

Jagdish Lal and another v. Surender Kumar and others  
(J. V. Gupta, J.)

to the post in question. In the absence of any allegations of *mala fides*. We see no justification for respondent No.1 not to comply with the fresh requisition made by the Government for re-advertising the post. As already noticed, the post was advertised first in 1981 and then twice in 1982, but no eligible/suitable candidate was available on those occasions. These facts are indicative of the *bona fides* of the Government in making a fresh effort by raising the maximum age limit so as to attract better talent.

(6) In view of what has been discussed above, the Writ Petition is accepted and for the purpose of enforcing the statutory duty cast upon respondent No. 1 under Article 320 of the Constitution of India, a Writ of Mandamus is issued to the said respondent to comply with the fresh requisition made by the State Government to re-advertise the post of Assistant Professor of Dentistry with the modification in regard to the maximum age limit i.e. 45 years, as stipulated under the amended Services Rules. As the matter of selection has been hanging fire for the last three years, it is hoped that respondent No. 1 shall do the needful with due promptitude. In regard to the prayer on behalf of the petitioner for issuance of a direction to the respondents to consider his claim for the post of Assistant Professor Dentistry, no such direction is necessary as it is averred in the written statement of the Government that the application of the petitioner shall be forwarded to the Commission as and when the post is re-advertised. In the peculiar circumstances of the case, we make no order as to costs.

D. S. Tewatia, J.—I agree.

N.K.S.

Before J. V. Gupta, J.

JAGDISH LAL AND ANOTHER,—Appellants.

*versus*

SURENDER KUMAR AND OTHERS,—Respondents.

Execution Second Appeal No. 240 of 1984

July 24, 1984

*Code of Civil Procedure (V of 1908)—Section 47 and Order 21, Rules 97, 99, 101 and 103—Decree for possession of immovable property—Execution of—Decree holder filing a petition under Order 21 Rule 97 alleging obstruction by the judgment-debtor—Judgment-debtor in reply claiming fresh tenancy and seeking dismissal of the*

*petition—Trial Court accepting the objection of the judgment-debtor and holding the decree to be inexecutable—Trial Court—Whether deemed to have decided the objections under section 47—Appeal against the order of the Trial Court—Whether maintainable—Section 47 and Order 21 Rules 97 and 101—Difference between the two—Stated.*

*Held*, that under section 47 of the Code of Civil Procedure, 1908, questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree are covered whereas under Order 21, Rule 97 read with Rule 101 of the Code, questions including those relating to right, title or interest in the property arising between the parties to the proceeding on an application under Rule 97 or Rule 99 of Order 21 are to be determined by the executing Court. The reply-cum-objection petition filed to the application, filed on behalf of the decree-holder, was not covered by the provisions of Order 21, Rule 97 of the Code. The language of Rule 97 of Order 21, provides that where the holder of a decree for possession of immovable property 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. The language used is "obstructed by any person". It may be by the judgment-debtor or by a third person. Sub-rule (2) of Rule 97 further provides that where an application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions thereunder contained. The cumulative effect of all these rules read with rule 101 is that if an application under Order 21, Rule 97 is made, then its determination will be under Rule 101 and then Rule 103 further provides that where an application is adjudicated upon under Rules 98 or 100, the order made thereon shall have the same force and will be subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, section 47 and Order 21, Rule 101 of the Code contemplate different situations. Under section 47, all questions relating to the execution, discharge or satisfaction of the decree have to be determined by the executing Court whereas under Rule 101 all questions including questions relating to right, title or interest in the property arising between the parties to the proceedings have to be determined by the executing Court. There is, thus, no conflict between the two provisions. Section 47 is a general provision whereas Order 21 Rules 97 and 101 deal with a specific situation. Moreover, section 47 deals with executions of all kinds of decrees whereas Order 21 Rules 97 and 101 deal only with execution of decree for possession. Apart from that, prior to the amendment of the Code in 1976, every order falling under section 47 was appealable whereas now only certain orders as provided for under Order 21 have been made appealable. The order of the trial Court accepting the objections of the judgment-debtor and holding the decree to be inexecutable was appealable under Rule 103 read with Rule 101 of Order 21 of the Code.

