

RESERVE JUDGMENT

Court No. - 7

Case :- MATTERS UNDER ARTICLE 227 No. - 11249 of 2019

Petitioner :- Abdul Hasan

Respondent :- First Addl. Dist. Judge Pratapgarh And Ors.

Counsel for Petitioner :- Shailesh Kumar Srivastava

Counsel for Respondent :- Akshat Kumar, Ankit Pande, Malkhan Singh, Sanjay Kumar Srivastava

Hon'ble Alok Mathur, J.

1. Heard Sri Shailesh Kumar Srivastava, learned counsel for the petitioner as well as Sri Sanjay Kumar Srivastava, learned counsel appearing for the respondents.

2. The petitioner by means of the present writ petition has challenge order dated 26.02.2019 passed by the 1st Additional District Judge Pratapgarh in Civil Revision No. 60 of 2015 (Abdul Hasan and others versus Shrimati Shobha Rani) as well as the order dated 31/07/2015 passed by the Additional Civil Judge (Junior Division) Pratapgarh in Execution Suit No. 23 of 1980 (Bismilla Begam versus the Ramraj Kunwari)

3. The brief facts of the case are that Raja Jagat Ranvir Bahadur Singh, a Taluqdar of Kaithola Estate, was the owner of the disputed property and had adopted Raja Jagat Ranvir Mahesh Prasad Singh by means of an adoption deed. He further executed will on 27/12/1945 in favour of Raja Jagat Ranvir Mahesh Prasad Singh and gave all his property to him. He executed a deed dated 29-05-1935 in favour of his wife Rani Dharam Raj Kuer respondent No. 9 in respect of this house and some other property. It has been submitted that under this deed Rani Dharam Raj Kuer was granted a heritable but non-transferable lease so far as the house in dispute is concerned and as such under the terms of this grant she could only remain in possession of the house but could not make any temporary or permanent transfer thereof. The

Raja died on 09-09-1949. Hence both as an adopted son and as a legatee he was owner of the interest reserved by the Raja in the said house under the deed dated 29-05-1935. Smt. Bimlawati Kumari Devi was the daughter of Raja and had claimed the property through Rani Dharam Raj Kuer by inheritance. The said property was sold by Rani Dharam Raj Kuer by a registered sale deed in favour of Abdul Rahman 05/01/1960.

4. Raja Jagat Ranvir Mahesh Prasad came to know about the sale deed filed a suit before the civil judge Pratapgarh for cancellation of Sale deed dated 05/01/1960 executed in favour of Abdul Rehman and also for possession after their ejectment. The suit was registered as Regular Suit No. 17 of 1960 where it was stated that Rani Dharam Raj Kuer has been granted only lifetime interest and she has not been given right of transfer by sale of the property in question as such the sale deed is without any authority of law.

5. The suit filed by Raja Jagat Ranvir Mahesh Prasad was decreed by the Munsif Magistrate and an appeal was filed before the District Judge by Abdul Rahman which was allowed and the judgement and decree passed by the Munsif Magistrate was set aside. A second appeal was filed against the judgement of the District Judge before this court being Second Appeal No. 372 of 1963 which was allowed and the order passed by the District Judge was set aside affirming the judgement and decree passed by the Munsiff Magistrate, Pratapgarh on 29/08/1972.

6. The High Court while allowing the Second Appeal recorded the following findings after using the documents placed before them:-

a. With regard to the validity of the adoption deed it was held- *Besides being an adopted son of the Raja, the plaintiff is also Ms legatee. From a perusal of this will it is dear that whatever interest had been retained by the Raja under the document dated 29-5-1935 in respect of the house in suit was covered by this will and it had not*

been excluded therefrom. In fact the Raja tried even to whittle down the extent of the grant made under that document which he could not do. That is not an issue before us. The point worth noticing is that whatever interest was retained by the Raja in the house in suit under the document dated 29-5-1935 was not excluded from the purview of the will in favour of the plaintiff. So the plaintiff on both these grounds is entitled to step into the shoes of the Raja and safeguard his interest, if any, in the house in suit reserved under the deed dated 29-5-1935.

