

(1997) 01 KAR CK 0030

In the Karnataka High Court

Case No : Regular First Appeal No. 500 of 1996

Shanoor Begum

APPELLANT

Vs

Rukn-ul-Mulk S. Abdul Wajid (deceased by LRs) and another

RESPONDENT

Date of Decision : 24-01-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18 (2), Order 21 Rule 97, 151, 54

Citation : AIR 1997 Kar 199

Hon'ble Judges : Chidananda Ullal, J

Bench : Single Bench

Advocate : S. Shekar Shetty, for the Appellant; Sri Tarakaram and M.M. Rehman, for the Respondent

Judgement

1. The instant appeal is filed by the Obstrucster to challenge the common order dt. 23-7-96 passed on I.A. No. 3 filed by the respondent 1(i) and 1(ii) herein, an unnumbered I.A. filed by the appellant -- Obstrucster u/s 151 of C.P.C. and a memo filed by the Court Receiver in FDP 56/86 passed by the Court of IX Additional City Civil Judge and Sesprovisions Judge at Bangalore City, whereby the Court while allowing I.A. No. 3 rejected the I.A. of the appellant -- Obstrucster and further directed that the obstruction placed by the appellant -- Obstrucster be removed with police help by the Court Receiver appointed by the Court to execute the warrant issued earlier by the Court to divide the suit property by metes and bounds or effect sale to distribute the sale proceeds among the parties in terms of the preliminary decree in the suit.

2. I heard Sri S. Shekar Shetty, the learned Counsel appearing for the appellant -- Obstrucster and Sri V. Tarakaram, Senior Counsel appearing along with M. M. Rehman, Advocate for the respondents Nos. 1(i) and (ii). I have also perused the records.

3. The whole case has a sad tale, for, what the Court would not have done, had done, without recourse to law, in the matter of dispossession of a person in settled possession of the property for long lapse of time, may be due to default,

totally forgetting for a moment that the Court shall condemn none without being heard. The facts in brief of the case are as hereunder :

That one Rukn-ul-Mulk S. Abdul Wajid since dead, had filed O.S. No. 480/55 as against one Hurmath Unnissa Begum, Smt. Mahmooda Begum, Sri S. M. Taqi, Sri S.M.R. Askari, Sri. S.M.H. Hassan and Smt. Siddique Begum (all since dead) and Sri. M. A. Azeem, Sri. Kamar, Smt. Naz and Smt. Mehar, all at Spencer's Road, Cleveland town, Civil Station, Bangalore. Now all the parties to the suit, except the defendants Nos. 7 to 10 to the original suit are all dead and gone and as such, the L. Rs. of the original plaintiff on the one side and the L.Rs. of the deceased defendants Nos. 1 to 6 and the living parties -- defendants Nos. 7 to 10 are pursuing the litigation presently in the stage of Final Decree Proceedings (in brief FDP henceforth) in No. 56/86 pending before the Court of IX Additional City Civil and Sessions Judge, Bangalore City (hereinafter referred to as the Court below for convenience) after the preliminary decree in the suit passed on 21-9-56 giving certain shares as per the Mohammedan Law, also confirmed by this Court on 21-10-59 in R.A. No. 9/57. For the reasons best known to the parties in the FDP, the FDP proceedings instituted under Sec. 54 and Order 20, Rule 18(2) read with Sec. 151 of C.P.C. was filed as late as on 1-10-86. Time had its own healing effect, finally, the parties thereto after warring for long came around to sell the suit schedule property as the same was not found to be divisible beneficially and for that purpose, the Court below had appointed on 17-1-1991 one Anis Askari, the respondent No. 2 herein in this appeal as the Court Receiver; of course the said Court Receiver appointed is none other than one of the L.Rs. of the original defendant No. 4 now arrayed as respondent No. 4(b) to the FDP proceedings before the Court below.

4. In pursuance of his appointment as Court Receiver, to put the parties into possession of their respective shares in the suit schedule property or in the alternative to sell the same and to distribute the said proceeds thereof among the parties in proportion to the extent of respective shares in terms of the preliminary decree, the Court below on 20-10-92 passed a considered order whereby the Court below directed to issue Receiver warrant in respect of the property, whereupon the Court Receiver was issued with the warrant accompanied by a copy of the preliminary decree and further the memo of instructions to effect sale after taking possession of the subject property in view of the fact that some persons including the appellant -- Obstrucater herein were squatting over therein. That the Court Receiver thereafter had visited the spot and filed his preliminary report on 15-12-93 together with the detailed sketch of the property and the copies of the notices he had issued to four persons including the appellant -- Obstrucater herein. It is stated that when three persons have received the copy of the original notice on 14-2-83 issued by the Court Receiver, the appellant -- Obstrucater is reported to have refused even to receive the same. In the said notice to the appellant --Obstrucater and three other persons, the Court Receiver directed therein that they had to vacate from the portions under their respective occupation. It is further directed in the said notice

that in the event of non-compliance of the demand made therein, the Court Receiver would be forced to take legal action against them. That in the said preliminary report dt. 15-12-93 filed by the Court Receiver before the Court below, at para 5 therein he had reported as follows :

