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

Reserved on: 31st January, 2020

Date of decision: 19th March, 2020

+ **CM(M) 1448/2019, CM APPLs. 43987/2019 & 43988/2019**

DEV RAJ & ORS

..... Petitioners

Through: Mr. B.B. Gupta, Senior Advocate with
Mr. Devesh Pratap Singh, Advocate.
(M:9999814755)

versus

SATPAL GULIA

..... Respondent

Through: Mr. R.K. Saini, Ms. Bhavana Jain and
Ms. Tavishi Vats, Advocates.
(M:8447641995)

CORAM:

JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. The Petitioners - Shri Dev Raj, Shri Shiv Raj and Shri Hans Raj were the Plaintiffs (*hereinafter*, "*Plaintiff Nos. 1-3*") in a suit for permanent injunction in respect of property bearing No. 223, Village Mangolpur Kalan, Delhi (*hereinafter*, "*suit property*"). In the said suit, an interim order was passed in the application under Order XXXIX Rules 1 and 2 CPC on 15th February, 1994 to the following effect: -

"4. I have perused the report of the local commissioner. The local commissioner has categorically stated in his report that he served a notice upon the defendant with regard to his appointment to execute the commission but the

defendant deliberately refused to accept the notice. The defendant deliberately and intentionally did not take part in the proceedings held by the local commissioner. It is reported by the local commissioner in his report that the defendant was constructing a wall with the help of the police and the wall was just adjoining the doors of the house of the plaintiffs, which were mostly about to close. After carefully considering the arguments of the plaintiff counsel and in view of the nature of the suit and inasmuch as the documents placed on record by the plaintiff counsel in support of his contention particularly when the plaintiffs claimed themselves to be the owner of the suit property_____house and whereas the defendant has failed to appear despite service and information particularly given by the local commissioner who executed the commission after giving notice to the defendant and since the doors of the house of the plaintiffs are closed on account of raising the wall and whereas it has become difficult for the plaintiffs to enter in the back portion of the house or to open the doors or to tether the cattle. I am of the view that these are the exceptional circumstances where the court must intervene and the Court should not hesitate even to grant the relief which is in the nature of the mandatory form. I accordingly allow the application moved by the plaintiffs as the defendant has not appeared despite knowledge and I order that the walls raised in front of the doors of the house of the plaintiffs be removed in order to facilitate the plaintiffs for their egress and ingress in the premises. In case the hurdle of raising the wall in front of the doors is not removed, the plaintiffs are likely to suffer irreparable loss. The plaintiffs shall remove the wall, raised by the defendant as alleged in front of the doors of the house and if

necessity be the plaintiffs shall take the assistance of the local police. The local police is also directed to get this order implemented. I am of the considered view that since the defendant is absent despite knowledge inasmuch as where the process has not been received in the court issued to the defendant in pursuance to order contained in order 39 rule 3 CPC I in the interest of justice once again order that the defendant be again served with the restraint orders on filing of P.F. R.C. etc. for 28.2.94.”

The Court, by way of an interim mandatory order, had thus directed removal of the wall so as to provide access to the Plaintiffs on the basis that the Plaintiffs were the owners of the property.

2. The said suit, however, came to be finally dismissed by the Id. Trial Court vide judgment/decreed dated 24th December, 1999, which reads as under: -

“17. In view of the foregoing discussions and facts and circumstances of the case and on perusal of the material placed on record, I am of the view that the plaintiff have totally failed to prove that they are the owners and entitled to possess the suit property, falls in the back portion of their houses and also failed to prove that they are entitled to open the doors towards the suit land i.e. the land pertains to khasra No.70/1/1, 70/34 and 70/32 as shown in the site plan not belonging to them. Whereas the wall which was in existence at the time of filing of the suit was demolished in pursuance of ad interim order dt. 15.2.94, therefore, the suit property be restored to its original condition.

18. In view of the foregoing discussions and facts and circumstances of the case, I accordingly dismiss the suit of the plaintiffs, with cost of Rs.5000/- Decree sheet be prepared accordingly. File be consigned to R/R.”

At the final stage, the trial court came to the conclusion that the Plaintiffs had failed to establish ownership and thus, while dismissing the suit, directed the reconstruction of the wall which was demolished and restoration of the same to its original condition.

3. The said judgment/decree was challenged by Plaintiff Nos. 1-3. The first appeal was dismissed on 16th May, 2018 and the second appeal was dismissed on 14th September, 2018. In effect, the original judgment/decree was maintained by both the Appellate Courts.

