
(1930) 09 BOM CK 0014
In the Bombay High Court
Case No : First Appeal No. 50 of 1926

Maruti Babaji Vadekar

APPELLANT

Vs

Ramchandra Balvant Punekar

RESPONDENT

Date of Decision : 24-09-1930

Acts Referred:

Civil Procedure Code, 1882 — Section 266
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63

Citation : (1931) 33 BOMLR 396

Hon'ble Judges : Patkar, J;Broomfield, J

Bench : Division Bench

Judgement

Patkar, J.—This was a suit brought by the plaintiff to recover the sum of Rs. 9, 900 alleged to have been deposited with the defendant by one Meghagir and for a declaration that the settlement dated April 7, 1921, passed by Meghagir in favour of Anusuya and Umedmal was void as against the plaintiff.

2. The plaintiff Punekar obtained a decree against Meghagir in suit No. 325 of 1921 for Rs. 5, 620-3 0 and filed darkhast (Exhibit 26) No. 757 of 1921 on July 6, 1921. The defendant Wadekar made an application No. 293 of 1921 (Exhibit 24) on October 4, 1921, to raise the attachment against the house attached on the ground that he had become the purchaser, and on January 7, 1922, the attachment was raised on the ground that the property did not belong to Meghagir, the judgment-debtor, and the darkhast No. 757 of 1921 was disposed of on January 30, 1922.

3. Punekar thereupon filed a second darkhast No. 197 of 1922 for attachment of Rs. 9, 900 on February 4, 1922, (Exhibit 23) and it appears that the amount in possession of Wadekar was attached under Order XXI, Rule 46, of the Code of Civil Procedure. Wadekar then made an application No. 187 of 1922 (Exhibit 21) on June 26, 1922, to have the attachment raised on the ground that the amount kept in deposit was to be paid on condition that he got possession of the house and the condition was not fulfilled. On November 11, 1922, a purshis was given

by Wadekar as follows:--

With respect to the amount of deposit mentioned in the application the Court should in the matter of the execution of the darkhast either cause auction to be held or should appoint a receiver and this application should be disposed of.

4. The learned Judge thereupon passed the following order :

In view of the purshis (Exhibit 15, which is Exhibit 22 in the present case) this application need not be proceeded with.

The learned Judge ordered the debt to be sold, and with the permission of the Court, Punekar purchased the right to recover the debt on February 15, 1923, for Rs. 6, 209-10-3.

6. After the auction purchase the plaintiff Punekar sent a notice demanding the amount of the deposit, and on the defendant's refusal to pay on January 15, 1924, brought the present suit on October 16, 1924.

7. The defendant in the written statement contended that Meghagir did not sell the house to the defendant, that the suit was not maintainable, that though Anusuya and Umedmal in whose favour Meghagir passed a settlement deed had sold the house to the defendant, one Chimangir was in possession of the house and as the defendant did not get possession of the property he was not liable to pay the amount of consideration kept in deposit to Anusuya and Umedmal, that in the miscellaneous application No. 293 of 1921 the deed of settlement and the sale-deed were held to be proved and valid. The learned Subordinate Judge held that the defendant's contentions were barred by reason of the order passed in miscellaneous application No. 187 of 1922, and did not go into the merits of the case, and held that, as the defendant did not bring a suit within one year from the date of the order under Order XXI, Rule 63, the order made in the execution proceedings was conclusive, and therefore passed a decree in favour of the plaintiff for Rs. 9, 900 with costs and interest.

