

(1996) 02 MP CK 0052

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 228 of 1990

Mohd. Yousuf and Others

APPELLANT

Vs

Smt. Jyotsana Ben and Others

RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58(2), Order 21 Rule 58(4)

Citation : AIR 1996 MP 197 : (1996) ILR (MP) 144

Hon'ble Judges : S.C. Pandey, J

Bench : Single Bench

Advocate : A.K. Pathak, for the Appellant; Ravish Agarwal, for the Respondent

Final Decision : Allowed

Judgement

S.C. Pandey, J.—This is an appeal against the order dated 12-1-90 filed by the objectors under Order 21, Rule 58(4) of the Code of Civil Procedure. The 1st Additional District Judge to the Court of District Judge, Satna, has rejected the application under Order 21, Rule 58 of the CPC registered as M.J.C. No. 26/88. This appeal is filed under Order 21, Rule 58(4) of the CPC read with Section 96 of the Code.

2. The respondents 1 to 4 were the decree holders who filed Execution Case No. 47/79 against the judgment-debtor Mohd. Ahsan Bux. It is alleged in the application under Order 21, Rule 58, filed by the appellants, that the property in question known as "Chandani Talkies", shown as House No. 190/1125 Purana Ward No. 11, Satna in the Municipal records, was not liable to attachment. It was alleged inter alia that same property was sold to the appellants by a registered sale deed dated 5-10-70 pursuant to an attachment for recovery of Income Tax dues against the judgment-debtor. The appellants stated that they purchased the attached property after obtaining permission of the Income Tax Officer. They stated that they had deposited Rs. 73,000/- by Treasury Challan No. 3015/ 1/1 dated 5-10-70 in State Bank of India, Satna towards the Tax dues of the judgment-debtor. It was further alleged that earlier the same property was

attached in the Execution Case No. 47/74 at the instance of the decree holders. The appellants had objected to attachment on the ground that the property belonged to them. The claim of the appellants was duly investigated. The property in question was released by order dated 18-4-80 passed by District Judge, Satna. Subsequently another order of attachment was obtained by decree holders on 29-10-86. The fact of earlier release from attachment was suppressed by the decree-holders. The Court also did not notice it. No notice was served upon the appellants. The Court then proceeded to auction the property and published the sale notice as per order dated 30-11-88. There upon the appellants filed objection under Order 21, Rule 58 of the C.P.C. to the attachment of property on 1-12-88.

3. The respondents Nos. 1 to 4 appeared to have not disputed the fact of earlier attachment. They however denied that earlier order in Execution Case No. 47/74 was not in any way *res judicata*. They alleged *inter alia* that they have obtained a decree against the Firm of which the appellants were also partners and, therefore, even if they purchased the property, they are bound to pay the debts. The objection under Order 21, Rule 58 of the C.P.C. was made with an object to defraud and defeat the creditors. The transfer by Mohd. Ahsan Bux in favour of his sons was bogus. He had no power to transfer the property belonging to the Firm. The sale was void, it was alleged that Mohd. Ahsan Bux, the judgment-debtor, fully knew about the attachment. He had twice filed objection. The objectors knew about the attachment as it was earlier published in News Papers. The objection of Mohd. Ahsan Bux was rejected on 30-11-88. Thereupon the appellants filed the objection.

