

(1984) 04 PAT CK 0020
In the Patna High Court
Case No : A.F.O.O. No. 245 of 1979

Smt. Jyotsna Mehta

APPELLANT

Vs

Ram Bahadur Thakur and Co. and Another

RESPONDENT

Date of Decision : 03-04-1984

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 58(4), 72, 97, 97(2)
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63

Citation : AIR 1985 Patna 59 : (1985) PLJR 39

Hon'ble Judges : Birendra Prasad Sinha, J; Bageshwari Prasad Griyaghey, J

Bench : Division Bench

Advocate : K.K. Sharan, A.K. Sharan and Brajkishore Gaur, for the Appellant;
Madhusudan Singh and Nath Singh, for the Respondent

Final Decision : Dismissed

Judgement

Birendra Prasad Sinha, J.—This appeal by Smt. Jyotsna Mehta, wife of the judgment-debtor has been filed under Order 22 Rule 58(4) of the Civil P C (in short the "Code") against an order dated 23rd June 1979 passed in Miscellaneous Case No. 87 of 1965/44 of 1976 by the Subordinate Judge 2nd Court, Muzaffarpur.

2. The short facts leading to this appeal are these: --

The respondent No. 1 M/s. Ram Bahadur Thakur and Company obtained a decree against the respondent No. 2 Pashupati Nath Mehta and some others on 29-6-63. On 3-10-63 the decree-holder filed execution -case No. 84 of 1963 and put certain properties belonging to the judgment-debtor under execution. Sometime in the year 1964 the properties were attached. Thereafter, it appears, some applications were filed under Order 21 Rule 58 of the Code by the judgment-debtor and some others which were dismissed. The present appellant Smt Jyotsna Mehta filed an application under Order 21 Rule 58 of the Code on 16-9-65 which was registered as Miscellaneous case No. 87 of 1965. She claimed that in a partition suit she was allotted 1/3rd share in some properties by a

compromise and she was in possession thereof. As she was not a party to the decree under execution the decree could not be executed against her or her properties. The plea was negatived and the Miscellaneous case filed by her was dismissed by the learned Subordinate Judge by the impugned order.

3. Mr. Shree Nath Singh learned counsel appearing on behalf of the respondents-decree-holder, at the very out-set, submitted that the appeal filed by the appellant in this Court under Order 21 Rule 58(4) of the Code as amended in 1976 is not maintainable. He further submitted that the remedy of the appellant, if any, was to file a suit under Order 21 Rule 63 of the old Code.

4. The question for consideration, therefore, is whether the appeal as filed under the provisions of Order 21 Rule 58(4) of the Code as amended is maintainable.

5. Some provisions of the Civil P C, 1908 were amended by the CPC (Amendment) Act 1976, (No. 104 of 1976). The relevant provisions came into force on 1st Feb. 1977. The provisions contained in Order 21 Rule 58 of the Code before the amendment provided for investigation of claims and objections. According to it where any claim was preferred to or any objection was made to the attachment of any property attached in execution of a decree on the ground that such property was not liable to such attachment the Court was required to proceed to investigate the claim or objection with a like power as regards the examination of claimant or objector and in all other respects as if he was a party to the suit Order 21 Rule 63 of the Code prior to amendment provided that where a claim or an objection was preferred, the party against whom an order was made could institute a suit to establish the right which he claimed to the property in dispute, but subject to the result of such suit, if any, the order was conclusive. Such orders were not appealable under the provisions of Section 104 of the Code.

6. The provisions contained in Order 21 Rule 58 (old) had a limited scope. After the adjudication of claims and objections in the execution proceeding the matter could be further agitated in a regular suit This unnecessarily led to protracted litigation. It was thought desirable to have all questions including the question of title settled finally in the execution proceeding itself. Rules 58 to 63 were, therefore, substituted by the amending Act which now provides for an appeal from an order determining the claim or objection under Order 21 Rule 58 of the Code. Order 21 Rule 58, as amended, reads as under : --

"58(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 within 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 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 whom such 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, an order so refusing to entertain the claim or objection shall be conclusive.

7. It is significant to note that the word "investigation" has been substituted by the word "adjudication". The executing Court can now go into even the question of title and settle the matter once for all in the execution proceeding itself. Sub-rule (4) of Rule 58 now provides that where any claim has been adjudicated upon under this Rule, the Order made therein shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree. Rule 63 of the old Code now stands repealed. The effect is that now a suit as contemplated by Rule 63 cannot be filed and the remedy is only by way of an appeal under Sub-rule (4).

8. In the present case, as stated above, the decree was passed on 29-6-63 and the attachment was made sometime in the year 1964. The present appellant filed her objection under Order 21 Rule 58 of the Code on 16-9-65 which has been decided on 23-6-79. The learned counsel appearing on behalf of the appellant submitted that since the order was passed after the Civil P C (Amendment) Act 1976 came into force his remedy is only by way of an appeal

under the provisions of the existing Code i.e. Order 21 Rule 58(4) of the Code. This argument cannot be accepted in the face of Section 97(2)(q) of the Amendment Act 1976. Section 97(2)(q) of the Amendment Act reads as under: --

(q) the provisions of Rules 31,32,48A,57, to 59,90 and 97 to 103 of Order XXI of the First Schedule as amended or, as the case may be, substituted or inserted by Section 72 of this Act shall not apply to or affect -

(i) any attachment subsisting immediately before the commencement of the said Section 72, or

(ii) any suit instituted before such commencement under rule 63 aforesaid to establish right to attached property or under Rule 103 aforesaid to establish possession; or

(iii) any proceeding to set aside the sale of any immovable property,

and every such attachment, suit or proceeding shall be continued as if the said Section 72 had not come into force;

9. As stated earlier Section 72 of the Amendment Act came into force on 1st of Feb. 1977. The attachment in the present case was made in 1964 and was therefore, subsisting from before the commencement of Section 72 of the Amendment Act. It is obvious that the old law which existed at the time of the attachment would hold the field. There can be, therefore, no doubt that in the present case, even though the order was passed after the Amending Act came into force, an appeal filed under Order 21 Rule 58(4) of the Code is not competent. In case of *Syndicate Bank Vs. Rallijes India Ltd. and Another*, on almost similar facts it was held that Section 97 of Act 104 of 1976 makes it clear that as far as the vested rights pertaining to attachments are concerned and which came into existence prior to 1st Feb. 1977, the old law would hold the field. Where a claim petition was made before the Amending Act and was dismissed after the Act came into force, the remedy was to file a suit under Order 21 Rule 63 and not to file an appeal under the new amended Rule 58 C, P. C. In the case of *N, Tali Reddi v. Syed Mecra Hussaini* AIR 1979 A&P 70 a similar view was taken and it was held that in view of Section 97 of the amendment Act of 1976 with regard to attachment subsisting before the enforcement of the amended provisions, the old provisions of Order 21 Rule 58 C P. C. would continue to apply.

10. I, therefore, hold that the present appeal filed under the amended provision of Order 21 Rule 58 (4) of the Code is not maintainable. This appeal must be dismissed on this ground alone.

11. The result is that this appeal is dismissed but without costs.

Bageshwari Prasad Griyaghey, J.

12. I agree.