8. The first question is whether the order passed on Exhibit 21, in the execution proceedings in miscellaneous application No. 187 of 1922 was an order under Order XXI, Rule 63, and whether it was an adverse order requiring it to be set aside in a subsequent suit within one year. The learned Subordinate Judge relied on the case of Tayaballi Gulam Husein v. Atmaram Sakharam ILR (1914) 38 Bom. 631, 16 Bom. L.R. 520 and held that an unsuccessful garnishee cannot be allowed to plead as defense what he had pleaded in the execution proceedings except by a suit instituted within one year. In the case of Tayaballi v. Atmaram it was held, dissenting from the previous decision of this Court in the case of Harilal Amthabhai v. Abhesang Meru ILR (1880) 4 Bom. 323, that it was permissible for a garnishee to make an application under Order XXI, Rule 58, for raising an attachment of debt, and that in case of an adverse order against the garnishee it was necessary for him to bring a suit within one year, and that in the absence of a suit being so brought, it was not open to the garnishee to plead a defense

which in an execution enquiry had already been unsuccessful.

9. The debt due to the judgment-debtor can be attached u/s 60 of the CPC and under Order XXI, Rule 46. The debt in the present case was not an unconditional debt. It was a debt which would be due under certain contingencies, and the important contingency contemplated by the parties was that Wadekar should get possession of the wada No. 342 in Raste's Peth. According to Haridas Acharjia Chowdhry v. Baroda Kishore Acharjia Chowdhry ILR (1899) Cal. 38:

The word "debt" in Section 266 of the CPC means an actually existing debt, that is, a perfected and absolute debt, not merely a sum of money which may or may not become payable at some future time or the payment of which depends upon contingencies which may or may not happen.

10. It is, therefore, doubtful in the circumstances of the present case whether there was any debt due by Wadekar.

11. Assuming, however, that there was a debt due by Wadekar the next question relates to the procedure to be adopted by the Court when a garnishee denies the existence of a debt. According to the decision of this Court in Toolsa Goolal v. John Antone ILR (1887) 11 Bom. 448, the procedure that is laid down is that "where...the garnishee denies the debt, there is no other course open to the judgment-creditor than to have it sold, or to have a receiver appointed." This view has been adopted by the Allahabad High Court in the case of Maharaja of Benares v. Patraj Kunwar ILR (1905) All. 262 and by the Rangoon High Court in Ma Saw Yin v. Hockto ILR (1926) Ran. 100. The decision in Toolsa Goolal v. John Antone though not referred to appears to have been affected by the decision in the case of Tayaballi v. Atmaram, where it was held that the garnishee who denied the debt could make an application under Order XXI, Rule 58, and the Court could pass an order under Order XXI, Rule 63, and that in case the garnishee did not bring a suit within one year from the date of the adverse order he would be debarred from raising contentions which had been disallowed in execution proceedings.

12. Assuming that there was a debt in this case and the procedure laid down by Order XXI, Rules 58 to 62, could be allowed even when the debtor denies the existence of the debt, the next question is whether in the present case there was an order adverse to Wadekar. According to the pursis (Exhibit 22) an application was made to the Court by Wadekar that the property should be sold, and the learned Judge made an order on Exhibit 21 that in view of the pursis the application need not be proceeded with. The merits of the application were not gone into, The contentions of Wadekar were not negatived in the execution proceedings and the Court proceeded to sell the debt alleged to have been due to Meghagir under Order XXI, Rule 66. I think, therefore, that the facts of the present case fall within the ruling of this Court in Chunilal Jivanlal v. Pira Miyaji (1926) 29 Bom. L.R. 285, where a debt owed by the defendant to the judgment-debtor having been attached in execution of the decree the defendant applied