4. It appears that on the date the application was filed, the counsel for the respondents Nos. 1 to 4 took notice and therefore, the case was registered. On 20-12-88 the counsel for the respondents Nos. 1 to 4 sought time to file reply. Again on 2-1-89 time was sought and case was fixed for 7-2-89. On 7-2-89 reply was tendered. Then counsel for the appellants filed the list of documents. It appears initially the case was fixed for evidence but that order was scored out and so also the date fixed for evidence 5-8-89. Instead it was recorded that Shri R. K. Agrawal had filed an objection that application under Order 21, Rule 58 of the C.P.C. is barred by time and the case is fixed for arguments on 3-3-89. On the next date, the case was adjourned because of paucity of time to 17-3-89. On 17-3-89, counsel for the appellants filed an application for deciding the preliminary objection after recording evidence. The case was then fixed for 18-3-89. On 18-3-89, the reply was filed and the case could not proceed further because the Advocates did not attend the Court on 18-3-89 in the afternoon due to a condolence meeting. The case was again adjourned on 3-4-89 to 11-4-89. On 11-4-89 it was again adjourned due to strike of employees. On 12-4-89 the Presiding Officer was busy in selection of Class III employees. The case was adjourned to 13-6-89. On 13-6-89 the case was again adjourned as the Presiding Officer was absent. On 5-1-89, the next date, case was adjourned to 2-8-89. On 2-8-89 the Presiding Officer ordered that the question of limitation can be

decided without evidence and fixed the case for 11-9-89. On 11-9-89 the Presiding Officer was on leave and the case was fixed for 4-10-89. Then on 4-10-89 the Presiding Officer was on leave again and the case was posted for 1-11-89. On 1-11-89 the case was fixed for 2-12-89. On 2-12-89 the case was adjourned at the request of counsel for parties to 8-12-89. Again on 8-12-89 the case was adjourned at the request of both the counsel. On 18-12-89 and 22-12-89 again the case was adjourned at the request of counsel for the parties. On 6-1-90 the case was heard and the impugned order was passed.

5. It appears that the objection was raised by the counsel for the respondents Nos. 1 to 4 that the objection under Order 21, Rule 58, C.P.C. was barred by time as it was filed on 1-12-88. On the other hand the counsel for the appellant urged that there was no limitation prescribed for filing an objection under Order 21, Rule 58 of the C.P.C.

6. It appears to this Court that right or wrong, the order contemplates dismissal of the objection not only on the ground of delay but also in view of Article 98 of Limitation Act, 1963. It was also held that the application was unnecessarily delayed. Here it may be observed that learned Judge has also considered the objection under Order 21, Rule 58 of the C.P.C. could be treated as application under Order 21, Rule 101 but it was barred being filed beyond one year.

7. Now since the appellant had filed an appeal, a preliminary objection was raised by Shri Ravish Agrawal, counsel for respondents, to the effect, that in view of the fact that the Court below refused to entertain the objection on ground of delay as provided by proviso to Sub-rule (1) of Order 21, Rule 58 of the Code, the appeal did not lie under Order 21, Rule 58(4) read with Section 96 of the Code of Civil Procedure. It was urged that the appellant had remedy of filing a civil suit under Order 21, Rule 58(5) of the Code of Civil Procedure. The counsel for the respondents frankly conceded that Article 98 of the Limitation Act, 1963 had nothing to do with this objection and the Court should not have applied the provisions of Article 98 of the Limitation Act, 1963. The learned counsel brought to notice of this Court a case reported in B.M. Aishabi Vs. A. Yakub and Others, relating to an objection under Order 21, Rule 58 of the C.P.C. It appears from the impugned order that the learned Addl. District Judge totally misappreciated the argument of the counsel for the appellant when he asserted that Order 21, Rule 58 of the C.P.C. itself provided that the Court could dismiss the case if it is delayed. The argument of the learned counsel for the appellants in the Court below was not regarding delay but it was regarding limitation for raising the objection. There is no specific Article under Limitation Act which covers an objection under Order 21, Rule 58 of the C.P.C. Such an objection is, however, nothing but an application and, therefore, limitation of three years would be applicable under Article 137 of the Limitation Act. However, neither the Court nor the counsel for the parties appeared to have taken cognizance of Article 137 of the Limitation Act, 1963. The Court does not refer to that Article but to Order 21, Rule 101, C.P.C. and Article 98 of the Limitation Act, 1963, but the aforesaid

provisions are utterly irrelevant because the question of application of Order 21, Rule 101, C.P.C. does not arise as the objection was under Order 21, Rule 58 of the C.P.C. The operative portion of the Order is as follows:

