
(2005) 01 KL CK 0009
In the High Court Of Kerala
Case No : C.R.P. No. 646 of 1996

K.C. Vasumathy Amma and Another	APPELLANT
Vs	
Makkancherry Janaki Amma and Others	RESPONDENT

Date of Decision : 11-01-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 35, Order 21 Rule 35(3), Order 21 Rule 97, Order 21 Rule 97(2)

Citation : AIR 2005 Ker 154 : (2005) 1 ILR (Ker) 449

Hon'ble Judges : K. Thankappan, J

Bench : Single Bench

Advocate : P.N.K. Achan, V.V. Surendran and P.A. Harish, for the Appellant; Suresh Kumar Kodoth, K.K.M. Sheriff, P.M. Mohamed Shiraz (for Amin) and V.T. Madhavanunni, for the Respondent

Judgement

K. Thankappan, J.—The revision petition is filed against the order dated 12-2-1996 in E.P. No. 221/899 in O.S. No. 2/1958 on the file of the Sub Court, Kozhikode.

2. The short facts leading to the revision petition are as follows :- Judgment-debtor is the revision petitioner. After the death of the original revision petitioner, C.M.P. No. 2314/2003 was filed for impleading the legal heirs of the original revision petitioner as additional 2nd revision petitioner and additional respondents 2 to 7. After issuing notice to the supplemental respondents the petition for impleading is allowed. As per the decree, item No. 104 was sought to be delivered. The delivery was obstructed. No delivery affected and the E.P. was dismissed. Subsequently the E. P. was restored to file. By the impugned order symbolic delivery of item Nos. 31 to 34 and actual delivery of item No,. 104 were ordered. The petitioner contended that there was obstruction to delivery of possession to the decree holders and the procedure for removal of obstruction is under Order XXI, Rule 97, which was not resorted to by them. Hence, the impugned order is illegal.

3. Learned senior counsel appearing for the revision petitioner Sri. P. N. K. Achan submits that the obstruction made by the revision petitioner has been brought to the notice of the Court. Without considering that the order under challenge has been passed. As per the provisions of Order XXI, Rule 97, if any obstruction is made it shall be adjudicated by the Court. Instead the decree holders filed an application under Order XXI, Rule 35(3) CPC. Learned counsel also submits that delivery ordered as per the impugned order is against the provisions contained under Order XXI, Rule 97, CPC.

4. Learned counsel appearing for the respondents submits that the decree-holders have right to adjudicate the matter under Order XXI, Rule 35, CPC if there was obstruction for the delivery of the property and the order impugned is sustainable in law.

5. From the records made available to this Court it is seen that there was obstruction of the delivery of the property and that was reported by the Amin before the Court below. The case of the petitioner is that the property is in his possession even after the delivery was ordered. This Court is not in a position to see that whether delivery is effected as per the impugned order or not. Since the Amin reported that there was obstruction, the matter should be adjudicated as per the provision contained under Order XXI, Rule 97, CPC. Order XXI, Rule 97 of the CPC reads as follows:-

"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 provision herein contained."

Reading of the above provision would indicate that if any resistance or obstruction is made, it is for the decree holder to take steps under Order XXI, Rule 97, CPC. In this context, decision of the Supreme Court reported in *Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another*, is relevant. In the above decision the Supreme Court held that when an application was made under Order XXI, Rule 97(2), the Court should adjudicate the same. It also held that executing Court must first adjudicate upon objections on merits under Rule 97(2) read with Rule 101 and 98 instead of insisting upon first handing over possession. In the decision reported in *Anwarbi Vs. Pramod D.A. Joshi and Others*, the Supreme Court held that it was for the decree holder to take appropriate steps under Order XXI, Rule 97 for removal of obstruction. Even in an earlier decision reported in *Kazi Akeel Ahmed Vs. Ibrahim and Another*, the Supreme Court held that when an application under Order XXI, Rule 97(2) was made, the matter should be investigated by the executing Court.

6. In the light of the decisions referred to above and considering the facts and circumstances of the case, this Court is of the view that the matter has to be considered in detail by the Court below. Hence, the order under challenge is set aside and the matter is remanded back to the Court below to re-decide the execution petition. In this context, observation contained in paragraph 10 of the decision in Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, that the application under Order XXI, Rule 35, sub-rule (3) had to be treated to be an application under Order 21, Rule 97, CPC is relevant. Hence, the application filed by the respondents under Order XXI, Rule 35(3) CPC shall be treated as a petition filed under Order XXI, Rule 97, CPC and re-decide the execution petition. Status quo as on today will be maintained till the matter is decided by the Court below. Since the matter is an old one, it shall be decided as early as possible, at any rate within six months from the date of receipt of copy of this judgment.

The revision petition is allowed as above. No costs.