b. The nature of gift deed made in favour Rani Dharam Raj Kuer it was also really considered and it was held- In my opinion, not only the document has been specifically classified as a permanent heritable and non-transferable lease but the incidents of the transfer as mentioned in the document also make out a clear case of lease and not an absolute gift. The grantor had reserved a right to receive Rs. 5/- per year from the grantee as Malikana in respect of the house in suit. This periodical payment described as Malikana is nothing but an amount of money to be paid periodically to the transferor by the transferee within the meaning of Section 105 of the Transfer of Property Act. The use of the word 'Malikana' is not conclusive to lead to an inference that it was an absolute transfer of the entire proprietary rights. At one place the grantor had also stated that the object of this grant was to provide maintenance to the grantee who was his own wife. I agree with the courts below that the transaction evidenced by this document dated 29-5-1935 so far as the house in suit is concerned is only a perpetual heritable but a non-transferable lease.

c. Considering the validity of the lease deed the High Court held- So, on the facts and circumstances of this case and the close relationship existing between the grantor and the grantee, it cannot be said that the restriction against alienation was only a surplusage or a

redundant condition which in the absence of a right of re-entry could not confer any benefit on the lessor in any event. In my opinion, the benefit of this restriction could under certain circumstances be available to the lessor or his own heirs. As such, this condition will be deemed to be valid under Section 10. That being so, the lessee (respondent No. 9) had no authority to make the transfer in favour of the predecessor of respondents Nos. 1 to 8 under the impugned sale deed dated 5-1-1960, and this sale deed shall be deemed to be void against the appellant who is successor-in-interest of the lessor.

d. With regard to the prayer seeking eviction of the defendant from the suit property it was held- So long as the lease in favour of respondent No. 9 is not determined by a notice under Section 111(g) of the Transfer of Property Act the plaintiff is not entitled to immediate possession. A lease under this provision can be determined on account of the breach of a condition which provides a right of re-entry for such breach. This condition is not available to the plaintiff-appellant. It also provides that if the lessee renounces his character as lessee and denies the title of the lessor, the lease may be forfeited. Whether or not this condition is available to the plaintiff-appellant, does not arise for our consideration at this stage. All that can be said is that the plaintiff is not in this suit entitled to eject respondent No. 9 so long as her lessee rights are not determined.

7. The High Court in second appeal held that the adoption deed in favour of Raja Jagat Ranvir Mahesh Prasad Singh was valid, and the gift in favour of the Rani Dharam Raj Kuer was without any right of transfer, and she not having any right of transfer could not have executed a valid sale deed, which accordingly was held to be void. The only issue which was decided against the plaintiff in favour of the defendant against the plaintiff even in favour of the defendant was the aspect of eviction inasmuch as what the aspect of eviction in as much as the Court was of the view that no notice under the court was of the

view that no notice under Section 111 (g) of the Transfer of Property Act was not given and accordingly the lease was not determined and accordingly the plaintiff was not entitled to immediate possession.

8. After the judgement of the High Court, notice under Section 111 (g) of the Transfer of Property Act was given to the petitioner and the suit for eviction was filed before the Munsif Magistrate which was registered as regular suit No. 170 of 1973. The said suit was dismissed as time-barred by order dated 21/07/1978. The appeal against the aforesaid judgement was allowed on the basis of compromise on 26/03/1980 and the judgement of the trial Court dated 21/07/1978 was set aside.

9. On the basis of the judgement and decree, Execution Case No. 23 of 1980 was filed before the Additional Civil Judge (Junior division), Pratapgarh the executing Court passed order for execution of the decree on 11/09/2009 where objections were filed by one Rahmat Ulla and Sakina Bano which were rejected. Against the rejection of the rejection they filed a revision before the District Judge Pratapgarh which was also dismissed on 24/10/2009. During the pendency of the execution case Raja Jagat Ranvir Mahesh Prasad Singh executed a sale deed of the disputed house in favour of Smt Bismillah Begum and Smt Meherunnisa Bano on 14/03/1980 and subsequently on 16/12/1980 Raja Jagat Ranvir Mahesh Prasad Singh along with Smt Bismillah Begum and Smt Meherunnisa Bano transferred house No. 105 Gha and the pertinent land through registered sale deed dated 16/12/1980 in favour of Smt Shobha Rani. It was further submitted that in pursuance to the execution of decree the Amin delivered the possession of the maximum part of house No. 105 Gha along with the pertinent land to Smt Bismillah Begum and the same was subsequently delivered to Shobha Rani on the basis of the sale deed.

