

(1961) 03 MP CK 0004
In the Madhya Pradesh High Court
Case No : F.A. No. 57 of 1959

Sawai Singhai Nirmalchand		APPELLANT
	Vs	
Union of India		RESPONDENT

Date of Decision : 14-03-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1961) J LJ 935 : (1961) MPLJ 681

Hon'ble Judges : S.P. Bahrgava, J; N.M. Golwalker, J

Bench : Division Bench

Advocate : A.P. Sen, for the Appellant; M. Adhikari, Advocate-General, for the Respondent

Final Decision : Dismissed

Judgement

N.M. Golwalker, J.

This is an appeal by the plaintiff whose suit apparently under Order 21, rule 63, Civil Procedure Code, for a declaration that certain house property belonging to him could not be proceeded against by the defendant for the recovery of certain amount of money from one Phoolchand has been dismissed.

Briefly stated the relevant facts giving rise to the plaintiff's suit are these. One Phoolchand had obtained a decree for Rs. 24,234-14-0 with costs amounting to Rs. 2,462-1-0 and future interest at 4 per cent. per annum from the date of his suit till its realization against the defendant. On appeal to this Court the said decree was modified and a decree for Rs. 10,971-13-6 inclusive of costs was passed instead. In the meantime, the defendant, who was ordered to deposit the decretal claim as decreed by the first Court, had deposited the same and Phoolchand after furnishing requisite surety had withdrawn the same. Consequent to the reduction of the decretal claim the excess amount received by Phoolchand was sought to be restored to the defendant by proceedings for restitution. In execution of the order for restitution the house property in

question was attached and the plaintiff objected to the attachment under Order 21, rule 58, Civil Procedure Code, claiming to be its exclusive owner. The said objection was dismissed on 16-4-1957. Thereafter the plaintiff gave a notice u/s 80, Civil Procedure Code, to the defendant on 12-4-1968 of the proposed suit, and as the civil Courts remained closed for summer vacation commencing from 12-5-1958 the instant suit was filed on 23-6-1958, the opening day after vacation.

The defendant contested the claim of the plaintiff in suit on merits and it was also contended that the suit was barred by limitation. It was urged that as no notice u/s 80, Civil Procedure Code, being required for the instant suit, the period of notice could not be excluded and, therefore, the suit having been filed after more than one year of the order dated 16-4-1957 in the claim proceedings, the order rejecting the claim of the plaintiff had become final and conclusive. This objection going to the root of the whole suit was tried as a preliminary issue.

The lower Court upheld the objection of the defendant and dismissed the suit as barred by limitation. Hence this appeal by the plaintiff challenging the correctness of the dismissal of his suit.

The plaintiff-appellant has urged that the lower Court was wrong in holding that no notice u/s 80, Civil Procedure Code, was required for filing the instant suit and as such period of notice could not be excluded under Article 15 of the Indian Limitation Act.

Thus the short question to be determined in this appeal is whether a notice u/s 80, Civil Procedure Code, is necessary for a suit to be filed under Order 21, rule 63, Civil Procedure Code, by a person who had unsuccessfully challenged the attachment of certain property under Order 21, rule 58 of the Code. If the answer is in the affirmative, the suit will have to be held to be within the prescribed period of limitation provided by Article 11 of the Indian Limitation Act and will have to be sent back for its adjudication on merits. However our answer to the question as shown hereafter is in the negative and consequently this appeal has to be dismissed.

