

(1968) 12 GUJ CK 0008
In the Gujarat High Court

Case No : Civil Revision Application No. 822 of 1965

Maneklal Nathalal Jingar

APPELLANT

Vs

Ochhavlal Chhaganlal and Another

RESPONDENT

Date of Decision : 03-12-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 21 Rule 35 , Order 21 Rule 97
Limitation (Amendment) Act, 1896 — Article 129
Limitation (Amendment) Act, 1963 — Article 129

Citation : AIR 1970 Guj 49 : (1969) GLR 654

Hon'ble Judges : V.R. Shah, J;B.J. Divan, J

Bench : Division Bench

Advocate : B.J. Shelat, for the Appellant; N.H. Bhatt, for the Respondent

Judgement

1. This application raises a short point about limitation in respect of an application made under Order 21, Rule 97 of the CPC and arises under the following circumstances:

2. The petitioner -original decree-holder obtained a decree for possession against opponent No. 1-Original judgment-debtor. He filed Darkhast NO. 569 of 1964 and a warrant for possession was issued under Order 21. Rule 35 of the Civil Procedure Code. The opponent No.2 resisted the delivery of possession and thereafter the petitioner withdrew his Darkhast on 2-4-1965. He filed another Darkhast NO. 220 of 1965 and obtained a fresh warrant for possession on 25-4-1965. Opponent No. 2 again resisted the delivery of possession to the petitioner and the petitioner filed Miscellaneous Application No. 156 of 1965 on 26-4-1965 under the provisions of Order 21, Rule 97 to remove the resistance made by the opponent No. 2 and for possession of the premises. It does not appear from the record of the case before us as to when the first resistance was made by opponent No. 2, but it was conceded on behalf of the petitioner that the first resistance was made more than 30 days before the filing of Miscellaneous Application No. 156 of 1965. The learned trial Judge dismissed this application on

the ground that it was barred by limitation under Article 129 of the Indian Limitation Act, 1963 (hereinafter referred to as "the Act").

3. The learned trial Judge came to the conclusion that the second resistance was made by the same person in same character and therefore, though the application was made within 30 days from the date of the second resistance by opponent No. 2, the limitation in fact began to run from the date of the first resistance; and since the application was filed more than 30 days after the first resistance, it was barred by the provisions of Article 129 which prescribes for such an application, a period of 30 days from the date of resistance or obstruction. Having arrived at these findings, the learned trial Judge dismissed the application of the petitioner. It is against the dismissal of this application that the petitioner has filed this Civil Revision Application.

4. On behalf of the petitioner it was urged that under the provisions of the Civil Procedure Code, so long as the decree for possession is alive and enforceable, he is entitled to file a Darkhast and to obtain a warrant for possession of the property under Order 21, Rule 35. Under Order 21, Rule 97 he is entitled to make an application to the Court complaining of resistance or obstruction to delivery of possession to him every time such resistance or obstruction is caused by any person. It is further contended that the provisions of Order 21, Rule 97 entitling him to make an application complaining of such resistance or obstruction are not mandatory but are merely permissive and enabling and intended to provide a summary remedy to him to remove the resistance or obstruction without filing a suit in the first instance. Article 129 of the Act prescribes a period of 30 days from the date of the resistance or obstruction as the period during which such an application should be made. The contention on behalf of the petitioner. Therefore, is that it is open to him to ignore the previous obstruction and to make an application under Order 21, Rule 97 in respect of the subsequent obstruction and that every obstruction or resistance gives him a fresh cause for making an application under Order 21, Rule 97; and therefore, if he makes an application within 30 days from the date when the obstruction or resistance complained by him has been caused, his application is within time.

5. On behalf of the opponent No. 2, his learned advocate Mr. Bhatt supported the judgment of the learned trial judge. He argued that if every act of resistance were deemed to give a fresh period of limitation, such a proposition would be in conflict with the provisions of Order 21, Rule 103. He urged that if such a proposition were accepted, it would enable a decree-holder who had applied under Order 21, Rule 97 against a previous resistance and failed therein, again to take out a warrant for possession and thereafter to make a second application against a fresh obstruction or resistance and he would again call upon the Court to investigate into the right of the obstructor or resister. Mr. Bhatt urged that in this manner, the provisions of Order 21, Rule 103, which make the decision of the Court on an application under Order 21, Rule 97 final, will be nullified.

