

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **C.R.P. 97/2014 and CM No.11212/2014 (Stay)**

% Reserved on: 10th March, 2015
Decided on: 20th April, 2015

SMT. SHAKUNTALA GUPTA Petitioner
Through: Mr. Siddharth Aggarwal, Advocate.

versus

SHRI MAN MOHAN GUPTA & ORS Respondents
Through: Ms.Prerna, Advocate for Respondent
No.1.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by the order dated 5th April, 2014 whereby the application of the Petitioner under Order 7 Rule 11 CPC was dismissed, the Petitioner prefers the present petition.
2. The Respondent No.1 filed Suit No.40456/2011 before the District Judge, Tis Hazari titled as 'Man Mohan Gupta vs. Smt. Shakuntala Gupta and others' praying for a decree of declaration that the order dated 29th October, 2010 passed by the learned ARC in Eviction Petition No.E-652/2009 and 653/2009 and order dated 5th July, 2011 in Execution Petition being Ex.No.73/2010 and Ex.No.74/2010 are non-est, null, void, unoperational and inconsequential, further for declaration that the Respondents/Plaintiff is the lawful occupant of the ground floor and first floor of the property admeasuring 80 sq. yards (in shot 'the suit property') out of Plot No.3430-31, Gali Bajrang Bali, Bazar Sita Ram, Delhi and a decree for recovery of possession and permanent injunction.

3. In the plaint, Respondent No. 1 pleaded that the Respondent was an occupant of the property falling under the control of Defendant Nos. 2 and 3, that is, Union of India and custodian of evacuee property as tenants by virtue of rent receipts under the Scheme of Rehabilitation of Refugees over the evacuee properties passed in 1947. The Petitioner dispossessed the Respondent No.1 by virtue of an ex-parte order dated 29th October, 2010 and an order in an execution petition dated 5th July, 2011 passed by the learned ARC against the predecessor in interest of Respondent No.1. The said decree was obtained by the father of the Petitioner by suppressing real and true facts and thus playing fraud upon the Court. It is stated that as per the record of the Custodian/Assistant Settlement Commissioner, the suit property along with the larger property formed part of estate of Rabina Begum and her two sons namely Hakim Abdul Hamid and Mohd.Sayeed. Rabina Begum died in Delhi on 5th October, 1949 as non-evacuee. Her one son Hakim Abdul Hamid stayed in India as non-evacuee but her other son Mohd.Sayeed migrated to Pakistan in January, 1948. The properties as noted above have not been separated as evacuee and non-evacuee property and thus are composite in nature. However, the Competent Officer sold the property in auction on 18th May, 1961 and the same was purchased by one Moti Ram, father of the Petitioner. In the proceedings as noted above between Moti Ram and Kesho Prasad and Khushi Ram, it was submitted by the Settlement Commissioner, Litigation Section that there was a defect in survey conducted by which the property No.2289/3430-31 was shown as part of property No.2243-46/3342-46 vide the report dated September, 1977 and since no action was taken by the Property Section, Moti Ram succeeded in getting the decree in his favour. The ground floor of the suit property had

been allotted to one Kushi Ram Mehta, the predecessor of Respondent No.1 who migrated in September, 1947 as part of rehabilitation scheme. Only a portion of the built up area on property No.IX/2243-46/3346 (new) was auctioned on 18th May, 1961 and since the property formed a part of non-evacuee property and was yet to be separated the plot was provisionally conveyanced to the purchaser, father of the Petitioner. Moti Ram was thus granted only provisional occupation on 31st October, 1961 which fact was not disclosed before the Court of law. Further Moti Ram in Suit No.185/81 was also able to obtain a decree of declaration in his favour without disclosing the true and correct facts of the case and Moti Ram was declared the owner of the entire property No.IX/2243-2246(old) 3342/3346 (new). Moti Ram was accepting the rent from Khushi Ram Mehta for the first floor by force and coercion and without any prior intimation or acknowledgment to the Respondent No.2 and 3/Defendant Nos. 2 and 3. The said property was handed over to the Respondent No.1 by Smt.Bimla, wife of late Khushi Ram Mehta vide possession letter, GPA, Agreement to Sell, Will dated 16th March, 1998. The Respondent No.1 has been in continuous and peaceful occupation of the suit property however, on 23rd June, 2011 the Petitioner took over the possession of the suit property vide the eviction order of the learned ARC. Thus the Petitioner had played fraud upon the Court and had misrepresented facts before the Rent Controller thereby obtaining an order on concocted facts.

4. In the suit, petitioner filed an application under Order VII Rule 11 CPC which was dismissed vide the impugned order. Though before this Court learned counsel for the Petitioner urges two grounds, that is, that a fresh suit was barred under Order 21 Rules 99, 101 and 103 CPC and that the

suit was also barred by the principle of res-judicata. However, the plea regarding the suit being barred by the principle of res-judicata was not taken before the learned Trial Court in the application under Order 7 Rule 11 CPC, thus this Court is not required to consider the said plea. Learned counsel for the Petitioner relies upon the decision in Nooruddin vs. Dr. K.L. Anand, 57 (1995) DLT 321 (SC); Shreenath and another vs. Rajesh and others, AIR 1998 SC 1827; N.S.S. Narayana Sarma and others vs. M/s Goldstone Exports (P) Ltd. and others, AIR 2002 SC 251 and Shyam Kak vs. J.P. Gupta and another, 24 (1983) DLT 12.