4. Considering the nature of the judgment/decree which was passed by the Trial Court, the Respondent/Defendant (*hereinafter, “Defendant”*) in whose favour a final order of restoration was passed by the Trial Court, sought execution of the judgment/decree. The Executing Court considered the judgment/decree and on 26th April, 2019, dismissed the objections filed by Plaintiff Nos. 1-3 and directed as under:

“20. The suit was filed in year 1993 and JDs got into the illegal possession of the suit property on 30.03.1994 and since then they are in the illegal possession of the suit property. JDs are in the

possession of the suit property for the last 25 years and for that period DH has been deprived of the enjoyment of his immovable property. JDs are reaping unjust benefits from the suit property for the last 25 years and on the other hand, DH is being deprived of enjoying the suit property and of profit generated from it. Therefore, equity demands that JDs should pay damages / mesne profits to the DH for the period they were in illegal possession of the suit property and compensate the DH.

21. The photographs filed alongwith the execution petition clearly shows that suit property is used for commercial purpose i.e. as a godown for keeping marble slabs and stones. Judicial notice is taken of the fact that village Mangolpur kalan i.e. the area where the suit property is located is a well known market of marble slabs. Therefore, in the opinion of the Court, the DH is entitled to damages / mesne profit of Rs. 1 lac for each year for which the suit property was in the possession of the JDs. Hence, DH is entitled to damages / mesne profit of Rs. 25 lacs from the JDs.

DH is entitled to recover the damages / mesne profit of Rs. 25 lacs only after depositing the requisite Court fee.

In case, JDs did not comply with this order then DH can get the order executed through the Court so that the order can be implemented in letter and spirit.

Application disposed of accordingly. ”

Thus, the executing court came to the conclusion that on the basis of the initial interim injunction which was granted in favour of the Plaintiffs, they continued to enjoy benefit of the order and possession of the property since 1994, while the Defendant was deprived of the enjoyment of the property, though finally the suit was dismissed. Thus, the court observed that the Defendant ought to be compensated for enjoying the property during the said period and directed the payment of damages/mesne profits of Rs. 25 lakhs. In order to implement its order, the Executing Court appointed a bailiff vide a separate order of the same date i.e., 26th April 2019, in the following terms:

“Vide separate order passed today, the objections filed by the Jds has been dismissed and it was held that DH is entitled to erect the western boundary wall upto the height of about Nine feet, in front of four doors as shown A,B,C and D in the site plan Ex. PW 1/A and also entitled to the possession of the suit property and also entitled to have the suit property in the same condition as it was in at the time when the suit was filed and as shown in photographs no. 5 and 6 filed on 24.09.2018.

Counsel for DH/defendant submitted that original position of the suit property be restored.

Bailiff of this court is directed to restore the original position of the suit property i.e. erecting a wall in front of four doors as shown at A,B, C and D in the site plan attached herewith which was demolished in pursuance of court order dated 15.02.1994 and file report on the next date of hearing.

Issue warrants of possession against the JD qua the suit property i.e. House No. 176 having area of

1160 sq. yards approximately in Khasra No. 70/1/1, Khasra No. 70/31, 70/32, Village Mangol Pur Kalan as shown at point ABJI in the site plan Ex. PW 1/A for NDOH on filing of PF.

.....

Further permission to break open the lock is also granted if it is required to execute the warrant.”

5. Plaintiff Nos. 1-3 thereafter preferred an appeal which has been dismissed vide the impugned order dated 16th September, 2019 on the ground that the same is not maintainable.

6. Mr. B.B Gupta, Id. Sr. Counsel appearing for Plaintiff Nos. 1-3 submits that on the issue of maintainability of the appeal, the Appellate Court was completely wrong in law. He submits that even objections under Section 47 CPC have to be treated as those filed under Order XXI Rule 97 CPC as the term “any person” in Rule 97 includes the Judgment Debtor. Since the objections under Order XXI Rule 97 CPC have to be decided under Rule 98 and are appealable under Rule 103, the finding of the Appellate Court is erroneous in law and the appeal has to be decided on merits. He relies on the following judgments –

i. Murti Bhawani Mata Mandir Represented Through Pujari Ganesh Lal (Dead) Through Legal Representative Kailash v. Ramesh and Others, (2019) 3 SCC 707

ii. Bhanwar Lal v. Satyanarain and Another, (1995) 1 SCC 6

iii. Asgar & Others v Mohan Verma & Others 2019 (3) CLJ 16 (SC)