that the debt owed by him was smaller than the debt stated in the execution proceedings, and the Court ordered a sale of the debt under Order XXI, Rule 66, and the debt was put up for sale and purchased by the plaintiff, it was held that the order passed by the executing Court was referable to Order XXI, Rule 66, and the defendant was not precluded from showing what was actually due from him. In that case there was no application under Order XXI, Rule 58, nor was there any order passed under Order XXI, Rule 63. But in the present case even though there was an application made under Order XXI, Rule 58, the Court ordered that the application need not be proceeded with. The result, therefore, is the same as if no application was made by the plaintiff. It does not appear on the record that the contentions of Wadekar were negatived in any way or that there was any adverse order against him. It would, therefore, follow that there was no necessity for Wadekar to bring a suit within one year from the date of the order of the Court which merely decided that the application need not be proceeded with. The facts of the present case resemble those in the case of Kachinamthodi Parambil Saharabi Vs. Kachinamthodi Puthia Purayil Seemamutti's son Ali and Others, , where it was held that an order that whatever right the judgment-debtor had would pass by the sale, the claim did not require further investigation, and would be noted in the sale proclamation, was not an order against the claimant. In the present case there being no adverse order by the executing Court against Wadekar and the application made by Wadekar not having been dismissed, the rulings cited on behalf of the respondent, viz., Venkataratnam v. Ranganayakamma ILR (1918) Mad. 985., Nagendra Lal Chowdhri v. Fani Bhusan Das ILR (1918) Cal. 785, Arsamma v. Moidin ILR (1923) Mad. 160 and Gobardhan Das v. Mukundi Lal ILR (1923) All. 438 do not apply to the facts of the present case. It is not necessary to go into the question whether the remarks of Sheshagiri Ayyar J. in Vankataratnam's case ILR (1918) Mad. 985. are applicable under all circumstances, It is sufficient to state that the cases cited do not apply to the present case as there was no adverse order against Wadekar, his application was not dismissed, but there was an order of the Court that the application need not be proceeded with. Though there may be no investigation, there must be an order allowing or dismissing the claim petition. I think that there was no order against Wadekar under Order XXI, Rule 63, and therefore it was not necessary for Wadekar to bring a suit within one year to set aside that order. It would, therefore, follow that there was no contention of Wadekar which was disallowed in execution proceedings, and the reasoning of the lower Court that Wadekar was barred from raising his contention in the suit on the ground that he could not raise the same contention which was disallowed in execution proceedings is not, in my Opinion, correct.

13. The next question is whether there was any debt due from Wadekar to Meghagir, and in order to ascertain that fact the question arises whether the suit should be remanded to the lower Court or the case should be decided on the materials before us. It is urged on behalf of the respondent that the preliminary point having been decided against him he should be given an opportunity of

leading evidence on the question of fact. It is urged on the other hand that having regard to our decision in F.A. 28 of 1926 it is not necessary to send down the case, and that the judgment in that case should be brought on the record of this case in order to satisfy the technical objection that Punekar was not a party to that suit. That decision would be admissible in evidence u/s 13 of the Indian Evidence Act. It is further necessary to point out that an application was made in the lower Court that the present suit should not be decided till the final decision in suit No. 910 of 1922. The learned Subordinate Judge was wrong in our opinion in not staying this suit till the final decision in suit No. 910 of 1922. If the learned Subordinate Judge had stayed the suit till the final decision of the suit No. 910 of 1922 his decree passed on September 22, 1925, would not have been inconsistent with the decree passed on October 10, 1925, in suit No. 210 of 1922.

14. On the merits the debt due to Meghagir could only be alleged to have existed either on the assumption that the property was math property or on the assumption that the property was the private property of Meghagir. If the assumption is made that the property was math property then Meghagir was not entitled to sell it or to make a settlement of it in favour of Anusuya and Umedmal, and Anusuya and Umedmal would have no right to sell the property to Wadekar, The amount of Rs. 9, 900 was due as debt by Wadekar only in the event of Wadekar getting possession of the property. In F.A. 28 of 1926, which was heard as a companion appeal and just disposed of, we have held that the property in suit belongs to the math, and that Wadekar is not entitled to recover possession of the property. It would, therefore, follow that there was no debt due by Wadekar to anybody and the amount was to be paid by Wadekar only on the fulfillment of the condition that he obtained possession of the property. If, on the other hand, the assumption is made that the property was the private property of Meghagir, it would follow that Meghagir had a right to make a settlement on Anusuya and Umedmal. Anusuya and Umedmal sold the property to Wadekar, and in case Wadekar had succeeded in getting possession of the property the amount of Rs. 9, 900 would have been a debt due to Anusuya and Umedmal and not to Meghagir. That was the effect of the decision just delivered in second appeal No. 824 of 1929 to which the present plaintiff Punekar was a party. On either hypothesis there was no debt due by Wadekar in favour of Meghagir, and therefore plaintiff's purchase of the right to realise the amount as debt due to Meghagir is of no avail,

15. Under these circumstances we think that it is unnecessary to send back the case for a decision on the merits, for, whichever view is taken, the plaintiff is bound to fail. We, therefore, thin k that the view taken by the lower Court is erroneous. We would, therefore, reverse the decree of the lower Court and dismiss the plaintiff's suit with coats throughout,

Broomfield, J.

