

(1975) 08 AHC CK 0009
In the Allahabad High Court
Case No : Civil Revision No. 1229 of 1974

Smt. Jairaji

APPELLANT

Vs

Firm Jagarnath Prasad and Others

RESPONDENT

Date of Decision : 22-08-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 95, Order 21 Rule 97, Order 21 Rule 99, 151

Citation : AIR 1976 All 1

Hon'ble Judges : M.P. Saxena, J

Bench : Single Bench

Advocate : A.N. Bhargava, for the Appellant;

Final Decision : Dismissed

Judgement

M.P. Saxena, J.—This is a revision application u/s 115, CPC against the order dated 10-9-1974 passed by the learned Additional District Judge, Gyanpur, Varanasi.

2. Briefly stated the facts giving rise to this application are that firm Jagarnath Prasad Thekedar, opposite party had filed a suit (No. 18 of 1961) for the recovery of money. In that suit attachment before judgment of certain property including a house with Ahata and Parti land bounded as below and situate in Qasba Bhadoi, District Varanasi, was made:

North:-- House and Ahara of Sukhnandan Lal

South:-- House of Pyagram Gupta.

East:-- Pucca Road which goes from Bhadoi to Gyanpur.

West:-- Ahata of Sukhnandan Lal in possession of Elaka Prasad Baijnath Prasad.

In execution of the decree the said house was put to auction on 15-1-1969 and was purchased by the decree-holder. The sale was confirmed on 17-8-1972 and

the sale certificate was issued on 7-9-1972. On the same day the decree-holders auction purchasers moved an application under Order XXI, Rule 95, CPC for possession over the said house after removal of locks etc., if any. On 18-9-1972 they gave another application (7-D) praying that police aid may also be provided because the judgment-debtors were likely to resist delivery of possession. It may be stated here that Hansraj, Judgment-debtor, had died and the application was moved against his widow Smt. Jaswant Devi, son Prem Kumar, daughters Smt. Krishna Devi, Smt. Sarla Devi and Smt. Sudarshan Devi. On 28-9-1972 the court passed the following order:

"Issue warrant of possession returnable by 28-10-1972."

3. On 11-10-1972 the application 7-D was allowed and a letter was directed to be issued to the Circle Officer Bhadoi for giving necessary police aid on payment of requisite charges by the decree-holder. On 25-10-1972 the court Amin went to deliver possession of the house. The pairokar of the decree-holder took him to Mauza Bagh Talab Sardar Khan and pointed out a house of which possession was to be delivered. The Amin was accompanied by a police constable also. The Amin compared the boundaries of this house with those given in the sale certificate and found that they tallied with each other. The only difference was that in the sale certificate the house was shown to be situate in Qasba Bhadoi but, in fact, it lay in village Bagh Talab Sardar Khan. Plot No. or house No. was not given in the sale certificate. The Amin found that the house consisted of several rooms and manufacture of carpets was going on in the rooms and the Verandah and about 20 persons were working there. When some of these persons and one woman Smt. Jairaji (the revisionist) came near him he apprised them with the purpose of his visit. Smt. Jairaji gives out to him that the house belongs to her and she had got it constructed with the sanction of the Municipal Board. She showed the plan and sanction for construction. She also gave out that she was carrying on carpet manufacturing business in that house and the judgment-debtor or his heirs had no concern with it nor it was ever attached or sold in execution of any decree. She also represented that the house shown in the sale certificate lies in Qasba Bhadoi while this house is situate in Bash Talab Sardar Khan and there is sufficient distance between the two places. She, therefore, refused to deliver possession of the house and also gave a written application (11-C) to that effect to the Amin. As the Amin apprehended reasonable apprehension of breach of the peace, he came back without executing the Parwana and submitted his report (10-C 2) to the court on 28-10-1972 narrating all the facts.