(Paras 3 & 4).

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*Execution Second Appeal from the order of the Court of Shri Krishan Kant Aggarwal, Additional District Judge, Rohtak, dated 17th January, 1984, reversing that of Shri J. K. Sud, HCS, Senior Sub-Judge, Rohtak, dated 30th October, 1982, dismissing the reply-cum-objection petition of the respondents J.Ds, and further holding that the decree passed in Civil Suit No. 41 of 1979 by Shri P. L. Goel, then Sub-Judge, II Class, Rohtak, has not been satisfied but is still executable even as against Jagdish Lal and Suresh Kumar, respondents-J.Ds. The D.Hs. would be at liberty to apply to the executing court for or due execution of the decree.*

S. C. Kapur, Advocate, for the Appellant.

R. S. Mittal, Senior Advocate (N. K. Khosla and Harsh Kumar, Advocates with him for No. 1.)

#### JUDGMENT

J. V. Gupta, J.:

(1) The brief facts giving rise to this appeal are as under :—

Surinder Kumar and others, sons of Jai Narain, filed a suit for possession of the shop in dispute by way of redemption against Jagdish Lal and Suresh Kumar appellants on February 24, 1979. The main plea taken by the defendants was that they were tenants prior to the mortgage and, therefore, they could not be dispossessed even if the mortgage is redeemed. However, the trial court decreed the suit on August 2, 1980. Immediately thereafter, an execution application was filed on behalf of the decree-holders on August 7, 1980. Meanwhile, an appeal against the said decree of the trial Court was filed and therein the order for staying the execution of the decree was obtained. The said appeal was dismissed on February 11, 1981. Thereafter, the execution application was restored and warrants of possession were issued on February 24, 1981. On February 25, 1981, when warrants were being executed, the judgment-debtors resisted the same and obstructed in obtaining possession of the shop in dispute. As a result thereof, the decree-holder Surinder Kumar, filed an application purporting to be one under Order 21, Rule 97, Civil Procedure Code in which it was prayed that orders for police help along with orders of breaking open the lock, etc., be given for delivery of possession along with fresh warrants. On March 18, 1981, the judgment-debtors Suresh Kumar and Jagdish Lal filed an application purporting to be reply to the application filed on behalf of the decree-holders

under Order 21, Rules 97 and 98, Civil Procedure Code. It was prayed therein that the notices issued by the Court under Order 21 Rule 97, Civil Procedure Code, may kindly be withdrawn and the execution application be dismissed as the same is inexecutable. It was stated therein that after the appeal filed on behalf of the judgment-debtors was dismissed on February 11, 1981, Ashok Kumar—one of the decree-holders, was requested to increase the rent and allow them to continue in possession. According to them Ashok Kumar agreed to double the rent and to allow them to continue as tenants provided rent for six months was paid in advance. Accordingly, they paid to Ashok Kumar a sum of Rs. 300 as advance rent from February 15, 1981 to August 14, 1981 for which a receipt was executed by Ashok Kumar in favour of Suresh Kumar. On these facts, it was contended that the objectors are in possession of the disputed property as tenants in their own rights and could not be thrown out in the execution proceedings which has thus become inexecutable. On the pleadings of the parties, the executing court framed the following issues:—

- (1) Whether Ashok Kumar decree-holder created a fresh tenancy in favour of Suresh Kumar on February 15, 1981?
- (2) Whether Ashok Kumar received advance rent in the sum of Rs. 300 from 15th February, 1981 to 14th August, 1981 and also executed receipt in this behalf?
- (3) Whether Ashok Kumar was not competent to let out the premises in dispute to Suresh Kumar as alleged in the reply?

