

SHAMSHER SINGH & ANR.

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v.

LT. COL. NAHAR SINGH (D) THR. LRS. & ORS.

(Civil Appeal No. 5632 of 2019)

JULY 29, 2019

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[ASHOK BHUSHAN AND NAVIN SINHA, JJ.]

Code of Civil Procedure, 1908:

Or. XXI, r. 101 – Scope of – Pursuant to a court decree possession of the property in question given to the decree-holders, after dispossessing the respondent – Respondent filed application before Executing Court complaining of his dispossession, claiming to be in adverse possession of the property – Executing Court rejected the application, holding that the respondent-applicant failed to prove his title on the property – In First Appeal, High Court set aside the order of Executing Court and directed to put back the respondent into possession of the property – Appeal to Supreme Court – Held: After the 1976 amendment in rule 101 of Order XXI, an applicant is required to prove not only his bonafide possession, but also his right, title and interest in the property, to be put back in possession – Therefore, there was no error in the order of Executing Court – High Court committed error in allowing the appeal.

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Allowing the appeal, the Court

HELD: 1. The scope and ambit of Rule 101 of Order XXI of CPC prior to amendment of CPC was entirely different as compared to Rule 101 as was brought into statute after 1976 amendment. Earlier a person who was a *bona fide* claimant and who satisfied that he was in possession of the property on his own account or on account of some other person then the judgment-debtor could have been put in possession of the property on an application under Rules 100 and 101, whereas now after the amendment for putting back into possession an applicant has not only to prove that he is in *bona fide* possession, rather he has to prove his right, title or interest in the property. What was earlier to be adjudicated in a suit under unamended

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- A Rule 103 is now to be adjudicated in Rule 101 itself, thus, for being put in possession, an applicant has to prove his right, title or interest in the property and by simply proving that he was in possession prior to the date he was dispossessed by decree-holder, he is not entitled to be put back in possession.
- B Thus, In view of the statutory scheme which is delineated by amended provisions of Rule 101, it cannot be said that by simply proving the fact that the respondent was in possession prior to he being dispossessed by decree-holder, he should be put back in possession. The respondent-applicant had to prove his right, title or interest in the property to be put back in possession.
- C [Paras 14, 16 and 17] [1164-A-B, G; 1165-A-B]

2. All issues between the parties in application under Order XXI Rules 99, 100 and 101 need to be examined by Executing court and decided. The use of the words “all questions (including the 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” has to be given meaning and full play. Prior to Amendment, 1976, under Rule 103, the aggrieved party could have brought a suit for determination of rights between them but by Amendment, 1976,
- D Rule 103 has been amended. The purpose of amendment under Rule 103 is also that any adjudication made under Rule 101 shall have same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. Rule 101, thus, affords an opportunity to get all issues relating to right, title or interest in the property to be determined. When respondent No.1 filed
- E his application claiming to be put back into possession, it was obliged to establish its right, title or interest in the property without which his application could not have been allowed. The Executing Court has considered the application of respondent No.1 in right perspective and has clearly held that respondent No.1 failed to prove his title by adverse possession, hence
- F application deserves to be rejected. [Paras 25, 26 and 27] [1173-C-H]
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3. High Court committed error in observing that in application proceedings under Order XXI Rules 99, 100 and 101,

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the Court is not to decide such question. The High Court, was not correct in holding that the title in respect of the property by way of adverse possession need not be gone into in the appeal before it. In the proceeding under Order XXI Rules 99, 100 and 101, right, title or interest has to be determined and without establishing right, title or interest, the respondent No.1 cannot claim that he should be put back into possession. [Paras 28, 29] [1174-A-C]

4. The suit filed by respondent No.1 seeking declaration of title to the property by adverse possession has been subsequently dismissed by decree on 16.03.2009 and no steps have been taken for restoration of the suit. Therefore, there is no error in the order passed by the Executing Court. The High Court committed error in allowing the appeal, directing respondent No.1 to be put back into possession. [Para 28] [1174-C]

Shreenath and Another v. Rajesh and Others (1998) 4 SCC 543; [1998] 2 SCR 709; *Silverline Forum Pvt. Ltd. v. Rajiv Trust and Another* (1998) 3 SCC 723 : [1998] 2 SCR 587; *Ghasi Ram and Others v. Chait Ram Saini and Others* (1998) SCC 200 : [1998] 3 SCR 863 ; *Ashan Devi and Another v. Phulwasi Devi and Others* (2003) 12 SCC 219 : [2003] 5 Suppl. SCR 820 – relied on.

