



HIGH COURT OF ANDHRA PRADESH
WEDNESDAY ,THE TENTH DAY OF MAY
TWO THOUSAND AND TWENTY THREE

PRESENT

THE HONOURABLE SRI JUSTICE RAVI NATH TILHARI
CIVIL REVISION PETITION NO: 1154 OF 2023

Between:

1. HEMALATHA W/o. S. Venkataramana,
Hindu aged about 50 years, Residing at Door No.6-12-12, Ground Floor,
Kanakabhushnam Layout,
Tirupathi.
2. Kanaka Bhushnam (Died) by his L.R P.S.V. Ramana Rao, S o.late. P.
Kanakabhushnam, aged about 67 years, occ. Retd. Employee,Residing
at 6-12-159, Sairam street, Tirupathi.

...PETITIONER(S)

AND:

1. P.KANAKA BHUSHNAM (Died) by his L.R P.S.V. Ramana Rao,
S o.late. P. Kanaka Bhushnam, aged about 67 years, occ. Retd.
Employee,Residing at 6-12-159, Sairam street, Tirupathi.
3. Chinnaswamy S/o. Chinna Narasaiha (Died)
4. Dr. P. Sivasankar S/o. late. P. Chinnaswamy,
Hidu aged about 56 years, Occ. Service,
SVIMS Hospital, Alipiri Road, Tirupathi.
(Respondent No.2 died and Respondent No.3 not necessary
party to this CRP)

...RESPONDENTS

Counsel for the Petitioner(s): SATYANARAYANA NIMMALA

Counsel for the Respondents:

The Court made the following: ORDER



THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

CIVIL REVISION PETITION No.1154 OF 2023

JUDGMENT:-

1. Heard Sri Satyanarayana Nimmala, learned counsel for the petitioner and perused the material on record.
2. The petitioner is the defendant/judgment debtor No.3.
3. The plaintiff respondent No.1 filed O.S.No.147 of 2011 for a decree directing the defendants to vacate and surrender vacant possession of the plaint scheduled property, as also for payment of the arrears of rent and damages.
4. The suit was decreed vide judgment/decreed dated 24.11.2017 passed by the learned Principal Senior Civil Judge, Tirupati.
5. The plaintiff died on 24.11.2017 itself.
6. The respondent No.1, son of the original plaintiff/decreed holder, filed E.P.No.12 of 2020.
7. The learned Principal Senior Civil Judge, Tirupati by order dated 03.03.2023 issued delivery warrant against the petitioner/judgment debtor under Order XXI Rule 35 C.P.C.
8. Challenging the order dated 03.03.2023 the present Civil Revision Petition has been filed.



9. Learned counsel for the petitioner submitted that the E.P was filed under Order XXI Rule 35 C.P.C which provision is not applicable. In his submission, the application ought to have been filed under Order XXI Rule 36 C.P.C., as the petitioner/judgment debtor is the tenant in occupancy of the plaint schedule property and for execution of a decree for delivery of immovable property in the occupancy of a tenant, specific provision is Order XXI Rule 36 C.P.C. His submission, in other words is, that the decree holder is not entitled for actual possession but only symbolic or constructive possession.

10. Learned counsel for the petitioner next submitted that the petitioner filed counter affidavit in E.P, that the respondent No.1 decree holder be put to a strict proof that he was entitled to get execution of the decree. But the question if he was the 'legal representative' of the deceased decree holder was not decided as per Order XXII Rule 5 C.P.C. He placed reliance in the case of ***Varadarajan vs. Kanakavalli & others***¹.

11. Learned counsel for the petitioner next submitted that the notice of the Execution Case was not issued under Order XXI Rule 22 C.P.C, but wrong provision of Order XXI Rule 35 C.P.C was mentioned in the notice.

