

(1937) 03 CAL CK 0024
In the Calcutta High Court

Sasthi Charan Biswas Banik and Others	APPELLANT
Vs	
Gopal Chandra Saha and Others	RESPONDENT

Date of Decision : 10-03-1937

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92

Citation : AIR 1937 Cal 390

Hon'ble Judges : S.K. Ghose, J;Patterson, J

Bench : Full Bench

Judgement

This Judgment has been overruled by : Kancherla Lakshminarayana Vs. Mattaparthi Syamala and Others, AIR 2008 SC 2069 : (2008) 2 CTC 774 : (2008) 3 SCALE 641 : (2008) 14 SCC 258 : (2008) 1 UJ 570 : (2008) AIRSCW 2800

S.K. Ghose, J.—This is an appeal by the plaintiffs from a decision of the Subordinate Judge, 2nd Court, Faridpur, affirming a decision of the Munsif at Faridpur under the following circumstances. The plaintiffs and defendant 4 are brothers. Defendants 2 and 3 obtained a decree against defendant 4 and in execution thereof they brought certain properties for sale. The sale was fixed for 20th November 1931. On that date the plaintiffs filed a petition claiming that they had title to those properties to the extent of 5/6 share. The sale was postponed to 23rd November 1931 on which date it was held. The plaintiffs' petition was put up for consideration on 30th January 1932. But on that date the plaintiffs did not appear and the petition was dismissed for default. On 26th January 1933 the plaintiffs filed the suit for declaration of title and recovery of possession in the Court of the same Munsif. On 8th August 1933 the Munsif returned the plaint for presentation to proper Court holding that the plaint had been under-valued. Thereupon on 17th August 1933 the plaint was filed before the Munsif of the Sadar Court at Faridpur. That Court held that the plaintiffs had proved their title to properties Nos. 1 and 5 to the extent of 5/6 share, that the suit was not barred by the general law of limitation, but that it was barred under Article 11, Lim. Act as not having been filed within one year from the date of the

order of dismissal for default, namely 30th January 1932. Against that judgment the plaintiffs filed an appeal. On the preliminary point the learned Judge agreed that the suit was barred under Article 11, Lim. Act. Hence this appeal by the plaintiffs.

2. It is contended in support of the appeal that Article 11, Lim. Act, cannot apply as the order of dismissal for default which was passed on 30th January 1932 was not an order under the CPC because the sale had already been held and the Munsif had no jurisdiction to make an order of that nature upon an application filed under the provisions of Order 21, Rule 58, Civil P. C, and therefore the provisions of Rule 63 have no application. It is contended for the other side that, even if that be the case, the application had been filed before the sale was actually held and therefore at a time when admittedly the Munsif had jurisdiction and all that he has done is to dismiss the application. This argument however does not help, because the application has actually been dismissed for default. But if it is conceded that at that time the jurisdiction of the executing Court had ceased by reason of the sale having actually taken place, then it was unnecessary for the applicant to prosecute his application and so the application could not be dismissed for default. All that the Munsiff could say was that he could no longer entertain the application. Therefore the material question is whether the order of dismissal for default which was made on 30th January 1932 was an order without jurisdiction. This turns upon the question whether the claim filed under Order 21, Rule 58, may be investigated after the sale has actually been held.

3. It seems to us, having regard to the relevant provisions, that the stage at which a claim is to be preferred under Order 21, Rule 58 is intended to be a stage before the sale has actually been held and the attachment is pending. It is open to the Court under Sub-rule (2), Rule 58 to postpone the sale pending investigation of the claim. The fact that the words used are that the Court may postpone the sale and not must postpone the sale are not necessarily inconsistent with the conclusion that the investigation should not be made after the sale has been held. It only means that the Court may postpone the sale if it thinks necessary and such postponement may not be necessary if the Court can dispose of the claim before the sale is actually held. Moreover the conclusion that follows, where the Court is satisfied that the claim should be granted, is under Rule 60 that the Court shall make an order releasing the property from attachment. Where the sale has actually been held, this cannot be done without setting aside the sale. Obviously an auction-purchaser cannot be a party to the investigation of a claim filed under Rule 58 but if the sale has to be set aside, notice has to be given to all persons affected thereby and the auction-purchaser is entitled to an order for repayment of his purchase money on such terms as the Court may direct against any person to whom it has been paid: see Rule 93. The fact that the claimant has certain remedies under Rr. 99 and 100 does not affect the present question, because these are proceedings arising after the sale had actually taken place and quite independent of a claim filed under Rule 58.

Therefore it seems to us that where a sale has actually taken place the executing Court has no jurisdiction to entertain a claim or objection filed under Rule 58. The matter is not one of first impression. In *Gopal Chandra Mukherji v. Notobar Kundu* (1912) 16 C W N 1029 it was held that the Court acted in excess of its authority in allowing a claim petition preferred under Order 21, Rule 58, after the property attached was sold. The same view was taken by B.B. Ghose, J. in AIR 1926 Cal. 468 . This view was followed by the Patna High Court in *Mt. Puhupdei Kuar Vs. Ramcharitar Barhi and Others*, and also by the Rangoon High Court in *Maung Po Pe v. Maung Kwa* AIR 1928 Rang 80.

4. In the case *Chitturu Jagannadham Vs. Bura Pydayya and Others*, , a Single Judge of the Madras High Court dissented from all these rulings and took a different view for reasons which however do not commend themselves to us. Some of the grounds I have already mentioned. It may also be added that Order 21, Rule 55 in our opinion does not exhaust the circumstances under which attachment may be removed. That rule merely states that under certain circumstances when the decree is satisfied the attachment shall be deemed to be withdrawn. But there are other circumstances under which the attachment may be withdrawn and Rule 60 itself makes mention of one such circumstance. It may be added that on behalf of the respondents a point was sought to be made on the ground that the sale was not confirmed until a much later date, and it was contended that the sale was no sale at all until it had become absolute. u/s 65 of the Code the purchasers title would vest as from the date of sale and Order 21, Rule 92, under which a sale is to become absolute or be set aside, is independent of a proceeding under Rule 58. The latter moreover refers to attachments of all kinds of properties, whether movable or immovable, whereas the question of a sale becoming absolute arises only in the case of immovable property. It may also be pointed out that the Subordinate Judge was not correct in saying that "the attached property was sold in execution conditionally before the disposal of the claim petition". The order on 14th January 1932 was that confirmation be stayed pending disposal of the claim case.

5. We hold, therefore, that the order of dismissal for default passed on 30th January 1932 was without jurisdiction and consequently limitation under Article 11, Lim. Act does not run from that date. It has also been found that the suit is not barred by the general law of limitation. Therefore the judgment appealed against must be reversed and the suit must be remanded to the trial Court for consideration on the merits. It will be open to that Court to consider whether further court-fees should be paid and the plaintiffs should be given an opportunity to amend their plaint, if necessary. It has been pointed out to us that as regards the claim to properties Nos. 3, 4 and 6 the trial Court has already held that they belong to defendant 4 alone and the plaintiffs have no right. This finding cannot be challenged now and must not be re-agitated at the fresh trial on remand. The question for trial will be only with regard to properties Nos. 1 and 5. There will be no order as to costs in this Court. Future costs will abide the result.

Patterson, J.

6. I agree.