

(1962) 12 OHC CK 0001

In the Orissa High Court

Case No : Misc. Appeal No's. 77, 78, 90 and 91 of 1960

Nityananda Mohapatra and Others

APPELLANT

Vs

Madhusudan Mohapatra and Others

RESPONDENT

Date of Decision : 13-12-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 53, Order 21 Rule 53(2), Order 21 Rule 53(3), Order 21 Rule 57, Order 21 Rule 63

Citation : AIR 1963 Ori 99

Hon'ble Judges : R.L. Narasimham, C.J

Bench : Single Bench

Advocate : P. Kar, for the Appellant; B.K. Pal, D.P. Mohapatra, R.K. Mohapatra and G.N. Seth, for the Respondent

Judgement

R.I. Narasimham, C.J.—These four appeals arise out of one judgment passed u/s 47 C. P. C. by the Subordinate Judge of Berhampur in two execution petitions (E. P. 48 of 1958 and E. P. 73 of 1958), The facts which are somewhat complicated are as follows. Appellant Nityananda Mohapatra (hereinafter referred to as the attaching decree-holder) obtained a decree on 10-1-1938 in O. S. No. 514 of 1935, in the Court of the Munsif of Aska, against one Madhusudhan Mohapatra (hereinafter referred to as the transferor decree-holder) and others. The decree was made absolute on 9-5-1942. In execution of that decree, in E. P. 75 of 1943, Nityananda Mohapatra attached the decree obtained by the transferor decree-holder in O. S. 48 of 1935 in the Court of the Subordinate Judge, Berhampur. The attachment of that decree was made final on 24-6-44. But prior to that attachment Madhusudhan transferred the decree in favour of his wife Kousalya Devi (hereinafter referred to as the transferee-decree-holder). Both the attaching decree-holder and the transferor-decree-holder took out several executions of their decrees. It is unnecessary to refer to them in detail. It is sufficient to say that in E. P. 193 of 46 in the Court of the Subordinate Judge of Berhampur filed by the transferee decree-holder the attaching decree-holder intervened and filed objections. His execution petition No, 44 of 1946 had already been filed before

the same Subordinate Judge on 20-1-1946 (His earlier execution petition E. P. 153/45 had been dismissed for default on 13-8-45). The learned Subordinate Judge by his order dated 29-8-47 overruled the objections to the executability of the decree raised by the attaching decree-holder, but with a view to safe-guard his interests he passed the follow-ing order;

"The transferee decree holder do proceed with the execution and the execution case started by the attaching creditor (referred to here as the attaching decree-holder) (E. P. 44/46) be called on along with this execution application. If, on any day, on any account, the transferee decree-holder fails to execute the decree the attaching creditor shall be at liberty to proceed with further execution; if any money is realised in the execution by the transferee decree-holder the attaching creditor shall be paid first his dues under the decree for which he has been executing, and the balance, if any, only shall go to the transferee decree-holder"

2. Thus the learned Subordinate Judge practically linked up the two execution petitions, namely, E. P. 193/45 of the transferee decree-holder and E. P. No. 44/46 of the attaching decree-holder. The execution petitions proceeded in their usual course and ultimately some properties were brought to sale and sold for Rs. 5800/- out of which a sum of Rs. 4472/8/- was directed to be paid to the attaching decree-holder. The sale was confirmed in due course and on 11-9-54 E. R. No. 193/1946 and E. P. No. 44/46 were both dismissed on full satisfaction.

3. But one Narasingho Sabato who was an unsuccessful claimant in the attachment proceedings filed Title Suit No. 50 of 1953, under Order 21, Rule 63, C. P. C., in the Court of the Subordinate Judge of Berhampur challenging the attachment and sale of the properties claiming them to be his own. The suit was decreed in his favour on 15-3-1958 and his title to the lands sold (Except Survey No. 1786) was declared. Thereupon the attaching decree-holder filed E. P. No. 48 of 1958 and the transferee decree-holder filed E. P. No. 73 of 1958 for revival of their previous execution cases, viz. E. P. 44 of 1946 and E. P. No. 193 of 1946 respectively and for realisation of their dues. The main objection was by judgment-debtor No. 9 Pollaya Dora who urged that as the aforesaid two execution petitions had been dismissed on full satisfaction on 11-9-54 after confirmation of sale and as no application was made under Order 21, Rule 91 for setting aside the sale on the ground that the judgment-debtors had no saleable interest in the property the execution proceedings could not be revived merely because the unsuccessful claimant subsequently succeeded in his suit under Order 21, Rule 63, C. P. C.

4. Thus there are two important questions to be decided here :

(i) whether in consequence of the success of the claimant in T. S. No. 50 of 53 filed under Order 21, Rule 63 E. P. "No. 193 of 1946 was automatically revived so as to enable the transferee decree-holder to further execute the decree? and

(ii) whether the attaching decree-holder also is entitled to claim revival of E. P.

