

(1982) 09 MAD CK 0049
In the Madras High Court

Ammakannu Ammal

APPELLANT

Vs

Natesa Thevar (died) and Others

RESPONDENT

Date of Decision : 06-09-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 32, Order 21 Rule 97, Order 21 Rule 98

Citation : (1984) ILR (Mad) 388 : (1983) 96 LW 530 : (1984) 1 MLJ 187

Hon'ble Judges : V. Balasubrahmanyam, J

Bench : Single Bench

Judgement

V. Balasubrahmanyam, J.—In this second appeal a nice point arises in the administration of the execution chapter of the Civil Procedure Code. The question is about how adequate Order 21 of the Code could be to tackle a situation which had arisen in this case.

2. The case is one where the decree-holders had obtained a mandatory injunction against their neighbour. The mandatory injunction was to demolish a superstructure in the suit land. The judgment-debtors did not comply with the decree. When the decree-holders proceeded to file an execution petition, the judgment-debtor's mother who had trespassed into the superstructure in the meantime, offered obstruction. The decree-holders filed an application for removal of the obstruction. The executing Court ordered the application and ordered the obstructor to remove the obstruction, holding that she was a trespasser. She filed a statutory suit for establishing her title to the superstructure. This suit failed in the trial Court and in the first appellate Court. In this second appeal filed by the obstructor her learned Counsel put forward more than one contention. The first was that the Courts below were in error in holding that the obstructor had no title to the superstructure. This contention can be easily disposed of. The basis of the obstructor's claim was that she got the property under an oral partition. She relied on a partition chit. Both the Courts below had rejected this chit as a pure fabrication. Since this finding is supported by materials on record, the learned Counsel could not make good his contention

that the finding is erroneous in point of law.

3. The next arguments of the obstructor's learned Counsel was more law-oriented, although it had not been put forward at earlier stages. The endeavour of learned Counsel was to show that even the decree-holder's application for removal of obstruction was misconceived. It was said that such an application was not within the contemplation of Order 21 of the Code, and the only remedy available to the decree-holders against the obstructor was to have filed a suit for possession. An argument of this kind comes a little too late, considering that the order passed by the executing Court ordering the removal of the obstruction had long ago become final, not having been questioned by the obstructor in a higher forum. Anyway, I proceed to examine the point raised, since it is one of jurisdiction .

4. It was urged by the obstructor's learned Counsel that the decree-holder's application for removal of obstruction did not lie under Order 21, Rule 97, which was the provision of law relied on in that application. This is a technical objection which no Court countenances nowadays. For, the principle is that the mere citation of a provision of law is of no significance. A wrong provision of law may have been quoted. Or no provision of law at all may have been quoted in the application. These laches are immaterial. The thing to be inquired into is whether the Court, has the requisite power to grant the kind of relief asked for by the suitor. We must, therefore, turn our attention to examining the relevant provisions. The obstructor's contention is that Order 21 contains no provision to enable the holder of a decree for mandatory injunction to apply to the executing Court for the removal of obstruction. Order 21, Rule 97, it was pointed out, has pertinence only to a case where a decree for possession under execution encounters an obstruction by a third party obstructor. It was contended that the language of Order 21, Rule 97 was not capable of any wider application to include, for instance, a motion for removal of obstruction filed by the holder of a decree for mandatory injunction.

5. It may be conceded that Order 21, rule 97, must be strictly confined to proceedings in execution of a decree for possession, having regard to the clear limiting words enacted in the text of Rule 97. But, the question is whether the Court executing a decree for mandatory injunction has power to remove an obstruction, even though Order 21, Rule 98 does not provide for it and even though Order 21 has no other express provision conferring such power on the executing Court. The answers to my mind is in the affirmative. The contention of the obstructor's learned Counsel to the contrary is erroneous. The mistake lies in supposing that Order 21 of the Code is so exhaustive of the Court's powers in execution that whatever is left unexpressed in it must be held to have been deliberately left out of the scope of the jurisdiction. Order 21 is by no means an exhaustive Code on the subject of execution of decrees. It is only its length and attention to details that give Order 21 the humbug impression of exhaustiveness. There are fearful gaps in the rules on vital topics in execution. If the statute

makers had the imagination to visualise these situations might have made provision for them too. But, the fact that there are gaps and they remain so does not mean those represent lacunae in the legislation which can be filled only by legislative enactment. In other words, Order 21 does not exhaustively define the jurisdiction and powers of the executing Court. It only enumerates them in its various rules. The incompleteness in numeration is however nothing serious; it only affords scope for the invocation of implied or ancillary powers in appropriate cases to see if the executing Court can grant the relief asked for. That Order 21, Rule 32 provides for execution of a decree for injunction in a particular fashion, namely, by committing the judgment-debtor to a civil prison does not mean that the executing Court is altogether benefit of its implied or ancillary powers not only against the judgment-debtor himself but also against a third party hindering the execution of its decree. This is because, enumeration of powers of a particular kind does not rule out the exercise of appropriate enabling or ancillary powers of another kind to make execution an effective instrument to help the decree-holder realise the fruits of his decree.

6. Here is a case where the judgment-debtor, mother plays the obstruction and with impunity, if we accept the findings of the Court, as we must. The decree is for demolition of the offending superstructure. The judgment-debtors had made themselves scarce and this woman, their mother, squats on the property. From the viewpoint of execution being a judicial machinery for enforcement of Court decree I can find no difference, in substance, between obstruction to a decree for possession and obstruction to a decree for mandatory injunction, from a third party. It would be an intolerable distinction to maintain if the holder of a decree for possession can apply to the executing Court summarily dealing with a third party obstructor, but the holder of a decree for mandatory injunction cannot. In my judgment, in the absence of an express prohibition in the Code preventing the Court from removing the obstruction in execution of a decree for mandatory injunction, the executing Court in this case was right in passing an order of that kind against the mother of the judgment-debtors. As for her suit to set aside the summary order against her, I have given my reasons for holding that both the Courts below were right in dismissing it. This second appeal is also accordingly dismissed. Having regard to the relationship between the parties, however, there will be no order as to costs.