

GAHC010042412023



In the Gauhati High Court

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)
PRINCIPAL SEAT AT GUWAHATI

R.S.A NO. 42 OF 2023

Sri Gopal Ghosh
Aged about-64 years
S/O-Late Bhupati @ Bibhuti Ghosh
R/O- Ward No.6, Bihupuria Town
P.O.-Bihupuria, P.S.-Bihupuria,
Dist.-Lakhimpur, Assam.

.....***Appellant***

-Versus-

Sri Surajit Gope
S/O-Late Nikhil Gope
R/O-Ward No.4, Bihupuria Town
P.O.-Bihupuria, P.S.-Bihupuria,
Dist.-Lakhimpur, Assam.

.....***Respondents***

Advocate for the Appellant(s) : Mr. A.R. Shome, Advocate.

Advocate for the Respondent(s) : Ms. P. Bhattacharjee, Advocate.

- B E F O R E -

HON'BLE MR. JUSTICE DEVASHIS BARUAH

Date of Hearing : 09.05.2024

Date of Judgment : 09.05.2024

:: JUDGMENT AND ORDER (ORAL)::

This is an appeal under Section 100 against the Judgment and Decree dated 09.12.2022 passed in Misc. Appeal No. 02/2021 by the Court of the learned Civil Judge, Lakhimpur, North Lakhimpur, whereby the appeal filed against the rejection of an application under Order XXI Rules 97/99 and 101 of the Code of Civil Procedure, 1908 (for short, the Code) was affirmed. This Court by an order dated 08.05.2024 had admitted the said plea by formulating a substantial question of law, which reads as under:-

“(i). Whether the learned Courts below were justified in rejecting the application under Order XXI Rules 97 and 101 filed by the appellant with an observation that the appellant ought to have filed a separate suit? ”

2. The question, therefore, arises in the instant appeal as to whether the learned Executing Court as well as the First Appellate Court were justified in dismissing the application and relegating the appellant to file a separate suit. Taking into account the short question, this Court had therefore, taken up the matter today as any delay in disposal of the instant proceedings would neither be in the interest of the decree holder nor the appellant.

3. I have heard Mr. A.R. Shome, the learned counsel appearing on behalf of the appellant as well as Ms. P. Bhattacharjee, the learned counsel appearing on

behalf of the respondents.

4. The Supreme Court in the case of *Brahmdeo Chaudhary Vs Rishikesh Prasad Jaiswal and Anr*: reported in (1997) 3 SCC 694 culled out as to what a conjoint reading of Order XXI Rules 97, 98, 99 and 101 of the Code projects. Paragraph 8 and 9 of the said Judgment being relevant is reproduced herein under:-

“8. A conjoint reading of Order 21, 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 21, Rule 35 then the decree-holder has to move an application under Order 21, 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 21, Rule 97, sub-rule (2) read with Order 21, Rule 98. It is obvious that after such adjudication if it is found that the resistance or obstruction was occasioned without a 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 21, 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 21, 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 the 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 21, 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 21, Rule 98, sub-rule (1) CPC the executing court can direct the stranger applicant under Order 21, 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 21, Rule 98, sub-rule (1) would be deemed to be a decree as laid down by Order 21, Rule 103 and would be appealable before appropriate appellate forum. But no separate suit would lie against such orders as clearly enjoined by Order 21, Rule 101.*

9. In short the aforesaid statutory provisions of Order 21 lay down a complete code for resolving all disputes pertaining to execution of the 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 21, Rule 97, sub-rule (1) and he cannot bypass such obstruction and insist on reissuance of warrant for possession under Order 21, Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order 21, 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 21, 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 21, 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 21, Rule 99. Order 21, 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 21, 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 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 21 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 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 21, Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order 21, 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 on 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 21, 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 21, Rules 97 to 103 would remain a complete code and the sole remedy for the parties concerned to have their grievances once and for all finally resolved in execution proceedings themselves."