10. The execution case proceeded for execution of the decree for the remaining part of the disputed property, when fresh objections were

filed by the petitioner and 2 other persons including State Government and one Lalji. The objections raised by the petitioner were considered and rejected on 30/04/2015 in his absence and accordingly a recall application was moved on 08/05/2015. The recall application as well as objection of the other persons were disposed of on 29/05/2015.

11. Against the order dated 30/04/2015 and 29/05/2015 the petitioner preferred a revision before the Additional District Judge, Partapgarh which was numbered Revision No. 60 of 2015 and has been rejected by means of order dated 26/02/2019 which has been assailed in the present writ petition along with the order dated 31/07/2015.

12. It had been submitted by counsel for the petitioner that the objections raised by the petitioners in the execution proceedings have been rejected in the most illegal and arbitrary manner and contrary to the provisions laid down under Order 21 Rule 97, 99 and 100 CPC. It was submitted that the objections could have been decided only after permitting the petitioner to lead evidence and by not doing so the exhibiting court has committed grave illegality and consequently the aforesaid order deserves to be set aside.

13. Because of the respondent on the other hand has urged that all the issues in the dispute have been adequately considered and decided. It was stated that this Court in 2nd appeal has already decreed the suit where Raja Jagat Ranvir Mahesh Prasad was held to be the legatee of the original tenure holder by means of a valid will and further that his wife Rani Dharam Raj Kuer did not have any power to alienate the said property which was given on lease to her for her lifetime, and the other opposite parties having purchased the property from Rani Dharam Raj Kuer did not acquire any right or title from her. The objections filed by the petitioner in the execution proceedings were rejected by means of the order dated 30/04/2015 in his absence on the ground that the same did not have any merit. The application for recall of the order dated 30/04/2015 was also rejected on the 29/05/2015

where the reason for non-appearance on 30/04/2015 could not be satisfactorily explained, and the court considered that the matter is 25 years old and its execution is being deliberately delayed and therefore rejected the application of recall as being misconceived and also the ground that no satisfactory explanation have been given for non appearance of the petitioner on 30/05/2015. It was further submitted that in the order passed in revision the revisional court found that the applications of the petitioner been rejected after due application of mind and there is no error in the same and consequently there was no requirement for interference of the revisional court.

14. I have heard the counsel for the parties and perused the record.

15. In the present dispute Raja Jagat Ranvir Mahesh Prasad Singh had filed an Original Suit No. 170 of 1973 against Rani Dharam Raj Kuer which was decreed by this Court by means of order dated 29/08/1972 in 2nd Appeal No. 372 of 1963. The rights in favour of the plaintiff crystallized, and the suit was partially decreed to the extent that the plaintiff was declared to be the owner of the disputed property, but the relief with regard to eviction was not allowed as no proper notice as provided for under section 111g of the Transfer of Property Act was not given to the tenant. Accordingly, after giving notice to the occupants of the disputed property the 2nd round of litigation with regard to the eviction of the occupants/tenants commenced. The suit was initially dismissed by the Munsiff Magistrate on 21/07/1978, but the appeal against the said order was allowed on the basis of a compromise on 26/03/1980. The order dated 26/03/1980 attained finality as no appeal or revision was preferred against the same. The 3rd leg of litigation commenced when the execution case No. 23 of 1980 was filed for executing the decree dated 26/03/1980 before the Additional Civil Judge (Junior division), Sadar.

16. Objections were filed by the petitioner under Order 21 Rule 97 CPC stating that the disputed property was being used by a particular religious sect and the said property is a “wakf by user” of which the applicant claimed to be the manager. He stated that the decree obtained by the decree holder was collusive and not enforceable.

