

Sameer Singh & Anr vs Abdul Rab & Ors on 14 October, 2014

Equivalent citations: 2014 AIR SCW 6552, 2015 (1) SCC 379, (2014) 2 WLC(SC)CVL 751, (2015) 146 ALLINDCAS 215 (SC), (2015) 1 PAT LJR 64, (2014) 6 ANDHLD 100, (2015) 1 JCR 298 (SC), (2015) 110 ALL LR 516, (2015) 1 ALL WC 321, (2015) 1 CAL HN 57, (2015) 3 MAH LJ 227, (2015) 128 REVDEC 412, (2015) 1 ALLMR 450 (SC), AIR 2015 SC (CIV) 775, (2015) 149 ALLINDCAS 95 (SC), (2014) 2 CLR 1199 (SC), (2015) 2 CIVLJ 705, (2015) 1 CIVILCOURTC 67, (2015) 1 MAD LW 280, (2015) 2 MPLJ 580, (2015) 1 ICC 627, (2014) 12 SCALE 111, (2014) 4 JLJR 521, (2015) 2 PUN LR 390, (2014) 4 RECCIVR 914, (2015) 1 ALL RENTCAS 719, (2015) 2 CURCC 103, AIR 2015 SUPREME COURT 591, 2014 AIR SCW 6552 AIR 2015 SC (CIVIL) 775, AIR 2015 SC (CIVIL) 775

Author: Dipak Misra

Bench: Dipak Misra, V. Gopala Gowda

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.9699 OF 2014
[Arising out of S.L.P. (Civil) No.33699 of 2011]

Sameer Singh and Another

... Appellants

Versus

Abdul Rab and Others

... Respondents

J U D G M E N T

Dipak Misra, J.

Leave granted.

The Universal Construction Company, the respondent No. 3 herein, instituted Civil Suit No. 480 of 1971 in the High Court of Calcutta invoking its original civil jurisdiction for realization of a sum of Rs.2,15,289.28 paise from the Engineers Syndicate (India) Private Limited, the 4th respondent herein, and an ex parte decree was passed in the suit. After obtaining the decree, respondent No. 3 assigned the same in favour of Abdul Rab, respondent No. 1 herein, on 20th May, 2005. After the deed of assignment was given the formal shape, the 1st respondent moved the High Court of Calcutta and got the said decree transferred to the Court of Sub Judge-I, Jamshedpur for execution by way of attachment and sale of immovable properties of the 4th respondent situated within the jurisdiction of the executing Court. Thereafter, the 1st respondent filed an execution case against the 4th respondent. A schedule of property was attached to the execution petition.

3. As the factual matrix would unfurl, the executing court after receipt of the decree on 23.8.2006 issued notice to the 4th respondent by registered post and when the service was not effected, mode of publication was taken recourse to for appearance of the judgment-debtor. Eventually, the execution case was fixed for ex parte hearing on 9.3.2007 on the petition of the assignee-decree-holder. After following the procedure, the scheduled property was put up for sale by way of auction and ultimately Abdul Rafai, respondent No. 2, purchased the property and pursuant to the order of the Court took over possession of the said immovable property.

4. As the factual narration would further undrape, at the said juncture, the present appellants filed an application under Order XXI, Rules 97, 99 and 101 of the Code of Civil Procedure (C.P.C.) contending, inter alia, that the disputed property originally belonged to the 4th respondent who had borrowed a sum of Rs.14,571/- from his deceased father, Gopal Singh, by depositing the sale deeds of the said property on 18.2.1971 at Calcutta and had delivered possession of the said property to Gopal Singh on 19.2.1971 in lieu of interest of said borrowed amount. When he failed to pay the borrowed sum, the 4th respondent agreed to transfer the said property for a consideration of Rs.25,000/- to Gopal Singh after adjusting the borrowed amount i.e. Rs.14,571/-. Regard being had to the said arrangement, Gopal Singh had paid the balance amount of Rs.10,429/- and accordingly an agreement for sale was executed. When the 4th respondent did not honour his part of the contract, Gopal Singh instituted Title Suit No. 43 of 1974 in the Court of Sub Judge-I, Jamshedpur against the 4th respondent and eventually the said suit was decreed by the Second Additional Sub Judge-I on 14.5.1977. Thereafter, a case was filed and in pursuance of the decree a sale deed was executed on 10.10.1982 in favour of the father of the appellants through Court and he was put in possession through Nazir of the Civil Court in respect of the property in question, and after the demise of Gopal Singh, the appellants, being sons, inherited the said property and remained in possession having right, title and interest till 27.4.2008 when all of a sudden, respondent No. 2 through the help of Nazir took delivery of the property after dispossessing the appellants therefrom. On an inquiry being made, they came to know under what circumstances they had been dispossessed by the Nazir. The application further asserted that the schedule of property which had been appended to Execution Case No. 24 of 2006 had been deliberately added though the 4th respondent had no concern with the same. It was also put forth that an order of attachment was published in a local daily 'Uditwani' dated 23.10.1982 in respect of the scheduled property by the High Court of Calcutta in Suit No. 480 of 1971 and the father of the appellants coming to know of the same had filed an objection before the High Court which after considering the objection and taking

