

Ashan Devi & Anr vs Phulwasi Devi & Ors on 19 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 511, 2003 AIR SCW 6458, 2004 AIR - JHAR. H. C. R. 747, (2004) 13 ALLINDCAS 721 (SC), 2003 (7) SLT 385, (2004) 1 ANDHWR 290, (2004) 3 ANDH LT 78, 2003 (9) SCALE 783, 2003 (12) SCC 219, 2004 (13) ALLINDCAS 721, 2004 (1) BLJR 183, (2004) 1 CTC 55 (SC), (2004) 1 JCR 124 (SC), 2004 BLJR 1 183, 2004 (2) SRJ 449, (2003) 8 SUPREME 285, (2003) 9 SCALE 783, (2004) 1 CIVILCOURTC 212, (2004) 1 LANDLR 25, (2004) 3 MAD LW 624, (2004) 1 PAT LJR 132, (2004) 1 ANDHLD 1, (2004) 1 RECCIVR 38, (2004) 1 ICC 689, (2004) 1 JLJR 132, (2004) 13 INDLD 259, (2004) 54 ALL LR 187, (2004) 1 BLJ 280, (2004) 1 CAL HN 182, (2004) 1 CAL LJ 99, (2004) 1 CURCC 58

Bench: Shivaraj V. Patil, D.M. Dharmadhikari

CASE NO.:

Appeal (civil) 3130 of 2002

Special Leave Petition (civil) 8261 of 2001

PETITIONER:

Ashan Devi & Anr.

RESPONDENT:

Phulwasi Devi & Ors.

DATE OF JUDGMENT: 19/11/2003

BENCH:

Shivaraj V. Patil & D.M. Dharmadhikari.

JUDGMENT:

J U D G M E N T Dharmadhikari J.

This appeal and the connected special leave petition arise out of the same execution proceedings and the impugned order dated 23.4.2001 passed by the High Court of Patna.

The principle question involved is whether a purchaser of a vacant land under registered Sale Deed and claiming to be in possession of the land can maintain an application under Order 21 Rule 97 of the Code of Civil Procedure complaining of his alleged dispossession in execution of the decree of specific performance of contract of sale obtained ex parte by the decree holder against the original owner of the suit property?

For the sake of easy understanding, the parties shall be described in their status in the executing proceedings as Decree Holder, Judgement Debtor and Objector. For the purpose of these appeals, we do not consider it necessary to go into greater details of the proceedings in the suit which resulted in passing of the decree of specific performance of the contract.

Bare facts necessary for the purpose of decision are as under :-

According to the decree holder, an Agreement of Sale was obtained on 12.07.1984 from the judgment debtor in respect of the suit lands which are now potential building sites on the outskirts of Patna city. The case of the decree holder is that when she filed the suit no. 22/87 against her vendors for specific performance of Agreement of Sale dated 12.7.1984, she was not aware that the Objectors had obtained title to the suit property by four separate sale deeds in the year 1985 and got them registered in Calcutta where the vendors resided. The purchasers were not made parties to the suit.

The case of the Objectors is that pursuant to the execution of the registered sale deeds, they obtained possession of the land and got their names mutated in the records of the Patna Municipality. According to them, they had no knowledge of any prior agreement of sale existing in favour of the Decree Holder.

The vendors did not contest the suit for specific performance of agreement of sale filed by the Decree Holder. An ex-parte decree of specific performance of contract was passed on 08.11.1990 in favour of the Decree Holder. The decree was put in execution by Decree Holder by depositing the balance consideration of sale in the court. A registered sale deed was executed by the court in favour of the decree holder as the judgment debtors absented despite notice and failed to execute it. According to the Decree Holder, on 5.9.1996, through the process issued by the executing court, possession of the decreed property was obtained by the Decree Holder through Court Nazir without any obstruction or resistance from any one.

On 21.9.1996, the Objectors filed an application under Order XXI Rule 99 before the executing court complaining their illegal dispossession and seeking restoration of possession to them. It was urged that they were not parties to suit for specific performance of the contract and could not have been dispossessed in execution of the decree. Their case was that they had no knowledge of any alleged prior agreement in relation to the same property existing in favour of the Decree Holder. It was alleged that the suit for specific performance and the decree obtained ex-parte against the judgement debtors were collusive.

