
(2014) 01 RAJ CK 0205

In the Rajasthan High Court

Case No : Civil Revision Petition No. 89 of 2002

Smt. Bhanwari Bai Rathi and Others

APPELLANT

Vs

Rahul Lodha and Others

RESPONDENT

Date of Decision : 23-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97 115

Citation : (2015) 1 WLN 131

Hon'ble Judges : Bela M. Trivedi, J

Bench : Single Bench

Advocate : Bihari Lal Agarwal and Mr. Amit Gupta, for the Appellant; Gajendra Vyas for the Respondent No. 1, for the Respondent

Final Decision : Allowed

Judgement

Bela M. Trivedi, J.—The present revision petition filed u/s 115 of CPC arises out of the order dated 25/09/2001 passed by the Additional District Judge, Kishangarh, Ajmer (hereinafter referred to as "the Appellate Court") in Civil Misc. Appeal No. 9/1999, whereby the Appellate Court dismissed the said appeal filed by the petitioners-appellants-decree holders and allowed the cross-objections filed by the respondent No. 1-Objector, and further modified the order dated 25/08/1999 passed by the Additional Civil Judge (Junior Division), Kishangarh (hereinafter referred to as "the Executing Court") in Civil Misc. Application No. 10/1999 and directed the petitioners-defendants to hand over the possession of the suit premises to the respondent No. 1. The short facts, giving rise to the present revision petition, are that late Shri Rameshwar Lal Rathi, predecessor-in-title of the present petitioners, had filed the suit being No. 407 of 1993 (Old No. 135/82) for eviction relating to the suit shop against one Hundamal (original defendant), in the Court of Civil Judge (Junior Division), Kishangarh. The said suit was decreed by the said Court on 5/3/1995. The said decree remained unchallenged at the instance of the said defendant-judgment debtor Shri Hundamal. The petitioners-decree holders having filed the execution proceedings

before the Executing Court, the possession of the suit premises was taken from the said tenant Hundamal-judgment debtor on 9/3/1998 through warrant of possession. It appears that the respondent No. 1 claiming possession of the said suit premises had filed an application under Order XXI Rule 97 raising objection, however, the Executing Court had dismissed the said application on 24/2/1996. The respondent No. 1 thereafter filed the separate Civil Suit seeking injunction against the present petitioners in respect of the suit premises. In the said suit, the respondent No. 1 had also filed an application seeking temporary injunction, which was dismissed by the Trial Court on 5/3/1998, and the appeal arising out of the said order was dismissed by the Appellate Court on 27/5/1998. The respondent No. 1 thereafter had preferred a revision petition bearing No. 1451 of 1998 before this Court in which this Court permitted the respondent No. 1 to move an application under Order XXI Rule 97 before the Executing Court, vide the order dated 28/4/1999. The respondent No. 1 having filed the said application, the Executing Court vide order dated 25/8/1999 allowed the said application, however, did not pass any order against the petitioners-decree holders to hand over possession to the respondent No. 1. Being aggrieved by the said order passed by the Executing Court dated 25/08/1999, the petitioners-appellants had preferred the appeal being No. 9/1999 before the Appellate Court, and the respondent No. 1 filed the cross-objections in the said appeal. The Appellate Court vide the impugned order dismissed the appeal of the petitioners and allowed the cross-objections of the respondent No. 1, as stated hereinabove.

2. It is submitted by the learned counsel for the petitioners that the respondent No. 1, being not in possession of the disputed premises, could not have filed an application under Order XXI Rule 97 of CPC, nor the Appellate Court could have directed the petitioners to hand over the possession to the respondent No. 1. Placing reliance on the decision of Bombay High Court in the case of Ramdulari and Subhadra (dead) (Legal representatives Dr. Kamalsingh, Mrs. Kiran Mithlani and Mrs. Anita Gulabrao Lokhande) Vs. Meerabai Baghel, L.R. No. 1 (Smt. Sharad Baghel) and Babulal Pande, submitted that when there was no resistance or dispute made by the party while the possession was taken by the decree holder, neither Rule 97 nor any Rule of Order XXI would apply. In the instant case, according to Mr. Agarwal, the original owner of the suit premises was one Yusuf, who had mortgaged the suit shop with Rameshwar Lal Rathipredecessor-in-title of the petitioners and the said Rameshwar Lal Rathihad let out the said property to Hundamal. He further submitted that during the pendency of the suit filed by said Rameshwar Lal Rathiaagainst Hundamal, the original owner had sold out the property to Smt. Indu Lodha. Thus, according to Mr. Agarwal, Smt. Indu Lodha i.e. the respondent No. 1 was never in possession of the suit property, and therefore, there was no question of dispossessing her. He also submitted that Smt. Indu Lodha could have filed the suit for possession of the suit premises or could have filed the suit for redemption of mortgage, she having stepped into the shoes of original owner, but her application under Order XXI, Rule 97 was not maintainable in the eye of law.

3. However, the learned counsel Mr. Gajendra Vyas for the respondent No. 1 submitted that the respondent No. 1 having been permitted by the High Court to file the application under Order XXI Rule 97 of CPC, in the revision petition, the respondent No. 1 had filed the same in the execution proceedings. According to him, there being concurrent findings of facts recorded by the Courts below, this Court should not interfere with the impugned orders passed by the Courts below.

4. Having regard to the submissions made by the learned counsels for the parties, and to the impugned orders passed by the Courts below, it appears that the very fact that the Appellate Court has directed the petitioners-appellants to hand over the possession of the suit premises to the respondent No. 1 establishes the fact that the respondent No. 1 was not in possession, when the application under Order XXI Rule 97 was filed by her before the Executing Court. Though the said application was filed pursuant to the order passed by this Court in the revision petition, the said application was required to be decided by the Executing Court, in accordance with law. At this juncture, if the provisions of Order XXI Rule 97 are perused, it clearly transpires that said provision could be invoked, when the whole of the decree for the possession of the movable property is resisted or obstructed by any person obtaining the possession of the property. Hence, the person obstructing the decree holder has to be in possession of the property at the time when the decree for possession is sought to be executed. In the instant case, admittedly the respondent No. 1 was never in possession of the suit shop inasmuch as the respondent No. 1 had purchased the property from the original owner Yusuf and the said Yusuf had mortgaged the said property with late Shri Rameshwar Lal- predecessor-in-title of the petitioner, who in turn had let out the said property to Hundamal, for which Rameshwar Lal Rathi had filed the suit for eviction against him. Under the circumstances, the respondent No. 1 being not in possession of the suit premises at any point of time pending the suit proceedings and the execution proceedings, her application under Order XXI Rule 97 could not be said to be maintainable in the eye of law. Both the Courts below having misinterpreted the provisions contained in Order XXI Rule 97 and having misinterpreted the evidence on record, the impugned orders deserve to be set aside. In that view of the matter, the impugned order dated 25/09/2001 passed by the Appellate Court as well as order dated 25/8/1999 passed by the Executing Court are hereby set aside. The respondent No. 1 is directed to hand over the possession of the suit premises to the petitioners forth with, if the possession is taken over by the respondent No. 1 pursuant to the impugned order passed by the Appellate Court. The revision petition stands allowed accordingly.