"That the portion marked "A" in the sketch which is in the unauthorised occupation of one Smt. Shanoor Begum, a stranger and trespasser is in a totally dilapidated condition, unfit and dangerous for use and occupation. The front portion to the extent of 20" x 15" has no roof and the walls are crumbling down. Further in the rear portion measuring about 10" x 14", the roof as well as a portion of the wall have fallen down.

The Receiver prays that permission for arranging to demolish this entire portion after evicting the said Smt. Shanoor Begum and others in this portion may kindly be granted, there by preventing any untoward accident and safe guarding the life and property thereof.

5. That on 17-12-94 the Court Receiver submitted further report to the Court below, whereby he had reported that the suit schedule property is incapable of being divided by metes and bounds corresponding with the number of shares as per the preliminary decree and therefore, he intended to sell the suit schedule property to a prospective buyer -- M/s. Top City Builders Overseas Pvt. Ltd., Bangalore at a specified rate. He had also filed with the further report, a draft agreement of sale in a stamp paper. The said draft agreement was duly approved by the Court below to sell the suit schedule property in the name and favour of M/s. Top City Builders Overseas Pvt. Ltd., Bangalore.

6. That on 20-7-95, the Court Receiver also filed his second further report, wherein he reported to the Court below that some of the persons in the suit schedule property had delivered the portions under their occupation and the said portions are since in his possession. He had further reported in para 3 of the said second further report that the appellant -- Obstructer was in unlawful and unauthorised occupation of a small portion of the premises in a highly dilapidated condition and had refused to deliver the possession thereof and further that she had objected to the execution of warrant issued by the Court to effect sale. He further prayed therein for the help of the Court Bailiff to remove the appellant -- Obstructer from the dilapidated portion of the premises under her occupation, if necessary by Police help. In para 3 of the said second further report, the Court Receiver had stated as follows :

"That, as stated earlier in his reports the Court Receiver submits that a lady named Smt. Shanoor Begum is in unlawful and unauthorised occupation of a small portion of a fallen and dilapidated house situated in a small portion of the schedule property, and who is not a party to the proceedings and who has refused to receive the Notice of the Court Receiver and whose claim set up earlier has been rejected by this Hon"ble Court vide orders dt. 19-4-91 passed on I.A. No. 2, obstructs the execution of the Receiver warrant by creating scenes

on the spot and by quarrelling with the Court Receiver during the course of discharging his legal duties. The Court Receiver submits that he bona fide believes and apprehends breach of peace and unruly scenes on the spot during the course of his executing the warrant completely in this behalf. As such, the Court Receiver requires the help and assistance of a Court Bailiff and Police help in this behalf in order to carry out and comply with the directions of this Hon''ble Court and to completely execute the Receiver warrant thereof.

Wherefore the Court Receiver humbly prays that, this Hon''ble Court be pleased to grant/ order the help and assistance of a Court Bailiff in this regard and to evict the said Smt. Shanoor Begum from the dilapidated and fallen portion of the house with Police help in executing the Receiver warrant completely in the interest of justice and equity".

7. That on 19-9-95, the respondents 1(i) and (ii) herein (the petitioners Nos. 1 and 2 in the FDP proceedings before the Court below) had filed I.A. under Order 21, Rule 97 read with Sec. 151 of CPC numbered I.A. No. 3 before the Court below, whereby they had prayed for a direction to remove the resistance or obstruction placed by the appellant -- Obstrucuter or anybody claiming under her so as to execute the warrant issued to the Court Receiver to effect sale.

8. That the Court below on filing of that I.A. No. 3 by the respondents No. 1(i) and (ii) herein, directed issue of notice to the appellant -- Obstrucuter and on service of the notice, the appellant -- Obstrucuter appeared before the Court below and filed a detailed objection statement as against I.A. No. 3 wherein she had contended the following :

(i) That the proceedings being a final decree proceedings and the final decree in the suit was yet to be passed in pursuance of the preliminary decree, there was no decree-holder to maintain an I.A. under Order 21, Rule 97 of CPC.

(ii) That the appellant -- Obstrucuter was not claiming any title through the decree holders.