4. On 4-11-1972 the defendant auction-purchaser gave another application (12-C) under Order XXI, Rule 95, CPC for issuing the parwana for delivery of possession again. This time it was prayed that a Vakil Commissioner be appointed to execute the Parwana and aid of one Sub-Inspector and four police constables be provided. On this application the following order was passed on the same day:

"Issue writ to Sri Shiva Kumar Sri-vasatva Advocate who is appointed

Commissioner to do the needful in terms of the application, a copy whereof shall be sent to him. Fee Rs. 50/- plus necessary expenses. Report by 4-12-1972." On 10-11-1972 Smt. Jairaji, the revisionist moved an application (16-C 2) u/s 151, CPC stating that the judgment-debtor auction-purchaser was trying to dispossess her by misrepresentation that she was resisting delivery of possession on behalf of the judgment-debtors when, in fact, she had no connection with them and was in possession of the house in her own right. She, therefore, prayed for time to file a detailed objection. The court ordered:--

"Let the applicant file his regular claim by the 25-11-1972. This will be disposed of under Order XXI, Rule 97 (2) C. P. C. on 9-12-1972. Stay despatch of warrant of possession in the meantime."

5. The applicant took further time for this purpose and ultimately filed a detailed objection on 2-12-1972. They purported to be under Order XXI, Rule 97, C. P. C. probably in view of the Court's order dated 10-11-1972. She objected to the delivery of possession, inter alia, on the grounds that the house is situate in Mauza Bag Talab Sardar Khan and not in Bhadoi as shown in the sale certificate; that it was never attached nor sold in execution of any decree, that she has no concern with the judgment-debtors nor she was in possession on their behalf; that the house was constructed by her and she was in possession of it in her own right and had resisted delivery of possession on the first occasion.

6. On 5-12-1972 the decree-holder gave an application (23-C-2) to the effect that the objections filed by Smt. Jairaji are legally not maintainable under Order XXI, Rule 97, CPC and this point may be disposed of first. They also filed detailed objections (24-C) to her application. 9-12-1972 was fixed for disposal of the preliminary objection. On this date the decree-holder relied on the case of Motamarii Ramaiah and Others Vs. Malliah and Others, and contended that except a decree-holder or his assignee, no third party can adopt the forum of Order XXI, Rule 97, CPC and if he does file an application under this provision impleading the decree-holder the latter can contend that such an application does not lie and the third party is not entitled to ask for an enquiry in the matter and the application should be dismissed. The court, therefore, dictated an order holding that the objections under Order XXI, Rule 97, CPC are legally not maintainable but before he could dictate the order of its dismissal Smt. Jairaji moved another application (25-C) praying that her objections be treated u/s 151 or Order XXI, Rule 95 or 99, Civil Procedure Code. The Court, therefore, did not dismiss (21-C) but gave time to the decree-holder to file objections to this also. These objections (26-C) were filed on 14-12-1972. On 23-12-1972 the amendment application (25-C) was allowed on payment of costs and 10-2-1973 was fixed for reconsideration of the matter whether the objections (21-C) as amended were maintainable u/s 151 or Order XXI Rule 95 or 99, C. P. C.

7. On 22-12-1972 Smt. Jairaji gave one more application (28-C) alleging that the decree-holder wants to dispossess her from the house illegally under the cover of Rule 95 of Order XXI in spite of the fact that after the first resistance she had

given application u/s 151, CPC stating that she was in possession of it in her own right and that the entire proceedings regarding delivery of possession amount to abuse of the process of law.

8. On 21-4-1973 she filed two papers to establish her prima facie title to the property. In rebuttal the decree-holder also filed certain papers. After hearing the learned counsel for both sides the learned Lower Court arrived at the conclusion that the application of Smt. Jairaji is neither maintainable u/s 151, CPC nor under Order XXI, Rule 95 or Rule 99. Civil Procedure Code. As regards Section 151 it observed that it is an established principle of law that where specific provisions exist in the CPC for a particular situation aid of Section 151, CPC cannot be invoked. As regards the argument that despite overt resistance to delivery of possession offered by her the decree-holder auction-purchaser was committing an abuse of the process of the court by not having recourse to Order XXI, Rule 97, CPC so that she may file an objection under Sub-rule (2) of this Rule and the insistence of the decree-holder auction-purchaser to make a subsequent application under Order XXI. Rule 95 even after resistance which amounts to clear abuse of the process of court, the learned lower court observed that the applicant, if she had really any interest in the house, could have filed objections on earlier occasions and as she did not do so but offered resistance at a late stage, she was herself guilty of the abuse of the process of court and was not entitled to invoke the inherent powers of the court.

