

B. GANGADHAR
v.
B.G. RAJALINGAM

MAY 12, 1995

[K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

Code of Civil Procedure 1908

Order 21 Rules 35(3).101—Execution proceedings—Questions relating to right, title or interest in the property—Executing Court mandated to decide—Not by way of a separate suit—Tenant need not eonominee be impleaded as party defendant—Nor is it an impediment to remove obstruction put up by them to deliver possession to the decree holder.

The petitioner was a judgment-debtor. Respondent laid a suit for declaration of title to and possession of a certain property. The trial Court issued the declaration and directed the petitioner to hand over the vacant possession to the respondent. The decree had become final. When the warrant was issued execution for delivery of possession the bailiff returned it on the ground that the petitioner had constructed shops and inducted tenants into possession and that therefore he could not execute the warrant. On an application from Respondent, the executing court directed bailiff by warrant to demolish the shops and to deliver vacant possession to Respondent. Revision preferred by the petitioner was dismissed.

In this Special Leave Petition, the petitioner contended that in the absence of mandatory injunction granted in the decree the executing court was devoid of power and jurisdiction to direct demolition of the shops constructed by the petitioner and that the tenants in possession being eonominee parties to the decree, they were not bound by the decree of the trial Court and therefore the direction to dispossess them was illegal.

Dismissing the Special Leave Petition, this Court

HELD : 1. The right to ownership of a property carries with it the right to its enjoyment, right to its access and of other beneficial enjoyment incidental thereto. If any obstruction or hindrance is caused for its enjoyment or use, the owner, of necessity, has the remedy to have it removed. If

- A any obstruction is raised by putting up a construction *pendente lite* or prevents the passage or right to access to the property *pendente lite*, the plaintiff has been given right and the decree-holder is empowered to have it removed in execution without tortious remedy of separate suit seeking mandatory injunction or for possession so as to avoid delay in execution or
- B frustration and thereby defeat the decree. The executing court, therefore, would be justified to order its removal of unlawful or illegal construction made *pendente lite* so that the decree for possession or eviction, as the case may be, effectually and completely executed and the delivery of possession is given to the decree holder expeditiously. Admittedly, pending suit the petitioner had constructed shops and inducted tenants in possession
- C without permission of the court. The only course would be to decide the dispute in the execution proceedings and not by a separate suit. [539-F-H]

Halsbury's *Laws of England*, IV Ed. Vol.35 paragraph 1211, 1214 : Black's *Law Dictionary* VI ED, referred to.

- D 2. Rule 35(3) of Order 21 C.P.C. itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to
- E remove any obstruction or super-structure made *pendente lite*. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken
- F law in his hands and made any constructions on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of
- G the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the Code expressly prohibits.

[540-D-F]

3. It is settled law that a tenant who claims title, right or interest in the property through the judgment debtor or under the colour of interest
- H through him, he is bound by the decree and that, therefore, the tenant need

not eonominnee be impleaded as a party defendant to the suit nor it be an impediment to remove obstruction put up by them to deliver possession to the decree-holder. What is relevant is only a warning by the bailiff to deliver peaceful possession and if they cause obstruction, the bailiff is entitled to remove the obstruction; cause the construction demolished and deliver vacant possession to the decree holder in terms of the decree. Thus the High Court and the executing court have not committed any error of law in directing demolition of shops and delivery of the possession to the decree holder. [540-H, 541-A-B]

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C)
No. 10546 of 1995.

From the Judgment and Order dated 17.2.1995 of the Andhra Pradesh High Court in C.R.P.No. 496 of 1994.

Subodh Markandeya and Ms. Chitra Markandaya for the Petitioner.

The following Order of the Court was delivered :

This petition arises from the order of the Andhra Pradesh High Court dated 17.2.1995 made in C.R.P. No. 496/94.

The petitioner is the judgment-debtor. The respondent laid O.S. No. 375/1985 for declaration of title to and for possession of the property bearing No. 21-6-652 situated at Chelapura, Hyderabad. By decree dated January 25, 1991 the trial court declared him to the absolute owner of the suit property and also directed the petitioner "his men, tenants to vacate and hand over vacant possession of the land held by the petitioner". The decree had become final. When warrant was issued in execution for delivery of possession, the bailiff returned it on the ground that the petitioner had constructed shops and inducted tenants into possession and that, therefore, he cannot execute the warrant. Thereon, the respondent filed an application under Order 21, Rule 98 read with s.151 CPC to issue warrant to the bailiff to demolish the shops constructed by the petitioner and deliver vacant possession of the suit house. The executing court, after enquiry, by its order dated September 30, 1993 directed bailiff by warrant to demolish the shops and to deliver vacant possession to the respondent. The petitioner carried the order in revision but was unsuccessful. Thus this SLP.