(iii) That she being the daughter of the original owner of the suit schedule property by name Amjad Ali and Hurmath Unnissa Begum, the original defendant No. 1 in O.S. No. 480/55, she i.e. the appellant -- obstrucuter was entitled to for 7/8th share in the suit schedule property and that the original defendant No. 1 -- Hurmath Unnissa Begum was entitled to for 1/7th share only as the residuary under the Mohammedan Law.

(iv) That the preliminary decree in O.S. No. 480/1955 was a nullity, she being a sharer to an extent of 7/ 8th share in the suit schedule property and further that she being not a party to the said suit O.S. 480/1955.

(v) That she was in physical possession of the entire suit schedule property for about four decades, that she paid the assessment in respect of the suit schedule property to the Corporation, City of Bangalore, that the khata in support of the suit schedule property stood in her name and that the City Survey had also

conferred title on her and that she filed even eviction case as against a tenant and got possession of a portion of the premises through Court order.

(vi) That she being in physical possession and enjoyment of the suit schedule property for more than 12 years had perfected her title even by adverse possession.

(vii) That the Court below had no jurisdiction to remove her from the possession of the suit schedule property, and

(viii) That the I.A. filed by the respondent Nos. 1(i) and (ii) before the Court below therefore was not maintainable and liable to be dismissed.

9. That the appellant -- Obstruter had filed yet another I.A. on 29-6-96 requesting the Court below to recall the order dt. 2-3-96 posting the I. A. No. 3 for hearing and further to post the same for enquiry. The respondents Nos. 1(i) and (ii) have opposed the said I.A. filed by the appellant -- Obstruter. In the meantime, on 25-8-95 the Court Receiver had filed a memo dt. 21-8-95 before the Court below praying the Court below to issue a specific direction/order for removal of the obstruction placed by the appellant -- Obstruter by Police help.

10. That the Court below had considered the said I.A. No. 3 Of the respondents Nos. 1(i) and (ii), I.A. dt. 29-6-96 filed by the appellant -- Obstruter under Sec. 151 (unnumbered) and the Memo of the Court Receiver for Police help both referred to above, together and the Court below was pleased to pass the impugned order which is now under challenge in the hands of the appellant -- Obstruter.

11. Sri Shekar Shetty appearing for the appellant -- Obstruter argued at length with several authorities in support of his argument. Though several grounds are urged in the appeal memorandum, Sri Shetty had restricted his argument to three points. They are; at the first instance that the I.A. under Order 21, Rule 97 read with Sec. 151 CPC resorted to by the respondents Nos. 1(1) and (ii) was not maintainable, at the second that even if the same was maintainable, the Court below would have held an enquiry as contemplated in sub-rule (2) of Rule 97 of Order 21 of CPC and at the third that the appellant --Obstruter would have been dispossessed by the Court Receiver only with recourse to law and not otherwise.

12. With regard to the first limb of his argument that the application under Order 21, Rule 97 was not maintainable, Sri Shekar Shetty argued that the provision of law in Order 21, Rule 97 of CPC could be invoked only in execution proceedings by a decree-holder and none else. He pointed out that, what was before the Court below was only final decree proceedings in pursuance of a preliminary decree passed in the Original Suit O.S. No. 480/1955 and as such, it could not be said that the lis had come to a close between the parties thereof and the respondents I(i) and (ii) were the decree-holders. Drawing my attention to the said provision of law under Order 21, Rule 97 of CPC, Sri Shetty further submitted that as long as there was no decree-holder and a judgment-debtor,

question of filing an application thereunder for removal of the obstructions in the hands of the appellant -- Obstructor did not arise at all or in other words, his argument is that, it is only in an execution case there would be an obstructor's application under Order 21, Rule 97 in the hands of a decree-holder and not otherwise. Citing a decision in Shankar Balwant Lokhande (dead) by L.Rs. Vs. Chandrakant Shankar Lokhande and Another, , he argued that unless and until the final decree is drawn in terms of the preliminary decree by partitioning the suit schedule property by metes and bounds and the decree is drawn on the stamp paper, there is no executable decree within the meaning of Sec. 2(2) of CPC. Citing yet another decision reported in Phoolchand and Another Vs. Gopal Lal, , Sri Shetty further submitted that there can be more than one preliminary decree in a partition suit and as long as the same had not reached finality, with the final decree being drawn in pursuance of the preliminary decree, or preliminary decrees if the shares were to be readjusted on settling up new disputes that might have arisen during the course of the proceedings in the final decree proceedings.