In view of extreme latches on the part of Smt. Jairaji she could not be permitted to file objections u/s 151. CPC until she was actually ejected. After eviction she was at liberty to file an objection under Order XXI. Rule 100, Civil Procedure Code. As regards the provision of Order XXI, Rule 95 or 99. Civil Procedure Code, the learned lower court observed that objection of the nature filed before him was not maintainable under Rule 95 of Order XXI. Since the stage of Order XXI, Rule 97 has not been reached, even Rule 99. CPC will not come into play. Accordingly Smt. Jairaji's application was dismissed as legally not maintainable and the decree-holder auction-purchaser was directed to take further steps on his application under Order XXI, Rule 95, CPC presented on 4-11-1972, viz., 12-C. It is against this order that the present revision application has been filed mainly on the ground that after the first resistance the learned lower court was not competent to issue a second warrant of delivery of possession without directing the decree-holder to take recourse to Order XXI Rule 97. Civil Procedure Code. The aforesaid facts make it clear that firm Jagarnath Prasad Thekedar, opposite party, is the decree-holder auction-purchaser. Smt. Jairaji, the revisionist, is not the judgment-debtor but is a stranger. It is further clear that the first application for delivery of possession was allowed on 28-9-1972 and on 25-10-1972 when the Amin went to deliver possession the revisionist offered resistance. There-after the auction purchaser moved a second application under Order XXI. Rule 95, CPC for possession with police aid and it was allowed. Obviously the main question which arises for consideration is whether the decree-holder auction-purchaser was entitled to a fresh warrant for possession and was

not obliged to proceed under Order XXI, Rule 97 or to file a suit after the first resistance. Before going into the merit of this question it will be proper to refer to certain cases in this regard.

9. In *Muttia v. Appassmi*. ILR (1890) Mad 5041 it was held that the purchaser of property at an auction sale in the execution of a decree is entitled to make a fresh application for delivery without being compelled to make a complaint u/s 334 of the Code of 1887 (which corresponds to Order XXI, Rule 97 of the Code of 1908) where an attempt to get possession of the property purchased is resisted. In *Narain Das v. Hazari Lal*. ILR (1896) All 233 the question whether second application lies or not was not expressly decided. All that was held was that so far as resistance or obstruction is concerned, the decree-holder, if he wishes to take proceedings u/s 328 of the Code must do so within one month but the bar created by the limitation imposed by this section does not extend to and hold good so as to bar complaints against acts of resistance or obstruction made upon fresh proceedings taken by the decree-holder. It may be stated here that Rule 97 of Order XXI, are composed of Sections 328 and 334 of the old Code.

10. In *Kesri Narain v. Abdul Hasan* ILR (1904) All 365 decree-holder auction-purchasers had applied to the court u/s 318 (Order XXI, Rule 95 of the present Code) for delivery of possession of the property which they had purchased. The court ordered the Amin to put them into possession of the property. The Amin returned the warrant unexecuted reporting that a person other than the judgment-debtor had resisted the purchasers in setting possession. The purchasers did not, as they might have done, apply to the court u/s 335 of the Code (Order XXI, Rule 97, Civil Procedure Code) to inquire into the matter of the resistance. But after the expiry of thirty days allowed for making such an application, they made a fresh application to be put into possession. The court executing the decree rejected the second application for possession because no application u/s 335 (Order XXI, Rule 97, Civil Procedure Code) was made within the time limited by law. Against, this order the auction-purchasers filed a revision application in this Court. It was disposed of by a Division Bench consisting of Aikman and Knox, JJ.