It cannot be disputed that the sole purpose of a notice u/s 80 of the Code to the party concerned is to afford him an opportunity to reconsider the position with regard to the claim made and if so advised, either to settle it or otherwise to make amends without recourse to Courts. It is also equally true that though the terms of section 80 are imperative, explicit and mandatory admitting of no implications or exceptions even in cases of hardship or in cases of where irremediable harm might be caused, yet it does not define the rights of the parties or confers any rights on them but only provides a mode of procedure for getting the relief in respect of a particular cause of action. (See AIR 1951 S.C. 258). Not only that but although imperative and mandatory the party entitled to notice can waive it and the Court would not be in a position to dismiss the suit on the ground of want of such a notice where the party for whose benefit the

provision of prior notice is made has chosen to waive it. (A.I.R. 1947 P.C. 197). This waiver, in our opinion, would necessarily be in the circumstance where the party concerned is otherwise fully aware of the cause of action as also of the relief intended to be claimed thereon. We should not of course be understood to suggest that no notice of a suit would be necessary at all where the plaintiff is able to establish that the defendant was otherwise aware of the cause of action and the proposed suit thereon. Our intention is only to show how the provisions u/s 80, Civil Procedure Code, have been viewed and understood.

Now as far back as in the year 1907 it was held by the Privy Council that the plaint in a suit u/s 283 of the then CPC (now under Order 21, rule 63 of the Code) is "a plaint for review of a summary decision", the summary decision referred to being one u/s 278 (now Order 21, rule 58 of the Civil Procedure Code). (See ILR 35 Cal. 202 at page 207). Then later on in the case of Krishnappa v. Abdul Kadar Saheb AIR 1915 Mad. 495=ILR 38 Mad. 535, it was held that a suit under Order 21, rule 63 of the CPC is "a continuation of claim proceedings" and it is merely "a form of appeal in the guise of an original suit". This legal position was accepted in this Court in the case of Khairulla v. Dhanrupmal 22 NLR 67 and after relying on ILR 35 Cal. 202 (P.C.) it was held in this Court in the case of Chintaman v. Govind AIR 1938 Nag. 376=ILR 1940 Nag. 519, that a suit under Order 21, rule 63 of the CPC is substantially one to set aside a summary decision or order of any civil Court meaning one under Order 21, rule 58. Then all the aforesaid views were followed again by this Court in the case of Madholal Damlal v. Gajrabai 1951 NLJ 175=AIR 1951 Nag. 194=ILR 1951 Nag. 241, where especially the view expressed in Krishnappa v. Abdul Kadar Saheb AIR 1915 Mad. 495=ILR 38 Mad. 535 was pointedly accepted.

As against the aforesaid view of this Court, the appellant relies on the contrary view of this Court taken in the unreported case of the Liquidator of Society, Sangakheda v. Ayodhyaprasad 1939 NLJ 215=AIR 1939 Nag. 232, which was followed later on in the case of Vasant v. G.M. Khandekar 1948 NLJ 212=AIR 1949 Nag. 25=ILR 1948 Nag. 216. In the former unfortunately there is no consideration at all as to the nature and scope of the suit under Order 21, rule 63 of the Code which in our opinion has a decisive bearing on the question of requirement of a notice u/s 80 of the Code for such a suit. We are, therefore, unable to say anything with respect to the view therein expressed except to say that with all respect we do not feel disposed to accept the same for reasons which we would elaborate hereafter. This view no doubt found favour with this Court in the latter case. But it will be apparent from the facts of that case that there was never any objection under Order 21, rule 58 of the Code and the declaratory suit was not one that was filed under Order 21, rule 63 of the Code. Instead the suit was a simple suit for declaration presumably u/s 42 of the Specific Relief Act. That suit was filed, no doubt, after objection to the execution of the decree was disallowed. But the objection there was to the decree itself and not to challenge any attachment of any property in execution of that decree. Besides the suit was filed on the direction of the High Court in appeal preferred

by the plaintiff challenging rejection of his objection. So in the circumstances of that case notice u/s 80, Civil Procedure Code, was rightly held to be necessary. So, in our opinion, none of these two cases of this Court helps the appellant. On the relevant question as to the scope and nature of a suit under Order 21, rule 63 over which this Court, as indicated and pointed out in the foregoing paragraphs, has expressed a definite view.