13. Departing from the above line of argument Sri Shetty alternatively argued that even if the Court below held that an I.A. under Order 21, Rule 97 was maintainable, it would have held an enquiry as contemplated under sub-rule (2) of Rule 97 or Order 21 of CPC. In support of that argument of his, he cited before me Paramound Industries Vs. C.M. Malliga, and Babulal Vs. Raj Kumar and Others, .

14. In Paramound Industries Vs. C.M. Malliga, the Division Bench of this Court held as follows :

"From the underlined words contained in sub-rule (1) of Rule 35 of Order 21, it is clear that the executing Court can execute the decree against the judgment-debtor and any person who is bound by the decree. Therefore, it is clear from the aforesaid Rule that if any person causes obstruction to the execution of a decree, it becomes necessary for the executing Court whether or not the decree-holder files an application for removing the obstruction under Order 21, Rule 97, CPC to decide the objections of the Obstructor and determine the question as to whether the objector/ Obstructor is bound by the decree or not. This determination falls under, and shall have to be made in accordance with, Rules 97, 98, 100 and 101 of Order 21 of the C.P. Code. Such determination also attracts Rules 103 and 104 of Order 21 of the C. P. Code. Until those objections are decided, the executing Court cannot proceed to execute the decree. To hold that such objections to the execution are not maintainable and the only remedy for such a person is to file a suit after he is dispossessed to establish his title and secure possession is a procedure which not only ignores the possessory right; but is it opposed to basic principles of jurisprudence that no person shall be condemned without affording him due opportunity to defend his case and no right or interest of a person whether in Immovable or moveable property or of any other nature can be taken away without giving him due opportunity of

hearing. Rule of procedure shall have to be construed and enforced to advance justice and not to defeat the substantive right of a person ... It is a very poor solatium to a person who is in possession of a property in his own right to tell him that he can have his right, title and interest in the property decided after he is dispossessed. It would be nothing but travesty of justice. When the person in possession of Immovable property claims that he is not bound by the decree and dispossess him and thereafter he could file a suit and establish his title, is opposed to the very civilised notions of civil rights of the citizen which include a right, title and interest in, and to Immovable property. This would result in obtaining collusive decrees and dispossessing the person in possession of Immovable property in their own right. This will also result in abusing the process of the Court. The endeavour of the Court must be to safeguard against such abuse of the process of the Court so as to avoid any injustice being caused to any party by the acts of the Court, in other words, by reason of exercise of jurisdiction by the Court or by the use of the process of the Court. . . Keeping in view these basic principles, the provisions of sub-rule (1) of Rule 35 of Order 21 and Rules 97 to 101, 103 and 104 of Order 21, C.P.C. are to be read and construed. These Rules are to be read together. In that case, it is not difficult to see that these Rules provide for deciding such obstruction or objections in the same manner as a suit and the order passed therein is made appealable. No doubt Rule 99 of Order 21 also provides a remedy to such a person after he is dispossessed in the process of execution. But, there is no justification for denying a person in possession of the property in his own right and not being a party to the order of eviction or a decree for possession, a right to resist the decree for possession or the order of eviction and to have the objections decided before he is dispossessed. As to whether such a person is a party to the decree or not is one of the questions to be decided in such proceedings because, if it is found that he is not a party to the decree, other contentions raised by him would not become relevant for consideration because in that event, he would be bound by the decree".

15. In *Babulal Vs. Raj Kumar and Others*, , the Supreme Court held as follows (at p. 2051 of AIR):

"The controversy is no longer *res integra*. This Court in *Bhanwar Lal Vs. Satyanarain and another*, considered the controversy and had held that even an application filed under Order 21, Rule 35(3) or one filed under Sec. 47 would be treated as an application under Order 21, Rule 97 and an adjudication is required to be conducted under Rule 98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in Order 21, Rules 98, 101, 102 enjoin conduct of a regular adjudication, finding recorded thereon would be a decree and bind the parties.

It would therefore, be clear that an adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the

objector the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21, Rule 103 and it shall be subject to an appeal. Prior to 1976, the order was subject to suit under 1976 Amendment to CPC that may be pending on the date of the commencement of the amended provisions of CPC was secured. Thereafter, under the amended Code, right of suit under Order 21, Rule 63 of old Code has been taken away. The determination of the question of the right, title or interest of the objector in the Immovable property under execution needs to be adjudicated under Order 21, Rule 98 which is an order and is a decree under Order 21, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete Code in itself. Therefore, the executing Court is required to determine the question, when the applicants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance".