^ ^vr,o vk/khu vkns" k 21 fu;e 58 ?ch? tk- nh- ,oa vkfVZdy 98 vof/k vkf/k- 1963 ds izko/kkuksa dh n` "Vhxr j[krs gq, ;g vkosnu vuqfpr nsjh ls is" k gqvk gS vof/k ds ckgj Hkh gSA vr,o fujLr fd;k tkrk gSA

izdj.k dh dk;kZogh lekIr dh tkrh gSA i{kdkjku viuk viuk okn O;; Lo;a ogu djsaxsA**

8. The counsel for the appellants, Shri Ashish Pathak, on the other hand asserted that since Court below had already issued notice in this case and fixed the case for evidence and, therefore, it had already taken a decision for hearing the case on merits. In view of these facts, the Court could not put the clock back and dismiss the case on delay. So far as limitation was concerned, it was argued that application was not barred by time.

9. In order to decide the preliminary objection, it is necessary to state how one should judge the forum of further remedy available to a party. It appears to this Court that only basis for determining the forum of further remedy is to read order sought to be impugned carefully. In most of cases, it would be crystal clear that an order or judgment purports to be under a particular provision. That will determine the forum easily. However, there are grey areas. Some times Court passes a particular order assuming it to be under a specific provision. The specific provision provides a remedy. The provision under ,which a Court should have passed an order provides an other remedy. Which way to choose? According to this Court, remedy should be judged by what the Court below purports to do and not by what it ought to have done, This way of looking at things fixes the remedy if the order is clear and avoids confusion. The grey area is "what the Court ought to have done. "There may be more than one opinion about that matter. Normally there will not such difficulty in determining remedy if we find out under what provision of law it was passed. The view of this Court appears to have been supported by learned single Judge of this Court T. P. Naik, J. in Govardhan Badrilal Mahajan v. Ganesh Balkrishna Deshmukh, 1962 MPLJ 325 thus :

"It is what a Court actually does which determines the forum and gives jurisdiction to the appellate or revisional Court and not what it ought to have done. If it were otherwise a great deal of uncertainty would be introduced into this class of litigation which could never be the intention of the law. As matter of judicial consideration also, when a specific provision is mentioned (unless it be a clerical or typing error), it would not be open to anybody to contend that the judicial intent was something different than what the plain and unambiguous language of the judgment warranted as the language of the judgment was the best indication of the Court's intent. Consequently, where a decree has been passed expressly under a specific provision of the Code of Civil Procedure,

however erroneously, the remedy is as provided by that provision, viz., by an appeal or revision."

10. However, escaping the one grey area as enter into another thicket of difficulties. The operative portion of order, quoted above," shows that the Court below exercised" its power not only under the proviso to Sub-rule (1) of Order 21, Rule 58 but also on the basis of Article 32 of the Limitation Act, 1965. It held that the objection was barred by time. It may be true that this order is totally wrong. Even the view that the objection under Order 21, Rule 58 of the C.P.C. could be treated as an application under Order 21, Rule 101, C.P.C. may also be wrong in the sense that the scope of that Rule is entirely different. However, we are not concerned with the ultimate result. We are concerned with what the Court did. It purported to dismiss the objection on the ground of limitation. Therefore, the decision pertains to the merits of the case.

11. It is further necessary to examine Order 21, Rule 58 of the CPC which reads as under :--

"Order 21, Rule 58. Adjudication of claims to, or objections to attachment of, property. (1) where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained--

(a) Where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) Where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in Sub-rule (2), the Court shall, in accordance with such determination,--

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to as to appeal or otherwise as if it were a decree.

(5) where a claim or an objection is preferred and the Court, under the proviso to Sub-rule (1), refuses to entertain it, the party against when such order is made any 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, an order so refusing to entertain the claim or objection shall be conclusive."

