
(1952) 12 PAT CK 0007
In the Patna High Court
Case No : Civil Revision No. 308 of 1952

Bhai Lal Tanti

APPELLANT

Vs

Prabhu Sahu and Others

RESPONDENT

Date of Decision : 03-12-1952

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63

Citation : AIR 1953 Patna 223 : (1953) 1 BLJR 13

Hon'ble Judges : Narayan, J

Bench : Single Bench

Advocate : H.K. Banerji, for the Appellant; A.K. Prasad and M.P. Singh, for the Respondent

Final Decision : Allowed

Judgement

Narayan, J.—This application is directed against an order of the Additional Subordinate Judge, Monghyr, allowing an application under Order 21, Rule 58, Civil Procedure Code, and releasing from attachment the property attached in arc execution case. The property in question is a house, and it had been attached in a previous execution case as well arising out of the same decree.

Prabhu Sahu, the opposite party No. 1 before this Court, had filed an application under Order 21, Rule 58, in the previous execution case, and it appears that he had examined a witness in support of his claim. The decree-holder, the present applicant, had also examined a witness in that case, but as on the date to which the case had been adjourned nobody turned up on behalf of the applicant, the case was dismissed for default. The claimant again filed an application under Order 21, Rule 58, and this application has been allowed by the learned Subordinate Judge.

2. On behalf of the decree-holder it was contended that as the previous application had been dismissed, the second application with regard to the same property and by the same claimant was not maintainable. It was further urged

that the house attached was not the same house which is mentioned in the sale-deed propounded by the claimant. The claimant Prabhu Sahu claimed to be the purchaser of the house under a sale-deed executed by the cousins of the judgment-debtors.

3. The learned Subordinate Judge allowed the claim after rejecting both the contentions urged on "behalf of the decree-holder.

4. The most important point for consideration is whether the second application under Order 21, Rule 58, is maintainable, even though the first application had been dismissed. It is true that evidence had been adduced in the previous miscellaneous case and that the case had to be dismissed because the lawyer engaged on behalf of the claimant did not turn up for arguing the case. The claimant had, after the dismissal of the case, filed a petition praying that the case be disposed of on the merits as evidence had already been adduced, but this petition was rejected by the learned Subordinate Judge.

The learned Subordinate Judge against whose order the present application in Civil Revision is directed was of the opinion that under the circumstances of the case the second application was maintainable. But I am not able to agree with the learned Subordinate Judge that the second application under Order 21, Rule 58, on the same grounds would be maintainable. It is true that the previous application should have been disposed of on the merits, because evidence had been adduced. But, as has been pointed out in several cases, the present position of law is that the party against whom an order is made has to institute a suit to establish the right which he claims to the property in dispute, and subject to the result of such suit the order shall be conclusive. The rulings which had been given when Section 283 of the Code of 1882 was in force cannot apply now, the language of the present rule being much more comprehensive than the language of the old Section 283. There are, now a catena of authorities which lay down the proposition that the rule applies to every order made against a party to a claim preferred or an objection made under Rule 58, and that it applies even if the order was made for default and without investigation.

A Full Bench of the Madras High Court held in -- "Venkataratnam v. Ranganaynkamma AIR 1919 Mad 738 (A) that an order refusing to investigate a claim on the ground that there was delay in filing it, is an order passed against the claimant within Order 21, Rule 6.3, and that an order on a claim petition merely stating that, as it was filed late, it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of Order 21, Rule 63, will apply. As was pointed out by Wallis C. J. in this case, Section 283 of the old Code failed to provide for the speedy settlement of the questions of title raised by the claim, and the legislature intended to supply this omission when in Rule 63 of Order 21 of the present Code it conferred the right of suit in general terms "where a claim or an objection is preferred" upon "the party against whom the order is made", instead of limiting it, as in Section 283, to cases in which an order had been passed under Rules 60, 61 and 62.

As was pointed out in a later Full Bench case of the same Court, this decision has received the approval of all the High Courts in India. This was the case reported in -- *The Cannanore Bank, Limited Vs. Pattarkandy Arayanveetil Madhavi and Others*, . In this case it was held that even if the petition of claim had been dismissed as not pressed, it would be an adverse order within the meaning of Order 21, Rule 63, Civil P. C. It is not open to this Court now to revise the order passed in the previous miscellaneous case on the ground that it was improper for the learned Subordinate Judge who decided that case to have dismissed it for default after evidence had been adduced. The order might be an erroneous order, but it was not an order with jurisdiction. In this view of the matter, I am of opinion that the second petition for claim could not be entertained by the Court,

As was pointed out by the Judicial Committee in -- AIR 1949 239 (Privy Council) , although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference by the High Court in revision under sub-section " (c) of Section 115, Civil P. C., nevertheless, if the erroneous decision results in the subordinate court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under Sub-section (a) or subsection (b) of Section 115 of the Code, and Sub-section (c) can be ignored.

In another case reported in -- AIR 1949 156 (Privy Council) their Lordships held that Section 115, Civil P. C., applies to jurisdiction alone, and empowers the High Court to satisfy itself on three matters, (a) that the order of the subordinate Court is within its jurisdiction, (b) that the case is one in which the subordinate Court ought to exercise jurisdiction, and (c) that in exercising jurisdiction the court has not acted illegally, that is, in breach of some provision of law, or with material irregularity, that is, by committing some error of procedure in the course of the trial which is material in that it may have effected the ultimate decision. XTndoubtedly, if the second application could not be entertained by the Court, then the order of the learned Subordinate Judge allowing the claim is an order without jurisdiction. The position seems to be obvious that the second application was not maintainable, and therefore the learned Subordinate Judge had no jurisdiction to allow the claim on the basis of the second application.

5. The present application in Civil Revision must, therefore, succeed, and the order of the learned Subordinate Judge must be set aside.

6. I see no reason to differ from the view of the learned Subordinate Judge that the property covered by the sale-deed is the same property which has been attached in the execution case.

7. This application is, therefore, allowed with costs, and the order of the learned Subordinate Judge releasing the property from attachment is set aside. Hearing fee one gold mohur.