16. Sri Shetty further argued that when the tenor of decisions of the Hon''ble Supreme Court as well as the Division Bench of this Court that the obstruction application filed under Order 21, Rule 97 has to be treated as a plaint and the contentious issue: settled between the parties one way or the other, the Court below in the instant case, in a very perfunctory manner directed that the appellant -- Obstruter be removed by Police help, citing the decisions in Ram Rattan and Others Vs. State of Uttar Pradesh, wherein the Hon''ble Supreme Court as well as this Court had consistently held that the settled position of the parties should not be disturbed without recourse to law, Sri Shetty decreed what the Court below had done in the instant case summarily throwing out the appellant -- Obstruter by use of force, of course with the process of Court. Further citing a decision in Krishna Ram Mahale (Dead), by his Lrs. Vs. Mrs. Shobha Venkat Rao, , Sri Shetty submitted that the Supreme Court in the said case went to the extent of holding that a licensee even after expiry of the period of licence cannot be dispossessed except with recourse to law.

17. While drawing my attention to the case of the appellant -- Obstruter as made out in the detailed objection statement filed by her before the Court below as against I.A. No. 3 more fully referred by me in para (8) above, Sri Shetty reiterated that the appellant -- Obstruter would not have been dispossessed without there being any enquiry as contemplated in sub-rule (2) of Rule 97 of Order 21 of CPC.

18. Under the aforesaid circumstances, according to Sri Shetty, what the Court Receiver would have done the least in the facts''and circumstances of the case was, that he would have filed a regular suit for ejectment of the appellant-abstractor with the permission of the Court.

19. For the aforesaid reasons, Sri Shelly submitted that the impugned order passed by the Court below be set aside, the appellant-abstractor who was illegally turned out of the suit schedule property by use of Police help be put into possession of the suit schedule property. He further prayed that the Court below

be directed to hold an enquiry as contemplated under sub-rule (2) of Rule 97 of Order 21 of CPC.

20. The learned Senior Counsel Sri V. Tarakaram appearing for the respondents 1(i) and (ii) herein along with Sri M. M. Rehman taking me through the backdrop of the case argued that in O.S. No. 480/1955 not only that the Court had passed the preliminary decree apportioning the shares in between the parties thereto in consonance with the Mohammedan Law, but the said preliminary decree when challenged before this Court in R. A. No. 9/1957, this Court too had confirmed such a preliminary decree to the knowledge of appellant-Obstrucker. He further pointed out that despite she had full knowledge as to what had transpired before the trial Court as well as before this Court, she did not bother to challenge the same at any stage of the case. According to him, the conduct of the appellant-Obstrucker was totally strange that when she made a tall claim that she was entitled to for 7/8th share in the suit schedule property as sharer, she did not raise even the little finger either to establish her right or to challenge the claim of the parties in the suit and the final decree proceedings even to this date in the manner known to law. He further submitted that the appellant-Obstrucker had adopted such a tactics for she was knowing very well that the decree in O.S. No. 480/1955 had since been confirmed by this Court in R.A. No. 27/1957 her writ would not run large before the Court/Courts. He further submitted that even after summons were served on I.A. No. 3, in the FDP before the Court below, the appellant-abstractor did not challenge even the appointment of the Court Receiver when she knew pretty well that he was armed with a warrant with a specific purpose to effect the division of the property by metes and bounds and alternatively to effect the sale to distribute the sale proceeds in proportion to the shares set out in the preliminary decree proceedings in the above suit. To substantiate his point that the Receiver appointed by the Court below under Order 40, Rule 1 holds the property for the benefit of the party who ultimately may be adjudged by the Court to be entitled to the same and that without the leave of the Court no proceedings be initiated in respect of the suit property. Sri Tarakaram cited before me the decision of the Hon''ble Supreme Court reported in Kanhaiyalal Vs. D.R. Banaji and Others, ; of course there can be no quarrel on the point settled in the said decision of the Supreme Court. Sri Tarakaram had also cited before me yet another decision of the Supreme Court reported in Hiralal Patni Vs. Loonkaram Sethiya and Others, wherein the Supreme Court held that the Receiver appointed by the Court shall continue till he was discharged and that the Court which had appointed the Receiver was entitled to direct the appellant to give back possession of the property to the Receiver and on his failure to return back, the Court was competent under Order 40, Rule 1(d) of C.P.C. to confer power on the Receiver to receive the property and further that it was not necessary for the Receiver to file a suit for recovery of the property. In the said decision, the Hon''ble Supreme Court held as follows :

"Held, that the receiver continued by the preliminary decree was entitled to function till he was discharged. The legal position with regard to the continuance

of receivers is that : (i) if a receiver is appointed in a suit until judgment, the appointment is brought to an end by the judgment in the suit; (ii) if a receiver is appointed in a suit without his tenure being expressly defined, he will continue till he is discharged; (iii) even after the final disposal of the suit, though as between the parties to the suit his functions are usually terminated, the Receiver continues to be answerable to the Court till he is finally discharged, and (iv) the Court has ample power to continue the Receiver even after the final decree if the exigencies of the case so require. The final decree in the present case did not finally dispose of the suit and did not bring the appointment of the Receiver to an end.