Case Law Reference

[1998] 2 SCR 709	relied on	Para 21
[1998] 2 SCR 587	relied on	Para 23
[1998] 3 SCR 863	relied on	Para 24
[2003] 5 Suppl. SCR 820	relied on	Para 24

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 5632 of 2019

From the Judgment and Order dated 15.12.2009 of the High Court at Calcutta in FMA No. 720 of 2005

A Debal Banerji, Sr. Adv., Joydeep Mazumdar, Rohit Dutta,
Ms. Priyata Chakraborty, Dipak Kumar Jena, Advs. for the Appellants.

 Amol Chitale, Ankur S. Kulkarni, Shatadru Chakraborty, M/s. Lex
Regis Law Offices, Advs. for the Respondents.

B The Judgment of the Court was delivered by

ASHOK BHUSHAN, J.

 1. This appeal has been filed against the Division Bench Judgment
of Calcutta High Court in FMA No.720 of 2005, by which the appeal
filed by the respondent No.1 has been allowed setting aside the order of
C Executing Court dated 10.08.2004 rejecting the application filed by
respondent No.1 under Order XXI Rules 98, 99 and 100 of the Code of
Civil Procedure (hereinafter referred to as “CPC”).

 2. Brief facts of the case giving rise to this appeal are:-

D 2.1 One Tarapada Dutta owned premises No.15, Sahanagar Road,
P.S. Tollygunge, Calcutta. An agreement for sale was
executed by Anadi Dutt, who claimed to be son of Tarapada
Dutta in favour of Rajvindar Singh in respect of 4 Kh. 4 Ch.
and 00 sft. of land and structures at premises No.15.
Another agreement for sale was entered by Anadi Dutt with
E Shamsher Singh in respect of 4 Kh. 6 Ch. and 6 Sft. of land
and structures of premises No.15.

 2.2 The respondent had filed a T.S. No.211 of 1990 before the 3rd
Munsif at Alipore praying for decree of declaration of his
right with regard to premises in question on the basis of
F adverse possession.

 2.3 Anadi Dutt having not executed the sale deed in pursuance of
agreement for sale dated 07.05.1990, two title suits being
Suit No.50 of 1994 and 51 of 1994 were filed by Rajvindar
Singh and Shamsher Singh, which were decreed ex-parte on
20.12.1994. In pursuance of decree of the Court, two
G separate Deeds of Conveyance were executed in favour of
Dayal Singh (Nominee of Rajvindar Singh) and in favour of
Shamsher Singh. Decree holders filed two execution cases
vide Execution no. T.Ex. No.09 of 1995 and T.Ex. No.10 of
1995 seeking delivery of possession of the suit property. First
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Time Court Bailiff could not succeed in delivering possession, however, subsequently the Court Bailiff with the help of police delivered Khas vacant possession of the suit premises to the Decree Holder on 12.04.1996. A

