

APPELLATE CIVIL.

Before Mukerji and S. K. Ghose JJ.

1934

July 4.

BEER BIKRAMKISHORE MANIKYA

v.

RAJKUMAR PAL*

Execution—Court executing decree for possession of land, if can order demolition of puccâ structure—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 35, 95.

The test of sufficiency of acts necessary to be done for delivery of possession under rule 95 read with rule 35 of Order XXI of the Code of Civil Procedure is that the purchaser should be put in effective and complete possession against the judgment-debtor or his representative or the person claiming under a title created by him subsequent to the attachment of the property. But nowhere is it said in the law that the demolition of a *puccâ* structure which is on the land, covered by a decree or by a purchase made in execution of a decree, is necessary in order to make the possession delivered effective and complete as actual or *khâs* possession.

The Government of Bengal v. Alimaddin (1) distinguished.

Radha Gobind Shaha v. Brijendro Coomar Roy Chowdhry (2) followed.

Sreenath Chakrabarti v. Bhagabanchandra Kapali (3) referred to.

APPEAL FROM APPELLATE ORDER by the decree-holder purchaser.

The facts of the case are stated in the judgment.

Rameshchandra Sen (with him *Nripendrachandra Das* for *Santimay Majumdar*) for the appellant. Under Order XXI, rule 95 of the Code the auction-purchaser is entitled to get actual possession of the land by removing any person who refuses to vacate the same. But, when the judgment-debtor had raised structures, whether huts or buildings, the auction-purchaser does not get physical possession of the land

*Appeal from Appellate Order, No. 271 of 1933, against the order of U. K. Kar, First Subordinate Judge of Tipperah, dated Feb. 25, 1933, affirming the order of H. C. Mitra, Fourth Munsif of Comilla, dated Aug. 29, 1932.

(1) (1932) 57 C. L. J. 41.

(2) (1872) 18 W. R. 526.

(3) (1928) M. A. 475 of 1926, decided by B. B. Ghose and Cammiade JJ. on 17th Feb.

covered by those structures until they are removed. If the huts or buildings are locked, he cannot make any use of the land covered by them. He is entitled to have the land without its being burdened by any structures, and, therefore, he can ask the executing court to deliver possession by removing the structures. Huts and buildings stand on the same footing: *Rajchandra Bose v. Dharmachandra Bose* (1). I may refer also to *The Government of Bengal v. Alimaddin* (2) and *Shah Abdul Hamid v. Prokash Chandra Nandi* (3).

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The position of the auction-purchaser at a sale for arrears of revenue is different; there the mode of delivery of possession by the Collector is proclamation by beat of drums as provided in Act XI of 1859.

Amarendramohan Mitra for the respondents. I have a preliminary objection that the present appeal is incompetent. Although the application was styled as one under Order XXI, rule 95, it was really one under rule 97, in as much as what the applicant complained of was resistance caused in obtaining possession; and since such alleged resistance was caused by the judgment-debtor, the order made on the application was not under rule 95; but under rule 98. As such, rule 103 is a bar to the present appeal. *Surendra Nath Das Gupta v. Satyendra Nath Bhattacharjya* (4).

[MUKERJI J. Do not the application and the orders thereon come under section 47 of the Civil Procedure Code?]

Order XXI, rule 95 does not by its terms authorise demolition of any structures and only provides for obstruction caused by a human being by refusing to vacate.

The case in *The Government of Bengal v. Alimaddin* (2) was a criminal case, in which the

(1) (1868) 2 B. L. R. (A. C.) 77.

(4) (1925) 92 Ind. Cas. 544.

(2) (1932) 57 C. L. J. 41.

[1926] A. I. R. (Calc.) 935.

(3) (1934) 38 C. W. N. 832.

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powers of the executing court in this respect were not in issue and were not discussed.

In applying under rule 97, a decree-holder auction-purchaser does not proceed in execution of his decree but seeks to assert a right which has accrued to him by virtue of his title. I rely on the judgment of Mookerji J. in *Sobha Ram v. Tursi Ram* (1).

Cur. adv. vult.

MUKERJI J. The appellant as decree-holder has purchased a *táluk* in execution of a rent decree and has applied for delivery of possession under Order XXI, rule 95 of the Code by demolition of *puccá* structures. The Munsif held that the prayer for delivery of possession of the land by breaking down the building on it cannot be entertained and "delivery of possession of the land only should be given." The Subordinate Judge, on appeal, affirmed the said order of the Munsif.

In our opinion, the prayer of the appellant for delivery of possession by demolition of the *puccá* structures cannot be allowed. Order XXI, rule 95 of the Code entitles the purchaser to be put in possession of the purchased properties—the lands in this case, "and, if need be, by removing any person who "refuses to vacate the same ." The acts necessary to be done by the officer, who is entrusted with the duty of executing a writ for delivery of possession issued under this rule, must vary according to the circumstances of each particular case, the only test of sufficiency of such acts being that they should put the purchaser in effective and complete possession as against the judgment-debtor or his representatives or the person claiming under a title created by him subsequently to the attachment of the property. If the judgment-debtor or any of such persons refuses to vacate, he has to be removed, because otherwise the delivery falls short of the test. Order XXI, rule 35,

sub-rules (1) and (3) relate to the same kind of possession, namely actual or *khâs* possession, which the holder of a decree is entitled to, as a purchaser is entitled to get under Order XXI, rule 95. Sub-rule (1) of rule 35 is worded similarly as rule 95; and sub-rule (3) of rule 35 lays down special procedure in respect of a building or enclosure. But nowhere is it said in the law that the demolition of a *puccâ* structure, which is on the land covered by a decree or by a purchase made in execution of a decree, is necessary in order to make the possession delivered effective and complete as actual or *khâs* possession. The prayer for demolition of the structures, therefore, has been rightly refused.

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The appellant has drawn our attention to certain observations of Rankin C. J. in the case of *The Government of Bengal v. Alimaddin* (1), as suggesting that the auction-purchaser is entitled to have the property without the property being burdened with the huts which were the structures in that case. The learned Judge before whom the case was cited was inclined to think that in that case the huts were probably erected after the attachment of the property purchased. Whether this is correct or not we cannot say; but, in any case, the observations were not pronounced as a decision on any contention to that effect. The view we take of the question finds support in the decision of this Court in the case of *Radha Gobind Shaha v. Brijendra Coomar Roy Chowdhry* (2), in which the question was directly raised and decided, in the case of some buildings which were not covered by the decree which was sought to be executed by the decree-holder concerned. Also, in the judgment of this Court in *Sreenath Chakrabarti v. Bhagabanchandra Kapali* (3) it has been observed:—

If there is any structure of the defendants, judgment-debtors, the plaintiffs, in taking *khâs* possession of the lands, would get *khâs* possession of the structures also, if not previously removed by the judgment-debtors and then the plaintiffs may remove them or keep them up as they choose, etc.

(1) (1932) 57 C. L. J. 41.

(2) (1872) 18 W. R. 526.

(3) (1928) M. A. 475 of 1926, decided by B. B. Ghose and Carmiade JJ. on 17th Feb.

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The possession, which the court will give, will not, in our opinion, be concerned with any act of demolition. Any further action which the appellant will take will be his own act and must be such as the law will allow.

The appeal is dismissed with costs: 2 gold mohurs.

GHOSE J. I agree.

Appeal dismissed.

A. A.