The application under Order XXI Rule 99 filed by the Objectors was opposed by the Decree Holder stating that with prior knowledge of the agreement of sale, the Objectors having obtained the sale deeds, the decree of specific performance can be executed against them in accordance with section 19(b) of the Specific Relief Act,

1963. Preliminary objection was also raised by the Decree Holder on the maintainability of application under Order XXI Rule 99 of the Code. It was urged that since the Objectors did not offer any resistance or obstruction to the execution of the decree and were not present at the time of its execution through court, they cannot be held to have been 'dispossessed' physically or actually within the meaning of Order XXI Rule 99 of the Code.

On the basis of the pleadings of the Objectors in their application under Order XXI Rule 99 of the Code and the reply submitted by the Decree Holder to the same, the executing court framed a preliminary issue on the maintainability of the application filed by the Objectors. Issues on merits were also framed; as to whether the suit for specific performance was filed with knowledge of execution of registered sale deeds and deliberately the registered purchasers were not impleaded as parties to the suit OR whether Objectors purchased the property with full knowledge of prior agreement of sale with the decree holder. The executing court decided all the contesting issues including preliminary objection on maintainability of application under Order XXI Rule 99 of the Code in favour of the Objectors. By order dated 02.6.2000, it directed restoration of possession of the property in dispute to the Objectors.

Aggrieved by the order of the executing court allowing objection under Order XXI Rule 99 of the Code, the Decree Holder preferred an appeal to the High Court. The learned single Judge of the High Court of Patna by its impugned order dated 23.4.2001, allowed the appeal of the Decree Holder. The High Court came to the conclusion that as in execution of the decree, the Objectors were not 'actually and physically dispossessed', the application under Order XXI Rule 99 of the Code was not maintainable and the executing court could not have decided the competing claims of the parties to the property in the course of execution proceedings. The High Court set aside the order of the executing court and observed that the Objectors may resort to a separate suit for enforcing their rights and title to the property. The High Court also observed that if such a suit is filed, the findings and observations recorded by the executing court and the High Court would not be binding on the parties nor prejudice their contentions in that suit that may be filed.

Aggrieved by the reversing judgment of the High Court, the Objectors are in this appeal. The connected special leave petition has been filed by the Decree Holder as they feel aggrieved only by the last direction of the High Court giving liberty to the Objectors to file a separate suit for their rights, without being prejudiced by findings and conclusions reached in proceedings under Order XXI Rule 99 of the Code.

We have heard both the learned senior counsel Shri P.S. Mishra appearing for the Objectors and Shri R.S. Suri for the Decree Holder at sufficient length. On behalf of the Objectors, it is contended that they being in possession under registered sale deeds and their names having also been mutated in records of Patna Municipality,

the delivery of possession of the land in execution of decree of specific performance to the Decree Holder was clearly a case of 'dispossession' within the meaning of Order XXI Rule 99 of the Code. Reliance is placed on *Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal & Anr.* [1997 (3) SCC 694]; *Shreenath & Anr. vs. Rajesh & Ors.* [1998 (4) SCC 543]; *Silverline Forum Pvt. Ltd., vs. Rajiv Trust & Anr.* [AIR 1998 SC 1754]; and *Tanzeem-E- Sufia vs. Bibi Haliman & Ors.* [2002 (7) SCC 50] The second contention advanced is that the decree holder had full knowledge of the registered sale deeds existing in favour of the Objectors and without impleading the Objectors, an ex-parte decree of specific performance was obtained against the original vendors. It is contended that the Objectors being subsequent purchasers under sale deeds were necessary parties to the suit in accordance with the provisions of section 19(b) of the Specific Relief Act, 1963. It is contended that the decree in the absence of the Objectors who were necessary parties to the suit, is not executable. Reliance is placed on *Ram Sworup Singh vs. Mahabir Mahton* [AIR 1960 Patna 235]; *Chinna Vanan vs. Alamelu & Ors.* [1975 Vol.I Madras Law Journal Reports 263]; and *Vimala Ammal vs. C. Suseela & Ors.* [AIR 1991 Madras 209].

We need not go into the question whether the Objectors as subsequent purchasers of the suit properties were necessary parties to the suit for specific performance based on alleged prior agreement of sale, because both parties plead want of knowledge of each other's transactions at the time the registered sale deeds were obtained by the Objectors and at the time of institution of suit by the Decree Holder.

We would, first, take up for consideration the main question involved between the parties as to whether the Objectors could have made application under Order XXI Rule 99 to the executing court and seek adjudication of their right and title through the executing court in accordance with Order XXI Rule 101 of the Code or their remedy lay in filing an independent suit. Order XXI Rule 99 & 101 read as under :-

"O.XXI, Rr.99. 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 here contained.