Aikman, J., observed that the purchasers' application u/s 335 (Order XXI, Rule 95, Civil Procedure Code) was rightly rejected because if a purchaser at a sale in execution of a decree falls within the period allowed by law to apply to the court to inquire summarily into the matter of the resistance to his getting possession he is relegated to his remedy of a civil suit against the person resisting. The case of *Muttia v. Appasami* ILR (1890) Mad 504 (*ibid*) was distinguished on the ground that in that case the resistance was offered not by a third party but by the judgment-debtor. Reliance was placed on the case of *Vinayakrav Amrit v. Devrao Govind*. ILR (1887) Bom 473 in which an order of a subordinate court refusing a second application for delivery of possession was sustained on the ground that to grant the second application "would virtually make clause 167 of the statute of limitation a dead letter". Accordingly he was of opinion that the only remedy

open to the purchaser was to bring a regular suit against a resister.

He was inclined to reject the revision application accordingly. Knox, J., on the other hand was inclined to the view that the application for delivery of possession u/s 318 is substantially an application for execution of a decree by ordering delivery of possession of the property purchased. In his opinion the principle laid down in *Muttia v Appasami* (ibid) governed that case. However, in view of the expression of opinion of Aikman, J., he concurred with the order rejecting the revision application. It makes it clear that in that case the view taken was that if an auction-purchaser applies for delivery of possession and a stranger resists, the former cannot have a second warrant for delivery of possession issued. His remedy is either to move an application under Order XXI, Rule 97, CPC or to file a civil suit. In *Raghunandan Prosad Misra v. Ram Charan Manda* AIR 1919 Pat 425 the Full Bench discussed a larger number of cases and after tracing the history of the relevant provisions from the CPC 1859 to the Code of 1908 expressed a view that even in the case of an auction-purchaser (who is not a decree-holder) if an application for delivery of possession has become infructuous by reason of obstruction he is entitled to make an application for a fresh writ of possession without applying under Order XXI, Rule 97 of the Present Code.

11. In *Mukund Bapu Jadhav Vs. Tanu Sakhu Pawar*, the Full Bench held that it was not incumbent upon the decree-holder upon obstruction to the first warrant of possession to apply under Order XXI, Rule 97 and that it was open to him to make an application under Order XXI, Rule 35 to obtain a fresh warrant for possession.

12. In *The Official Trustee of West Bengal Vs. Monmothnath Sadhukhan*, it was observed that the decree-holder has the right to take out a fresh writ of possession and every resistance or obstruction to such writ gives a fresh period of limitation for the purpose of Order XXI, Rule 97, CPC from the time of that particular resistance or obstruction.

13. This question came up Before the Full Bench of this Court in the case of *Sobha Ram Vs. Tursi Ram and Others*, That was a case when the auction-purchaser of a property in execution of a decree had attempted after confirmation of the sale to obtain possession of the property under Order XXI Rule 95 but was resisted in that attempt. It was found that the persons who had offered resistance were in possession of the property in their own right and not on behalf of or through the judgment-debtor and that their removal could not be contemplated. It was contended before the Bench that a court has no jurisdiction to make any inquiry when an application. under Order XXI, Rule 95, CPC is made. Suleiman, J., pointed out the difference between a case where the property was in possession of the judgment-debtor or a person claiming through him and a case where the property was in possession of a person holding it in his own right. He observed:--

"Examining the rule, however, one is bound to hold that the court cannot pass an order delivering possession of the property to the auction-purchaser as against a person other than the judgment-debtor who is holding property on his behalf or claiming title under him unless the court is satisfied that he is such a person. I fail to see how an order can be passed under that Rule against such a person unless either that person admits or he holds the property in that capacity or the court, is otherwise satisfied that he is holding as such. It may be that no thorough inquiry need be made under Rule 95, but there is nothing under that rule which prevents the court from being satisfied on prima facie evidence as to whether this other person is holding the property on behalf of the Judgment-debtor and claiming the title under him or not. If the court is satisfied that he is so holding the property, the order can be passed forthwith. If, however, the court comes to the conclusion that he is holding the property on his own account, there is no option to the court but to dismiss the application under Rule 95." (Underlined by me.)

