

(1988) 01 BOM CK 0011

In the Bombay High Court

Case No : Second Appeal No. 130 of 1975

Chandrabhagabai Madhao and another

APPELLANT

Vs

Premchand Kasturchand Jain and others

RESPONDENT

Date of Decision : 19-01-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11

Citation : (1988) 01 BOM CK 0011

Hon'ble Judges : S.W. Puranik, J

Bench : Single Bench

Advocate : R.L. Khapre, for the Appellant; S.R. Deshpande for Respondents Nos. 1 to 4, 6(a), 6(b), 7(a) to 7(e), 8 and B.N. Mohta for Respondent No. 9(a), for the Respondent

Final Decision : Allowed

Judgement

S.W. Puranik, J.—An interesting question regarding the finality of order under Order 21, Rule 63 of the CPC falls for consideration in this Second Appeal.

2. Certain properties were attached in execution of a decree against one Raghunath. They were to be sold in execution proceedings. Objection to the execution and attachment under Order 21, Rule 58 of CPC was raised by Madhay the brother of judgment debtor. The objector Madhav died and was succeeded by his widow Chandrabhagabai and daughter Fulvanti. However, Fulvanti was not made a party to the said execution proceedings. The application under Order 21, Rule 58 filed by Chandrabhaga was dismissed in default. Under Order 21, Rule 63, Criminal Procedure Code therefore, her objection was finally rejected unless she filed an independent suit as provided therein. She, however, did not prefer any civil suit. Hence, there is a finality to the order dismissing her objection.

2-A. In the meantime, several creditors of Raghunath filed proceedings for insolvency against Raghunath. In the said insolvency proceedings, some property which was involved in the earlier execution was sited as property belonging to

the insolvent and available for distribution. Chandrabhagabai and her daughter Fulvanti both raised objections in the insolvency proceedings alleging that the property shown as belonging to the insolvent is owned by them as successors of Madhav. In the alternative, they pleaded that at any rate the said property was joint property of Raghunath the insolvent and his brother Madhav, and therefore, Madhav's widow and daughter i.e. Chandrabhagabai and Fulvanti had half share in the property and to that extent the attachment for purpose of insolvency proceedings is liable to be set aside.

3. After enquiry, the trial Court found that the property was jointly owned by Madhav and Raghunath. The trial Court held that the property belonged to Madhav, because the title deeds in respect of the said property in the name of Madhav, and therefore, there was no saleable interest of Raghunath, the insolvent in the said property and he consequently held that the said property is not liable to be sold for distribution of the liabilities of creditors.

4. The creditors preferred appeal before the District Court who held that the property was jointly belonging to Raghunath and Madhav. Thus, Madhav's half share was succeeded to by his widow and daughter. It further held that because Chandrabhaga had filed petition under Order 21, Rule 58 in the execution of a money decree against one of the creditors and that objection had been dismissed in default, therefore, Chandrabhaga could not reagitate the same objection in these proceedings. The Appellate Court consequently held that 1 /4th share belonging to Chandrabhaga was also liable to be attached and sold along with the property of insolvent. The Appellate Court, however, held that the objection of Fulvanti that she has 1 /4th share can be considered because she was not a party in earlier execution case and she was entitled to get her 1 /4th share wherein the insolvent had no saleable interest. Chandrabhaga has therefore, preferred this Second Appeal. Fulvanti her daughter is the co-appellant.

5. With the assistance of Shri R. L. Khapre for the appellant, Mr. S. K. Deshpande for respondents Nos. 1 to 4 and Shri B. N. Mohta for respondent No. 9,1 have gone through the impugned judgment.

6. Shri Khapre for the appellant had raised several grounds and he initially challenged the finding even on the ground of full title of Madhav to the property. However during the course of arguments, he fairly conceded that the concurrent findings of fact of both the courts below holding that the property was joint property of Raghunath and Madhav is correct.

7. He seriously contends that the lower Appellate Court erred in holding that Chandrabhagabai's 1 /4th share is not liable to be released, because in the earlier execution proceedings, her application under Order 21, Rule 58 was dismissed in default. The Division Bench of our High Court in Jagjivan Dhondiram Kirad Vs. Gopal Vinayak Joshi, has held as follows:

In considering the effect of R. 63, it is necessary to bear in mind that as a result of this rule what becomes conclusive is the order passed in the enquiry held

under R. 58. It is not the reasons given by the Judge in passing the final order, not even the findings recorded by him in the said enquiry that become conclusive. It is the final order either allowing or dismissing the application that becomes conclusive. Where the final order in the proceeding was that the application should be dismissed with costs the order becomes conclusive and the inevitable consequence of this position is that the objector cannot raise any plea which will affect the said order, unless he institutes a suit to establish his right within one year....