iv Babulal v Raj Kumar & Ors. (1996) 3 SCC 154

7. On the other hand, Mr. R.K. Saini, ld. counsel appearing for the Defendant submits that this is a case of gross abuse by Plaintiff Nos. 1-3 who ensured that they enjoyed the property in question, by way of interim relief in a suit which was finally dismissed. He submits that Plaintiff Nos. 1-3 deliberately delayed the adjudication of the first appeal and have, in effect, enjoyed the property for almost 20 years after the passing of the decree. It was under these circumstances, that the Court has the power of restitution under Section 144 CPC wherein the Court, while ensuring that the benefit of the interim order which was originally passed is no longer enjoyed by Plaintiff Nos. 1-3, directed construction of the wall, as also payment of *mesne* profits. He submits that such an order would not be appealable, inasmuch as the Judgment Debtor was all along a party to the suit itself, and thus the order passed dismissing the objections by the Judgment Debtor would not be appealable as the same was under Section 47 CPC.

8. In order to decide whether the order dated 26th April, 2019 was an appealable order or not, what is important to be seen is the nature of the order which was passed. The Executing Court considered the entire issue of restitution which was directed by the final judgement and also held that since the Judgment Debtors had come into possession of the property due to the interim/mandatory injunction which was passed by the Court on 15th February, 1994, and the suit having been dismissed resulting in the said order being

vacated, the Court ought to put the Defendant in the same position as it was, prior to the filing of the suit. In the Court's opinion, restitution was in two forms—

- First, by restoring the original position of the property i.e. by erecting a wall which had earlier been demolished pursuant to the interim order and
- Secondly, by directing the Judgment Debtors to pay damages for the occupation of the said property from 1994 till 2019 i.e. a period of almost 25 years.

9. The CPC contemplates various orders that can be passed in execution proceedings. Whenever there are questions which arise between the parties to the suit in respect of either the execution, discharge or satisfaction of the decree, the same can be determined by the Executing Court itself under Section 47 CPC. Section 47 reads as under:

“47. Questions to be determined by the Court executing decree. – (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I. – For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II. – (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) All questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree with the meaning of this section.]”

10. There is no dispute as to the legal proposition that if objections are filed in execution proceedings, if the Court is of the opinion that there are any complex facts evolved, evidence would have to be recorded. **Bhanwar Lal** (*supra*) cited by the Plaintiffs, holds that under Order XXI Rule 97 CPC the term ‘any person’ would include a Judgment Debtor. However, the nature of the order needs to be considered to see whether an order passed by the executing court is one under Order XXI Rule 97 CPC, where the decree holder faces obstruction or resistance, or is an order which is implementing the decree. The mandatory nature of the injunction which was granted in the final judgment/decreed has resulted in warrants of possession being issued by the Executing Court, and rightly so. It is the settled position that dismissal of a suit also constitutes a decree. The dismissal of the suit in the present case is not a mere dismissal, but a dismissal which entailed a final order by the Court, that the Defendant needs to be restored possession of the property, which was

occupied by the Plaintiffs due to the operation of an interim order of the Court itself. Such an order, is clearly one that is passed exercising the inherent powers of the Court to reconstitute a party to the same position as he or she was at the time when the suit was filed when, the *status quo* had been changed due to an order passed by the Court, and ultimately the Court has dismissed the suit itself. The Executing Court was merely implementing the original judgment/decreed.

11. The judgment in ***Babulal v. Raj Kumar And Others (supra)*** is clearly distinguishable on facts, inasmuch as in the said case, the party objecting to the execution of the decree was not a party to the original judgment/decreed for specific performance. The executing court had not conducted any enquiry into the objections filed by him, and it was in that context that the Supreme Court held that the executing Court ought to have enquired into the matter. The facts in the present case are different, inasmuch as the Plaintiffs who are objecting to the execution of the decree were party to the suit since inception. They enjoyed the interim order which was originally passed by the Court. The judgment/decreed, to which they were a party has attained finality.

12. Even in ***Asgar & Ors v. Mohan Varma & Ors.(supra)*** the parties who were objecting to the decree, were not parties to the original judgment and were strangers to the decree. Since the objectors set up an independent claim, the Supreme Court held that the executing court had to decide the issue as to whether the claim was justified or not. The Supreme Court had observed as under:

“The provisions of Order XXI Rules 97 to 103 constitute a complete code and provide the sole remedy both to parties to a suit and to a stranger to a decree. All questions pertaining to the right, title and interest which the appellants claimed had to be urged in the earlier Execution Application and adjudicated therein. To take any other view would only lead to a multiplicity of proceedings and interminably delay the fruits of the decree being realized by the decree holder.”