O. XXI, Rr.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."

It is necessary at this stage to take into account the objects of drastic amendments introduced to the Code of Civil Procedure by Act No. 104 of 1976. This court in the case of Shreenath & Anr. (supra), has compared the unamended provisions of the Code in Order XXI and the provisions introduced after amendment. It is noticed that earlier under the Code, third party 'dispossessed' in the execution of the decree was required to institute an independent suit for adjudication of its right and claims. In order to shorten the litigations concerning same properties between same and third parties, claims of third parties to the property in execution are now required to be determined by the executing court itself in accordance with provisions under Order XXI Rule 101 with right of appeal to the higher court against such adjudication treating it to be a 'decree' under Order XXI Rule 103 of the Code. On the amendments introduced to the Code by Amendment Act of 1976, this Court observed thus :-

'In interpreting any procedural law, where more than one interpretation is possible, the one which curtails the procedure without eluding justice is to be adopted. The procedural law is always subservient to and is in aid of justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed.' In case of Brahmdeo Chaudhary (supra), the provisions of Order XXI Rule 97 of the Code, as amended, came up for construction. They read thus :-

"O.XXI, Rr.97. Resistance or obstruction to possession of immovable property. (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 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."

The question raised in that case was whether the Objector cannot claim adjudication of his claim being third party to the decree under execution until he is 'actually dispossessed'. The argument advanced was that application under Order XXI Rule 97 at the instance of Objector is not maintainable to the executing court because such application complaining 'resistance and obstruction' by the third party could be filed only by the Decree Holder under Order XXI Rule 97 of the Code. It was argued that the remedy of the third party to the executing court is only after he suffers dispossession in execution of the decree. Thereafter, he has to complain under Order XXI Rule 99 and seek adjudication of his claims and rights. This Court negated that contention and observed thus :-

'On the contrary the statutory scheme envisaged by Order XXI Rule 97 CPC clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the executing court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to

seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI Rule 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievance once and for all finally resolved in execution proceedings themselves.' The case of Brahmdeo Chaudhary (supra) was relied by this Court in the case of Silverline Forum Pvt. Ltd.,(supra). It was held that the remedy under Order XXI Rule 99 in execution is available to a party only on his dispossession but a third party who is resisting or obstructing the execution of decree can also seek adjudication of his claims and rights by making application under Order XXI Rule 97 of the Code.

In the case of Tanzeem-E-Sufia(supra), the third party who was in possession of a part of premises had filed a separate suit for declaration of its right and title. In executing proceedings, the Decree Holder in respect of the entire decretal property, complained of obstruction and resistance to the execution by the third party. Even on these facts, this Court held that the application of Decree Holder required adjudication under Order XXI Rule 97 of the Code and the application of the third party also necessitated adjudication of its rights under Order XXI Rule 99 of the Code irrespective of the fact that for part of the property, the third party had filed an independent suit for declaration of its title to the suit property.

The above mentioned decided cases of this Court clearly indicate that the provisions of Order XXI Rule 97 and 99 have been widely and liberally construed to enable the executing court to adjudicate the inter se claims of the decree holder and the third parties in the executing proceedings themselves to avoid prolongation of litigation by driving parties to file independent suits.

The word "dispossessed" as used in Order XXI Rule 99 of the Code has been narrowly construed to be an ouster from actual and physical possession of the property by several High Courts. See AIR 1954 Mad 516 (519); 1966 (32) Cut. LT 972; and AIR 1978 Goa 48.

Salmond on jurisprudence explains that the word "possession" is a word of 'open texture'. Its legal meaning has to be ascertained from the context. The property involved in the present case is open vacant land. Such property is possessed by a person who has control over the same. This 'control' over the property means 'power to exclude all others'. The test then for determining whether a man is in possession of anything is whether he is in 'general control' of it - maybe that he is not in actual and physical possession or using the same.

The Objectors have laid evidence before the executing court to show that after obtaining by recitals in the sale deeds delivery of possession of the property, the names of purchasers were also mutated in the municipal's records. Merely because at the time of execution of the decree through Court Nazir, the Objectors were not physically present on the property, it cannot be said that the delivery of possession to

the Decree Holder by the court does not amount to the Objectors' legal ouster or 'dispossession'. The word 'possession', therefore, has to be given contextual meaning on facts of a particular case and the nature of the property involved.

