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**(2007) 03 GAU CK 0022**

**Gauhati High Court**

**Case No:** Civil Revision Petition No. 126 of 2005

Mojib Uddin Choudhury and Ors.

APPELLANT

Vs

Fazil Ahmed Choudhury

RESPONDENT

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**Date of Decision:** March 13, 2007

**Acts Referred:**

- Civil Procedure Code, 1908 - Order 21 Rule 97, 47
- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 97, 47

**Citation:** (2008) 1 GLR 376

**Hon'ble Judges:** I.A.Ansari, J

**Bench:** Single Bench

**Advocate:** B.Ahmed, Advocates appearing for Parties

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**Judgement**

1. The order, under challenge in the present revision, was passed, on 4.8.2005, in Miscellaneous Case No. 25/2003, which arose out of the Title Execution Case No. 17/1979, passed by the learned Civil Judge (Junior Division) No. 2, Silchar. The material, facts, which have given rise to the present revision, may, in brief, be described, thus:

(i) Pursuant to Title Execution Case No. 17/1979, the decreeholder received, on 15.6.2003, possession of the entire decreetal land and the decree, so put in execution, stood fully satisfied. Thereafter, the present petitioners, who were not parties to the said decree, filed a petition before the District Magistrate, Cachar, Silchar, alleging, inter alia, that the decreeholder (i.e., the opposite party herein), had erected fencing around the land, which had been in the use of the present petitioners and others of their locality as a public path, and thereby restraining the present petitioners and others of their said locality from using the land as a path. Based on this petition, the District Magistrate passed an order directing the police to remove the fencing. The decreeholder, then, filed a petition, in the Title Execution Case No. 17/1979 aforementioned, alleging, inter alia, that he had been illegally

dispossessed from the land, which, in execution of the said decree, he had been given possession of and accordingly prayed for necessary direction to restore possession of the said land to him. This petition gave rise to Misc. Case No. 25/2003 aforementioned. Having received objection from the present petitioner against the prayer of the decreeholder, and treating the said application as an application made under order XXI, rule 97 of the Code of Civil Procedure ("the Code"), the learned court below passed an order, on 14.10.2005, directing that the possession of the decreeholder over the said land shall not be disturbed by the present petitioners. It is this order, which stands impugned in the present revision.

2. I have heard Dr. B. Ahmed, learned counsel for the petitioner. None has appeared on behalf of the decreeholderoppositeparty.

3. While considering the present revision, what is of paramount importance to note is that Order XXI deals with various facets of execution of decrees and orders. Order XXI does not come into play if a decree has already been executed, discharged or satisfied. Broadly speaking, the Code stands divided into two parts. While the Sections, which appear in the Code, vest the courts with jurisdiction to deal with such matters, as are mentioned therein, the Rules, framed under various Orders, lay down the procedure for exercise of such jurisdiction. Thus, the Sections are substantive part of the Code and the Rules, framed under various Orders, are procedural part of the Code. The substantive power is derived by a civil court from the various Sections in the Code and not from the Rules framed under the Orders. How a power, conferred on a civil court, or the jurisdiction, vested in the civil court, would be exercised, is a matter of procedure and it is the procedure, which the various Rules, framed under the Orders, indicate.

4. What needs to be, now, carefully noted is that the substantive power of the court to execute a decree is not derived from Order XXI, but from section 47, which makes it clear that all questions, arising between the parties to the suit, in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. How the questions relating to execution, discharge or satisfaction of a decree would be dealt with and determined are contained in the Rules framed under Order XXI. When a decree stands executed and no question with regard to execution, discharge or satisfaction of the decree arises between the parties to the suit, in which the decree was passed, or their representatives, section 47 is not attracted.

5. In the case at hand, it was the case of the decreeholder himself that he had already received possession of the decreetal land. In other words, the decree had stood executed and satisfied. In such circumstances, when the present petitioners were, admittedly, not parties to the decree nor were they claiming any right over the land, in question, or on any part thereof as a representative of the judgmentdebtor, they could not have been bound down by the decree and the learned court below,

having executed the decree, could not have entertained an application such as, the present one, as an application under order XXI, rule 97. As a matter of fact, the very language of order XXI, rule 97 makes it clear that rule 97 comes into play, when there is resistance or obstruction to possession of the immovable property during the course of execution of a decree. For the sake of clarity, order XXI, rule 97(1) is reproduced hereinbelow:

"97. Resistance or obstruction to possession of immovable property.

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the court complaining of such resistance or obstruction.

(2) Where any application is made under subrule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained."

6. The present petition filed by the decreeholder, if taken to logical conclusion, would amount to seeking a second execution of the decree, which had already stood executed. Such a power is not available in, and cannot be derived from, order XXI, rule 97 or any other Rules framed therein. In fact, in *Shew Bux Mohata and Another v. Bengal Breweries Ltd. and Others* AIR 1961 SC 137, the Apex Court considered the question as to whether a second execution of a decree, which already stood executed is permissible and clinched the position of law, in this regard, in the following words:

"(20) It is not in dispute that if the decree was once executed against defendant No. 4 in full, then it cannot be executed over again, regarding premises No. 27. In other words, if possession had been fully delivered to the decreeholders in execution of the decree on 1st October, 1948, the decree must have been wholly satisfied and nothing remains of it for enforcement by further execution. The decree was for khas possession and under order 21, rule 35 of this Code in execution of it possession of the property concerned had to be delivered to the decreeholder, if necessary, by removing any person bound by the decree who refused to vacate the property. The records of the proceedings show that such possession was delivered. Defendant No. 4 was the party in possession and bound by the decree. With regard to defendant No. 4, the order made on September 8, 1949 states, "Possession so far as regards the Bengal Breweries are concerned, delivered." This is an order binding on the decreeholders. It has not been said that this order was wrong nor any attempt made at any time to have it set aside or to challenge its correctness in any manner. The same is the position with regard to the order of November 22, 1948, recording on the Nazir's return that possession had been delivered in terms of the writ." (emphasis supplied)

7. Because of what have been discussed and pointed out above, it is transparent that the impugned order, dated 4.8.2005, aforementioned, is without jurisdiction and cannot be allowed to survive.
8. In the result and for the foregoing reasons, this revision succeeds and the impugned order is set aside.
9. Before parting with this revision, it is, however, made clear that the disposal of this revision shall not be treated as this court's approval of the order or action of the District Magistrate in removing the alleged obstruction from the land, which became subjectmatter of Misc. Case No. 25/2003 aforementioned.
10. With the above observations and directions this revision shall stand disposed of.
11. Send back the LCR.