Thus, the executing court has very vast powers while deciding an execution. The intention of the Code as also the judgements has been to ensure that delays are not caused in execution of decrees and multiplicity of proceedings is avoided, by permitting the executing courts to decide the issues even relating to title if raised.

13. The powers of the Executing Court are quite broad. Under Order XXICPC, the various steps that can be taken by the Executing Court for implementing a decree are stipulated. The same include granting of set off, sale of the property, auctioning of the property, execution of a document, endorsement of immovable property, taking custody of movable property, directing oral examination of a Judgment Debtor, attachment of agricultural produce, orders against garnishee, attachment of salaries, attachment of partnership property, attachment of immovable property, conduct of sale by public auctioning, etc. In the case of immovable property, if there is any resistance, by any person including the Judgment Debtor, the Decree Holder can approach the Executing Court, which shall then pass orders under Order

XXI Rule 98 CPC. Any order passed at the behest of a Decree Holder under Order XXI Rule 97 and 98 CPC would constitute a decree under Order XXI Rule 103 CPC. The same would then be appealable. If a person is wrongly dispossessed, such person can approach the Executing Court under Order XXI Rule 99 CPC for orders to be passed in terms of Order XXI Rule 100 CPC, which would also constitute a decree under Order XXI Rule 103 CPC.

14. The Plaintiffs argue that the orders passed by the Executing Court, first by appointing a bailiff to restore the original position of the suit property, and secondly by directing payment of damages for illegal possession are both orders under Section 47 CPC, and hence no appeal lies to the ADJ from the said order.

15. The scheme of Order XXI Rules 97 to 106 CPC is quite clear. If there is obstruction or resistance by any person, the Decree Holder approaches the Executing Court under Order XXI Rule 97 CPC. If the person in occupation has been wrongly dispossessed, so long as that person is not the Judgment Debtor, the Executing Court can be approached under Order XXI Rule 99 CPC. What happens if the Judgment Debtor who is bound by the decree is dispossessed? Would such dispossession be covered under Order XXI Rule 99 CPC or under Section 47 CPC? This issue needs to be examined.

16. The nature of the order passed in the present case has the following elements:

- i) the order is against the Judgment Debtors;

ii) it is of a mandatory nature i.e., the Judgement Debtors have to restore the property to its original condition. The exact wording of the final decree, while dismissing the suit is as under:

“....Whereas the wall which was in existence at the time of filing of the suit was demolished in pursuance of ad interim order dt. 15.2.94, therefore, the suit property be restored to its original condition.....”

iii) the Plaintiffs did not comply with the same hence the Defendant sought execution;

iv) the Judgment Debtors were the Plaintiffs in the original suit and have enjoyed possession;

v) the executing court thus directs the bailiff to restore possession from the Judgment Debtors;

vi) rightly or wrongly, the Executing Court has directed the Judgment Debtors to pay damages.

17. Clearly, it is the Judgment Debtors who are sought to be dispossessed. By a simple reading of Order XXI Rule 99, it is clear that the impugned order is not an order under the said provision.

18. Further, the order that has been passed by the executing court is not in respect of obstruction or resistance by the Judgment Debtors for which the Decree Holder has approached the Executing Court. The Judgement Debtors have simply failed to comply with a mandatory order or mandatory injunction.

Thus, this is not an order under Order XXI Rule 97 either. In the present case, the Decree Holder has sought orders under Order XXI Rule 32 CPC for enforcement of a mandatory injunction which directed restoration of the wall to its original condition. The executing court holds that the said provision does not apply.

19. An order like the impugned order, would, in the opinion of this Court be an order under Section 47 CPC i.e., it would relate to execution, discharge or satisfaction of the decree by the Executing Court. The final decree directing restitution and the same being given effect to by the executing court, would also be an order relating to the implementation of the decree and not one under Order XXI Rule 97 CPC which contemplates resistance or obstruction to the execution of a decree.

20. The Id. ADJ exercising appellate jurisdiction, has also observed that the order passed by the Executing Court is under Section 47 and is not appealable under Order XXI Rule 103. The observations of the Id. ADJ are as under:

“12. Since the maintainability of the appeal has been seriously challenged by learned counsel for the respondent, I am of the view that it will be appropriate to test the maintainability of the appeal before going into merits.

13. The objections which were filed by the appellants before the Ld. Executing Court were titled as ‘objections on behalf of judgment debtors/objectors under order XXI R 97 of the Code of Civil Procedure read with all other enabling provisions and also under section 47 of Code of Civil Procedure to the execution petition filed by the alleged decree holder. The

executing court while deciding the objections has observed that, “Vide this order, the court shall decide, the objections filed by the JDs u/sec. 47 of CPC.” The present appeal has been titled as “Appeal u/O 21 R 58/97/98/99/100/101/103/104/105 CPC...”

