

**(2010) 10 MAD CK 0284**

**Madras High Court**

**Case No:** C.R.P. NPD. No. 2335 of 2010 and M.P. No. 1 of 2010

S. Arumugam

APPELLANT

Vs

Krishnammal and Arunachala  
Nainar

RESPONDENT

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**Date of Decision:** Oct. 5, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 35, Order 21 Rule 97, Order 21 Rule 97(1)

**Citation:** (2010) 5 LW 735

**Hon'ble Judges:** V. Periya Karuppiyah, J

**Bench:** Single Bench

**Advocate:** P. Mani, for the Appellant; P.T. Asha, for Sarbhauman, Associates for 1st Respondent, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

V. Periya Karuppiyah, J.

This revision has been filed against the order passed in R.E.A. No. 87 of 2010 in R.E.A. No. 71 of 2009 in R.E.P. No. 80 of 2008 in O.S. No. 30 of 2005 dated 28.06.2010 by the lower Court in dismissal of the said petition.

2. Heard Mr. P.Mani, the learned Counsel for the Petitioner and Ms. P.T. Asha , the learned Counsel for the first Respondent. No appearance for the second Respondent.

3. The learned Counsel for the Petitioner would submit in his argument that he is a third party to the decree passed in O.S. No. 30 of 2005 and he has filed an application in E.A. No. 88 of 2010 claiming the title to the property subjected to the execution and also for the stay of delivery of possession of the schedule lands to the

first Respondent decree holder and he has also asked for the stay of delivery of possession ordered in the E.P. He would also submit that in spite of the obstruction to the delivery proceedings, the lower Court had ordered for Police Aid and delivery of possession was also ordered without removing the obstruction. He would submit that the lower Court without resorting to the procedure contemplated under law, had ordered delivery of possession and therefore, it should have been stayed. Further, he would submit that the Petitioner himself has filed a suit for partition and separate possession of his half share, in the suit properties subject matter of the execution in O.S. No. 184 of 2008, before the Sub-Court, Krishnagiri and it is also pending adjudication and in the mean while, if delivery has been ordered in favour of the first Respondent, the right of the Petitioner in the partition suit will be prejudiced and therefore, he would submit in his argument that the delivery of possession ordered by the Court shall be stayed. He would also submit in his argument that the Petitioner was in possession of the properties mentioned in E.P., and obstructed to the delivery ordered by the lower Court in E.P. No. 71 of 2009 on 07.04.2010 and the amin of the Executing Court has also reported the obstruction by the Petitioner on 12.04.2010 and an application to removal of obstruction and sought for police help was filed by the first Respondent on the same day and the Executing Court ordered delivery with police protection on 15.04.2010. Against which, the Petitioner filed a revision in C.R.P.S.R. No. 49376 of 2010 and an order was passed directing the Petitioner to file claim petition under Order 21 Rule 97 CPC on 08.06.2010. Accordingly, he filed a claim petition in R.E.A. No. 88 of 2010, and an application in R.E.A. No. 87 of 2010 for stay of the delivery till the disposal of the claim petition on 14.06.2010. The execution Court has posted the applications on 21.06.2010 for filing counter and however in the meanwhile the amin effected delivery of the property in the absence of the Petitioner who is the owner of the property and subsequently on 28.06.2010, the stay application in R.E.A. No. 87 of 2010 was dismissed and the claim petition in R.E.A. No. 88 of 2010 was subsequently posted to 16.07.2010 for enquiry. He would further submit in his argument that the lower Court ought to have stayed the delivery of possession but it had permitted the first Respondent to execute the decree despite a claim petition has been filed by the Petitioner as directed by this Court. He would also submit that this Court in M.P. No. 1 of 2010 had granted interim stay against recording of delivery since delivery have been effected to the first Respondent. He would bring it to the notice of this Court, various judgments of this Court to the effect that the Executing Court should firstly adjudicate the claim under Order 21, Rule 97 CPC and thereafter, to pass an order in the execution petition. He would cite a judgment of Hon"ble Apex Court reported in AIR 1995 SC 856 in between Brahmdeo Choudhar v. Rishikesh Prasad Jaiswal, in support of his case. He would also submit in his argument that the delivery ordered during the pendency of the claim petition filed under Order 21, Rule 97 Code of Civil Procedure, would be against the provisions under Order 21, Rule 101 CPC that the claim petition be disposed first and thereafter, to proceed with the execution petition. He would also draw the attention of the Court to a judgment of Hon"ble

Apex Court reported in [Babulal Vs. Raj Kumar and Others,](#) . He would also submit in his argument that the lower Court was wrong in ordering delivery of possession during the pendency of the claim petition, R.E.A. No. 88 of 2010 and again erred in not granting stay in the petition filed in R.E.A. No. 87 of 2010. He would also submit in his argument that the lower Court had finally dismissed the stay application in R.E.A. No. 87 of 2010, which is against the provisions of law and therefore the order passed by the lower Court should be interfered and the revision be allowed after giving suitable directions.