- A Two principal contentions raised all through are that in the absence of mandatory injunction granted in the decree, the executing court is devoid of power and jurisdiction to direct demolition of the shops constructed by the petitioner. The second contention is that the tenants in possession being not eonominee parties to the decree, are not bound by the decree of the trial court and, therefore, the direction to dispossess them is illegal. The courts below have rightly rejected both the contentions.
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Order 21 Rule 101 provides that :

- C "All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 90 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."
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- E The executing court, therefore, is mandated to decide all questions relating to right, title or interest in the property in the execution proceedings and not by way of a separate suit, notwithstanding anything contained contrary in any other law of the time being in force. Halsbury's *Law of England*, IVth Ed., Vol. 35 in paragraph 1214 at page 735, the word 'possession' is used in various contexts and phrases, for example, in the phrase 'actual possession' or 'to take possession' or 'interest in possession' or 'estate in possession' or 'entitled in possession'. In paragraph 1211 at page 732, legal possession has been stated that possession may mean that possession which is recognised and protected as such by law. Legal possession is ordinarily associated with *de facto* possession; but legal possession may exist without *de facto* possession, and *de facto* possession is not always regarded as possession in law. A person who, although having no *de facto* possession, is deemed to have possession in law is sometimes said to have constructive possession. In paragraph 1216 at p.736 it is stated that the right to have legal and *de facto* possession is a normal but not necessary incident of ownership. Such a right may exist with, or apart from, *de facto*
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- G
- H or legal possession, and different persons at the same time in virtue of

different proprietary rights.

In Black's *Law Dictionary*, VIth Ed., the ownership has been defined as "Collection of rights to use and enjoy property, including right to transmit it to others. Therefore, ownership is *de jure* recognition of a claim to certain property. Possession is the objective realisation of ownership. It is the *de facto* exercise of a claim to certain property and a *de facto* counterpart of ownership. Possession of a right is the *de facto* relation of continuing exercise and enjoyment as opposed to the *de jure* relation of ownership. Possession is the *de facto* exercise of a claim to certain property. It is the external form in which claims normally manifest themselves. Possession is in fact what ownership is in right enforceable at law to or over the thing. A man's property is that which is his own to do what he likes with it. Those things are a man's property which are the object of ownership on his part. Ownership chiefly imports the right of exclusive possession and enjoyment of the thing owned. The owner in possession of the thing has the right to exclude all others from the possession and enjoyment of it. If he is wrongfully deprived of what he owns, the owner has a right to recover possession of it from the person who wrongfully gets into possession of it. The right to maintain or recover possession of a thing as against all others is an essential part of ownership. Ownership implies not so much the physical relation between the person and the thing as the relation between the person owning and the thing owned. Ownership is pre-eminently a right. The right to ownership of a property carries with it the right to its enjoyment, right to its access and of other beneficial enjoyment incidental thereto. If any obstruction or hindrance is caused for its enjoyment or use, the owner, of necessity, has the remedy to have it removed. If any obstruction is raised by putting up a construction *pendente lite* or prevents the passage or right to access to the property *pendente lite*, the plaintiff has been given right and the decree-holder is empowered to have it removed in execution without tortuous remedy of separate suit seeking mandatory injunction or for possession so as to avoid delay in execution or frustration and thereby defeat the decree. The executing court, therefore, would be justified to order its removal of unlawful or illegal construction made *pendente lite* so that the decree for possession or eviction, as the case may be, effectually and completely executed and the delivery of possession is given to the decree holder expeditiously. Admittedly, pending suit the petitioner had constructed shops and inducted tenants in possession without permission of the court. The only course

- A would be to decide the dispute in the execution proceedings and not by a separate suit.

Order 21, Rule 35(3) envisages that :

- B "Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any women not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession."

- C Rule 35(3) of Order 21 C.P.C. itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendente lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any constructions on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the code expressly prohibits such multiplicity of proceedings.

- G It is also not necessary that the tenant should be made party to the suit when the construction was made pending suit and the tenants were inducted into possession without leave of the court. It is settled law that a tenant who claims title, right or interest in the property through the judgment debtor or under the colour of interest through him, he is bound by the decree and that, therefore, the tenant need not eonominnee be H impleaded as a party defendant to the suit nor it be an impediment to

remove obstruction put up by them to deliver possession to the decree. A
What is relevant is only a warning by the bailiff to deliver peaceful possession and if they cause obstruction, the bailiff is entitled to remove the obstruction; cause the construction demolished and deliver vacant possession to the decree holder in terms of the decree. Thus considered, we hold that the High Court and the executing court have not committed any error of law in directing demolition of shops and delivery of the possession to the decree holder. B

The S.L.P. is accordingly dismissed.

G.T.

Petition dismissed.