2.4 After lapse of 30 days, respondent No.1 filed two Misc. cases Nos. 10 of 1996 and 11 of 1996 against Rajvindar Singh, Shamsher Singh, Dayal Singh and Asis Dutt under Order XXI Rules 98, 99 and 100 CPC before the 6th Assistant District Judge, Alipore. In the said two Misc. cases, respondent No.1 claimed that his father Sardar Iqbal Singh was the occupier and was running his business under the name and style as Public Transport Business in the suit premises and after his death, respondent No.1 has been running a business under the name and style of Ex-Service United Coal Enterprise (P) Ltd. In the above said Misc. Case No.10 of 1996, the respondent No.1 claimed that Anadi Dutt was not the son of Tarapada and it was Asis Kumar Dutt, who was the only son, owner and only legal heir of Late Tarapada. It was also claimed that a T.S. No.211 of 1990 was pending before 3rd Munsiff at Alipore filed by respondent No.1, in which he claimed right and title of the suit premises on the basis of adverse possession. It was further claimed that Shamsher Singh, Rajvindar Singh and Dayal Singh had fraudulently obtained decree in collusion with Anadi Dutt and has evicted the respondent No.1 from the suit property. B
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2.5 In Misc. proceeding application, although, the respondent No.1 has impleaded Asis Kumar Dutt but he neither contested the Misc. application nor challenged the title of Anadi Dutt, against whom an ex-parte decree was passed. On 21.01.1999, Dayal Singh also got a deed of conveyance executed in his favour by Asis Kumar Dutt, alleged true legal heir of the Late Tarapada Dutta. Dayal Singh got his name mutated in Kolkata Municipal Corporation. F
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2.6 The Executing Court by order dated 10.08.2004 rejected Misc. Case No.10 of 1996 and Misc. Case No.11 of 1996 filed by respondent No.1. Executing court held that respondent No.1 failed to prove that he has acquired title by way of adverse possession. Against the order dated 10.08.2004 rejecting the H

A Misc. applications filed by respondent No.1, first appeal, FMA
No. 720 of 2005 was filed by respondent No.1 in the Calcutta
High Court, which appeal has been allowed by Calcutta High
Court by the impugned judgment dated 15.12.2009. The High
Court by impugned judgment has set aside the order of the
B Executing Court dated 10.08.2004 disposing the application
filed by respondent No.1 under Order XXI Rules 98, 99 and
100 with a direction that appellant (respondent No.1 in this
appeal) should be put back into possession of the suit
property. Aggrieved by the judgment of the High Court, this
appeal has been filed.

C 3. We have heard Shri Debal Banerji, learned senior counsel for
the appellant and learned counsel appearing for the respondent.

4. Shri Debal Banerji, learned senior counsel appearing for the
appellant submits that Executing Court had rightly rejected the
application of respondent No.1 filed under Order XXI Rules 98, 99 and
D 100 CPC, he having failed to prove his title over suit premises. It is
submitted that the appellants were put in possession of the property in
execution of decree of the Court. The Executing Court having held that
respondent No.1 failed to prove his title by adverse possession, the
application was rightly rejected. It is further submitted that T.S.No.211
E of 1990 filed by respondent No.1 claiming for declaration of the title on
the basis of adverse possession has been subsequently dismissed on
16.03.2009. It is submitted that High Court committed error in allowing
the appeal filed by respondent No.1 without any valid ground. It is
submitted that High Court has in its impugned judgment erred in taking
F the view that the question whether the appellant has obtained any title in
respect of the suit property by way of adverse possession or not, need
not be gone into in the appeal. It is submitted that decree passed by Civil
Court in favour of the appellant was never challenged by anyone
including the respondent No.1 or Asis Kumar Dutt, who is claimed by
respondent No.1 as son of Tarapada Dutta. Respondent No.1 having
G failed to prove his title to the property, he was not entitled to put back in
the possession and High court committed error in allowing the appeal of
respondent No.1.

5. Learned counsel for the respondent refuting the submissions of
the learned counsel for the appellant contends that the fact is that

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respondent No.1 was in long possession of the premises and had acquired possessory title. It is submitted that several documents were filed by the respondent No.1 before the Executing Court to prove his possession. It having been found that respondent No.1 was in possession prior to he being dispossessed in execution of the decree, he was entitled to be put back into possession. It is submitted that it was not necessary for respondent No.1 to establish his title to the land in dispute for purposes of Order XXI Rules 98, 99 and 100 CPC. It was sufficient for the respondent No.1 to prove that he was in possession prior to his dis-possession, which was sufficient for putting him back into possession. He submitted that the High Court did not commit any error in putting back the appellants into possession by allowing the appeal. He submits that the appellants have obtained a fraudulent decree against a person Anadi Dutt, claiming to be son of Late Tarapada Dutta, whereas the real son is Asis Kumar Dutt. The respondent No.1 has been dispossessed on the basis of a fraudulent ex-parte decree, on the strength of agreement of sale executed by a person, who has no title to the property.

