

Brahmdeo Choudhary vs Rishikesh Prasad Jaiswal & Anr on 22 January, 1997

Equivalent citations: AIR 1997 SUPREME COURT 856, 1997 (3) SCC 694, 1997 AIR SCW 685, (1997) 1 JT 641 (SC), (1997) 1 SCR 463 (SC), 1997 (1) REVLR 185, 1997 (1) SCALE 437, 1997 SCFBRC 183, 1997 HRR 328, 1997 (1) SCR 463, 1997 (1) JT 641, (1997) 1 CIVILCOURTC 612, (1997) 1 MAD LW 569, (1997) 2 ICC 678, (1997) 2 MAD LW 266, (1997) 1 RENCRC 332, (1997) 1 RENTLR 96, (1997) 2 ALL WC 1003, (1997) 2 CIVLJ 788, (1997) 1 CURCC 460, (1997) 1 MAH LJ 817, (1997) 1 MPLJ 487, (1997) 1 SCALE 437, (1997) 2 MAD LJ 128, (1997) 2 RAJ LW 256, (1997) 2 SUPREME 660, (1997) 1 CTC 292 (MAD), 1997 (99) BOM LR 643, 1997 BOM LR 1 642

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Bench: S.B. Majmudar

PETITIONER:

BRAHMDEO CHOUDHARY

Vs.

RESPONDENT:

RISHIKESH PRASAD JAISWAL & ANR.

DATE OF JUDGMENT: 22/01/1997

BENCH:

A.S. ANAND, S.B. MAJHUDAR

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T S.B. Majmudar, J.

In this appeal by special leave the appellant has posed a short question for our consideration. It runs as under:

"Whether the appellant who claims to be a stranger, occupying decretal premises in his own right and who has offered resistance to the execution of the decree obtained by the decree-holder against the judgment-debtor qua such property can request the Executing Court to adjudicate upon his resistance and obstruction without being insisted upon that first he must hand over possession and then only move an application under Order XXI Rule 99 Code of Civil Procedure ('CPC' for short)?"

The High Court agreeing with the Executing Court has negatived the aforesaid request of the appellant by holding that such stranger to the decree who has put forward his obstruction in the execution proceedings has the only remedy under Order XXI Rule 99, CPC after his obstruction is first removed and he is dispossessed of the premises. This Court granted special leave to appeal to the appellant under Article 136 of the Constitution of India and granted stay of dispossession by its order dated 17th September 1996. Shri Sanyal, learned senior counsel for the appellant has raised a serious grievance against the aforesaid view of the High Court.

For resolving the aforesaid controversy between the appellant on the one hand and respondent no.1 decree-holder on the other a few introductory facts deserve to be noted at the outset.

Respondent no.1 filed an Eviction Suit No. 54 of 1988 in relation to six and a half dhurs of the suit land against respondent no.2 and his mother Bachani Devi. A decree was passed in favour of respondent no.1 against the judgment-debtor respondent no.2 in 1988 by the Court of Munsif II, Munger. Respondent no.1 filed execution proceedings in 1990 against respondent no.2 judgment-debtor. These proceedings were registered as Execution Case No. 25 of 1990. On 25th April 1991 respondent no.1 decree-holder obtained warrant for delivery of possession from the Executing Court against respondent no.2. When the bailiff went on spot to execute the warrant on 28th April 1991 he was resisted by the present appellant as well as his brothers Sitaram Choudhary and Jago Choudhary along with 20-25 persons and because of the resistance offered by them and on account of abuses and throwing of bricks and stones indulged in by them it was impossible to execute the warrant for possession. Under these circumstances the decree-holder by his application dated 6th May 1991 requested that help of magistrate and armed force be made available at his cost for execution of the decree. It appears that the said application remained lingering on the file of Executing Court for number of years and ultimately the Executing Court directed execution of the warrant for possession by affording help of police force to the decree-holder. It was at that stage that the present appellant filed a written application on 22nd January 1996 before the Executing Court to stay operation of the said warrant and to decide his objections. By a rejoinder dated 1st February 1996 respondent no.1 decree-holder raised the question of maintainability of such an application before handing over actual possession to the decree-holder. The Executing Court without adjudicating upon the objections of the appellant on merits and without deciding whether the obstruction or resistance offered by him was legally justified or not dismissed the appellant's application dated 22nd January 1996 by order dated 15th February 1996. The Executing Court took the view that the remedy of the appellant was to move an application under Order XXI Rule 99, CPC only after he was

dispossessed and as that stage was not still reached the request of the appellant to adjudicate his claim could not be entertained. It is this order of the Executing Court which has come to be confirmed by the High Court of Judicature at Patna by the impugned order dated 17th May 1996.

