

## **HIGH COURT OF UTTARAKHAND AT NAINITAL**

Bench: Hon'ble Justice Alok Kumar Verma

Date of Decision: 24<sup>th</sup> June 2024

Case No.:

SECOND APPEAL NO. 139 of 2023

### **APPELLANT(S):**

**Upendra Kumar Sharma alias Bhagat and Another  
.....Appellants**

### **VERSUS**

### **RESPONDENT(S):**

**Anirudh Kumar .....Respondent**

Counsel for the Appellants: Mr. Piyush Garg, Advocate

Counsel for the Respondent: Mr. Siddhartha Singh, Advocate

Legislation:

Order I, Rule 10 of the Code of Civil Procedure, 1908

Order XXI, Rule 99 of the Code of Civil Procedure, 1908

Order XXI, Rules 97-99 of the Code of Civil Procedure, 1908

**Subject:** Second appeal involving issues around the execution of a preliminary decree for partition and the rights of a third party to protect possession under Order XXI, Rules 97-99 CPC before actually losing possession.

### **Headnotes:**

**Execution of Decree – Third Party Rights – Application of Order XXI Rule 99 CPC – The respondent filed an application to execute a preliminary decree for partition. The appellants, not party to the original suit, sought protection of possession under Order XXI Rule 99 CPC. The Trial Court dismissed their application, a decision upheld by the Appellate Court. The High Court, considering substantial questions of law, remitted the matter to the Trial Court for proper adjudication after framing issues and allowing evidence [Paras 1-13].**

**Maintainability of Application under Order XXI Rule 99 CPC – The court addressed whether a third party can seek relief under Order XXI Rule 99 CPC before losing possession. Emphasizing procedural requirements, the court noted the necessity of**

**framing issues and leading evidence to adjudicate rights [Paras 3-9].**

**Remand for Proper Adjudication – The court remanded the matter to the Trial Court to adjudicate the application filed by the appellants under Order XXI Rule 99 CPC, ensuring proper procedural compliance [Paras 11-13].**

**Referred Cases:**

BhogadiKannababu and Others vs. VugginaPydamma and Others  
(2006) 5 SCC 532

Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal and Another  
(1997) 3 SCC 694

Decision: Appeal allowed. The impugned orders were set aside, and the matter remitted to the Trial Court for fresh adjudication in accordance with procedural rules, ensuring issues are framed and evidence is led before deciding the application under Order XXI Rule 99 CPC [Paras 12-15].

**Representing Advocates:**

For Appellants: Mr. Piyush Garg, Advocate

For Respondent: Mr. Siddhartha Singh, Advocate

**JUDGEMENT**

**Hon'bleAlokKumarVerma,J.**

The respondent had instituted an Original Suit (O.S. No.76 of 1991, "Anirudh Kumar Vs. Jyoti Prasad and Others"), seeking decree of partition. The present appellants were not party to the said Suit. The Trial Court passed a preliminary decree on 16.12.2000. The respondent-plaintiff was declared the owner of 1/3 share in the land bearing Khasra No.1601. Keshaw Dutt and Others, the defendants of the said original suit, had filed a Civil Appeal (No.05 of 2001) against the judgment and decree dated 16.12.2000. On receipt of information about the said Appeal, an Application under Order I Rule 10 of the Code of Civil Procedure, 1908 was filed by the present appellants. The said Application was dismissed by the Appellate Court and the Civil Revision, filed by the present appellants, was also dismissed by this Court.

**2.** The respondent-plaintiff had filed an Application (Miscellaneous Case No.44 of 2001) to execute the

judgment dated 16.12.2000. The present appellants had filed an Application under Order XXI Rule 99 CPC seeking dismissal of the said Miscellaneous Case No.44 of 2001. The said Application (Miscellaneous Case No. 07 of 2017) was dismissed. The appellants had filed a Civil Appeal (No.22 of 2018) against the order dated 08.02.2018, by which the said Miscellaneous Case No. 07 of 2017 was dismissed. The said Appeal has been dismissed by the learned Vth Additional District Judge, Haridwar vide judgment dated 25.07.2023.

