
(1935) 09 BOM CK 0004
In the Bombay High Court
Case No : Second Appeal No. 241 of 1932

Jamnabai Gulabchand Gujarati

APPELLANT

Vs

Dattatraya Ramchandra Gujarati

RESPONDENT

Date of Decision : 09-09-1935

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63
Specific Relief Act, 1877 — Section 42

Citation : AIR 1936 Bom 160 : (1936) 38 BOMLR 251

Hon'ble Judges : John Beaumont, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is a second appeal from a decision of the Assistant Judge, Poona, confirming a decree made by the Subordinate Judge, Poona. The material facts are that in 1926 defendant No. 2, who is the wife of defendant No. 1, purchased a certain house. In 1927 the plaintiff obtained a decree against defendant No. 1 in the Small Causes Court at Poona, and in due course he filed a darkhast to recover the amount of his decree by sale of the house which had been purchased by defendant No. 2, the contention of the plaintiff being that defendant No. 2 purchased the house as benamidar for her husband, defendant No. 1. On July 21, 1929, the house was attached, and defendant No. 2 objected to the attachment under Order XXI, Rule 58, Civil Procedure Code. Thereupon the plaintiff withdrew the attachment, and the darkhast was disposed of. On October 1, 1929, the plaintiff started this suit asking for a declaration that the house in dispute is owned by defendant No. 1 and was purchased benami in the name of defendant No. 2, and that it is liable to attachment and sale in execution of the plaintiff's decree.

2. Both the lower Courts held on the merits that the house was purchased in the name of defendant No. 2 as benamidar for defendant No. 1. That question is really one of fact, and it has not been suggested in second appeal that I should

interfere with the concurrent findings of the lower Courts on that point.

3. It is argued, however, that the plaintiff's suit does not lie. Both the lower Courts agreed that the suit does not fall within Order XXI, Rule 63, Civil Procedure Code, which provides that-

Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive.

That rule would have applied if the plaintiff had not withdrawn his attachment and an order had been made against him dismissing his attachment. But as that course was not adopted, I agree with the lower Courts that the case does not fall within Order XXI, Rule 63, Civil Procedure Code.

4. The trial Judge held that the case fell within Section 53 of the Transfer of Property Act, but I agree with the lower appellate Court in thinking that that section is not applicable, because there was no transfer of property from defendant No. 1 to defendant No. 2.

5. The lower appellate Court held that the case fell within Section 42 of the Specific Relief Act, and the real question in this appeal is whether that view is right. It is well established that the right to make a declaratory order is statutory; and this case must be brought within Section 42 of the Specific Relief Act, if a declaration is to be made. Now, that section, so far as material, provides that-

Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled.

6. It is argued by the appellant that the plaintiff has not any right as to the property in question. Now, I agree that if the words in the section were " any right to any property ", the argument would be unanswerable, because the plaintiff whose claim is merely that of an execution-creditor has at present no right to the property. The question, however, is whether he has any right as to the property. The right which the plaintiff claims is a right to attach the property; and it seems to me that a right to attach particular property is a right as to that property.

7. Counsel for the appellant has referred me to two cases which, he suggests, are opposed to that view. The first is *Mulk Raj v. Ralla Ramrao Mal* ILR (1926) Lah. 235. All that the Court there held was that the terms of Order XXI, Rule 63, do not apply where an attachment has been voluntarily withdrawn by an execution-creditor. The learned Judges, however, do say, with reference to an argument that the suit was covered by Section 42 of the Specific Relief Act, that Order XXI, Rule 63, precludes all suits but the one under the rule itself, and

therefore no suit under any other provision of law was competent. I have already read the provisions of Rule 63 of Order XXI, and I cannot accede to the view of the learned Judges that it precludes any suit at all. All that the rule does expressly is to authorise the institution of a suit and to render final an order of a character which has not been made in the suit. I am not, therefore, prepared to accept the reasons given in that case for saying that the case did not fall within Section 42 of the Specific Relief Act.

8. The other case relied on is A". R. M. A. Firm by their Agent Meyappa Chettiar v. Mating Po Thein ILR (1926) 4 Ran. 22. In that case the plaintiff did not proceed in attachment at all but brought his suit u/s 42 of the Specific Relief Act in the first instance. The learned Judges made certain observations as to the difference between the position of a person who is claiming a declaration of his own right, and that of a decree-holder who claims a declaration of the right of his judgment-debtor. The observations, I venture to think, would have been more appropriate if the relevant words of Section 42 had been right to property and not right as to property. But, at the end of the judgment, the learned Judges recognize that the actual words in the section are " any right as to any property "; and, as I understand their judgment, they considered that the case did fall within Section 42 of the Specific Relief Act, but in exercising their discretion under that section they refused to make an order, because the plaintiff had not proceeded, as he might have done, in attachment.

9. I entirely agree that the Court ought not to encourage the filing of suits where the relief claimed can be sought expeditiously and cheaply in attachment; and if I thought that the plaintiff in this case could have obtained the relief, which he seeks, in attachment, I should not be prepared to make any declaration in his favour. But it is apparent from the judgment of the trial Court that the question whether the purchase in the name of defendant No. 2 was benami for defendant No. 1 was a somewhat complicated one, and I doubt very much whether a Court would deal with the question in execution. I think it would probably refer the parties to a suit; and I see no reason for doubting that it was because the plaintiff took that view that he withdrew his attachment in the first instance. If in the exercise of my discretion I refuse to make a declaratory order here, it would be open to the plaintiff to attach the property again; defendant No. 2 would again raise her objection; the execution Court would probably refuse to deal with the matter, and the parties would then have to bring another suit of exactly the same nature as the present suit. I do not think that any useful purpose will be served by putting the parties to so much expense and delay.

10. It seems to me that what the plaintiff in substance is claiming is a declaration of his right as to this property. I think the proper form of declaration to make is this : The Court being of opinion that the purchase of the suit property in the name of defendant No. 2 was benami for defendant No. 1, it is declared that the plaintiff in execution of his decree against defendant No. 1 is entitled to attach the property. That seems to me to be a declaration which falls within Section 42

of the Specific Relief Act.

11. With that variation in the declaration contained in the order, the appeal will be dismissed with costs.