In interpreting the provisions of Order XXI Rule 97 of the Code and the other provisions in the said order, the aims and objects for introducing amendment to the Code cannot be lost sight of. Under the unamended Code, third parties adversely affected or dispossessed from the property involved, were required to file independent suits for claiming title and possession. The Legislature purposely amended provisions in Order XXI to enable the third parties to seek adjudication of their rights in execution proceedings themselves with a view to curtail the prolongation of litigation and arrest delay caused in execution of decrees. See *Bhag Mal vs. Ch. Parbhu Ram* [1985 (1) SCC 61].

The High Court in the impugned judgment dated 23.4.2001 has construed the word "dispossessed" under Order XXI Rule 99 of the Code to mean actual and physical dispossession. The reasoning adopted is that if the expression 'dispossessed' is thus not narrowly construed, 'anybody apprehensive of dispossession or anybody claiming right although not actually dispossessed can come within the purview of Rule 99 and there would be flood-gate and a decree holder who obtained a decree by due process of law would be frustrated in not getting the fruit of the decree'.

There is fallacy in the above reasoning. As has been held by this court in the case of *Brahmdeo Chaudhary* (supra), a third party resisting or obstructing the execution of the decree can also seek adjudication of his rights under Order XXI Rule 97 in the same way as the Decree Holder. If that be so, it seems illogical that the third party which complains of actual dispossession because of the delivery of possession in execution to the Decree Holder should not be allowed to claim adjudication of his rights through the executing court. An interpretation of the provision which promotes or fulfils the object of the amended provisions of the Code of curtailing litigation, has to be preferred to the one which frustrates it. The High Court also lost sight of the fact that the property involved was a vacant land and it could have been possessed only by having ownership and control over it. Mere physical absence of the third party at the time of execution of the decree was not a relevant fact to reject application under Order XXI Rule 99 of the Code. From the trend and ratio of decisions of this Court surveyed above, if the Objectors would have been present at or near the vacant land at the time of execution of a decree and had offered obstruction or resistance to the execution, they would have been entitled to seek adjudication of their rights and claims through the executing court under Order XXI Rule 97. On the same legal position and reasoning even though the Objectors were not in actual and physical possession of the vacant land, but as a result of delivery of possession of the land through Nazir to the decree holder, lost their right and control over the land to put it to their use, they will have to be treated to have been "dispossessed" within the meaning of Order XXI Rule 99 of the Code. Such interpretation would fulfil aim and

object of the amended provisions of the Code by allowing adjudication of disputes of title between the decree holder and the third party in the executing court itself without relegating them to an independent litigation.

In view of the discussion aforesaid, in our opinion, the executing court was well within law in recording evidence and adjudicating the claim of the third party. The executing court rightly rejected the preliminary objection to the maintainability of application of the Objectors under Order XXI Rule 99 of the Code and decided the other issues on merits of their claims arising between the Decree Holder and the Objectors.

The High Court in appeal mainly concentrated its decision on the question of tenability of application under Order XXI Rule 99 at the instance of the Objectors and having rejected the said application did not in detail deal with other issues on merits arising between the decree holder and the objectors. The issues on merits which were liable to be re-examined by the appellate court, as the first court of facts and law, were :-

(1) Whether the decree holder at the time of institution of suit had knowledge of the execution of the registered sale deeds in favour of the Objectors and yet they deliberately avoided to make them as parties to the suit and thus obtained in collusion with the vendors an ex-parte decree of specific performance of the contract; OR (2) Whether the Objectors had full knowledge of existence of prior agreement of sale executed by the vendors in favour of the decree holder and despite such knowledge they purchased the suit property to frustrate the agreement existing in favour of the decree holder.

As the appellate court, having rejected the Objectors' application under Order XXI Rule 99, has not in greater details gone into the contested issues on merits, it is necessary to set aside the impugned order of the High Court and remand the case to it for decision of the appeal afresh in accordance with law.

In the result, the appeal preferred by the Objectors succeeds and is allowed. The impugned order of the High Court dated 23.4.2001 is hereby set aside and the case is remanded to the High Court for deciding the issues on merits in accordance with law.

The permission sought by Decree Holder to file the connected Special Leave Petition 8261/2001 is refused.

CC

In the circumstances, the costs incurred in these proceedings shall abide the final result of the appeal to be decided by the High Court.