¹ (2020) 11 SCC 598



12. I have considered the submissions of the learned counsel for the petitioner and perused the material on record.

13. In view of the submissions advanced the following points arise for consideration:

i) Whether the E.P was filed under correct provision of Order XXI Rule 35 C.P.C. or it ought to have been filed under Order XXI Rule 36 C.P.C. ?

ii) Whether the E.P filed by the respondent No.1 (decree holder representative) was maintainable without deciding if respondent No.1 was the legal representative of the deceased decree holder, as per Order XXII Rule 5 C.P.C. ?

POINT NO. 1:

14. Learned counsel for the petitioner submitted that the petitioner being a tenant the E.P for execution of the decree for delivery of immovable property in occupancy of the petitioner/tenant should have been filed under Order XXI Rule 36 C.P.C which is the specific provision against tenant and it was not maintainable under Rule 35, which is a general provision. In his submission only constructive possession or symbolic possession could be delivered and not actual possession.

15. It is relevant to reproduce Order XXI Rules 35 and 36 C.P.C. as under:-

**Order XXI Rule 35:****“Decree for immovable property:-**

(1) *Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.*

(2) *Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.*

(3) *Where possession of any building on 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 woman 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.”*

Order XXI Rule 36:

“Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.”



16. A bare reading of Rule 36 of Order XXI C.P.C makes it evident that it applies, where a decree is for delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy.

17. Rule 36 of Order XXI C.P.C shall apply when the tenant in occupancy of the immovable property, for which decree for delivery of possession has been passed, is not bound by the decree, to relinquish his occupancy. Rule 36 shall not apply to all tenants in occupancy, but only to those who are not bound by the decree to relinquish the occupancy. If the tenant in occupancy is bound by the decree to relinquish the occupancy Rule 36 of Order XXI does not get attracted.

18. The petitioner/defendant/judgment debtor/tenant was party in the suit. The decree was passed against her to vacate and surrender vacant possession of the plaint scheduled property in her occupancy as tenant of the plaintiff/decreed holder. The petitioner is thus bound by the decree to relinquish her occupancy.

19. In ***Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and another***², the Hon'ble Apex Court referred to its

² (1997) 3 SCC 694



previous judgment in *Bhanwar Lal vs. Satyanarain*, [(1995) 1 SCC 6], in which it was held that Order XXI Rule 35 (3) postulates that the person in possession of the immovable property to be delivered under the decree must be per force bound by the decree.

20. Para No.10 of the ***Brahmdeo Chaudhary (supra)*** reads as under:-

“10. In this connection we may also profitably refer to a judgment of a Bench of three learned of this Court in the case of [Bhanwar Lal v. Satyanarain](#) [(1995) 1 SCC 6]. In that case the Bench consisting of K. Ramaswamy, S.C. Agrawal, and N. Venkatachala, JJ., Satyanarain had to consider a parallel fact-situation. One Satyanarain had obstructed to the delivery of possession of the suit immovable property which was sought to be obtained in execution by the appellant decree-holder. After such an obstruction was offered by Satyanarain the decree-holder moved an application under Order 21, Rule 35 for police assistance to remove obstruction caused by Satyanarain. The Executing Court directed the decree-holder to make an application under Order 21 Rule 97. This Court took the view that the very application under Order 21, Rule 35 sub-rule (3) for police assistance for removal of obstruction caused by Satyanarain had to be treated to be an application under Order 21, Rule 97 and such an application was maintainable and could not be said to be beyond limitation. In this connection the following pertinent observations were made by this Court: (SCC pp. 8-9, paras 2-6)

“2. The crux of the question is whether the application filed on 25-5-1979 by the appellant, though purported to be under Order 21, Rule 35(3) against Satyanarain, is convertible to one under Order 21, Rule 97. Order 21, Rule 35(3) provides that:

‘35. (3) Where possession of any building on 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 woman 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.'

3. A reading of Order 21, Rule 35(3) postulates that the person in possession of the immovable property to be delivered under the decree must be per force bound by the decree. Admittedly, Satyanarain was not a judgment-debtor and that therefore, he is not bound by the decree unless he claims right, title or interest through the judgment-debtor, Ram Kishan. the person resisting delivery of possession. In other words the resistor must claim derivate title from the judgment-debtor. The court gets power under Order 21, Rule 97 to remove such obstruction or resistance and direct its officer to put the decree-holder in possession of the immovable property after conducting enquiry under Rule 97.”