6. We have considered the submissions of the learned counsel for the parties and have perused the records.

7. There is no dispute between the parties that the premises in question was originally owned by one Tarapada Dutta. The case of the respondent No.1 is that his father Late Iqbal Singh has trespassed into the premises No.15, Sahanagar Road and after his death in 1965, it was respondent No.1, who was in occupation and possession of the premises. In pursuance of decree for specific performance of contract passed in T.S. No. 50 of 1994 and T.S. No.51 of 1994, in execution proceedings, the decree holders were put in possession on 12.04.1996. At the time of taking possession, one Shri Gopal Adak was found present in the premises, who had claimed to be employee of respondent No.1. Respondent No.1 had filed a suit for declaration of the title on the basis of adverse possession being T.S. No. 211 of 1990. Copy of the plaint of the suit filed in the Court of 3rd Munsiff, 24 Parganas is brought on record as Annexure P-1. In the suit, following reliefs had been claimed by the respondent No.1, who was plaintiff in the suit:-

“a) A declaratory decree that the plaintiff has absolute possessory title in the suit premises No.15, Shahanagar Road,

A Calcutta under P.S. Tollygunge as fully described in the Schedule 'A' of the plaint since the year 1965 to the exclusion of all other person or persons.

B b) Decree for permanent injunction restraining the defendant and/or any person on its behalf and agent, its men, for interfering with the plaintiff's possession and occupation of the suit premises fully described in Schedule 'A' of the plaint in any manner whatsoever.

c) Temporary injunction.

d) Ad-interim injunction in terms of prayer (c) above.

C e) Commission.

f) Receiver.

g) Costs."

D 8. In the application, which was filed by respondent No.1 for putting him back into possession under Order XXI Rules 98, 99 and 100 CPC, the respondent No.1 has claimed his possession since 1965 after death of his father. The respondent No.1 in his application has also relied on filing of suit for declaration of his title being Suit No.211 of 1990. There is no dispute between the parties that in execution of decree of specific performance, the appellants were put in possession and respondent No.1 aggrieved by his dispossession had filed an application under Order XXI Rules 98, 99 and 100.

F 9. Before we proceed further, it is necessary to look into the provisions of Order XXI Rules 98, 99 and 100, as it existed at the relevant time. It is to be noted that by Code of Civil Procedure (Amendment) Act, 1976, there has been amendment in Order XXI Rules 97 to 103. Order XXI Rule 97 deals with the resistance or obstruction to possession of immovable property, with which we are not concerned. Present is a case where the respondent No.1 alleged his dispossession by decree holders.

G 10. Order XXI Rules 97 to 103 was substantially amended by Code of Civil Procedure Amendment Act, 1976, Act No.104 of 1976 w.e.f. 01.02.1977. The bill further to amend the code of Civil Procedure of 1908 was introduced in Parliament as Bill No.27 of 1974 on 08.04.1974. The statement of objects and reasons of the bill is relevant to be noticed. The statement of objects and reasons as well as notes on clauses were

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published in the Gazette of India extraordinary Part II Section (2) on 08.04.1974. Notes of clauses with regard to amendment of Rules 97 to 103 of Order XXI of Civil Procedure Code is contained in Clause 75 (sub-clause xxxiii), which is to the following effect: -

“Sub-clause(xxxiii). – The general scheme of rules 97 to 103 has been altered on the lines of the amendments proposed to rules 58 to 63. The main feature is that questions (including a question relating to right, title or interest in the property) arising between the parties to a proceeding under rule 97 or rule 99 is to be determined in execution proceeding itself and not left to be decided by way of separate suit. Rule 98 has been amplified to cover cases of resistance, etc., by a person acting under any instigation by the judgment-debtor.”

11. In the present case, the Rule which has fallen for interpretation is Rule 101 of Order XXI. What was the Rule 101 prior to 1976 Amendment and subsequent to 1976 amendment is relevant to be noticed to mark the difference into legislative scheme.