In the background of the aforesaid factual matrix it is necessary to have a look at the relevant statutory provisions governing the controversy between the parties. As respondent no.1 decree-holder seeks to execute his decree for possession of immovable property against judgment-debtor respondent no.2 he has rightly invoked provisions of Order XXI, CPC by putting the decree for possession of immovable property into execution. His application for issuance of a fresh warrant for possession with the police aid as moved by him on 6th May 1991 purports to invoke the provision of Order XXI Rule 35, CPC which reads as under:

"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, by 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 possession of any building on 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."

A mere look at the aforesaid provision shows that warrant for possession can be straightaway sought against persons occupying immovable property which is subject-matter of decree by the decree-holder provided such persons who are occupying the suit property are judgment-debtors or persons claiming through the former. We are concerned with the situation in which the appellant resisted the execution proceedings on the ground that he was a stranger to the decree and claimed an independent interest in the suit immovable property possession of which was decreed in favour of respondent no.1 decree-holder. The Nazir in his report dated 28th April 1991 has noted that the warrant for possession could not be executed on spot on account of the resistance and obstruction offered by the appellant, amongst others. Once that report was received by the Executing Court respondent no.1 decree-holder naturally became alive to the fact of such resistance on spot by the appellant, amongst others. Thereafter when he moved the application on 6th May 1991 for issuance of fresh warrant for possession with the help of police force though the application purported to be under Order XXI Rule 35 it would strictly not fall within that provision as the decree-holder wanted to bypass the obstruction and resistance offered by a stranger to the decree, namely the appellant

who was not claiming any right, title or interest through the judgment-debtor. Whether his claim was right or wrong on merits is a different matter. But once such resistance was offered by him the proper procedure which was required to be followed by respondent no.1 decree-holder was the one contemplated by Order XXI Rule 97, CPC. The said provision reads as under:

"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 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."

On the undisputed facts on record it has, therefore, to be held that because of the resistance or obstruction offered by the appellant, amongst others, on 28th April 1991 the application moved by the respondent decree-holder on 6th May 1991 was necessarily to be one falling within the scope and ambit of Order XXI Rule 97. It is pertinent to note that the resistance and/or obstruction accordance with the subsequent provisions contained in the said Order. We may in this connection also refer to the Schedule to the CPC, Appendix E which gives various forms for summons to be issued to parties in execution proceedings especially form no.40 which deals with 'Summons to appear and answer charge of obstructing execution of decree (O.21. R.97)'. The said form reads as under:

Summons To Appear And Answer Charge Of Obstructing Execution Of Decree (O.21. R.97) (Title) Whereas, the decree-holder in the above suit, has complained to this Court that you have resisted (or obstructed) the officer charged with the execution of the warrant for possession.:

You are hereby summoned to appear in this Court on the day of 19....., at A.M., to answer the said complaint.

Given under my hand and the seal of the Court, this day of 19

Judge."

It is, therefore, clear that in an application under Order XXI Rule 97 moved by a decree-holder who complains about the resistance or obstruction offered by any person to the decree-holder in his attempt at obtaining possession of property and who wants such obstruction or resistance to be removed which otherwise is an impediment in his way, a lis arises between the decree-holder applicant under Order XXI Rule 97 on the one hand and such obstructionist or resisting party on the other, to whom summons has been issued by the Court as per Form No.40. When such a lis arises, it has to be adjudicated upon as enjoined by Order XXI Rule 97 sub- rule (2).

The procedure for adjudicating such a lis has to be called out from the remaining succeeding Rules of Order XXI. This directly takes us to the consideration of Order XXI Rule 101 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 be 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."

Now it is obvious that such questions relating to the right, title and interest in the property arising between the parties to any proceedings under Order XXI Rule 97 or Rule 99 have to be adjudicated upon by following an identical gamut of procedure by the Executing Court. The said gamut of procedure is laid down by Order XXI Rule 98 which reads as under :

"98. 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 the 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."

It is not time for us to consider Order XXI Rule 99 which reads as under:

"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 herein contained."