5. Learned counsel for the Respondent on the other hand claims that since the Respondent No.1/Plaintiff has played fraud thus a decree of declaration obtained on the basis of fraud played could be set aside only by filing a separate suit and an application under Order XXI Rules 99, 101 and 103 CPC was not maintainable. Learned counsel for the Respondent No.1 relies upon Ram Chandra Singh vs. Savitri Devi and others, 2003 (8) Scale 505; V.K. Rama Setty vs. A. Gopinath, AIR 1998 Karnataka 186 (FB); and Ramu and others vs. Jai Singh, 78 (1999) DLT 1.

6. Thus, the issue that arises is whether the suit is maintainable to set aside the decree allegedly obtained by fraud or is liable to be dismissed in view of the remedy available under Order XXI Rules 99, 101 and 103 CPC.

7. In Nooruddin (supra) the Supreme 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 CPC 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.”

8. In N.S.S.Narayana Sarma (Supra) the Supreme Court held:

“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 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 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 in the property on his own including that of a tenant including a stranger.

9. In Shreenath (supra) the Supreme Court held:

“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?”

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9. *This sub-clause (2) was substituted by the Amending Act 1976. Earlier sub-clause (2) was:*

"The Court shall fix a day of investigating the matter and shall summon the party against whom the application is made to appear and answer the same."

10. *Under sub-clause 1 Order 21, Rule 35, the Executing Court delivers actual physical possession of the disputed property to the decree-holder and, if necessary, by removing any person bound by the decree who refuses to vacate the said property. The significant words are by removing any person bound by the decree. Order 21, Rule 36 conceives of immovable property when in occupancy of a tenant or other person not bound by the decree, the Court delivers possession by fixing a copy of the warrant in some conspicuous place of the said property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. In other words, the decree-holder gets the symbolic possession. Order 21, Rule 99 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through judgment debtor or claiming independent right of his own including tenant not party to*

the suit or even a stranger. A decree holder, in such a case, may make an application to the Executing Court complaining such resistance, for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the Executing Courts when such claim is made to proceed to adjudicate upon the applicants claim in accordance with provisions contained hereinafter. This refers to Order 21, Rule 101 (As amended by 1976 Act) under which all questions relating to right, title or interest in the property arising between the parties under Order 21, Rule 97 or Rule 99 shall be determined by the Court and not by a separate suit, By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstructed by a stranger is adjudicated and finality given even in the executing proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the Executing Court could adjudicate the claim made in any such application under Order 21, Rule 97. Thus by the use of the words 'any person' it includes all persons resisting the delivery of possession, claiming right in the property even those not bound by the decree, including tenants or other persons claiming right on their own including a stranger.

10. In Shyam Kak (surpa) it was held by the Supreme Court:

“8. What is the remedy available in such a situation to a person who is claiming in good faith or otherwise to be in possession in his own right, in this case a tenant? He has no doubt full and adequate remedy under Order 21 Rule 98 to make an application to the court complaining of dispossession whereupon the court shall proceed to adjudicate under Rule 100 and make appropriate orders. A suit is barred under Rule 101. Instead of doing so, the petitioner has filed the present petition under Article 227 of the Constitution. It is a requirement of natural justice that before any adverse order is passed against a party, he must be given a hearing. That is also the specific requirement of Rule 105 of Order 21. The landlords knew very well that the

petitioner Shri Kak was claiming the tenancy in his own right and should have brought this fact to the notice of the Controller and made an application under Rule 99 but he has not chosen to do so. All that has happened was not at all proper and defensible. I, therefore, agree with Dr. Chitale in his submission that where rules of natural justice are violated or high handedness or fraud is in display, the extraordinary jurisdiction of the court under Article 227 can in suitable cases be invoked.”

11. Learned counsel for the Respondent No.1 distinguishing Nooruddin (supra) submits that the said decision did not state that an application under Order XXI Rules 97 CPC was the only remedy but an additional remedy with the right to file the civil suit. As noted above in Nooruddin (Supra) the Supreme Court clearly noted that as per the scheme of the Court under order XXI Rule 97 CPC the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to proceedings or between the decree holder and the person claiming independent right, title or interest in the immovable property. The determination shall be conclusive between the parties as if it was a decree and not a matter to be agitated by a separate suit. The Full Bench decision in V.K. Rama Shetty (supra) held that by use of word ‘may’ under Order XXI Rule 99 CPC, the Code gives an option to a person to file application before the executing Court averring his grievance but does not make the remedy exhaustive thereby debarring him from preferring a suit for possession completely. It further notes that once an application is filed by the aggrieved person under Rule 97 or 99 then Rule 101 CPC in an unambiguous term bars the filing of a separate suit on any question arising between the parties including the question of right, title and interest in the property.

12. This Court dealing with similar situation in Mohd.Farjam vs. Sarfaraz Ahmed and others, 191 (2012) DLT 247 (DB) held that as per the mandate of Rule 101 all questions including questions relating to right, title or interest in the property arising between the parties to proceeding on an application under Rule 99 CPC have to be adjudicated by the Executing Court and this would include a right claimed by a third party, that is, a party not being a party to the original eviction proceedings. It was further noted that the executive Court which is seized of the application filed by the objector would have to decide even the question of fraud.

13. Consequently, the impugned order is set aside. The petition and the application is disposed of allowing the application of the Petitioner under Order VII Rule 11 CPC and rejecting the suit, with liberty to the Respondent to take remedies available in law, if so advised.

(MUKTA GUPTA)
JUDGE

APRIL 20, 2015

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