6. The argument of Mr. Bhatt is devoid of any substance. If the Court

investigates into the claim of the resister or obstructor on an application under Order 21, Rule 97 and decides not to remove that obstruction or resistance, that order itself becomes final and conclusive, subject to the result of a suit, under Order 21, Rule 103. Therefore, the executing Court will not be competent to go over again into the merits of a second application complaining of resistance or obstruction under Order 21, Rule 97.

7. The learned trial Judge relied upon certain observations in the case of *Mukund Bapu Jadhav Vs. Tanu Sakhu Pawar*, . That is a case decided by a Full Bench of the Bombay High Court. In that case the judgment-creditor who had taken out a warrant for possession under Order 21, Rule 35 and who was obstructed in the delivery of possession to him, did not file an application under Order 21, Rule 97 complaining of such an obstruction. The Darkhast in which the warrant for possession was issued, was struck off the file on 21st of January 1927. The judgment-creditor filed a fresh Darkhast on 6th July 1927 and asked for issue of a warrant for possession under Order 21, Rule 35. Both the Courts below came to the conclusion that the application for a fresh warrant to obtain possession under Order 21, Rule 35 did not lie as the Judgment-creditor did not file an application under O. 21, R. 97 in respect of the resistance to delivery of possession in the first Darkhast. The Full Bench held, after consideration of certain decisions, that because of the mere fact that the judgment-creditor did not file an application complaining of the obstruction in the first Darkhast, he was not disentitled from filing a fresh Darkhast and from obtaining a fresh warrant for possession under Order 21, Rule 35. That was the only point before the Full Bench for decision and the Full Bench decided it in favour of the judgment-creditor, holding that he was entitled to a fresh warrant for possession under Order 21, Rule 35. *Baumont, C. J.*, who delivered the leading judgment, observed on page 456:-

"All that the applicant is asking at the moment is that a fresh warrant for possession may issue under R. 35, and to that, I think, he is entitled. That really disposes of the appeal, because we are not dealing today with the rights which may accrue under that fresh warrant. But as the whole question has been argued, and as the rights accruing under the warrant will arise for decision at a later stage of these proceedings. It is, I think, desirable that we should indicate our opinion upon the point."

The learned Chief Justice then proceeded to consider as to what would be the position of the obstructor if he obstructed the delivery of possession in pursuance of the fresh warrant and the judgment-creditor made an application under Order 21, Rule 97 against the obstructor. Dealing with this point, he observed as follows:-

"..... it will be open to the party obstructing to show that his obstruction is by the same person and in the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Art 167 will then be a bar to the decree-holder's application. The mere fact that the

application is made in respect of a fresh warrant for possession does not, in my view, involve that the obstruction is a fresh obstruction."

We may mention that Article 167 in the Limitation Act of 1908 corresponds now to Article 129 of the Limitation Act of 1963. In so expressing itself, the Full Bench dissented from the decision in *Narain Das v. Hazari Lal* (1896) ILR 18 All 233. It is clear that the above observations about bar of Article 167 of the Limitation Act of 1908 were not necessary for the decision of the actual point involved in the case before the Court. This is in terms stated by the Court. The Court, however, decided to indicate the view in case the decree-holder was again obstructed in execution of the fresh warrant. It is clear therefore, that these observations of the Full Bench are obiter and therefore, not binding upon us, though they are entitled to due weight. No other authority was shown to us on behalf of the petitioner.

8. The other view, which is adopted by several of the other High Courts in India is to the effect that every resistance or obstruction gives rise to a fresh period of limitation which begins from the date of the particular resistance or obstruction complained of. The main reasons on which these High Courts have based the above view can be summarised as follows:-

9 (1) Making of an application under Order 21, Rule 97 complaining about the resistance or obstruction to delivery of possession is permissive and an enabling provision for the decree-holder and he is not bound to make such an application. No penalty of any nature can be imposed upon the litigant if he fails to avail himself of a merely permissive or enabling remedy.

(2) The different rules of Order 21, deal with procedure in execution of a decree. The issuance of a warrant for possession is a step in the entire procedure for helping the decree-holder to obtain the fruits of his decree. The decree-holder is entitled to say to the Court at any stage of the procedure that he would not like to have the help of the Court any more. Merely because he does not ask the Court to help him any further, it would not deprive him of his right to go to the Court again at any time during which his decree is alive and enforceable.