No. 44 of 1946 for the same reason?

5. The first question is obviously more important and may be dealt with first. It was urged by Mr. Dasgupta for the transferee decree-holder that a suit by an unsuccessful claimant under Order 21, Rule 63 C. P. C. is merely a mode of obtaining a review of an "order passed rejecting his claim and that consequently when E. P. No. 193 of 46 was dismissed on full satisfaction, after rejecting the claim of the claimant and making the sale of the attached property absolute, that order of dismissal must be deemed, for all purposes, to be a conditional order, and the execution case was liable to be revived in the eventual success of the claimant in his suit under Order 21, Rule 63, C. P. C. A direct decision bearing on this point is that of a Division Bench of the Patna High Court in *Mt. Bibi Umatul Rasul Vs. Mt. Lakho Kuer*, where the previous Division Bench decision of the same High Court in *Radha Kishun Lal Vs. Kashi Lal and Another*, was followed and a later Full Bench decision of that High Court reported in *Surendra Kumar Singh Vs. Srichand Mahata and Others*, was distinguished. That Full Bench decision has obviously no application here because, there, after the sale of the attached property and the satisfaction of the decree it was subsequently discovered that in some other litigation the property had been sold already and that the judgment-debtor had therefore no saleable interest in the property at the time of the execution sale. That was not a case of a suit filed under Order 21, Rule 63 C. P. C. On the other hand the case reported in *Mt. Bibi Umatul Rasul Vs. Mt. Lakho Kuer*, is practically on all fours with the present case though there is a difference in one important particular. There the unsuccessful claimant took special care to implead not only the decree-holder, but also the judgment-debtor in his suit under Order 21, Rule 63 C. P. C. and hence their Lordships held :

"Where the order which is passed in execution proceedings is itself subject to review or appeal and that order is subsequently set aside the foundation upon which the sale stands in favour of the decree-holder-auction-purchaser disappears and the sale ipso facto stands vacated and no formal order is required by the executing Court to set aside the sale,"

No decision of any High Court disagreeing with this view has been cited before me.

6. But the question still arises as to whether the aforesaid principle will apply if in the suit under Order 21, Rule 63, C. P. C. the judgment-debtor is not made a party. This aspect was not discussed in AIR 1941 Patna 405 or in *Radha Kishun Lal Vs. Kashi Lal and Another*, because there the judgment-debtor had been made a party. Mr. Mohapatra therefore contended on behalf of the judgment debtor that the aforesaid principle will not apply and that the order of satisfaction of E. P. 193 of 1946 passed by the Executing Court on 11-9-54 cannot be deemed to have been vacated.

7. Elaborate arguments were advanced about the true nature of a suit under Order 21 Rule 63 CPC and whether the judgment debtor is a necessary party in

such a suit. Reliance was placed by Mr. Dasgupta on *Suppan Asari Vs. Alima Bibi and Others*, for the view that the judgment-debtor is not a necessary party. On the other hand Mr. Mohapatra relied on *Gbasi Ram ,v. Mangal Chand* ILR All 41, *Mg. Khin Gyi v. Rahimulla Khan* AIR 1937 Rang 249 and *Harchandrai v. Gopaldas* AIR 1939 Sind 177 in support of his contention that the judgment-debtor was a necessary party in a suit filed by the unsuccessful claimant, under Order 21, Rule 63 CPC though he may not be a necessary party in such a suit brought by the decree-holder against the successful claimant. Though there is no direct decision applicable to the present case, some of the observations in a Full Bench decision of the Andhra High Court, reported in *Chimpiramma v. Subramanyam* AIR 1957 AP 61 (FB) are helpful. There it was pointed out that if a judgment-debtor is not made a party either in the claim proceeding or in a subsequent suit under Order 21 Rule 63 CPC the only point that may be said to have been decided between the decree-holder and the claimant is the right of the decree-holder to bring the property to sale as against the right of the claimant to have the property released from attachment. Such an order would not obviously bar the judgment-debtor who was not a party to the proceeding.