The executing court under issues Nos. (1) and (2), discussed together, found that it was established on the file that Ashok Kumar—one of the owners-landlords created fresh tenancy in favour of the objectors on February 15, 1981 and received rent at double the rate for six months, that is, from February 15, 1981 to August 14, 1981. Under issue No. (3), it was held that it was not established that Ashok Kumar was not competent to let out the shop to Suresh Kumar. In view of the these findings, the objection petition was allowed and the decree was held to be in-executable. In appeal, filed on behalf of Surinder Kumar, decree-holder, a preliminary objection was taken that the appeal as such was not maintainable, since the objections will be deemed to have been decided

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under Section 47 of the Code of Civil Procedure and according to the amended Code of Civil Procedure, no appeal as such was competent. However, the learned Additional District Judge overruled the said preliminary objection as it was found that the objections were filed in proceedings under Order 21 Rule 97, Code of Civil Procedure and in view of the provisions of Order 21, Rule 103 of the Code, it amounts to a decree and thus the appeal was maintainable. On merits, the lower appellate Court found that the finding of the executing court under issues (1) and (2) was correct. However, it was further found that Surinder Kumar, decree-holder had become the exclusive owner of the shop in dispute with effect from April 6, 1979, on the basis of the partition decree exhibit DH/1 and therefore, Ashok Kumar was not competent to let out the shop in dispute to Suresh Kumar. In view of this finding it was concluded that Suresh Kumar and Jagdish Lal objectors did not become the tenants of the shop in dispute as claimed by them. Consequently, the reply-cum-objection petition filed on behalf of the appellants dated March 18, 1981 was dismissed. Dissatisfied with the same, the objectors have filed this Second Appeal in this Court.

(2) Learned counsel for the appellants, vehemently contended that the executing court while allowing the Objection petition, will be deemed to have decided the same under Section 47 of the Civil Procedure Code and, therefore, no appeal as such was competent against the said order of the executing court. According to the learned counsel from the nature of the issues framed and the objections filed on behalf of the appellants, it was quite evident that they are related to the execution, discharge or satisfaction of the decree and, therefore, the same were covered by the provisions of Section 47 of the Civil Procedure Code and it has been wrongly held by the lower appellate court that the objection petition will be deemed to have been filed in the proceedings under Order 21 Rule 97 and decided under Order 21 Rule 103, Civil Procedure Code. The main argument of the learned counsel is that the objections are fully covered under section 47 and not under Order 21 Rule 97, Civil Procedure Code. In support of his contention, he referred to *Dharamadevan and Others v. Kesavan Unniparan and another*, (1)

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(1) AIR 1971, Kerala 221.

*Shri Santa Singh v. Shri Dial Singh and another*, (2); *State of U.P. and another v. Mahendra Tripathi* (3); and *Shri 108 Pujay Pad Advait Panch Parmeshwar Panchayati Akhara Bara Udasin Nirman and another v. Rameshwar Mandal and others*, (4).

(3) After hearing the learned counsel for the parties on this point, I do not find any force in this contention. Under Section 47 of the Code of Civil Procedure, questions arising between *the parties to the suit* relating to the execution, discharge or satisfaction of the decree are covered whereas under Order 21, Rule 97 read with rule 101 of the Civil Procedure Code, questions including those relating to right, title or interest in the property arising between *the parties to the proceeding* on an application under Rule 97 or Rule 99 of Order 21 are to be determined by the executing court. It could not, therefore, be successfully argued on behalf of the appellants that the reply-cum-objection petition filed to the application, filed on behalf of the decree holder, dated March 2, 1981 was not covered by the provisions of Order 21, Rule 97, Civil Procedure Code. The language of rule 97 of Order 21 provides that where the holder of a decree for possession of immovable property 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. The language used is "obstructed by any person". It may be by the judgment-debtor or by a third person. Sub-rule (2) of the said rule 97 further provides that where an application is made under sub-rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions thereunder contained. Sub-rule (2) of rule 98 of Order 21, further provides that where upon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor or by some other person at his instigation or on his behalf, he shall direct that the applicant be put into possession of the property. Rule 101 of Order 21 provides as under :—

“—All questions (including 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 or their representatives, and relevant to the

(2) 1980, P.L.J. 551.