Held, further that the Court was entitled to direct the appellant to give back possession of the flour mill to the Receiver. The Court was merely making suitable arrangement for the running of the mill in the course of its administration of the estate through the Receiver. The mill had been leased out to the appellant with an express condition that he should redeliver the property to the Receiver on the expiry of the lease and the Court was competent under Order 40, Rule 1(1)(d), CPC to confer a power on the Receiver to recover the property from the appellant. It was not necessary for the Receiver to file a suit for the recovery of the property".

21. I have gone through the above decision. In my considered view, the above decision is clearly distinguishable from the case in hand, for the reason that in the above said decision, the Receiver appointed by the Court on taking possession of the subject property, leased the same -- a mill, to the appellant in the said case for a specific period with an understanding that immediately on the expiry of the period of lease, the mill were to be made over to the Receiver and that it is under the said circumstances, the Hon"ble Supreme Court held as above. But, in the instant case in hand, it is not the case that the appellant -- Obstrucker had intervened or meddled with the suit schedule property subsequent to the possession of the suit schedule property that was taken over by the Court Commissioner, for, it is borne on record that the appellant -- Obstrucker was living in the suit schedule property considerably for long time and as proof thereof, she had also stated to have paid tax to the Corporation of the City of Bangalore, got the khata transferred in her name and further she had city survey records also built up in her name in respect of the property and further more she had also stated to have evicted a tenant from the portion of the premises in her own name and taken possession thereof through Court. That being the position, in my considered view, the said decision is clearly distinguishable and therefore not applicable to the instant case in hand.

22. Sri Tarakaram next cited before me AIR 1985 pat 222 (Nalini Kant Sinha v. Ajoy Krishna) wherein it was held that under Order 40, Rule 1 of CPC, the trespassers in respect of the property in possession of the Court Receiver can be got removed with Police help as the Court has got power to get the trespassers removed. By citing the above decision, the learned Senior Counsel wanted to

draw an analogy that in the instant case too, that exactly what had visited the appellant -- Obstructor in the hands of the Court Receiver. Unfortunately, as I pointed out above, that is not the situation here in the case of the appellant. Therefore, the instant decision too, in my considered view, is of no assistance to the respondents in the facts and circumstances of the case.

23. To sum up, Sri Tarakaram while supporting the impugned order passed by the Court below submitted that in the facts and circumstances of the case, the appellant --Obstructor had nothing to complain before this Court by resorting to the instant appeal and therefore, he prayed that the appeal be dismissed.

24. Now the points at dispute to be settled by this Court are :

(i) Whether the I.A. 3 under Order 21, Rule 97 of CPC as resorted to by respondent No. 1(i) and (ii) to remove the obstruction placed by the appellant -- Obstructor is maintainable in the FDP filed under Sec. 54 read with Order 20, Rule 18(2) before the Court below?

(ii) Whether it was just and proper for the Court below to remove the obstruction placed by the appellant-Obstructor by dispossessing her from the suit schedule property by extending Police help to the Court Receiver ?

(iii) Whether the impugned order is just and proper and whether the same is called for to be interfered with in the instant appeal?

25. Regarding Point No. 1: I should point out at the outset that neither side in the strict sense addressed the argument addressing themselves to the above points at controversy; with the result, I had to examine myself, the legal position vis-a-vis the above points to be decided one way or other, nevertheless the argument of both the sides and the authorities cited before me assisted me to great extent to understand the points at dispute and the legal issues involved.

26. It is true that the FDP before the Court below under Order 20, Rule 18(2) read with Section 24 filed by the respondents No. 1(i) and (ii) was not an execution proceedings, at all within the meaning of Order 21, of C.P.C. and that the FDP is only an extension of the list in the original partition suit and that there is no executable decree as argued by the learned Counsel for the appellant Obstructor. Further more, it is not in doubt that the FDP is only a proceedings in pursuance of a preliminary decree with the allotment of definite shares in the suit schedule property among the parties to suit. But it is to be noted importantly that in the FDP, the Court below was pleased to pass an order on 20-10-1992 to issue warrant to the Court Receiver in respect of the suit schedule property, in pursuance of which the Court Receiver, the respondent No. 2 herein was also issued with warrant with a copy of the preliminary decree and further the Memo of Instructions to take delivery of the possession of the suit schedule property either to effect the division of the suit property by metes and bounds in terms of the preliminary decree or in the alternative to effect sale of the same to distribute the sale proceeds in terms of the shares allotted to the parties thereto

under the preliminary decree; obviously, that order is an executable order within the meaning of Section 36 of CPC: The said section was substituted by Act. 104 of 1976 with effect from 1-2-1977. The said Section 36 of CPC falls in Part II under the head "Execution" and the same reads as follows:

PART II

EXECUTION

General

36. Application to orders. -- The provisions of this Code relating to the execution of decrees (including provisions relating to payment under a decree) shall, so far as they are applicable, be deemed to apply to the execution of orders (including payment under an order)."