A conjoint reading of Order XXI Rules 97, 98, 99 and 101 projects the following picture:

(1) If a decree-holder is resisted or obstructed in execution of the decree for possession with the result that the decree for possession could not be executed in the normal manner by obtaining warrant for possession under Order XXI Rule 35, then the decree-holder has to move an application under Order XXI Rule 97 for removal of such obstruction and after hearing the decree-holder and the obstructionist the Court can pass appropriate orders after adjudicating upon the controversy between the parties as enjoined by Order XXI Rule 97 sub-rule (2) read with Order XXI Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without just cause by the judgment-debtor or by some other person at his instigation or on his behalf then such obstruction or resistance would be removed as per Order XXI Rule 98 sub-rule (2) and the decree-holder would be permitted to be put in possession. Even in such an eventuality the order passed would be treated as a decree under Order XXI Rule 101 and no separate suit would lie against such order meaning thereby the only remedy would be to prefer an appeal before the appropriate appellate court against such deemed decree. (2) If for any reason a stranger to the decree is already dispossessed of the suit property relating to which he claims any right, title or interest before his getting any opportunity to resist or offer obstruction on spot on account of his absence from the place or for any other valid reason then his remedy would lie in filing an application under Order XXI Rule 99, CPC claiming that his dispossession was illegal and that possession deserves to be restored to him. If such an application is allowed after adjudication then as enjoined by Order XXI Rule 98 sub-rule (1) CPC the Executing Court can direct the stranger applicant under Order XXI Rule 99 to be put in possession of the property or if his application is found to be substanceless it has to be dismissed. Such an order passed by the Executing Court disposing of the application one way or the other under Order XXI Rule 98 sub-rule (1) would be deemed to be a decree as laid down by Order XXI Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order XXI Rule 101.

In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of 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 XXI Rule 97 sub-rule (1) and he cannot bypass such obstruction and insist on re-issuance of warrant for possession under Order XXI Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order XXI

Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI Rule

99. Order XXI Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard or merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order XXI Rule 97, CPC as discussed earlier 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 Rules 97 and 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally

resolved in execution proceedings themselves.

In this connection we may also profitably refer to a judgment of a Bench of three learned of this Court in the case of Bhanwar Lal v. Satyanarain and Another (195) 1 SCC

6. In that case the Bench consisting of K. Ramaswamy, S.C. Agrawal, and N. Venkatachala, JJ., Satyanarain had obstructed to the delivery of possession of the suit immovable property which was sought to be obtained in execution by the appellant decree-holder. After such an obstruction was offered by Satyanarain the decree-holder moved an application under Order XXI Rule 35 for police assistance to remove obstruction caused by Satyanarain. The Executing Court directed the decree-holder to make an application under Order XXI Rule 97. This Court took the view that the very application under Order XXI Rule 35 sub- rule (3) for police assistance for removal of obstruction caused by Satyanarain had to be treated to be an application under Order XXI Rule 97 and such an application was maintainable and could not be said to be beyond limitation. In this connection the following pertinent observations were made by this Court:

"The crux of the question is whether the application filed on 25-5-1979 by the appellant, though purported to be under Order 21. Rule 35(3) against Satyanarain, is convertible to one under Order 21, Rule 97. Order 21, Rule 35(3) provides that:

"35(3) Where possession of any building on 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.' A reading of Order 21. Rule 35(3) postulates that the person in possession of the immovable property to be delivered under the decree must be per force bound by the decree. Admittedly, Satyanarain was not a judgment-debtor and that therefore, he is not bound by the decree unless he claims right, title or interest through the judgment-debtor, Ram Kishan. the person resisting delivery of possession. In other words the resistor must claim derivate title from the judgment-debtor. The court gets power under Order 21, Rule 97 to remove such obstruction or resistance and direct its officer to put the decree-holder in possession of the immovable property after conducting enquiry under Rule 97.

Order 21, Rule 97 provides thus: `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 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.'

The procedure has been provided in Rules 98 to 103. We are not, at present, concerned with the question relating to the procedure to be followed and question to be determined under Order 21, Rules 98 to 102. A reading of Order 21, Rule 97 CPC clearly envisages that "any person" even including the judgment-debtor irrespective whether he claims derivative title from the judgment-debtor or set up his own right, title or interest dehors the judgment-debtor and he resists execution of a decree, then the court in addition to the power under Rule 35(3) has been empowered to conduct an enquiry whether the obstruction by that person in obtaining possession of immovable property was legal or not. The decree-holder gets a right under Rule 97 to make an application against third parties to have his obstruction removed and an enquiry thereon could be done. Each occasion of obstruction or resistance furnishes a cause of action to the decree-holder to make an application for removal of the obstruction or resistance by such person.

When the appellant had made the application on 25-5-1979 against Satyanarain, in law it must be only the application made under Order 21, Rule 97(1) of CPC. The executing court, obviously, was in error in directing to make a fresh application. It is the duty of the executing court to consider the averments in the petition and consider the scope of the applicability of the relevant rule.

