980 (Vol 67) M.P. 146), held that the appellants had no right to object to the decree under Order 21, Rule 97. The said full Bench held :

The executing Court has no jurisdiction to start an enquiry suo motu or at the instance of a third party other than the decree-holder/auction-purchaser under 0.21, Rule 97. This Rule is merely permissive and not mandatory so that the decree-holder/auction-purchaser need not resort to it against his will and may even apply for fresh warrant under O.21, R. 35, C.P.C. Executing Court is not bound to stay its hands the moment a third party files an objection to the execution nor the stay would continue till an unwilling decree-holder/auction - purchaser is forced to apply for investigation into the right or title claimed by the third party and negative the claim therein. If the executing Court were to stay its hands till investigation into a third party's claim is not finally decided then it would result in depriving the decree-holder of his possession by filing repeated spurious claims. 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 and 96 of Order, 21, C.P.C. when the decree-holder or the auction-purchaser applies for obtaining possession. Subsequently when the decree-

holder or auction-purchaser is met with obstruction or resistance in obtaining possession, one of the options open to him is to apply under Rule 97 but that provision is merely permissive and not mandatory and it is open to the decree-holder/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 O. 21. R. 100 after he was dispossessed and not before it.

The omission by the executing Court to investigate into the objection filed by a third party does not result in injustice to the third party. It cannot be said that he would have no remedy to protect his possession and have his title judicially investigated prior to his dispossession his only remedy then being under Order 21, Rule 100 after dispossession. Another remedy available to such a third party is to institute an independent civil suit for a declaration of his title claiming therein the relief of temporary injunction to protect his possession."

7. The High Court upheld the Executing Court's order following the said Full Bench decision of the M.P. High Court. Hence this appeal. The only question raised is, whether the Full Bench decision is correctly decided. In view of this Full Bench decision, objection of the appellant was rejected without considering the points raised on merit or other objections.

8. In order to appreciate the controversy, Order 21, Rule 35, Order 21, Rule 36 and Order 21, Rule 97 are quoted hereunder :

"O. 21, R. 35: Decree for 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 his behalf, and, if necessary, be removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where a possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

O.21.R.36: Decree for delivery for immovable property when in occupancy of tenant:

Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place,

the substance of the decree in regard to the property.

O. 21 R. 97: Resistance or obstruction to possession of immovable property :

(1) Where the holder of a decree for the possession of immovable property 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. This sub-clause (2) was substituted by the Amending Act 1976. Earlier sub-clause (2) was :

"The Court shall fix a day of investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

10. Under sub-clause 1 Order 21, Rule 35, the Executing Court delivers actual physical possession of the disputed property to the decree-holder and, if necessary, by removing any person bound by the decree who refuses to vacate the said property. The significant words are by removing any person bound by the decree. Order 21, Rule 36 conceives of immovable property when in occupancy of a tenant or other person not bound by the decree, the Court delivers possession by fixing a copy of the warrant in some conspicuous place of the said property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. In other words, the decree-holder gets the symbolic possession. Order 21, Rule 99 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through judgment debtor or claiming independent right of his own including tenant not party to the suit or even a stranger. A decree holder, in such case, may make an application to the Executing Court complaining such resistance, for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the Executing Courts when such claim is made to proceed to adjudicate upon the applicants claim in accordance with provisions contained hereinafter. This refers to Order 21, Rule 101 (As amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21, Rule 97 or Rule 99 shall be determined by the Court and not by a separate suit. By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstructed by a stranger is adjudicated and finality given even in the executing proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21, Rule 97. Thus by the use of the words 'any person' it includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, includes tenants or other persons claiming right on their own including a stranger.

11. So, under Order 21, Rule 101 all disputes between the decree-holder and any such person is to be adjudicated by the Executing Court. A party is not thrown out to re-ligate itself to the long drawn out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree-holder and other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21, Rule 35 deals with cases of delivery of possession of an immovable property to the decree-holder by delivery of actual physical possession and by removing

any person in possession who is bound by a decree, while under Order 21, Rule 36 only symbolic possession is given where tenant is in actual possession. Order 21, Rule 97, as aforesaid, conceives of cases where delivery of possession to decree-holder or purchaser is resisted by any person. 'Any person', as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including stranger.