16. The plaintiff Ramchandra Punekar brought this suit on October 16, 1924, to recover a sum of Rs. 9, 900 from Maruti Wadekar having on February 15, 1923,

purchased at a Court sale the right of one Maghagir Gosavi to recover that amount from Wadekar. The money formed part of the purchase price of a house in Poona sold by Meghagir, Anusuya and Umedmal to Wadekar on June 24, 1921, but had remained deposited with the purchaser, because at the time of the sale the house was in the possession of a third party one Chimangir. Puneekar's suit was decided on September 22, 1925. The suit was not heard on the merits but decided on a technical ground which I shall discuss later on. The Court held that the money in question belonged to Meghagir and that the plaintiff Puneekar was, therefore, entitled to recover the same from Wadekar. Then on November 19, 1925, the same Subordinate Judge decided a suit (No. 910 of 1922) which had been filed by Wadekar against Meghagir, Anusuya and Umedmal and the aforesaid Chimangir. In that suit he had claimed possession of the house sold to him or in the alternative a declaration that he was entitled to retain the balance of the purchase money, Rs. 9, 900, and that the defendants in that suit had no right to it. The finding in that suit was that the sale was invalid because the property was math property, and therefore the plaintiff could not be given possession, but he was awarded a declaration of his right to retain the sum of Rs. 9, 900. The decisions in these two connected cases are obviously inconsistent and mutually destructive. Whichever decision is right the other must clearly be grossly unjust. It appears, therefore, that there must be something wrong somewhere. The law no doubt sometimes appears to be unreasonable but it can hardly be as unreasonable as this. Although it may not be strictly relevant for the purposes of this appeal, we cannot ignore the fact that we have heard the appeal in suit No. 910 of 1922 and have confirmed the decision of the trial Court. So apparently the mistake does not lie there. We must bear in mind of course that hard cases make bad law--as the saying is--and that if the law is clear then it must not be strained or unreasonably stretched even for the purpose of avoiding injustice. But we have to consider whether the trial Judge was right in his view that the law compelled him to decree the plaintiff's claim and whether it is incumbent upon us to accept the incongruous and unsatisfactory result abovementioned.

17. The material facts in the execution proceedings with which we are concerned are these. On July 6, 1921, Puneekar filed a Darkhast No. 757 of 1921, for attachment of the house No. 341. On October 4, 1921, in Miscellaneous Application No. 293 of 1921, Wadekar applied to raise the attachment on the ground that he had purchased the house. The attachment was raised on January 7, 1922, and that darkhast was disposed of on January 30, 1922. On February 4, 1922, Puneekar filed a second Darkhast No. 197 of 1922 for attachment of the sum of Rs 9, 900 in the hands of Wadekar. On February 7, 1922, a prohibitory order was made under Order XXI, Rule 46, and on June 8, 1922, the Court made an order for the payment of the money into Court. The actual terms of the order were, " Money attached may be called for." This particular order, it appears, was not complied with or enforced. Then on June 26, 1922, Wadekar made an application (Miscellaneous Application No. 187 of 1922) for raising the

attachment on the money, and on November 11, 1922, the pleaders for both parties put in a purshis, Exhibit 22, to the following effect:--

The purshis of the pleaders for the applicant and opponent in this matter is be the effect that with respect to the amount of deposit mentioned in the application the Court should in the matter of the execution of the Barkhast either cause auction to be held or should appoint a receiver and this application should be disposed of.