21. In the present case the petitioner, the person in possession of the immovable property to be delivered under the decree being bound by the decree Rule 35 of Order XXI was attracted.

22. In ***Ratan Lal Jain and others vs. Uma Shankar Vyas and others***³, the Hon’ble Apex Court held that where a decree is for delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or his agent, by removing any person bound by the decree who refuses to vacate the property, if it becomes necessary to do so. Where a decree is for the delivery of any immoveable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing

³ (2002) 2 SCC 656



a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. The former is known as actual or physical delivery of possession while the latter is known as delivery of formal or symbolic possession.

23. It is apt to refer Para No.5 of **Ratan Lal (supra)** as under:-

“5. Having heard the learned counsel for the parties, we are of the opinion that the appeals are devoid of any merit and no fault can be found with the view taken by the High Court. Rules 35 and 36 of Order 21 of the CPC are relevant and clinch the issue arising for decision. Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or his agent, by removing any person bound by the decree who refuses to vacate the property, if it becomes necessary to do so. (Rule 35, sub-rule 1). Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property. (Rule 36) The former is known as actual or physical delivery of possession while the latter is known as delivery of formal or symbolic possession. In the latter case, the person in actual occupation is not physically dispossessed from his possession of the decretal property. Still delivery of possession in the manner contemplated by Rule 36 remains delivery of formal or symbolic possession so far as the person in actual possession is concerned but as against the person bound by the decree, it amounts to actual delivery of possession. (See five-Judge Bench decision in Juggobundhu Mukerjee and Ors. Vs. Ram Chunder Bysack 1880 ILR 5 Calcutta 584 and Full Bench decision in Jayagopal Mundra Vs. Gulab Chand Agarwalla



and Ors. AIR 1974 Orissa 173). The rights of the person bound by the decree stand extinguished, he is removed from the property in the eye of law and his right and entitlement whatever it may be qua the person in actual possession and not bound by the decree stand vested in the decree-holder.”

24. Reference may also be made to the Full Bench judgment of the Allahabad High Court in ***Bhagwati Singh vs. Board of Revenue, Allahabad and other***⁴, where in Paras 17 and 18 it was held that Order XXI Rule 36 C.P.C. applies only where the property was in exclusive possession of a person not bound by the decree and entitled to remain in possession.

25. Para Nos.17 & 18 of ***Bhagwati Singh (supra)*** are reproduced as under:-

“17. That third submission made by the learned counsel was that the respondents 4 to 9 did not obtain formal delivery of possession after the order of reinstatement was passed under sub-section (3) of Section 27 of the Amending Act, therefore, the rights of the said respondents acquired under the aforesaid order were lapsed. In other words, the argument put forward was that since the Said respondents did not apply for formal delivery of possession under Order XXI, Rule 36 of the Code of Civil Procedure, they obtained no rights as hereditary tenants by virtue of the decree obtained by them. The submission made is devoid of substance. Order XXI, Rule 36 of the Code of Civil Procedure is not meant to be applied to a case like the present. This is a rule under which for example, a plaintiff who has been dispossessed of the rents and profits of his tenants but who, by reason of their being tenants is possession with a lawful title is not entitled to be put into actual possession, is enabled to be put into possession of his proprietary rights, of which he has been deprived of by the defendants. But where, as here, the petitioner himself was a party in the proceedings under Section 27 of the Amending Act the respondents 4 to

⁴ AIR 1978 ALL 323 (FB)



9 were not required to obtain formal delivery of possession. The order, by which the respondents 4 to 9 had been declared entitled to take back possession, was binding on the petitioner. The Amending Act had only imposed the bar prohibiting the reinstated tenant from obtaining possession for three years. In the circumstances, the question of obtaining formal possession did not arise.