(3) AIR 1984 All. 59.

(4) AIR 1984 Patna 95.

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adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

Thus the cumulative effect of all these rules read together is that if an application under Order 21, rule 97 is made, then its determination will be under rule 101 and then rule 103 further provides that where any application has been adjudicated upon under rules 98 or 100, the order made thereon shall have the same force and will be subject to the same conditions as to an appeal or otherwise as if it were a decree.

(4) Even if it be assumed that the questions in the instant case related to the execution, discharge or satisfaction of the decree, even then the question depended on the right, title or interest which the appellants claimed in the shop in dispute because of the alleged fresh agreement in their favour executed by Ashok Kumar. Thus Section 47 and Order 21, Rule 101, C.P.C. contemplate different situations. Under Section 47, C.P.C. all questions relating to the execution, discharge or satisfaction of the decree have to be determined by the executing court whereas under rule 101 all questions including question relating to right, title or interest in the property arising between the parties to the proceedings have to be determined by the executing court. Thus there is no conflict between both the provisions as argued by the learned counsel for the appellants. Section 47 is a general provision whereas Order 21 rules 97 and 101 deal with a specific situation. Moreover, Section 47 deals with executions of all kinds of decrees whereas Order 21, rules 97 and 101 deal only with execution of decree for possession. Apart from that, earlier, i.e., prior to the amendment, every order falling under Section 47, C.P.C., was appealable (as the terms 'decree' included the order under Section 47, C.P.C.) whereas now only certain orders as provided for under Order 21 have been made appealable. In the cases relied upon on behalf of the appellants, it has nowhere been laid down that the questions to be determined under Order 21, rule 97 will be deemed to have been decided under Section 47, C.P.C., if it was between the judgment-debtor and the decree-holder. In this view of the matter, this contention is repelled. The

lower appellate Court rightly found that the order of the executing court was appealable as a decree under Order 21, Rule 103 of the C.P.C.

(5) It was next contended that the alleged partition between the brothers in the year 1975 which was declared by the civil court,—*vide* decree, dated April 6, 1979, was a sham transaction as it was never acted upon. According to the learned counsel for the appellants in spite of the said decree, the present suit for redemption was filed on behalf of all the brothers and no effort was made to bring it to the notice of the court that only Surinder Kumar decree-holder was entitled to redemption as the suit property had fallen in his share by partition. According to the learned counsel, Ashok Kumar being one of the decree-holders and a co-sharer had the right to let out the property and the finding of the lower appellate court in this behalf to the contrary was wrong and illegal. Reference in this connection was made to *Devi Das v. Mohan Lal* (5), *Sri Ram Pasricha v. Jagannath and others*, (6) and *Bhartu v. Ram Sarup*, (7). However, I do not find any force in this contention either. The admitted facts are that Jai Narain—the father of the decree-holders died on March 14, 1984. He left behind six sons; four daughters and a widow. Earlier a suit for declaration was filed on September 20, 1978 in which it was prayed that only sons of the deceased—Jai Narain, are entitled to succeed to his estate and the daughters and the widow had no right therein and the said suit was decreed. Immediately thereafter, the said six sons of the deceased—Jai Narain filed a suit for redemption on February 24, 1979 which was ultimately decreed on August 2, 1980. However, meanwhile since the family partition between the brothers, which had taken place earlier, was not being accepted by the various authorities, therefore, they had to file another suit for a declaration on March 5, 1979. The said suit was decreed on April 6, 1979. Since the suit for redemption had already been filed on February 24, 1979, the same was allowed to continue as such in spite of a decree for declaration with respect to the partition which had taken place earlier. Under these circumstances, it could not be successfully argued that the alleged partition between the brothers was a sham transaction. Thus the lower appellate court

(5) AIR 1982 S.C. 1213.