12. Rule 101 prior to amendment contained marginal note “Bona fide claimant to be restored to possession” which Rule is as follows: -

<p><i>“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.”</i></p>	<p><i>Bona fide claimant to be restored to possession.</i></p>	<p>E</p>
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13. After the 1976 amendment both the marginal note and Rule 101 was substantially changed. Rule 101 after 1976 Amendment is as follows: -

<p><i>“Question to be determined</i></p>	<p><i>101. 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.”</i></p>	<p>F G H</p>
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A 14. The scope and ambit of Rule 101 prior to amendment was entirely different as compared to Rule 101 as was brought into statute after 1976 amendment. Under unamended Rule 101, a bonafide claimant had to be restored to possession and by virtue of Rule 103, Orders passed under Rule 101 was conclusive subject to the result of the suit to be filed by any party not being the judgment-debtor.

B Unamended Rule 103 was as follows: -

C	<p><i>"103. Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99, or 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."</i></p>	<p><i>Orders conclusive subject to regular suit.</i></p>
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15. Rule 103 was also amended by 1976 amendment and after the amendment, Rule 103 now is as follows: -

D	<p><i>"Orders to be treated as decrees.</i></p>	<p><i>103. Where any application has been adjudicated upon 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 or otherwise as if it were a decree."</i></p>
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E 16. There is a marked difference between Rule 101 as it existed prior to amendment and as it now exists after 1976 amendment. Earlier a person who was a bona fide claimant and who satisfied that he was in possession of the property on his own account or on account of some other person then the judgment-debtor could have been put in possession of the property on an application under Rules 100 and 101, whereas now after the amendment for putting back into possession an applicant has not only to prove that he is in bona fide possession rather he has to prove his right, title or interest in the property. What was earlier to be adjudicated in a suit under unamended Rule 103 is now to be adjudicated in Rule 101 itself, thus, for being put in possession, an applicant has to prove his right, title or interest in the property and by simply proving that he was in possession prior to the date he was dispossessed by decree-holder, he is not entitled to be put back in possession.

H 17. In view of the statutory scheme which is delineated by amended provisions of Rule 101, the submissions of the counsel of the

respondent that by simply proving the fact that he was in possession prior to he being dispossessed by decree-holder, he should be put back in possession cannot be accepted. The respondent-applicant had to prove his right, title or interest in the property to be put back in possession. A

18. Now, for ready reference, Order XXI Rules 99, 100 and 101 are quoted below:- B

“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 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. C

(2) Where any such application is made, the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.

100. Order to be passed upon application complaining of dispossession— Upon the determination of the questions referred to in rule 101, the Court shall, in accordance with such determination,— D

(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 E

(b) pass such other order as, in the circumstances of the case, it may deem fit.

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.” F G

19. Whether in the facts of the present case, Executing Court was required to determine questions relating to right, title or interest in H

- A the property or on mere finding that respondent No.1 was in possession prior to he being dispossessed from the property, he was entitled to put back into possession ? The Executing Court while determining the Misc. application of the respondent No.1 has considered the entire case of the respondent No.1 including the documents filed by him for proving his possession. The Executing Court noticed that respondent No.1 has
- B already filed a Suit No.211 of 1990 for declaration of his title on the basis of adverse possession. After considering the oral evidence and documentary evidence, the Executing Court returned the findings that respondent No.1 had failed to establish his case that he has clear right, title and interest over the suit property by way of adverse possession.
- C Following observations of the trial court may be referred to in this context:-
- “Next we have to examine the other aspect of the matter, i.e., we are required to determine all the questions including question relating to right, title and interest of the suit property which arises under application u/R 97 or 99. We have initially observed that
- D there is a title suit pending where the question about the acquisition of title by the petitioner by way of adverse possession is the subject matter. It is to be carefully thought whether at this stage it will be proper to pass any observation on a matter which is already pending before a competent Court of law. We cannot
- E ignore that title suit is yet to be decided conclusively and pending the suit we should not pass any comment about petitioner’s claim.
- Be that as it may, let us find out as to how far the petitioner has been able to establish his assertion that he has acquired right, title and interest over the suit property by way of adverse possession.
- F Therefore, we find from the evidence of PW1 that it is not wholly trustworthy and from his oral evidence it is very difficult to appreciate the petitioner’s case. It is not clear as to how and on what date Tarapada Dutta, the admitted owner was disposed or in what manner Iqbal Singh came to possess and occupy the suit
- G property. The elements for asserting right by adverse possession have not at all been proved in this case. Rather, there has been no attempt by the petitioner to establish his acquisition of title by way of adverse possession.
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In a proceeding u/s 21 Rules 98 and 99 it is even more essential to establish his right so as to seek relief. The whole burden was upon the PW1 but he failed miserably.” A