18. The controversy relating to the requirement of obtaining formal possession came up for consideration before a Division Bench of this Court in Ganga Saran v. Board of Revenue. In this case the view taken was that the provisions of Order 21, Rule 36 are not applicable to a case where an order of reinstatement is obtained under Section 27 of the Amending Act, 1947. I am in respectful agreement with the view taken in that case. The learned Judges have given a number of reasons in support of their conclusion. I need not mention the same in my judgment. As already stated above, Order XXI, Rule 36 applies only where the property was in exclusive possession of a person not bound by the decree and entitled to remain in possession. The present is not a case of such category.”

26. Consequently, Rule 36 of Order XXI, is not attracted. E.P was filed under correct provision of Order XXI Rule 35 C.P.C and was maintainable. The decree holder is entitled for actual delivery of possession.

POINT NO. 2:

27. Learned counsel for the petitioner next submitted that the respondent No.1 claimed will from the original decree holder in his favour. Consequently, the question if he was the legal representative, based on such will, and entitled to get the decree executed should have been decided by the Execution Court as per Order XXII Rule 5 C.P.C.



28. It is not disputed by the petitioner's counsel that the respondent No.1 is the son of the deceased original plaintiff/decreed holder.

29. The petitioner even in the counter affidavit filed in E.P, did not dispute that the respondent No.1 is the son of the deceased decreed holder. With respect to his case of will from the original decreed holder (father), plea was taken that he be put to strict proof.

30. The expression 'Legal representative' has been defined under Section 2 (11) of C.P.C. as follows:-

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued;

31. Son, is a class I heir entitled to succeed on the death of his father under Section 8 read with the Schedule of the Hindu Succession Act.

32. Son, legally represents the estate of his deceased father. He is a 'legal representative' under Section 2 (11) C.P.C.

33. So, in the considered view of this Court, even if the respondent No.1 was not put to proof of the will, it cannot be said that he is not the 'legal representative' of the deceased



decree holder. He is entitled to get the decree executed being deceased decree holder's representative.

34. Further any dispute, by any person claiming to be the legal representative of the decree holder to the exclusion of the respondent No.1, was not in the Execution Proceedings, so as to call for such determination by the Execution Court in view of Rule 5 of Order XXII C.P.C.

35. In **Varadarajan (supra)**, upon which learned counsel for the petitioner placed reliance, the Hon'ble Apex Court held that Order XXII of the code is applicable to the pending proceedings in a suit, but the conflicting claims of legal representatives can be decided in execution proceedings in view of the principles of the Rule 5 of Order XXII C.P.C.

36. It is apt to refer Para Nos.7 and 8 of the **Varadarajan (supra)** as under:-

*"7. We find that the order of the High Court is not sustainable in law. The appellant claims to be the legal representative of Umadevi on the basis of the Will executed by her. He has produced an attesting witness and the scribe of the Will. The witnesses have deposed the execution of the Will by Umadevi in favour of the appellant who is the son of her sister. **No one else has come forward to seek execution of decree as the legal representative of the deceased decree-holder.** It is Umadevi who has filed the execution petition but after her death, the appellant has filed an application to continue with the execution. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of*



Order 22 Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature.

8. *We may state that Order 22 of the Code is applicable to the pending proceedings in a suit. **But the conflicting claims of legal representatives can be decided in execution proceedings** in view of the principles of Rule 5 of Order 22....”*

In the present case also there is no rival claimant claiming to be the legal representative of the deceased decree holder.

37. In **Varadarajan (supra)**, the facts were that one Umadevi filed the suit for partition claiming ½ share and separate possession of the suit property as the successor in interest of one Manicka Naicker, her husband. Prior to Umadevi, he had married one Valliammal and had a child, one Munisamy Naicker. Manicka Naicker died in the year 1971. The suit was decreed on 07.04.1989. The decree attained finality. In 1999, Umadevi sought execution of the decree. She died on 22.07.1999. Varadarajan, the son of Umadevi’s younger sister filed an application to execute the decree as the legal representative of Umadevi on the basis of a will. The judgment debtor asserted that the will was forged and the son of sister is not the legal heir as per Section 15 of the Hindu Succession Act, 1956. The learned Execution Court decided the application on 19.09.2005 and held that Varadajan was the legal



representative of the deceased Umadevi based on the will entitled to execute the decree.