note of the right, title and interest of the father of the appellants had released the said property from attachment but the 1st respondent by suppressing all the facts got the said schedule of property attached and put the same in auction and respondent No. 2 who was set up by the respondent No.1 became the purchaser of the property. In essence, it had been pleaded that respondent Nos. 1 and 2 had colluded to put the property to auction which did not belong to the respondent No. 4 and was not meant for attachment and sale, for it had been already released by the High Court of Calcutta and, in any case, the respondent No. 4 had no concern with the said property. In the application it was prayed that the appellants, the applicants in the court below, should be put in possession of the scheduled property and the respondents be restrained from changing the nature and character of the property till the adjudication of the application.

5. The said application was resisted by respondent Nos. 1 and 2, the opposite parties No. 1 and 2 before the executing court, on many a ground and basically reasseverating the facts how the decree had been passed by the High Court of Calcutta and how there had been a deed of assignment and further the fairness of procedure adopted in putting the property to auction and the eventual sale.

6. The executing court framed two issues which read as follows:-

“I. Whether the transferee executing court has jurisdiction to adjudicate the present petition filed by the applicants under order XXI rules 97, 99 and 101 C.P.C.?

II. Whether the applicants are entitled to get as relief in claim in their application?”

7. The executing court noted the submissions of both the parties, referred to the order passed by the High Court of Calcutta transferring the decree for execution, adverted to the provisions under Sections 39 to 42 of C.P.C., placed reliance on certain authorities as regards the limitation on the powers of the transferee court under Section 42 of C.P.C., recorded the fact that it had already dismissed the execution case to the full satisfaction of the decree-holder on 19.12.2008 and informed the same to the Registrar of the High Court of Calcutta, and eventually came to hold that it had no jurisdiction to reopen and discuss the matter pertaining to the title of the parties in execution case at the instance of a third party. In that backdrop, it observed that the executing court had become functus officio and could not entertain the application. Adverting to the second issue, the executing court noted the contentions and referred to the authorities earlier cited but ultimately opined that as a finding had been recorded to the effect that the transferee-executing court had no jurisdiction to entertain the petition, regard being had to the fact that the decree had been executed to the full satisfaction and an intimation had been sent to the Registrar of the Calcutta High Court, the controversy raised could not be dealt with and no relief could be granted.

8. The aforesaid order came to be assailed before the High Court in W.P.C. No. 348 of 2011 under Article 227 of the Constitution of India. A preliminary objection was raised on behalf of the 1st respondent that an order passed under Order XXI, Rule 98 to 100 of C.P.C. is a decree as per the provisions contained under Order XXI, Rule 103 of C.P.C. and, therefore, an appeal would lie and the writ petition was not maintainable. The preliminary objection was resisted by proponing a contention that only those orders which adjudicate the dispute between the parties would be treated

as decree but as in the case at hand, the Court had not decided the lis in question as it had expressed an opinion that it had no jurisdiction after having become functus officio, an appeal would not lie.

9. The learned Single Judge accepted the preliminary objection on the foundation that dispute between parties regarding jurisdiction of executing court could be determined under Order XXI, Rule 100 of C.P.C. and that when a decision had been rendered on that score it would be a deemed decree under Order XXI, Rule 103 of C.P.C. and hence, the writ petition was not maintainable. Expression of aforesaid view entailed dismissal of the writ petition. Hence, the present appeal by special leave.

We have heard Mr. Saurabh S. Sinha, learned counsel for the appellants and Mr. Jayesh Gaurav, learned counsel for the respondents.