An attempt was made to distinguish this case on the ground that, here the judgment-debtor was a party in the claim case and as the sale was confirmed in his presence and the execution case was shown as fully satisfied he could not possibly claim any interest in the property as against the decree-holder, and that consequently the omission to make him a party in the subsequent suit under Order 21 Rule 63 CPC would not affect the result. This may be so, so far as his interest in the property is concerned, but if the decree-holder wants to revive the Execution case and to proceed against the judgment-debtor once again in consequence of the claimant's success in his suit under Order 21, Rule 63 Civil Procedure Code, there is a clear jeopardy to the judgment-debtor's interest. In such a case the fundamental principle that a party would not be bound by an order passed in his absence would apply with full force. If the judgment-debtor had been made a party in the suit under Order 21, Rule 63 CPC he would certainly have been in a much better position than the decree-holder to show that the claimant had no interest in the property because he is obviously in the best position to prove all available evidence to establish his title to the same. Moreover he would defend that suit with much more greater zeal than the decree-holder because he knows very well that if the claimant succeeds in that suit there is a danger of the execution case being revived and he being called upon to satisfy the decree. Hence neither on principle, nor on the authority can it be said that the decision in *Mt. Bibi Umatul Rasul Vs. Mt. Lakho Kuer*, should be stretched so as to apply even to cases where the judgment-debtor is not made a party in a suit under Order 21, Rule 63 Civil Procedure Code. In my opinion this is a fundamental defect which cannot be ignored. I would therefore hold that the Order of the Executive Court dated 11-9-54 dismissing E. P. No. 193 of 1946 on full satisfaction cannot be deemed to have been vacated. Hence the fresh execution case started by the transferee decree-holder in E. P. No. 73/1958 must

be held to be not maintainable.

8. The second question relates to a controversy between the attaching decree-holder and the transferee decree-holder: The learned lower Court thought that on a construction of Order 21 Rule 53 (1) (b) CPC the attachment of the decree of the "transferee decree-holder would subsist only till the attaching decree-holder applies to the Berhampur Court to execute that decree and that the moment he files an execution petition before that Court that attachment also comes to an end. On this basis he held that when the attaching decree-holder's petition (E. P. 153) of 1945 was dismissed for default on 13-8-45, the attachment also came to an end and that the attaching decree-holder had no right to further execute the decree by a fresh execution proceeding (E. P. 44 of 1946). Here the learned lower Court has committed two errors; Firstly he overlooked the principle of *res judicata* which applies not only to suits but also to execution proceedings. In E. P. 193 of 1946 decided by the learned Subordinate Judge of Berhampur on 29-8-47 the right of the attaching decree-holder to appropriate the proceeds of that execution towards his own dues was expressly declared. The transferee decree-holder was also a party to this order and is bound by it; and it will not be open to him now to say that E. P. No. 44 of 1946 of the attaching decree-holder is not maintainable.

9. Secondly the learned lower Court has not fully appreciated the purpose of the notice required to be served on the Court when the decree is attached under Order 21 Rule 53 (1) (b) Civil Procedure Code. As pointed out by the Privy Council in 1940 MWN 1194 (Privy Council) that notice is a mere request and a notice under Order 21 Rule 53 does not purport to prohibit the Court to which it is addressed, from executing the decree unless the conditions in the request are fulfilled. The object of the request is to ensure that the decree-holder himself does not proceed to execution without the leave of the Court making the attachment. The right of the attaching decree-holder to proceed with the execution of the attached decree is dealt with in Sub-rules (2) and (3) of Rule 53, of Order 21 Civil Procedure Code. He is deemed to be the representative of the original decree-holder and the Court to whom the request is made is directed to proceed with the execution of the attached decree. Hence the mere fact that the previous execution petition E. P. No. 193 of 1945 was dismissed would not affect the right of the attaching decree-holder to file a fresh execution petition so long as it is not barred by limitation. The lower Court seems to have relied on Order 21 Rule 57 CPC which says that when any property is attached in execution of a decree but if the execution petition of the decree-holder is dismissed for default, the attachment shall cease. But the property referred to in this rule relates to the property attached and not to the attached decree itself -- see *Syed Muhammad Amirul Hasan Vs. Musammatt Wazir Bibi and Others*, and *Ramakrishna Aiyar v. Mari Goundan* AIR 1927 Mad 1025; I would therefore reverse the finding of the lower Court.

10. But this finding becomes somewhat academic in view of my holding that the

order dated 11-9-54 dismissing E. P. 193 of 1946 on full satisfaction cannot be deemed to have been vacated. The attaching decree-holder's petition E. P. No; 44 of 1946 was also dismissed on full satisfaction on the same date and that cannot be revived merely because the unsuccessful claimant succeeded in his suit under Order 21 Rule 63 Civil Procedure Code.

11. For these reasons Miscellaneous appeals Nos. 90 and 91 of 1960 are allowed, the order of the lower Court is set aside and E. P. No. 48 of 1958 and E. P. No. 58 (sic 73) of 1958 are both dismissed as non-maintainable. Miscellaneous Appeals 77 and 78 are dismissed. There will be one set of costs throughout which shall be borne half and half by the attaching decree-holder and the transferee-decree-holder and shall be apportioned equally between the appellant in M. A. 91 of 1960 (Gopinath Mohapatra) and the appellant in M. A. No. 90 of 1960 (Dasari Fakir Mohan Dora).