27. In this context, it is relevant to find out what is meant by an order under CPC. If we refer to Section 2(14) of CPC, we find the definition of an order; Section 2(14) of CPC reads as follows:

"2. Definitions -- In this Act, unless there is anything repugnant in the subject or context,--

(1) to (13)

(14) "Order" means the formal expression of any decision of a Civil Court which is not a decree;"

28. From the above provisions in Section 36 and Sec. 2(14) of CPC, it is clear that the order dated 20-10-1992 passed by the Court below in the F.D.P. to issue warrant to the Court Receiver to take possession of the suit schedule property and divide the same by metes and bounds in terms of the preliminary decree or in the alternative to effect sale of the same and distribute the sale proceedings also in terms of the preliminary decree though not a decree within the meaning of Section 2(2) of C.P.C. is an order within the meaning of Section 2(14) of CPC and further an executable order within the meaning of Section 36 of CPC. It is to be observed here that in Section 36 of CPC, it is made clear therein that the provision of CPC relating to execution of a decree shall apply as well to the order. To sustain such a view I have taken, I placed reliance on Kedar Nath Bothra Vs. Baijnath Bothra and Others, wherein it was held as follows:

"Rule 97, O.21 would apply equally to a person who was entitled to an order for possession in the same way as it, in terms, applies to the holder of a decree for possession. An order which has been made for a receiver to obtain possession is in effect and for the purpose of execution the same as a decree for possession, and application under O. 21, R. 97 though not made by the receiver in person is proper if it has been made on behalf of the receiver."

29. The set of facts in the above reported case and the set of facts in the instant case in hand appear to be similar, though the same differ only with regard to the

suit in which the preliminary decree came to be passed. In the reported case, the preliminary decree was passed in a mortgage suit, whereas in the instant case in hand, the preliminary decree was passed in a partition suit. To show the analogy, I deem it proper to quote the point at controversy and the opinion expressed by the Court on the issue. The same reads as follows:

"Dr. Roy bases his contention that the application is not maintainable on the words of R. 97. R. 97, he argues, confines the relief to a decree-holder or to the purchaser and he argues that the present petitioner is not the holder of a decree, for all that he has obtained is a preliminary decree in a mortgage suit which is not a decree for possession. He further points out that Mt. Kesar Bai was not a party to that suit until the preliminary decree was passed and that she is claiming in her individual right as without from the rights of the other members of the joint family, had that being no party to the mortgage suit she cannot be bound by the mortgage decree.

For the applicant however it is contended that the relief is granted to the holder of a decree for possession of immovable property and reference is made to Section 36, CPC which provides that the provision of this Code relative to the execution of decrees shall, so far as they are applicable, be deemed to apply to execution of orders. O. 21 deals entirely with execution and R. 97, O.21 would apply equally to a person who was entitled to an order for possession in the same way as it in terms applies to holder of a decree for possession. An order which has been made for a receiver to obtain possession is in effect and for the purpose of execution the same as a decree for possession. He further points out that although the application is not made by the receiver in person it has been made on behalf of the receiver according to the usual practice and he refers to a statement of the practice by Ker. on Receivers where it is pointed out that all applications on behalf of a receiver should be made by the person having carriage of the proceedings. In my opinion the contention on behalf of the petitioner is sound and he has the right to apply under O. 21, R. 97 for the relief which is sought."

30. From the above, in my considered view, it is clear that an executable order falls within the meaning of Section 36 of CPC and therefore the provision in Order 21 of CPC as to execution is equally applicable as applicable to the execution of decree or in other words an executable order is kept as part as that of an executable decree under the provision in Section 36 of CPC.

31. Therefore, I hold that in view of the order passed on 20-10-1992 by the Court below in the FDP to issue a warrant to the Court Receiver and in pursuance whereof the court below had directed the Court Receiver to take possession of the suit schedule property and further to divide the same by metes and bounds in consonance with the preliminary decree or in the alternative to effect sale and to divide the sale proceeds thereof in the ratio of the shares as set out in the preliminary decree, the I. A. 3 under Order 21, Rule 97 filed by the respondent No. 1(i) and (ii) in the FDP is perfectly maintainable, no matter, that the same

was filed by the said respondents on a report by the Court Receiver reporting that the appellant Obstructor had placed obstruction restraining him from executing the warrant in question. Hence, I answer point No. 1 in the affirmative.