20. Thus, the executing court returned categorical finding that appellant has failed to prove his right, title and interest and his application deserves to be rejected. The High Court in appeal filed by respondent No.1 without upsetting the finding of the Executing Court that respondent No.1 failed to prove his title by adverse possession allowed the appeal by making following observations:- B

“Be that as it may, the question whether the appellant has obtained any title in respect of the suit property by way of adverse possession or not is not being decided by this Court and thus this Court is not going into the said question. But the fact remains that the appellant was very much in possession of the suit property when the respondent No.1 took delivery of possession of the suit property through the Court’s bailiff without any proceeding being initiated against the appellant and without the appellant being served with any prior notice with regard to such delivery of possession.....” C D

21. The amendments made in Order XXI Rules 97 to 103 by Code of Civil Procedure (Amendment) Act, 1976 came to be considered by this Court in **Shreenath and Another Vs. Rajesh and Others, (1998) 4 SCC543**. This Court while noticing the question, which had arisen in the above case has made following observations in paragraph Nos. 2, 3 and 5:- E

“2. The courts within their limitation 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 bout 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. F G

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- A **3.** 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.
- B **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?"
- C 22. In the above case, respondent No.1 filed a suit for redemption of mortgage against respondent No.2, 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, the appellants were not parties. The appellant, who claimed to be in possession, obstructed the execution of the decree on the ground that they were the tenants in the shop from much before the execution of the mortgage. In the above context, this Court noticed the amendments made in Order XXI. In paragraph Nos. 11, 13 and 16, following was laid down:-
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- E **"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 relegate 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 the
- F 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
- G possession is given where the tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to the 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
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in the property on his own including that of a tenant including a stranger. A

13. So far sub-clause (1) of Rule 97 the provision is the same but after the 1976 Amendment all disputes relating to the property made under Rules 97 and 99 are 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's application. Thus even prior to 1976, right of any person claiming right on his own or as a tenant, 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 the own, if resists delivery of possession to the decree-holder, the dispute and his claim has to be decided after the 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 was 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. B
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16. In *Noorduddin v. Dr K.L. Anand*, (1995) 1 SCC 242 it is held: (SCC p. 249, para 8)

“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 G

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- A 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.”
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- D 23. In **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and Another, (1998) 3 SCC 723**, a Three-Judge Bench had occasion to consider provisions of Order XXI Rules 97, 101, 102 and 103 as amended by Code of Civil Procedure (Amendment) Act, 1976. In paragraph Nos. 9 and 10, following was laid down:-

- E “9. At the outset, we may observe that it is difficult to agree with the High Court that resistance or obstructions made by a third party to the decree of execution cannot be gone into under Order 21 Rule 97 of the Code. Rules 97 to 106 in Order 21 of the Code are subsumed under the caption “Resistance to delivery of possession to decree-holder or purchaser”. Those rules are intended to deal with every sort of resistance or obstructions offered by any person. Rule 97 specifically provides that when the holder of a decree for possession of immovable property is resisted or obstructed by “any person” in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the court to proceed to adjudicate upon such complaint in accordance with the procedure laid down.
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- H 10. It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions “arising between the parties to a proceeding on an application under Rule

97 or Rule 99” shall be determined by the executing court, if such questions are “relevant to the adjudication of the application”. A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment-debtor, the scope of the adjudication would be shrunk to the limited question whether he is such a transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act.

