

# RAJASTHAN HIGH COURT

Kanhaiya Lal

Vs.

Pushpa

Civ. Ex. First Appeal No. 2 of 2001

(Dr. Vineet Kothari, J.)

04.04.2008

## JUDGEMENT

**Dr. Vineet Kothari, J.**

1. This appeal is directed against the order dated 27-8-1999 passed by the learned Dist. Judge, Udaipur in execution application rejecting the objection filed by the applicant Kanhaiya Lal under Order 22 Rule 99 and 100 read with Section 151 C.P.C.

2. The present appellant-objector before the learned Executing Court filed the said application under Order 21 Rule 99 in execution of decree of specific performance held by the decree holder Smt. Pushpa against the respondent No. 2 Smt. Mohini Devi on the ground that the land in question, namely, plot No. 515 was sold by the decree holder Smt. Pushpa Devi on 26-12-1998 to one Smt. Shobha Jain and Basant Kumar for a sum of Rs. 40,000/- and said Smt. Shobha Jain and Basant Kumar on 1-3-1994 sold the said plot to the present appellant Kanhaiya Lal and also handed over the possession of the said plot to him. The suit filed by Pushpa Devi, namely, Civil Suit No. 170/1992 on 28-3-1992 was decreed on 13-8-1993. The appellant has further stated that the decree holder Pushpa Devi after getting the decree of specific performance executed against the defendant Mohini Devi obtained possession of the suit property on 22-10-1994 and sold the same to one Sanjay Murdia on 25-10-1994. The appellant, therefore, contended that since the suit property was already sold to him on 1-3-1994 and he was put into possession, he could not be dispossessed in execution of the said decree by the decree holder Smt. Pushpa Devi and accordingly, he filed the said application under Order 21 Rule 99 C.P.C.

3. That the learned Dist. Judge has rejected the said application. Being aggrieved by the same, the appellant has approached this Court by way of present appeal.

4. Mr. Dileep Kawadia, the learned counsel for the appellant relied upon the decision of the Hon'ble Supreme Court in the case of *Babu Lal v. Raj Kumar reported* <sup>1</sup> in has submitted that since the present appellant was put in possession of the suit property in pursuance of sale dated 1-3-1994, he could object to the execution of the decree and the learned trial Court was required to decide the question of right, title and interest also in terms of Order 21 Rule 101 and said order passed under Order 21 Rule 101 has to be treated as decree in terms of Order 21 Rule 103. Therefore, he submitted that the learned trial Court could not have held that this application was not maintainable.

5. Mr. Shambhoo Singh and Mr. S. N. Trivedi appearing for the respondents have opposed these submissions.

6. It would be appropriate to refer to the aforesaid cited judgment in the case of *Babu Lal v. Rajkumar and Ors., AIR 1996 Supreme Court 2050* (supra). Relevant extract is reproduced hereunder (Paras 6 and 7) :

"The controversy is no longer res integra. This Court in *Bhanwar Lal v. Satyanarain and Anr.*, <sup>2</sup> considered the controversy and had held that even an application filed under Order 21 Rule 35 (3) or one filed under Section 47 would be treated as an application under Order 21 Rule 97 and an adjudication is required to be conducted under Rule 98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in Order 21 Rules 98, 101, 102 enjoin conduct of a regular adjudication; finding recorded thereon would be a decree and bind the parties.

It would, therefore, be clear that an adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the object or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21 Rule 103 and it shall be subject to an appeal. Prior to 1976, the order was subject to suit under 1976 Amendment to Civil Procedure Code that may be pending on the date of the commencement of the amended provisions of Civil Procedure Code was secured. Thereafter under the amended Code, right to suit under Order 21, Rule 63 of old Code has been taken away. The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21 Rule 98 which is an order and is a decree under Order 21 Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it was a decree. Thus, the procedure prescribed is a complete

code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance."

7. In view of the aforesaid binding precedent of the Hon'ble Supreme Court, the objection of the present appellant and his right, title or interest was required to be decided by the learned trial Court and the application under Order 21 Rule 99 C.P.C could not be dismissed as not maintainable. The learned trial Court has not only dismissed the said application as not maintainable, but has also observed that the said application was not maintainable on merits. The learned trial Court appears to have rejected the application of the appellant being swayed by the fact that the appellant Kanhaiya Lal himself did not appear in the witness box but only one Pawan Kumar his power of attorney holder appeared in the witness box, who stated before the trial Court that the Registry in favor of the appellant Kanhaiya Lal was done on 1-3-1994 and he was also put in possession by said Shobha Jain and Basant Kumar, but in later part of the said statement he stated that the appellant Kanhaiya Lal was put in possession on 9-3-1994. It is further stated in Para 18 of the order that the sale deed is not signed by said power of attorney Pawan Kumar. These considerations, in the opinion of this Court, were not sufficient to reject the objection of the present appellant merely because the power of attorney holder was examined by the learned Court below. Once, the sale-deed was claimed to be prior in point of time being of 1-3-1994 with the stipulation that the appellant was put in possession; the same could not be brushed aside merely because the appellant himself did not appear in the witness box. As held by the Hon'ble Supreme Court in the aforesaid judgment, even dispossession of the objector from the property is not a condition for declining to entertain the application under Order 21 Rule 99. Therefore, so called inconsistency in the statement of the power of attorney holder Pawan Kumar that the appellant Kanhaiya Lal was put in possession on 1-3-1994 and later on he stated that he was so put in possession on 9-3-1994 was not sufficient to reject the application under Order 21 Rule 99 itself.

8. Consequently, this appeal is allowed and setting aside the order of the learned Dist. Judge, Udaipur dated 27-8-1999, the matter is restored back to the said Executing Court for deciding the application of the present appellant afresh in accordance with law. No order as to costs.

Appeal allowed.

Cases Referred.

1. JT 1996 (2) SC 716: (AIR 1996 SC 2050)
2. JT 1994 (6) SC 626: AIR 1995 SC 358