It has to be seen that the Court can refuse to entertain a plea at the very outset if the grounds mentioned in paragraph (a) or (b) to provide exist. Refusal to entertain must be at the threshold. It is like rejection of a memorandum of appeal. This power is to be exercised after hearing the objector. The other party is not involved in such refusal to entertain. It is askin to power of dismissal at the admission stage in Motion hearing. The Court is required to ascertain simple facts regarding the entertainment of the application. If the sale has already taken up then question of deciding the objection does not arise as per proviso (a). So far as proviso (b) is concerned, the Court will not tolerate unnecessary delay or a delay which is designed.

Hence the Court must prima facie hold if there be delay, could it be attributed any design on the part of the objector or in the alternative whether the delay could be attributed to laches on the part of the objector. Was he sleeping over his right? Could he have approached the Court earlier and if he could, whether he had crossed the apogee of necessity and gone far beyond it to make it "unnecessarily delayed". The facts and circumstances of each case shall govern the decision. However, this exercise on the part of the Court would not amount to any adjudication of rights of the parties. Therefore, Sub-section(5) of Order 21, Rule 58 says that in such cases Civil Suit would be the remedy.

12. The Sub-section (2) of Order 21, Rule 58, C.P.C. says the Court is required to determine all questions "relevant to the adjudication of claim or objection" shall be determined by the Court. The question whether an application is barred by time or not definitely relates to the adjudication of the claim on merits. It is not a technical plea. It is a plea on merits. The Privy Council in Charan Das v. Amir Khan, AIR 1921 PC 50, at page 51, Col. 2 held as follows :

"In a case such as the present, where the right sought is one involving the dispossession of a perfectly lawful purchaser of property, it is not, in their Lordships" opinion, quite ascurate to say that a plea that such a suit has not been brought within the proper period of time limited by the Act is a technical plea, if by a technical plea is meant a plea which asserts rights which have no merits for their support."

This plea could not be a subject matter of the suit filed by appellant pursuant to

Order 21, Rule 58(5), C.P.C. In terms of Order 21, Rule 58(2) such plea would be barred. The order dismissing an application or a plaint or an appeal on the point of limitation conclusively determines the rights of the parties. It has an effect of a decree. Recently a Full Bench of this Court in S.A. No. 16/1967 (Maniram v. Mst. Fuleshwar), decided on 8-9-1995 was required to consider the question whether a second appeal would lie if the first appellate Court had dismissed an application for condonation of delay in filing appeal in exercise of its powers u/s 5 of the Limitation Act and consequently the appeal. The Full Bench of this Court has overruled earlier decision of this Court and it has held that such a dismissal of the appeal would operate as a decree and, therefore, it would be appealable. Thus, in view of this Court, the question of limitation regarding the adjudication under Order 21, Rule 58, C.P.C. in question which is relevant to adjudication. The dismissal of this application on the ground of limitation does not amount to refusal to entertain. Refusal to entertain would be covered by proviso (a) or (b) of Sub-rule (1) of Order 21, Rule 58, C.P.C. and these provisions should be strictly construed.

13. The view taken by the Kerala High Court in B.M. Aishabi Vs. A. Yakub and Others, is not contrary to view now taken by this Court. The following observation at page 238 brings out the conclusion of the Court :

"The Court below has refused to entertain the appellant's claim or objection under Clause (b) of the proviso thus attracting the consequence under Sub-rule (5). That being so, the remedy open to the appellant is the remedy prescribed by Sub-rule (5), to institute a suit to establish the right which she claims to the property under attachment. The remedy of appeal under Sub-rule (4) is recovered only for orders adjudicating upon claims or objections and not to orders of refusal to entertain them under the proviso to Sub-rule (1)".