24. To the same effect is the judgment of this Court in **Ghasi Ram and Others Vs. Chait Ram Saini and Others, (1998) 6 SCC 200**. Another judgment, which need to be noticed is judgment of this Court in **Ashan Devi and Another Vs. Phulwasi Devi and Others, (2003) 12 SCC 219**. In the above case, a decree of specific performance of contract was obtained on 08.11.1990. Decree was put in execution by the decree-holder, in pursuance of which execution, possession was also obtained on 05.09.1996 through Court. A petition was filed under Order XXI Rule 99 before the Executing Court claiming that the objector being not party to the suit for specific performance, they cannot be dispossessed in execution of the decree. It was contended by the objector that they have purchased the property by sale deed in the year 1985 and decree in the absence of the Objectors who were necessary parties to the suit, is not executable. The application was allowed by the Executing Court and objectors were put in possession, against which order, an appeal was filed in the High Court. High Court had allowed the appeal holding that 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 matter was taken to this Court, where this Court after noticing the relevant provisions have interpreted the provisions of Order XXI Rules 99 and 101. This Court held that the purpose of amendment brought by Code of Civil Procedure

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A (Amendment) Act, 1976 was to enable the third parties to seek adjudication of their rights in execution proceedings with a view to curtail the prolongation of litigation. Following was laid down in paragraph Nos. 25, 28, 29 and 30:-

B “25. In interpreting the provisions of Order 21 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 21 to enable the third parties
C 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 v. Ch. Parbhu Ram*, (1985) 1 SCC 61.

D 28. 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 21 Rule 99 of the Code and decided the other issues on merits of their claims arising between the
E decree-holder and the objectors.

F 29. The High Court in appeal mainly concentrated its decision on the question of tenability of application under Order 21 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:

G (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.

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(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. A

30. As the appellate court, having rejected the objectors' application under Order 21 Rule 99, has not in greater detail 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." B

25. The above judgment of this court clearly lays down that all issues between the parties in application under Order XXI Rules 99, 100 and 101 need to be examined by executing court and decided. C

26. The use of the words "all questions (including the 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 " has to be given meaning and full play. It is also relevant to note that prior to Amendment, 1976, under Rule 103, the aggrieved party could have brought a suit for determination of rights between them but by Amendment, 1976, Rule 103 has been amended to the following effect:- D

"103.Orders to be treated as decrees.— Where any application has been adjudicated upon 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 or otherwise as if it were a decree." E

27. The purpose of amendment under Rule 103 is also that any adjudication made under Rule 101 shall have same force and be subject to the same conditions as to an appeal or otherwise as if it was a decree. Rule 101, thus, affords an opportunity to get all issues relating to right, title or interest in the property to be determined. When the respondent No.1 filed his application claiming to be put back into possession, it was obliged to establish its right, title or interest in the property without which his application could not have been allowed. The Executing Court has considered the application of respondent No.1 in right perspective and has clearly held that respondent No.1 failed to prove his title by adverse possession, hence application deserves to be rejected. F
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- A 28. High Court committed error in observing that in application proceedings under Order XXI Rules 99, 100 and 101, the Court is not to decide such question. Without determination of right, title or interest, the application could not have been allowed. We having already extracted the observations of the High Court, where it clearly held that the title in respect of the property by way of adverse possession need not be gone into in the appeal before it. The above observation of the High Court was erroneous. In the proceeding under Order XXI Rules 99, 100 and 101, right, title or interest has to be determined and without establishing right, title or interest, the respondent No.1 cannot claim that he should be put back into possession. We do not accept the submission of the learned counsel for the respondent that on mere fact that respondent No.1 was in possession of the premises prior to being dispossessed, they should be put back into possession. For putting back into possession, the respondent No.1 was obliged to establish his title to the property by adverse possession, without which, he could not have asked the Court to put him back into possession. The High Court clearly erred in allowing the appeal and the Executing Court has rightly rejected the application filed by respondent No.1. We may further notice that suit No.211 of 1990 filed by respondent No.1 seeking declaration of title to the property by adverse possession has been subsequently dismissed by decree on 16.03.2009 and no steps have been taken for restoration of the suit.
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- E 29. We do not find any error in the order passed by the Executing Court and the High Court committed error in allowing the appeal, directing the respondent No.1 to be put back into possession. In view of the foregoing discussions, we allow this appeal and set aside the judgment of the High Court dated 15.12.2009 and restore the order of the Executing Court dated 10.08.2004. Parties shall bear their own costs.
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