(6) AIR 1976, S.C. 2335.

(7) 1981 P.L.J. 204.

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rightly came to the conclusion that as a result of the partition of the property between the brothers, the shop in dispute had fallen to the share of Surinder Kumar-decree-holder, who had become its exclusive owner. I do not find any infirmity or illegality therein as to call for interference in this Second Appeal.

(6) Faced with this situation, the learned counsel for the appellants contended that the said partition being a pre-decree matter, the executing court could not go into the same as it will amount to modifying the decree sought to be executed. In support of this contention, reference was made to *Co-operative Bank, Haryana, Kalany Ram Sarup Ravi Dutt*, (8), *Sardarni Jaswant Kaur, etc. v. Surjit Inder Singh Sibia, etc.*, (9); and *Rajappa v. Sagar Krishnappa and Sons*, (10). I do not find any merit in this contention either. The question of partition between the brothers could not be said to be a pre-decretal matter between the parties to the present suit for redemption. It is those matters between the parties as such to a decree, which are relevant to the passing of the decrees which are forbidden to be pleaded in the executing court. The situation is different as regards the facts of the present case. Here the decree for declaration with respect to the partition between the brothers where the objectors were not arrayed as parties was passed on April 6, 1979, i.e., prior to the decree for redemption was sought to be executed. Thus it could not be successfully argued that it was a pre-decretal matter between the parties as such. The decree-holders tried to prove that Ashok Kumar decree-holder was not entitled to let out the property in dispute because he was no more the owner of the said property or a co-sharer therein because of the partition earlier. Therefore, this contention also fails.

(7) It was then contended that after the tenancy was created by Ashok Kumar in favour of the judgment-debtor-appellants, they stepped into the shoes of Ashok Kumar and they cannot be dispossessed by the decree-holders unless partition is sought. To

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(8) AIR 1953 Pb. 267.

(9) I.L.R. 1972(2) Pb. 2 Hy. 271.

(10) AIR. 1974 Karnataka 51.

support this contention reference was made to *South-Eastern Roadways v. Satyanarayan and others*, (11). This plea is not available to the appellants because the partition had already taken place between the decree-holders and according to the earlier finding, Ashok Kumar was not entitled to lease out the property when he ceased to be the co-sharer therein by virtue of the partition between the brothers.

(8) Lastly it was contended that possession will be deemed to have been delivered to Ashok Kumar when he accepted the appellants as his tenants on his behalf as well as on behalf of the other co-sharers and thus the decree stands satisfied. According to the learned counsel, it was not necessary that decree must be satisfied by way of execution. Again there is a fallacy in this argument. Once it is found that Ashok Kumar was not competent to let out the premises, this question does not arise.

(9) On behalf of the decree-holder-respondents, it was contended that it has been wrongly held by the courts below that Ashok Kumar executed receipt exhibit O/1 by virtue of which he rented out the premises in dispute to Suresh Kumar. According to the learned counsel the said receipt or the plea of the tenancy created by Ashok Kumar was never taken by the judgment-debtors earlier when they filed a criminal complaint on February 25, 1981 nor at the time when resistance was shown to the execution of the decree. Thus, argued, the learned counsel, the story was an after-thought and the so-called receipt, exhibit O/1 was created just to meet the situation. In any case, in view of the finding that Ashok Kumar was not competent to let out the premises because of the partition between the brothers in the year 1975, this question need not be gone into in this Second Appeal.

(10) As a result of the above discussion, this appeal fails and is dismissed with costs.

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(11) 1982(2) Rent Control Reporter 362.