Moreover, the Kerala High Court further referred to the case of Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, and observed B.M. Aishabi Vs. A. Yakub and Others, :

"The Supreme Court agreed with counsel that the word "entertain" meant either "to deal with or admit to consideration" and held that the word in the proviso meant the first occasion on which the Court takes up the matter for consideration."

14. As already stated earlier that on the date the objection was filed, the counsel for the respondents 1 to 4 took notice and were given time for reply. This was the time when the Court took case for consideration. It entertained it by admitting it. Therefore, the stage for exercising powers under proviso to Sub-rule (1) of Order 21, Rule 56, C.P.C. had passed and the Court could not put the clock back for exercising its power under Rule 1. However, it did so. The matter would rest there even if the Court had passed an order under the proviso even after entertaining it. For the reason, then there would be no adjudication and no decree within the meaning of Sub-rule (4) read with Sub-rule (2) because still

the Court purported to exercise its power under proviso to Sub-rule (1). Therefore, under the test laid down above in para (9) we have to see what the Court had done and not what the Court ought to have done. However, in the present case the Court" went a step further and held right or wrong that the application is barred under law of limitation. Thus there was a composite order.

15. As we have seen one part of the order falls within Sub-rule (1) of Order 21, Rule 58 and another under Sub-rule (2) of Order 21, Rule 58. In the opinion of this Court the second part of the order makes the rule a decree within the meaning of Rule 4 of Order 21, Rule 58, C.P.C. and it is, therefore, appealable. Once we hold that the correct remedy is to file an appeal against the order impugned, it follows that each and every part of the order is liable to be attacked in the decree for the reason every order merges to the decretal part of the order. Moreover, it is well established when an order is of composite nature, the aggrieved party is entitled to choose the larger remedy available to it. Section 107 of the C.P.C. embodies this principle.

16. We may examine the point from another angle. If we accept the view of lower Court as correct then could he file a separate suit? Could it not be argued by respondents Nos. 1 and 4 that objection has been adjudicated upon after notice and it was found to be barred by time. This order has the effect of decree. No fresh suit could lie because the impugned order conclusively determines the rights of parties by saying that the application is barred by time. It is res judicata. It would be correct to say that no suit lies because the composite order primarily is under Sub-rule (2) of Order 21, Rule 58. In the opinion of the Court such a plea would bar a suit.

17. The learned counsel for the respondents 1 to 4 fairly conceded that there is no question of application of Article 98 of the Limitation Act, 1963 to an objection under Order 21, Rule 58. Otherwise also it does not apply. The first part of the order, that is to say, the objection was unnecessarily delayed can also be disposed of by saying that Court had already entertained it by giving notice to the opposite party. As it had already entertained it, there was no occasion to review that order at the instance of the party who had accepted notice. The objection should have been decided on merits. The Court could not backtrack its order on admission. It has to hear the case finally on merits. It appears that same principle was accepted by T. G. Shrivastava J., C.R. No. 57/58 decided on 24-2-59 in *Parasmal v. R. S. Rekhchand Gopaldas Mehta*, 1959 MPLJ 67 when the Court laid down that power of summary rejection of an objection under Order 21, Rule 58, C.P.C. should be exercised before commencing the investigation. Though this case is an authority under unamended Order 21, Rule 58, C.P.C. before 1976, but the principle stated therein that Court had no inherent power to reject a claim or objection on the ground of delay is equally applicable to the facts of the case. Some what similar view was taken in another case short noted in the same volume as Note 43 in *Kalleelal v. Singhal Komalchand*, 1959 MPLJ 43 by P. K. Tare, J.

18. For the reasons given in the foregoing paragraphs, this appeal succeeds and is allowed. The impugned order dated 12-1-90 is set aside. It is directed that the executing Court shall decide the objection on merits after giving full opportunity to the parties as per Order 21, Rule 58(2) of the Code of Civil Procedure. Under the facts and circumstances of the case, there shall be no order as to costs of this appeal.