32. Regarding Point No. 2: I have already held while answering point No. 1 that an application under O. 21, Rule 97 as resorted to I.A. No. 3 by the respondents No. 1(i) and (ii) is maintainable before the Court below obviously what next for the Court below to follow was to hold an enquiry thereon as contemplated under sub-rule (2) of R. 97 of O.27, of CPC, for there was no escape from it. But unfortunately, in the instant case, the Court below without recourse to that provision of law did not hold such an enquiry at all and instead it had directed the Court Receiver to remove the obstruction placed by the appellant-Obstructor by use of "minimum police help" and with the result, the appellant-Obstructor was visited with the great injury, for the appellant-Obstructor was not only dispossessed from her settled or judicial possession from the portion of the property she appeared to have held for long, but in addition to it in the further process, the Court below had caused irreparable loss to her even in demolishing that portion of the premises under her occupation in misconstruing the law applicable to the facts and circumstances of the case; probably the Court below had done it in best of intention to put an end to a long drawn litigation of forty years started way back in the year 1955 in filing a partition suit and nothing beyond, for, I believe that Court shall do no wrong to any body in discharge of its solemn duty to do justice.

33. Therefore, I hold that what the Court had done in removing the obstruction placed by the appellant-Obstructor and in the process turning out the appellant-Obstructor by affording Police help to the Court Receiver is totally unjust and illegal. Hence, I answer the point No. 2 in the negative.

34. Regarding Point No. 3: In view of my finding on the Point No. 1 in the affirmative and Point No. 2 in the negative, my answer to the first part of Point No. 3 is in the negative, whereas my answer to the second part of the said Point No. 3 is in the affirmative.

35. Before departing from the discussion, I have to point out here that it is painful to see that the appellant-Obstructor is out of possession of the portion of the property under her occupation by instrumentality of the court for the reason that the Court below had misunderstood the law applicable to the case. In my considered view, this is a fit case where this Court has to suo motu restore possession of the property that was divested from the appellant-Obstructor for the reason that she was summarily and without recourse to law turned out therefrom. But, unfortunately, as I see, the damage to the appellant-Obstructor is complete for, there is nothing to restore with the demolition of the portion of the premises under her occupation by the Court Receiver immediately after taking possession thereof on the ground, that the premises in question was in a highly dilapidated condition and called for immediate demolition.

36. That being the position, all that the appellant-Obstructor can be restored back is symbolic possession of the portion of the premises, but in view of the fact that no such premises is now in existence, it is impossible to identify the portion of the property to be restored back to her that part at least symbolically. In view of total change of circumstances, even if a symbolic possession thereof is made over by venturing into identification thereof, it appears to me that the same is of no consequence and relief to her. In the said circumstances, to my mind it further appears that it would be in fitness of things that the Court below be directed to hold an enquiry under sub-rule (2) of Rule 97 of Order 21 of CPC with the completion of the pleading thereof in filing I. A. No. 3 -- the obstruction application by the respondent No. 1(i) and (ii) under Order 21, Rule 97 of CPC and in filing objection statement thereto by the appellant Obstructor herein and decide the dispute between the parties once and for all for the good.

37. In the above said peculiar circumstances, I make the following:

ORDER

38. That the impugned order dated 23-7-1996, passed by the Court below on I. A. No.3 filed under Order 21, Rule97 and on an application filed by the appellant-Obstructor u/s 151 of CPC (unnumbered by the Court below) and the Memo filed by the Court Receiver, whereby the Court below was pleaded to allow the application under Order 21, Rule 97 and further pleaded to reject the application u/s 151 of CPC filed by the appellant-Obstructor (unnumbered) is set aside.

39. Both the said two I.As. are restored on the file of the Court below.

40. That the Court below is directed to hold an enquiry as contemplated under sub-rule (2) of Rule 97 of Order 21 of CPC in pursuance of I.A. 3. In view of the peculiar circumstances, firstly that the appellant-Obstructor is summarily turned out of the subject property illegally and without recourse to law and secondly, that the parties to the FDP are litigating for considerably long time, without any progress pursuant to the preliminary decree passed in the suit, the court below is directed to dispose of the case within two months from the date of communication of this order, by holding the above enquiry, if not on day to day basis, at least on alternative-day basis.

41. The appeal is therefore liable to be allowed and accordingly allowed with the above direction.

42. Appeal allowed.