18. The literal translation of the vernacular words is that "the Court should sell by auction about the amount in deposit, " The order which the Court made on this purshis was--

In view of the purshis, Exhibit 15, (in this appeal it is Exhibit 22) this application need not be proceeded with.

19. The application referred to is Wadekar's application for the raising of the attachment. It is this order of the Subordinate Judge dated November 11, 1922, which has been held by the trial Court to be an order under Order XXI, Rule 63, and to be conclusive against Wadekar. Subsequently, on February 15, 1923, Meghagir's right to recover the amount of deposit was put up for sale by auction and with the Court's permission was purchased by the plaintiff Punekar for Rs. 6, 209-10-3. The question is whether the trial Court was right in its view that the order above referred to was a conclusive order under Order XXI, Rule 63, and whether it barred the defendant Wadekar from setting up any defense to Punekar's claim. The trial Judge relied on the decisions in Venkataratnam v. Ranganyyakamma ILR (1918) Mad. 985, F.B., Nagendra Lal Chowdhry v. Fani Bhusan Das ILR (1918) Cal. 785, Gobardhan Das v. Mukundi Lal ILR (1933) All. 438 and Tayaballi Gulam Husein v. Atmaram Sakharam ILR (1914) 88 Bom. 631, 16 Bom. L.R. 520. In addition to these cases Mr. Thakor for the respondent has quoted the case of Arsamma v. Moidin ILR (1923) Mad. 160 an extreme case in which it was held that an order dismissing a claim-petition without investigation was conclusive against the claimant in spite of the fact that the order itself contained a provision that the sale in execution would not affect the rights, if any, of the claimant. The cases cited from the other High Courts lay down the proposition that an order to be conclusive under Rule 63 need not be passed after investigation. The application may be dismissed for default or on a preliminary point. As to that there need be no difficulty, for the amendment of the old Section 283 of the CPC (Act XIV of 1882) appears to have been intended to provide that a previous investigation should not be essential. But the cases referred to appear also to lay down this further proposition that any order which is not in favour of a party must be construed as being against him within the meaning of this rule. With the greatest respect I am not prepared to go to that length, and it does not appear to me that the decisions of this Court, at any rate, require us to do so, As regards Tayaballi v. Atmaram, relied on by the trial Court and Mr. Thakor, that case can be distinguished on the ground that there was a definite decision. The judgment shows that in that case an objection taken was

over-ruled by the Court, whereas, as my learned brother has pointed out, in this case there is no order which can clearly be said to be an order to the prejudice of the claimant Wadekar. It was urged by Mr. Thakor that the attachment was not raised until it was automatically raised by the auction sale. It does not appear, however, that this formal attachment or its continuance during the period between the application and the sale prejudiced Wadekar in any material way. What appears to have happened was that the parties' pleaders got together and, having regard to the suit No. 910 of 1922 which was then pending, decided that it was not necessary to go into the question of Meghagir's title in this proceeding, Wadekar at any rate must have had in mind the fact that he was already prosecuting a suit in which one of the issues was whether Meghagir was entitled to the money, and as I understand the execution proceedings, it seems to me that that question was left open for decision elsewhere. The order passed was not that the application to raise the attachment was dismissed, but simply that in view of the purshis referred to it was not necessary to proceed with it. I may repeat that the order previously passed for the production of the money in Court also remained in abeyance. In view of these circumstances, I agree with my learned brother that the reasoning of this Court in *Chunilal Jivanlal v. Pira Miyaji* (1926) 29 Bom. L.R. 285 may be applied in this case. I refer specially to the remarks of Shah J. on page 287 where he said:--

The order made on January 28, 1922, is consistent with the view that the executing Court then left the question as to what was due by the defendant to the deceased Dwarkadas open as between the parties and may have for the purposes of Rule 66 accepted the amount as given by the present plaintiff.