5. From a perusal of the above quoted paragraphs of the said Judgment, it would be seen that when an application under Order XXI Rule 97 of the Code is being filed the Executing Court, the said Court had been conferred with the powers to pass appropriate orders after adjudicating upon the controversy between the parties in terms with Order XXI Rule 97 to 106 of the Code.

6. In the case of *Silverline Forum Pvt. Ltd. Vs Rajiv Trust and Anr.* reported in (1998) 3 SCC 723, it was observed that Rule 97 to 106 of Order XXI 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. It was observed that a third party to a decree who offers resistance would 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. It is also apposite herein to take note of the observations made to the effect that Rule 102 of Order XXI prohibits

the resistance made by a transferee pendente lite of a judgment-debtor. Paragraph 12 of the said Judgment gives a clear picture as to what the words "all questions arising between the parties to a proceeding on an application under Rule 97" would envelop. It was observed that the Court is not obliged to determine a question merely because the resister raised it. The questions which the executing Court is obliged to determine under Rule 101, must possess two adjuncts. First, such questions should have legally arisen between the parties, and second the questions must be relevant for consideration and determination between the parties. For example, if the obstructor admits that he is a transferee pendente lite it is not necessary to determine a question raised by him that he was unaware of the litigation when he purchased the property. Similarly, a third party, who questions the validity of a transfer made by a decree-holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. It is therefore necessary that the questions raised by the resister or the obstructor must legally arise between him and the decree-holder.

7. This Court further finds it very pertinent to take note of another Judgment of the Supreme Court in the case of *Shamsher Singh and Anr. Vs Lieutenant Colonel Nahar Singh (DEAD) through legal representatives and Ors.* reported in (2019) 17 SCC 279, wherein the Supreme Court has observed that post 1976 amendment the objector if being removed from possession and seeking to be put back into possession has not only to prove that he is in bona fide possession but he is also required to prove his right, title or interest in the property. It was also observed that the objector cannot claim recovery of possession or to remain in possession merely on showing that he was in possession of the property but he has to also prove his right, title and interest in the property. The

Supreme Court further observed in the said Judgment that 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 and in view of Rule 103 of Order XXI any adjudication made under Rule 101 of the Code shall have the same force and the subject to the same condition as to an appeal or otherwise as if it was a decree.

8. This Court further finds it relevant to take note of the Judgment of the Supreme Court in the case of *Bangalore Development Authority Vs N. Nanjappa and anr.* reported in *2021 SCC Online SC 1179*, wherein the Supreme Court in paragraph No.15 had observed that as per Order XXI Rule 101 of the Code all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Order XXI Rule 97 or Rule 99 of the Code and relevant to the adjudication of the application shall be determined by the Court dealing with the application and for that a separate suit is not required to be filed.

9. In the backdrop of the above propositions of the law, if this Court takes note of the orders being passed by the learned Executing Court as well as the first Appellate Court it would be seen that both the Courts below did not decide as to whether the appellant herein, who was the objector had been able to prove his right, title or interest over the suit property rather relegated the appellant to file a separate suit. The same in the opinion of this Court is completely contrary to the provisions of Order XXI Rule 97, 99 and 101 of the Code as well as the well settled principles of law.

10. Accordingly, this Court therefore, set aside the Judgment and Decree dated 09.12.2022 passed in Misc. Appeal No. 02/2021 by the Court of the learned Civil

Judge, Lakhimpur, North Lakhimpur and directs the learned Executing Court to decide the application filed by the appellant under Order XXI Rule 97, 99 of the Code, which have been registered and numbered as Misc (J) Case No. 16/2020 within the contours of the jurisdiction under Order XXI Rule 97 to 106 of the Code.

11. Taking into account that both the parties are duly represented, the parties are directed to appear before the learned Executing Court on 3rd June, 2024.

12. The learned Executing Court on appearance of the parties shall dispose of the said application in accordance with the settled principles of law as already mentioned herein above.

13. With the above, the instant appeal stands allowed. In the present premises, this Court is not inclined to impose any costs.

JUDGE

Comparing Assistant