



JUDGMENT

The question to be answered in this appeal is whether the appellants (referred to as 'applicants') could have filed an application under Order 21 Rule 97 of Code of Civil Procedure ('CPC' for short) in the execution proceeding initiated by the respondent. This question is to be answered in the following factual background.

2. O.S. No. 45/2012, on the file of First Addl. Sr. Civil Judge, Ballari, was a suit filed by the respondent for declaration of his title over four acres of land in Sy. No. 2 of the village Janekunte and, taluk and district Ballari (for short 'suit property'). He also sought a direction to defendant nos.2 and 3 to disburse compensation amount to him in connection with acquisition of the said land. The first defendant in the suit was the brother of the applicants. The trial court decreed the suit declaring the respondent to be the owner of the suit property and that he was entitled to receive the compensation amount. The respondent initiated the suit on the premise that he purchased the suit property from Belaglappa under a registered sale deed dated 07.10.1998. For some reason the respondent could not get the revenue records mutated to his name and the name of



Belagalappa continued in the revenue records. The suit property was acquired by the second defendant, the Special Land Acquisition Officer for the benefit of the third defendant and the compensation amount was deposited. The respondent pleaded that since he had already purchased the suit property by the time it was subjected to acquisition, he was entitled to compensation and for this reason he sought for a direction to defendant nos.2 and 3 to pay compensation amount to him. The suit was decreed on 17.12.2015. Seeking disbursement of the compensation amount, the respondent initiated execution proceeding and in the course of proceeding the applicants came up with an application under order 21 Rules 47, 94, 97, 106 and 107 read with Sections 47, 94 and 151 of CPC. The executing court dismissed the application by its order dated 16.04.2019 and hence this appeal by the applicants challenging the said order.

3. We heard Sri Raghuveer R. Sattigeri, learned counsel for the applicants.

4. At the outset we state that the executing court rightly dismissed the application not for the reason that the application



was not maintainable but giving findings that the applicants failed to prove that their father was not alive when the sale deed came into existence in the year 1998 in favour of the respondent and they also failed to prove that they were the legal heirs of Belagalappa. The applicants claim that they are the daughters of Belagalappa.

5. In our opinion the executing court should not have entertained the application filed under Order 21 Rule 97 CPC. Although the applicants invoked other provisions of Order 21, the application was filed basically under Rule 97, the applicants being the objectors. When we questioned Sri Raghuveer R. Sattigeri, whether the executing court had passed an order attaching any immovable property and for holding an auction to recover the compensation amount, he honestly answered that no immovable property had been attached and sold in auction. He also honestly answered to our question that suit was not filed for possession of any immovable property and that no delivery warrant as required under Order 21 Rule 35 of CPC had been issued by the executing court. In this context the question would arise whether the applicants could have filed an



application under Order 21 Rule 97 of CPC. For better understanding, we have extracted Rule 97 of CPC here.

"97. Resistance or obstruction to possession of immovable property. – (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

[(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provision herein contained."]

6. Plain language of the Rule makes it very clear as to under what circumstances an application under Rule 97 can be filed. The holder of a decree for possession may file an application to the executing court for removing the obstruction or resistance shown by any other person to the execution of the decree. Also if an auction purchaser finds resistance or obstruction to his taking possession of the property sold in auction, he can request the executing court to remove the obstruction. It is now a settled law that even a third party who has got interest in the property which is subject matter of the execution



proceeding can file an application under Order 21 Rule 97 of CPC. That means there must be a decree for possession or an immovable property should have been attached and sold in the course of execution proceeding and the auction purchaser should have found an obstruction to taking possession. Even the taking of possession by an auction purchaser can be resisted by a third party if he has got any kind of interest over the auctioned property. In this case these two circumstances are conspicuously absent.

7. The respondent might have thought that he should seek declaration of title over the suit property in order to claim the compensation amount. Since the compensation amount was lying in deposit somewhere, he sought its release in his favour by filing execution. Respondent being the decreeholder did not apply for attachment of any immovable property. This being the position, the applicants could not have filed an application under Order 21 Rule 97 of CPC. If it is their case that their father had died much before the sale deed in favour of respondent came into existence, they should have filed a suit; they should not have approached the executing court. Taking note of these aspects, the executing court ought to have



dismissed the application in limine, without holding any enquiry. It is not that an application under Order 21 Rule 97 of CPC cannot be dismissed in limine if the obstructor fails to satisfy the court his prima facie right to show resistance to the execution. Enquiry can be held only when the executing court finds that the obstructor has got a semblance of right or interest which requires detailed enquiry. Satisfaction as to prima facie right or interest can be arrived at on reading the affidavit filed along with the application and supporting documents. Order 21 Rule 102 of CPC is one instance of dismissing the obstructor's application at the initial stage; the court may not entertain third party application for any such other reasons as the court thinks not entertainable. If this kind of examination is not done at the initial stage, and if enquiry is ordered on frivolous application, the decreeholder can never reap the fruits of the decree. In this case the brother of the applicants was the first defendant in the suit. Instead of dismissing the application at the initial stage without holding enquiry, the executing court held an enquiry and gave findings that the applicant's father was not alive in the year 1998 and that they were not the legal representatives of Belagalappa.



