PETITIONER:
BABULAL

Vs.

RESPONDENT:
RAJ KUMAR & ORS.

DATE OF JUDGMENT: 16/02/1996

BENCH:
K. RAMASWAMY, G.B. PATTANAIK

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted.

Though the respondents have been served, the second respondent has filed a photocopy of the Power of Attorney on behalf of respondent Nos.1 and 3 to 6 but when the Registry directed him to produce the original he failed to do the same. He is also not present in the Court. One Shyam Lal, son of Prabhu Lal Kayasth had laid the suit for specific performance; the Civil Judge dismissed the suit but on appeal No.16/1973 by judgment and decree dated October 18, 1973, the suit was decreed as under:

> "Appeal is accepted with cost. Judgment and decree under appeal is set aside and suit for specific performance of contract is decreed with costs that defendants as per contract Ex.1 at 1.9.66 shall execute sale deed within 3 months and plaintiff shall pay the balance sum to the defendant in the said period, otherwise plaintiff shall be entitled to get the sale deed executed of the dispute property as per the law depositing the balance amount in the court within two months."

In the suit there was prayer for specific performance with possession of the property in prayer 1 thus:

> "It be decreed that defendants should performs their part of the contract regarding the land and for this purpose get the sale deed registered after receiving a sum of Rs.1100/- and handover the possession of the disputed house to the plaintiff."

Under Section 22(1) of the Specific Relief Act, 1963, notwithstanding anything contained in Civil Procedure Code, the plaintiff suing for the specific performance of a contract for transfer of immovable property may, in an

appropriate case, ask for possession or partition with specific possession of the property, in addition to such specific performance. Sub-section (2) puts fetters on the power of the court to grant such relief without there being the relief specifically claimed in the plaint. As seen in the decree, though prayer for possession was claimed, no decree for possession was granted which had become final.

It would appear that in execution of the decree the legal representatives of the decree-holder sought to dispossess the appellant from the property said to be in his possession. Apprehending his dispossession, the appellant had filed another suit for injunction based on possessory title obtained an adinterim injunction on July 2, 1991 as under:

> "Counsel for the applicant present. The Presiding Officer has been transferred. Notice be issued to non-applicant on filing the process fee. File be Put up on ..... After writing this, non-applicant No.2 Subhash Saxena appeared and informed the court that he has not received copy of stay application. Copy of stay application is given to him today. Rest of the applicants Nos. 1, 3, 4, 5 and 6 be summoned through notices on filing the Registry fees and other expenses. Meanwhile non-applicant No.2 would not dispossessed applicant Babu Lal from the disputed house (except the decree of the court). Put file on 17.8.91."

We are informed that the injunction is still subsisting.

In the execution application filed under Order 21 Rule 32 of the CPC the appellant filed an objection on the ground that he could not be dispossessed. It is not in dispute that the appellant was not a party to the decree for specific performance. His objection was over-ruled by the executing Court holding that since he had not been dispossessed, application under Order 21 Rule 97 is not maintainable. That view was affirmed by the High Court in the impugned order dated May 9, 1995 in CRP No.656/94 by the High Court of Rajasthan at Jaipur Bench. Thus, this appeal by special leave.

The controversy is no longer res integra. This Court in Bhanwar Lal v. Satyanarain & Anr. [(1995) 1 SCC 6] considered the controversy and had held that even an application filed under Order 21 Rule 35(3) or one filed under Section 47 would be treated as an application under Order 21 Rule 97 and an adjudication is required to be conducted under Rule 98. Dispossession of the applicant from the property in execution is not a condition for declining to entertain the application. The reasons are obvious. The specific provisions contained in Order 21 Rules 98, 101, 102 enjoin conduct of a regular adjudication, finding recorded thereon would be a decree and bind the parties. In Para 7 thereof it was held thus:

> "In the above view we have taken, the High Court has committed grievous error of jurisdiction and also patent illegality in treating the application filed by the appellant as barred by limitation

and the third one on res judicata. Once the application, dated 25.5.1979 was made, the Court should have treated it to be one filed under Order 21, Rule 97 (1) CPC. The question of res judicata for filing the second and third applications does not arise. Under these circumstances, the appellate court, though for different reasons was justified in directing an enquiry to be conducted for removal of the obstruction or resistance caused by Satyanarain under Order 21, Rules 35(3) and Order 21, Rules 101 and 102 of CPC".

It would, therefore, be clear that an adjudication is required to be conducted under Order 21, Rule 98 before removal of the obstruction caused by the object or the appellant and a finding is required to be recorded in that behalf. The order is treated as a decree under Order 21, Rule 103 and it shall be subject to an appeal. Prior to 1976, the order was subject to suit under 1976 Amendment to CPC that may be pending on the date of the commencement of the amended provisions of CPC was secured. Thereafter, under the amended Code, right of suit under Order 21, Rule 63 of old Code has been taken away. The determination of the question of the right, title or interest of the objector in the immovable property under execution needs to be adjudicated under Order 21, Rule 98 which is an order and is a decree under Order 21, Rule 103 for the purpose of appeal subject to the same conditions as to an appeal or otherwise as if it were a decree. Thus, the procedure prescribed is a complete code in itself. Therefore, the executing Court is required to determine the question, when the appellants had objected to the execution of the decree as against the appellants who were not parties to the decree for specific performance.

The appeal is accordingly allowed. The executing Court is directed to enquire into the matter and record a finding after giving opportunity to the parties. No costs.