**3.** The present Second Appeal has been admitted on the following substantial questions of law:-

(i) Whether an Application under Order 21 Rule 97-99 CPC is not maintainable at the behest of a third party to protect his possession and before actually losing possession and his remedy is only to file an Application under Order 21 Rule 97-99 CPC after actually losing possession?

(ii) Whether in the facts and circumstances of the case, the Application under Order 21 Rule 97-99 CPC could have been dismissed without adopting the procedure like a suit viz framing of issues and permitting the parties to lead evidence?

**4.** Heard Mr. Piyush Garg, learned counsel for appellants and Mr. Siddhartha Singh, learned counsel for respondent.

**5.** Mr. Piyush Garg, Advocate, contended that the appellants are the owner in possession of the Khasra No.1273 measuring 0.1330 hectare. The area of Khasra No.1601 is only 17 biswa i.e. 18785 square feet, however, the area of Khasra No.1601 was shown more than 35000 square feet in the said Original Suit No.76 of 1991. The respondent-plaintiff of Original Suit No.76 of 1991

malafidely sought to include the area of Khasra No.1273 also within the boundary of Khasra No.1601.

**6.** Mr. Piyush Garg, Advocate, submitted that the appellant has also filed a Civil Suit (Original Suit No.246 of 2015, "Upendra Kumar Vs. Shashikant Mishra and Ors.") seeking prohibitory injunction in respect of the property bearing Khasra No.1273 measuring 0.1330 hectare and an interim injunction has been granted to the appellants in the said Original Suit No.246 of 2015. A survey report has also been filed in the said Original Suit No.246 of 2015.

**7.** Mr. Piyush Garg, Advocate, argued that the dismissal of an Application under Order I Rule 10 CPC does not disentitle the third party to file an Application under Order XXI Rule 97-99 CPC in case the cause of action arises for that purpose. In support of his submission, he has relied upon a judgment of the Hon'ble Supreme Court passed in "**Bhogadi Kannababu and Others Vs. Vuggina Pydamma and Others, (2006) 5 SCC 532**".

**8.** Mr. Piyush Garg, Advocate, further contended that it was incumbent upon the learned Trial Court to first frame issues and then to permit the parties to lead evidence and then to decide the rights instead of dismissing the Application, filed under Order XXI Rule 97- 99 summarily.

**9.** On the other hand, Mr. Siddhartha Singh, Advocate, argued that by the order of the court, the possession of the property-in-question has been taken by the respondent on 01.08.2017 and the Application, filed by the appellants under Order XXI Rule 99, was not maintainable.

**10.** Mr. Piyush Garg, Advocate, refuted the said submission and relied upon a judgment of the Hon'ble

Supreme Court passed in “**Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Another, (1997) 3 SCC 694**”.

**11.** Today, learned counsel for both the parties have requested to remit the present matter to the Trial Court to decide the Application, filed by the appellants-third party under Order XXI Rule 99 of the Code of Civil Procedure, 1908.

**12.** With the consent of both the parties, the impugned order dated 25.07.2023, passed by learned V<sup>th</sup> Additional District Judge, Haridwar in Civil Appeal No. 22 of 2018 and the impugned order dated 08.02.2018, passed by learned I<sup>st</sup> Additional Civil Judge (Senior Division), Haridwar in Miscellaneous Case No. 7 of 2017, are set aside.

**13.** The present matter is remitted to the trial court to decide the Application, filed by the appellants-third party under Rule 99 of Order XXI of the Code of Civil Procedure, 1908, after framing the issues and permitting the parties to lead evidence.

**14.** I make it clear that the observations made earlier will not influence the court concerned while deciding the case.

**15.** With the aforesaid directions, the present Second Appeal is disposed of accordingly.

© All Rights Reserved @ LAWYER E NEWS

\*Disclaimer: Always compare with the original copy of judgment from the official website.