8. At this stage learned counsel Sri. Raghuv eer R. Sattigeri expressed apprehension that the findings given by the executing court would operate as resjudicata in case the applicants decide to file a suit for appropriate remedy and in this context he referred to a judgment of the Supreme Court in the case of ***Pavan Kumar Gupta Vs. Rochiram Nagdeo***¹. In this ruling a finding had been given in the prior suit in favour of the plaintiff though the suit was dismissed. In the subsequent suit between the same parties, the defendant took up the same defence on which there was already a finding. An argument was put forward by the defendant on the lines that since the prior suit was dismissed, any finding therein would not operate as resjudicata. Taking analysis of the factual position, the Hon'ble Supreme Court held as below:

"19. Thus the sound legal position is this: if dismissal of the prior suit was on a ground affecting the maintainability of the suit any finding in the judgment adverse to the defendant would not operate as res judicata in a subsequent suit. But if dismissal of the suit was on account of extinguishment of the cause of action or any other similar cause a decision made in the suit on a vital issue involved therein would operate as res

¹ (1999) 4 SCC 243



judicata in a subsequent suit between the same parties. It is for the defendant in such a suit to choose whether the judgment should be appealed against or not. If he does not choose to file the appeal he cannot thereby avert the bar of res judicata in the subsequent suit.

20. In this case the position is still stronger for the appellant. Dismissal of the first suit was only on account of what the respondent did during the pendency of the suit, i.e., depositing the arrears of rent claimed by the appellant. The Court permitted the plaintiff to withdraw that amount under deposit for satisfying his claim. Such a decree cannot be equated with a case where the suit was dismissed as not maintainable because any adverse finding in such a suit would only be obiter dicta. The finding made in OS No. 75-A of 1990 that the appellant was the real owner of the building as per Ext.P-11 sale deed became final. If the respondent disputed that finding he should have filed an appeal in challenge of it.”

(emphasis supplied)

9. Learned counsel is justified in expressing the apprehension about applicability of resjudicata. But in this regard we have to state that since the executing court has given findings on an application which was not at all maintainable, the findings affecting the applicant’s interest do not operate as resjudicata in the subsequent suit that they may



initiate. This position becomes very clear from the observations made by the Hon'ble Supreme Court in paragraph no. 19 of the judgment extracted above. In addition, there is one more judgment of the Hon'ble Supreme court in the case of ***Blue Star Employees' Union Vs. Ex. Off. Principal Secy. To Government and another***², where the situation was akin but in relation to a matter under Industrial Disputes Act, it is held:

"3. Learned counsel for the appellant contained that if the real scope of Section 33-A of the Act is borne in mind, there is no impediment in the present case to make reference under Section 10 of the Act, notwithstanding the awards in question. He further submitted that the awards in question should not have decided the question that the dismissal of the workmen is justified without first examining whether such termination of service is contrary to Section 33 of the Act which alone gave competence to the Tribunal to proceed further in the matter. We find force in this contention. However, Shri R.V. Reddy, learned senior counsel for the respondent, very strenuously contended that there was no dispute before the Tribunal as to the jurisdiction and, therefore, there was no occasion for the Tribunal to give a finding on that aspect of the matter on question whether there has been any contravention of the terms of Section 33 of the Act to attract the reliefs sought for under Section 33-A of the Act. This argument ignores the

² AIR 2000 SC 3110



essential requirement of Section 33-A of the Act. Section 33-A of the Act, in fact, involves consideration of two aspects of the matter, firstly, whether there has been any violation or contravention of the provisions of Section 33 of the Act and secondly, whether the act complained of is justified or not. Therefore, violation or contravention of the provisions of Section 33 of the Act would be the justification for the authority concerned to entertain an application under Section 33-A of the Act. If this essential requirement is forgotten and if an authority decides a question as to whether the act complained of under Section 33-A of the Act is justified or not cannot in a matter of this nature operate as res judicata or cannot be treated to have decided the dispute between the parties.”

10. Therefore we hold that the findings of the executing court while deciding the application under Order 21 Rule 97 of CPC do not operate as resjudicata in case they institute a suit for appropriate relief.

11. Since we do not find infirmity in the ultimate conclusion of the executing court in dismissing the application, we have to dismiss this appeal. But this dismissal order does not affect the applicant’s interest if any, and they have liberty to agitate their right in the appropriate forum. Of course if any suit is filed, it is subject to limitation and in that event the applicant may



plead for exemption under Section 14 of the Limitation Act and if they do so it is for the court to consider this plea in the background of pleaded material facts.

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