The aforesaid observations of the court make it clear that if there is some person other than the judgment-debtor who is not his representative and not holding the property on his behalf and who resists or obstructs his possession, there are two remedies open to the auction purchaser viz. either to bring a regular suit for possession against that person or to have recourse to speedier remedy by way of application under Order XXI, Rule 97, C. P. C. It is well settled that the auction purchaser is not bound to have recourse to the second remedy. If he follows this remedy but unsuccessfully, then his remedy to bring a regular suit is curtailed and the period of time is prescribed by Article 11-A of the Limitation Act no thorough inquiry need be made under Rule 95, but there is nothing under that rule which prevents the court from being satisfied on a prima facie evidence whether this other person is holding the property on behalf of the judgment-debtor or in his own right. An application under Rule 97 cannot be made until the decree-holder or the auction-purchaser has been resisted or obstructed in the delivery of possession.

14. This matter came up for consideration before a Division Bench of this Court in the case of Ragho Prasad v P. N. Agarwal 1969 All LJ 929. That was also a case in which resistance was offered at the time of the first delivery of possession and after the second writ of possession was issued an objection was taken that the decree-holders were not entitled to a fresh warrant for possession. All that they could do was to apply under Order XXI. Rule 97 of the Code or to file a suit. Pathak and Gulati, JJ., after a resume" of various provisions of Rules 35, 97, 98 and 99 of Order XXI and a number of cases, observed that the said rules appear to indicate the following scheme of execution:

"Under Rule 35 the execution court directs delivery of possession of the property to the decree-holder and to his agent in that behalf and, if necessary, it will direct the delivery of possession by removal of the judgment-debtor or any other persons bound by the decree who refuses to vacate the property. A person bound

by the decree includes a person claiming through the judgment-debtor. The provision for removal of the person bound by the decree who does not vacate takes into account a situation where resistance to Possession is offered or obstruction is made by the judgment-debtor or any other person bound by the decree on a ground which is patently without substance. It will include the case of a person who claims to be in possession in his own right and independently of the judgment-debtor but whose claim is on the face of it unacceptable and cannot be said to be made in good faith. In such a case there is, in my opinion, no bar to the issue of fresh warrant for possession. Such a bar, it seems to me, cannot be spelled out either from Rule 35 or Rule 97. Where, however, resistance is offered or obstruction is made by a judgment-debtor on a ground which appears to necessitate investigation, the proceeding will be under Rule 97. So also where resistance or obstruction proceeds from a person claiming to be in possession in his own right and independently of the judgment-debtor and whose claim cannot be rejected as not being made in good faith without investigation the decree-holder must proceed under Rule 97. While an ex facie consideration of the ground for resistance or obstruction can be had, under Rule 35 a ground for claim, which cannot be disposed of, is obviously without foundation needs to be investigated under Rule 97". In support of the aforesaid view reliance was placed on the following observation of Kanhaiya Lal, J., in *Sobha Ram Vs. Tursi Ram and Others*, : "The person who refuses and is to be removed may be the judgment-debtor or a person holding possession on his behalf or a person claiming under a title created by a judgment-debtor subsequently to the ejectment which resulted in the sale. Before a court can pass an order for his removal the court has, however, to be satisfied that he belongs to one or other of the categories mentioned and in order to satisfy itself that he does belong to one or other of these categories the court may have to make such prima facie inquiry as the circumstances of case may require." (Underlined by me.) In the case of *Ragho Prasad v. P. N. Agrawal* (ibid) the executing court had found that the claim of the person in possession was obviously without substance and he was in possession through his father, the judgment-debtor. Therefore, the Division Bench held that the claim could not be said to have been made in good faith and was liable to be ignored outright without applying the provisions of Rule 35. As the executing court did not reach the stage when Rule 97 could come into play, it was open to it to issue a fresh warrant for possession.