12. Prior to the 1976 Amending Act, provisions under Order 21, Rules 97 to 101 and 103 were different which are quoted hereunder :

"97.(1) Where the holder of a decree for the possession of immovable 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) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

98. Where 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, 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 to be detained in the civil prison for a term which may extend to thirty days.

99. Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

100.(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 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) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made and answer the same.

101. Where the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debtor, it shall direct that the applicant be put into possession of the property.

103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 and rule 101 may institute a suit to establish the right which he claims to the present possession of the property but, subject to the result of such suit (if any), the order shall be conclusive."

13. So far sub-clause (1) of Rule 97 the provision is same but after 1976 amendment all disputes relating to the property made under Rules 97 and 99 is to be adjudicated under Rule 101, while

under unamended provision under sub-clause (2) of Rule 97, the Executing Court issues summons to any such person obstructing possession over the decretal property. After investigation under Rule 98 the Court puts back a decree-holder in possession where the Court finds obstruction was occasioned without any just cause, while under Rule 99 where obstruction was by a person claiming in good faith to be in possession of the property on his own right, the Court has to dismiss the decree-holder application. Thus even prior to 1976 right of any person claiming right on his own or as a tenants not party to the suit such person's right has to be adjudicated under Rule 99 and he need not fall back to file a separate suit. By this, he is saved from a long litigation. So a tenant or any person claiming a right in the property, on his own, if resists delivery of possession to the decree-holder the dispute and his claim has to be decided after 1976 Amendment under Rule 97 read with Rule 101 and prior to the amendment under Rule 97 read with Rule 99. However, under the old law, in case order is passed against the person resisting possession under Rule 97 read with Rule 99 then by virtue of Rule 103, as it then was, he has to file a suit to establish his right. But now after the amendment one need not file suit even in such cases as all disputes are to be settled by the Executing Court itself finally under Rule 101.

14. We find both either under the old law or the present law the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21, Rule 97, has to be decided by the Executing Court itself.

15. Rule 100 of the old law, as referred in the aforesaid Full Bench decision of the Madhya Pradesh High Court is a situation different from what is covered by Rule 97. Under Rule 100 (old law) and Order 99 the new law covers cases where persons other than judgment debtor is dispossessed of immovable property by the decree-holder, of course, such cases are also covered to be decided by the Executing Court. But this will not defeat the right of such person to get his objection decided under Rule 97 which is a stage prior to his dispossession or a case where he is in possession. In other words, when such person is in possession the adjudication to be under Rule 97 and in case dispossessed adjudication to be under Rule 100 (old law) and Rule 99 under the new law. Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under Order 21, Rule 97. One has not to wait for his dispossession to enable him to participate in the execution proceedings. This shows that such person can object and get adjudication when he is sought to be dispossessed by the decree-holder. For all the aforesaid reasons, we do not find the Full Bench in Smt. Usha, Jain (supra) correctly decided the law.

16. In Noorduiddin Vs. Dr K. L. Anand 1995 (1) SCC 242) it is held :-

"Para 8 : 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 by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it Thus, the scheme of the Code appears to be to put an end to the protraction of the

execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution ."

17. In *Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Another* (1997 (3) SCC 694), the question raised was whether a stranger occupying the premises on his own right when offered resistance to the execution of the decree obtained by the decree holder can or cannot request the Executing-Court to adjudicate his claim without being insisted upon that first he must handover the possession and then move an application under Order 21, Rule 97. It is held in para 9 :-

"Para 9 : In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the executing court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of notice force, as that course would amount to by passing and circumventing the procedure laid down under Order 21, Rule 97..... "

18. In view of the aforesaid finding and the law being well settled the interpretation given by the aforesaid full Bench of the M.P. High Court in the case of *Usha Jain Vs. Manmohan Bajaj* (supra) cannot be held to be a good law. As we have recorded above, both the Executing Court and the High Court have rejected the application of the applicant under Order 21, Rule 97 only on the basis of the said Full Bench decision, hence the said order cannot be sustained. Accordingly, both the orders dated 20th February, 1985 passed by the High Court in Civil Revision No.406 of 1983 and the order dated 20th April, 1983 passed by the Executing Court in execution case No.1-A/70/81 is herewith quashed.

19. We direct the Executing Court to consider and dispose of the objections and the application of the appellants under Order 21, Rule 97, after giving opportunity to the parties in accordance with law. The appeal is accordingly allowed. On the facts and circumstances of the case, cost on the parties.