In technical ground the executing court dismissed the second application on limitation and also the third application, on the ground of res judicata which the High Court has in the revisions now upheld. The procedure is the handmaid of substantive justice but in this case it has ruled the roost."

In view of the aforesaid settled legal position, therefore, and in the light of the statutory scheme discussed by us earlier it must be held that respondent no.1 decree-holder's application dated 6th May 1991 praying for issuance of warrant for delivery of possession with the aid of armed force, was in substance for removal of obstruction offered by the appellant and others under Order XXI Rule 97, CPC and had to be adjudicated upon as enjoined by Order XXI Rule 97 sub-rule (2) read with Order XXI Rule 101 and Order XXI Rule 98. In this connection the Court had also to follow the procedure laid down by Order XXI Rule 105 which enjoins the Executing Court to which an application is made under any of the foregoing Rules of the Order to fix a date of hearing of the application. As the Executing Court refused to adjudicate upon the obstruction and the claim of the appellant who obstructed to the execution proceedings it had clearly failed to exercise jurisdiction vested in it by law. The High Court in revision also committed the same error by taking the view that such an application was not maintained. It is of course true as submitted by learned counsel for the decree-holder that in paragraph 4 of the judgment under appeal the High Court has noted that there was some discrepancy about the Khasra Number. But these are passing observations. On the contrary in the subsequent paragraphs of the judgment the High Court has clearly held that such an application by the objector was not maintainable and his only remedy was to move an application under Order XXI Rule 99 after handing over possession and consideration of objection to delivery of possession by a stranger to the decree at any earlier stage was premature. It must, therefore, be held that neither the Executing Court nor the High Court in revision had considered the objection of the appellant against execution or merits. Consequently the impugned judgment of the High court as well as the order of the Executing Court in Civil Execution Case No. 25 of 1990 dated 15th February

1996 are quashed and set aside and proceedings are remanded to the Court of Munsif II, Munger to re-decide the application of respondent no.1 decree- holder dated 6th May 1991 by treating it to be one under Order XXI Rule 97 for removal of obstruction of the appellant and after hearing the decree-holder as well as the appellant to adjudicate the claim of the appellant and to pass appropriate orders under Order XXI Rule 97 sub-rule (2), CPC read with Order XXI Rule 98, CPC as indicated in earlier part of this judgment.

Before parting with this case we may mention one apprehension voiced by learned counsel appearing for the decree-holder. He submitted that the Nazir has noted in his report dated 28th April 1991 that when he went to execute the decree he was resisted on spot by Brahmdeo Chaudhary, that is the present appellant, as well as by Sitaram Chaudhary and Jago Chaudhary who are found to be brothers of the appellant and some other persons and, therefore, these other persons also would one by one come forward to further obstruct the execution proceedings which would be indefinitely delayed. This submission though prima facie looking attractive on a closer scrutiny does not remain well sustained. Even though the Nazir's report mentions the obstructions offered by Sitaram Chaudhary, Jago Chaudhary, Brahmdeo Chaudhary and others, only the appellant objected to the order passed by the Executing Court on respondent no.1's application dated 6th May 1991 for issuance of a fresh warrant for delivery of possession with the aid of police force. Only he put forward his written objections on 22nd January 1996. Neither of his brothers, namely, Sitaram Chaudhary or Jago Chaudhary nor anyone else filed any objections to the said application for issuance of fresh warrant for possession with the police aid. Therefore, it must be held that the only objectionist to remain in the field claiming to be a stranger having any right, title and interest in the suit property is the appellant and no one else. The others who might have resisted on spot on 28th April 1991 must be treated to have given up their obstructions and resistance subsequently and have gone out of picture. It must, therefore, be held that only the appellant is the sole surviving obstructionist whose claim regarding the alleged independent right, title and interest in the decretal property has to be adjudicated upon by the Executing Court under Order XXI Rule 97 sub-rule (2), CPC pursuant to the present order. The Executing Court shall not entertain objection or obstruction from any other party or person. It is also necessary to direct the Executing Court, to which these proceedings are being remanded, to adjudicate upon the claim of the appellant to the decretal property as per the provisions of Order XXI Rule 97 sub-rule (2), CPC read with Order XXI Rule 98 within a period of three months from the receipt of the writ of the order at its end as the decree is of 1988 and the execution proceedings now would be pending for about nine years.

The appeal is accordingly allowed. There will be no order as to costs in the facts and circumstances of the case.