15. In *B.K. Tewari v. G. H. Jafri* 1970 All LJ 1311 it was held that where an application under Order XXI, Rule 95. CPC is made it is the duty of the Court to be satisfied that certificate under Rule 94 has been granted to the applicant and property is in possession of the judgment-debtor or some person on his behalf before issuing order for delivery to be made. Rule 95 does not provide for any notice being issued to persons against whom possession is claimed but there is no bar if before an order is passed for delivery to be made, the persons against whom such an application has been made or any one else to come to court and say that the property was not in possession of such a person as is contemplated

under Rule 95 or that it was in possession of a person who is neither the judgment debtor nor a person claiming under a title created by the judgment debtor subsequently to the attachment of the property, for by coming to court in deciding as to whether the court should order delivery to be made by putting the purchaser or his nominee in possession. If an order for delivery of possession is already passed there is no occasion for any objection being made."

From the aforesaid discussion it is clear that even under Order XXI, Rule 95, CPC a second writ of possession can be issued after resistance or obstruction provided the court is prima facie satisfied that resistance or obstruction has been offered by the person on a ground which is patently without substance or whose claim is on the face of it unacceptable and cannot be said to be in good faith. In the instant case also there was no bar to the executing court to issue a second writ of possession if it was satisfied that the claim of the person offering resistance or obstruction viz., the present applicant, was prima facie not acceptable or not bona fide. It is important to state that the applicant had represented to the court that she was not liable to be dispossessed in execution of the decree because the house in dispute is situate in Mauza Bagh Talab Sardar Khan while the house shown in the sale certificate is situate in Qasba Bhadoi. According to her, there is sufficient distance between the two places. She also alleged that she was a shikmi tenant of this land and after obtaining sanction of the Municipal Board she constructed this house. According to her, she was carrying on carpet manufacturing business in this house with the assistance of about 20 labourers. She not only gave these objections in writing to the Amin when she resisted delivery of possession on the first occasion but also filed them in court when order for issue of a fresh Parwana was passed. She filed certain papers also in support of her contention. A perusal of the record shows that the court did not apply its mind to her contentions. It cannot be presumed to have done so simply because the second warrant of possession was issued. Even in the order under revision there is not a word to show that the court applied its mind to her contentions and satisfied itself that her claim was prima facie not acceptable or not bona fide. It confined itself to the simple question whether her application was maintainable u/s 151 or Order XXI, Rule 95 or 99, Civil Procedure Code. As discussed above, no such application could be made under Order XXI, Rule 95 or Rule 99. It could not be done even u/s 151, Civil Procedure Code. In this connection reference may be made to the case of Ouseph George v. Varkey Varkey AIR 1953 Trav-Co 123 and Keshavan Padmanabhan v. Neelakantan Narayanan AIR 1955 Trav-Co 225 (FB) in which it has been held that a stranger to a decree for possession of immovable property cannot approach the court by means of an application u/s 151, CPC and record his resistance or his obstruction to delivery of possession of the property either to the decree-holder or purchaser, as the case may be, before he has been dispossessed. The learned lower court was, therefore, right in holding that the application was not maintainable under Order XXI, Rule 95 or 99, CPC or Section 151, Civil Procedure Code. The revision application has also no force and is liable

to be dismissed. Since the executing court does not appear to have satisfied itself on the question whether the claim of the applicant is prima facie acceptable and bona fide or not, it will do so now before issuing the Parwana. If it finds that her claim is acceptable and bona fide it will refuse to issue second Parwana for delivery of possession and it will be for the decree-holder to apply under Order XXI, Rule 97, CPC or to file a regular suit. An executing court has no power to compel a decree-holder to move an application under Order XXI, Rule 97, Civil Procedure Code. If on the other hand the executing court is satisfied that the claim is prima facie not acceptable and not bona fide, it will be well within its rights to issue a second Parwana for delivery of possession. It is not required to make an enquiry of the nature contemplated by Order XXI, Rule 97 nor any procedure is prescribed for it. This enquiry will be made only for satisfaction of the court whether the person to be dispossessed prima facie belongs to the category given under Order XXI, Rule 95. Civil Procedure Code.

16. The revision application is accordingly dismissed, but in the circumstances of this case the parties shall bear their own costs of this revision.