Then again on page 288, the learned Judge said:--

If an order falling under Rule 63 of Order XXI is made, the party against whom the order is made would be bound to sue within twelve months from the date of the order, if he wants to question the correctness of that order. Otherwise the order would be conclusive against him. But where it is not clear at all whether the question raised by the garnishee in this case was one which the Court was bound to determine and where also it is not clear that the Court in fact determined it, it would not be reasonable to spell out an implied order under Rule 63 from such order as we have in the present case which is referable to Rule 66 of Order XXI.

The order under Rule 66 is of course the order for the sale of the property or debt. It has been objected that the decision in *Chunilal Jivanlal v. Pira Miyaji* is not in point because in that case there was no order under Rule 63. But there was an application made to the Court by a party raising an objection as to the amount of the debt. The order for the sale of the debt left that question open, i.e., no order was passed in favour of the claimant. If the principle laid down in the above-mentioned cases were to be followed, it would appear that there was an order against the party conclusive under Rule 63, This Court, however, took the view that that was not so.

20. I was at first inclined to think that this case might have been disposed of on another ground. Order XXI, Rule 63, provides:--

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.

In the great majority of cases the suit referred to here must obviously be a suit to be filed subsequently against the other party to the claim proceedings, the judgment creditor or the auction purchaser as the case may be. But, supposing that a suit for the determination of the right in question has already been filed--a suit the decision in which would be binding on the other party to the claim proceeding--would Rule 63 necessarily require that another suit should be filed? In the present case Wadekar had already filed a suit (No. 910 of 1922) which was in part a suit for the determination of the right to this sum of Rs. 9, 900, and, but for the accident that Meghagir died during the pendency of that suit, it would appear that the decision in that suit would have bound Punekar. In such a case difficulties might arise in view of Sections 10 and 11 of the Code of Civil Procedure, and *lex non cogit ad impossibilia*. However, in this particular case that point does not arise. It is no doubt true that Punekar has merely purchased the right to recover this money, which was possessed by Meghagir, a party to Suit No. 910. Meghagir, however, died on January 25, 1924, and though his wife Anusuya was placed on the record as his heir, her interests were not identical with his and she can hardly be said to represent him for all purposes. That being so, the decision in suit No. 910 of 1922 could not be held to be binding as *res judicata* on Punekar. As my learned brother has pointed out, the trial Judge could have avoided all the confusion and difficulties which we have found in the case if he had postponed the hearing of the suit No. 1396 of 1924 until the decision of suit No. 910 of 1922, and if he had made Punekar a party to the latter suit. The importance of doing this ought to have been sufficiently obvious to him. The record of suit No. 910 of 1922 is before us and it shows that the recording of evidence in that case began on July 27, 1925, and ended on September 19, 1925, i.e., only three days before the date on which the judgment in the present suit was given. An application was made to him to postpone the proceedings in this suit, but he declined on the ground that the provisions of Section 10 of the CPC did not make it necessary for him to do so. It seems to me that he should in any case have done so on the ground of convenience and common sense.

21. Then the next question is what should be the consequence of our finding that the trial Court was wrong on the preliminary point. In the ordinary way as the suit was not heard on the merits and the plaintiff had no opportunity of adducing evidence, we should have ordered a remand for trial upon the merits. But in the present case an order of remand for the decision of the question whether Meghagir was entitled to this money would be entirely futile in view of the subsequent events and the results of other litigation. Mr. Thakor contended that

this Court ought not to take any account of such extraneous matters in dealing with this appeal. But the powers given to the Court by Rule 33 of Order XLI "to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require" are very wide, and, in my opinion, justify the Court in refraining from passing an order which would ordinarily follow as a result of the conclusions on the issues, if in view of subsequent events the order would be inequitable or futile, a mere waste of time and money, and in., fact an abuse of the process of the Court, In that connection I may refer to the decision of this Court in Pandurang v. Ramchandra : (1930)32BOMLR1252 , where the decision in Sakharam Mahadev Dange v. Hari Krishna Dange ILR (1881) 6 Bom 113 and other, cases were referred to.

22. I agree that the order proposed by my learned brother is the only reasonable order to make in the peculiar circumstances of this case.