
(1978) 03 BOM CK 0002

In the Bombay High Court

Case No : Civil Revision Application No. 361 of 1968

Subhan Bi Sheikh Noor and another

APPELLANT

Vs

Abdul Samad Haji Abdul Raheman and others

RESPONDENT

Date of Decision : 01-03-1978

Acts Referred:

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

Citation : (1978) MhLj 519

Hon'ble Judges : M.D. Kambli, J;B.A. Masodkar, J

Bench : Division Bench

Advocate : J.M. Dharaskar, for the Appellant; P.T. Trivedi, for the Respondent

Final Decision : Dismissed

Judgement

B.A. Masodkar, J.—The applicants are decree-holders having obtained a decree against the original opponents Nos. 1 and 2 (hereinafter styled as the judgment debtors) in Civil Suit No. 3-A of 1954 which was decreed on 15-4-1957 directing the judgment debtors to hand over possession of the suit property and further to pay the mesne profit of Rs. 3600 as well the costs. As the facts are not in dispute the said decree was put in execution and the controversy in the present revision relates to the execution regarding that part of the decree directing delivery of possession of the suit immovable property. A warrant of possession was issued by the executing Court which was resisted by an obstruction initially as found by the Court on 19-5-1963. It is further found by the Court that no application under Order 21, Rule 97, of the CPC was made by the decree-holders against that obstruction. However, the decree-holders obtained a fresh warrant for possession which was also obstructed on 19-6-1967. In M. J. C. No. 224 of 1967 in which the impugned order is made the present applicant-decree holder applied under Order 21, rule 97 of the CPC for the purpose of making appropriate orders. To that application the original judgment-debtors as well the opponents Nos. 3 to 5 who had raised obstruction were also joined as parties. It appears that in these proceedings opponents Nos. 3 to 5 contended that they were in possession of the

property on their own account. On that aspect of the matter, after considering the evidence on record the Court has recorded a finding against these opponents. It has been found that the opponents have not shown that they were in possession of the property on their own account. However, the Court took the view relying on the Full Bench decision of this Court in *Mukund v. Tanu* 35 Bom. L R 1033 that the application was barred by time having been filed beyond 30 days from the first obstruction which, according to the Court, was the same obstruction which was raised on 7-5-1963. The application itself had been failed on 6-7-1967 and applying the provisions of Article 167 of the Limitation Act, 1908, the Court dismissed the same.

2. As far as the aspect of good faith and entitlement in their own right pleaded by the opponents Nos. 3 to 5 is concerned, the finding recorded by the Court cannot be interfered with in revision. That is clearly based on the evidence coming forth from the affidavits and probabilities involved in the case. It has been found that the property belonged to Chhotumiya and the opponents Nos. 3 to 5 could not prove any claim to the same property of Chhotumiya and to hold the same on their own account.

3. That being the position, the only remaining question is whether the Court was right in refusing the application as barred by time on the basis of the decision of this Court in *Mukund v. Tanu* (cit. supra). That decision of the Full Bench does contain observations which go to substantiate that it is open to the party obstructing to show that his obstruction is by the same person and of the same character as the former obstruction in respect of which no proceedings were taken, and if he succeeds in proving that, Article 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 involve that the obstruction is a fresh obstruction. It is pertinent to see that the Full Bench was not concerned with the question of limitation but only with the question with regard to the entitlement of the applicant seeking a fresh warrant for possession under Order 21, rule 35 of the Code of Civil Procedure, and these observations were made after holding that the applicant is so entitled to a fresh warrant for possession. By expressly stating that the Court was not dealing with the rights which may accrue under the fresh warrant and further stating that as the whole question was argued, the Court has in law indicated the opinion about the point so argued. Thus, this statement of law available in the Full Bench decision is characterised by the Full Bench itself as an opinion and not as a ratio. It is thus clearly a part of the obiter available in that judgment and has to be appreciated and applied as such. The position of such obiter dicta is well settled, the same being the statements made by the way and of ten partake of the opinion of the Court which it thinks desirable to express though not necessary for the decision of the given case. Such obiter has not the binding weight of the decision of the case, nor the reasons for such decision: see *Flower v. Abbw Vale Steel, Iron and Coal Co.* (1934) 2 K B 132, 154 We are entirely in respectful agreement with what has been stated by the Gujarat and Calcutta High Courts in *Maneklal v. Ochhav Lal* A I R 1970 Guj. 49 and in *The*

Official Trustee of West Bengal Vs. Monmothnath Sadhukhan, with regard to the position of these observations available in the Full Bench judgment of this Court.

4. Having said to, we have the position in law which permits taking of afresh warrant for possession of the property under Order 21, rule 35 of the Code of Civil Procedure, after the obstruction is so received to the earlier warrant, and further that in case in execution of such a warrant an obstruction is raised, the provisions of Order 21, rule 97, is available to the decree-holder for the purpose of removing the resistance or obstruction in spite of the fact that the resister of obstruction is the same and raises obstruction of the same kind and further that the period of thirty days is available from the date of such obstruction. This view is preponderantly taken in the decisions which are noted with approval in the case of *Maneklal v. Ochhavlal* (cit. supra).

5. It appears plain to us that once we grant that a warrant for possession can be successively issued and obtained by the decree-holder, then the period of limitation for the purpose of making applications under Order 21, rule 97 of the Code, will operate independently as and when the resistance is offered. The Articles of the Limitation Act are to be strictly construed and while interpreting it is not permissible to add words to the plain language available in the body of the Articles. Article 129 of the Limitation Act, 1963, lays down the period of limitation and fixes the time from which the period begins to run for the purpose of making application. If the application were of the kind seeking possession after removing resistance or obstruction to delivery of possession of immovable property decreed or sold in execution of a decree, then the date of the resistance or obstruction is the time from which the period begins to run. We cannot add to this the words "the date of first resistance or first obstruction." By the very nature, a summary application is to be made and a short period of limitation of one month is provided. In view of this and in view of the conclusion we have reached that the observations in *Mukur.d v. Tanu* (cit supra) are obiter, the application under Order 21, rule 97; would not be barred if that is made within thirty days of the obstruction complained of, in such an application after the second warrant of possession was so obstructed. The legal position that after a fresh warrant is so granted and fresh resistance is offered an application lies within thirty days of such resistance appears to us to be well settled even on the authorities of the different High Courts: *Ramasekara v. Vharmaraya* I L R 5 Mad. 113, *Narain Das v. Hazari Lal* I L R 18 All. 238, *Kotumal v. Our Ashram* A I R 1947 Sind 118 and *Official Trustee v. Manmothnath*.

6. We respectfully follow the decision in *Maneklal v. Ochhaxlal* (cit supra) and hold that the starting point for the purpose of computing limitation under Article 167 of the Limitation Act of 1908 and under Article 129 of the Limitation Act of 1963 would be the date of raising of resistance or obstruction and on the same way on 19-6-1967 and the application being filed on 6 7-1967 it is within time. Having held so, the order impugned cannot be sustained and the same is set aside to the extent it holds that the application was barred by limitation. Instead,

the application filed under Order 21, rule 97 of the CPC is granted and it is directed that the present applicants be put in possession, and if the judgment-debtors or opponents Nos. 3 to 5 still persist in obstructing taking of the possession, the executing Court may make suitable orders as permitted under rule 98 of Order 21 of the CPC with regard to the detention of such persons in civil prison so as to remove the obstruction.

7. Rule absolute in these terms. The opponents Nos. 3 to 5 to pay the costs of the applicants throughout including of the original application.