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BHANWAR LAL

v.

SATYANARAIN AND ANR.

OCTOBER 4, 1994

B

[K. RAMASWAMY, S.C. AGRAWAL AND
N. VENKATACHALA, JJ.]

Code of Civil Procedure, 1908 :

C

Order 21—Rule 35(3)—Rule 97 Scope and distinction between—Decree—Execution—Obstruction by third party not deriving title through judgment debtor—Decree holder's application under Judgment debtor—Decree holder's application under Rule 35(3)—Whether can be treated under Rule 97.

D

The appellant obtained an ejection decree against R which became final. Thereafter when the first respondent obstructed delivery of possession the appellant filed an application under Order 21 Rule 35(3) of the Code of Civil Procedure, 1908 for police assistance but the Court directed him to file application under Order 21 Rule 97. Consequently, he filed second application under Order 21 Rule 97 but the same was dismissed as barred by limitation. The appellant filed a third application under Order 21 Rule 97 which was dismissed on the ground of res-judicata. On appellant's appeal the appellate Court directed removal of obstruction holding that he was not precluded from filing the third application. The respondent filed a revision before the High Court which set aside the order of the appellate court and confirmed that of the executing court. On further review, the High Court confirmed its order. Against the orders of the High Court the appellant preferred appeal in this Court.

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F

Allowing the appeal, this Court

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HELD : 1. The High Court has committed grievous error of jurisdiction and also patent illegality in treating the second application filed by the appellant as barred by limitation and the third application on res-judicata. Once the application under Order 21 Rules 35(3) of the Code of Civil Procedure was made, the court should have treated it to be one

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filed under Order 21 Rule 97(1) CPC. [212-B, C]

2. 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, Respondent 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. However, Order 21 Rule 97 CPC clearly envisages that if "any person" even including the judgment debtor, irrespective of the fact whether he claims derivative title from the judgment-debtor or set up his own right title or interest, *de hors* the judgment-debtor, resists execution of a decree, then the court in addition to the power under Rule 35(3) can 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. [210-H, 211-E, F]

3. When the appellant had made the application against respondent, in law it must be only the application made under Order 21 Rule 97(1) of CPC. But 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. The Executing Court was directed to conduct an enquiry for removal of the obstruction for delivery of possession of the property covered by the decree and pass appropriate orders according to law.

[211-H, 212-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3651 of 1990.

From the Judgment and Order dated 362/88 of the Rajasthan High Court in S.B.C.R. No. 352 of 1983.

U.N. Bachawat, and H.M. Singh for the Appellant.

R.K. Maheshwari and Vineet Maheshwari for the Respondents.

The following Order of the Court was delivered :

The appellant had obtained a decree in Second Appeal No. 175/71 from the High Court of Rajasthan on March 21, 1979 of ejection of Ram Kishan, *mesne profits* till date of possession and also arrears of rent. That decree had become final. Thereafter, the appellant filed an execution application under Order 21 Rule 35(3) of the Code of Civil Procedure, for

- A short the CPC, on May 24, 1979. Thereafter, when one Satyanarain, the first respondent in this appeal had obstructed delivery of the possession, on the next day, namely, May 25, 1979, he made an application under Order 21, Rule 35(3) for police assistance to remove the obstruction caused by Satyanarain. The Court directed the appellant to make an application under Order 21, Rule 97 pursuant to which the appellant made second application on July 18, 1979 under Order 21 Rule 97 CPC for removal of obstruction caused by Satyanarain. The District Munsif, Executing Court, on January 12, 1981, dismissed that application as being barred by limitation under Art. 129 of the Schedule to the Indian Limitation Act, 1963. On the even day, he filed a third application under Order 21 Rule 97 CPC which was dismissed on February 20, 1982 as being barred by *res judicata*. On an appeal filed by the appellant, the Civil Judge, Bikaner, by his Order dated May 19, 1983, directed removal of the obstruction holding that the third application was not precluded to be filed by the appellant. The High Court in Civil Revision No. 352 of 1983 filed by Satyanarain in the impugned order dated February 3, 1987 set aside the order of the appellate court and confirmed that of the Executing Court. On further review, the High Court confirmed its earlier order. Thus, this appeal by special leave against both the orders.

- The crux of the question is whether the application filed on May 25, 1979 by the appellant, though purported to be under Order 21, Rule 35(3) against Satyanarain, is convertible to be 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, Ramkrishan. The person resisting delivery of possession must be bound by the decree for possession. In other words the resistor must claim derivative 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 of 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 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 *de hors* 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 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 May 25, 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

- A to consider the averments in the petition and consider the scope of the applicability of the relevant rule. On 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 rule the roost.

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In the above view we have taken, the High Court has committed grievous error of jurisdiction and also patent illegality in treating the application filed by the appellant as barred by limitation and the third one on *res judicata*. Once the application, dated May 25, 1979 was made, the court should have treated it to be one filed under Order 21, Rule 97(1) CPC. The question of *res judicata* for filing the second and third applications does not arise. Under these circumstances the appellate court, though for different reasons was justified in directing an enquiry to be conducted for removal of the obstruction or resistance caused by Satyanarain under Orders 21 Rule 35(3) and 97(2) and Order 21 Rule 101 and 102 of CPC.

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The appeal is accordingly allowed. The Order of the High Court and that of the Executing Court are set aside. The Executing Court is directed to conduct an enquiry for removal of the obstruction for delivery of possession of the property covered by the decree and pass appropriate orders according to law. The application filed by Lakshminarain is rejected. If he has got any other right independent of the rights in the proceedings under execution, it may be open to him to agitate the same according to law. No costs.

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T.N.A.

Appeal allowed.