4. The learned Counsel for the first Respondent would submit in her argument that the claim of the Petitioner was not bonafide and he is not the actual owner of the property, but he was set up by the second Respondent/judgment debtor to protract the execution proceedings as far as possible by raising obstructions and even after removal of the obstruction he would come forward with the plea of ownership of the property and it was promptly observed by the lower Court that the intention of the Petitioner was only to protract the proceedings. She would further submit that the Petitioner was projected by the 2nd Respondent/Judgment Debtor to file a suit for partition as if he is having right over the said property but actually after the sale deed has been executed in the E.P., filed by the 1st Respondent and the claim of the Petitioner by raising obstructions was found by the lower Court as not bona-fide and therefore, his obstruction was removed and Police protection was ordered and this Court has also rightly pointed out to go for claim petition. While the claim was presented by the Petitioner, before the lower Court, it found mala-fide of the Petitioner and had not granted any stay in the said application but the execution Court is keeping the claim petition in R.E.A. No. 88 of 2010 pending for disposal. She would further submit in her argument that the delivery was very much ordered earlier to the filing of the presentation of the claim petition (i.e.) on 17.03.2010 and the E.P., has not been terminated and final order in the E.P., has to be ordered, depending upon the order to be passed in the claim petition in R.E.A. No. 88 of 2010 and therefore, there is no violation of any rules of law as contemplated under Order 21 Rule 97 or Rule 101 Code of Civil Procedure. She would also submit in her argument that in pursuance of the delivery order, the Court amin has effected delivery of the property and the 1st Respondent has also taken possession of the property in pursuance of the decree and the recording of delivery alone is due before the Executing Court. She would also submit that the remedy available to the Petitioner is not resting in this revision for getting an order of stay, since delivery has already been effected, but to proceed with the claim petition in R.E.A. No. 88 of 2010 and if his claim is up-held he has further resort under appropriate provision for obtaining possession of the petition mentioned properties. She would also submit that the recording of delivery by the Execution Court is an administrative act and therefore, it cannot be said that the delivery ordered and effected by the lower Court has to be stayed in this revision. Therefore, she would request the Court to dismiss the revision petition.

5. I have given anxious thoughts to the arguments advanced on either side. The first Respondent/decreed holder had obtained a specific performance decree against the second Respondent in respect of petition mentioned properties and he had also launched the execution proceedings in pursuance of the specific performance decree obtained in his favour and the Execution Court has already ordered for the execution of sale deed and accordingly, the first Respondent had obtained sale deed, in respect of petition mentioned property, through Court. After obtaining the sale deed, he has launched execution petition for delivery of possession. In the said execution petition in E.A. No. 71 of 2009 delivery was ordered on 17.03.2010, in respect of the petition mentioned properties in favour of the first Respondent/decreed holder. When the amin went to the suit property for effecting delivery, the Petitioner/third party obstructed the delivery by saying that he is the owner of the property and the amin reported the obstruction made by the Petitioner to the Court. Thereafter, the first Respondent/decreed holder filed steps for removing obstruction and sought for police help for removal of such obstruction and accordingly, police help was ordered by the lower Court on 15.04.2010. It has been stated by the Petitioner that he preferred revision against the said order in CRP SR. No. 49376 of 2010 and this Court had directed the Petitioner to file a claim petition under Order 21, Rule 97 Code of Civil Procedure. Accordingly, the Petitioner is said to have filed a claim petition in R.E.A. No. 88 of 2010 under Order 21, Rule 97 CPC claiming that the property belonged to him and he also filed a petition for stay in R.E.A. No. 87 of 2010 and the said application for stay was dismissed by the lower Court, since the delivery has already been effected and therefore, he has preferred the present revision.

6. The point on which the Petitioner would insist that the Execution Court shall not proceed with the execution petition, when an application under Order 21, Rule 97 CPC has been filed and it is pending for adjudication. No doubt, the execution Court did not grant any interim stay in R.E.A. No. 87 of 2010 and therefore, an order of delivery was passed by the lower Court on 17.03.2010 and subsequently on 15.04.2010 with the help of police delivery was effected on 18.06.2010 during the pendency of the petitions in R.E.A. No. 88 of 2010 and R.E.A. No. 87 of 2010. Hence, this Court has stayed the recording of delivery. However, the lower Court has not passed any order in R.E.A. No. 88 of 2010 but dismissed the petition for stay filed in R.E.A. No. 87 of 2010 by holding that the delivery has already been effected. According to the submission made by the learned Counsel for the Petitioner that the physical delivery has not been effected to the first Respondent and actually he is in possession of the said property. Whether the Petitioner is entitled to the property or not, could be tested only on the enquiry to be held in the petition filed in R.E.A. No. 88 of 2010 which is posted by the lower Court for enquiry. The judgment of Hon'ble Apex Court reported in [Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another](#), . The relevant passage would run thus:

12: ...Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI, Rule 97 Sub-rule (1) and he cannot by-pass such obstruction and insist on re-issuance of warrant for possession under Order XXI, Rule 35 with the help of police force, as that course would amount to by-passing and circumventing the procedure laid down under Order XXI, Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI, Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI, Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualise that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder.