14. So far as provisions invoked in the present appeal are concerned, most of the provisions do not in any manner provide for any appeal. Only Rule 103 of Order XXI CPC prescribes that any order passed under Rule 98 on an application under rule 97 and rule 100 on an application under rule 99 of order XXI CPC shall be deemed to be a decree which means that such an order is appealable. For the purpose of provisions of Order XXI R 103 CPC, it is to be seen whether the impugned order was actually an order passed under Rule 97 to rule 100 CPC. In this regard, it is found from the record that though the application/objections were titled under order XXI Rule 97 CPC but in fact the said provision was not attracted in the given situation and probably due to this reason only the Ld. Executing Court has treated the objections only under 47 CPC which deals with the questions arising between the parties to the suit in relation to execution, discharge or satisfaction of the decree.

15. Rule 97 of Order XXI CPC deals with a remedy available to the decree holder and a purchaser of the property when there is resistance to execution of warrant of possession etc. The appellant is not a decree holder or purchaser of property in this case; so, there does not arise any question of the appellant availing the abovesaid provision.

16. Similarly, Rule 99 of Order XXI CPC deals with the remedy available to a third person who is dispossessed during execution of a decree. The appellants also do not fall in the category of third person as they were

party to the suit and are judgment debtors in the present execution petition. So, this provision is also not available to the appellants.

17. There is an argument on behalf of appellant that the ld. Executing court has taken recourse to section 144 CPC, which deals with restitution, so, by virtue-of the definition of term decree u/sec. 2(2) CPC which includes an order u/sec. 144 CPC, the impugned order is appealable. In this regard, it is to be seen that, order of restitution has already been passed by the Ld. Trial Court vide judgment dated 24.12.1999 and it can be taken that the ld. executing court has simply analyzed the same for the purpose of execution in its letter and spirit. The judgment dated. 24.12.1999 has already been challenged by way of first and second appeal and both appeals filed by the appellants have already been dismissed vide judgment dated 16.05.2018 and 14.09.2018. Without commenting upon the correctness of impugned order. It can be said that the different reliefs have been granted by the ld. executing court to the decree holder while deciding the objections filed by the appellants as a measure to ensure restitution as per the judgment passed by the ld. Trial court and not as an independent measure for restitution.

18. In view of above. It can be said that the objections were treated u/sec. 47 CPC by the ld. Executing Court which deals with questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree. It is well settled that it is the substance and not the nomenclature which is material. So, far as an order passed u/sec. 47 CPC is concerned, the same is not an appealable order as it does, not find mention either in section 104 or in order 43 CPC which prescribe exhaustive list of the appealable orders.' There is also no special provision which makes the

order u/sec. 47 CPC an appealable order. An order u/sec. 47 CPC is also not covered by the existing definition of term decree u/sec. 2(2) of CPC.

19. Considering the above facts and circumstances, I am of the considered view that present appeal is not maintainable in this court and same is accordingly dismissed.”

21. It is the settled position in law that the nomenclature of an application does not govern the nature of the application, or the order passed in the same. Clearly the order passed by the Executing Court in this case is one under Section 47 CPC and not under Order XXI Rule 97 CPC. The question as to whether the Judgment Debtor is covered under the term “any person” in Rule 97 does not even arise in the present petition inasmuch as the said provision has in fact been wrongly invoked in the title of the application. The order passed is one for implementing the mandatory injunction as granted by the original decree dated 24th December, 1999 along with restitution in the form of damages. Such an order cannot constitute an order under Order XXI Rule 97 CPC and is clearly an order under Section 47 CPC.

22. In cases of this nature, if the Judgment Debtor himself is provided repeated remedies for indirectly challenging the judgment/decreed which has attained finality, that too by invoking provisions which are not applicable, the same would result in complete injustice. The decree which is sought to be executed in the present case was originally passed in 1999 i.e., two decades ago. The same was upheld in 2018. As per the said decree, the Judgment Debtors had to restore the property to its original condition which they failed to

do. The Executing Court has given effect to the said decree. No issues have been raised before the Executing Court, which warrant any enquiry. If such orders are held to be appealable, the same would result in providing repeated remedies to a Judgment Debtor who was a party to the original decree which has attained finality. Any interpretation that delays the execution ought to be avoided. The ADJ –as the Appellate Court was right in the view that was taken. Accordingly, the present petition and all pending applications are dismissed.

**PRATHIBA M. SINGH
JUDGE**

MARCH 19, 2020

Rahul/Rg