In the course of arguments it was also urged that since the execution in the instant case was as a result of an order for restitution, Order 21, rule 63 did not apply to the suit and reliance was placed on the law laid down in the case of *Khawaja Allawali v. Keshrimal and others* 1947 NLJ 197=AIR 1947 Nag. 239=ILR 1947 Nag. 176. No doubt the said case lays down that there is an essential difference between restitution and execution in the sense that while restitution means in law restoring to the party what has been lost to him in execution of the decree reversed and varied or in consequence of that decree, the execution is the enforcement of the direction in the executable decree and to give effect to it. But this essential difference was pointed out in order to conclude that an application to secure an order of restitution is governed by Article 181 and not by Article 182 of the Indian Limitation Act. It did not lay down and obviously it could not lay down that after the order of restitution is secured, the said essential difference persists and those proceedings cannot be termed execution proceedings governed by Order 21 of the CPC throughout the subsequent stages during which the said order is sought to be executed. For, such an order is a decree within the definition of decree as defined in the CPC and as such liable to be challenged in appeal. If that be the position then the procedure given in Order 21 of the CPC governs the proceedings taken for execution of such an order with the result that objection to any attachment of property by a claimant on the ground that it is not liable to be attached and sold in execution of that order would be under Order 21, rule 58 of the Code and any order passed would be subject to the decision in the suit if and when filed under Order 21, rule 63 of the Code. We are thus unable to see how the ruling relied upon by the learned counsel for the appellant helps his cause.

Then apart from the position that the suit under Order 21, rule 63, Civil Procedure Code, is mere continuation of the proceedings taken under Order 21, rule 58 of the Code and the order therein being only a provisional one liable to be confirmed or set aside in the suit, there is another aspect which has also to be borne in mind. The right conferred on the person aggrieved by the order in the claim proceedings under Order 21, rule 58 of the Code is a statutory right just like the right of appeal. The consequence therefore is that the person successful in the claim proceedings is at once fixed with full knowledge of such a suit to be filed within one year and of the order in his favour being only provisional subject to the decision of that suit. If then that is the result, the very purpose of notice u/s 80, Civil Procedure Code, is fully served, the proposed defendant in the intended suit having, we would say, a sort of statutory notice of the same. In such a situation the plaintiff would not be relying merely on the fact that the

defendant is aware of the proposed suit otherwise than by a notice according to law. The suit provided under Order 21, rule 63 gives full information to the person sued upon of all that is required u/s 80 of the Code. The same reasons, which do not render the notice of appeal in a suit necessary, would in our opinion render it unnecessary. It makes no difference that it is styled a suit under Order 21, rule 63, since as already pointed out the said suit is nothing but an appeal only in the garb of an original suit (I.L.R. 38 Mad. 535).

The result, therefore, of all that has been stated in the foregoing paragraphs is that the suit under Order 21, rule 63, Civil Procedure Code, being merely a continuation of the proceedings initiated under Order 21, rule 58 of the Code, no notice of the said suit, in our opinion, was necessary. The successful defendant in those claim proceedings was fully aware that such a suit was bound to be filed within one year and it could still, if so desired, come to a decision whether to contest it or not or to amicably settle the claim therein out of Court. We are fortified in this view by the decision in the case of Ram Sundri v. Collector AIR 1959 Punj. 413. The ruling reported in AIR 1955 Pat. 404 and relied upon by the lower Court deals with the provisions of Bihar and Oriasa Public Demands Recovery Act (4 of 1914) which are identical with those in Order 21, rules 58 and 63, Civil Procedure Code.

The result, therefore, is that in view of the true legal position as pointed out above, we hold that no notice by the plaintiff u/s 80, Civil Procedure Code, was necessary to be served on the defendant for the present suit and as such the plaintiff was not entitled to deduct the period of notice as provided in Article 15(2) of the Indian Limitation Act so as to extend the date of expiry of the period of limitation of one year prescribed under Article 11 of the Indian Limitation Act for such a suit. The suit filed on 23-6-1958 being after one year of the date of order dated 16-4-1957 was correctly held by the lower Court to be barred by limitation. The appeal thus fails and is dismissed with costs.