17. The said objections were heard on 30/04/2015 on which date the petitioner/applicant was not present, and the court after perusing the objections filed by the petitioner rejected the same as being without any merits. The petitioner subsequently moved an application for recall stating that while coming to the Court he met with an accident and consequently he could not inform. His counsel also did not appear and his objections were rejected ex-parte. Recall application was objected to by the decree holder, who stated that the averments made in the said applications are false and misconceived and the only effort of the applicant is to delay the execution proceedings and even otherwise there is no document to support the alibi made by the applicant.

18. The only ground raised by the petitioner assailing the aforesaid orders is that the trial court should have permitted the petitioner to adduce evidence as provided for under order 21 Rule 97 CPC so that the petitioner could have demonstrated that he has a better title than the decree holder so as to prevent the decree from being executed.

19. In this regard the question regarding maintainability of the objections preferred by the person who claims to be in possession of the disputed property deserves to be considered 1st. Order 21 Rule 97 provides as under:-

“97. Resistance or obstruction to possession of immovable property.-

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession

of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) Where any application is made under sub-rule (1) the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.”

20. It is also noticed that there was no application by the decree holder before the executing Court seeking further direction with regard to petitioner who was resisting the execution of the decree. He has straight away moved an application under Order 21 Rule 97 CPC.

21. It has been submitted that according to the provisions of Order 21 Rule 97 CPC, word “any person” would include the third party against whom the decree is sought to be executed and consequently submitted that application was maintainable at the behest of petitioner. It was stated that the rule is merely permissive and not mandatory and there is no limitation that only decree holder or auction purchaser can move appropriate application under Order 21 Rule 97 CPC and the moment the third-party files objections to the execution, the Court should stay the execution till rights claimed by the third party are decided.

22. Learned counsel for the respondent on the other hand has opposed the arguments made by the petitioner. It has been submitted that under Order 21 Rule 97 CPC it is only the decree holder who is entitled to make an application in case where execution proceedings are resisted by any person. It was further stated that the petitioner being third party cannot take shelter of provisions of Order 21 Rule 97 CPC and it is only when he is dispossessed, he can approach the Court for restoring his possession as provided under Order 21 Rule 99 CPC.

23. With regard to maintainability of application under Order 21 Rule 97 CPC the issue has been settled by the Hon’ble Apex Court in the case of **Jini Dhanrajgir and Another vs Shibu Mathew and Another**, 2023 SCC OnLine SC 643 has held :-

“16. *In our considered view, for more reason than one, relief claimed by the Appellants ought to be declined.*

17. *Section 47 of the CPC, being one of the most important provisions relating to execution of decrees, mandates that the court executing the decree shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit. What is intended by conferring exclusive jurisdiction on the executing court is to prevent needless and unnecessary litigation and to achieve speedy disposal of the questions arising for discussion in relation to the execution, discharge or satisfaction of the decree. Should there be any resistance offered or obstruction raised impeding due execution of a decree made by a court of competent jurisdiction, the provisions of Rules 97, 101 and 98 of Order XXI enable the executing court to adjudicate the inter se claims of the decree-holder and the third parties in the execution proceedings themselves to avoid prolongation of litigation by driving the parties to institute independent suits. No wonder, the provisions contained in Rules 97 to 106 of Order XXI of the CPC under the sub-heading “Resistance to delivery of possession to decree-holder or purchaser” have been held by this Court to be a complete code in itself in *Brahmdeo Chaudhary* (supra) as well as in a decision of recent origin in *Asgar v. Mohan Verma*. In the latter decision, it has been noted that Rules 97 to 103 of Order XXI provide the sole remedy both to parties to a suit as well as to a stranger to the decree put to execution.*

18. *In *Bhanwar Lal v. Satyanarain* , this Court held that when any person, whether claiming derivative title from the judgment-debtor or sets up his own right, title or interest de hors the judgment debtor, the executing court whilst executing the decree, in addition to the power under Rule 35(3), is empowered to conduct an enquiry whether the obstruction by that person is legal or not.*

19. This Court in Noorduddin v. Dr. K.L. Anand reiterated that the executing court was bound to adjudicate the claim of an obstructionist and to record a finding allowing or rejecting the claim which was laid before the executing court, the person being neither a party to the earlier proceedings nor the decree being passed against him.