...The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order XXI, Rule 97, CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist.

7. Similarly, in the judgment of Hon"ble Apex Court reported in 1996 SC 2050, in between Babulal v. Raj Kumar and Ors. The relevant passage would run thus:

7. It would therefore, be clear than 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.

...

...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.

8. Similarly in the judgment of Hon'ble Apex Court reported in [Anwarbi Vs. Pramod D.A. Joshi and Others](#), it has been laid down as follows:

4. ...We. therefore, make it clear that the possession of the Appellant cannot be distributed except in accordance with law; and that in view of the obstruction raised by her to the execution of the said decree, the rights of the obstructionist will have to be decided in appropriate proceedings, in accordance with law. Unless and until such proceedings terminate in favour of the decree-holder, the decree holder cannot take possession and the Appellant is entitled to retain possession.

9. On a careful perusal of the aforesaid judgments of the Hon'ble Apex Court, is very clear that whenever an obstruction has been made by a third party claiming the property as his own property, the executing Court shall proceed to remove the obstruction first and thereafter, to proceed further.

10. As far as this case is concerned, the Petitioner had complained about removal of obstruction on the filing of the memo by the first Respondent/decreed holder before executing Court, seeking police protection for removal of obstruction. However, this Court had directed him to file a claim petition under Order 21, Rule 97 CPC in its order on maintainability of the revision. The delivery has been effected despite, the applications were filed by the Petitioner before the lower Court. According to the amin's report, delivery has been effected on 18.06.2010 and the report of the amin is yet to be recorded by the lower Court. Therefore, the removal of obstruction which was questioned before this Court was directed to be filed by way of claim petition under Order 21, Rule 97 Code of Civil Procedure. However, the removal of obstruction through memo by the lower Court has not been set aside by this Court, in the said revision filed by the Petitioner which was disposed at threshold of admission on maintainability.

11. Now, the only point to be seen is whether the delivery effected can be stayed in an application filed by the Petitioner before the lower Court in R.E.A. No. 87 of 2010, against which the present revision has been preferred. The property has been delivered to the first Respondent as seen from the records. The recording of delivery alone is due. This Court has passed an order of stay of recording of the delivery in M.P. No. 1 of 2010. It is a settled principle that the recording of delivery is an administrative act. The said principle has been categorically laid down by this Court

in various judgments reported in [Perumal and Others Vs. Ramachandra Padayachi and Others, . V. Shanmugha Mudaliar Vs. IX Assistant Judge, City Civil Court and Another, .](#); and [Komiah Vs. Subbulakshmiammal and Soundaraja Pattar, .](#) Even though the judgments are very clear that the recording of evidence is only an administrative act of the Court to record the delivery of possession already effected, in the peculiar circumstances of this case, the lower Court ought to have stayed the delivery immediately or atleast the recording of delivery, when a petition for a claim over the property has been filed. It was not done so by the lower Court, but it did not pass any order of interim stay in the stay application and in the meanwhile, the delivery of property has been effected on 18.06.2010. Now, the application in R.E.A. No. 88 of 2010, namely, the claim petition of the Petitioner is pending before the Execution Court and it has to be disposed of by the Execution Court on merits.

12. In the aforesaid circumstances, the delivery effected in favour of the first Respondent/decreed holder cannot be set aside in this revision, since the revision has been preferred only against the refusal of an order of stay. If really, the Petitioner is having a meritorious case in R.E.A. No. 88 of 2010, and the Petitioner is not remediless to get at his possession through Court. In the judgment of Hon"ble Apex Court reported in [Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, ,](#) a person who has lost the possession of the property can resort his remedy as per provisions of Order 21, Rule 99 Code of Civil Procedure. As far as this case is concerned, the Petitioner is yet to establish his right, title and interest in the decreetal property in R.E.A. No. 88 of 2010. In such circumstances, the delivery effected in favour of the decree holder/first Respondent, cannot be set aside in the revision preferred against the refusal of passing an order of stay. The Petitioners' actual claim was that he was not still dis-possessed from the petition mentioned properties, even though the amins report is contrary to it. Therefore, this Court could at best stay further proceedings in the E.P., at the stage of recording of delivery till the disposal of application in R.E.A. No. 88 of 2010. The lower Court is accordingly directed to stay further proceedings in the E.P., and to proceed with the enquiry of the application in R.E.A. No. 88 of 2010 and to pass lawful orders and to pass consequent orders in the E.P., depending upon the decision to be reached in the said claim petition in R.E.A. No. 88 of 2010.

13. With the aforesaid observations and directions, this revision petition is ordered. No order as to costs. Consequently, connected miscellaneous petition is closed.