(3) When a person resists or obstructs delivery of possession he merely intimates to the decree-holder that he would not allow him to take possession. It is open to the decree-holder not to join issue with him at that time and to allow the warrant to lapse. This conduct of the decree-holder may be the result of (a) his belief that the claim of resister is correct, or (b) he may not, for some reason, be prepared to spend time and money at that particular time; or (c) he may feel that the claim of the resister or obstructor is of a temporary duration; or (d) he may think it advisable to deal with the resister or obstructor out of Court. Since the making of the application under Order 21, Rule 97 is permissive and not mandatory, the resistance or the obstruction that was occasioned at the first time comes to an end with the abandonment by the decree-holder of his right to enforce the warrant for possession by making an application for the removal of

resistance or obstruction. That obstruction cannot then be said to be continued when a fresh obstruction is made to delivery of possession under a fresh warrant for possession.

(4) Since the law allows the decree-holder to abandon, at his sweet will, the enforcement of warrant for possession and to apply for a fresh warrant for possession at any time so long as the decree for possession remains alive and enforceable, it is implicit in this right of the decree-holder that he can make an application under Order 21, Rule 97 every time he is obstructed or resisted.

(5) Article 167 of the Limitation Act of 1908 (corresponding to Article 129 of the Limitation Act of 1963) relates to a complaint of resistance or obstruction to delivery of possession of immovable property decreed and the period of limitation begins to run from the date of resistance or obstruction. The resistance or the obstruction mentioned in the third column of Article 167 refers to the resistance or obstruction of which the complaint is made in the application under Order 21, Rule 97.

If, therefore, the complaint is made regarding the second obstruction, time will begin to run from the date of the second obstruction and not from the date of the first obstruction.

These are the different reasons which have induced the High Courts of Calcutta, Madras, Allahabad, Patna, Travancore-Cochin and Sind to accept the view that even if the first obstruction was made by the same person in the same character as the second obstruction, in respect of the application under Order 21, Rule 97 complaining of the second obstruction, the time would begin to run from the date of the second obstruction and not from the date of the first obstruction. Some of the cases in which this view has been expressed by the High Courts are: (1896) ILR 18 All. 233; *The Official Trustee of West Bengal Vs. Monmothnath Sadhukhan*, ; *P.N. Pathak Sharma Vs. Sm. Renuka Debi and Others*, ; *Narayanswami v. Veerappa* AIR 1949 Mad 753; *Raghunandan v. Ramcharan* AIR 1919 Pat. 425(2) (FB); *S. Gnanappu v. T. Pillai* AIR 1957 Trav. Co. 287 and *Kotumal v. Gur Ashram* AIR 1947 Sind 118 . We are in agreement with the conclusion and the reasoning expressed in these decisions and, with respect, we do not think that the observations in *Mukund Bapu Jadhav Vs. Tanu Sakhu Pawar*, lay down the correct law.

10. It was urged on behalf of the opponent No. 2 that if the period of limitation were to run from the second obstruction it would make Article 129, a dead letter because every decree-holder finding that his application under Order 21, Rule 97 in respect of the first obstruction would be beyond time, would defeat this provision of the Limitation Act by taking out a fresh warrant for possession and thus invite a fresh resistance and then making an application within 30 days from the date of the second resistance, even though it may be more than 30 days after the first resistance. In our opinion, in view of the nature of the proceedings and the language of the Article in question, the fear expressed by Mr. Bhatt on

behalf of opponent No. 2 is more imaginary than real. What Article 129 of the Limitation Act of 1963 does is to bar the making of an application about the resistance or obstruction which was made more than 30 days ago. If a second obstruction is made, the complaint is not about the first obstruction but is about the second obstruction; and since the law allows the decree-holder to make such an application, it cannot be said that the provisions of Article 129 are made nugatory.

11. We, therefore, hold that the Miscellaneous application made by the petitioner on 26-4-1965 is not barred by limitation.

12. In the result, therefore, this revision application is allowed and the order passed by the learned trial Judge dismissing the application as barred by limitation is set aside and we remand the application back to the trial Court with a direction to proceed further therein in accordance with law. Opponent No. 2 will pay the cost of this revision application to the petitioner and bear his own. Rule made absolute with costs.

13. Petition allowed.