Assailing the impugned order it is contended by Mr. Sinha that the learned Single Judge has failed to appreciate the language employed in Order XXI, Rules 97 to 103 which commands the executing court to adjudicate the controversy pertaining to all the aspects and, therefore, when the executing Court has only opined that it has become functus officio, the said order cannot be treated as a decree. It is urged by him that the said order tantamounts to refusal of exercise of jurisdiction duly vested in a Court and, therefore, such an error has to be rectified in exercise of the power of superintendence by the High Court under Article 227 of the Constitution of India. It is his further submission that the view expressed by the High Court is fallacious as far as its understanding of the ratio of the decision in *Babulal v. Raj Kumar and Others*[1]. To pyramid the submission that there has to be an adjudication as warranted in law, learned counsel has placed reliance on *Ghasi Ram and Others v. Chait Ram Saini and others*[2] and *Ram Kumar Tiwari and Others v. Deenanath and Others*[3].

Mr. Jayesh Gaurav, learned counsel appearing for the respondents in support of the order passed by the High Court has contended that when the executing court had clearly expressed the view that it has no jurisdiction to embark upon the issues as required to be gone into under Order XXI, Rules 97 to 103 of C.P.C., there was no necessity to proceed further and it would be a travesty of justice if it is construed that when there has been no adjudication of an application on behalf of a third party it would not be a decree. It is canvassed by him that adjudication does not necessarily mean to record evidence and deal with the issue of right, title and interest to make the order a deemed decree as stipulated under Order XXI, Rule 103. It is urged by him that when finality is given to the objection it assumes the character of a decree as envisaged under Order XXI, Rule 103 and, therefore, the reasons ascribed by the High Court cannot be faulted. In support of his contention, learned counsel has commended us to the authority in *S. Rajeswari v. S.N. Kulasekaran and Others*[4]. To appreciate the submissions raised at the Bar, it is necessary to appreciate the whole gamut of provisions contained in Order XXI, Rules 97 to 103 of CPC and the fundamental objects behind the same. Rule 97 deals with resistance or obstruction to possession by the holder of a decree for possession or the purchaser of any such property sold in execution of a decree. It empowers such a person to file an application to the Court complaining of such resistance or obstruction and requires the Court under sub-rule (2) to adjudicate upon the application in accordance with the provisions provided therein. Rule 99 deals with dispossession by decree- holder or purchaser. It stipulates that 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. The Court is obliged to adjudicate such an application. Thus this rule, as is manifest, includes any person other than the judgment-debtor. Rule 101 deals with the questions to be determined. It provides that 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 an application and not by a separate suit and for the said purpose, the executing court has been conferred the jurisdiction to decide the same. Rule 100 deals with orders to be passed upon application complaining of dispossession. It is apt to reproduce the said rule:-

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

make an order allowing the application and directing that the applicant be put into possession of the property or dismissing the application; or

(b) pass such order as, in the circumstances of the case, it may deem fit.” Rule 98 deals with orders after adjudication. Sub-rule (1) provides that upon the determination of questions referred to in Rule 101, the Court in accordance with determination and subject to provisions of sub-rule (2) therein make an order allowing the application and directing that the applicant be put in possession of the property or dismissing the application or pass such other order, as in the circumstances of the case it may deem fit. As far as sub-rule (2) is concerned, the same is not necessary to be taken note of for the purposes of present case. Rule 103 which is significant reads as follows:-

“Rule 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.” The submission of the learned counsel for the appellants is that if the scheme underlying the said Rules is appositely appreciated, it is clear as crystal that the legislature in order to avoid multiplicity of proceedings has empowered the executing court to conduct necessary enquiry and adjudicate by permitting the parties to adduce evidence, both oral and documentary, and to determine the right, title and interest of the parties and, therefore, such an order has been given the status of a decree. As has been put forth by him, a proceeding in terms of Rule 97 or Rule 99 is in the nature of a suit and the adjudication is similar to that of a suit and when in the case at hand, the Court has declined to embark upon any enquiry by calling for reply, recording evidence and appropriately adjudicating the controversy, the order passed cannot be regarded under Rule 103 of Order XXI as a decree. In this context, the authorities that have been commended to us need to be carefully noticed.

In Noorduiddin v. Dr. K.L. Anand[5], the executing court had rejected the application of the appellant therein on the ground that the High Court had already adjudicated the lis. Analysing the language employed in Rules 97, 98 and 100 to 104, the Court held:-

“Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21, Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code Amendment Act, 1976, right of suit under Order 21, Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution.” Elucidating further, the Court opined that adjudication before execution is an efficacious remedy to prevent fraud, oppression, abuse of the process of the court or miscarriage of justice. The object of law is to meet out justice and, therefore, adjudication under Order XXI, Rules 98,

100 and 101 and its successive rules is sine qua non to a finality of the adjudication of the right, title or interest in the immovable property under execution.