Even if an order dismissing the application is passed for default in this enquiry, such an order becomes conclusive, subject to the result of a suit under R. 63".

8. The Courts below have considered this rule to hold that because Chandrabhagabai's objection petition under Rule 58 of Order 21 was dismissed for default, she cannot reagitate the same contention in these insolvency proceedings.

9. I am afraid, this reasoning is not proper, because the proceedings under Order 21. Rule 58 which are of a summary nature are for the purpose of enquiry into the question whether an attachment of property should be raised or not. If the objection under Rule 58, Order 21 is dismissed for one reason or the other or even in default, the same becomes conclusive for purpose of that proceeding unless a separate suit within one year is filed by the objector as provided in Rule 63. However, it would not mean that it operates as *res judicata* for all other proceedings and for all times. In the instant case from the facts what we gather is that, one individual creditor had obtained money decree against Raghunath. In the execution of that decree this property was attached and Chandrabhagabai had raised objection under Rule 58. Her objection came to be dismissed in default. Therefore, as held by our High Court in the decision cited *supra*, she cannot reagitate the same ground against the same decree holder in any other proceedings in respect of that decree, she having failed to institute a suit as provided by Rule 63 of Order 21.

10. However, the objection which is raised in these proceedings is in the proceeding for insolvency which is a separate proceeding altogether. It is a proceeding started by several creditors of insolvent Raghunath. Therefore, Chandrabhagabai would be entitled to raise objection independently to her property being taken up for insolvency proceedings. The insolvency proceedings are not proceedings between the earlier creditor alone and the judgment debtors, but they are proceedings in remand basically it is a matter between the Court and the insolvent's property only. It is for the Court to find out which is the property lawfully belonging to the insolvent wherein he has a saleable interest. It is for the Court then to declare the said property as such which vests in the Court; and it is the Court alone which will take further steps towards the satisfaction of the debts of the creditors either by apportionment or by distribution of the assets of the insolvent. In these independent proceedings therefore, even if one of the creditors who happens to be the earlier decree-

holder and had obtained decree against the insolvent, yet the two proceedings, viz. one of execution of his individual decree and the other of insolvency case are entirely separate and as such Chandrabhagabai would not be barred from raising her objection afresh.

11. The Supreme Court had an occasion to deal with the provisions of Order 21, Rules 58 and 63 read with section 11 of the CPC in *Mangru Mahto and Others Vs. Shri Thakur Taraknathji Tarakeshwar Math and Others*, . In paragraph 5, it is observed as follows:

A claim proceeding under Order 21, Rule 58 is not a suit or a proceeding analogous to a suit. An order in the claim proceedings does not operate as *res judicata*. It is because of Rule 63 that the order becomes conclusive. The effect of Rule 63 is that unless a suit is brought as provided by the rule, the party against whom the order in the claim proceeding is made or any person claiming through him cannot reagitate in any other suit or proceeding against the other party or any person claiming through him the question whether the property was or was not liable to attachment and sale in execution of the decree out of which the claim proceeding arose, but the bar of Rule 63 extends no further.

(emphasis added).

12. From the said observation of the Supreme Court, it would be clear that the bar which is provided by Rule 63 or the finality which is provided by Rule 63 is only in respect of the very same proceedings or other proceedings arising out of the same decree and between the same parties. But the bar of Rule 63 extends no further. Thus, in the present case also Chandrabhagabai would be entitled to raise the objection and there is no bar merely on the ground in one separate proceeding, her objection under Rule 58. Order 21 was dismissed in default.

13. In the instant case, we find that the Appellate Court has held that Chandrabhagabai and her daughter Fulwanti had half share in the entire property but had not released 1 /4th share of Chandrabhagabai because of the bar. Having held that the said reasoning is not proper, the necessary conclusion is that half the property of Raghunath attached is liable to be released, that is to say, the half property belonging to Chandrabhagabai and Fulwanti is not liable for sale. The same be released.

14. In the result, the appeal is allowed. The impugned judgments of both the courts below are quashed and set aside. Half share belonging to the appellants, in the property attached is liable to be released as Raghunath had no saleable interest in the same. There shall be no orders as to costs.