38. It is thus evident that in **Varadarajan (supra)**, the legatee under the will was not otherwise the legal representative of the deceased Umadevi, the decree holder, as per Section 15 of the Hindu Succession Act and consequently, unless the question of his being the legal representative based on the will, was considered by the Execution Court, he could not maintain the Execution Petition as then he was neither the decree holder nor the decree holder representative. In the present case, the respondent No.1 is the decree holder being the son of the deceased decree holder. So it was not legally required for the Execution Court to determine such question on the principles of Order XXI Rule 5 C.P.C.

39. In **Varadarajan (supra)**, the Hon'ble Apex Court held that 'the conflicting claims of legal representatives can be decided in Execution Proceedings in view of the principles of Rule 5 of Order XXII. In the present case, there is not conflicting claims of the legal representatives which required decision under Rule 5 of Order XXI C.P.C by the Execution Court.

40. In view of the aforesaid consideration, this Court holds as follows:-



- a) **On Point No.1:** the E.P was filed under correct provision of Order XXI Rule 35 C.P.C. Rule 36 of Order XXI C.P.C. is not applicable to the present case.
- b) **On Point No.2:** the respondent No.1 is the decree holder representative being the son of the deceased original decree holder. It was legally not required for the Execution Court to decide the point of legal representative under Order XXII Rule 5 C.P.C. The Execution Petition by respondent No.1 is maintainable.

41. Another submission advanced is that the notice was issued to the petitioner under Order XXI Rule 35 and not under Order XXI Rule 22, and as such the issuance of the notice was not under correct provision of law.

42. The above submission deserves rejection being without substance and also having no effect on the ultimate order impugned herein. Rule 22 provides for issuance of notice against execution in certain cases. The notice of Execution Petition was issued to the petitioner who contested the matter. There was compliance with the requirement of issuance of notice as provided by Rule 22. Mere non-mention of Rule 22 in the notice would not vitiate the order.



43. Learned counsel for the petitioner lastly submitted that the petitioner is suffering from Neurological problem. The Execution Court ought to have given some time to vacate.

44. In this revision petition, the petitioner has filed an undertaking affidavit dated 28.04.2023, before this Court.

Para 2 of the said undertaking affidavit reads as under:-

“2. I submit that I am herewith agreed to vacate the petition schedule property on or before 31-07-2023 without any obstruction. I am suffering with neurological problems and my children are also not healthy to search houses for rent and to shift the houses in Tirupathi we need 3 months time. Therefore I am requesting this Hon’ble Court may be pleased to grant 3 months time to vacate the petition schedule property i.e. on or before 31-07-2023 and there are no arrears pending and I am also undertaken to pay each and every monthly rental to the LR of DHR before 5 the day preceding month. Hon’ble Court may be pleased to consider my family difficulties and granted 3 months time upto 31-07-2023 and directed the Court below to differ or not to effect the delivery warrant issued till 31-07-2023 and pass necessary order or orders in the interest of justice.”

45. The petitioner has requested for time to vacate on or before 31.07.2023 and to pay each and every monthly rent.

46. I do not find any merit in the Revision Petition which deserves dismissal.



47. However, considering the petitioner's undertaking and the request made the time, latest by 31.07.2023 is granted to the petitioner to vacate and handover peaceful possession, to the respondent No.1/decree holder representative.

48. Till the petitioner vacates as aforesaid, she shall make the payment of damages for use and occupation of the premises, to the respondent No.1/decree holder representative, at the rate of rent.

49. The Civil Revision Petition is dismissed.

No order as to costs.

As a sequel thereto, miscellaneous petitions, if any pending, shall also stand closed.

RAVI NATH TILHARI,J

Date: 10.05.2023

Note:-

Issue C. C by 11.05.2023.

B/o:- SCS



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THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

CIVIL REVISION PETITION No.1154 OF 2023

Date: 10.05.2023

Scs.