20. Yet again, in Babulal v. Raj Kumar, this Court after setting aside the order impugned held that a determination is required to be conducted under Order XXI Rule 98 before removal of the obstruction caused by the objector and a finding is required to be recorded in that regard. It was also held that the executing court was required to determine the question relating to when the appellants had objected to the execution of the decree as against those appellants who were not parties to the decree for specific performance.

21. The decision in Brahmdeo Chaudhary (supra) cited by Mr. Chitambaresh, is also to the same effect.

22. Considering the scheme of Order XXI Rules 97 to 106, this Court in Silverline Forum Pvt. Ltd. v. Rajiv Trust found it difficult to agree with the High Court that resistance or obstruction made by a third party to the decree put to execution cannot be gone into under Order XXI Rule 97. Referring to Rules 97 to 106, this Court further held that they were intended to deal with every sort of resistance or obstruction raised by any person and that Rule 97(2) made it incumbent on the court to adjudicate upon such complaint in accordance with the procedure laid down. This Court also proceeded to observe:

“It is clear that executing court can decide whether the resistor or obstructer is a person bound by the decree and he refuses to vacate the property. That question also squarely falls within the adjudicatory process contemplated in Order 21, Rule 97(2) of the Code. The adjudication, mentioned therein need not necessarily involve a detailed enquiry or collection of evidence. Court can make the adjudication on

admitted facts or even on the averments made by the resistor. Of course, the Court can direct the parties to adduce evidence for such determination if the Court deems it necessary”.

23. The long line of precedents notwithstanding, it is indeed true that in terms of the ordainment of Rule 102 of Order XXI, Rules 98 and 100 thereof would not apply to resistance or obstruction in execution of a decree for the possession of immovable property by a person to whom the judgment-debtor has transferred the property after the institution of the suit in which the decree was passed.”

24. The 1st question which arises for determination is with regard to the validity of the order dated 30/04/2015 and 29/05/2015 whereby the application filed by the petitioner was dismissed and further the recall application was also rejected. The petitioner stated that on 30/04/2015 he had met with an accident and consequently could not reach the Court nor inform his counsel and consequently his application under Order 21 Rule 97 was rejected. The trial Court was of the view that the proceedings have been pending for 35 years, and also that he had perused the record where on merits no case for interference was made out and accordingly rejected the application. From perusal of the above order it is clear that the application for recall was rejected without considering the grounds on which it was filed. This court treats the said rejection to be merely on account of want of prosecution as no reasons have been either considered or stated for rejecting the said application on merits. The recall application was filed soon thereafter, which also was rejected affirming the order dated 30/04/2015. Considering the reasons given by the petitioner for his non-appearance on 30/04/2015, and recall application moved immediately thereafter clearly indicates that the non-appearance was not intentional. The Court is satisfied that reasons for non appearance were adequately explained by the petitioner and hence the ex-parte order ought to have been recalled. Though the

contesting respondent had opposed the said application as being false and misconceived, but no document or evidence was filed to controvert the facts stated in the application preferred by the petitioner, and accordingly both the orders are therefore, arbitrary and accordingly set aside and the application for recall is allowed.

25. This Court after perusal of the facts of the case concludes that the petitioner being an interested party in the suit being in possession of the decreed property, has right to raise his objections under Order 21 Rule 97 CPC before the execution of the decree, which ought to have been duly considered by the trial Court.

26. Accordingly, the writ petition is **allowed** and the matter is remitted to the trial Court to pass fresh orders on the application under Order 21 Rule 97 CPC preferred by the petitioner. Considering the fact that much time has lapsed due to pendency of the proceedings, the trial Court is directed to consider and decide the application expeditiously, say within maximum period of six weeks from the date of production of certified copy of this order.

27. The parties before this Court undertake to cooperate the proceedings before the trial Court.

Order Date :- 05.07.2024

A. Verma

(Alok Mathur, J.)