In Babulal (supra), the appellant apprehending that it would be dispossessed in an execution proceeding had filed an application based on possessory title and obtained interim injunction. He had also filed an application stating, inter alia, that he should not be dispossessed. His objection was overruled by the executing court holding that since he had not been dispossessed, an application under Order XXI, Rule 98 was not maintainable. The said view was affirmed by the High Court in Civil Revision Petition. The Court while interpreting the Order XXI, Rules 98 to 102 referred to the decision in Bhanwar Lal v. Satyanarain and Another[6] and opined that it is clear that an adjudication is required to be conducted under Order XXI, Rule 98 before removal of the obstruction caused by the objector or the appellant and a finding is required to be recorded in that behalf. The Court ruled that the order is treated as a decree under Order XXI, Rule 103 and it is subject to an appeal. It has been observed in the said case that prior to 1976, the order was subject to suit, but under the amended Code, right of suit under Order XXI, Rule 63 of old Code has been taken away, and the determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order XXI, Rule 98 which is an order and is a decree under Order XXI, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. The Court further opined that the procedure prescribed is a complete code in itself and, therefore, the executing [pic]court is required

to determine the question.

In Ghasi Ram and Others (supra) while making a distinction between the provisions prior to the amendment brought in 1976 in CPC and the situation after the amendment, a two-Judge Bench observed thus:-

“The position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of a fresh suit.” In the case of S. Rajeswari (supra), the appellant was one of the persons who had obstructed the execution of a decree obtained by the 1st respondent therein and had filed an application under Section 151 of CPC which was rejected by the executing court on the ground that it was not maintainable. Being grieved by the said order he preferred a revision petition which was allowed by the High Court. The Court treated the application preferred under Section 151 of C.P.C. to be one under Order XXI, Rule 97 because the executing court proceeded to record evidence and thereupon adjudicated the matter. The evidence of the decree-holder was considered and a conclusion was arrived at that the identity of plot in question had not been established and thereby the plaintiff was disabled from executing the decree for possession of the land. A contention was raised before this Court that the High Court had erred in entertaining a revision petition under Section 115, C.P.C., for the order was a decree under Order XXI, Rule 103 of C.P.C. and hence, an appeal lay. The said contention was accepted by this Court.

At this juncture, we may refer with profit to the pronouncement in *Brahmdeo Chaudhary v. Rishikesh Prasad Jaiswal and another*[7] wherein a two-Judge Bench scanning the anatomy of the rules came to hold 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 dehors the interest of the judgment-debtor. Both these types [pic]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.” The aforesaid authorities clearly spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained Code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the amendment the entire enquiry has to be conducted by the executing court. Order XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. If a Court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under Article 227 of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it. The appellants had approached the High Court as per the dictum laid down by this Court in *Surya Dev Rai v. Ram Chander Rai and others*[8].

Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable as has been held in *Joy Chand Lal Babu v.*

Kamalaksha Chaudhury and others[9]. The same principle has been reiterated in *Keshardeo Chamria v. Radha Kissan Chamria and others*[10] and *Chaube Jagdish Prasad and another v. Ganga Prasad Chaturvedi*[11]. Needless to emphasise, the said principle is well-settled. After the amendment of Section 115, C.P.C. w.e.f. 1.7.2002, the said power is exercised under Article 227 of the Constitution as per the principle laid down in *Surya Dev Rai* (supra). Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication.

In view of the forgoing analysis, we conclude and hold that the High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order. The High Court shall decide the matter as necessary under Article 227 of the Constitution of India. As a long

span of time has expired we would request the High Court to dispose of the matter within a period of three months. There shall be no order as to costs.

.....J. [Dipak Misra]J. [V. Gopala Gowda] New Delhi;

October 14, 2014

- [1] (1996) 3 SCC 154
- [2] (1998) 6 SCC 200
- [3] AIR 2002 Chhattisgarh 1
- [4] (2006) 4 SCC 412
- [5] (1995) 1 SCC 242
- [6] (1995) 1 SCC 6
- [7] AIR 1997 SC 856
- [8] (2003) 6 SCC 675
- [9] AIR 1949 PC 239
- [10] AIR 1953 SC 23
- [11] AIR 1959 SC 492
